



Senate Standing

Committee for the Scrutiny of Bills

Scrutiny Digest 15 of 2023

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Committee information

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 nonpartisan 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, standing order 24 enables senators to ask in the Senate Chamber, the responsible minister, for an explanation as to 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* (the 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.

Report snapshot¹

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¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report Snapshot, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 229.

Chapter 1

Initial scrutiny

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

Bankruptcy Amendment (Discharge from Bankruptcy) Bill 2023²

Purpose	The Bankruptcy Amendment (Discharge from Bankruptcy) Bill 2023 (the bill) amends the <i>Bankruptcy Act 1966</i> (the Act) to regularise and validate the administrative processes of the Australian Financial Security Authority (AFSA), its predecessors and things done, purported to be done, or not done, in reliance on the administrative practice relating to the determination of when a statement of affairs is taken to have been filed for the purposes of a debtor's petition or as required in relation to a sequestration order.
Portfolio	Attorney-General
Introduced	House of Representatives on 14 November 2023
Bill status	Passed both Houses on 17 November 2023

Privacy³

1.2 The bill establishes a consistent process for the Official Receiver when assessing a statement of affairs for adequacy during the process of declaring bankruptcy. It also seeks to provide legal certainty to debtors, trustees and other parties who may have been affected by the previous administrative practices of the Australian Financial Security Authority (AFSA).

1.3 The explanatory memorandum explains that:

An individual is required to provide details of their estate through a statement of affairs which must be provided to the Official Receiver either on becoming bankrupt through court order or to accompany their debtor's petition to become bankrupt. The purpose of a statement of affairs is to provide sufficient detail to enable the trustee of the bankrupt estate to

² This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bankruptcy Amendment (Discharge From Bankruptcy) Bill 2023, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 230.

³ The committee draws senators' attention to the bill pursuant to Senate standing order 24(1)(a)(i) and (v).

administer it effectively over the period of the bankruptcy. In this way, statements of affairs are, by nature, documents containing personal information. Information contained in these documents includes personal family details, whether the debtor is involved in legal action, and their assets, liabilities, and any other business details. Some of these details are also made public through the NPII, which is a publicly available electronic record of personal insolvencies.⁴

1.4 While the explanatory memorandum notes that private information will be collected, used, and, in some cases, publicly disclosed, it does not set out whether there are any safeguards in place to protect this information, including whether the *Privacy Act 1988* applies.

1.5 The committee considers that where a bill provides for the collection, use or disclosure of personal information, the explanatory materials to the bill should address why it is appropriate to do so and what safeguards are in place to protect the personal information, and whether these are set out in law or policy.

1.6 **As the bill has already passed both Houses of the Parliament, the committee makes no further comment in relation to privacy. The committee notes with concern the speed at which this bill was passed, being introduced on 14 November 2023 and passing both Houses on 17 November 2023, and the impact this has on the ability for the Parliament to undertake scrutiny.**

⁴ Explanatory memorandum, p. 6.

Crimes and Other Legislation Amendment (Omnibus No. 2) Bill 2023⁵

Purpose	The Crimes and Other Legislation Amendment (Omnibus No. 2) Bill 2023 (the bill) would amend the <i>Australian Crime Commission Act 2002</i> (the ACC Act), the <i>Crimes Act 1914</i> (Crimes Act) and the <i>Criminal Code Act 1995</i> (Criminal Code), and make consequential amendments to the <i>Customs Act 1901</i> (Customs Act) and the <i>Defence Force Discipline Act 1982</i> .
Portfolio	Attorney-General
Introduced	House of Representatives on 14 November 2023
Bill status	Finally passed both Houses on 17 November 2023

Retrospective validation⁶

1.7 Item 1 of Schedule 3 to the bill provides retrospective validation to things related to federally relevant criminal activity within the meaning of the *Australian Crime Commission Act 2002* (the ACC Act) done by a person in reliance on an authorisation or determination of the Board of the Australian Crime Commission on or after 4 September 2013 and before 10 December 2019 under paragraph 7C(1)(c), and subsections 7C(2) and (3) of the ACC Act. This is to the extent that the doing of that thing would, apart from this item, be invalid or ineffective because the relevant authorisation or relevant determination was invalid or ineffective (including because, at the time when the authorisation was given or the determination was made, the authorisation or determination failed to specify or identify federally relevant criminal activity within the meaning of the 31 ACC Act as in force at that time).

