The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 5 of 2021

17 March 2021

ISSN 2207-2004 (print)
ISSN 2207-2012 (online)

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

Membership of the committee

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator Dean Smith (Deputy Chair)	LP, Western Australia
Senator the Hon Kim Carr	ALP, Victoria
Senator Perin Davey	NATS, New South Wales
Senator Janet Rice	AG, Victoria
Senator Paul Scarr	LP, Queensland

Secretariat

Mr Glenn Ryall, Secretary

Ms Eloise Menzies, Principal Research Officer

Ms Sarah Batts, Senior Research Officer

Ms Georgia Fletcher, Legislative Research Officer

Committee legal adviser

Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3050

Email: scrutiny.sen@aph.gov.au

Website: http://www.aph.gov.au/senate_scrutiny

Contents

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

Comment bills

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

Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021

Purpose	This bill seeks to establish a framework for making, varying, revoking, and applying National Environment Standards. It further seeks to establish an Environment Assurance Commissioner to undertake transparent monitoring and/or auditing
Portfolio	Environment
Introduced	House of Representatives on 25 February 2021

Significant matters in delegated legislation

Exemption from disallowance[1]

National environmental standards

1.2 Item 6 of Schedule 1 to the bill seeks to insert proposed Chapter 3A into the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), relating to national environmental standards. Proposed subsection 65C(1) would give the minister power to make national environmental standards for the purposes of the EBPC Act by legislative instrument. The explanatory memorandum explains that national environmental standards:

> will set the requirements for decision-making to deliver outcomes for the environment and heritage, and clearly define the fundamental processes that ensure sound and effective decision-making. They will be specific, and provide clear rules, giving upfront clarity and certainty for decision-makers and proponents… [the standards will] underpin accredited environmental

1 Schedule 1, item 6, proposed sections 65C and 65H, *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

> assessment and approval processes under bilateral agreements with states and territories, as well as certain decisions or things under the Act.[2]

1.3 Proposed subsection 65C(3) provides that disallowance does not apply in relation to each of the first standards made under section 65C in relation to a particular matter.

1.4 The committee's view is that significant matters, such as the matters that will be dealt with in national environmental standards, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.5 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 is unclear to the committee why at least high-level guidance in relation to these matters cannot be provided on the face of the bill. The committee considers that providing such guidance in primary legislation is particularly important in light of the proposal that the first standards made in relation to a particular matter are to be exempted from parliamentary disallowance, which would remove the primary means by which the Parliament could exercise control over this delegated legislation.

1.6 The committee further expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. With respect to exempting the first standards from disallowance, the explanatory memorandum states:

> National Environmental Standards in force under new Part 5A will be integral to facilitating single-touch approvals under accredited state and territory environmental assessment and approval processes. The disallowance of the first Standard made in relation to a particular matter would frustrate this process, as it would mean no National Environmental Standards would exist for a particular matter and bilateral agreements would not be underpinned by the National Environmental Standards. As the Minister must be satisfied that the processes accredited for a bilateral agreement are not inconsistent with one or more National Environmental Standards that are in force under new Part 5A (see Items 1 and 2), they are an essential pre-requisite for the entry into, and the ongoing operation of, bilateral agreements with the states and territories. As such, an exemption from the disallowance provisions of the Legislation Act for the first Standard made in relation to a particular matter is required to ensure the effective operation of bilateral agreements. In addition, as a state or territory process proposed for accreditation for the purposes of a bilateral agreement will be benchmarked against the National Environmental Standards in force under

2 Explanatory memorandum, p. 5.

> new Part 5A, the exemption from disallowance is necessary to provide certainty to the states and territories, and assurance to the public generally, that those processes meet the necessary standards to make environmental assessment and approval decisions in relation to Commonwealth protected matters.[3]

1.7 While noting the above explanation, the committee also notes that, under section 42 of the *Legislation Act 2003*, a legislative instrument is only subject to disallowance for a period of 15 sitting days of a House of Parliament after it is tabled in that House. Further, the instances of the disallowance procedure resulting in disallowance by the Parliament are very low,[4] and there are alternative mechanisms available to makers of delegated legislation to overcome any remaining uncertainty, such as having delegated legislation come into effect after the disallowance period has passed. In this regard, the committee notes that proposed subsection 65C(2) already establishes a delayed commencement for a standard of at least 1 month, and not more than 6 months, after the day on which the standard is made.

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

- **why it is considered necessary and appropriate to establish national environmental standards by legislative instrument;**
- **why it is considered necessary and appropriate to exempt the first standards made under section 65C from disallowance, noting that instances of the disallowance procedure resulting in disallowance by the Parliament are very low, and that certainty may also be achieved by having delegated legislation come into effect after the disallowance period has expired; and**
- **whether the bill can be amended to include at least high-level guidance regarding the content of national environmental standards on the face of the primary legislation, particularly in light of the proposal to exempt first standards made under section 65C from disallowance, which would remove the primary means by which the Parliament could exercise control over this delegated legislation.**

Requirements for decisions or things under the Act

1.9 Proposed subsections 65H(1) and (4) provide that the minister may, by legislative instrument, determine a decision or thing under the EPBC Act in relation to which the person making the decision or doing the thing must be satisfied that the decision or thing is not inconsistent with a national environmental standard.

---

3 Explanatory memorandum, pp. 6-7.

4 See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, p. 62.

Subsection 65H(8) allows the minister to determine exceptions to this requirement by legislative instrument if the minister is satisfied that the decision or thing is in the public interest. Section 65E further provides that a national environmental standard may specify circumstances in which the standard (or a variation of the standard) does not apply in relation to a decision or thing covered by subsection 65H(1).

1.10 The committee's view is that significant matters, such as the range of matters that must be consistent with a national environmental standard or are exempt from requirements to be consistent with a national environmental standard, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.11 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.

1.12 The committee notes that these provisions appear to provide the minister with a broad power to determine the scope of matters that must be consistent with national environmental standards. It is unclear to the committee why at least high-level guidance in relation to these matters cannot be provided on the face of the bill.

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

- **why it is considered necessary and appropriate to leave the determination of decisions or things that must be consistent with a national environmental standard, or are exempt from requirements to be consistent with a national environmental standard, 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.**

Incorporation of external materials existing from time to time [5]

1.14 Proposed subsection 65C(4) provides that a national environmental standard made under section 65C may make provision in relation to a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time.

---

5 Schedule 1, item 6, proposed subsection 65C(4), *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

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

1.16 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.

1.17 The explanatory memorandum explains:

> New subsection 65C(4) creates a contrary intention for the purposes of subsection 14(2) of the Legislation Act. New subsection 65C(4) will enable a National Environmental Standard to apply, adopt or incorporate an instrument or other writing as it exists at a particular time, or as in force or existing from time to time, even if the instrument or other writing does not yet exist when the Standard is made. For example, a National Environmental Standard may make reference to Australia's obligations under international conventions, or may refer to Commonwealth instruments, such as conservation advices. It is necessary to allow instruments or other writings to be applied, adopted or incorporated into a National Environmental Standard either as in force or existing from time to time to ensure the environmental outcomes of a Standard are able to be met, and will ensure the Standard remains contemporary as documents are updated or created over time. It is the intention that any instruments or other writings applied, adopted or incorporated into a National Environmental Standard will be freely and publicly available. For example, section 266B of the Act requires the Minister to publish conservation advices on the internet within 10 days of approval.[6]

1.18 While noting this advice, the committee notes that the matters contained in national environmental standards will set out significant matters in relation to decision-making about environment and heritage matters, such that the committee is

6 Explanatory memorandum, p. 7.

concerned that the incorporation of external documents in force 'from time to time' may operate to change the requirements set out in these instruments without any involvement from Parliament.

1.19 Noting the above comments, the committee requests the minister's further advice as to why it is considered necessary and appropriate to incorporate documents as in force or existing from time to time, noting that such an approach may mean that future changes to an incorporated document could operate to change important aspects of the national environment standards without any involvement from Parliament.

Tabling of reports[7]

1.20 Proposed section 65G establishes a requirement for national environmental standards to undergo regular reviews. The persons undertaking a review of a standard must give the minister a written report of the review which the minister must cause to be published on the department's website as soon as practicable after the report is given to the minister (proposed subsections 65G(4) and (5)). However, there is no requirement that such reports be tabled in Parliament.

1.21 The committee notes that not providing for the review report to be tabled in Parliament reduces the scope for parliamentary scrutiny. The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are not made public or are only published online. As such, the committee expects there to be appropriate justification for not including a requirement for review reports to be tabled in Parliament.

1.22 Noting the impact on parliamentary scrutiny of not providing for review reports to be tabled in Parliament, the committee requests that proposed section 65G of the bill be amended to provide that the report of a review must be tabled in each House of the Parliament.

---

7 Schedule 1, item 6, proposed section 65G, *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

Privacy

Significant matters in delegated legislation[8]

1.23 Schedule 2 to the bill seeks to insert proposed Part 18A into the EPBC Act which would establish an Environment Assurance Commissioner. Proposed section 501U would allow the Commissioner to disclose information or provide a document the Commissioner obtains in the course of performing the Commissioner's functions to a range of persons and bodies. Paragraph 501U(1)(f) would allow the regulations to specify additional persons or bodies to whom information can be disclosed or documents can be provided, for purposes prescribed by the regulations. Subsection 501U(2) provides that the information that is disclosed may be personal information and documents provided may contain personal information.

1.24 The committee's view is that significant matters, such as the persons and bodies to whom personal information may be disclosed, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.25 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 is unclear to the committee why at least high-level guidance in relation to these matters cannot be provided on the face of the bill.

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

- **why it is considered necessary and appropriate to leave additional persons and bodies to whom personal information may be disclosed or provided, and purposes for which the information may be disclosed or provided, 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 Schedule 2, item 1, proposed section 501U, *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

Northern Australia Infrastructure Facility Amendment (Extension and Other Measures) Bill 2021

Purpose	This bill seeks to amend the *Northern Australia Infrastructure Facility Act 2016* to: • extend the investment time period of the Northern Australia Infrastructure Facility by five years to 30 June 2026; • strengthen the Facility's governance; and • enhance the scope, speed and flexibility for the Facility to provide financial assistance to support the development of Northern Australia economic infrastructure
Portfolio	Resources, Water and Northern Australia
Introduced	House of Representatives on 24 February 2021

Parliamentary scrutiny—section 96 grants to the states[9]

1.27 Item 10 of Schedule 1 to the bill seeks to amend the *Northern Australia Infrastructure Facility Act 2016* (the Act) to substitute paragraph 7(1)(a) which would empower the Northern Australia Infrastructure Facility (NAIF) to provide grants of financial assistance to the states under section 96 and the territories under section 122 of the Constitution, for the development of Northern Australia economic infrastructure. This proposed change to the Act broadens the scope of NAIF's investment decisions by allowing it to invest in the 'development' of Northern Australia economic infrastructure, rather than only being permitted to invest in 'construction'.

1.28 Paragraph 7(1)(b) of the Act provides that the NAIF may determine terms and conditions for the grants of financial assistance to the states and territories.

1.29 The committee notes that section 96 of the Constitution confers on the Parliament the power to make grants to the states and to determine the terms and conditions attaching to them.[10] Where the Parliament delegates this power to the executive, the committee considers it appropriate for the exercise of the power to be subject to at least some level of parliamentary scrutiny, particularly noting the terms

9 Item 11, Schedule 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

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

of section 96 and the role of senators in representing the people of their state or territory.

1.30 In this instance, neither this bill nor the Act contains any guidance as to the terms and conditions on which financial assistance may be granted. In addition, there is no requirement to table the agreements between the NAIF and the states and territories in the Senate to ensure that senators are at least made aware of, and have an opportunity to debate, any agreements made with the states and territories.

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

- **include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and**
- **include a requirement that written agreements with the states and territories about grants of financial assistance are:**
  - **tabled in the Parliament within 15 sitting days after being made; and**
  - **published on the internet within 30 days of being made.**

Broad discretionary powers[11]

1.32 Item 38 of Schedule 1 to the bill seeks to add a new paragraph 21(1)(d) to the Act which would empower the minister to terminate the appointment of a board member if the minister is satisfied that the collective experience and expertise of the Board are not sufficiently diverse or appropriate to enable the Board to perform its functions effectively.

1.33 The committee notes that proposed paragraph 21(1)(d) would provide the minister with a broad power to terminate the appointment of a board member. The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum. In this instance, the explanatory memorandum notes that any changes to the functions or Investment Mandate of the NAIF may result in a requirement for different expertise and experience.[12] However, the explanatory memorandum contains no further justification for the inclusion of this broad discretionary power.

1.34 The committee also notes that current sections 9 and 10 of the Act provide a broad power for the minister to give directions to the NAIF through the Investment Mandate, which is a non-disallowable legislative instrument.

---

11 Item 38, Schedule 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

12 Explanatory memorandum, p. 11.

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

- **why it is considered necessary and appropriate to provide the minister with a broad power to terminate the appointment of a board member; and**
- **whether the bill can be amended to include additional guidance on the exercise of the power on the face of the primary legislation.**

Online Safety Bill 2021

Purpose	This bill seeks to create a modern, fit for purpose regulatory framework that builds on the strengths of the existing legislative scheme for online safety
Portfolio	Communications, Urban Infrastructure, Cities and the Arts
Introduced	House of Representatives on 24 February 2021

Broad discretionary power

Merits review[13]

1.36 Clauses 31, 34, 37, 42 and 43 provide the eSafety Commissioner with discretion to investigate complaints in relation to cyber-bullying material, the posting of intimate images, cyber-abuse material and in relation to certain online material and breaches of a service provider rule or industry code.

1.37 The committee notes that the proposed power in these clauses provides the Commissioner with a broad power to determine which complaints will be investigated, when an investigation will be terminated, and the manner in which investigations will be undertaken.

1.38 The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum. In this instance, the explanatory memorandum states that the discretionary nature of the power:

> provides flexibility to the Commissioner to decide which complaints can be investigated, and will allow the Commissioner to appropriately direct resources to where they are needed most.[14]
>
> …an investigation under this clause is to be conducted as the Commissioner sees fit and that the Commissioner may, for the purposes of an investigation, obtain information from such persons, and make such inquiries, as the Commissioner sees fit. It is expected that the Commissioner will develop appropriate procedures for the acceptance, investigation and closing of complaints.[15]

1.39 While noting this explanation, neither the bill nor the explanatory memorandum provides any further information about the expected content of

13 Clauses 31, 34, 37, 42, 43 and 220. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iii).

14 Explanatory memorandum p. 86.

15 Explanatory memorandum p. 88.

procedures for the acceptance, investigation and closing of complaints, and there does not appear to be a positive requirement in the bill for the Commissioner to develop such procedures or ensure that these are accessible for people considering making a complaint.

1.40 Clause 220 sets out an exhaustive list of decisions of the Commissioner that are subject to review by the Administrative Appeals Tribunal. However, decisions to investigate or not investigate a complaint made under clauses 31, 34, 37, 42 and 43 are not included as reviewable decisions under clause 220.

1.41 The explanatory memorandum states:

> A decision not to investigate a complaint is not reviewable under the Bill (clause 220 deals with review of decisions under the Bill). Instead, review of such a decision would be governed by *the Administrative Decisions (Judicial Review) Act 1977* and section 39B of the *Judiciary Act 1903*.[16]

1.42 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided. The committee notes that victims of cyber-bullying, and image-based or cyber-abuse may experience significant psychological harms, such that a decision to refuse to investigate a complaint could affect the rights and interests of individuals. Noting also that the explanatory memorandum emphasises the discretion of the Commissioner in making these decisions, it appears that merits review may be appropriate for decisions made under clauses 31, 34, 37, 42 and 43.

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

- **why it is considered necessary and appropriate to provide the Commissioner with a broad discretion to determine whether to investigate complaints and the manner in which investigations will be undertaken;**
- **whether the bill can be amended to include additional guidance on the exercise of this discretion on the face of the primary legislation or, at a minimum, in the explanatory memorandum; and**
- **why merits review will not be available in relation to decisions made by the Commissioner under clauses 31, 34, 37, 42 and 43.**

1.44 The committee's consideration of the appropriateness of excluding merits review will be assisted if the minister's response identifies established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What Decisions Should be Subject to Merit Review?.*

16 See explanatory memorandum, pp. 83 and 88.

Broad discretionary power[17]

1.45 Part 9 of the bill seeks to establish an online content scheme to provide for the regulation of 'class 1 and class 2 material' online. Clauses 106 and 107 propose to set out when online content will be 'class 1' or 'class 2' material. These provisions rely heavily on whether the material has already been classified by the Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act) as falling into certain categories such as 'refused classification', X 18+, R 18+ or 'Category 1 restricted' or 'Category 2 restricted' material.

1.46 Clauses 106 and 107 further provide that material will be 'class 1' or 'class 2' material if the relevant material 'would be likely to be' classified in one of the listed classification categories.

1.47 If the Commissioner is satisfied that material is 'class 1' or 'class 2' material, a range of measures are available to the Commissioner to restrict access to the material, including issuing removal notices,[18] remedial notices,[19] link deletion notices,[20] and app removal notices.[21]

1.48 The committee notes that the proposed power in these clauses appears to provide the Commissioner with a broad discretion to determine the scope of content that will be regulated by the online content scheme.

1.49 The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum. In this instance, the explanatory memorandum contains no justification for the inclusion of this broad discretionary power.

1.50 The committee further notes that clause 222 seeks to provide that the Commissioner and any of their delegates are not liable to an action or other proceeding for damages for, or in relation to, an act or matter done or omitted to be done in good faith in the performance or purported performance of any function or in the exercise or purported exercise of any power that is conferred on the Commissioner by or under the bill.

1.51 This would remove any common law right to bring an action for damages, unless it can be demonstrated that lack of good faith is shown, and the committee

17 Part 9. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

18 Clauses 109, 110, 114, and 115.

19 Clauses 119 and 120.

20 Clause 124.

21 Clause 128.

notes that the courts have taken the position that bad faith can only be shown in very limited circumstances. It may therefore be very difficult for a person who is adversely affected by an action of the Commissioner to seek compensation for damage suffered as a result of a mistaken removal of or restriction of access to their online content.

1.52 The explanatory memorandum does not explain why it is appropriate that the Commissioner or their delegates should not be liable for damages for actions taken in this context.

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

- **why it is considered necessary and appropriate to provide the Commissioner with a broad discretionary power to determine that material which has not previously been classified will be 'class 1' or 'class 2' material; and**
- **whether the bill can be amended to include additional guidance on the exercise of the power on the face of the primary legislation; and**
- **why it is considered necessary and appropriate to provide that the Commissioner and their delegates are not liable for damages for acts done in good faith in the performance or exercise of powers or functions conferred by the bill.**

Exclusion of liability[22]

1.54 Subclause 235(1) provides that the law of a State or Territory, or a rule of common law or equity has no effect to the extent to which it:

- subjects or would have the direct or indirect effect of subjecting an Australian hosting service provider or an internet service provider to liability (whether civil or criminal) in respect of hosting or carrying particular online content, where the provider was not aware of the nature of the content; or
- requires or would have the direct or indirect effect of requiring an Australian hosting service provider or internet service provider to monitor, make inquiries about, or keep records about online content hosted or carried by the provider.

1.55 The committee notes that the explanatory memorandum to the bill simply describes the provision. The intended effect of the provision is therefore unclear, and it is not clear whether the provision may affect any existing rights and obligations of hosting service providers, internet service providers, or other persons.

22 Clause 235. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

- **the intended purpose and operation of subclause 235(1);**
- **examples of the types of liability that may be excluded; and**
- **what rights and obligations may be affected by the exclusion of liability in subclause 235(1).**

Procedural fairness[23]

1.57 Subclause 99(1) creates a power for the Commissioner to issue a written notice requiring an internet service provider to disable access to material that promotes, incites or instructs in abhorrent violent conduct or depicts abhorrent violent conduct. Subclause 99(3) provides that the Commissioner is not required to observe the requirements of procedural fairness in relation to issuing a blocking notice under subclause 99(1). Failure to comply with a blocking notice is subject to a civil penalty of 500 penalty units.[24]

1.58 The committee notes that the right to procedural fairness has two basic rules. It requires that decision-makers are not biased and do not appear to be biased, and requires that a person who may be adversely affected by a decision is given an adequate opportunity to put their case before the decision is made. The committee considers that the right to procedural fairness is a fundamental common law right and it expects that any limitation on this right to be comprehensively justified in the explanatory memorandum. In this instance, the explanatory memorandum states:

> This is intended to exclude any procedural fairness requirements to both an ISP [internet service provider] and to any other person to whom procedural fairness might be owed, for example the owner of a website that is being blocked. The reason for excluding procedural fairness in relation to the issuing of the notice is to enable the Commissioner to issue a notice as quickly as possible to protect the Australian community from seriously harmful material. Exposure to this material can traumatise and harm those who view it, compound the harm experienced by the victims of such actions, glorify perpetrators, incite further violence and contribute to the radicalisation of end-users.[25]

1.59 While noting the above explanation, the committee also notes that the courts have consistently interpreted procedural fairness obligations flexibly based on specific circumstances and the statutory context. If it could, in the circumstances of a particular

23 Clause 99. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

24 See clause 103.

25 Explanatory memorandum, p. 119.

case, be demonstrated that there was a need for particular urgency to protect from harmful material, then the rules of natural justice may require no more than a consideration of the extent to which it is possible to give notice to the affected person and how much (if any) detail of the reasons for the proposed decision should be disclosed. The explanatory materials do not address why this level of flexibility would not be adequate in these circumstances.

1.60 The committee also notes that the explanatory memorandum only appears to address the natural justice aspect of procedural fairness and does not provide any explanation why the other limb of the right to procedural fairness, the bias rule, has also been excluded.

1.61 In light of the above comments, the committee requests the minister's more detailed justification regarding why it is considered necessary and appropriate to remove the requirement to observe *any* requirements of procedural fairness in relation to issuing a blocking notice under subclause 99(1).

Privacy

Significant matters in delegated legislation[26]

1.62 Part 15 of the bill enables the Commissioner to disclose information for certain purposes. Clauses 211 to 214 allow the Commissioner to disclose information to a Royal Commission, certain authorities, school principals, or parents, and to impose conditions to be complied with in relation to the disclosed information by legislative instrument.

1.63 The committee notes that, under the bill, the Commissioner is able to collect personal identifying information about individuals, including through clause 194 which would allow the Commissioner to require a person who provides a social media service, relevant electronic service or designated internet service to give the Commissioner information about the identity of an end-user of a service.

1.64 The committee's view is that significant matters, such as conditions for the disclosure of information that may include identifying personal information, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

---

26 Clauses 211 to 214. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

1.65 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.

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

- **why it is considered necessary and appropriate to leave conditions to be complied with in relation to the disclosure of information to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding conditions which will be imposed on the face of the primary legislation.**

Significant matters in delegated legislation[27]

1.67 The bill seeks to insert a range of powers for the minister or Commissioner to prescribe matters in delegated legislation:

- Clauses 6 and 7 – in relation to conditions to be met for material to be considered cyber-bullying or cyber abuse material (legislative rules made by the minister may set out other conditions);
- Clause 13 – in relation to the definition of 'social media service' (meeting conditions in rules or an electronic service specified in the rules; or being an exempt service by virtue of being specified in the legislative rules);
- Clause 13A – in relation to the definition of 'relevant electronic service' (includes an electronic service specified in the legislative rules);
- Clause 14 – in relation to the definition of designated internet service and exempt services (these are to be specified in a legislative instrument made by the minister);
- Clause 27 – in relation to the commissioner's functions, which may include such other functions as are specified in the legislative rules;
- Clause 45 – in relation to basic online safety expectations (these may be determined by legislative instrument made by the minister, including determining expectations in relation to each relevant electronic service or designated internet service);

27 Clauses throughout the bill as listed. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

- Clauses 52 and 59 – periodic and non-periodic reporting obligations for service providers may be determined by legislative instrument made by the Commissioner;
- Clause 86 – a provision of intimate image will be an exempt provision of an intimate image if it satisfies one or more conditions determined by legislative instrument made by the minister;
- Clause 108 – the restricted access system may be determined by legislative instrument made by the Commissioner;
- Subclause 145(1) – industry standards may be determined by the Commissioner by legislative instrument to apply to participants in a particular section of the online industry;
- Clause 151 – service provider determinations may be determined by the Commissioner by legislative instrument
- Clause 152 – exemptions from service provider determinations may be determined by the minister by legislative instrument;
- Subclause 235(2) – the minister may, by legislative instrument, exempt a specified law of a State or Territory, or a specified rule of common law or equity, from the operation of subsection 235(1).

1.68 The committee's view is that matters that may be significant to the operation of a legislative scheme should be included in primary legislation unless sound justification for the use of delegated legislation is provided. The committee notes that providing for a broad range of matters to be provided for in delegated legislation provides the minister and Commissioner with a broad power to determine the scope and operation of significant aspects of the bill. For example, the committee notes that leaving the determination of the 'restricted access system' to delegated legislation provides the Commissioner with a broad discretion to determine the manner in which online content may be subject to access controls.[28] It is unclear to the committee why at least high-level guidance in relation to these matters cannot be provided on the face of the bill.

1.69 A number of the above clauses will also establish obligations on service providers, which will attract enforcement measures including civil penalties for failure to comply.[29] The committee considers that significant matters such as provisions that

28 Division 4 of Part 9 provides for the Commissioner to issue remedial notices in relation to 'class 2' material which may require a service provider to take steps to ensure that access to material is subject to a restricted access system.

29 See, for example, clauses 53 and 60, which impose civil penalties of 500 penalty units for non-compliance with determinations made under clauses 52 or 59.

establish obligations subject to civil penalties should also be included in primary legislation unless sound justification for the use of delegated legislation is provided.

1.70 The explanatory memorandum in relation to each of the above clauses generally only describes the provisions. The committee therefore considers that these matters have not been sufficiently addressed in the explanatory memorandum and that the prescription of so many delegated legislation making powers has not been adequately justified.

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

- **why it is considered necessary and appropriate to leave each of the above matters 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.**

Significant matters in non-disallowable delegated legislation[30]

1.72 Clause 145 provides for the Commissioner to determine an industry standard that applies to participants in a particular section of the online industry. Subclause 145(3) provides for the minister to give the Commissioner a written direction as to the exercise of the Commissioner's powers under this clause.

1.73 Clause 184 requires the requires the ACMA to assist the Commissioner to perform their functions and exercise their powers, including by providing advice and making resources and facilities available. Subclause 184(5) enables the Minister, by legislative instrument, to give directions to the ACMA in relation to providing this assistance.

1.74 Subclause 188(1) enables the Minister, by legislative instrument, to give directions to the Commissioner about the performance of the Commissioner's functions or exercise of the Commissioner's powers.

1.75 The explanatory memorandum states that a direction made under subclause 145(3) is a legislative instrument that is not subject to disallowance, by virtue of section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015.[31] Notes to clauses 184 and 188 similarly state that the instruments are not subject to parliamentary disallowance, with reference to regulations made under paragraph 44(2)(b) of the *Legislation Act 2003*.

---

30 Clauses 145, 184, 188 and 191. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

31 Explanatory memorandum, p. 138.

1.76 The committee's view is that significant matters, such as directions relating to the performance of the Commissioner's powers or the manner in which assistance is provided to the Commissioner should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.77 The committee further expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. The fact that a certain matter has previously been within executive control or continues current arrangements does not, of itself, provide an adequate justification.

1.78 The committee also notes that clause 190 would continue in existence the online safety special account, and that clause 191 provides for the crediting of funds to the special account, including by enabling the minister to determine that a specified amount be credited to the special account. Subclause 191(2) provides that such a determination is a legislative instrument that is not subject to disallowance under section 42 of the *Legislation Act 2003*.

1.79 The explanatory memorandum states that 'exclusion from disallowance is appropriate in this instance to provide certainty of funding to the Commissioner'.[32]

1.80 While noting this explanation, the committee also notes that, under section 42 of the *Legislation Act 2003*, a legislative instrument is only subject to disallowance for a period of 15 sitting days of a House of Parliament after it is tabled in that House. Further, the instances of the disallowance procedure resulting in disallowance by the Parliament are very low, and there are alternative mechanisms available to makers of delegated legislation to overcome any remaining uncertainty, such as having delegated legislation come into effect after the disallowance period has passed. The committee therefore does not generally accept a desire to provide certainty, of itself, to be sufficient justification for exempting an instrument from the parliamentary disallowance process.

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

- **why it is considered necessary and appropriate to leave the following matters to delegated legislation which is exempt from disallowance:**
  - **directions about the exercise of powers or performance of functions of the Commissioner;**
  - **directions about the provision by the ACMA of assistance to the Commissioner; and**

32 Explanatory memorandum, p. 153.

- **determinations of amounts to be credited to the online safety special account; and**

- **whether the bill can be amended to:**
  - **provide that these directions and determinations are subject to parliamentary disallowance; and**
  - **provide at least high-level guidance regarding what may be included in the directions on the face of the primary legislation.**

Parliamentary scrutiny—section 96 grants to the states[33]

1.82 Clause 27 of the bill sets out the functions of the Commissioner, which include, at paragraph 27(1)(g) to make grants of financial assistance relating to online safety for Australians. Subclause 27(2) provides that such grants may be made to a State, a Territory, or a person other than a state or territory. Subclause 27(3) provides that the terms and conditions on which financial assistance is granted are to be set out in a written agreement between the Commonwealth and the grant recipient.

1.83 The committee notes that section 96 of the Constitution confers on the Parliament the power to make grants to the states and to determine the terms and conditions attaching to them.[34] Where the Parliament delegates this power to the executive, the committee considers it appropriate for the exercise of the power to be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.84 In this instance, however, the bill contains no guidance as to the terms and conditions on which financial assistance may be granted. In addition, there is no requirement to table the written agreements between the Commonwealth and the states and territories in the Senate to ensure that senators are at least made aware of, and have an opportunity to debate, any agreements made under clause 27.

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

- **include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and**

---

33 Clause 27. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

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

- **include a requirement that written agreements with the states and territories about grants of financial assistance relating to online safety for Australians made under clause 27 are:**
  - **tabled in the Parliament within 15 sitting days after being made; and**
  - **published on the internet within 30 days of being made.**

Reversal of evidential burden of proof[35]

Offence-specific defences to offence of non-compliance with requirement to give evidence

1.86 Clause 205 creates an offence of non-compliance with a requirement by the Commissioner to answer a question, give evidence or to produce documents under Part 14 of the bill. Subclauses 205(3), (4) and (5) provide exceptions (offence-specific defences) to this offence, stating that the offence does not apply if:

- the person has a reasonable excuse;
- the answer to the question or the production of the document would tend to incriminate the person; or
- the person is a journalist and the answer to the question or the production of the document would tend to disclose the identity of a person who supplied information in confidence to the journalist.

1.87 The offence carries a maximum penalty of imprisonment for 12 months.

1.88 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.

1.89 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in clause 205 have not been addressed in the explanatory materials.

---

35 Clauses 75 and 205. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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.

Exceptions to prohibition on non-consensual sharing of intimate images

1.90 Clause 75 of the bill would create a prohibition on the non-consensual sharing of intimate images. Subclause 75(1) provides that a person who is an end-user of a social media service, a relevant electronic service, or a designated internet service, must not post or make a threat to post an intimate image of another person without their consent. A civil penalty of 500 penalty units may be imposed for contravening the provision. Subclauses 75(2), (3) and (4) each provide an exception to the prohibition, providing that subclause 75(1) does not apply if:

- the intimate image was posted with the consent of the person it depicts;
- the intimate image is covered by subclause 15(4) because it depicts, or appears to depict, the other person without particular attire of religious or cultural significance; and the person posting the image did not know that the person depicted consistently wears that attire in public; or
- the post of the intimate image is, or would be, an exempt provision of the image. An exempt provision of an intimate image is broadly defined in clause 86 and includes if the provision of the image is necessary for the enforcement of a law, for the purposes of court or tribunal proceedings or if an ordinary reasonable person would consider the provision of the intimate image acceptable on a number of grounds.

1.91 Notes to subclauses 75(2), (3) and (4) state:

> In proceedings for a civil penalty order against a person for a contravention of subsection (1), the person bears an evidential burden in relation to the matter in this subsection (see section 96 of the *Regulatory Powers (Standard Provisions) Act 2014*).

1.92 The committee notes that the explanatory materials do not provide any justification for the reversal of the evidential burden of proof, merely stating the effect of the relevant provisions.

1.93 The committee also notes that the reversal of the burden of proof in subclauses 75(2), (3) and (4) relates to a civil penalty, rather than to a criminal offence. However, the committee recognises that, in certain cases, there may be a blurring of distinctions between criminal and civil penalties, with civil penalties applied in circumstances that are akin to criminal offences. The committee considers that reversals of the burden of proof in such cases merit careful scrutiny, as there could be a risk that reversing the burden of proof in such cases may unduly trespass on personal rights and liberties. This is particularly the case where more significant penalties are

imposed. In this case, the committee notes that subclause 75(1) seeks to impose a maximum penalty of what currently amounts to $111,000 on natural persons.[37]

1.94 As the explanatory materials do not address this issue, the committee requests the minister's advice as to the appropriateness of reversing the evidential burden of proof in offence-specific defences in clause 205 and exceptions in clause 75.

1.95 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*.[38]

Incorporation of external materials existing from time to time[39]

1.96 Subclause 230(2) provides that an instrument made under the Act may make provision in relation to a matter by applying, adopting or incorporating matter contained in any other instrument or writing as in force or existing from time to time. Subclause 230(3) provides a non-exhaustive list of examples of material that may be incorporated including regulations or rules made under an Act, a State Act or law of a Territory, or an international technical standard or performance indicator.

1.97 The explanatory memorandum provides no explanation as to why it would be necessary for this material to apply as in force or existing from time to time.

1.98 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

---

37 See section 4AA of the *Crimes Act 1914* which defines a 'penalty unit', and Notice of Indexation of the Penalty Unit Amount [F2020N00061], providing that the value of the penalty unit amount increased to $222 from 1 July 2020.

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

39 Subclause 230(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

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

1.99 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.

1.100 Noting the above comments, the committee requests the minister's advice as to whether material that may be applied, adopted or incorporated by reference under subclause 230(2) will be made freely available to all persons interested in the law and why it is necessary to apply this material as in force or existing from time to time, rather than when the instrument is first made.

Broad delegation of administrative powers[40]

1.101 Clause 181 provides that the Commissioner may, by writing, delegate any or all of the Commissioner's functions and powers to members of the staff of the ACMA or persons whose services are made available to the ACMA under paragraph 55(1)(a) of the *Australian Communications and Media Authority Act 2005*. The Act specifies that the Commissioner may delegate these powers or functions to a member or person if they are an SES employee or acting SES employee, or an APS employee who holds or performs duties of an Executive Level 1 or 2 or APS 6 position or equivalent positions.

1.102 Clause 182 provides that the Commissioner may, by writing, delegate any or all of the Commissioner's functions or powers to a contractor engaged by the Commissioner under subsection 185(1), unless those powers are specified in subclause 182(4).

1.103 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.

1.104 The explanatory materials provide no information about why these powers are proposed to be delegated to persons in Executive Level 1 or 2, or APS 6 level

40 Clauses 181 and 182. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

positions. In relation to the delegation of powers and functions to contractors, the explanatory memorandum states:

> The intention behind this provision is that a contractor engaged by the Commissioner under subclause 185(1) cannot be delegated any of the Commissioner's powers or functions where there are civil penalties attached, or where, for example, it would be more appropriate for the Commissioner or APS staff, who are subject to the *Public Service Act 1999*, to exercise the power. The contractor could, for example, be involved in day-to-day work to inform the decisions of the Commissioner; however, final decision-making authority will rest with the Commissioner personally, or a sufficiently senior APS employee who has had the appropriate functions and powers delegated to them under clause 181. It is not intended that this provision extends to general delegations under the PGPA Act or *Public Service Act 1999*. For example, a contractor engaged by the Commissioner under subclause 185(1) could not sign a contract on behalf of the Commonwealth. However, the contractor could undertake work to inform a contract up to the point of signature.[41]

1.105 While noting this explanation of subclause 182(4), the committee notes that the explanatory memorandum does not include an explanation of why it is necessary or appropriate to allow the Commissioner's functions and powers to be delegated to contractors.

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

- **why it is considered necessary and appropriate to allow any or all of the Commissioner's functions and powers to be delegated to members of the staff of the ACMA or persons whose services are made available to the ACMA who hold Executive Level 1 or 2, or APS 6 level positions;**
- **why it is considered necessary and appropriate to allow the Commissioner's functions and powers that are not listed in subclause 182(4) to be delegated to a contractor; and**
- **whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated to members of the staff of the ACMA or persons whose services are made available to the ACMA.**

41 Explanatory memorandum, p. 150.

Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021

Purpose	This bill is part of a legislative package including the Online Safety Bill 2021, which seeks to replace the *Enhancing Online Safety Act 2016*. This bill seeks to provide additional powers to the Online Safety Commissioner, as well as transitional provisions
Portfolio	Communications, Urban Infrastructure, Cities and the Arts
Introduced	House of Representatives on 24 February 2021

Increased penalties[42]

1.107 Item 64 of Schedule 2 proposes to repeal and substitute the existing maximum penalty of three years' imprisonment for the offence at subsection 474.17(1)[43] of the Criminal Code with a maximum penalty of five years' imprisonment.

1.108 Item 65 of Schedule 2 proposes to repeal and substitute the maximum penalty of five years' imprisonment for the aggravated offence at subsection 474.17A(1)[44] of the Criminal Code with a maximum penalty of six years' imprisonment.

1.109 The committee's expectation is that the rationale for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties.

1.110 In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a similar kind or of similar seriousness. This should include a consideration of… other comparable offences in Commonwealth legislation'.[45]

---

42 Schedule 2, items 64 and 65. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

43 Under this subsection a person commits an offence if the person uses a carriage service to menace, harass or cause offence.

44 Under this subsection a person commits an aggravated offence if the person uses a carriage service to menace, harass or cause offence, involving private sexual material.

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

1.111 In this instance, the explanatory memorandum provides a rationale for the imposition of increased penalties, noting that the increase in the penalty for each offence sends a strong message that this conduct is serious.[46] However, the explanatory memorandum does not provide any reference to similar offences in Commonwealth legislation.

1.112 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the justification for the increased maximum penalties for the offence of using a carriage service to menace, harass or cause offence, and the related aggravated offence.

46 Explanatory Memorandum, pp. 11–12.

Private Health Insurance Legislation Amendment (Age of Dependants) Bill 2021

Purpose	This bill seeks to amend the *Private Health Insurance Act 2007* and associated legislation to: • change the maximum allowable age for people to be covered under a family private health insurance policy as a dependent up to 31 years old; and • allow people with a disability, regardless of their age, to be covered under family private health policy as a dependent
Portfolio	Health and Aged Care
Introduced	House of Representatives on 25 February 2021

Significant matters in delegated legislation[47]

1.113 Items 14 and 16 of the bill seek to amend the *Private Health Insurance Act 2007* (the Act) to allow for the new term 'person with a disability' to be defined by the Minister for Health in the Private Health Insurance (Complying Product) Rules. Item 20 seeks to insert the definition of 'dependent person with a disability' into the dictionary in Schedule 1 to the Act as meaning a person who is aged 18 years or over and who is:

- a person with a disability within the meaning of the expression ***person with a disability*** as defined by the Private Health Insurance (Complying Product) Rules; or
- a person with a disability within the meaning of the expression ***person with a disability*** as defined by the *rules of the private health insurer that insures the person.

1.114 This new definition is relevant to items in the bill which seek to provide that a person with a disability may be covered by their family's private health insurance policy regardless of their age.

1.115 The committee's view is that significant matters, such as the definition of 'person with a disability' for the purposes of a legislative scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in

47 Items 14, 16 and 20. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

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.

1.116 The committee also notes that the statement of combability provides information as to the definition that is expected to be included in the rules:

> It is proposed a definition of disability will be included in the Private Health Insurance (Complying Product) Rules, and this will be 'a participant under the National Disability Insurance Scheme under the *National Disability Insurance Scheme Act 2013*'. It is also proposed private health insurers will be permitted to be more expansive in their definition under their insurer rules, but will not be able to apply a narrower definition than that in the Rules. The commencement date will be stated in the Rules.[48]

1.117 It is unclear to the committee why this proposed definition, or other high-level guidance in relation to the definition cannot be provided on the face of the bill. The committee also notes that there appears to be no requirement on the face of the legislation to require that private health insurers will not be able to apply a narrower definition than that in the rules.

1.118 In this regard, the committee notes that the definitions of 'dependent non-student' and 'dependent student' to be inserted into the Schedule 1 dictionary also apply definitions of the 'rules of the private health insurer that insures the person'. These rules are defined in Schedule 1 to the Act as being:

> the body of rules established by the insurer that relate to the day-to-day operation of the insurer's *health insurance business and (if any) *health-related business.[49]

1.119 The explanatory memorandum does not address why it is necessary or appropriate for the definitions of 'person with a disability', 'dependent non-student' and 'dependent student' to rely on rules established by private health insurers, which appear to be non-legislative documents that are not subject to any form of parliamentary scrutiny and may not be publicly accessible.

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

- **why it is considered necessary and appropriate to leave the definition of 'person with a disability' to delegated legislation;**
- **whether the bill can be amended to include on the face of the primary legislation:**
    - **at least high-level guidance regarding this definition, and**

48 Statement of compatibility, p. 3.

49 See Clause 1 of Schedule 1 to the *Private Health Insurance Act 2007*.

- **the requirement that private health insurer rules may not apply a narrower definition of 'person with a disability' than that in the rules; and**

- **why it is considered necessary and appropriate to apply definitions set out in rules of a private health insurer to the definitions of 'person with a disability', 'dependent non-student' and 'dependent student'.**

Bills with no committee comment

1.121 The committee has no comment in relation to the following bills which were introduced into the Parliament between 22 – 25 February 2021:

- Ending Indefinite and Arbitrary Immigration Detention Bill 2021
- Social Services Legislation Amendment (Strengthening Income Support) Bill 2021
- Special Recreational Vessels Amendment Bill 2021
- Work Health and Safety Amendment (Norfolk Island) Bill 2021

Commentary on amendments and explanatory materials

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

- Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020;[50]
- Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021;[51]
- Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020.[52]

50 On 23 February 2021, the House of Representatives agreed to five Government amendments, the Minister for Industrial Relations (Mr Porter) tabled a supplementary explanatory memorandum, and the bill was read a third time. On 25 February 2021, in the Senate, Senator Duniam tabled a revised explanatory memorandum, and debate was adjourned till the next day of sitting.

51 On 22 February 2021, Senator Seselja tabled an addendum to the explanatory memorandum and a revised explanatory memorandum, and debate was interrupted. On 23 February 2021, the Minister for Superannuation, Financial Services and the Digital Economy (Senator Hume) tabled a supplementary explanatory memorandum, and the bill was read a second time. On 24 February 2021, the Senate agreed to five Government amendments, the bill was read a third time, the House of Representatives agreed to the Senate amendments, and the bill finally passed both Houses.

52 On 25 February 2021, the Senate Committee of the Whole agreed to 14 Government amendments and agreed to two Government requests, the Minister for Superannuation, Financial Services and the Digital Economy (Senator Hume) tabled a supplementary explanatory memorandum, and the bill was agreed to subject to requests On 25 February 2021, the House of Representatives made the Senate requested amendments.

Chapter 2

Commentary on ministerial responses

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

Data Availability and Transparency Bill 2020

Purpose	This bill seeks to authorise and regulate controlled access to Australian Government data to promote better availability and use of government data, empower the government to deliver effective policies and services, and support research and development
Portfolio	Government Services
Introduced	House of Representatives on 9 December 2020
Bill status	Before the House of Representatives

Privacy[1]

Significant matters in delegated legislation[2]

2.2 The committee initially scrutinised this bill in *Scrutiny Digest 1 of 2021* and requested the minister's advice.[3] The committee considered the minister's response in *Scrutiny Digest 3 of 2021* and requested that an addendum to the explanatory memorandum be tabled in the Parliament as soon as possible. The committee also requested the minister's further advice as to:

- whether the addendum to the explanatory memorandum can provide specific examples of current guidance on the meaning of 'unreasonable or impracticable' and provide information on where this current guidance can be accessed; and
- why it is considered necessary and appropriate for guidelines on aspects of the data sharing scheme, which may play an important role in minimising the risk of interpretations of the operation of the scheme that trespass on

1 Clauses 15, 16 and 88. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

2 Clauses 15, 126 and 133. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

3 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 4-8.

personal privacy, to be included in non-legislative instruments that are not subject to parliamentary scrutiny.

Minister's response[4]

2.3 The minister advised:

> I have approved an Addendum to the Explanatory Memorandum to address concerns raised by the Committee and I will arrange for that Addendum to be tabled in the House of Representatives as soon as practicable.
>
> I have provided additional information below in relation to specific issues raised by the Committee.
>
> *2.19, 2.20 of Scrutiny Digest 3, 2021. Privacy; significant matters in delegated legislation*
>
> The Addendum includes further information about the meaning of the expression 'unreasonable or impracticable' in the context of clause 16(2)(c) of the Bill. The Addendum provides information on where to locate guidance issued by the Australian Information Commissioner (AIC) on privacy and consent matters.
>
> The Committee has requested my advice on why it is necessary and appropriate for guidelines on aspects of the data sharing scheme to have the status of non-legislative instruments that are not subject to parliamentary scrutiny.
>
> The Bill establishes a framework of resources, of scaled legal weight, to assist its interpretation and application. These resources range from fact sheets, guidelines on aspects of the Bill which entities must have regard to when engaging with the sharing scheme, to legislative instruments subject to Parliamentary scrutiny that set binding legal requirements.
>
> I consider this scaled approach to be reasonable, and necessary to achieve the desired outcome of supporting both best practice data sharing and a graduated approach to enforcing compliance with the Bill. This approach is consistent with that of other principles-based legislative schemes, in particular the AIC's powers and framework of instruments to support understanding of, and compliance with, privacy law. It is also supported by findings from a review of the *Public Interest Disclosure Act 2013*, which found a principles-based, graduated approach to regulation to be well adapted to achieving cultural change in data handling, and to driving fair and outcomes-focussed conversations between regulators and decision makers [independent review conducted by Mr Phillip Moss AM (15 July 2016), part 3 [94-95]: Review of the *Public Interest Disclosure Act 2013*]

4 The minister responded to the committee's comments in a letter dated 4 March 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> I understand from the AIC's experience that it is desirable from a regulatory perspective to have guidelines which entities must regard as an interim step between general guidance and legislative instruments [see recommendation 16 of the Submission by the Office of the Australian Information Commissioner on the Privacy Act Review – Issues Paper, 11 December 2020]. Learning from this experience, the approach taken in the Bill enables the National Data Commissioner to produce both informal guidance material, and more formal "guidelines". Scheme entities must have regard for the guidelines however they are not binding. The guidelines do not alter the law but provide clear guidance from the Commissioner about their view of law applied and better practice. It is not appropriate for such guidance to be disallowable. Data codes made by the Commissioner, and rules made by the Minister, are binding on scheme entities and are legislative instruments subject to disallowance.

Committee comment

2.4 The committee thanks the minister for this response. The committee welcomes the minister's advice that an addendum to the explanatory memorandum to address the concerns raised by the committee has been approved and will be tabled in the House of Representatives as soon as practicable.

2.5 The committee notes the minister's advice that the addendum includes further information about the meaning of the expression 'unreasonable or impracticable' in the context of paragraph 16(2)(c) of the bill, as well as information on where to locate guidance issued by the Australian Information Commissioner (AIC) on privacy and consent matters.

2.6 In relation to why it is considered necessary and appropriate for guidelines on aspects of the data sharing scheme to be included in non-legislative instruments that are not subject to parliamentary scrutiny, the committee notes the minister's advice that the bill establishes a framework of resources, of scaled legal weight, to assist its interpretation and application. The minister advised that these resources range from fact sheets, guidelines on aspects of the bill which entities must have regard to when engaging with the sharing scheme, to legislative instruments subject to parliamentary scrutiny that set binding legal requirements.

2.7 The committee notes the minister's advice that, from the AIC's experience, it is desirable from a regulatory perspective to have guidelines which entities must regard as an interim step between general guidance and legislative instruments.

2.8 The committee also notes the minister's advice that the guidelines do not alter the law but provide guidance from the Commissioner about their view of law applied and better practice and therefore that it is not appropriate for such guidance to be disallowable. While noting this advice, the committee reiterates its concerns that the guidelines may play an important role in minimising the risk of interpretations of the operation of the scheme that trespass on personal privacy.

2.9 The committee remains of the view that significant matters, such as the application of privacy safeguards for data sharing, may be more appropriately provided for in delegated legislation that is subject to parliamentary scrutiny and disallowance.

2.10 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving guidelines on aspects of the data sharing scheme that are relevant to the application and operation of privacy safeguards to non-legislative instruments that are not subject to parliamentary scrutiny or disallowance.

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Purpose	This bill seeks to amend the *Fair Work Act 2009* and related legislation to assist Australia's recovery from COVID-19 by improving the operation and usability of the national industrial relations system
Portfolio	Industrial Relations
Introduced	House of Representatives on 9 December 2020
Bill status	Before the Senate

Significant matters in delegated legislation[5]

2.11 In *Scrutiny Digest 2 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate to leave the following matters to delegated legislation:

- the prescription of the model national employment standards interaction term;
- the prescription of matters relating to the content or form of, and manner of providing to employees, a Casual Employment Information Statement; and
- other purposes for which additional agreed hours are to be treated as ordinary hours of work.[6]

Minister's response[7]

2.12 The minister advised:

> *Model National Employment Standards (NES) interaction term*
>
> I note that existing substantive provisions governing the interaction of the NES and enterprise agreements are contained (relevantly) at sections 55, 56 and 61 of the *Fair Work Act 2009* (the Act). The proposed model NES interaction term, which proposed subsection 205A(3) requires the Fair Work Regulations 2009 (the Regulations) to prescribe, would be declaratory

5 Schedule 3, item 42; Schedule 1, item 5; and Schedule 2, item 5. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

6 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 1-2.

7 The minister responded to the committee's comments in a letter dated 25 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

of these provisions and explain their effect. The model term cannot modify the effect of the Act's substantive provisions. In this context, it is appropriate for the term to be prescribed by the Regulations, consistent with existing arrangements for model dispute settlement and consultation terms.

Casual Employment Information Statement

The Committee observes that significant matters should be included in primary legislation rather than in legislative instruments. In this context, I note that key requirements for the content of the Casual Employment Information Statement (the Statement) and employers' obligation to provide it to new casual employees, would be stipulated in the Act. Matters the Statement must contain are set out in proposed subsection 125A(2), including the meaning of 'casual employee', when an employer's offer for casual conversion must be made, circumstances in which an offer for casual conversion need not be made, and the FWC's ability to deal with disputes. The regulation-making power in proposed new subsection 125A(4) is supplementary to these legislative requirements and is consistent with existing arrangements for the Fair Work Information Statement in subsection 124(4). The regulation power only ensures that content, form and provision requirements can quickly be supplemented (but not diminished), should this be necessary in future. The content of the Fair Work Information Statement is similarly specified in the Act supplemented by the regulation power to encompass additional matters.

Treatment of additional agreed hours

The Bill would amend the Act to enable an employer and part-time employee to make an additional hours agreement where an identified modern award applies. Such agreements can provide for an employer to offer, and for a part-time employee to accept or reject, additional hours at ordinary rates of pay in certain circumstances. Under proposed subsection 168Q(2), additional agreed hours generally do not attract overtime payments.

An employee's ordinary hours of work are important for the calculation of various minimum entitlements. Proposed subsection 168Q(4) ensures that an employee's additional agreed hours are treated as ordinary hours of work for the purposes of applicable penalty rates, minimum paid leave entitlements under the NES, and the definition of ordinary time earnings in subsection 6(1) of the *Superannuation Guarantee (Administration) Act 1992*. Proposed paragraph 168Q(4)(e) would enable the Regulations to prescribe other such purposes, should this be necessary in future.

Committee comment

2.13 The committee thanks the minister for this response. The committee notes the minister's advice with respect to the model national employment standards (NES) interaction term that the model term would be declaratory of existing sections 55, 56

and 61 of the *Fair Work Act 2009* (the Act) and explain their effect, and that the model term cannot modify the effect of the Act's substantive provisions. The minister also advised that this provision is consistent with existing arrangements for model dispute settlement and consultation terms.

2.14 With respect to the casual employment information statement (the statement), the committee notes the minister's advice that the key requirements for the content of the statement are set out in the Act. The committee also notes the minister's advice that the proposed regulation-making power is supplementary to the proposed legislative requirements, and ensures that content, form and provision requirements can quickly be supplemented (but not diminished) should this be necessary in future. The minister also advised that the regulation-making power is consistent with existing arrangements for the Fair Work Information Statement in subsection 124(4).

2.15 While noting the above explanation, the committee does not consider that consistency with current arrangements is, of itself, sufficient justification for including significant matters in delegated legislation. Further, the committee notes that there is no guidance on the face of the bill as to manner in which the statement may be given to employees.

2.16 With respect to the treatment of additional agreed hours, the committee notes the minister's advice that proposed subsection 168Q(4) ensures that an employee's additional agreed hours are treated as ordinary hours of work for the calculation of various minimum entitlements, including applicable penalty rates, minimum paid leave entitlements under the NES, and in relation to the *Superannuation Guarantee (Administration) Act 1992*. The minister advised that proposed paragraph 168Q(4)(e) would enable the regulations to prescribe other such purposes, should this be necessary in future.

2.17 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

2.19 In light of the information provided in relation to the model NES interaction term and the treatment of additional agreed hours, the committee makes no further comment on these matters.

2.20 With respect to the prescription of matters relating to the manner of providing a casual employment information statement to employees in delegated legislation, the committee draws its scrutiny concerns to the attention of the Senate and leaves to the Senate as a whole the appropriateness of this matter.

Procedural fairness—right to a fair hearing[8]

2.21 In *Scrutiny Digest 2 of 2021* the committee requested the minister's advice as to the justification for the amendments removing the requirement for the consent of parties to conduct an appeal or review of a decision by the Fair Work Commission without a hearing.[9]

Minister's response

2.22 The minister advised:

> The Committee sought justification for the proposed amendment to subsection 607(1), which would enable the Fair Work Commission (FWC) to conduct an appeal or review without a hearing, provided it takes into account the views of persons making submissions in the matter as to whether this is appropriate (removing the requirement for parties' consent to dispense with an oral hearing). The Committee suggested this may limit the right to procedural fairness.
>
> This amendment was sought by the President of the FWC, the Hon Justice Iain Ross AO. The President considers the current requirement for the parties' consent unduly restrictive, as it prevents the FWC from dealing with appeals in the most appropriate way, with consequent delays and increased costs to parties.
>
> The FWC is generally not required to hold a hearing in performing functions or exercising powers, except as required by the Act, but is of course bound by the requirements of procedural fairness. The obligation to afford procedural fairness (and specifically, an opportunity to be heard) does not necessarily require an oral hearing: *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 at [33], [63]. Whether an oral hearing (as distinct from an opportunity to provide written submissions) is required depends on the circumstances. Generally, an oral hearing would be required (for example) where disputed facts need to be resolved or there is otherwise evidence of a kind that needs to be able to be tested.
>
> The amendment to subsection 607(1) relates to appeals against and reviews of decisions. Unlike first instance proceedings in which oral hearings may be needed in the context of contested evidence, on appeal or review such questions may not arise for consideration by a Full Bench of the FWC. There will be circumstances where fairness necessitates the oral hearing of an appeal. The FWC is expected to exercise its discretion in light of the

8 Schedule 6, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 3-4.

requirements of procedural fairness in particular cases, having regard to the parties' views.

Committee comment

2.23 The committee thanks the minister for this response. The committee notes the minister's advice that the amendment was sought by the President of the Fair Work Commission (FWC), noting that the President considered the current requirement for the parties' consent to conducting an appeal or review without a hearing unduly restrictive, as it prevents the FWC from dealing with appeals in the most appropriate way, with consequent delays and increased costs to parties.

2.24 The committee also notes the minister's advice that the FWC is bound by the requirements of procedural fairness, and that there will still be circumstances where procedural fairness will necessitate the oral hearing of an appeal against a decision.

2.25 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Retrospective application[10]

2.27 In *Scrutiny Digest 2 of 2021* the committee requested the minister's advice as to:

- the necessity of retrospective application for the matters set out in clauses 45 and 46; and
- the extent to which this retrospective effect may have any adverse impact on individuals.[11]

Minister's response

2.28 The minister advised:

> The Committee sought advice on the necessity of application and commencement clauses for certain provisions in proposed clauses 45 and

10 Schedule 7, item 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 4-5.

46 of Division 2, Part 10, Schedule 7 to the Act and the extent to which this may adversely affect individuals.

Clause 45 would enable applications to the FWC to vary an existing enterprise agreement to resolve uncertainty or difficulty arising from the new definition of casual employment and the entitlement to convert from casual to full-time or part-time employment. This will provide certainty for employers and employees about their rights and obligations by ensuring that agreements work effectively with legislative changes, and is modelled on similar transitional provisions concerning the NES (e.g. following the introduction of family and domestic violence leave in 2018).

Clause 46 provides application provisions for the new definition of casual employment in proposed section 15A, arrangements for offsetting casual loading payments against claimed leave and other entitlements, and various consequential changes relating to casual employment. These provisions provide certainty of rights and obligations, fairness between parties as to outstanding entitlements, and uniform, clear treatment of casual employment across the Act.

The effect of new subclauses 46(1) and 46(3) appearing in the Bill at Schedule 7, Part 10, Division 2, is to apply the statutory definition of 'casual employee' in new section 15A to existing employees who meet the definition by virtue of the nature of their contract of employment, but not to an employee who (before commencement) a court has definitively determined is not casual, or who converted to full-time or part-time employment. This approach ensures certainty of rights and obligations (reflecting the parties' agreement expressed in the relevant contract in question).

Proposed new Division 4A of Part 2-2 of the Act contains new arrangements for conversion from casual to full-time or part-time employment. Subclause 46(5) applies Division 4A to periods of employment starting before, on or after commencement of the Bill. This gives existing employees access to conversion by ensuring their pre-commencement service counts for the purpose of eligibility for an offer of (or request for) conversion.

New section 545A enables amounts payable by an employer to a person for leave and other entitlements to be offset by the amount of casual loading previously paid to an employee to compensate for the absence of such entitlements. Courts can reduce an employee's claim for relevant entitlements by an amount equal to the proportion of the loading amount the court considers appropriate. Subclauses 46(6) to (8) apply this rule to entitlements that accrue, loading amounts paid, and periods of employment arising, before, on or after commencement. This provides for consideration of payments made to employees for the same period of service as a potential claim for entitlements under the NES. The approach provides fairness by ensuring employees receive their correct entitlements, but not so as to require employers effectively to pay for entitlements twice.

> The Bill would make consequential amendments to the Act to clarify how conversion from casual to full-time or part-time employment affects NES entitlements. New subclause 46(9) provides that a reference to a period of employment as a casual employee in various NES provisions (concerning annual leave, paid personal/carer's leave and notice of termination and redundancy pay) applies to a period of employment starting before, on or after commencement of the Bill. This ensures certainty and clarity about periods of casual employment and merely confirms, for avoidance of doubt, the long-standing position that casual employees are not entitled to these NES benefits.
>
> The Bill would also define 'regular casual employee' and repeal the current definition of 'long term casual'. New subclause 46(10) provides that a reference to regular casual employee in certain provisions of the Act (including those governing eligibility to request flexible working arrangements, and for the entitlement to unpaid parental leave and protection from unfair dismissal) applies to periods of employment starting before, on or after commencement of the Bill. This does not change entitlements or obligations, but ensures that references to casual employment are consistent throughout the Act.

Committee comment

2.29 The committee thanks the minister for this response. The committee notes the minister's advice that clause 45 will provide certainty for employers and employees about their rights and obligations by ensuring that agreements work effectively with legislative changes. The minister also advised that clause 45 is modelled on similar transitional provisions concerning the national employment standards.

2.30 With respect to clause 46, the committee notes the minister's advice that the provisions also provide certainty of rights and obligations, fairness between parties as to outstanding entitlements, and uniform, clear treatment of casual employment across the Act. The committee notes in particular the minister's advice that the approach of applying proposed section 545A to entitlements that accrue, loading amounts paid, and periods of employment arising, before, on or after commencement provides fairness by ensuring employees receive their correct entitlements, but not so as to require employers effectively to pay for entitlements twice.

2.31 While noting this advice, the committee notes that the minister's response has not identified whether, or discussed the extent to which, the retrospective effect of clauses 45 and 46 would have any adverse impact on individuals.

2.32 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic

material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.33 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the retrospective application for the matters set out in clauses 45 and 46.

Family Assistance Legislation Amendment (Early Childhood Education and Care Coronavirus Response and Other Measures) Bill 2021

Purpose	This bill seeks to respond to the impacts of the COVID-19 pandemic on the early childhood education and care sector and families, by expanding the circumstances in which the Commonwealth can pay business continuity payments to approved child-care providers
Portfolio	Education
Introduced	House of Representative on 17 February 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation[12]

2.34 In *Scrutiny Digest 4 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave significant matters such as the manner in which emergency business continuity payments (BCPs) may be made and the determination of circumstances in which a debt will be due to the Commonwealth to delegated legislation;
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[13]

Minister's response[14]

2.35 The minister advised:

> *Proposed emergency Business Continuity Payments (BCPs)*
>
> As noted in the Explanatory Memorandum to the Bill, the purpose of emergency BCPs is to 'extend the range of strategies available to the Australian Government to respond to disasters and emergencies', by

12 Items 17 and 36. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2021*, pp. 5-6.

14 The minister responded to the committee's comments in a letter dated 10 March 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

'expanding the circumstances in which business continuity payments can be made to approved child care providers'.

To put these amendments in context, the Government moved quickly at the start of the COVID-19 pandemic to put in place the Early Childhood Education and Care Relief Package, (Relief Package) which operated from 6 April to 12 July 2020. The foundation of the Relief Package was the payment of BCPs to approved providers under the existing mechanism in Division 6 of Part 8A of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act).