1.8 Underlying the basic rule of law principle that all government action must be legally authorised is the importance of protecting those affected by government decisions from arbitrary decision-making and enabling affected persons to rely on the law as it currently exists. Retrospective legislation has the potential to undermine these values.

1.9 The committee's consistent scrutiny view is that the fact that a court overturns previous authority is not, in itself, a sufficient basis for Parliament to retrospectively reinstate the earlier understanding of the previous legal position. In saying this, when a precedent is overturned this itself necessarily has a retrospective effect and may

⁵ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Crimes and Other Legislation Amendment (Omnibus No. 2) Bill 2023, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 231.

⁶ Schedule 3. The committee draws senators' attention to the schedule pursuant to Senate standing order 24(1)(a)(i).

overturn legitimate expectations about what the law requires. Nevertheless, the committee considers that where Parliament acts to validate decisions which are put at risk, in circumstances where previous authority has been overturned, it is necessary for Parliament to consider:

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

1.10 In *Scrutiny Digest 10 of 2019* and *Scrutiny Digest 1 of 2020* the committee raised similar concerns in relation to the Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2019.⁷ In that instance, the bill retrospectively validated determinations of the Board of the Australian Crime Commission and things done by a person in connection with a special operation or special investigation in performing any function or exercising any power under the ACC Act. This retrospective validation was to the extent that doing the thing would otherwise be invalid or ineffective because no investigation or intelligence operation was being undertaken at the time the thing was done.

1.11 As this bill appears to be in effect reproducing the same scrutiny concerns that arose in relation to the 2019 bill, the committee expects that the explanatory memorandum should have addressed the questions posed by the committee in relation to that bill in 2019 and 2020. In *Scrutiny Digest 10 of 2019* and *Scrutiny Digest 1 of 2020* the committee noted that the explanatory memorandum to the 2019 bill should have:

- justified why it was necessary and appropriate to retrospectively validate both determinations by the Board and the exercise of powers done in connection with any special operation or investigation;
- provide the number of persons who may be affected by this retrospective validation, whether any affected persons would suffer a detriment as a result and whether this would lead to unfairness; and
- consider whether there are any current matters before the courts that may be affected and the extent to which a matter may be affected.

1.12 The committee notes that the explanatory memorandum to this bill also does not contain any information as to why it is necessary to retrospectively validate either determinations by the Board to authorise a special operation or investigation or the exercise of powers done in connection with any special operation or investigation.

⁷ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2019* (5 December 2019), pp. 3–5; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2020* (5 February 2020), pp. 47–49.

1.13 Additionally, the committee notes that subitems 1(3) and 1(4) of the bill provide that the thing is done as valid and effective and taken to have always been so, including for the purposes of legal proceedings. However, there is no information on the face of the bill or in the explanatory materials regarding an exception for matters that are currently on foot. As a result, it is unclear to the committee whether there are current matters before the courts that may be detrimentally affected by the retrospective validation.

1.14 The committee remains concerned about the retrospective validation of actions as prescribed by the bill. However, as the bill has already passed both Houses of the Parliament, the committee makes no further comment. The committee notes with concern the speed at which this bill was passed, being introduced on 14 November 2023 and passing both Houses on 17 November 2023, and the impact this has on the ability of the Parliament to scrutinise proposed legislation.

Migration Amendment (Bridging Visa Conditions) Bill 2023

Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023⁸

Purpose	<p>Migration Amendment (Bridging Visa Conditions) Bill 2023: amends the <i>Migration Act 1958</i> and Migration Regulations 1994 in response to the High Court’s judgement in <i>NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (S28/2023)</i> to provide for certain conditions to be placed on bridging visas granted to non-citizens released from immigration detention.</p> <p>Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023: amends the <i>Migration Act 1958</i> to complement and reinforce amendments made by the <i>Migration Amendment (Bridging Visa Conditions) Act 2023</i>. It introduces new criminal offences for relevant visa holders, and clarifies collection, use and disclosure of information provisions.</p>
Portfolio	Home Affairs
Introduced	<p>Migration Amendment (Bridging Visa Conditions) Bill 2023: House of Representatives on 16 November 2023</p> <p>Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023: House of Representatives on 27 November 2023</p>
Bill status	<p>Migration Amendment (Bridging Visa Conditions) Bill 2023: received Royal Assent on 17 November 2023</p> <p>Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023: before the House of Representatives</p>