The current section 205A of the Family Assistance Administration Act requires that the Minister make Minister's rules prescribing the circumstances in which those BCPs are payable (paragraph 205A(l)(c)), and the method of determining the amount of those payments (paragraph 205A(2)(a)), and permits the Minister's rules to 'prescribe any other matters relating to making (BCPs)', (paragraph 205A(2)(b)).

The Hon Dan Tehan MP, former Minister for Education, amended the *Child Care Subsidy Minister's Rules 2017* (Minister's Rules) with effect from 6 April 2020 to enable those BCPs to be paid – see the *Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister's Rules 2020* (F2020L00406).

However, the current provisions are not well-adapted to enabling BCPs to be paid in emergency circumstances, BCPs are designed largely to enable payment during temporary outages of the information technology systems that support the payment of Child Care Subsidy (CCS), and otherwise assume the ordinary operation of the family assistance law and the CCS scheme. The other amendments to the family assistance law in Part 6 of Schedule 1 to the Bill reflect some of the consequences of utilising BCPs under the current section 205A to provide funding to approved providers in emergency situations.

The proposed section 205C, which will enable the payment of emergency BCPs, does leave a number of matters relating to those BCPs to be specified in the Minister's Rules.

Nevertheless, the section endeavours to set as much detail as reasonably practicable for a discretionary payment mechanism that is intended only to be triggered in response to emergencies.

In particular, paragraphs 205C(1)(a) and (b) set out overarching criteria for the payment of emergency BCPs. The definition of 'emergency or disaster' in subsection (2) links to existing definitions for disaster responses payments under the social security law (noting that other emergencies can be specified in the Minister's Rules). Subsections (3) and (4) set out minimum administrative requirements with which the Secretary must comply when paying emergency BCPs. Beyond these matters, it is not clear what other guidance on the content of the Minister's Rules would be suitable for inclusion in the primary legislation, even at a high level.

The nature of emergency BCPs requires that there be considerable flexibility in their implementation and administration. Any scheme for the payment of emergency financial assistance must be inherently able to be fine-tuned and adapted to the needs of responding to the emergency in question. The assistance must be properly targeted to achieve its intended policy outcome of supporting those in need, and it must also work in conjunction with any other actions or supports that are being undertaken in response to the emergency. A Government response to an emergency involving the payment of emergency BCPs is neither a 'one-size-fits-all' nor a 'set-and-forget' scheme.

Consequently, it is essential that the criteria for eligibility for emergency BCPs, the amounts of payment, and the period in relation to which they are payable, be left to subsidiary legislation. In this respect, section 205C does not depart from the existing section 205A, and is consistent with the operation of legislative provisions in relation to other emergency payments, including disaster recovery allowance (see Part 2.23B of the *Social Security Act 1991* (Social Security Act), esp. s 1061KA), and the Australian Government Disaster Recovery Payment (see Part 2.24 of the Social Security Act).

I note that, unlike BCPs payable under section 205A of the Family Assistance Administration Act, emergency BCPs payable under section 205C will be subject to the internal and external review processes available for most decisions of the Secretary under the family assistance law, further ensuring there is appropriate accountability for those decisions.

BCPs paid during the Relief Package to be debts in circumstances prescribed in Minister's Rules

The Committee also seeks my advice as to why it is appropriate for the Minister's Rules to set out circumstances in which the BCPs paid during the Relief Package are to be debts. This question relates to the provision at item 36 of Schedule 1 to the Bill.

It should be noted that items 36 and 37 of Schedule 1 operate together. As the Explanatory Memorandum explains, item 37 of Schedule 1 is intended to ensure that BCPs paid during the Relief Package do not need to be automatically offset against other child care payments to approved providers under section 205B of the Family Assistance Administration Act.

Normally, BCPs are not debts, as they must be entirely offset against other payments to providers under section 205B. However, in circumstances where those BCPs are not being offset-as would be the case for BCPs paid during the Relief Package as a consequence of the provision at item 37 of Schedule 1 to the Bill – there does need to be some facility for the Commonwealth to recover those BCPs in appropriate circumstances. These could be where the amount of a BCP paid to a provider exceeded the amount prescribed in the Minister's Rules, or the provider was not eligible for a particular BCP that was paid to them.

> For example, a provider may have been paid a supplementary amount of BCP under section 60F of the Minister's Rules, but was not eligible for that supplementary amount in accordance with the *Early Childhood Education and Care Relief Package Payment Conditions* published by the Department of Education, Skills and Employment that were in force at the time.
>
> As the Relief Package was implemented rapidly at the start of the COVID-19 pandemic, and was continually adapted during its operation to meet the evolving needs of the early childhood education and care sector, the risk of incorrect payments of BCPs was always recognised and factored into the Government's planning. Some incorrect payments were identified during and after the Relief Package, and the Department instituted quick and effective recovery processes. Once the incorrect payments were notified to the providers concerned, most providers voluntarily paid back the excess amounts.
>
> Because the prospect of recovering BCPs paid during the Relief Package is a one-off and the circumstances in which those BCPs may need to be recovered may be quite specific to a small number of providers, and given the almost complete recovery of incorrect payments to date, there is no need for permanent amendment to the family assistance law to address the issue. Indeed, there may yet be no need for the Ministers' Rules to be amended to provide for any BCPs paid during the Relief Package to be debts. The provision at item 36 of Schedule 1 to the Bill is a reserve power that will enable specific overpayments of those BCPs to be recovered in the event that is necessary.
>
> As mentioned in the Explanatory Memorandum in relation to item 36 of Schedule 1, if Minister's Rules are made to give rise to debts, the existing laws and processes for raising and recovering family assistance law debts must be followed.

Committee comment

2.36 The committee thanks the minister for this response.

Proposed emergency Business Continuity Payments (BCPs)

2.37 The committee notes the minister's advice that proposed section 205C endeavours to set out as much detail as reasonably practicable for a discretionary payment mechanism that is intended only to be triggered in response to emergencies, including the minister's advice that paragraphs 205C(1)(a) and (b) set out overarching criteria for the payment of emergency BCPs.

2.38 The committee also notes the minister's advice that the nature of emergency BCPs requires that there be considerable flexibility in their implementation and administration, and that such schemes need to be able to be fine-tuned and adapted to the needs of responding to the relevant emergency. The minister advised that a government response to an emergency involving the payment of emergency BCP is neither a 'one-size-fits-all' nor a 'set-and-forget' scheme, and that it is therefore

essential that matters relevant to the payments are left to delegated legislation. The minister also advised that section 205C is consistent with the operation of legislative provisions in relation to other emergency payments.

2.39 The committee notes that, generally, neither a desire for administrative flexibility, nor the fact that a provision continues or is consistent with existing arrangements is likely to be, of themselves, sufficient justification for including significant matters in delegated legislation. However, in this instance, the committee also notes the minister's advice that emergency BCPs payable under section 205C will be subject to the internal and external review processes available for most decisions of the Secretary under the family assistance law, to further ensure that there is appropriate accountability for these decisions.

BCPs paid during the relief package to be debts in circumstances prescribed in minister's rules

2.40 The committee notes the minister's advice with respect to the way in which items 36 and 37 of Schedule 1 work together, and the information provided by the minister relating to background to the payment of BCPs during the relief package.

2.41 The committee also notes the minister's advice that the prospect of recovering BCPs paid during the relief package is a 'one-off', and that the circumstances in which those BCPs may need to be recovered may be quite specific to a small number of providers. Because of this, and the almost complete recovery of incorrect payments to date, the minister advised that there is no need for permanent amendment to the family assistance law to address the issue.

2.42 The minister also advised that there may be no need for the Ministers' Rules to be amended to provide for any BCPs paid during the Relief Package to be debts, and that the provision for the rules to determine circumstances in which these payments will be taken to be debts is a reserve power that will enable specific overpayments of those BCPs to be recovered in the event that is necessary.

2.43 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

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

Retrospective validation[15]

2.46 In *Scrutiny Digest 4 of 2021* the committee requested the minister's advice as to:

- why retrospective validation is sought in relation to paragraphs 8(1)(h) and (i) and section 47AA of the Child Care Subsidy Minister's Rules 2017; and
- whether any persons are likely to be adversely affected by the retrospective validation of the provisions, and the extent to which their interests are likely to be affected.[16]

Minister's response

2.47 The minister advised:

> Paragraph 8(1)(h) of the Minister's Rules precludes an individual being eligible for CCS for a session of care provided by an approved child care service during the period of the Relief Package, from 6 April to 12 July 2020.
>
> Section 47AA of the Minister's Rules imposes a condition on the approval of an approved provider that it not charge fees during the period of the Relief Package, and paragraph 8(1)G) precludes an individual being eligible for CCS for a session of care provided by an approved child care service of a provider that contravened section 47AA (that is charged fees for the session of care).
>
> These provisions were inserted in the Minister's Rules by the Child Care Subsidy Amendment (*Coronavirus Response Measures No. 3) Minister's Rules 2020* (FL202000490). The Explanatory Statement for that instrument states in relation to the provisions:
>
> > *These amendments are intended to ensure that, as part of the Early Childhood Education and Care Relief Package, child care providers are not able to charge fees and receive associated CCS during the period that BCP is payable. In combination with other financial assistance measures announced by the Government, including JobKeeper Payment, extension of absence days and CCCF-SC [grants under the Community Child Care Fund - Special Circumstances program], the Early Childhood Education and Care Relief Package BCP has been structured to ensure the viability of the early childhood education and care sector in circumstances where the COVID-19 pandemic has resulted in decreases in enrolments and a drop in fee revenue for services.*
> >
> > *BCPs are made to providers to give a guaranteed income stream, based on a reference period, with providers also able to access*

15 Item 38. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2021*, pp. 6-7.

> *supplementary payments in exceptional circumstances as detailed in the Early Childhood Education and Care Relief Package Payment Conditions document. Further, families are offered free child care to encourage them to maintain their enrolments with services and to provide financial assistance to families. Therefore, CCS and ACCS must not be payable due to the stated aim of Government that there are no fees to subsidise.*
>
> *These amendments acknowledge and are intended to cater for dynamic circumstances during the COVID-19 pandemic, and ensure fee-relief for families. The measures are temporary, only applying to the period in respect of which services are eligible for Early Childhood Education and Care Relief Package BCP.*

That is, the provision of fee-free child care was an essential policy outcome of the Government's Relief Package, and as CCS operates as a subsidy for child care fees, no CCS should be payable if no fees are payable. As mentioned in the Explanatory Statement for the amending Rules, a suite of financial support measures were provided to approved providers by Government as an alternative to them charging fees for child care.

Advice to Government indicates that there is a risk that the specific measures enacted by paragraphs 8(1)(h) and (j) and section 47AA of the Minister's Rules may not be fully authorised by the powers in the family assistance law to make Minister's Rules. This risk was acknowledged and accepted at the time the provisions were made, noting the importance of a rapid response to the impacts of COVID-19 on the early childhood education and care sector and the importance of ensuring child care remained open and freely available to children of essential workers, including health workers and others on the front lines of responding to the pandemic.

At the time, a provider's participation in the Relief Package was voluntary- a provider could accept the BCPs that were payable, on condition that they did not also charge fees (and hence no CCS was payable), or could suspend their approval under the family assistance law, and continue to charge fees to their families. Some providers did opt out of the Relief Package and its associated conditions.

The retrospective validation of certain Minister's Rules is not expected to impact families or service providers.

However, the Government recognises the theoretical possibility that imposing a condition on a provider that it not charge fees while in receipt of BCPs and other Government support, or rendering an individual ineligible for CCS while their provider is providing free child care, could amount to an 'acquisition of property' in Constitutional terms. Item 39 of Schedule 1 to the Bill provides that, if that is the case, and the acquisition is not on just terms as required by paragraph 51(xxxi) of the Constitution, the Commonwealth must pay the person reasonable compensation.

Committee comment

2.48 The committee thanks the minister for this response. The committee notes the minister's advice in relation to the context for the insertion of paragraphs 8(1)(h) and (i) and section 47AA into the rules, including that the relevant provisions in the rules were intended to ensure the provision of fee-free child care as part of the Early Childhood Education and Care Relief Package.

2.49 The committee also notes the minister's advice that advice to government indicates that there is a risk that the specific measures enacted by paragraphs 8(1)(h) and (j) and section 47AA of the rules may not be fully authorised by the powers in the family assistance law to make Minister's Rules. The committee further notes the minister's advice that the retrospective validation of these provisions is not expected to impact families or service providers.

2.50 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Broad delegation of administrative powers[17]

2.52 In *Scrutiny Digest 4 of 2021* the committee requested the minister's advice as to:

- why it is necessary to allow the secretary's powers under section 85GA of the Family Assistance Act to be delegated to an official of any non-corporate Commonwealth entity at any level; and
- whether the bill can be amended to provide legislative guidance as to the categories of people to whom those powers might be delegated.[18]

Minister's response

2.53 The minister advised:

> The Explanatory Memorandum to the Bill provides a reasonably comprehensive rationale for the amendment to section 221 of the Family

17 Item 29. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

18 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2021*, pp. 7-9.

> Assistance Administration Act that would allow the Secretary to delegate their power under section 850A of the Family Assistance Act to enter into, vary and administer funding agreements in relation to child care. As noted there, the power is analogous to the powers of accountable authorities in section 23 of the *Public Governance, Performance and Accountability Act 2013* (POPA Act) and 32B of the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act) to enter into, vary and administer arrangements between persons and the Commonwealth under which payments can be made.
>
> Accountable authorities are able to delegate their powers under section 23 of the POPA Act and section 32B of the FF(SP) Act to officials of any Commonwealth agency at any level (see, respectively, subsection 110(1) of the POPA Act and subsection 32D(3) of the FF(SP) Act).
>
> The power in section 85GA of the Family Assistance Act is a routine administrative power to manage Commonwealth grants. Commonwealth grants processes are subject to considerable regulation and oversight through mechanisms that stand outside of the delegation process. I direct the Committee's attention to the significant body of information about the framework for Commonwealth grants management on the Department of Finance's website at www.finance.gov.au.
>
> In practice, the power to administer grants cannot be limited to Senior Executive Services (SES) officers or officers holding particular statutorily-designated positions. Grants administration is a widespread task undertaken at all levels of the Australian Public Service, and limiting decision-making in relation to grants to SES officers would have a significant adverse effect on the efficiency and coordination of grants processes.
>
> In short, limiting the scope of delegation of the section 85GA power to SES officers or officers holding particular designated positions is neither feasible nor, given the established framework for Commonwealth grants, necessary to ensure proper oversight of and accountability for grants management.

Committee comment

2.54 The committee thanks the minister for this response. The committee notes the minister's advice that grants administration is a widespread task undertaken at all levels of the Australian Public Service, and limiting decision-making in relation to grants to SES officers would have a significant adverse effect on the efficiency and coordination of grants processes.

2.55 The committee also notes the minister's advice with respect to the administration of other Commonwealth grants processes, including that these processes are subject to considerable regulation and oversight through mechanisms outside of the delegation process.

2.56 The minister advised that limiting the scope of delegation of the section 85GA power to SES officers or officers holding particular designated positions is neither

feasible nor, given the established framework for Commonwealth grants, necessary to ensure proper oversight of and accountability for grants management.

2.57 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020

Purpose	This bill seeks to ensure that the Inspector-General of Intelligence and Security retains oversight of the Australian Federal Police's and the Australian Criminal Intelligence Commission's use of network activity warrants This bill also seeks to amend the *Inspector-General of Intelligence and Security Act 1986* to ensure that the legislation governing the IGIS is adapted to contemporary circumstances, including technical amendments to improve clarity, modernise drafting expressions and removing redundant provisions, as well as amendments to address certain limitations in the Inspector-General of Intelligence and Security's oversight functions and powers in order to improve the flexibility and strengthen the integrity of inquiry processes
Portfolio	Attorney-General
Introduced	House of Representatives on 9 December 2020
Bill status	Before the House of Representatives

Reversal of evidential burden of proof[19]

2.59 In *Scrutiny Digest 2 of 2021* 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 proposed subsection 41(2).[20]

Attorney-General's response[21]

2.60 The Attorney-General advised:

> You have requested my advice regarding items in the Bill that contain offence-specific defences which reverse the evidential burden of proof. In particular, you have identified amendments to the:

19 Schedule 1, item 195. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

20 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 10-11.

21 The Attorney-General responded to the committee's comments in a letter dated 23 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) (Schedule 1, items 150 and 152, and contingent amendments in Schedule 2, items 28 and 32),
- *Australian Security Intelligence Organisation Act 1979* (ASIO Act) (Schedule 1, items 165-167),
- *Intelligence Services Act 2001* (IS Act) (Schedule 1, items 185-193),
- *Taxation Administration Act 1953* (TA Act) (Schedule 1, item 203), and
- *Australian Human Rights Commission Act 1986* (AHRC Act) (Schedule 2, item 52).

I note that a number of the items identified by the Committee make technical updates to existing offence-specific defences and do not change or shift an existing evidential burden from the prosecution to the defendant (Schedule 1, items 165-167, 185-193 and 203 and Schedule 2, item 32).

The remaining items would create new offence-specific defences to permit the disclosure of information to an Inspector-General of Intelligence and Security (IGIS) official who is performing duties, functions or powers as an IGIS official. These defences impose an evidential burden on a defendant who wished to rely on the defence.

In order to discharge an evidential burden, a defendant would need to point to evidence that suggests a reasonable possibility that they disclosed information to an IGIS official and that the disclosure was part of that IGIS official's duties, functions or powers. This is a relatively low threshold. Moreover, this information would be readily available to the defendant in these matters, as it is likely such a disclosure would have been made through existing IGIS channels.

Where the evidential burden has been discharged, it would then be a matter for the prosecution to disprove beyond reasonable doubt that the relevant defence is satisfied in order to establish the offence.

Conversely, requiring the prosecution to prove the substance of this defence beyond reasonable doubt and without reliance on any evidence from the defendant would impose a disproportionate burden on the prosecution. Moreover, secrecy offences under section 34 of the *Inspector-General of Intelligence and Security Act 1986* (Cth) prevent IGIS officials from disclosing 'any information' obtained in the course of their duties, functions or powers to any person, which could limit the ability of the prosecution to independently obtain information from an IGIS official about whether a disclosure was part of their duties, functions or powers.

This secrecy is necessary given the highly sensitive nature of the IGIS 's work.

Committee comment

2.61 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that several items in the bill propose to make technical updates to existing offence-specific defences and do not change or shift an existing evidential burden from the prosecution to the defendant.

2.62 The committee also notes the Attorney-General's advice that other items identified by the committee would create new offence-specific defences to permit the disclosure of information to an Inspector-General of Intelligence and Security (IGIS) official who is performing duties, functions or powers as an IGIS official; and that these defences impose an evidential burden on a defendant who wished to rely on the defence.

2.63 The committee further notes the Attorney-General's advice that the information required to discharge the evidential burden in relation to these defences would be readily available to the defendant, as it is likely such a disclosure would have been made through existing IGIS channels. The Attorney-General further advised that where the evidential burden has been discharged, it would then be a matter for the prosecution to disprove beyond reasonable doubt that the relevant defence is satisfied in order to establish the offence.

2.64 In addition, the committee notes the Attorney-General's advice that secrecy offences under section 34 of the *Inspector-General of Intelligence and Security Act 1986* prevent IGIS officials from disclosing 'any information' obtained in the course of their duties, functions or powers to any person, which could limit the ability of the prosecution to independently obtain information from an IGIS official about whether a disclosure was part of their duties, functions or powers.

2.65 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Attorney-General be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

Purpose	This bill seeks to amend the *Migration Act 1958* to provide a framework to protect confidential information against unauthorised disclosure where that information has been provided by a law enforcement or intelligence agency to an authorised Commonwealth officer for consideration in a character test-based visa decision This bill further seeks to amend the *Australian Citizenship Act 2007* to create a framework for the disclosure of confidential information provided by gazetted law enforcement and intelligence agencies for consideration in character related citizenship decisions
Portfolio	Home Affairs
Introduced	House of Representatives on 10 December 2020
Bill status	Before the House of Representatives

Adequacy of judicial review
Significant matters in delegated legislation[22]

2.67 In *Scrutiny Digest 1 of 2021* the committee requested the minister's advice as to:

- whether the bill can be amended to allow the court to disclose part of the secret information in circumstances where partial disclosure could be achieved without creating a real risk of damage to the public interest;
- whether the gazetted intelligence and law enforcement agencies which may make use of the proposed scheme should be outlined in primary legislation or at least in delegated legislation subject to parliamentary disallowance, given the importance of balancing the constitutional right of an individual to meaningful judicial review with the interest of keeping certain information connected with law enforcement secret;
- whether proposed subsection 52C(5) of the *Australian Citizenship Act 2007* and proposed subsection 503C(5) of the *Migration Act 1958* could be

22 The committee draws senators' attention to this matter pursuant to Senate Standing Order 24(1)(a)(iii) and (iv).

amended to provide that the list of matters relevant to assessing the risk to the public interest is non-exhaustive;

- the appropriateness of allowing 'other matters' relevant to assessing the risk to the public interest to be specified in regulations; and
- whether, given the effect the secrecy provisions may have on the practical ability of the court to ensure power is exercised subject to jurisdictional limitations, proposed subsection 52B(8) of the *Australian Citizenship Act 2007* and proposed subsection 503B(8) of the *Migration Act 1958* can be amended to provide that the minister has an obligation to consider the exercise of the power to allow disclosure of information supplied by law enforcement or intelligence agencies, including to specified tribunals undertaking merits review of relevant decisions.[23]

Minister's response[24]

2.68 The minister advised:

> ***Whether the bill can be amended to allow the court to disclose part of the secret information in circumstances where partial disclosure could be achieved without creating a real risk of damage to the public interest***
>
> The Bill proposes amendments to the *Migration Act 1958* (the Migration Act) and the *Australian Citizenship Act* 2007 (the Citizenship Act) to create a framework for the protection and controlled authorised disclosure of information provided in confidence by gazetted law enforcement and intelligence agencies and relied upon in character- related visa and citizenship decision-making (protected information). The framework will enable the Minister to authorise the disclosure of protected information to specified persons or bodies, such as a tribunal or a Commonwealth officer after consultation with the gazetted agency which provided such information. It also empowers the High Court, Federal Court of Australia and the Federal Circuit Court (the Courts) to order the Minister to disclose information to it if satisfied that the information is protected information and it is for the purposes of the proceedings before the Court in relation to a relevant character-related decision.
>
> In practice, law enforcement and intelligence agencies provide confidential information to the Department of Home Affairs (the Department) on the basis that it can be protected from disclosure. This is because, if such information were disclosed, there would be a real risk that there would be damage to the public interest and jeopardise the capabilities of law

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 15-17.

24 The minister responded to the committee's comments in a letter dated 17 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

enforcement and intelligence agencies – and potentially compromise active investigations. Therefore, it is the agencies themselves who designate the information as confidential because of the intrinsically sensitive nature of its contents and scope.

Criminal intelligence and related information is vital to assess the criminal background or associations of non-citizen visa and citizenship applicants and visa holders. The measures in this Bill will ensure that information – disclosed in confidence by law enforcement and intelligence agencies for use in visa and citizenship decision-making – is appropriately protected.

Given the highly sensitive nature of confidential information and the identities of the gazetted agencies, partial disclosure of the information or giving the gist of the information to the applicant or their legal representative could damage the public interest. Further, it is open to gazetted agencies to communicate information which they may indicate is not communicated in confidence. Where this occurs, the information would not be subject to the protected information framework and so may (subject to other relevant laws) be subject to full or partial disclosure, or disclosure of a summary, as appropriate.

The Minister considers that the current approach in the Bill is appropriate and that any consideration of whether to disclose part of the protected information would be duplicative and unnecessary: the same risks of damage to the public interest would arise from partial and full disclosure given the sensitive nature of the information in question.

Nonetheless, the Bill will provide for greater judicial. oversight in visa and citizenship decisions that rely on confidential information. The amendments allow the Courts to access all relevant information that was considered by the Minister (or delegate) when that decision was made.

The Bill will provide safeguards for the applicant by allowing the Courts to decide how much weight to give to the confidential information that has been submitted in evidence. This allows the Courts to weigh up a number of factors, including fairness to the applicant and the public interest, in using this information in review of visa and citizenship decisions. Practically, this may include a situation where the Court has determined not to disclose the information, which would include not disclosing the information to the applicant. Even so, the Court is to weigh up a number of factors when assessing what weight to give to evidence, including unfair prejudice to an applicant by not having access to the confidential information, as well as the public interest.

Whether the gazetted intelligence and law enforcement agencies which may make use of the proposed scheme should be outlined in primary legislation or at least in delegated legislation subject to parliamentary disallowance, given the importance of balancing the constitutional right of an individual to meaningful judicial review with the interest of keeping certain information connected with law enforcement secret

The Bill amends sections 5(1) and 503A-503C of the Migration Act and introduces new section 52A-52C of the Citizenship Act to provide a framework for the disclosure of confidential information provided by gazetted law enforcement and intelligence agencies for consideration in character-related visa and citizenship decisions.

The gazetted intelligence and law enforcement agencies are defined in the Bill at section 503A(9) of the Migration Act (which is identical to the current section 503A(9) of the Migration Act). The same definition applies within the context of the Citizenship Act. Gazetted agencies include Australian and foreign law enforcement or intelligence bodies which are listed in the Gazette. A war crimes tribunal established under international arrangements of law may also be a gazetted agency and is not required to be listed in the Gazette.

The Australian and foreign law enforcement or intelligence bodies which are gazetted agencies are currently listed in Gazette Notice 16/001 made pursuant to section 503A(9) of the Migration Act which was signed by Minister Dutton on 22 March 2016 and commenced on 1 April 2016. Gazette Notice 16/001 is published on the Federal Register of Legislation.

As such, the gazetted agencies are publicly identifiable. Effectively, this means that affected persons are on notice as to the identities of intelligence and law enforcement agencies that may communicate confidential information to the Department for use in character-related visa and citizenship decision making.

This may help affected persons and their representatives understand where the confidential information may be sourced and to put forward relevant matters for the consideration of the Court. As such, it is not necessary to list the gazette agencies in either primary or delegated legislation.

Whether proposed subsection 52C(5) of the Australian Citizenship Act 2007 and proposed subsection 503C(5) of the Migration Act 1958 could be amended to provide that the list of matters relevant to assessing the risk to the public interest is non-exhaustive

The measures in the Bill are necessary to strengthen the Government's ability to uphold public safety and the good order of the Australian community through character-related decisions made under both the Migration Act and the Citizenship Act.

These measures will enhance the ability of decision-makers to use confidential information to manage the risk of certain individuals of character concern, where there may otherwise be insufficient information to underpin a decision. The changes help ensure that these individuals who pose a risk to public safety will be prevented from entering or remaining in Australia, or acquiring Australian citizenship (which offers additional rights and privileges and further permanency), by providing a framework which protects the confidential information from harmful disclosure. Regardless of which agencies provide information under the proposed amendments,

the Courts must determine if disclosure of confidential information would create a real risk of damage to the 'public interest', having regard to a series of matters specified in the Bill or specified in the regulations (if any, and only those matters). It is appropriate that the list of matters the Court can have regard to (if relevant) in subsections 52C(5) of the Citizenship Act and 503C(5) of the Migration Act is exhaustive, as it provides clarity and certainty for the Court in exercising its functions.

The scope and content of the matters listed in those sections also reflects and emphasises the sensitive nature of the information, and the need for careful consideration to be given as to whether it would create a real risk of damage to the public interest if disclosed more widely, including to the applicant in judicial review proceedings. It should be noted that it is the relevant intelligence and law enforcement agency which designates the information as confidential because of the sensitive nature and the list of matters acknowledges and reflects this characterisation.

The potential disclosure of confidential information outside the framework of the Bill also poses an unacceptable risk to the intelligence capabilities, operations and sources of law enforcement and intelligence agencies - including active investigations. This risks jeopardising the trusted relationship between the Department and law enforcement and intelligence agencies.

The Bill provides that the Courts may give such weight in the substantive proceedings to the information as the Court considers appropriate in the circumstances. Such circumstances may involve a situation where the Court has determined not to disclose the protected information. This allows the Courts to weigh up a number of factors, including unfair prejudice to an applicant by not having access to the confidential information and the public interest. This provides clear safeguards for the applicant's interests in any proceedings and places these safeguards within the control of the Court.

The appropriateness of allowing 'other matters' relevant to assessing the risk to the public interest to be specified in regulations

This can be effected through amendments to the Australian Citizenship Regulation 2016 (the Citizenship Regulation) or Migration Regulations 1994 (the Migration Regulations), as appropriate. Regulations made under Part 9 of the Migration Act or under the Citizenship Act are disallowable and subject to Parliamentary scrutiny.

It is noted that paragraphs 52C(5)(h) of the Citizenship Act and 503C(5)(h) of the Migration Act provide a mechanism for other matters to be specified under these subsections. These paragraphs were included in the Bill to provide flexibility going forward.

Given the rapidly evolving and complex security challenges, these amendments are necessary to protect confidential information shared between the Department, law enforcement and intelligence agencies, and to uphold public and national security interests. Protection of sensitive and

confidential information also supports broader strategies to counter terrorism, transnational crime and related activities.

As such, if Parliament passes the Bill, the Department will monitor the operation of the protected information framework provided for in the Bill and, if deemed desirable or necessary to assist the Court in determining whether to disclose the confidential information, to specify further matters for the Court to have regard under subsections 52C(5) of the Citizenship Act and 503C(5) of the Migration Act. This can be effected through amendments to the Australian Citizenship Regulation 2016 (the Citizenship Regulation) or Migration Regulations 1994 (the Migration Regulations), as appropriate. As amendments to these Regulations are disallowable, they will be accompanied by a Statement of Compatibility with Human Rights and subject to parliamentary scrutiny.

Whether, given the effect the secrecy provisions may have on the practical ability of the court to ensure power is exercised subject to jurisdictional limitations, proposed subsection 52B(S) of the Australian Citizenship Act 2007 and proposed subsection 503B(S) of the Migration Act 1958 can be amended to provide that the minister has an obligation to consider the exercise of the power to allow disclosure of information supplied by law enforcement or intelligence agencies, including to specified tribunals undertaking merits review of relevant decisions.

Section 503A of the Migration Act was introduced by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998*. Under section 503A, the Department was able to rely upon confidential information provided by law enforcement and intelligence agencies to inform character test based visa decisions under the section 501 provisions of the Migration Act. The current framework in section 503A-503D permits the Minister to protect information from disclosure during merits review as it relates to character-related visa decisions. This is unaffected by the High Court decision described below.

This Bill addresses a High Court decision in which the Court held that the then Minister for Immigration and Border Protection could not be prevented by section 503A of the Migration Act from being required to divulge certain confidential information to the High Court or the Federal Court of Australia in order to review character test based visa decisions.

The Bill will provide the Minister with discretionary powers to disclose the confidential information (having consulted the relevant gazetted agency) to specified persons, bodies, tribunals or courts.

Given the sensitive nature of protected information, and the Minister's power under the Migration Act's current framework to protect protected information from disclosure during merits review, it is not appropriate for this legislation to require the Minister to have a duty to consider whether to authorise disclosure of that information to Tribunals undertaking merits review of relevant decisions.

Information which falls within the protection of the Bill's framework is, by its nature, highly sensitive. This is because it is information communicated to the Department by its intelligence and law enforcement agency partners on the condition that it is treated as confidential. It is the agencies that have designated the information as confidential and therefore requiring protection under the Bill's framework. As noted above, such agencies have been consulted on the Bill's framework and have

provided their support for it. As such, it is appropriate for the Minister not to have a duty to consider whether to authorise disclosure of such information (subject to consultation with the relevant agency).

As noted elsewhere, the Bill is designed to strengthen protection for confidential information provided by law enforcement and intelligence agencies. The Bill will ensure confidential information can be used in certain character-related visa and citizenship decisions without the risk of disclosure unless a Court determines that disclosure would not create a real risk of damage to the public interest.

If the applicant is unsuccessful before a Tribunal, judicial review of that decision is always available. The framework of the Bill is such that the Court can exercise its judicial functions in order to conduct an effective judicial review which has regard to, amongst other things, the interests of the applicant.

The framework of the Bill provides a mechanism which allows the Court to require disclosure of the relevant protected information to it and a further mechanism for the Court to consider whether it can disclose the protected information to the applicant (amongst others) if doing so does not create a real risk of damage to the public interest.

Specifically, the framework will provide that during judicial review, the Courts may order the Minister to disclose confidential information to it that was relevant to the visa decision (that is, the Minister will not have a discretion not to comply in this circumstance). If protected information is provided in evidence, a party to the proceedings may make submissions to the Court on the use which should be made of the information and the impact disclosure of that information may have, if that party is aware of the content of the information and has not obtained the information unlawfully or in circumstances that would found an action for breach of confidence.

As noted elsewhere, the Bill provides that the Courts may give such weight in the substantive proceedings to the information as the Court considers appropriate in the circumstances. Such circumstances may involve a situation where the Court has determined not to disclose the protected information. This allows the Courts to weigh up a number of factors, including unfair prejudice to an applicant by not having access to the confidential information and the public interest. This provides clear safeguards for the applicant's interests in any proceedings and places these safeguards within the control of the Court.

Committee comment

2.69 The committee thanks the minister for this response.

Partial disclosure and parliamentary oversight of gazetted agencies

2.70 The committee notes the minister's advice that law enforcement and intelligence agencies provide confidential information to the Department of Home Affairs on the basis that it can be protected from disclosure and therefore the designation of the information as confidential is done by the individual agencies. The minister further advised that gazetted agencies are able to communicate information to the Department without stipulating that such information is confidential.

2.71 The committee also notes the minister's advice that, given the sensitive nature of the information, partial disclosure of the information to the applicant or their legal representative carries the same risks of damage to the public interest as full disclosure, but that the bill provides safeguards for applicants in that Courts may decide how much weight to give to the confidential information.

2.72 While noting this advice, the committee is of the view that it is illogical to suggest that the consideration of partial disclosure will in every case involve the same risks of damage to the public interest as that of full disclosure. In this context, the committee notes that a core purpose of the bill is to recognise the ability of Courts to determine that even full disclosure of adverse information to an applicant will not in every case cause damage the public interest. While noting the ability for agencies to disclose information on conditions other than it be kept confidential, the committee also notes that these agencies are not required to consider the interests of the affected applicant in receiving a fair hearing when determining whether information should be confidential, and that the bill does not prevent these agencies from generally taking a risk averse approach to the provision of information relevant to the decisions affected by the bill.

2.73 While also noting the advice that, under the bill, Courts may give secret information weight as they consider appropriate, the committee further notes that, in determining the question of weight to be given to such information, the Court must take into account any submissions made pursuant to proposed subsections 52C(2) or 503C(2). By operation of proposed subsections 52C(3) and 503C(3), such submissions will typically only be received from the Minister, as the applicant and other parties will be excluded unless they are lawfully aware of the content of the information. It appears to the committee that, in many instances, the Minister will be able to make submissions about the weight to be given to the information while the applicant will not be heard on this question. These factors accordingly appear to limit how effective the Court's ability to determine the weight of secret evidence will be as a safeguard to ensure an applicant retains access to effective judicial review.

2.74 With respect to the committee's request for information as to whether gazetted intelligence and law enforcement agencies can be outlined in primary legislation or delegated legislation subject to parliamentary disallowance, the minister

advised that, as the gazetted agencies are publicly identifiable, it is not necessary to list the agencies in either primary or delegated legislation.

2.75 However, the committee remains particularly concerned that the minister's response did not address the committee's concerns with respect to specifying law enforcement or intelligence bodies for the purposes of the bill in instruments that are not subject to any level of parliamentary oversight. The designation of information as confidential is central to the operation of the protected information framework in the bill, which will operate in many cases to ensure that an applicant cannot access the information upon which a decision to refuse or cancel their visa or citizenship is based. As the minister's response emphasises, this decision is left to the gazetted agencies. In this regard, the committee notes that, in addition to more traditional Australian law enforcement and intelligence agencies, this list currently includes foreign law enforcement bodies in *all* countries, and a significant number of federal and state or territory government departments that would not ordinarily be considered to be law enforcement or intelligence agencies.[25] The committee further notes that the bill does not appear to limit the range of information that the gazetted agencies may determine should be confidential.

2.76 The committee therefore retains serious scrutiny concerns regarding the absence of parliamentary oversight of the bodies who may provide, and declare as confidential, information upon which character-related visa and citizenship decisions may be based.

2.77 In practice, it appears that the process of the inclusion of bodies by specification in a gazette notice has not involved close attention to the appropriateness of including particular bodies within this scheme for the provision and protection of secret information. Rather, the process has enabled the executive to set a very broad and default rule by which investigative bodies will be presumptively included. The committee considers that the appropriateness of that approach should be a matter for parliamentary debate and decision.

2.78 The committee is of the view that the specification by non-disallowable gazette notice of the exceptionally broad list of bodies who may provide confidential information for the purposes of the bill is an inappropriate delegation of the Parliament's legislative power.

Exhaustive list of matters and allowing other matters to be specified in regulations

2.79 The committee notes the minister's advice that establishing an exhaustive list of matters the Court can have regard to when determining whether disclosing the information would create a real risk of damage to the public interest is appropriate as

25 See *Notice under section 503A of the Migration Act 1958 – 16/001* [C2016G00414] available at https://www.legislation.gov.au/Details/C2016G00414. The list of law enforcement agencies or Australian intelligence bodies included in Schedule 1 includes, for example, the Commonwealth Departments of Human Services and Social Services.

it provides clarity and certainty for the Court in exercising its functions. The minister advised that the scope and content of the matters that may be considered reflects and emphasises the sensitive nature of the information and the need for careful consideration to be given in making such a determination. The minister further advised that the potential disclosure of confidential information outside the framework of the bill poses an unacceptable risk to the intelligence capabilities, operations and sources of law enforcement and intelligence agencies and risks jeopardising the relationship between the Department and law enforcement and intelligence agencies.

2.80 The committee also notes the minister's advice that the department will monitor the operation of the protected information framework and may specify further matters for the Court to have regard to in regulations if this is deemed desirable or necessary to assist the Court.

2.81 While noting this advice, from a scrutiny perspective, the committee remains concerned that the proposed exhaustive list does not allow fairness to individuals to be considered in determining whether disclosing the information would create a real risk of damage to the public interest.

Ministerial obligation to consider disclosure of information

2.82 The committee notes the minister's advice that it is not appropriate for the legislation to require the minister to have a duty to consider whether to authorise disclosure of the protected information to tribunals undertaking merits review of relevant decisions, given the sensitive nature of this information. The minister also advised that judicial review is available if an applicant is unsuccessful before a tribunal, and that the framework of the bill allows the court to conduct effective judicial review.

2.83 However, as noted above, the committee remains concerned about the limitations to judicial review proposed by the bill, and therefore does not consider that the availability of judicial review in this context is effective to overcome the concerns arising from reliance on secret evidence in decision-making at the merits review stage.

2.84 The committee reiterates its scrutiny concerns that the provisions in the bill may operate to undermine the practical efficacy of judicial review in many cases.

2.85 The committee is also of the view that the specification by non-disallowable gazette notice of the exceptionally broad list of bodies who may provide confidential information for the purposes of the bill is an inappropriate delegation of the Parliament's legislative power.

2.86 In particular, in relation to the specification of foreign law enforcement body countries for the purposes of existing and proposed paragraph 503A(9)(b) of the *Migration Act 1958*, the committee considers that as the list currently specifies all

countries this should be set out in the primary legislation so that the appropriateness of this approach may be considered by the Parliament.[26]

2.87 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the proposed framework for the disclosure of protected information in proceedings for the review of certain migration and citizenship decisions.

Parliamentary scrutiny[27]

2.88 In *Scrutiny Digest 1 of 2021* the committee requested that proposed subsection 52A(3) of the *Australian Citizenship Act 2007* and proposed subsection 503A(3) of the *Migration Act 1958* be amended to omit the prohibition on the production or giving of confidential gazetted agency information to 'a parliament or parliamentary committee'.[28]

Minister's response

2.89 The minister advised:

> I note and appreciate the Committee's concern. The Committee notes that the Senate has well-established processes allowing the Executive to make claims for public interest immunity, which would, if the claim were successful, prevent the release of confidential information.
>
> A Minister's claim for public interest immunity in relation to protected information before Parliament would be broadly assessed by weighing up the harm to the public interest in disclosing that information against Parliament's claim to know particular things about government administration, so that the Parliament can perform its proper function of scrutinising, and ensuring accountability of, the government.
>
> The Bill provides that neither a Commonwealth officer nor the Minister can be required to produce protected information to, or give the information in evidence before, Parliament or a parliamentary committee. This reflects the current provisions of s503A(2)(c) and (d).
>
> Given the sensitive nature of the confidential information provided by intelligence and law enforcement agencies and the potential damage to the

---

26 The committee notes that item 1 of Schedule 1 to the bill seeks to expand the application of the definition of 'gazetted agency' in subsection 503A(9) of the Migration Act to the *Australian Citizenship Act 2007*.

27 Schedule 1, item 3, proposed subsection 52A(3), *Australian Citizenship Act 2007* and item 9, proposed subsection 503A(3), *Migration Act 1958*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 18-19.

public interest if such information is disclosed, relying on public interest immunity may not provide the kind of comprehensive protection required for the full range of confidential information provided by law enforcement and intelligence agencies to support character-related decisions. This is crucial given the sensitive nature of the confidential information and the importance of the Department's information sharing relationships with intelligence and law enforcement agencies, as well as the potential damage to the public interest if such information is disclosed.

As previously noted, the Bill provides a framework for the protection and controlled disclosure of sensitive information provided on condition of confidentiality by gazetted law enforcement and intelligence agencies for use in character-related visa and citizenship decision-making. Protection of sensitive and confidential information also supports broader strategies to counter-terrorism, transnational crime and related activities.

The Bill provides a framework which empowers the Court to require disclosure of the relevant protected information to it and a further mechanism for the Court to consider whether it can disclose the protected information to the applicant (amongst others) if doing so does not create a real risk of damage to the public interest. This allows the Courts to review effectively the Executive's decision-making specified in the Bill.

Committee comment

2.90 The committee thanks the minister for this response. The committee notes the minister's advice that relying on public interest immunity may not provide the kind of comprehensive protection required for the full range of confidential information provided by law enforcement and intelligence agencies to support character related decisions. The minister also advised that proposed subsection 52A(3) of the *Australian Citizenship Act 2007* and proposed subsection 503A(3) of the *Migration Act 1958* reflect current provisions of the Migration Act.

2.91 While noting this advice, the committee does not consider that the fact that a proposed provision continues or reflects current arrangements is, of itself, adequate justification for significant limitations on parliamentary scrutiny. The committee remains concerned that the proposed provisions would have the effect of limiting (or continuing to limit, in the case of the *Migration Act 1958*) parliamentary scrutiny and the Parliament's ability to review or oversee executive decision making in relation to migration and citizenship matters.

2.92 From a scrutiny perspective, the committee maintains its view that it is inappropriate to prescribe a blanket prohibition on the disclosure of confidential gazetted agency information to a parliament or parliamentary committee, with such issues more appropriately being determined on a case-by-case basis by the Parliament or a parliamentary committee under the well-established processes for making claims of public interest immunity. These processes are suitable for the consideration of a range of sensitive information including the information as described by the minister.

Noting the minister's reference to the preservation of the ability of the courts to 'review effectively the Executive's decision-making specified in the bill', the committee is of the view that nor is there justification for curtailing the Parliament's powers and responsibility to effectively review executive decision-making.

2.93 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the prohibition on the production or giving of confidential gazetted agency information to 'a parliament or parliamentary committee'.

Evidentiary certificates
Natural justice[29]

2.94 In *Scrutiny Digest 1 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate for evidentiary certificates to be prima facie evidence of the fact that information was communicated to an officer by a gazetted intelligence or law enforcement agency;
- why it is considered necessary and appropriate to provide that the rules of natural justice do not apply to the consideration or exercise of the power for the minister to make a declaration to allow the disclosure of information; and
- why it is considered necessary and appropriate for proposed section 52J to provide that proposed sections 52G and 52H are exhaustive statements of the natural justice hearing rule in relation to review of a decision by the Administrative Appeals Tribunal.[30]

Minister's response

2.95 The minister advised:

> ***Why it is considered necessary and appropriate for evidentiary certificates to be prima facie evidence of the fact that information was communicated to an officer by a gazetted intelligence or law enforcement agency***

---

29 Schedule 1, item 3, proposed subsections 52A(4), (5) and (7), and proposed subsection 52B(9), *Australian Citizenship Act 2007*, item 9, proposed subsection 503A(4), (5) and (7), and proposed subsection 503B(9), *Migration Act 1958*, and Schedule 2, item 5, proposed section 52J, *Australian Citizenship Act 2007*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 19-21.

The Bill is designed to strengthen protection for confidential information provided by law enforcement and intelligence agencies and used in character-related visa and citizenship decision making. The Bill will ensure confidential information can be used in such decisions, without the risk of disclosure, unless a Court determines that the information should be disclosed to it during relevant substantive proceedings and further determines that disclosure would not create a real risk of damage to the public interest.

The framework in the Bill protects information which is:

- communicated to an authorised Commonwealth officer by a gazetted agency on the condition it is treated as confidential information; and
- relevant to the exercise of certain powers under the Citizenship Act (as set out in paragraph 52A(1)(b)) and the Migration Act (as set out in paragraph 503A(1)(b)).

Highly sensitive information must meet these two tests in order to benefit from the protections set out in the Bill's framework.

Practically, it may be difficult to prove that information is "relevant to the exercise" of one of the identified statutory powers without putting that information in evidence before the Court in a way that would be accessible to the applicant. Given the highly sensitive nature of this information, this would not be appropriate. Similar difficulties can arise in proving that information was provided by a gazetted agency, given that the name of that agency cannot be disclosed by reason of section 52D of the Citizenship Act and section 503D of the Migration Act. It is further noted that the provisions of sections 52C(1) of the Citizenship Act and 503C(1) of the Migration Act are such that it is for the Court to be satisfied that information is protected information by falling within the ambit of sections 52A and 503A of those Acts. It is therefore the role of the Court to assess and give weight to the evidence before it when considering whether it is so satisfied, which includes evidentiary certificates.

The capacity to lead hearsay evidence to prove that information falls within the relevant sections, and to use a certificate to provide prima facie evidence that information was provided by a gazetted agency is therefore crucial to allowing the Court to exercise its functions and simultaneously protect highly sensitive and confidential information. As noted above, it remains within the control of the Court to disclose the information to, amongst others, the applicant if it determines that disclosure would not create a real risk of damage to the public interest.

Why it is considered necessary and appropriate to provide that the rules of natural justice do not apply to the consideration or exercise of the power for the minister to make a declaration to allow the disclosure of information

The Bill strikes an appropriate balance between protecting the public interest and providing fairness to the applicant.

- The Bill will allow confidential information provided by law enforcement and intelligence agencies to be considered by the Courts while preventing its further disclosure where it would create a real risk of damage to the public interest.
- The Bill will provide safeguards for the applicant by allowing the Courts to decide how much weight to give the confidential information in judicial review, and to further disclose this information when there is no real risk of damage to the public interest.

The Bill does not remove natural justice from character-related visa and citizenship decision making processes. Rather, natural justice is owed at the stages in the process in a way that strikes an appropriate balance between protecting the public interest (by protecting confidential information provided by intelligence and law enforcement agencies) and providing fairness to the affected person. As noted elsewhere, protected information is highly sensitive and is designated as confidential and therefore requiring protection under the Bill's framework by the agencies which have communicated it to the Department.

Access to merits and judicial review rights will not be affected by the Bill. As noted elsewhere, and noting the sensitive nature of protected information, the current framework under section 503A-503D of the Migration Act permits the Minister to protect protected information from disclosure during merits review of character- related visa decisions. If the Minister does authorise disclosure of protected information to, for example, a Tribunal, in accordance with sections 52B(1) of the Citizenship Act and 503B(1) of the Migration Act, then the Tribunal will have obligations to afford natural justice during any relevant merits review subject to the obligations imposed upon it by sections 52B of the Citizenship Act and 503B of the Migration Act.

An affected person has the right to access judicial review of a Tribunal's decision. If so, the framework in section 52C of the Citizenship Act and section 503C of the Migration Act will be enlivened. This framework provides a mechanism which allows the Court to require disclosure of the relevant protected information to it and a further mechanism for the Court to consider whether it can disclose the protected information to the applicant (amongst others) if doing so does not create a real risk of damage to the public interest. In this way, the Court can exercise its judicial functions in order to conduct an effective judicial review which has regard to, amongst other things, the interests of the applicant.

Additionally, the Bill will allow the Courts to admit confidential information into evidence and to decide how much weight to give to that evidence. This will allow the Courts to weigh up a number of factors, including unfair prejudice to an applicant by not having access to the confidential information and the public interest.

The balance reflected in the Bill will enable law enforcement agencies to continue to provide confidential information to the Department to make

fully informed visa and citizenship decisions on character grounds, while providing fairness to applicants seeking merits or judicial review of a departmental decision. This is essential to the Government's core business of regulating, in the national interest, who should enter and remain in Australia, and who should be granted Australian citizenship and the privileges which attach to it

Why it is considered necessary and appropriate for proposed section 52J to provide that proposed sections 52G and 52H are exhaustive statements of the natural justice hearing rule in relation to review of a decision by the Administrative Appeals Tribunal

Amendments to the Citizenship Act in proposed section 52G will enable the Minister to prevent the disclosure of certain sensitive information or documents to the Tribunal relating to citizenship decisions under merits review where the Minister certifies that disclosure of that information or document would be contrary to the public interest, including for reasons relating to the defence, security or international relations of Australia, or because it would involve the disclosure of deliberations or decisions of the Cabinet or a committee of the Cabinet.

Further amendments to the Citizenship Act in proposed section 52H apply to information or documents:

- which the Minister has certified the disclosure would be contrary to the public interest (for any reason other than those set out in section 52G); or
- given to the Minister in confidence.

The Department may give such documents or information to the Tribunal, but must notify the Tribunal that section 52H applies to the documents or information, and may give written advice about the significance of the documents or information. The Tribunal may have regard to any matter in the documents or information during the relevant merits review and has a discretion to disclose any matter in the documents or information to, amongst others, the applicant for merits review.

These measures will strengthen the framework for the protection and use of confidential information in merits review in the Citizenship Act that is substantially the same as that in the Migration Act.

Sections 52G and 52H of the Citizenship Act are based substantially on sections 437 and 438 of the Migration Act. Section 4228(2) of the Migration Act provides that sections 416, 437 and 438, insofar as they relate to Division 4 of Part 7 of the Migration Act (conduct of merits review by the Administrative Appeals Tribunal), are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

Section 52J provides that, for the purposes of the review of a decision by the Tribunal, sections 52G and 52H are taken to be an exhaustive statement

of the requirements of the natural justice hearing rule in relation to the information or documents to which those sections apply. Section 52J does no more than provide consistency of approach between the Citizenship Act and the Migration Act as it relates to the disclosure of certain information under a non-disclosure certificate framework.

Providing an exhaustive statement of the natural justice hearing rule provides the Tribunal and the applicant with clarity and certainty as to the precise nature of the natural justice obligations owed. If the applicant is unsuccessful at merits review, judicial review of that decision may be sought and the Court will determine whether the Tribunal exercised its powers lawfully, including its obligations as they relate to the natural justice hearing rule.

In all other circumstances, information is subject to the normal requirements of the natural justice hearing rule.

Committee comment

2.96 The committee thanks the minister for this response.

Evidentiary certificates

2.97 The committee notes the minister's advice that the capacity to lead hearsay evidence to prove that information falls within the category of 'protected information' and to use evidentiary certificates is crucial to allowing the court to exercise its functions while protecting sensitive and confidential information. The minister advised that, practically, it may be difficult to prove that information is 'relevant to the exercise' of the relevant powers under the Citizenship Act or Migration Act without putting that information in evidence before the court in a way that would be accessible to the applicant. The minister further advised that difficulties can arise in proving that information was provided by a gazetted agency, given that the name of the agency cannot be disclosed.

Natural justice – disclosure of information by minister

2.98 The committee notes the minister's advice that the bill does not remove natural justice overall from character-related visa and citizenship decision making processes, noting that applicants will still have access to merits and judicial review of decisions. The minister's response also highlighted the ability of the Courts to admit confidential information into evidence and to decide how much weight to give to that evidence.

2.99 While noting this advice, it is not clear to the committee that an applicant's ability to access review of decisions will be sufficient to overcome the implications for fairness of providing that natural justice does not apply to the consideration or exercise of the minister's power to make a declaration to allow the disclosure of information.

Natural justice – exhaustive statement of hearing rule

2.100 The committee further notes the minister's advice that section 52J of the Citizenship Act provides consistency of approach between that Act and the Migration Act in relation to the disclosure of information under a non-disclosure certificate framework. The minister also advised that providing an exhaustive statement of the natural justice hearing rule provides clarity and certainty as to the precise nature of the natural justice obligations owed. While noting this advice, the committee does not generally consider that consistency with existing provisions is, of itself, sufficient justification for provisions that limit the availability or adequacy of review of decisions that will affect a person's rights and liberties, such as provisions that would impact whether an affected person would receive a fair hearing in relation to a character-related visa or citizenship decision.

2.101 The committee notes that proposed section 52H of the Citizenship Act would give the Tribunal a discretion to disclose information provided to it under proposed section 52G, and that this discretion must be exercised reasonably. In this regard it appears that the Tribunal would need to consider fairness to the applicant in determining whether to have regard to information covered by proposed section 52H and whether to disclose this to an applicant. However, the committee notes that, in relation to proposed section 52G, the minister is not expressly required to consider the impact of non-disclosure on the fairness of the hearing that the Tribunal is able to provide.

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

- **providing for evidentiary certificates to be prima facie evidence of the fact that information was communicated to an officer by a gazetted intelligence or law enforcement agency;**
- **providing that the rules of natural justice do not apply to the consideration or exercise of the power for the minister to make a declaration to allow the disclosure of information; and**
- **proposed section 52J, which would provide that proposed sections 52G and 52H are exhaustive statements of the natural justice hearing rule in relation to review of a decision by the Administrative Appeals Tribunal.**

Significant matters in delegated legislation[31]

2.103 In *Scrutiny Digest 1 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate to leave matters relevant to the Court's determination of whether to disclose information for judicial review to delegated legislation.[32]

Minister's response

2.104 The minister advised:

> As noted, this can be achieved through amendments to the Citizenship Regulation or the Migration Regulations, as appropriate. Regulations made under Part 9 of the Migration Act or under the Citizenship Act are disallowable. They will be subject to Parliamentary scrutiny.
>
> The measures in this Bill will ensure that sensitive information - disclosed in confidence by law enforcement and intelligence agencies - is appropriately protected. Protection of sensitive and confidential information supports broader strategies to counter-terrorism, transnational crime and related activities.
>
> As such, paragraphs 52C(5)(h) of the Citizenship Act and 503C(5)(h) of the Migration Act provide a mechanism for other matters to be included in subsections 52C(5) and 503C(5) if specified in relevant regulations. These paragraphs were included in the Bill in order to provide flexibility.
>
> If Parliament passes the Bill, the Department will monitor the operation of the protected information framework provided for in the Bill. If deemed desirable or necessary to assist the Court in its task of determining whether to disclose protected information, appropriate Regulations to include further matters for the Court to have regard in subsections 52C(5) of the Citizenship Act and 503C(5) of the Migration Act may be made. This flexible approach allows the matters in subsections 52C(5) of the Citizenship Act and 503C(5)(h) of the Migration Act to reflect changing circumstances and evolving security challenges, and this will assist the Court accordingly.

Committee comment

2.105 The committee thanks the minister for this response. The committee notes the minister's advice that paragraphs 52C(5)(h) of the Citizenship Act and 503C(5)(h) of the Migration Act were included in the bill in order to provide flexibility. The committee also notes the minister's advice that, in the course of monitoring the bill, regulations may be made to include further matters for the Court to have regard to, if

---

31 Schedule 1, item 3, proposed paragraph 52C(5)(h) and item 9, proposed paragraph 503C(4)(h). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 21-22.

this is if deemed desirable or necessary to assist the Court in its task of determining whether to disclose protected information.

2.106 While noting this advice, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. The committee further notes that paragraphs 52C(5)(h) and 503C(5)(h) do not limit the matters that may be determined through regulations, leaving open the ability for regulations to determine matters for the Court's consideration that may further weigh against disclosure.

2.107 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the prescription of additional matters relevant to the court's determination of whether to disclose information in judicial review proceedings to delegated legislation.

National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020

Purpose	Schedule 1 to this bill seeks to amend the *National Consumer Credit Protection Act 2009* to improve the flow of credit by reducing the time that it takes consumer and businesses to access credit Schedules 2 to 6 to this bill seek to amend the *National Consumer Credit Protection Act 2009* to enhance the consumer protection framework for consumers of small amount credit contracts and consumer leases, while ensuring that these products can continue to fulfil an important role in the economy
Portfolio	Treasury
Introduced	House of Representatives on 9 December 2020
Bill status	Before the House of Representatives

Significant matters in delegated legislation[33]

2.108 In *Scrutiny Digest 2 of 2021* the committee requested the Treasurer's advice as to:

- why it is considered necessary and appropriate to leave significant matters, such as comparisons of equity projections and aged care costs to consumers, to delegated legislation;
- whether the bill can be amended to include at least high-level guidance regarding the following matters on the face of the primary legislation:
  - the manner of giving a comparison of equity projections and aged care costs to a consumer;
  - the content of the non-ADI ['authorised deposit taking institution'] credit standards;
  - conditions whereby repayments under a small amount credit contract are taken to be equal; and
  - circumstances in which the regulations may prescribe that specified kinds of communications are not unsolicited communications for the

33 Schedule 1, items 63 and 67; Schedule 2, item 12, proposed subsection 133CD(5) and proposed paragraph 133CF(2)(c). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

purpose of the prohibition on unsolicited communications in proposed section 133CF.[34]

Treasurer's response[35]

2.109 The Treasurer advised:

Significant matters in delegated legislation, 133DB

The proposed amendments to the *National Consumer Credit Protection Act 2009* (the Credit Act) introduced by item 60 and 65 of Schedule 1 to the Bill would amend section 133DB of the Credit Act (which requires licensees to give projections of equity before providing credit assistance or entering a credit contract). The amendments provide that licensees must show a consumer a comparison of the consumer's stated expected aged care costs with equity projections before providing credit assistance for a reverse mortgage, entering into a reverse mortgage, increasing the credit limit of a reverse mortgage or making an unconditional representation about the consumer's eligibility. The comparison must be shown to the consumer in person or in a way prescribed in the regulations (133DB(1)(b)(ba)). Non-compliance with the obligations to provide comparisons of equity projections and aged care costs is subject to criminal offences in addition to civil penalties (Subsections 133DB(1) and (2) of the Credit Act).

Leaving to delegated legislation the prescription of circumstances the manner of giving comparison of equity projection and aged care costs to a consumer to delegated legislation

Regarding proposed subsection 133DB(1)(b)(ba) of the Credit Act, the committee has asked why it is considered necessary and appropriate to leave the manner of giving the comparison of the equity projection and aged care costs to a consumer to be specified in delegated legislations; and whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.

As outlined in the explanatory memorandum, this Bill is part of the Government's economic response to the COVID-19 pandemic. It is appropriate for the manner of giving the information to be specified in regulations even though a contravention of the obligation can result in a civil and criminal penalty. This provides the necessary flexibility for the Government to respond quickly to address circumstances of concern as they arise and to make timely amendments including where necessary to deal with new and emerging risks and mitigation strategies related to COVID-19. For example; during the COVID-19 pandemic it may not be possible or

34 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 12-15.

35 The Treasurer responded to the committee's comments in a letter dated 10 March 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

preferable to require a licensee to show information to a consumer in person because of the level of community transmission of the virus in Australia at any one time; and/or collective governments' responses to it (including restrictions on the movement of people to contain the spread of the virus). Moving beyond the pandemic, prescription by legislative instrument also facilitates adaptation to new and emerging technologies. In practice, this will accommodate innovation in the reverse mortgage sector while ensuring consumers receive the same level of protection across all modes of communication. Prescription by legislative instrument is necessary because of the changing nature of the subject matter.

This power is therefore appropriate and necessary to deal with situations where the operation of the Bill may produce unintended or unforeseen results that are not consistent with the policy intention for the consumer protection regime, for example, unnecessarily putting consumers and the Australian community at risk.

This regulation-making power provides the necessary flexibility for the Government to respond quickly to address circumstances of concern that arise and to make timely amendments. Therefore, although it may be desirable to place all of the details in primary legislation, I consider that it is necessary and appropriate to place specificity in delegated legislation as, given the nature of the reforms, this retains the ability to respond to unforeseen issues that could affect the ability for consumers to transact safely as well as accommodate future advances in business communications.

As regulations, the prescribed circumstances would be considered by the Federal Executive Council and subject to disallowance by the Parliament. Consistent with standard practice, the Government envisages undertaking consultation before making any regulations under this power to minimise the risk of unintended consequences. It is intended to rely on this justification.

While technically possible, the Government's intent was not to provide high level guidance on the face of the primary legislation for when it is appropriate to exercise the power to make regulations for the purpose of 133DB(1)(b) of the Credit Act is to ensure that the power is sufficiently broad to accommodate unforeseen circumstances.

Significant matters in delegated legislation, section 133EA (non-ADI credit standards)

The proposed amendments to the Credit Act in item 67 of Schedule 1 to the Bill would insert new section 133EA into the Credit Act. Proposed section 133EA would allow the Minister to determine non-ADI credit standards. Obligations in Part 3-2 of the Credit Act to assess whether credit is unsuitable will no longer apply in relation to certain types of credit conduct. Instead, where this conduct is engaged in by ADIs, it will be regulated primarily by existing prudential standards made by legislative instrument by APRA under the *Banking Act 1959* (Banking Act). Where this conduct is

engaged in by non-ADI credit providers, it will be regulated by the non-ADI credit standards.

The policy intent of these reforms is to ensure that ADIs continue to comply with APRA's prudential lending standards requiring sound credit assessment and approval criteria, while key elements of APRA's ADI lending standards are adopted and applied to the new non-ADI framework.