Overview

1.15 The Migration Amendment (Bridging Visa Conditions) Bill 2023 (the first bill) was introduced in the House of Representatives on 16 November 2023 and passed that day subject to substantive amendments. Then, on 27 November 2023, the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (the second bill) was introduced in the House of Representatives, seeking to amend

⁸ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Bridging Visa Conditions) Bill 2023, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 232.

provisions of the *Migration Act 1958* as recently amended by the first bill on 16 November 2023.

1.16 This entry considers the amendments made by the first and second bills in their entirety given the interconnected nature of the amendments.

Parliamentary scrutiny⁹

1.17 The committee notes with concern the speed with which the Migration Amendment (Bridging Visa Conditions) Bill 2023 (the first bill) was introduced and passed. The first bill (now Act) was introduced in the House of Representatives on 16 November 2023 and passed the Senate later that day. The committee seeks to consider and report on all bills while still before the Parliament in order to inform debate. The committee considers that such a rapid process limits parliamentary scrutiny and debate, and that proper consideration of all matters within the bill, particularly in relation to serious impacts on personal rights and liberties, may not have occurred.

1.18 Notwithstanding that its scrutiny of the legislation was not possible prior to the passage of the first bill through the Parliament, the committee intends to raise its significant scrutiny concerns, and questions which have arisen from its consideration, with the minister, and to carefully consider the responses it receives.

1.19 The committee also notes with concern the rapid and frequent legislative amendments to the Subclass 070 (Bridging (Removal Pending)) visa (BVR) scheme that have occurred since the first bill was introduced on 16 November 2023.

1.20 The first bill was introduced and then amended in the House of Representatives later that day, with the second bill being introduced within a week and again making substantive and significant amendments to the BVR regime.

1.21 For example, the committee notes that as originally introduced in the first bill, paragraph 76E(4)(b) provided that the minister could grant a BVR without specific mandatory conditions if satisfied that there are compelling and compassionate reasons to grant the second visa, and that it is not contrary to the public interest to grant the second visa. This provision was amended later that day in the House of Representatives and the test for granting a second BVR without specific mandatory conditions was amended to require the minister be satisfied that the individual does not pose a risk to the community. Now, the second bill is proposing to amend this threshold test for a third time, proposing that paragraph 76E(4)(b) provide that the minister must be satisfied that ‘those conditions are not reasonably necessary for the protection of any part of the Australian community’.¹⁰

⁹ The committee draws senators’ attention to this provision pursuant to Senate standing order 24(1)(a)(v).

¹⁰ To be amended by proposed item 3 of schedule 1 to the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023.

1.22 These rapid and frequent amendments prevent certainty in the law, which is of special concern noting the significant trespass on rights and liberties as a result of the new criminal offence provisions attaching to breach of BVR conditions.

1.23 The committee leaves to the attention of the Senate as whole the significant impact on parliamentary scrutiny imposed by passing and amending a bill within one day, with proposed significant and substantial amendments being introduced shortly after.

Undue trespass on rights and liberties

Broad scope of offence provisions

Significant penalties in primary legislation¹¹

1.24 Item 2 of Schedule 1 to the first bill¹² introduces subsection 68(5), which provides that a Subclass 070 Bridging (Removal Pending) Visa (the first visa) held by a non-citizen will not come into effect again during the visa period if:

- the first visa ceases to be in effect under subsection 82(3) of the *Migration Act 1958* (the Act) because another Subclass 070 (Bridging (Removal Pending)) visa (BVR) comes into effect; and
- if at the time the BVR is granted, there was no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future.¹³

1.25 The second visa imposes a number of additional conditions that are more rights-restrictive in nature.

1.26 Item 7 of Schedule 2 to the first bill provides the mandatory conditions that attach to the BVR. These include regulations 8550, 8551, 8553, 8554, 8555, 8556, 8560, 8561, 8562, 8563, 8612, 8613, 8614, 8615, 8616, 8617, 8618, 8619, 8622 and 8623, which are located in Schedule 8 of the Migration Regulations 1994 (the regulations) as well as conditions listed under regulation 070.611 of the regulations.¹⁴ Item 8 of Schedule 2 to the first bill also inserts clause 070.612A into the regulations, which requires conditions 8620 and 8621 to be imposed on visa holders, unless the Minister for Home Affairs (the minister) is satisfied they that those conditions are not reasonably necessary for the protection of any part of the Australian community.