Adopting elements from the APRA lending standards for the non-ADI standards ensures a level playing field between ADIs and non-ADIs in the new credit framework. The setting of non-ADI standards in subordinate legislation, enables them to be made consistently with the standards APRA requires of ADIs in APS 220 Credit Risk Management, which is itself subordinate legislation. Therefore, just as the ADI regime in APS 220 provides flexibility for APRA to update these requirements over time, it is necessary that a similar flexibility is afforded for the non-ADI standards to be dynamically updated in line with changes to the ADI regime. Requiring changes to be made to primary legislation to align APS 220 and the non-ADI Standard would result in periods of inconsistent regulatory frameworks, affording a competitive advantage to one of the sectors. This would be contrary to the Government's commitment to encourage and facilitate competition in the financial system.

As an independent prudential regulator, APRA maintains control of the content of their prudential standards and is able to dynamically update them as the regulatory landscape evolves and demands it. Therefore, it is critical that APRA has the flexibility currently afforded by the Banking Act to enable it to make changes to its prudential standards.

The Minister's power is already limited to determining systems, policies and processes that the non-ADI credit provider must have for engaging in non-ADI credit conduct.

If the non-ADI standards were contained in primary legislation, or were amended to further limit the Minister's powers, this could constrain the scope of changes APRA could practically make to its prudential standards without disturbing the level playing field between ADIs and non-ADIs, and may require significant deferral of changes to APRA's standards to enable primary legislation to amend the non-ADI credit standard framework.

Significant matters in delegated legislation, 133CD

The amendments in Schedules 2 and 6 to the Bill make amendments to the Credit Act relating to the regulation of small amount credit contracts (SACCs) and consumer leases. These amendments include prohibiting a licensee from entering into a SACC if the repayments under the contract would not be of equal amounts or would be repaid on an irregular basis (Schedule 2, item 12, proposed section 133CD), and prohibiting unsolicited communication about SACCs in certain circumstances (Schedule 2, item 12, proposed section 133CF).

The purpose of these provisions is to increase the consumer protections that apply in relation to SACCs by prohibiting behaviour by licensees that has historically resulted in harm to consumers. For example, allowing unequal payments or irregular repayment periods for SACCs permits licensees to lengthen the period of the SACC and therefore receive additional monthly fees.

The prohibitions in the Bill are broad and high-level so as to ensure effective coverage of the provisions, however there may be circumstances where unanticipated but legitimate behaviour by licensees would breach the provisions but not result in harm to consumers. To ensure that non-harmful behaviour is not captured by the prohibitions on unequal SACC repayments or certain unsolicited communications about SACCs, the Bill allows for delegated legislation to be made that specifies circumstances when the provisions would not be breached.

In the case of the prohibition on unequal and irregular SACC repayments, the Bill allows for one circumstance in which otherwise unequal repayment periods are taken to be equal, namely that regular payments that fall on non-business days may be paid on the previous or next business day and will still be taken to be equal (see Schedule 2, item 12, proposed section 133CD(4) of the Credit Act). However, there may be other unforeseen situations when otherwise unequal repayment periods should also be taken to be equal. Allowing ASIC to make an instrument that sets out the conditions where this will be the case ensures that businesses and consumers are not inappropriately penalised by the high-level prohibition.

The Bill also includes a general and broad prohibition on any communication that includes an offer to enter into a SACC or an invitation to apply for a SACC to a consumer has ever been a debtor under a SACC (including to consumers who currently have a SACC). As noted in the explanatory memorandum, this prohibition is intended to stop licensees from making unsolicited communications to vulnerable consumers and to ensure that consumers freely choose to enter into a SACC rather than being prompted to apply. This is an important part of the consumer protection provisions in the Bill, as the Review of the Small Amount Credit Contract Laws found that consumers can be directly targeted with invitations to enter into a new SACC when they are particularly vulnerable, such as around Christmas or when their current SACC is about to end. The prohibition on unsolicited communication is drafted at a high-level to only apply to certain targeted invitations to specific consumers (for example, by SMS or email), however the regulation-making power ensures that any unforeseen kinds of communication that do not cause harm to consumers can be excluded from the prohibition.

At this time it is not expected that ASIC would make an instrument setting out when unequal repayment periods are taken to be equal, nor that regulations would be made to permit communication that would otherwise be in breach of new section 133CF. However, the power to make delegated

legislation is important in both of these instances to allow the law to respond appropriately to rapidly changing business practices and not unfairly penalise legitimate business behaviour.

Committee comment

2.110 The committee thanks the Treasurer for this response.

Section 133DB – information before providing credit assistance or entering credit contract

2.111 The committee notes the Treasurer's advice that specifying the manner of giving information about the comparison of the equity projection and aged care costs to a consumer in delegated legislation is appropriate, as this provides necessary flexibility to allow the government to respond quickly to circumstances of concern as they arise and to make timely amendments. The committee also notes the examples provided of where prescription by legislative instrument may be necessary to respond to risks related to COVID-19, and how prescription by legislative instrument may be useful beyond the pandemic.

2.112 The committee further notes the Treasurer's advice that the government's intent was not to provide high level guidance in primary legislation in relation to this matter to ensure that the power is sufficiently broad to accommodate unforeseen circumstances.

2.113 While noting this advice, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation.

2.114 The committee also notes the Treasurer's advice that, consistent with standard practice, the government envisages undertaking consultation before making regulations under the amended section 133DB. However, the committee notes that there are no specific requirements on the face of the bill to require that such consultation takes place.

Proposed section 133EA – non-ADI credit standards

2.115 The committee notes the Treasurer's advice that the policy intent behind proposed section 133EA and related provisions in the bill is to ensure that, in relation to certain types of credit conduct, authorised deposit taking institutions (ADIs) must continue to comply with prudential standards made by the Australian Prudential Regulation Authority (APRA) while key elements of APRA's ADI lending standards are adopted and applied to the framework governing non-ADI credit providers. The Treasurer further advised that adopting elements from the APRA lending standards for the non-ADI standards ensures a level playing field between ADIs and non-ADIs in the new credit framework.

2.116 The committee also notes the Treasurer's advice that the setting of non-ADI standards in delegated legislation enables them to be made consistently with certain

standards required of ADIs by APRA, which are also prescribed by delegated legislation. The Treasurer advised that the regime for ADIs provides flexibility for APRA to update requirements over time, and that similar flexibility is necessary for the non-ADI standards so they may be updated in line with changes to the ADI regime. The committee further notes the Treasurer's advice that requiring changes to be made to primary legislation to align the relevant ADI standards made by APRA and the non-ADI standards would result in periods of inconsistent regulatory frameworks, affording a competitive advantage to one of the sectors.

2.117 The committee also notes the Treasurer's advice that the minister's power to make non-ADI credit standards is limited in the bill to determining systems, policies and processes that the non-ADI credit provider must have for engaging in non-ADI credit conduct. The Treasurer advised that if the non-ADI standards were amended to further limit the minister's powers, this could also constrain the scope of changes APRA could practically make to its prudential standards without disturbing the level playing field between ADIs and non-ADIs, and may require significant deferral of changes to APRA's standards to enable primary legislation to amend the non-ADI credit standard framework.

Proposed section 133CD – Small amount credit contracts

2.118 The committee notes the Treasurer's advice that the purpose of proposed sections 133CD and 133CF is to increase the consumer protections that apply in relation to small amount credit contracts by prohibiting behaviour by licensees that has historically resulted in harm to consumers. The Treasurer advised that the prohibitions are broad and high-level so as to ensure effective coverage, but that bill allows for delegated legislation to specify when the provisions would not be breached to account for circumstances where unanticipated but legitimate behaviour by licensees would breach the provisions but not result in harm to consumers.

2.119 The committee also notes the Treasurer's advice that it is not at this time expected that ASIC would make an instrument setting out when unequal repayment periods are taken to be equal, nor that regulations would be made to permit communication that would otherwise be in breach of proposed section 133CF. The committee further notes the Treasurer's advice that, nevertheless, the power to make delegated legislation is important in both of these instances to allow the law to respond appropriately to rapidly changing business practices and not unfairly penalise legitimate business behaviour.

2.120 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

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

Significant matters in delegated legislation

Reversal of legal burden of proof[36]

2.123 In *Scrutiny Digest 2 of 2021* the committee requested the Treasurer's advice as to:

- why it is considered necessary and appropriate to leave the prescription or determination of avoidance schemes and matters relevant to making a conclusion that a scheme is an avoidance scheme to delegated legislation;
- whether the bill can be amended to include at least high-level guidance regarding schemes that will be presumed to be entered into for an avoidance purpose on the face of the primary legislation;
- why it is proposed to place a legal burden of proof on the defendant by including presumptions in relation to these civil penalty provisions; and
- why it is not sufficient to reverse the evidential, rather than legal, burden of proof in this instance.

2.124 The committee also noted that its consideration of the appropriateness of provisions which include presumptions in relation to civil penalty provisions or offences would be assisted if the Treasurer's response explicitly addressed relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[37]

Treasurer's response

2.125 The Treasurer advised:

> *Leaving the prescription or determination of avoidance schemes and matters relevant to making a conclusion that a scheme is an avoidance scheme to delegated legislation, proposed section 323B*
>
> Proposed section 323B of the Credit Act outlines a number of matters that must be considered in determining whether there is an avoidance purpose in addition to the regulation-making power provided by proposed paragraph 323B(1)(c) of the Credit Act. The regulation-making power recognises that industry participants may develop new avoidance practices

36 Schedule 4, item 3, proposed sections 323B–323C. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

37 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 15-18.

which may require the Government to specify additional matters that must be considered in determining whether the relevant avoidance purpose exists. Not including the regulation-making power will jeopardise the ability of the law to achieve its purpose of prohibiting schemes that prevent a contract from being a small amount credit contract or a consumer lease.

Not including high-level guidance regarding schemes that will be presumed to be entered into for an avoidance purpose on the face of the primary legislation, proposed section 323C

Proposed section 323B of the Credit Act outlines a number of matters that are key indicators of whether there is an avoidance purpose. The instrument making powers in proposed subsection 323C(1) reflects historical experience that avoidance schemes tend to proliferate quickly. The instrument making powers ensure that either the Government or ASIC can respond quickly and effectively to evolving practices as needed.

…

Burdens of proof, proposed section 323C

Placing the legal burden of proof on the defendant by including presumptions in relation to civil penalty provisions

In the context of proposed section 323C of the Credit Act, placing the legal burden of proof on the person is appropriate as it will be within the knowledge for the person, opposed to ASIC, to establish that it would not be reasonable to conclude that there was a relevant avoidance purpose. For example, if the scheme in question does have a legitimate (non-avoidance) purpose, that matter would be known to the person. Although not strictly relevant, this approach is consistence [sic] with the guidance provided by pages 50-52 of the *Guide to Framing Commonwealth Offences*, which was referred to by the Committee. It should also be noted that the presumption applies only in civil cases. Not reversing the legal burden of proof will jeopardise the ability of the law to achieve its purpose of prohibiting schemes that prevent a contract from being a small amount credit contract or a consumer lease.

Not reversing the evidential, rather than legal, burden of proof

In the context of proposed section 323C of the Credit Act, merely reversing the evidential burden of proof is not sufficient as it will likely fall to ASIC to establish that it would not be reasonable to conclude that there was a relevant avoidance purpose. This is inappropriate as it will be considerably easier for the person, opposed to ASIC, to establish that it would not be reasonable to conclude that there was a relevant avoidance purpose. Not reversing the legal burden of proof will jeopardise the ability of the law to achieve its purpose of prohibiting schemes that prevent a contract from being a small amount credit contract or a consumer lease.

Committee comment

2.126 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that not including the regulation-making power in proposed paragraph 323B(1)(c) of the Credit Act and not reversing the legal burden of proof would jeopardise the ability of the law to achieve its purposes of prohibiting schemes that prevent a contract from being a small amount credit contract or a consumer lease.

2.127 While noting this advice, the committee remains concerned that using delegated legislation to prescribe or determine avoidance schemes and matters relevant to making a conclusion that a scheme is an avoidance scheme provides a broad power to expand or restrict the scope of the proposed prohibition on avoidance schemes, without the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

2.128 The committee also notes the Treasurer's advice that placing the legal burden of proof on a person is appropriate as it will be within the knowledge of the person to establish that it would not be reasonable to conclude that there was a relevant avoidance purpose.

2.129 The Treasurer also advised that merely reversing the evidential burden of proof is not sufficient as it will likely fall to ASIC to establish that it would not be reasonable to conclude that there was a relevant avoidance purpose. However, the committee notes that, if the provision only reversed the evidential burden of proof, ASIC would only be required to establish this matter if the person alleged to have engaged in an avoidance scheme could raise evidence that would suggest a reasonable possibility that it would not be reasonable to conclude that there was a relevant avoidance purpose.

2.130 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.131 The committee leaves to the Senate as a whole the appropriateness of:

- **leaving the prescription or determination of avoidance schemes and matters relevant to making a conclusion that a scheme is an avoidance scheme to delegated legislation; and**
- **placing a legal burden of proof on a person by including a presumption of avoidance for certain schemes.**

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

Broad delegation of legislative power—exemption of schemes[38]

2.133 In *Scrutiny Digest 2 of 2021* the committee requested the Treasurer's more detailed advice as to:

- why it is proposed to confer on ASIC the broad power to exempt schemes from the operation of the prohibition on avoidance schemes in proposed section 323A; and
- whether the bill could be amended to include at least high-level guidance regarding the circumstances where it will be appropriate for ASIC to exempt a scheme from the operation of the avoidance prohibitions.[39]

Treasurer's response

2.134 The Treasurer advised:

> *Proposal to confer on ASIC the broad power to exempt schemes from the operation of the prohibition on avoidance schemes in section 323A, and the absence of high level guidance*
>
> The power for ASIC to, by legislative instrument, exempt a scheme or class of schemes from all or specified parts of the prohibitions set out in proposed section 323A of the Credit Act ensures that ASIC can appropriately deal with schemes that do not cause harm to consumers or regulated industry participants and have legitimate non-avoidance purposes. A broad power is needed in order to capture the full array of schemes that might arise and to ensure that non-harmful business practices are not subject to the prohibition. In the absence of a broad power, legitimate arrangements may be inappropriately subject to the prohibitions in proposed section 323A of the Credit Act. Providing high level guidance in the primary law might operate to inappropriately restrict the application of the power and prevent it from applying to unforeseen schemes.

Committee comment

2.135 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the broad power to exempt schemes from the operation of the prohibition on avoidance schemes ensures that ASIC can appropriately deal with schemes that do not cause harm to consumers or regulated industry participants and have legitimate non-avoidance purposes. The Treasurer advised that, without this broad power, legitimate arrangements may be inappropriately subject to the prohibitions in proposed section 323A of the Credit Act, and that providing high level

38 Schedule 4, item 3, proposed section 323D. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

39 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 18-19.

guidance in the primary law might operate to inappropriately restrict the application of the power and prevent it from applying to unforeseen schemes.

2.136 While noting this advice, the committee reiterates its scrutiny concerns with respect to the use of delegated legislation to modify the operation of primary legislation in particular circumstances, with regard to the breadth of this proposed power and its potential impact on parliamentary scrutiny.

2.137 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.138 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring on ASIC the broad power to exempt schemes from the operation of the prohibition on avoidance schemes in proposed section 323A.

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

Reversal of evidential burden of proof
Significant matters in delegated legislation[40]

2.140 In *Scrutiny Digest 2 of 2021* the committee requested the Treasurer'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 also requested the Treasurer's detailed advice as to:

- why it is considered necessary and appropriate to leave to delegated legislation the prescription of circumstances in which it will be a defence to the offence or civil penalty provision of failing to comply with requirements to provide material to a consumer;
- whether the bill can be amended to include at least high-level guidance regarding the relevant circumstances that may be prescribed on the face of the primary legislation.[41]

40 Schedule 1, item 65. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

41 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 19-20.

Treasurer's response

2.141 The Treasurer advised:

Significant matters in delegated legislation; Reversal of evidential burden of proof, 133DB

Proposed paragraphs 133DB(1)(ba) and (bb) of the Credit Act establish a civil penalty for failure to provide a consumer with a comparison of equity projections and the consumer's expected aged care costs before entering into a reverse mortgage or providing other specified advice or services in relation to a reverse mortgage. Currently, subsection 133DB(2) of the Credit Act also makes it an offence to engage in conduct that breaches requirements in subsection 133DB(1). Proposed subsections 133DB(4A) and (4B) provide exceptions (offence-specific defences) to the civil penalty and offence, providing that the offence does not apply if another person has already given the required comparison; or circumstances prescribed by the regulations exist.

The criminal offence carries a maximum penalty of 50 penalty units and the civil penalty provision applies a civil penalty of 5000 penalty units.

Leaving to delegated legislation the prescription of circumstances in which it will be a defence to the offence or civil penalty provision of failing to comply with requirements to provide material to a consumer

As outlined above, this Bill is in response to the Government's economic response to the COVID-19 Pandemic. Given the unpredictability of outbreaks of the virus and related government regulatory responses, it is appropriate to leave to delegated legislation the prescription of circumstances in which it will be a defence to the offence or civil penalty provision of a licensee failing to comply with requirements to provide information to a consumer (133DB(1)(b) and (ba)). Equally, this regulation-making power provides the enduring flexibility for Government to support advancements in technology which achieve efficiencies for business while providing an appropriate level of consumer protection. This will help consumers and businesses safely transact during the COVID-19 pandemic while also facilitating long-term technological improvements in business communications which can benefit both consumers and licensees. As regulations, the prescribed circumstances would be subject to disallowance by the Parliament. Consistent with standard practice, the Government envisages undertaking consultation before making any regulations under this power to minimise the risk of unintended consequences.

Using offence-specific defences (which reverse the evidential burden of proof)

Proposed subsection 133DB(4A) of the Credit Act provides for specific circumstances in which there will not be a contravention of subsection 133DB(1)(ba)-(bb) and (2). Subsection 133DB(4B) of the Credit Act provides for specific circumstances (prescribed in regulations) in which there will not be a contravention of subsection 133DB(1)(ba)-(bb) and (2). In a preceeding

against a licensee in relation to 133DB, the defendant will bear the evidential burden that these specific circumstances occurred to successfully make out the defence.

The Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011) (the Guide) provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where it is peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. It is intended to rely on this justification.

In accordance with the Guide, it is appropriate that the defendant bears the evidential burden for providing a defence. This is because it would be peculiarly within the mind of the defendant, and the defendant would be better positioned to readily adduce evidence, that they reasonably believed that another person had already shown the consumer in person the comparison described in subparagraph 133DB(1)(ba)-(bb) of the Credit Act and given the consumer a printed copy of the comparison; or circumstances prescribed by the regulations under subsection 133DB(4B) existed that justified the defendant not providing the consumer with a comparison of equity projections and consumer's expected aged care costs before the defendant entered into a reverse mortgage or providing other specified services in relation to a reverse mortgage. The alternative would be that the prosecution has to adduce evidence to the contrary. In addition to this, the defendant only has an evidential burden which is less onerous than the legal burden.

It is intended to rely on this justification for the reversals of the evidential burden of proof in proposed subsections 133DB(4A) and (48) of the Credit Act which provide exceptions (offence-specific defences) to the civil penalty and offence provisions. This reversal of the evidential burden of proof is proportional, necessary, reasonable and in pursuit of a legitimate objective.

Although it would have been technically possible to make amendments along the line described by the Committee, the Government's preferred approach was, and remains, to provide for such details in the subordinate legislation for the reasons stated above.

Committee comment

2.142 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that it is appropriate to leave to delegated legislation the prescription of circumstances in which it will be a defence to the offence or civil penalty provision of a licensee failing to comply with requirements to provide information to a consumer, given the unpredictability of outbreaks of the COVID-19 virus and related government regulatory responses.

2.143 The Treasurer also advised that the regulation making power provides enduring flexibility for government to support advancements in technology. While noting this advice, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation.

2.144 While the Treasurer also notes that it is envisaged that the government will undertake consultation before making regulations under this power, the committee notes that the bill does not include a specific requirement on the government to undertake such consultation.

2.145 With respect to the use of offence-specific defences, the committee notes the Treasurer's advice that it would be peculiarly within the mind of the defendant that they reasonably believed that another person had already shown the consumer the required comparison in-person and given the consumer a printed copy of the comparison. The Treasurer also advised that the defendant would also be better positioned to readily adduce evidence of this matter.

2.146 The committee also notes the Treasurer's advice that it would be peculiarly within the mind of the defendant that circumstances prescribed by the regulations under subsection 133DB(4B) existed that justified the defendant not providing the consumer with a comparison of equity projections and consumer's expected aged care costs before the defendant entered into a reverse mortgage or providing other specified services in relation to a reverse mortgage. While acknowledging this advice, the committee notes that the regulation-making power does not appear to be confined in a way that would protect against circumstances that do not meet the test set out in the *Guide to Framing Commonwealth Offences* being prescribed in the regulations. That is, it appears open for regulations to prescribe circumstances, the existence of which would *not* be peculiarly within the knowledge of the defendant, and significantly more difficult and costly for the prosecution to disprove.

2.147 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.148 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the offence-specific defence proposed in subsection 133DB(4B), which:

- **reverses the evidential burden of proof, and**
- **allows the circumstances in which the defence will apply to be prescribed in delegated legislation.**

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

National Emergency Declaration Bill 2020

Purpose	This bill seeks to establish a legislative framework for the declaration of a national emergency by the Governor-General, on the advice of the Prime Acting Attorney-General
Portfolio	Attorney-General
Introduced	House of Representatives on 3 December 2020
Bill status	Received the Royal Assent on 15 December 2020

Power for delegated legislation to modify primary legislation (Henry VIII clause)[42]

2.150 The committee initially scrutinised this bill in *Scrutiny Digest 18 of 2020* and requested the Attorney-General's advice.[43] The committee considered the Attorney-General's response in *Scrutiny Digest 3 of 2021* and reiterated its request for the Attorney-General's further advice as to the appropriateness of amending the *National Emergency Declaration Act 2020* (NED Act) to:

- provide that determinations made under section 15 cease to be in force after three months; and
- provide that before making a determination under section 15, a minister must be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the determination is made.[44]

Acting Attorney-General's response[45]

2.151 The Acting Attorney-General advised:

> In its *Scrutiny Digest 18 of 2020*, the Committee observed that a determination made under section 15 will cease either on the day specified in the determination or may continue while a national emergency declaration is in force (including any extensions of the period in which the declaration is in force). This approach was intended to ensure that Commonwealth support could be provided without interruption and with

42 Clause 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, pp. 14-16.

44 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2021*, pp. 37-39.

45 The Acting Attorney-General responded to the committee's comments in a letter dated 11 March 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

certainty in an emergency deemed to be of national significance, including where a declaration is extended because the emergency is ongoing beyond the initial three month period.

In light of the Committee's comments, consideration will be given to whether it is appropriate to amend the NED Act to include further safeguards around the making of determinations under section 15, including through time limitations, while maintaining the policy objective of the provision to empower ministers to reduce 'red tape' requirements in legislation where this would benefit the public, or a section of the public, during or following a national emergency.

Committee comment

2.152 The committee thanks the Acting Attorney-General for this response. The committee welcomes the Acting Attorney-General's advice that consideration will be given to amending the NED Act to include further safeguards around the making of determinations under section 15, including through time limitations. The committee also notes the Acting Attorney-General's advice that any amendments to the Act will need to take into account the policy objective of the provision to empower ministers to reduce 'red tape' requirements in legislation where this would benefit the public, or a section of the public, during or following a national emergency.

2.153 The committee welcomes the Acting Attorney-General's undertaking that consideration will be given to amending the *National Emergency Declaration Act 2020* to include further safeguards around the making of determinations under section 15.

2.154 Noting that the Senate Legal and Constitutional Affairs Legislation Committee is currently undertaking an inquiry into the *National Emergency Declaration Act 2020*, the committee draws the Acting Attorney-General's undertaking to the attention of that committee.

Tabling of reports[46]

2.155 The committee initially scrutinised this bill in *Scrutiny Digest 18 of 2020* and requested the Attorney-General's advice.[47] The committee considered the Attorney-General's response in *Scrutiny Digest 3 of 2021* and requested the Attorney-General's further advice as to:

46 Clause 17. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

47 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 16-18.

- the appropriateness of amending paragraph 17(4)(a) of the *National Emergency Declaration Act 2020* to provide that reports on the exercise of powers and the performance of functions in relation to a national emergency declaration must be given to the minister responsible for administering the National Emergency Declaration Act as soon as practicable, and in any case not later than 14 days after the national emergency declaration ceases to be in force;
- the appropriateness of amending subsection 17(5) of the *National Emergency Declaration Act 2020* to provide that:
    - the above reports must be tabled in each House of the Parliament as soon as practicable, and in any case not later than 14 days after the Minister receives the reports; and
    - that the reports are to be presented in accordance with procedures in each House for the presentation of documents out of sitting in circumstances where the reports are ready for presentation, but the relevant House is not sitting.[48]

Acting Attorney-General's response

2.156 The Acting Attorney-General advised:

> As noted by the Committee, section 17 of the NED Act includes requirements for relevant Ministers to report on the exercise of powers or the performance of functions under national emergency laws, and provides timeframes and presentation requirements for those reports. These reporting requirements were included as an important safeguard to ensure that national emergency declarations and the powers and functions that may be used once a declaration is in force are effective, proportionate and subject to appropriate oversight.
>
> In light of the Committee's comments, consideration will be given to the appropriateness of amending the NED Act to provide for more specific requirements around the tabling and presentation of reports to ensure that there is appropriate Parliamentary accountability, particularly outside of sitting periods.

Committee comment

2.157 The committee thanks the Acting Attorney-General for this response. The committee welcomes the Acting Attorney-General's advice that consideration will be given to amending the NED Act to provide for more specific requirements around the tabling and presentation of reports to ensure that there is appropriate Parliamentary accountability, particularly outside of sitting periods.

48 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2021*, pp. 39-40.

2.158 The committee welcomes the Acting Attorney-General's undertaking that consideration will be given to amending the *National Emergency Declaration Act 2020* to provide for more specific requirements around the tabling and presentation of reports to ensure that there is appropriate Parliamentary accountability, particularly outside of sitting periods.

2.159 Noting that the Senate Legal and Constitutional Affairs Legislation Committee is currently undertaking an inquiry into the National Emergency Declaration Act 2020, the committee draws the Acting Attorney-General's undertaking to the attention of that committee.

National Emergency Declaration (Consequential Amendments) Bill 2020

Purpose	This bill seeks to amend various Acts and Regulations that contain powers used by the Commonwealth when responding to, or supporting the recovery from, emergencies to enable the use of alternative or simplified statutory tests to streamline the exercise of those powers where a national emergency has been declared
Portfolio	Attorney-General
Introduced	House of Representatives on 3 December 2020
Bill status	Received the Royal Assent on 15 December 2020

Significant matters in non-disallowable legislative instruments[49]

2.160 The committee initially scrutinised this bill in *Scrutiny Digest 18 of 2020* and requested the Attorney-General's advice.[50] The committee considered the Attorney-General's response in *Scrutiny Digest 3 of 2021* and reiterated its request for the Attorney General's advice as to the appropriateness of amending the *Telecommunications Act 1997* to:

- provide that an emergency declaration made under subsection 313(4D) is subject to parliamentary disallowance; and
- set out at least high-level guidance in relation to when an emergency may be declared under subsection 313(4D).[51]

Acting Attorney-General's response[52]

2.161 The Acting Attorney-General advised:

> The intention of the amendments to the *Telecommunications Act 1997* (as amended by the Consequential Amendments Act) is to provide a clear legislative basis for requiring telecommunications providers to give the

---

49 Schedule 1, item 55, proposed subsections 313(4A) – (4H). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

50 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 22-24.

51 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2021*, pp. 44-46.

52 The Acting Attorney-General responded to the committee's comments in a letter dated 11 March 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> Commonwealth, states and territories such help as is reasonably necessary during emergencies. These amendments provide industry with a clear legislative basis for providing assistance and ensure they do not incur civil liability while doing so.
>
> Subsection 313(4D) is intended to allow the Minister to declare emergencies where, in all of the circumstances, it is appropriate that industry participants be subject to a duty to give such help as is reasonably necessary for the purposes of preparing for, responding to or recovering from the emergency. Section 313(4D) would enable the Minister to act rapidly in unforeseen emergencies that, while serious, are not subject to a national declaration or state or territory emergency or disaster declaration, where the Minister would not otherwise be able to leverage the capability of carriers.
>
> As noted by the Committee, subsection 313(4F) of the NED Act provides that while a section 313(4D) declaration is a legislative instrument, it is not subject to disallowance. This exemption from disallowance is intended to provide certainty and ensure that telecommunications providers can act expeditiously and with confidence that their assistance will not incur civil liability where circumstances are rapidly evolving.
>
> Further consideration will also be given to whether high-level guidance could be provided in relation to when an emergency may be declared under subsection 313(4D) to provide additional certainty to the Parliament as well as carriers, carriage service providers and carriage service intermediaries about circumstances in which authorities may assistance.

Committee comment

2.162 The committee thanks the Acting Attorney-General for this response. The committee notes the Acting Attorney-General's advice that the amendments provided for in the bill are intended to provide industry with a clear legislative basis for providing assistance and ensure they do not incur civil liability while doing so.

2.163 The committee also notes the Acting Attorney-General's advice that section 313(4D) would enable the Minister to act rapidly in unforeseen emergencies that, while serious, are not subject to a national declaration or state or territory emergency or disaster declaration, where the Minister would not otherwise be able to leverage the capability of carriers. The Acting Attorney-General further advised that the exemption from disallowance is intended to provide certainty and ensure that telecommunications providers can act expeditiously and with confidence that their assistance will not incur civil liability where circumstances are rapidly evolving.

2.164 The committee welcomes the Acting Attorney-General's advice that further consideration will also be given to whether high-level guidance could be provided in relation to when an emergency may be declared under subsection 313(4D) to provide additional certainty to the Parliament as well as carriers, carriage service providers and

carriage service intermediaries about circumstances in which authorities may provide assistance.

2.165 The committee welcomes the Acting Attorney-General's undertaking that consideration will be given to amendments to provide high-level guidance in relation to when an emergency may be declared under subsection 313(4D) of the *Telecommunications Act 1997*.

2.166 Noting that the Senate Legal and Constitutional Affairs Legislation Committee is currently undertaking an inquiry into the *National Emergency Declaration Act 2020*, the committee draws the Acting Attorney-General's undertaking to the attention of that committee.

Security Legislation Amendment (Critical Infrastructure) Bill 2020

Purpose	This bill seeks to introduce an enhanced regulatory framework, building on existing requirements under the *Security of Critical Infrastructure Act 2018*
Portfolio	Home Affairs
Introduced	House of Representatives on 10 December 2020
Bill status	Before the House of Representatives

Significant matters in delegated legislation[53]

2.167 In *Scrutiny Digest 2 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate to leave matters which may be significant to the operation of a legislative scheme to delegated legislation.[54]

Minister's response[55]

2.168 The minister advised:

> The regulatory framework that would be established by the Bill relies on delegated legislation where necessary, and often to facilitate for the specific detail of requirements in the Bill be flexible and adjustable in order to minimise regulatory impost on business while maintaining an appropriate security framework. The Minister for Home Affairs is not permitted, when making rules, to exceed the principles set out in the primary legislation and all rules are subject to parliamentary scrutiny and disallowance.
>
> The Committee has requested further advice as to why it is considered necessary and appropriate to leave the matters identified in paragraph 1.82 of Scrutiny Digest 2/21 to delegated legislation. These matters will be dealt with in turn below.
>
> *a.* *Relevant Commonwealth regulator*
>
> Schedule 1 to the Security Legislation Amendment (Critical Infrastructure) Bill 2020 (the Bill) proposes to insert a definition of 'relevant

53 Schedule 1, items 13, 26, 30-32, 38, 39. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

54 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 22-23.

55 The minister responded to the committee's comments in a letter dated 23 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Commonwealth regulator' into section 5 of the *Security of Critical Infrastructure Act 2018* (the Act). The term is to be defined as:

(a) a Department that is specified in the rules; or

(b) a body that is:

(i) established by a law of the Commonwealth; and

(ii) specified in the rules.

This term is used to identify the relevant entity in respect of which certain functions and obligations to be introduced by the Bill attach, including:

- the recipient of annual reports in relation to critical infrastructure risk management programs (new paragraph 30AG(2)(b) of the Act)
- the body that must also be consulted by the Secretary prior to issuing a notice in relation to a statutory incident response plan (paragraph 30CB(4)(b)), cyber security exercise (paragraph 30CM(5)(b)), or vulnerability assessment (paragraph 30CU(3)(b)), and
- the body that may take certain enforcement actions in response to alleged contraventions of the regime, such as applying for civil penalty orders (subsections 49(2)-(3)) or accepting enforceable undertakings (subsections 49(3A)-(38)).

A central principle underpinning the Bill is the need to avoid unnecessary regulatory burden. Where a Commonwealth regulator exists, or comes into existence, who is better positioned to regulate a particular class of critical infrastructure assets rules may be made to specify that regulator as a 'relevant Commonwealth regulator' for the purposes of the Act. Where appropriate, this will avoid the regulatory burden that may arise from the responsible entity for an asset having to engage with multiple regulators as well as leveraging the sectoral expertise of particular regulators to the greatest extent possible.

The ability to specify regulators through rules provides the necessary flexibility to adjust, as appropriate, to evolving regulatory arrangements and ensure engagement with the Commonwealth Government is streamlined to the greatest extent possible. For example, as sector-specific rules to prescribe required content for critical infrastructure risk management programs are developed for the purpose of section 30AH through a co-design phase with industry, and refined into the future, there needs to be an appropriately flexible mechanism to ensure the most appropriate regulatory body can be identified in step with the evolving requirements specified in the rules.

However, it is important to note that the rules will exclusively be used to specify the most appropriate regulator in the Commonwealth, with the primary legislation conferring all relevant powers on that regulator. That is, and for the avoidance of doubt, the rules are only used in this context for

the determination of administrative arrangements through which the Commonwealth can use those powers which are provided through the primary legislation.

b. Commonwealth owned critical infrastructure assets

The Government's general policy is that the measures and powers in this Bill should not apply to assets that are Commonwealth owned (except where owned by a government business enterprise). Commonwealth assets are already subject to detailed management and governance frameworks that are designed to maintain security and resilience. For example, Commonwealth assets are subject to the Protective Security Policy Framework (PSPF) which requires government departments and agencies to implement certain security measures. The Australian Government is also in a position to provide active assistance should these assets be subject to a serious cyber incident.

However, new subsection 9(2A) of the Act provides exceptions to this principle and outlines circumstances where Commonwealth owned assets may be critical infrastructure assets and, as a result, subject to certain measures and powers in the Bill.

Paragraphs 9(2A)(c)-(d) outline that an asset that is owned by the Commonwealth or a body corporate established by a law of the Commonwealth may be a critical infrastructure asset if:

- the asset is declared under section 51 of the Act to be a critical infrastructure asset (paragraph (c)), or
- the asset is prescribed by the rules for the purposes of paragraph 9(1)(f) (paragraph (d)).

These provisions are intended to futureproof the Act and ensure appropriate and necessary action can be taken under the Act should existing security measures for Commonwealth assets be ineffective or the unique nature of an asset render the existing security measures inappropriate. This approach aligns with, and relies on, the existing rule-making power in section 9 of the Act which was introduced to ensure that the law can adapt to changes in the threat environment and criticality of assets and infrastructure. Specifically, existing paragraph 9(1)(f) provides the Minister for Home Affairs with a rule making power to prescribe additional assets to be a critical infrastructure asset.

c. Definitions of certain critical infrastructure assets

The Bill would allow the Minister for Home Affairs to make rules to prescribe requirements for, or specify an asset to be:

- a critical liquid fuel asset (new section 12A of the Act)
- a critical freight infrastructure asset (new section 12B)

- a critical freight services asset (new section 12C)
- a critical financial market infrastructure asset (new section 12D)
- a critical broadcasting asset (new section 12E)
- a critical banking asset-(new section 12G)
- a critical insurance asset (new section 12H)
- a critical superannuation asset (new section 12J)
- a critical food and grocery asset (new section 12K), and
- a critical domain name system (new section 12KA).

Similar to the current approach taken in the Act, and wherever appropriate and reasonable, the Bill would rely on qualitative and quantitative criteria to define certain subcategories of critical infrastructure assets.

The nature of the assets to be captured in the Bill means that it is not always possible to include a static threshold in the primary legislation. Specifically, what is considered to be critical in some sectors will continue to evolve for a variety of reasons including changes to the market, technology and interdependencies.

In these circumstances, it is appropriate to have mechanisms available via delegated legislation to ensure that the definitions can evolve to guarantee that the measures and powers only apply to those assets that are considered to be critical in each sector at any given time.

Importantly, the primary legislation appropriately limits, and provides transparency over, the types of rules that can be made for each of the subcategories listed above by providing that the rules can only be made in relation to narrow and discrete parts of the definitions. This ensures that delegated legislation cannot be used to introduce any unnecessary, unrelated and inappropriate requirements. For example, in relation to liquid fuel refineries, new paragraph 12A(2)(b) of the Act ensures that any additional requirements provided in the rules are to capture those refineries as critical infrastructure assets that are critical to ensuring the security and reliability of a liquid fuel market.

The use of subordinate legislation in this context replicates the approach that was taken in the existing Act. For example, section 10 of the Act as currently in force allows the Minister for Home Affairs to make rules to prescribe requirements for an electricity generation station to be critical to ensuring the security and reliability of electricity networks or electricity systems in a particular State or Territory.

d. *Responsible entities*

New section 12L of the Act, as to be inserted by the Bill, would provide the definition of 'responsible entity' for each class of critical infrastructure asset.

The definition has been separated into twenty five subsections representing the twenty-two classes of assets listed in the definition of critical infrastructure asset (see new subsection 9(1)), as well as assets that are prescribed under paragraph 9(1)(f), assets that are declared to be critical infrastructure assets under section 51 by the Minister or assets that are systems of national significance. This definition replaces the current definition of responsible entity in the section 5 of the current Act, to accommodate the new classes of critical infrastructure assets.

The term 'responsible entity' is used throughout the Bill, and current Act, to identify the entity with whom certain obligations sit. Responsible entities are those entities with ultimate operational responsibility for the asset. These entities have effective control or authority over the operations and functioning of the asset as a whole (even if they do not have direct control over a particular part of the asset), and are in a position to engage the services of contractors and other operators.

Importantly, new section 12L of the Act would provide the Minister with the ability to make rules to override the responsible entity for a specific category of critical infrastructure asset identified in this section, and prescribe another entity to be the responsible entity. The assets that are likely to be captured by this Bill are operating in a constantly evolving environment which may change the type of entity that is considered to be the responsible entity. Further, the unique circumstances of a particular asset may mean that the responsible entity may differ from the responsible entity of general application for that class of critical infrastructure asset.

This rule making power provides the necessary flexibility to deal with changes to the operating environment of critical infrastructure assets and to ensure that the regulatory measures in the current Act (the Register obligations at Part 2) and in this Bill (specifically those contained at Part 2A and Part 28) would continue to only apply to those entities that are best positioned to fulfil the obligations.

e. *Application provisions - Part 2 of the Act*

New paragraph 18A(1)(a) of the Act provides that the obligations relating to the Register of Critical Infrastructure Assets (the Register) at existing Part 2 of the Act apply to those critical infrastructure assets that are specified in the rules made by the Minister for Home Affairs, as well as assets that are currently regulated by the Act and assets privately declared under section 51 of the Act. This effectively works as an 'on switch' through which the Minister can ensure the obligations contained in the Part only apply in appropriate situations.

The consistent feedback from consultation with industry was that Government should consider the appropriateness of existing regulatory arrangements and only apply the obligations in the Act, and the Bill, to those assets that are not already subjected to similar and effective requirements

or arrangements. The rule making power at paragraph 18A(1)(a) is a direct response to this feedback received from industry and allows the Government to take a nuanced approach to the application of the obligations in the Act which accommodates interactions with current and future regulatory regimes.

New subsection 18A(3) of the Act outlines that the rules may provide that, if an asset becomes a critical infrastructure asset, Part 2 of the Act does not apply to the asset during the period beginning when the asset became a critical infrastructure asset (paragraph (a)) and ending at a time ascertained in accordance with the rules (paragraph (b)). This is intended to provide the ability to offer a delayed commencement or 'grace period' in the future when an entity becomes a critical infrastructure asset to which Part 2 applies, allowing them a reasonable period to adjust their business. This will permit equality between assets that are regarded as critical infrastructure assets at the time the rules are made who may benefit from a delayed commencement of those initial rules, and those who later become a part of that cohort.

Importantly, new section 18AA of the Act requires that the Minister consult on the content of any rules that are intended to be made under section 18A. Draft rules will be published on the Department of Home Affairs' website and persons will be invited to provide a submission in response to the proposal. Before making any rules, the Minister will be legislatively required to consider any submissions that were received. This provides additional transparency and ensures industry are afforded an opportunity to provide any information that may be relevant to the Minister's decision to make rules and activate the Register obligation.

f. *Application provision - Part 28 of the Bill*

Similarly to paragraph 18A(1)(a) – discussed above – new paragraph 30AB(1)(a) of the Act provides that the obligations relating to the critical infrastructure risk management program (the risk management program) in new Part 2A of the Act only apply to those critical infrastructure assets that are specified in the rules made by the Minister for Home Affairs. This effectively works as an 'on switch' through which the Minister can ensure that the obligations in this Part only apply in appropriate situations.

As noted above, during consultation sessions with industry, concerns were raised that the risk management program may duplicate existing obligations in some sectors. Industry encouraged Government to consider the appropriateness of any existing and relevant regulatory obligations, and suggested that the risk management program should only apply in circumstances where it is required.

The rule making power at new paragraph 30AB(1)(a) of the Act is a response to the feedback received from industry and allows the Government to take a nuanced approach to the application of the obligations in this Bill. As

discussed at paragraph 532 of the explanatory memorandum, this rule making power allows for the risk management program to apply in relation to assets that are not already subjected to a comparable and effective obligation:

> *In determining whether to make rules to apply the obligations to certain critical infrastructure assets, the Minister is likely to consider whether any existing requirements or arrangements appropriately deliver the same outcomes as intended by the critical infrastructure risk management program. This reflects the range of regulatory obligations that exist in relation to the various critical infrastructure assets, as well the obligations that may exist in relation to future critical infrastructure assets that are identified, and the Government's commitment to avoid duplicating regulation. Should these alternative regimes be found wanting, this mechanism provides a default option to ensure the security objectives can be achieved.*

New subsection 30AB(3) of the Act outlines that the rules may provide that, if an asset becomes a critical infrastructure asset, Part 2A does not apply to the asset during the period beginning when the asset became a critical infrastructure asset (paragraph (a)) and ending at a time ascertained in accordance with the rules(paragraph (b)). This is intended to provide the ability to offer a delayed commencement or 'grace period' in the future when an entity becomes a critical infrastructure asset to which the Part 2A applies, allowing them a reasonable period to adjust their business. This will permit equality between assets that are regarded as critical infrastructure assets at the time the rules are made who may benefit from a delayed commencement of those initial rules, and those who later become a part of that cohort.

Importantly, new section 30ABA of the Act requires that the Minister to consult on the content of any rules that are intended to be made under section 30AB. Draft rules will be published on the Department of Home Affairs' website and persons will be invited to provide a submission in response to the proposal. Before making any rules, the Minister will be legislatively required to consider any submissions that were received. This provide additional transparency and ensures industry are afforded an opportunity to provide any information that may be relevant to the Minister's decision to make rules and activate the Risk Management Program for an asset.

g. <u>Requirements of critical infrastructure risk management programs</u>

New section 30AH of the Act sets out the definition of a critical infrastructure risk management program. This definition is relevant to the obligations in new Part 2A of the Act, which require responsible entities for certain critical infrastructure assets to adopt, maintain, comply with, review and update a risk management program.

Subsection 30AH(1) provides that the plan must be a written program, the purposes that the program must achieve, and provides that the program must comply with such requirements (if any) as are specified in the rules. The Explanatory Memorandum for the Bill explains:

> *These rules will be used to provide further requirements on how the principles based obligations set out in subparagraphs [30AH] (1)(b)(i)-(iii) are to be implemented. Noting the array of critical infrastructure assets that may be subject to the obligation to adopt and maintain a critical infrastructure risk management program, now and into the future, this mechanism will be crucial for ensuring the program is implemented in a risk-based and proportionate manner for each industry sector while still achieving the desired security outcomes and avoiding any unnecessary burden. The Department will co-design these rules with industry and states and territories on a sector-specific basis.*

The requirements for risk management programs to be contained in the rules will outline matters that responsible entities must address to be compliant with the obligations in the Act, ensuring their actions are reasonable, proportionate and appropriate. These rules are expected to contain specific requirements which reflect the latest understanding of the threat environment, best practice security practices, industry maturity and the operating and regulatory context of critical infrastructure assets. Therefore, by their nature, these rules will need to be amended in a timely manner, as appropriate, to ensure they remain fit for purpose. Further, providing this degree of flexibility, while ensuring that the significant elements of the regime are set out in primary legislation, would enable the Government to achieve its objective of ensuring robust security practices are in place which do not impose undue regulatory burden.

This approach will also remove complexity from the regulatory framework by allowing sector-specific rules to be developed which address the specific circumstances of particular classes of assets, and as a result reducing unnecessary regulatory burden. This simplified approach can also be expected to ultimately increase the level of understanding about responsibilities and obligations and, ultimately, compliance with regulatory expectations.

h. Requirements for reports notifying of cyber security incidents

New Part 2B of the Act sets out obligations on responsible entities for certain critical infrastructure assets to notify the Government of particular cyber security incidents. Paragraphs 30BC(1)(c) and 30BO(1)(c) will provide that the respective report relating to the cyber security incident must include such information (if any) as is prescribed by the rules. The ability for the rules to set out such matters is necessary and appropriate for ensuring that the appropriate details of the incident are provided to Government while retaining flexibility to adjust the requirements to adapt to changes over time. These changes may include technological changes which alter

industries ability to detect and analyse compromises as well as particular indicators the Government may require to visibility to facilitate the necessary analysis of the reports. This flexibility in the procedural requirements associated with these reports will allow the Government to avoid undue regulatory impost associated with reporting cyber security incidents.

i. Enhanced Cyber Security Obligations

The Bill provides that rules may be made for the following purposes relevant to the enhanced cyber security obligations in new Part 2C of the Act:

- Paragraph 30CJ(1)(e)-An incident response plan must comply with requirements (if any) which are specified in the rules.
- Paragraph 30CN(1)(f) - A cyber security exercise must comply with requirements (if any) which are specified in the rules.
- Paragraph 30CS(c)-An evaluation report, in relation to a cyber security exercise that was undertaken in relation to a system of national significance must comply with requirements (if any) which are specified in the rules.
- Paragraph 30CY(1)(e) -A vulnerability assessment must comply with requirements (if any) which are specified in the rules.
- Paragraph 30DA(c) - A vulnerability assessment report, in relation to a vulnerability assessment that was undertaken in relation to a system of national significance must comply with requirements (if any) which are specified in the rules.

It is necessary and appropriate to allow for administrative components of the plans, exercises, reports, and assessments to be specified by rules in order to allow the requisite flexibility to adjust procedural matters in order to avoid undue regulatory burden on industry. The rules however do not alter the purposive components of the respective definitions, but merely permit rules to be made where necessary to supplement the definitions with necessary detail.

Committee comment

2.169 The committee thanks the minister for this detailed response. The committee notes the minister's advice that the regulatory framework that would be established by the bill relies on delegated legislation where necessary, often to facilitate the specific detail of requirements in the bill. The committee also notes the minister's advice that the delegated legislation provided for in the bill is required for flexibility and adjustability in order to minimise regulatory impost on business while maintaining an appropriate security framework in an evolving security and regulatory environment.

2.170 While noting this advice, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation.

2.171 The committee also notes the minister's advice that all rules are subject to parliamentary scrutiny and disallowance and that the Minister for Home Affairs is not permitted, when making rules, to exceed the principles set out in the primary legislation. In this regard, the committee further notes the minister's advice with respect to the guidance contained in primary legislation which will confine rules made with respect to the relevant Commonwealth regulator, definitions of certain critical infrastructure assets and enhanced cyber security obligations.

2.172 The committee also notes the minister's advice on specific consultation requirements in the bill in relation to the provisions governing the application of Part 2 and proposed Part 2B of the Act.[56] In particular, the committee notes the minister's advice that rules to be made under proposed sections 18A and 30AB will be subject to consultation requirements set out in proposed sections 18AA and 30ABA, which will require that draft rules are published on the Department of Home Affairs' website and that persons will be invited to provide a submission in response to the proposal. The committee also notes the minister's advice that, before making any rules, the minister will be legislatively required to consider any submissions that were received.

2.173 While noting the above explanations, the committee maintains its view that matters which may be significant to the operation of a legislative scheme should be included in primary legislation, unless sound justification for the use of delegated legislation is provided. The committee's consistent scrutiny view is that extensive reliance on the use of delegated legislation for new regulatory schemes considerably limits the ability of Parliament to have appropriate oversight over such schemes.

2.174 The committee notes the minister's advice in relation to the delegation of legislative powers under each of the proposed new sections raised by the committee, and requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.175 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the matters described above to delegated legislation.

---

56 These Parts would deal with the register of Critical Infrastructure Assets and the critical infrastructure risk management program.

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

Incorporation of external materials existing as in force from time to time[57]

2.177 In *Scrutiny Digest 2 of 2021* the committee requested the minister's advice as to:

- whether standards incorporated into the rules will be made freely available to all persons interested in the law; and
- further detail as to why it is considered necessary and appropriate to apply the standards as in force or existing from time to time, rather than when the instrument is first made.[58]

Minister's response

2.178 The minister advised:

> Schedule 1 of the Bill proposes to introduce new subsection 30AN(3) which provides, for rules made for the purposes of section 30AH, that:
>
> > *Despite subsection 14(2) of the* Legislation Act 2003*, the rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in a standard proposed or approved by Standards Australia as in force or existing from time to time.*
>
> In effect, rules made to specify requirements for a critical infrastructure risk management program may refer to the latest version standards proposed or approved by Standards Australia.
>
> The Committee has requested further advice as to:
>
> - whether standards incorporated into the rules will be made freely available to all persons interested in the law, and
> - further detail as to why it is considered necessary and appropriate to apply the standards as in force or existing from time to time, rather than when the instrument is first made.
>
> A common request from industry throughout the consultation process on this Bill was that the framework should, wherever possible, be consistent,

---

57 Schedule 1, item 39. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

58 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 23-24.

and evolve, with existing industry best practice in order to reduce regulatory burden while achieving the desired security outcomes.

The provision in new subsection 30AN(3) of the Act is included to allow for the direct recognition of accepted and reputable standards. Standards Australia is a peak standards development body - developing standards, or adopting international standards, across a range of topics which represent best practice specifications, procedures and guidelines. Therefore a mechanism to facilitate the incorporation of such standards meets the expectation that the regulatory framework reflects best practice and minimises regulatory impost on industry.

The underlying objective of new Part 2A of the Act is to ensure current and appropriate risk management programs are in place for critical infrastructure assets, and therefore it is vital that any requirements for such programs adapt overtime to changing security contexts. In light of this, the provision also recognises that these standards are regularly reviewed and updated to keep pace with emerging technology, risks, threats, etc., ensuring that the regulatory framework remains up to date and fit for purpose. A requirement to update the rules every time a specified standard is changed would be administratively burdensome and would likely result in the law falling behind industry best practice which is at odds with the principles underpinning the reforms.

Nevertheless the use of this provision will depend on the outcome of the co-design process the Government has committed to undertake with industry in developing the rules. Importantly, section 30AH permits rules to be made for different purposes to support the risk management program obligations.

Firstly, the rules may be used to provide 'safe harbour' by deeming certain actions to meet the obligations in the Act. Rules made for the purposes of subsection 30AH(9) may specify action that is deemed to be action that minimises or eliminates any material risk that the occurrence of a specified hazard could have a relevant impact on the asset. In practice, this would allow rules to be made which deem specified action, such as compliance with a particular standard, to meet aspects of the obligation. However, the entity would be free take alternative actions so long as they can ultimately demonstrate that their legal obligations have been met. In effect, compliance with standards specified in these types of rules is not mandatory as the entity will be free to pursue an alternative approach to ensuring regulatory compliance.

Alternatively, the rules may be used to establish mandatory requirements. For example, rules made for the purposes of paragraph 30AH(1)(c) may establish mandatory requirements for the critical infrastructure risk management program. The Government recognises the importance of accessibility for mandatory requirements for fair and effective functioning of the regime.

It is not possible to pre-empt the outcome of industry co-design, and potential application, adoption or incorporation of standards and the accessibility of those standards. However, if rules that incorporate standards are being considered, there are important safeguards to ensure the costs associated with accessing those standards is considered by the Minister.

Firstly, new section 30AL of the Act requires the Minister to conduct consultation prior to making or amending rules. Should consultation not be possible due to the immediacy of circumstances, section 30AM provides that consultation must occur as part of a review of the rules.

Secondly, new paragraphs 30AH(6)(b) and (c) of the Act require the Minister to have regard to the costs that are likely to be incurred by responsible entities in complying with rules specifying requirements for a critical infrastructure risk management program, and the reasonableness and proportionality of the requirements. This mandates consideration of issues such as costs associated with accessibility. Should the Minister consider making rules in this context which apply, adopt or incorporate standards proposed or approved by Standards Australia, consideration will be given to the accessibility of those standards by the regulated population and other persons interested in the law, such as responsible entities for assets which may become critical infrastructure assets in the future.

Finally, the Government has committed to undertaking regulatory impact statements for rules made for the purposes of new section 30AH of the Act. This provides another opportunity for the industry to advise Government of any cost implications of the incorporation of standards.

Ultimately, the accessibility of the standards will need to be considered on a case by case basis. The Minister or relevant Commonwealth regulator may consider entering into an agreement with Standards Australia to facilitate relevant standards being made available at no direct cost to users for example, on request or via the portal on the Department's Critical Infrastructure Centre's website. Such arrangements are supported by the Standards Australia Distribution and Licensing Policy Framework [Standards Australia, Distribution and Licensing Policy Framework, November 2019, accessible at <https://www.standards.org.au/getattachment/8b855la9-e580-4dce-a6d76b953b44bf31/StandardsAustralia-Distribution-and-Licensing-Policy-Framework-2019.pdf.aspx?lang=en-AU>]. Standards Australia are also currently developing new online products planned to be rolled out in 2021. These include new paid subscription models to access to standards. This model follows other product and subscription models for other forms of online content where users pay smaller, ongoing fees for a range of digital services across a wider range of products. These models seek to provide greater value to consumers through the provision of increased choice, accessibility and use via digital technologies. Alternatively, and in light of the

factors discussed above, it may be considered appropriate for the regulated population to incur the costs of accessing the standards.

Without prejudicing consultation, and therefore without the necessary context, the safeguards included in the legislation provide an appropriate balance of supporting industry's desire for existing standards to be incorporated and mandating processes to ensure any costs to industry or Government are considered. It is considered any potential regulatory costs associated with this approach would be minimal compared to the costs associated with generating new standards despite existing, and widely accepted, standards.

Committee comment

2.179 The committee thanks the minister for this response.

2.180 In relation to the question of whether to apply standards as in force or existing from time to time, the committee notes the minister's advice that the underlying objective of new Part 2A of the Act is to ensure current and appropriate risk management programs are in place for critical infrastructure assets, and therefore it is vital that any requirements for such programs adapt over time to changing security contexts.

2.181 The committee also notes the minister's advice that the provision recognises that these standards are regularly reviewed and updated to keep pace with emerging technology, risks and threats, ensuring that the regulatory framework remains up to date and fit for purpose. Further, the committee notes the minister's advice that a requirement to update the rules every time a specified standard is changed would be administratively burdensome and would likely result in the law falling behind industry best practice which is at odds with the principles underpinning the reforms.

2.182 In relation to whether the standards incorporated into the rules will be made freely available to all persons interested in the law, the committee notes the minister's advice that proposed paragraphs 30AH(6)(b) and (c) of the Act require the minister to have regard to the costs that are likely to be incurred by responsible entities in complying with rules specifying requirements for a critical infrastructure risk management program, and the reasonableness and proportionality of the requirements.

2.183 In addition, the committee notes the minister's advice that the government has committed to undertaking regulatory impact statements for rules made for the purposes of new section 30AH of the Act.

2.184 Finally, the committee notes the minister's advice that the minister or relevant Commonwealth regulator may consider entering into an agreement with Standards Australia to facilitate relevant standards being made available at no direct cost to users for example, on request or via the portal on the Department's Critical Infrastructure

Centre's website. While noting this advice, the committee also notes that the minister's response focuses on the access to standards by users or entities under the scheme, which may exclude access by other persons who are not subject to the legislation, but nevertheless are interested in its operation, for example persons with an academic interest in this area.

2.185 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.186 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of incorporating standards into the rules as in force from time to time and any potential costs associated with accessing standards.

Broad delegation of administrative power [59]

2.187 In *Scrutiny Digest 2 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to confer investigatory powers on any 'other person' to assist an authorised person; and
- whether the bill can be amended to require that any person assisting an authorised person have the expertise appropriate to the function or power being carried out.[60]

Minister's response

2.188 The minister advised:

> Sections 23 and 53 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) provide that an authorised person may be assisted by other persons in exercising powers or performing functions or duties under Part 2 (monitoring powers) and Part 3 (investigation powers), respectively, if that assistance is necessary and reasonable, and another Act empowers the authorised person to be assisted. A person assisting may exercise these powers or perform these functions for the purposes of

---

59 Schedule 1, item 57. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

60 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 24-25.

assisting an authorised person to monitor a provision or to investigate the contravention of a civil penalty or an offence provision. New subsections 49A(14) and 49B(12) of the Act respectively empower an authorised person to be assisted by other persons.

The Committee has requested further advice as to:

- why it is considered necessary and appropriate to confer investigatory powers on any 'other person' to assist an authorised person; and
- whether the bill can be amended to require that any person assisting an authorised person have the expertise appropriate to the function or power being carried out.

The amendments to the Act in the Bill do not confer or delegate any investigatory powers to the 'person assisting'. Instead, under subsections 49A(14) and 496(12), an authorised person may be assisted by 'other persons', where necessary and reasonable, in that authorised person's exercise of investigatory powers.

These provisions are directly linked to the Regulatory Powers Act. As the Explanatory Memorandum for the Regulatory Powers (Standard Provisions) Bill 2014 explains, under paragraph 53(1)(a) of that Act, the role of a person assisting an authorised person is to undertake assistance tasks at the direction of an authorised person. Further, an 'other person' can only assist if it is necessary and reasonable to do so. The assisting person must act under the direction of the authorised person and any valid actions of the person assisting will be taken to be those of the authorised person.

The intent of these provisions is that a person assisting an authorised person does not themselves exercise any powers or functions delegated or conferred under the Act but operates under direction and it is the authorised person who would be exercising the investigatory powers under the Regulatory Powers Act. Under the Act, as amended by the Bill, it is considered necessary and reasonable for an authorised person exercising monitoring and investigation powers to be assisted by another person, for example, for administrative or practical assistance with evidential material on the premises. It is envisaged that a person assisting an authorised person would be undertaking (at the direction of an authorised person) tasks such as assisting to make copies of voluminous records or documents and carrying evidential material seized from the premises.

Given a 'person assisting' does not exercise any delegated or conferred powers or functions under the Act, it is not necessary for the Act (as amended by the Bill) to require that a person assisting have the appropriate knowledge and expertise.

Committee comment

2.189 The committee thanks the minister for this response. The committee notes the minister's advice that, under proposed sections 49A and 49B, an 'other person' can only assist an authorised person if it is necessary and reasonable to do so. The assisting person must act under the direction of the authorised person and any valid actions of the person assisting will be taken to be those of the authorised person.

2.190 The committee also notes the minister's advice that the intent of these provisions is that a person assisting an authorised person does not themselves exercise any powers or functions delegated or conferred under the Act but operates under direction and it is the authorised person who would be exercising the investigatory powers under the Regulatory Powers Act.

2.191 Finally, the committee notes the minister's advice that it is considered necessary and reasonable for an authorised person exercising monitoring and investigation powers to be assisted by another person, for example, for administrative or practical assistance with evidential material on the premises; and that it is envisaged that a person assisting an authorised person would be undertaking (at the direction of an authorised person) tasks such as assisting to make copies of voluminous records or documents and carrying evidential material seized from the premises.

2.192 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020

Purpose	This bill seeks to amend the *Surveillance Devices Act 2004*, the *Crimes Act 1914* and associated legislation to introduce new law enforcement powers to enhance the ability of the Australian Federal Police and the Australian Criminal Intelligence Commission to combat online serious crime
Portfolio	Home Affairs
Introduced	House of Representatives on 3 December 2020
Bill status	Before the House of Representatives

Coercive powers – Authorisation of coercive powers
Privacy[61]

2.194 In *Scrutiny Digest 1 of 2021* the committee requested the minister's advice as to:

- why the categories of persons eligible to issue data disruption and network activity warrants should not be limited to persons who hold judicial office;[62]
- why it is considered necessary and appropriate to issue each type of warrant for an initial 90-day period as opposed to a shorter period; [63]
- why the bill does not require, in relation to all warrants, that the issuing authority must consider whether the warrant is proportionate having regard to the nature and gravity of the offence and the likely value of the information or evidence sought to be obtained, as well as the extent of possible interference with the privacy of third parties;[64] and

61 Schedules 1 to 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

62 Schedule 1, item 13, proposed subsection 27KA(2) and Schedule 2, item 9, proposed subsection 27KK(2) *Surveillance Devices Act 2004*.

63 Schedule 1, item 13, proposed subsection 27KD(2) and Schedule 2, item 9, proposed subsection 27KN(2) *Surveillance Devices Act 2004*, and Schedule 3, item 4, proposed subsection 3ZZUQ(3) *Crimes Act 1914*.

64 Schedule 1, item 13, proposed subsection 27KC(2); Schedule 2, item 9, proposed subsection 27KM(2) *Surveillance Devices Act 2004*; Schedule 3, item 4, proposed subsection 3ZZUP(2) *Crimes Act 1914*.