¹¹ Schedule 1, items 2 and 4. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

¹² All references in this entry will be to the bill as passed by both Houses.

¹³ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 2, subsection 68(5).

¹⁴ This regulation lists conditions 8303, 8401, 8513, 8514, 8541, 8542 and 8543, of which conditions 8401 is of particular concern as it relates to the requirement to report at a specified location at a specified time.

1.27 The first bill sets out a range of offences which are enlivened when conditions are breached. These conditions have been grouped into various categories that relate to the offences created by the first and second bill, such as:

- ‘monitoring conditions’ in relation to the offence under section 76B;
- conditions relating to wearing and maintaining monitoring devices;
- conditions requiring that the person not perform any work or participate in any regular organised activity involving more than incidental contact with a minor or other vulnerable person;
- conditions requiring a person not go within a specified distance of a school, childcare centre or daycare centre; and
- a condition relating to remaining at a specified address.

1.28 Item 4 of Schedule 1 to the first bill introduces subsections 76B(1), 76C(1), 76D(1), 76D(2), 76D(3) and 76D(4) to the Act, which provide that the following are offences:

- Failing to comply with a requirement of the monitoring conditions, which includes a mandatory condition that requires the visa holder to: notify the minister or the department; to report at a specified time or times and a specified place or in a specified manner; and to attend at a specified place on a specified day and time.¹⁵
 - Breaches of conditions 8617, 8618, 8619 and 8621 of the regulations are excluded from the scope of this offence.¹⁶
 - For example, the committee understands that if conditions 8401, 8513, 8550 or any other applicable monitoring conditions are breached, this offence is enlivened.¹⁷
- Failing to comply with a requirement to remain at notified address.¹⁸
 - If condition 8620 is breached, this offence is enlivened.

¹⁵ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, subsection 76B(4).

¹⁶ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 3, clause 2.25AC.

¹⁷ The committee understands that the following conditions are monitoring conditions as defined under subsection 76B(4): regulations 8401, 8513, 8542, 8543, 8550, 8552, 8561, 8612, 8614, 8615, 8616.

¹⁸ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, paragraph 76C(1)(c).

- Failing to comply with a requirement relating to monitoring devices, such as: wearing the device;¹⁹ allowing an authorised officer to fit, install, repair or remove the device;²⁰ taking specified and any other reasonable steps to ensure the device remains in good working order;²¹ and notifying an authorised officer as soon as the visa holder becomes aware that the device is not in good working order.²²
 - If condition 8621 is breached, this offence is enlivened.

1.29 The Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (the second bill) seeks to introduce subsections 76DAA, 76DAB, and 76DAC into the Migration Act, which provide that the following are offences:

- failing to comply with a visa condition requiring the person not perform any work, or participate in any regular organised activity, involving more than incidental contact with another person who is a minor or other vulnerable person;²³
- failing to comply with a visa condition requiring that the person not go within a particular distance of a school, childcare centre or day care centre;²⁴ and
- failing to comply with a visa condition requirement where a person has been convicted of an offence involving violence or sexual assault, and the visa is subject to a condition requiring that the person not contact or attempt to contact the victim or a member of their family.²⁵

1.30 The offences under subsections 76B(1), 76C(1), proposed subsections 76DAA(1), 76DAB(1) and 76DAC(1), and under section 76D carry maximum penalties of 5 years imprisonment or 300 penalty units. Section 76DA imposes a mandatory minimum sentence of 1 year imprisonment on any of the above offences.

1.31 The committee notes that the mandatory conditions listed above automatically attach to all visa holders in the affected cohort in the absence of an

¹⁹ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, subsection 76D(1).

²⁰ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, subsection 76D(2).

²¹ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, subsection 76D(3).

²² Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, subsection 76D(4).

²³ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, item 1, proposed subsection 76DAA(1).

²⁴ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, item 1, proposed subsection 76DAB(1).

²⁵ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, Schedule 1, item 1, proposed subsection 76DAC(1).

individualised assessment of the risk posed by the visa holder to the community.²⁶ The committee further notes that in this instance, the mandatory measures attaching to the BVR result in serious encroachments on personal liberties. This includes for example: condition 8620, which imposes a requirement to remain at a specified address at specified times on the visa holder; and condition 8621 which imposes a requirement on the visa holder to wear a monitoring device at all times. The explanatory memorandum provides:

Ordinarily, a visa holder who does not comply with a condition of their visa may be considered for visa cancellation on the basis of that breach – and if cancelled, would be liable to be detained as an unlawful non-citizen. For the NZYQ-affected cohort²⁷, immigration detention is not an available option where visa cancellation results in them being an unlawful non-citizen. As such, the prospect of visa cancellation for a breach of a visa condition is not an effective deterrent against non-compliance with reporting requirements. Establishing an offence specifically for NZYQ-affected BVR holders and future BVR holders granted without application by the Minister, makes it clear that compliance with requirements to report to the Department and to notify the Department of changes in circumstances, including address, household, employment and other matters ensures the person remains engaged with the Department. Importantly, the offence encourages compliance with relevant visa conditions and ongoing cooperation in arrangements relating to removal from Australia.²⁸

1.32 The explanatory memorandum also provides the following:

Of the current known cohort, the majority were refused a visa, or had their visa cancelled, on character grounds. Others in the cohort had their visa cancelled on other grounds, but had not previously been granted a bridging visa due to risks they present to the Australian community.²⁹

1.33 The supplementary explanatory memorandum provides the following:

The amendments make the imposition of conditions relating to curfews and electronic bracelets mandatory rather than discretionary, but only if the Minister is satisfied that the holder does not pose a risk to the community.

²⁶ Item 1 of schedule 1 to the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 relates to visa condition 8623 in Schedule 8 to the Migration Regulations, which applies to persons convicted of an offence that involves a minor or any other vulnerable person.

²⁷ The cohort as affected by the outcome of the decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (S28/2023), noting that the explanatory memorandum foreshadows that these conditions could apply to future cohorts.

²⁸ Migration Amendment (Bridging Visa Conditions) Bill 2023, Explanatory memorandum, p. 4.

²⁹ Migration Amendment (Bridging Visa Conditions) Bill 2023, Explanatory memorandum, p. 30.

This helps ensure that the imposition of the conditions is reasonable, necessary and proportionate to the individual circumstances.³⁰

1.34 While some conditions attaching to the BVR may be appropriately attached to the visa of a particular individual, it is not apparent to the committee that every condition that attaches to the BVR should be applied to every BVR visa holder. Nor is it apparent to the committee that a mandatory one year imprisonment would be a proportionate sentence for each breach of the offence provisions. At common law, it is understood that the purpose of a criminal sentence is that it reflects the objective seriousness of the offence committed and that there must be a reasonable proportionality to the circumstances of the offending.³¹

1.35 The committee is therefore concerned that the automatic imposition of conditions on the affected cohort may prove to be disproportionate responses to community risk in their application to individual circumstances and cases. Further, the automatic imposition of conditions, and the mandatory sentences for breaches of the offence provisions amount to serious deprivations of liberty. The committee does not consider that the justifications in the explanatory materials address the question of proportionality of the approach as applied to individual cases.

1.36 Further, in relation to the justification of the automatic imposition of onerous visa conditions, the committee notes that there are a range of character-based reasons that have contributed to a person having their visa cancelled. For example, a visa may have been cancelled if a person committed certain types of offences,³² or on the basis of having a substantial criminal record, which includes receiving a sentence of 12 months imprisonment.³³

1.37 As such, the reasons for the cancellation of a visa on character grounds can occur as a result of a range of offending, and the actual risk to the community posed by an individual in the NZYQ cohort or future cohorts is variable. The committee does not consider that the cancellation of a visa on character grounds in and of itself is sufficient as a justification for these measures.