- the nature of the defects or irregularities that will not lead to the invalidity of actions done under a purported warrant or emergency authorisation.[6566]

Minister's response

2.195 The minister advised:

> *Why the categories of persons eligible to issue data disruption and network activity warrants should not be limited to persons who hold judicial office*
>
> In the Bill, the power to issue data disruption warrants and network activity warrants is conferred on an eligible judge or a nominated Administrative Appeals Tribunal (AAT) member. These issuing authorities may grant the warrant if (amongst other things) they are satisfied that there are reasonable grounds for the suspicion founding the application for the warrant. This independent scrutiny of warrant applications is an important mechanism in ensuring that only warrants that are reasonable and proportionate are issued.
>
> *AAT members have the experience and skills necessary to issue data disruption warrants and network activity warrants*
>
> Both AAT members and judges play critical roles as independent decision-makers in authorising investigatory powers in the current regimes in the *Surveillance Devices Act 2004* (SD Act), as well as in the *Telecommunications (Interception and Access) Act 1979* (TIA Act). Nominated AAT members issue surveillance device warrants and computer access warrants under the SD Act, and have played a key role in issuing interception under the TIA Act since 1998. The skills and experience of AAT members make them suitable to assess applications for data disruption warrants and network activity warrants, and whilst doing so, to make independent decisions on the compliance of those applications with the legal requirements in the Bill.
>
> To be nominated as an AAT member for the purposes of issuing warrants under the SD Act, a person must have been enrolled as a legal practitioner for at least five years. In accordance with the existing framework, the Bill recognises that the complex decision-making involved in authorising the new powers in the Bill requires the independence offered by the AAT members and judges who already issue other warrants under those Acts and have the skills and experience to do so.
>
> *AAT members are independent decision-makers*
>
> The power to issue warrants is conferred on issuing authorities in their personal capacity (*persona designata*) as a means of ensuring accountability

65 Schedule 1, items 48 and 49, Schedule 2, item 3, Schedule 3, item 4, proposed subsection 3ZZVY(2).

66 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 29-33.

in the course of a sensitive investigation or law enforcement procedure. *Persona designata* functions are not an exercise of the formal judicial or administrative powers of a court or tribunal. Rather these issuing authorities are acting as independent decision-makers.

The AAT is not independent of government in the same way that the judiciary is the subject of a separation of powers (though some members of the AAT are also judges). Rather, the AAT's independence arises from its role in reviewing the merits of administrative decisions made under Commonwealth laws.

The independence of the AAT is also demonstrated in the process for the termination of a member's appointment. AAT members who are not judges can only have their appointment terminated by the Governor-General, and this termination can only be made on specific grounds, such as proven misbehaviour or the inability to perform duties.

The independence of AAT members exercising *persona designata* functions is strongly safeguarded. AAT members are afforded the same protection and immunity as a Justice of the High Court of Australia, and they must provide written consent prior to being authorised to perform *persona designata* functions. Consent also serves to protect an AAT members' independence and autonomy to decide whether or not to exercise *persona designata* powers.

Review of administrative decisions

In the unlikely event of unlawful decision-making, Australian courts will retain their jurisdiction to review administrative decisions, including any decision to issue a warrant, through the original jurisdiction of the High Court of Australia and in the Federal Court of Australia by operation of subsection 398(1) of the *Judiciary Act 1903*, or under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). There is an error in the human rights compatibility statement in the explanatory memorandum supporting the Bill, which states that the Bill excludes judicial review under the ADJR Act. This is incorrect, and the human rights compatibility statement will be amended accordingly. These judicial review mechanisms ensure that an affected person has an avenue to challenge the decisions to issue warrants made by any issuing authorities, including a nominated AAT member.

As such, the Government maintains that the persons eligible to issue data disruption warrants and network activity warrants should not be limited to only judicial officers, but should include nominated AAT members, in line with the existing legislation.

Why it is considered necessary and appropriate to issue each type of warrant for an initial 90-day period as opposed to a shorter period

Each of the three new warrants proposed in the Bill can be issued for an initial period of up to 90 days. As stated in the explanatory memorandum,

this is in line with the period for which surveillance device warrants and computer access warrants can be issued in the SD Act. Maintaining consistency in the length of time warrants can be issued allows warrants to be sought in conjunction with one another, and executed during the course of the same investigation or operation.

Importantly, this does not mean that all warrants will be issued for a period of 90 days. The period for which a warrant is in force will be determined by the issuing authority on a case-by-case basis depending on the circumstances of the application.

Data disruption warrants

As noted by the Committee, the explanatory memorandum states that an initial period of up to 90 days for execution of a data disruption warrant is intended to allow for complex, long-term operations. As with all warrants in the SD Act, as well as the other warrants proposed by this Bill, investigations and operations that utilise data disruption warrants will often involve multiple targets that are moving across computer networks, whose identities and locations may be obfuscated by the use of anonymising technologies. The disruption of data must be carried out in a targeted manner where any damage or loss of data is proportionate and necessary, an assessment of which takes agencies time to consider. In addition, as with the other warrants in the Bill, data disruption warrants are necessarily covert. This means that agencies need to assess the best time and methods to undertake the activities authorised in the warrant in accordance with circumstances that allow the concealment of these activities.

Network activity warrants

As an intelligence collection tool, it is appropriate for network activity warrants to be in force for an initial period of up to 90 days. The purpose of these warrants is to target criminal networks of individuals that may be comprised of a large number of unknown individuals. Criminal networks, particularly organised crime groups, will often use the dark web and anonymising communications platforms to evade law enforcement surveillance. Moreover, the composition of the network is likely to change from time to time as new participants enter the group and use multiple devices to conduct their criminal activities.

In order to infiltrate these complex and evolving networks, law enforcement will be required to deploy computer access techniques which may take a significant period of time to execute successfully. A maximum period of less than 90 days would, in many cases, not provide law enforcement with sufficient time to obtain access to the computers targeted by the warrant, and collect intelligence on the individuals using those devices, and ensure the operation remains covert.

Account takeover warrants

As with data disruption warrants and network activity warrants, investigations in which account takeovers will be used will often be complex and lengthy operations, requiring covert infiltrations. For example, the target accounts may belong to high-level forum members who may have hundreds of contacts within forums, which means that there would be multiple avenues of inquiry to pursue during the course of an account takeover.

Moreover, account takeover warrants are designed to be used in conjunction with controlled operations under Part IAB of the Crimes Act. The account takeover warrant would authorise the taking control of the person's account and locking that person out of the account. Any other activities, that would involve engaging in controlled conduct, would be performed under the accompanying controlled operation. Noting the high likelihood that the two powers will be used in conjunction, it is important that the time period for which agencies are authorised to conduct the authorised activities is aligned. An application for a controlled operation can also seek for the authority to be in place for a period of up to three months.

Why the bill does not require, in relation to all warrants, that the issuing authority must consider whether the warrant is proportionate having regard to the nature and gravity of the offence and the likely value of the information or evidence sought to be obtained, as well as the extent of possible interference with the privacy of third parties

In deciding whether to issue each of the warrants in the Bill, there are certain matters which the issuing authority must take into account. These considerations have been specifically designed with regard to the objective and contemplated operation of each of the warrants.

Proportionality test for data disruption warrants

In order to issue a data disruption warrant, the Judge or AAT member must be satisfied that, amongst other things, the disruption of data authorised by the warrant is justifiable and proportionate with regard to the offences targeted. This is to ensure that in considering whether to issue the warrant, the issuing authority weighs up the benefits of targeting the particular offences that the proposed data disruption seeks to frustrate, with the likely effect that data disruption could have beyond frustrating those offences. Satisfaction that the execution of the warrant is justifiable assists in satisfying the requirement under international human rights law that the limitation on the right to privacy is reasonable and not arbitrary.

A specific requirement that the issuing authority consider the privacy of third parties is not appropriate in the context of data disruption warrants, even though it is appropriate in the context of other electronic surveillance warrants the purpose of which is the gathering of evidence. Data disruption warrants are for the purpose of frustrating criminal activity, including

preventing further harm to victims, stopping criminal offences occurring, and re-directing activity so that agencies can take appropriate action. It will not always be possible, at the time of applying for the warrant, for an agency to estimate the full extent to which activity required to undertake data disruption is likely to have an impact on third parties. In light of this, rather than providing for an express privacy consideration the Bill contains a mandatory condition that the issue of a data disruption warrant be justified and proportionate having regard to the offences targeted. To further ensure that these warrants are proportionate to the activity they authorise, the issuing authority must consider the existence of any alternative means of frustrating the criminal activity.

Proportionality test for network activity warrants

In order to issue a network activity warrant, the Judge or AAT member must consider whether the activities authorised by the warrant are proportionate to the likely value of intelligence to be collected, as well as the extent to which the warrant is likely to result in access to data of persons lawfully using a computer. The purpose of network activity warrants is to allow the AFP and the ACIC to target the activities of criminal networks to discover the scope of criminal offending and the identities of the people involved. Due to the complexity of the threats posed by cyber-enabled crime, it is unlikely that agencies will know the identity or location of the offenders involved in the commission of offences to which the network activity warrant is related.

Network activity warrants are an intelligence collection tool and the information collected cannot be used in evidence in criminal proceedings. As such, the considerations for issue of a network activity warrant differ from those in relation to warrants that are issued for the purposes of gathering evidence (for example, computer access warrants in the SD Act). Intelligence collection by its nature is less targeted than evidence-gathering, and will necessarily involve a larger scope for its target. Using a network activity warrant, the AFP or ACIC may need to collect intelligence on a large number of unknown devices, the users and owners of which are not able to be identified or located, before seeking more targeted warrants that authorise gathering evidence (such as computer access warrants under the SD Act). It will be difficult, if not impossible, for an issuing authority to assess the privacy implications for multiple unknown persons to a sufficient degree to meet the threshold of a specific requirement to consider the privacy of third parties. In any event, the issuing authority must still consider the extent to which the execution of a network activity warrant is likely to result in access to data of persons who are lawfully using a computer. The proportionality test requires that the issuing authority weigh up the anticipated value of the intelligence sought with the activities authorised by the warrant. This ensures that the issuing authority must balance the utility of the network activity warrant in obtaining information about the criminal network against the scale, scope and intrusiveness of the activities authorised by that warrant. To further ensure that these warrants are

proportionate to the activity they authorise, the issuing authority must consider the existing of any alternative or less intrusive means of obtaining the information sought.

Privacy consideration for account takeover warrants

For account takeover warrants, the magistrate must consider the extent to which the privacy of any person is likely to be affected. An explicit privacy consideration is appropriate for the issue of account takeover warrants, as it is a targeted evidence gathering power. This is consistent with the approach for existing electronic surveillance powers, such as those in the SD Act.

When deciding whether to issue the warrant, the magistrate must also have regard to the nature and gravity of the alleged offence which founded the application for the warrant. This may involve consideration of the seriousness of the offence and the scale at which the offence has been, or will be, committed.

Consideration of this matter ensures that the magistrate will be able to assess the reasonableness and proportionality of executing the warrant in the circumstances. If the offence to which the warrant is sought is not sufficiently serious to justify the conduct of an account takeover warrant and its impact on privacy, the magistrate may decide not to issue to warrant.

The nature of the defects or irregularities that will not lead to the invalidity of actions done under a purported warrant or emergency authorisation

The Bill provides that where information is purportedly obtained under a warrant and there is a defect or irregularity in relation to the warrant, then obtaining the information is taken to be valid if, but for the defect or irregularity, the warrant would be sufficient authority for obtaining the information. These are proposed amendments to existing section 65 of the SD Act, and proposed new section 3ZZVY of the Crimes Act.

A defect or irregularity in relation to a warrant is a minor error in the warrant. Section 65 of the SD Act and proposed new section 3ZZVY of the Crimes Act do not apply to substantial defects that go to the operation, extent or effect of the warrant. A defect or irregularity in this context could not be one that would cause the warrant to operate beyond the scope of what is authorised by the legislation.

The intent of these amendments is not to undermine the oversight and scrutiny of warrant applications, by allowing substantially defective or irregular warrants to remain valid. Rather, these amendments are intended to minimise lawfully obtained information being deemed invalid or unusable solely on the basis of a minor defect or irregularity in an otherwise valid warrant. Some examples of a defect or irregularity in the warrant may include a typographical error, misprint or minor damage to a written form warrant. Such defects or irregularities are minor, and would not affect the warrant's intended operation.

Committee comment

2.196 The committee thanks the minister for this response.

Why the categories of persons eligible to issue data disruption and network activity warrants should not be limited to persons who hold judicial office

2.197 The committee notes the minister's advice that nominated Administrative Appeals Tribunal (AAT) members issue various existing warrants under the *Surveillance Devices Act 2004* and *Telecommunications (Interception and Access) Act 1979*. The minister advised that the skills and experience of AAT members make them suitable to assess applications for data disruption and network activity warrants, and also advised that the bill recognises that the complex decision-making involved in authorising the new powers requires the independence offered by the AAT members and judges who already issue warrants under the above Acts and have the skills and experience to do so.

2.198 The minister further emphasised the independence of AAT members acting as decision-makers in this context, and the availability of judicial review in the event of unlawful decision making to issue a warrant.

2.199 While noting this advice, the committee notes that it has previously raised concerns with regard to AAT members issuing computer access warrants.[67] In light of the extensive personal information of persons including innocent third parties that may be covertly accessed, copied, modified or deleted under these warrants, and the complexity of the tests for assessing proportionality in relation to each warrant, the committee reiterates its long standing preference that the power to issue warrants authorising the use of coercive or intrusive powers should only be conferred on judicial officers.

2.200 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of specifying non-judicial office holders as being eligible to issue data disruption and network activity warrants.

Why it is considered necessary and appropriate to issue each type of warrant for an initial 90-day period as opposed to a shorter period

2.201 The committee notes the minister's advice that the initial 90-day period for which a warrant can be issued is in line with the period for which surveillance device warrants and computer access warrants can be issued in the *Surveillance Devices Act 2004*. The minister advised that maintaining consistency in the length of time warrants can be issued allows warrants to be sought in conjunction with one another, and executed during the course of the same investigation or operation.

67 See *Scrutiny Digest 14 of 2018*, p. 55, in relation to the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018.

2.202 The committee also notes the minister's advice that the period for which a warrant is in force will be determined by the issuing authority on a case-by-case basis depending on the circumstances of the application. The minister also provided information about the purposes and activities for each of the three warrants that may justify granting initial warrants for this significant period of time, including the complexity and length of the relevant law enforcement operations, and that data disruption warrants are designed to be used in conjunction with controlled operations under Part IAB of the Crimes Act.

2.203 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Why the bill does not require, in relation to all warrants, that the issuing authority must consider whether the warrant is proportionate having regard to the nature and gravity of the offence and the likely value of the information or evidence sought to be obtained, as well as the extent of possible interference with the privacy of third parties

2.205 The committee notes the minister's advice that the considerations required of the issuing authority been specifically designed with regard to the objective and contemplated operation of each of the warrants.

2.206 The minister advised that a specific requirement that the issuing authority consider the privacy of third parties is not appropriate in the context of data disruption warrants, as the purpose of these warrants is to frustrate criminal activity. The minister further advised that it will not always be possible at the time of applying for these warrants for an agency to estimate the full extent to which activity required to undertake data disruption is likely to have an impact on third parties. The committee notes the minister's advice that the mandatory conditions that the issue of a data disruption warrant be justifiable and proportionate having regard to the offences targeted, and that the issuing authority must consider the existence of any alternative means of frustrating the criminal activity, are safeguards to ensure that these warrants are proportionate to the activity they authorise.

2.207 In relation to network activity warrants, the minister advised that the considerations for issue of a network activity warrant differ from those in relation to warrants that are issued for the purposes of gathering evidence and that it is unlikely that agencies will know the identity or location of the persons involved in the activity to which the warrants are related.

2.208 The minister advised that it will be difficult, if not impossible, for an issuing authority to assess the privacy implications for multiple unknown persons to a sufficient degree to meet the threshold of a specific requirement to consider the privacy of third parties. Instead, the issuing authority will weigh the anticipated value of intelligence sought with the activities authorised by the warrant, including the scale, scope and intrusiveness of activities authorised by the warrant. The minister also emphasised that the issuing authority must also consider the existence of alternative or less intrusive means of obtaining the information sought.

2.209 While noting this advice, in light of the broad scope of offences that may be 'relevant offences' for the purposes of the warrants, and the absence of mandatory considerations in relation to privacy for data disruption and network activity warrants, from a scrutiny perspective, the committee remains concerned that the mandatory considerations as currently drafted are not sufficient to safeguard against undue trespass on an individual's privacy, especially that of third parties, in the execution of these warrants.

2.210 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of *the Acts Interpretation Act 1901*).

2.211 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not requiring, in relation to all warrants, that the issuing authority must consider the extent of possible interference with the privacy of any person.

The nature of the defects or irregularities that will not lead to the invalidity of actions done under a purported warrant or emergency authorisation

2.212 The minister advised that a defect or irregularity in this context could not be one that would cause the warrant to operate beyond the scope of what is authorised by the legislation. The committee further notes the examples provided in the minister's response including a typographical error, misprint or minor damage to a written form warrant.

2.213 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Coercive powers – Use of coercive powers without a warrant
Privacy[68]

2.215 The committee further requested the minister's detailed advice as to:

- why it is considered necessary and appropriate to enable law enforcement officers to disrupt or access data or takeover an online account without a warrant in certain emergency situations (noting the coercive and intrusive nature of these powers and the ability to seek a warrant via the telephone, fax or email);
- the appropriateness of retaining information obtained under an emergency authorisation that is subsequently not approved by a judge or AAT member; and
- the appropriateness of enabling law enforcement agencies to act to conceal any thing done under a warrant after the warrant has ceased to be in force, and whether the bill could be amended to provide a process for obtaining a separate concealment of access warrant if the original warrant has ceased to be in force. [69]

Minister's response

2.216 The minister advised:

> *Why it is considered necessary and appropriate to enable law enforcement officers to disrupt and access data or takeover an online account without a warrant in certain emergency situations (noting the coercive and intrusive nature of these powers and the ability to seek a warrant via the telephone, fax or email)*
>
> In emergency circumstances, the activities permitted by a data disruption warrant and an account takeover warrant can be authorised internally. Such authorisations are only available where (amongst other considerations) there is an imminent risk of serious violence to a person or substantial damage to property. The circumstances must be so serious, and the matter of such urgency, that disruption of data or account takeover activity is immediately necessary for dealing with that risk.
>
> The ability to disrupt data under a data disruption warrant, and the ability to take control of an account under an account takeover warrant in emergency situations is important for ensuring that the AFP and the ACIC will be able to respond to rapidly evolving and serious threats in a timely

68 Schedules 1 to 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

69 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 33-36.

and effective manner. Emergency authorisations are available only in the most extreme circumstances where it is not practicable to apply for a warrant, including applying for a warrant remotely or with an unsworn application. For this same reason, it is essential that applications for emergency authorisations can be made orally, in writing, or by telephone, fax, email or any other means of communication, as they are for situations in which officers need to be able to take immediate action.

Emergency authorisations do not amount to warrants being internally issued. Within 48 hours of an emergency authorisation being given, approval must then be sought by application to a Judge or AAT member (for data disruption) or a magistrate (for account takeovers). At this time, the issuing authority must take into account strict issuing criteria, such .as the nature and risk of serious violence to the person and the existence of alternative methods that could have helped to avoid the risk, as well as an assessment of whether or not it was practicable in the circumstances to apply for a warrant instead of an authorisation This provides independent scrutiny of decisions to authorise data disruption and account takeovers in emergency situations.

The use of emergency authorisations for covert investigatory activity is not new. In the SD Act, emergency authorisations have been available for the use of surveillance devices since 2004 (subsection 28(1) of the SD Act), and for access to data held in a computer since 2018 (subsection 28(1A) of the SD Act). In practice, emergency authorisations are utilised very rarely and only in the most serious of circumstances. For example, in the *Surveillance Devices Act 2004 Annual Report for 2019-20*, no law enforcement agencies made an emergency authorisation for the use of surveillance devices or to access to data held in a computer.

The availability of account takeover powers under an emergency authorisation is proportionate and necessary to ensure that these powers can be used where there is an imminent risk of serious violence to a person or substantial damage to property, and urgent action must be taken to deal with that risk.

Emergency authorisations are not available for the activities permitted by the network activity warrant noting the purpose of this warrant in gathering intelligence, rather than responding to time-critical situations.

The appropriateness of retaining information obtained under an emergency authorisation that is subsequently not approved by a judge or AAT member

The Bill provides that an eligible Judge or nominated AAT member (for data disruption, new subsection 358(4) of the SD Act), or magistrate (for taking control of an online account, new subsection 3ZZVC(4) in the Crimes Act) may order that any information obtained from or relating to the exercise of powers under an emergency authorisation, or any record of that information be dealt with in a manner specified in the order. However, the Judge, AAT member or magistrate may not order that such information be

destroyed. These provisions reflect existing subsections 35(6) and 35A(6) in the SD Act in relation to emergency authorisations for the use of surveillance devices and access to data held in a computer. As noted by the Committee, the Explanatory Memorandum states that this Bill provides that this information cannot be destroyed because it 'may still be required for a permitted purpose [under the Act] such as an investigation'. As referenced in the Explanatory Memorandum to the *Surveillance Devices Act 2004* (which introduced existing subsections 35(6)), an example of an investigation for which improperly obtained information should be able to be used, is an investigation into the improper surveillance itself. Further, it is important that information gathered under an emergency authorisation – including one that is not subsequently approved by a judge, AAT member or magistrate – is not destroyed, as destruction of that information may detract from effective oversight of agencies' use of the emergency authorisation powers.

Information gathered as part of an emergency authorisation (including one that is not subsequently approved) is considered 'protected information,' and is subject to strict use and disclosure provisions in both the SD Act (existing section 45) and Crimes Act (proposed new section 3ZZVH). Criminal liability is attached to the unauthorised use or disclosure of 'protected information ' and this is another means by which the privacy of individuals will be protected.

The appropriateness of enabling law enforcement agencies to act to conceal anything done under a warrant after the warrant has ceased to be in force, and whether the bill could be amended to provide a process for obtaining a separate concealment of access warrant if the original warrant has ceased to be in force

The Bill makes provision for the AFP and the ACIC to perform activities lo conceal any thing done under a data disruption warrant, a network activity warrant and an account takeover warrant. Concealment activities may be carried out at any time while the warrant is in force or within 28 days after the warrant ceases to be in force, or at the earliest time after that 28 day period at which it is reasonably practicable to carry out those concealment activities. A period of longer than 28 days would be required, for example, where a computer being accessed under a network activity warrant is moved by the target and the agency must wait for ii to be physically relocated and recovered.

Making provision for concealment activities allows an agency to prevent targets learning that they are under investigation and attempting to impact further efforts to gather evidence or intelligence about their activities. This is because undertaking surveillance activities under these warrants is likely to alter data, or leave traces of activity, on an electronic device or online account. This may allow targets to recognise the lawful intrusion by law enforcement agencies and effectively change the way they communicate for the purposes of evading detection. For example, recognition may lead

> to reverse engineering police capabilities and methodology leading to individuals avoiding using certain technologies or undertaking counter-surveillance activities.
>
> Accordingly, the concealment of the execution of the warrants in the Bill is vital to the effective exercise of powers and maintaining the covert nature of the investigation or operation. In particular, it is appropriate that concealment activities are able to occur without additional external approval as the concealment activities are incidental to the granting of the original warrant. In the absence of a clear authority to conceal access under warrant, there is significant risk to the exposure of sensitive technologies and methodologies, and to law enforcement outcomes were targets to be notified that a warrant was in force against them.
>
> Importantly, the measures are subject to limitations, safeguards and oversight mechanisms designed to ensure that concealment activities are only undertaken where reasonable, proportionate and necessary. For example, the AFP and the ACIC are required to notify the Inspector-General of Intelligence and Security (IGIS) that a thing was done to conceal access under a network activity warrant after the 28-day period following expiry of the warrant within 7 days after the thing was done (proposed section 49D of the SD Act).

Committee comment

2.217 The committee thanks the minister for this response.

Emergency authorisations

2.218 The committee notes the minister's advice that the circumstances in which an emergency authorisation may be issued, and the matter to which it relates, must be of a level of seriousness and urgency to necessitate immediate disruption of data or account takeover activity to deal with the risk. The minister also advised that a judge, AAT member or magistrate, in determining whether to approve an emergency authorisation, must take into account strict issuing criteria, including the existence of alternative methods that could have helped to avoid the risks and an assessment of whether or not it was practicable in the circumstances to apply for a warrant instead of an authorisation.

2.219 The committee also notes the minister's advice that emergency authorisations are currently available for the use of surveillance devices and access to data under the *Surveillance Devices Act 2004* (the Surveillance Devices Act), and that, in practice, emergency authorisations are very rarely utilised.

2.220 While noting this advice the committee does not consider the fact that emergency authorisations are available for other types of warrants under the Surveillance Devices Act is, of itself, sufficient justification for their use in the context of this bill.

2.221 The committee further notes the minister's advice that information gathered as part of an emergency authorisation, including one that is not subsequently approved, is considered 'protected information' and is subject to strict use and disclosure provisions. The minister also noted that an example of a permitted purpose for the use of information obtained under an emergency authorisation that is not subsequently approved would include an investigation into improper surveillance. The committee also notes the minister's advice that destruction of information gathered under an emergency authorisation that is not subsequently approved may detract from effective oversight of agencies' use of emergency authorisation powers.

2.222 While noting this advice, from a scrutiny perspective, the committee reiterates its concerns that data disruption and account takeover activities can involve significant coercive and intrusive powers, and that allowing a law enforcement agency to initially authorise its own actions under an emergency authorisation, even in circumstances where such an authorisation must be subsequently approved, has the potential to unduly trespass on an individual's privacy.

2.223 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.224 From a scrutiny perspective, the committee remains concerned about the proposal to allow a law enforcement agency to initially authorise its own use of significant coercive and intrusive powers under an emergency authorisation, even in circumstances where such an authorisation must be subsequently approved. The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the use of emergency authorisations to disrupt data or undertake account takeover activities.

Actions to conceal things done under warrants

2.225 The committee notes the minister's advice that making provision for concealment activities allows an agency to prevent targets learning that they are under investigation and attempting to impact further efforts to gather evidence or intelligence about their activities. The minister advised that it is appropriate that concealment activities are able to occur without additional external approval as the activities are incidental to the granting of the original warrant.

2.226 The committee further notes the minister's advice with regard to oversight mechanisms including that the AFP and ACIC are required to notify the Inspector-General of Intelligence and Security that a thing was done to conceal access under a network activity warrant after the 28-day period following the expiry of the warrant within 7 days after the thing was done. However, it does not appear that such a

safeguard applies in relation to activities to conceal things done under data disruption warrants or account takeover warrants.

2.227 From a scrutiny perspective, the committee remains concerned that the provisions authorising concealment activities allow significant coercive or intrusive actions to be undertaken which have not been directly authorised under an existing warrant, and which may be undertaken for an extended period of time following the expiration of a warrant.

2.228 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.229 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of enabling law enforcement agencies to undertake activities to conceal any thing done under a warrant after the warrant has ceased to be in force.

Coercive powers – Innocent third parties

Privacy[70]

2.230 The committee further requested the minister's detailed advice as to:

- the effect of Schedules 1–3 on the privacy rights of third parties and a detailed justification for the intrusion on those rights, in particular:
    - why proposed sections 27KE and 27KP do not specifically require the judge or nominated AAT member to consider the privacy implications for third parties of authorising access to a third party computer or communication in transit;[71]
    - why the requirement that an issuing authority be satisfied that an assistance order is justifiable and proportionate, having regard to the

70 Schedules 1 to 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

71 Schedule 1, item 13, proposed paragraph 27KE(5)(e), Schedule 2, item 9, proposed paragraph 27KP(5)(e) of the *Surveillance Devices Act 2004*.

offences to which it would relate, only applies to an assistance order with respect to data disruption warrants, and not to all warrants;[72] and

- whether the breadth of the definitions of 'electronically linked group of individuals' and 'criminal network of individuals' can be narrowed to reduce the potential for intrusion on the privacy rights of innocent third parties.[73, 74]

Minister's response

2.231 The minister advised:

> *The committee requests the minister's detailed advice as to the effect of Schedules 1-3 on the privacy rights of third parties and a detailed justification for the intrusion on those rights, in particular:*
>
> *(a) why proposed sections 27KE and 27KP do not specifically require the judge or nominated AAT member to consider the privacy implications for third parties of authorising access to a third party computer or communication in transit*
>
> There are certain activities which can be authorised by an issuing authority under a data disruption warrant or a network activity warrant which could potentially have an impact on the privacy of third parties. These activities include entering premises and accessing computers and communications in transit, as these could potentially be premises, computers and communications of third parties. Such activities, along with the others listed in sections 27KE (data disruption warrants) and 27KP (network activity warrants), are specifically listed in the legislation because they will often be essential tools in the execution of these warrants. No warrant can authorise activity beyond that which is listed unless it is reasonably incidental to carrying out those actions. Further protections have been inserted in subsections 27KE(7), 27KE(12) and 27KP(6) to ensure that data disruption warrants and network activity warrants cannot authorise other activities.
>
> To safeguard any potential impact on the privacy of third parties, the Bill requires that the issuing authority undertake a proportionality test before deciding to issue a data disruption warrant or network activity warrant. These considerations are described in further detail in earlier answer above at 1.109(c), but are also summarised below.
>
> *Data disruption warrants*

---

72 Schedule 1, item 47, proposed subsection 45B(2); Schedule 2, item 31, proposed subsection 64A(6A), *Surveillance Devices Act 2004*; Schedule 3, item 4, proposed section 3ZZVG of the *Crimes Act 1914*.

73 Schedule 2, items 3 and 8.

74 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 36-41.

In order to issue a data disruption warrant, the Judge or AAT member must be satisfied that the activities authorised by the warrant are justified and proportionate with regard to the offences targeted. This is to ensure that the use of these warrants is proportionate to the alleged or suspected offending in all circumstances. In making this determination, the issuing authority may wish to take into account, for example, the scope of the warrant in terms of how many people are affected, the exact nature of the potential intrusion on people's private information, and whether that intrusion is justified by the serious nature of the criminality being targeted. Whilst it may be necessary to access information or property belonging to third parties in order to disrupt data. this must be proportionate to the frustration of the offences targeted. There are also strong protections and safeguards in place to ensure that information is protected and only used appropriately.

Network activity warrants

For a network activity warrant, the Judge or AAT member must consider whether the activities authorised by the warrant are proportionate to the likely value of intelligence to be collected, as well as the extent to which the warrant is likely to result in access to data of persons lawfully using a computer. Whilst it may be necessary to access information or property belonging to third parties, this must be proportionate to the value of intelligence that is collected, and there are safeguards associated with network activity warrants to further protect information.

(b) why the requirement that the issuing authority be satisfied that an assistance order is justifiable and proportionate, having regard to the offences to which it would relate, only applies to an assistance order with respect to data disruption warrants, and not to all warrants

As the Committee notes, an eligible Judge or nominated AAT member must be satisfied that disruption of data held in a computer is justifiable and proportionate, having regard to the offences targeted, before granting an assistance order in support of a data disruption warrant. This is because the criterion upon which the granting of an assistance order is assessed reflects that of which the issuing authority must be satisfied when authorising the supporting warrant.

In order to issue a data disruption warrant, an eligible Judge or nominated AAT member must (amongst other things) be satisfied that there are reasonable grounds for the suspicion of the applicant that the disruption of data is likely to substantially assist in frustrating the commission of relevant offences. The eligible Judge or nominated AAT member must also be satisfied that the disruption of data authorised by the warrant is justifiable and proportionate, having regard to the offences targeted (subsection 27KC(1) of the SD Act).

These are similar matters to which an eligible Judge or nominated AAT member must be satisfied of when granting an assistance order in support

of a data disruption warrant (subsection 648(2) of the SD Act). Satisfaction of similar matters at the time of issuing the warrant and the granting of the assistance order ensures that any activity required by an assistance order does not extend beyond the scope of the underpinning warrant.

The same principles apply in relation to the granting of assistance orders supporting network activity warrants and account takeover warrants. Similar matters that must be satisfied at the time of issuing these warrants must again be satisfied at the granting of an assistance order.

In recognition of the impact on privacy of third parties, the issuing authority is required to have regard to certain specified matters when deciding whether to issue the warrant. For network activity warrants, this includes consideration of whether the activities authorised by the warrant are proportionate to the likely value of intelligence to be collected, as well as the extent to which the warrant is likely to result in access to data of persons lawfully using a computer. For account takeover warrants, this includes taking into account the extent to which the privacy of any person is likely to be affected.

Consideration of these matters will inform the issuing authority's decisions to issue warrants, including his or her satisfaction of the matters particular to that warrant and, in turn, inform decisions about whether to grant an assistance order. Ensuring that the issuing authority is required to be satisfied of justifiability and proportionality before a warrant can be issued or assistance order granted is intended to safeguard against any undue impact on privacy.

(c) Whether the breadth of the definitions of 'electronically linked group of individuals' and 'criminal network of individuals' can be narrowed to reduce the potential intrusion on the privacy rights of innocent third parties

The purpose of network activity warrants is to enable the AFP and the ACIC to better target criminal groups operating online. Network activity warrants will be an essential tool for collecting information about the constitution and methodologies of criminal organisations, and people participating in criminal groups. A key consideration in applying for a network activity warrant under new section 27KK is suspicion on reasonable grounds that a group of individuals is a criminal network of individuals.

A criminal network of individuals is a group of individuals who are electronically linked. An electronically linked group of individuals may be using a shared internet service in common, or may have established their own secure communications networks in order to communicate and conduct their activities. Whilst the number and identity of the group of individuals may not be known, there must be a link between two or more people who meet or communicate electronically. It is essential that the concept of 'electronically linked group of individuals' is broad enough to encapsulate individuals who do not identify as being in a criminal organisation or group, but who are nevertheless operating in a network. An

'electronic link' also accounts for the fact that people may not have a personal relationship with an individual who they are nonetheless communicating with. They do not have to have knowledge of each other's activities. This definition is deliberately broad to capture groups of individuals who, for example, are accessing an illicit dark web marketplace where they are unlikely to consider themselves as members, but rather customers, such as people who are paying to view tine live streaming of child exploitation material.

In order for an electronically linked group of individuals to constitute a criminal network of individuals, one or more individuals in the group must have engaged, are engaging, or are likely to engage in conduct that constitutes a relevant offence, or have facilitated, are facilitating, or are likely to facilitate, another person's engagement in conduct that constitutes a relevant offence. The person whose engagement in criminal activity was facilitated by an individual in the group, may or may not be an individual in the group themselves. As noted by the Committee, there is no requirement that every individual who is part of the criminal network is himself or herself committing, or intending to commit, a relevant offence. This deliberately captures those individuals who are, knowingly or unknowingly, facilitating engagement by another person in conduct constituting a relevant offence. It is important that the concept of 'criminal network of individuals' is broad enough to cover unwitting participants in criminal activity, so that this crucial intelligence can still be collected. For example, a criminal network of individuals may include an individual who owns an IT platform that is, without the knowledge of that person, being exploited by a criminal organisation for illegal purposes.

Committee comment

2.232 The committee thanks the minister for this response.

Access to third party computers and communications in transit

2.233 The committee notes the minister's advice that, to safeguard any potential impact on the privacy of third parties, the bill requires that an issuing authority undertake a proportionality test before deciding to issue a data disruption warrant or network activity warrant. In relation to data disruption warrants, the minister advised that, in making a determination of whether activities authorised by a warrant are justified and proportionate with regard to the offences targeted, the issuing authority *may wish* to take into account matters relevant to the scope of people affected and the nature of intrusion into people's private information.

2.234 In relation to network activity warrants, the minister advised that access to information or property belonging to third parties in order to carry out the warrant must be proportionate to the likely value of intelligence that is intended to be collected.

2.235 While noting this advice, from a scrutiny perspective, the committee remains concerned that the coercive search powers available to law enforcement under data disruption and network activity warrants authorise the collection of potentially substantial amounts of personal information of persons who are not the subject of the warrant, such that the execution of these warrants may unduly trespass on the privacy of third parties.

2.236 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not specifically requiring the judge or nominated AAT member to consider the privacy implications for third parties when authorising access to a third party computer or communication in transit under a data disruption warrant or network activity warrant.

Compelling third parties to provide information

2.237 The committee notes the minister's advice that the criteria upon which the granting of an assistance order is assessed reflects that of which the issuing authority must be satisfied when authorising the supporting warrant. The minister advised that satisfaction of similar matters at the time of issuing the warrant and the granting of the assistance order ensures that any activity required by an assistance order does not extend beyond the scope of the underpinning warrant, and that ensuring that the issuing authority is required to be satisfied of justifiability and proportionality before a warrant can be issued or assistance order granted is intended to safeguard against any undue impact on privacy.

2.238 While noting this advice, the committee notes that the issuing of an assistance order has the potential to seriously impact the privacy of innocent third parties in ways that may be substantially more significant than that imposed by the issuing of the initial warrant. Of particular concern to the committee is the imposition of significant penalties, including imprisonment, for non-compliance with an assistance order.

2.239 The committee reiterates its scrutiny concerns that the provisions could result in a person not suspected of any wrongdoing being compelled to provide information which could lead to access to their own personal information. The committee further reiterates that its scrutiny concerns are heightened by the ability for assistance orders to be made in relation to emergency authorisations for disruption of data or account takeover activities.

2.240 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.241 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the grounds for consideration for granting assistance orders in relation to each of the proposed

warrants, noting that the granting of an assistance order could result in a person not suspected of any wrongdoing being compelled to provide information which could lead to access to their own personal information.

Broad definition of 'electronically linked group of individuals' and 'criminal network of individuals'

2.242 The committee notes the minister's advice that it is essential that the concept of 'electronically linked group of individuals' is broad enough to encapsulate individuals who do not identify as being in a criminal organisation or group, but who are nevertheless operating in a network, and that an 'electronic link' accounts for the fact that people may not have a personal relationship with an individual who they are communicating with, and do not have to have knowledge of each other's activities.

2.243 The minister further advised that the concept of criminal network of individuals deliberately captures individuals who are, knowingly or unknowingly, facilitating engagement by another person in conduct constituting a relevant offence.

2.244 While noting this advice, the committee notes that the scope of 'relevant offence' for network activity warrants is also very broad, capturing a broad list of offences including offences under various Acts, and which may be expanded by regulations.[75] From a scrutiny perspective, the committee remains concerned that the combined effect of these broad definitions may create a potentially unlimited class of persons who may be subject to surveillance under a network activity warrant, or be affected as a third party connected to a person whose information is being accessed under a network activity warrant.

2.245 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.246 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the broad definitions of 'electronically linked group of individuals' and 'criminal network of individuals'.

---

75 See *Surveillance Devices Act 2004*, section 6, paragraph (e) of the definition of ***relevant offence*** and Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, p. 32.

Coercive powers
Privacy – Use of information obtained through warrant processes[76]

2.247 The committee further requested the minister's detailed advice as to:

- whether all of the exceptions to the restrictions on the use, recording or disclosure of protected information obtained under the warrants are appropriate and whether any exceptions are drafted in broader terms than is strictly necessary; and
- why the bill does not require review of the continued need for the retention of records or reports comprising protected information on a more regular basis than a period of five years. [77]

Minister's response

2.248 The minister advised:

> *Whether all of the exceptions to the restrictions on the use, recording or disclosure of protected information obtained under the warrants are appropriate and whether any exceptions are drafted in broader terms than is strictly necessary*
>
> All information collected under the warrants in this Bill is strictly protected. Information is broadly prohibited from being used or disclosed. Where there are exceptions to that prohibition, those exceptions are necessary either to enable the warrants to be effective, or to enable strong oversight and accountability mechanisms, or to enable proper and appropriate judicial processes to be carried out, or to enable information sharing necessary for agencies to carry out their functions or in emergency circumstances. The ability to use and disclose information has been designed to be limited to only that which is necessary.
>
> *Prohibition and offences*
>
> The Bill classifies data disruption warrant information as 'protected information' under the existing provisions in the SD Act, which currently govern information collected under other warrants in that Act, for example, computer access warrants.
>
> Information gathered under an account takeover warrant is also classified as 'protected information'. This is a new concept in the Crimes Act introduced by the Bill, borrowing from the SD Act so that account takeover warrant information is governed by the same prohibitions and exceptions

76 Schedules 1 to 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

77 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 41-43.

as most information under the SD Act, including data disruption warrant information.

There is also a prohibition on using and disclosing 'protected network activity warrant information', a new category of protected information introduced by the Bill into the SD Act. Protected network activity warrant information is information obtained under, or relating to, a network activity warrant including information obtained from the use of a surveillance device under a network activity warrant but not including information obtained through interception. This also includes any information that is likely to enable the identification of the criminal network of individuals, individuals in that network, computers used by that network, or premises at which computers used by that network are located. Information that was obtained in contravention of a requirement for a network activity warrant is also captured by this definition.

A person commits an offence if he or she uses, records, communicates or publishes protected information or protected network activity warrant information except in very limited circumstances. The Bill also provides for an aggravated offence if this disclosure endangers the health or safety or any person or prejudices the effective conduct of an investigation.

Exceptions – data disruption warrants and account takeover warrants

The exceptions to the prohibition on using, recording, communicating or publishing information collected under a data disruption warrant and under an account takeover warrant are the same as exceptions in the SD Act that relate to existing warrants, such as computer access warrants.

It is permitted to use, record, communicate, publish, and admit in evidence, protected information where necessary for the investigation of a relevant offence, a relevant proceeding, or the making of a decision as to whether or not to bring a prosecution for a relevant offence (amongst other limited purposes). It is also permitted to use, record, communicate or publish protected information where that information has already been disclosed in proceedings in open court lawfully, and where the communication of the information is necessary to help prevent or reduce the risk of serious harm.

Information collected under each of these warrants may also be shared with an intelligence agency if the information relates to a matter that is relevant to the agency's functions, and with a foreign country, the International Criminal Court, or a War Crimes Tribunal under international assistance authorisations, and also where authorised by the *Mutual Assistance in Criminal Matters Act 1987* or the *International Criminal Court Act 2002*. It is essential that this information sharing is permitted, in order to facilitate investigations that involve other Australian agencies (for example conducting joint operations) and foreign jurisdictions.

Information may also be shared with the Ombudsman and the IGIS, and between those agencies to allow them to fulfil their oversight responsibilities in relation to the powers in the Bill.

Exceptions - network activity warrants

The exceptions to the general prohibition on using and disclosing protected network activity warrant information are configured differently to those relating to data disruption warrants and account takeover warrants. This is because, as network activity warrants are for intelligence purposes, they cannot be used to gather evidence in investigations, and the information collected generally cannot be adduced in evidence in a criminal proceeding.

Protected network activity warrant information may be used or disclosed if necessary for collecting, correlating, analysing or disseminating, or the making of reports in relation to, criminal intelligence in the performance of the legislative functions of the AFP or the ACIC. The information can also be the subject of derivative use allowing it to be cited in an affidavit on application for another warrant (which will themselves contain protections on information gathered). This will assist in ensuring that network activity warrants can be useful in furthering investigations into criminal conduct made under subsequent warrants.

Protected network activity warrant information cannot be used in evidence in criminal proceedings, other than for a contravention of the secrecy provisions that apply to this intelligence. This is important for ensuring that where a person has unlawfully used or disclosed this information, he or she may be effectively investigated and prosecuted for the offence. The information may also be disclosed for the purposes of the admission of evidence in a proceeding that is not a criminal proceeding. This is intended to allow protected network activity warrant information to be used in other proceedings, such as those that question the validity of the warrant. Therefore, if a case is brought to challenge the decision to issue a warrant, there will be evidence which can be validly drawn upon. These exceptions are intended to protect the rights of persons who are the subject of, or whose information has been collected under, a network activity warrant.

The ability to share information obtained under a network activity warrant with ASIO or an intelligence agency is intended to facilitate joint operations between the AFP and the ACIC and other members of the National Intelligence Community. These agencies currently conduct complex and interrelated intelligence operations, and may need to share information to support activities within their respective functions, in particular those in relation to safeguarding national security. For example, information collected under a network activity warrant about a terrorist organisation may be shared with ASIO if related to ASIO's functions. Information held by ASIO and intelligence agencies, including information obtained under a network activity warrant that is then communicated to those agencies, is protected by strict use and disclosure provisions in the *Australian Security Intelligence Organisation Act 1979* and *Intelligence Services Act 2001*.

To ensure compliance with reporting and record-keeping requirements, the Bill provides that protected network activity warrant information may be used or disclosed for the purpose of keeping records and making reports by

the AFP and the ACIC in accordance with the obligations imposed by the Bill. Information may also be shared with the Ombudsman and the IGIS, and between those agencies to allow them to fulfil their oversight responsibilities in relation to the powers in the Bill. These exceptions are important to facilitate effective oversight of the AFP and the ACIC and protect the rights of persons who are the subject of, or whose information has been collected under, a network activity warrant. Information held by the Ombudsman and IGIS, including information obtained under a network activity warrant that is then communicated to those bodies, is protected by strict use and disclosure provisions in the *Ombudsman Act 1976* and *Inspector-General of Intelligence and Security Act 1986*.

Why the bill does not require review of the continued need for the retention of records or reports comprising protected information on a more regular basis than a period of five years

Records comprising protected information in the Bill must be destroyed as soon as practicable if the material is no longer required, and at most within five years of the material no longer being required (unless a relevant officer certifies certain matters that go to the need to keep the material for ongoing activity). As noted by the Committee, the chief officer of the AFP or the ACIC must ensure that information obtained under each of these warrants is kept in a secure place that is not accessible to people who are not entitled to deal with the record or report. This is consistent with existing record-keeping and destruction obligations in relation to surveillance device warrants and computer access warrants in the SD Act.

As with information collected under existing warrants in the SD Act, the ability to retain information for five years reflects the fact that some investigations and operations are complex and run over a long period of time. Requiring the security and destruction of records ensures that the private data of individuals accessed under a warrant is only handled by those with a legitimate need for access, and is not kept in perpetuity where there is not a legitimate reason for doing so. The Ombudsman and IGIS are empowered to assess agencies' compliance with record-keeping and destruction requirements as part of their oversight of powers in the Bill.

Committee comment

2.249 The committee thanks the minister for this response.

Exceptions to prohibitions on use of information

2.250 The committee notes the minister's advice that where there are exceptions to the broad prohibitions on use or disclosure of information collected under warrants in the bill, these exceptions are necessary to enable to warrants to be effective, to enable strong oversight and accountability mechanisms, to enable proper and appropriate judicial processes to be carried out, or to enable information sharing necessary for agencies to carry out their functions or in emergency circumstances. The minister

advised that the ability to use and disclose this information has been designed to be limited to only that which is necessary.

2.251 The committee also notes the minister's advice in relation to the various exceptions for use of information obtained under data disruption and account takeover warrants, including that these are the same as exceptions in the *Surveillance Devices Act 2004* that relate to existing warrants.

2.252 The committee also notes that information collected under these warrants may be shared with a foreign country, specified international bodies, and also where authorised by the *Mutual Assistance in Criminal Matters Act 1987*. The minister advised that it is essential that this information sharing is permitted in order to facilitate investigations that involve other Australian agencies and foreign jurisdictions. While noting this advice, the sharing of sensitive personal information with foreign countries may raise scrutiny concerns where there are no requirements that the foreign countries receiving this information have the same rule of law protections in place as those which are afforded to individuals in Australia, and where such countries may criminalise behaviour which is not an offence in Australia.

2.253 With respect to network activity warrants, the committee notes the minister's advice that the exceptions to the general prohibition on using and disclosing protected network activity warrant information are configured differently to those relating to data disruption warrants and account takeover warrants, as network activity warrants cannot be used to gather evidence in investigations and the information collected generally cannot be adduced in evidence in criminal proceedings.

2.254 The minister provided examples of permitted uses or disclosures of protected network activity warrant information, including allowing for it to be cited in relation to an application for another warrant, and in relation to activities connected to criminal intelligence in the performance of functions of the AFP or ACIC. The committee also notes that where exceptions provide for information to be disclosed in criminal or non-criminal proceedings (such as in relation to a contravention of secrecy provisions or to question the validity of a warrant) these exceptions are intended to protect the rights of persons who are the subject of, or whose information has been collected under, a network activity warrant.

2.255 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.256 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the exceptions to the prohibitions on use and disclosure of information obtained under the warrants proposed in the bill.

Storage and destruction of records

2.257 The committee notes the minister's advice that the requirements in the bill around storage and destruction of records comprising protected information are consistent with existing record-keeping and destruction obligations in the *Surveillance Devices Act 2004*. The minister advised that the ability to retain information for five years reflects the fact that some investigations and operations are complex and run over a long period of time.

2.258 The committee also notes the minister's advice that the ombudsman and Inspector-General of Intelligence and Security are empowered to assess agencies' compliance with record-keeping and destruction requirements as part of their oversight of powers in the bill.

2.259 While noting this advice, it remains unclear to the committee why the bill does not require a review of the continued need for the retention of such records on a more regular basis, particularly noting that it does not appear that all investigations relevant to the warrants will be so lengthy or complex as to make more regular review inappropriate.

2.260 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.261 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of specifying a period of five years for the review of the continued need for the retention of records or reports comprising protected information.

Presumption of innocence—certificate constitutes prima facie evidence[78]

2.262 In *Scrutiny Digest 1 of 2021* the committee requested the minister's detailed advice as to:

- why it is considered necessary and appropriate to provide for evidentiary certificates to be issued in connection a data disruption warrant or emergency authorisation, a network access warrant, or an account takeover warrant;

78 Schedule 1, item 44; Schedule 2, item 29; Schedule 3, item 4 (proposed section 3ZZVZ of the *Crimes Act 1914*). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

- the circumstances in which it is intended that evidentiary certificates would be issued, including the nature of any relevant proceedings; and
- the impact that issuing evidentiary certificates may have on individuals' rights and liberties, including on the ability of individuals to challenge the lawfulness of actions taken by law enforcement agencies.[79]

Minister's response

2.263 The minister advised:

> *Why it is considered necessary and appropriate to provide for evidentiary certificates to be issued in connection with a data disruption warrant or emergency authorisation, a network activity warrant, or an account takeover warrant*
>
> The *Guide to Framing Commonwealth offences, Infringement Notices and Enforcement Powers* notes that evidentiary certificates should generally only be used to settle formal or technical matters of fact that would be difficult to prove by adducing admissible evidence. It is generally unacceptable for evidentiary certificates to cover questions of law, which are for courts to determine.
>
> Evidentiary certificates are able to be issued in relation to acts done by the AFP or the ACIC in connection with the execution of the warrant, or the information obtained under the warrant. The evidentiary certificate regimes in relation to each of the warrants are designed to protect capabilities and methodology being disclosed in court.
>
> Evidentiary certificates will only cover the manner in which evidence was obtained and by whom but not the actual evidence itself. The certificates would only deal with factual matters, being the factual basis on which an officer did any thing in connection with the execution of the warrant, or in relation to the information obtained under the warrant. They would not deal with questions of law that would be properly the role of the courts to determine.
>
> Evidentiary certificates are *prima facie* (that is, certificates issued under the regimes will be persuasive before a court, as distinct from a conclusive certificate that cannot be challenged by a court or defendant). The *prima facie* nature of evidentiary certificates will protect sensitive AFP and ACIC capabilities by preventing prosecutors from being required in the first instance to disclose the operation and methods of law enforcement unless a defendant seeks to dispute the veracity of the methods used to gather information against their interest. The courts will retain the ability to test the veracity of the evidence put before it should there be founded grounds to challenge the evidence.

79 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 43-45.

The circumstances in which it is intended that evidentiary certificates would be issued, including the nature of any relevant proceedings

Evidentiary certificates are intended to streamline the court process by reducing the need to contact numerous officers and experts to give evidence during proceedings on routine matters. Evidentiary certificates can be issued by an appropriate authorising officer for a law enforcement officer and assist agencies in protecting sensitive capabilities.

The certificates will cover circumstances where it would be difficult to prove the methods of data collection before a court without exposing sensitive law enforcement capabilities. Methods used to conceal that a warrant has been executed or the methods used to covertly access or disrupt data, or take control of an online account, may be covered by an evidentiary certificate. In a criminal trial, where it may be necessary to establish the provenance of evidence called against a defendant, it may be necessary to rely on an evidentiary certificate lo prove that evidence was collected as a result of a warrant.

Evidentiary certificates will be used in respect of the warrant-related activities and handling of information obtained under warrants as they are able to be used with existing surveillance device warrants and computer access warrants in the SD Act. A certificate may be issued, for example, in respect of anything done by a law enforcement officer in connection with the warrant's execution. The certificate may also set out relevant facts with respect to anything done by the law enforcement officer relating to the communication of information obtained under a warrant by a person to another person. A certificate can also set out anything done by a law enforcement officer concerning the making use of, or the making of, a record or the custody of a record of information obtained under the warrant.

These certificates relate to technical questions and not substantial matters of fact or questions of law. For example, it may be that a certain vulnerability within a device was used to execute a warrant. Enquiries into these actions may put at risk existing operations also utilising that vulnerability. Evidentiary certificates to protect capabilities and methodology is critical to maintaining law enforcement's ability to effectively utilise Commonwealth surveillance laws.

The impact that issuing evidentiary certificates may have on individuals' rights and liberties, including on the ability of individuals to challenge the lawfulness of actions taken by law enforcement agencies

The Bill engages certain rights, such as Article 14(2) of the International Covenant on Civil and Political Rights, which provides that everyone charged with a criminal offence should have the right to be presumed innocent until proven guilty according to law. Limitations on this right are permissible when they are reasonable in the circumstances, and maintain the rights of the accused.

> The evidentiary certificate provisions in the Bill create a presumption as to the existence of the factual basis on which the certificate is issued which requires the defendant to disprove the matters in the certificate if they seek to challenge them. However, these matters will only be details of sensitive information such as how the evidence was obtained and by whom. This is necessary to protect law enforcement agencies' sensitive capabilities and methodology. Evidentiary certificates will not, however, establish the weight or veracity of the evidence itself which is a matter for the court.
>
> The defendant will not be prevented from leading evidence to challenge a certificate. The nature of a prima facie evidence certificate regime provides an ability for the accused to establish illegality – that is, to seek to establish that acts taken in order to give effect to a warrant contravened the legislation should they choose to do so within the boundaries of the judicial framework, and put the party bringing the proceedings to further proof. However, regardless of the evidentiary certificate regime, the prosecution will still have to make out all elements of any offence.

Committee comment

2.264 The committee thanks the minister for this response. The committee notes the minister's advice that that the evidentiary certificates would only deal with factual matters and would not deal with questions of law (which would be determined by the court). The minister also advised that the evidentiary certificate regimes in relation to each of the warrants are designed to protect capabilities and methodology from being disclosed in court, and that the certificates will only cover the manner in which evidence was obtained and by whom but not the actual evidence itself.

2.265 The committee also notes the minister's advice that the *prima facie* nature of evidentiary certificates will protect sensitive AFP and ACIC capabilities by preventing prosecutors from being required in the first instance to disclose the operation and methods of law enforcement unless a defendant seeks to dispute the veracity of methods used, and that the courts will retain the ability to test the veracity of the evidence should there be founded grounds to challenge the evidence.

2.266 The committee further notes the minister's advice that the circumstances in which certificates would be issued are intended to cover circumstances where it would be difficult to prove the methods of data collection before a court without exposing sensitive law enforcement capabilities, such as methods used to conceal that a warrant has been executed or methods used to covertly access or disrupt data or take control of an online account. The minister advised that the certificates may be issued in respect of anything done by a law enforcement officer in connection with a warrant's execution, and may set out anything done by a law enforcement officer concerning the making use of, or the making of, a record or the custody of a record of information obtained under the warrant.

2.267 The minister advised that the certificates relate to technical questions and not substantial matters of fact or questions of law. The minister also provided examples of where evidentiary certificates may be used including:

- in a criminal trial, where it may be necessary to rely on an evidentiary certificate to prove that evidence was collected as a result of a warrant; and
- in circumstances where a certain vulnerability within a device was used to execute a warrant, in order to protect existing operations also utilising that vulnerability.

2.268 Finally, the committee notes the minister's advice in relation to the impact that issuing evidentiary certificates may have on individuals' rights and liberties, including that the defendant will not be prevented from leading evidence to challenge a certificate. The minister advised that the provisions create a presumption as to the existence of the factual basis on which the certificate is issued but that evidentiary certificates will not establish the weight or veracity of the evidence itself. The committee notes the minister's advice that the regime provides an ability for an accused to seek to establish that acts taken in order to give effect to a warrant contravened the legislation, and put the party bringing proceedings to further proof.

2.269 While noting the minister's advice, the committee remains concerned that the use of evidentiary certificates may impose a significant burden on persons seeking to challenge the validity of certain actions, in particular things done in the execution of warrants and steps taken to conceal them. For example, where matters in an evidentiary certificate relate to covert access and concealment, raising evidence to challenge these matters may be extremely difficult.

2.270 The committee also notes that the minister's response indicates that evidentiary certificates may cover how evidence that goes directly to the culpability of an offence was obtained, even if the certificates may not cover the evidence itself. In some cases, the question of whether evidence was unlawfully obtained may be central whether a person is ultimately convicted of an offence. Consequently, it is not apparent that the evidentiary certificates contemplated by the bill would in all cases be sufficiently removed from the main facts at issue in proceedings—such as would make their use appropriate.[80]

2.271 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

80 See Attorney General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 55.

2.272 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the use of evidentiary certificates in relation to things done in connection with warrants established by the bill.

Reversal of evidential burden of proof[81]

2.273 In *Scrutiny Digest 1 of 2021* the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance.[82]

Minister's response

2.274 The minister advised:

> The Bill introduces the concept of 'protected information' into the Crimes Act in relation to account takeover warrants, replicating the meaning of 'protected information' in the SD Act. This means that it will be an offence to disclose protected information under the Crimes Act except in limited circumstances. That offence, as well as the associated aggravated offence, are substantively similar to section 45 of the SD Act. The exceptions to the commission of the offences also replicate section 45.
>
> In accordance with subsection 13.3(3) of the *Criminal Code Act 1995*, it is the defendant who must adduce evidence that suggests a reasonable possibility that he or she has not unlawfully used or disclosed protected information. If the defendant discharges an evidential burden, the prosecution must disprove those matters beyond reasonable doubt (subsection 13.3(4) of the Criminal Code).
>
> The *Guide to Framing Commonwealth Offences* provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:
>
> - it is peculiarly within the knowledge of the defendant, and
> - it would be significantly more difficult and costly for the prosecution to disprove that for the defendant to establish the matter.
>
> In accordance with the principles set out in the *Guide to Framing Commonwealth Offences*, the Bill places an evidential burden on the defendant because the matter is peculiarly within the defendant's knowledge. The defendant would be best placed to explain his or her

---

81 Schedule 3, item 4, proposed section 3ZZVH of the *Crimes Act 1914*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

82 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 45-46.

> motivations when using or disclosing protected information, as to how and why they should be considered to be acting in accordance with one of the exceptions set out in subsections 3ZZVH(3)-(5).
>
> In order for the prosecution to disprove the matter, the prosecution would need to understand the information held by the defendant, including the defendant's state of mind and motivations. This would be significantly more difficult and costly, if not impossible, for the prosecution to disprove.

Committee comment

2.275 The committee thanks the minister for this response. The committee notes the minister's advice that the matter of whether the defendant has not unlawfully used or disclosed the protected information is peculiarly within the defendant's knowledge, as the defendant would be best placed to explain his or her motivations when using or disclosing protected information including how they were acting in accordance with one of the exceptions set out in subsections 3ZZVH(3) to (5).

2.276 The minister also advised that it would be significantly more difficult and costly for the prosecution to disprove this matter, as this would require the prosecution to understand information held by the defendant and the defendant's state of mind and motivations.

2.277 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Broad delegation of administrative powers[83]

2.279 In *Scrutiny Digest 1 of 2021* the committee requested the minister's advice as to why it is considered necessary to allow for executive level members of staff of the ACIC to be 'appropriate authorising officers', in particular with reference to the committee's scrutiny concerns in relation to the use of coercive powers without judicial authorisation under an emergency authorisation.[84]

---

83 Schedule 3, item 4, proposed subsection 3ZZUM(4) of the *Crimes Act 1914*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

84 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 46-47.

Minister's response

2.280 The minister advised:

> Proposed section 3ZZUX of the Crimes Act allows law enforcement officers of the AFP and the ACIC to apply to an 'appropriate authorising officer' instead of seeking a warrant from a magistrate for the taking control of an online account in certain emergency situations.
>
> In relation to the ACIC, an 'appropriate authorising officer' is the CEO of the ACIC or an executive level member of staff of the ACIC who is authorised by the CEO to be an appropriate authorising officer. This means that an executive level staff member of the ACIC is only able to give an emergency authorisation if they have been authorised to do so by the CEO.
>
> The level of officer in the ACIC able to give an emergency authorisation differs to that in the AFP to reflect differences in the organisational structures and staffing arrangements of those agencies. There may be circumstances where it is necessary and appropriate for the CEO of the ACIC to authorise executive level staff members to give emergency authorisations. For example, where particular resourcing or operational requirements permit. However, such decisions will be made at the discretion of the CEO of the ACIC.

Committee comment

2.281 The committee thanks the minister for this response. The committee notes the minister's advice that the level of officer in the ACIC able to give an emergency authorisation differs to that in the AFP to reflect differences in the organisational structure and staffing arrangements of those agencies. The minister also advised that an executive level staff member of the ACIC is only able to give an emergency authorisation if they have been authorised to do so by the CEO of the ACIC, and that circumstances in which it may be necessary and appropriate for this to occur may be in response to resourcing or operational requirements.

2.282 While noting this advice, from a scrutiny perspective, the committee reiterates its significant concerns with respect to emergency authorisations for account takeover activities, which may authorise the use of significant coercive and intrusive powers before an independent decision maker has the opportunity to review and assess the arguments for and against their use. The committee remains concerned that the bill allows the CEO of ACIC to delegate the authority to issue emergency authorisations to *any* executive level staff of the ACIC, rather than the most senior executive level staff of that organisation.

2.283 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic

material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.284 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing for *any* executive level members of staff of the ACIC to be an 'appropriate authorising officer' for the purposes of issuing emergency authorisations for account takeover activity.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

- **Online Safety Bill 2021**—clause 190 (Continues in existence a special account: CRF appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*).

Senator Dean Smith
Deputy Chair

---

1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills *Fourteenth Report of 2005*.