1.38 In reaching this conclusion, the committee has been mindful of the operation of subsections 76E(3) and 76E(4), which provide for a process by which a visa holder may make representations to the minister to relax the application of the conditions automatically attached to their visa. Nevertheless, the committee does not consider that this process will ensure that a proportionate approach is taken to assessing risk in light of the significant liberty interests affected by the visa conditions. Of particular concern to the committee are the unclear standards to be considered by the minister (i.e. that those conditions are not reasonably necessary for the protection of any part

³⁰ Migration Amendment (Bridging Visa Conditions) Bill 2023, Supplementary explanatory memorandum, p. 7.

³¹ *Veen v The Queen (No 2)* 164 CLR 465 at [477].

³² *Migration Act 1958*, section 501.

³³ *Migration Act 1958*, paragraph 501(7)(c).

of the Australian community), and the fairness of the process associated with the minister's exercise of the power to relax liberty-restricting conditions. These matters are the subject of further consideration below.

1.39 The committee's concerns regarding the likely undue trespass on personal rights and liberty occasioned by the automatic imposition of conditions are exacerbated by three further features of the offence provisions. First, as noted above, a breach of these, or any mandatory condition attached to an offence provision, would result in the visa holder being subject to a minimum of 1 year imprisonment. Relatedly, the maximum penalty of 5 years imprisonment which has not been adequately justified in the explanatory materials by reference to the principles set out in the Attorney-General's Department's *Guide to framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.³⁴

1.40 Second, due to the application of subsection 4K(2) of the *Crimes Act 1914*,³⁵ if the breach continued over a period of several days, it would result in multiple offences, each of which carry a minimum sentence of 1 year imprisonment and a maximum penalty of 5 years imprisonment.

1.41 In the committee's view, mandatory minimum sentencing necessarily raises questions about the proportionality of a penalty in light of the seriousness of particular instances of offending. In relation to the maximum penalty, the statement of compatibility provides:

The offences carry a maximum penalty of 5 years imprisonment or 300 penalty units. The purpose of the maximum penalty available for the offences established by proposed sections 76B, 76C, and 76D is to appropriately reflect the seriousness of these offences and the need to make clear that non-compliance with visa conditions that are aimed at protecting community safety is viewed seriously. The maximum penalty provides flexibility for courts to consider individual circumstances and treat different cases differently, according to the circumstances of the offending.³⁶

1.42 While the committee acknowledges the importance of maintaining community safety, it is not apparent that there is a need for such significant penalties to be applied to any visa holder for the breach of a visa condition.

1.43 It is the committee's understanding that visa conditions which attach to offence provisions under section 76B of the bill include, for example, condition 8401 which relates to reporting to a time or place specified, orally or in writing, by the

³⁴ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011) pp. 37–38.

³⁵ Sections 76B, 76C, 76D, and proposed sections 76DAA, 76DAB, and 76DAC.

³⁶ Migration Amendment (Bridging Visa Conditions) Bill 2023, Explanatory memorandum, p. 46.

minister, and condition 8513 which relates to notifying the department of a change of residential address within 5 working days.

1.44 Further, the committee understands that it is the mere breach of these conditions that is criminalised, with no requirement for any risk of harm to the community to be realised. In this instance, the explanatory memorandum to the first bill has not justified the seriousness of the offences, which may occur by merely failing to report at a specified location or failing to notify the department of a change of address, and why these offences warrant such a significant penalty, including a mandatory minimum sentence. The explanatory memorandum to the second bill further adds:

By applying to those individuals with a history of criminal offences involving minors, vulnerable people or sexual assault, these offences are targeted towards those who pose the most risk to Australian community. The particular conduct engaged in by breaching these offences puts at risk the most vulnerable members of society and disregards community expectations about the protection of especially vulnerable members of society.

Ordinarily, a visa holder who breaches a condition on their visa would be subject to visa cancellation, detention and removal. However, for the NZYQ affected cohort, this usual course of action is not available. The government therefore considers that the strengthened requirements of the minimum mandatory sentences, targeted towards only those individuals with serious criminal history, are necessary, reasonable and proportionate for protecting the most vulnerable members of society.

Mandatory minimum sentences appropriately reflect the seriousness of these offences and the need to make clear that non-compliance with visa conditions that are aimed at protecting community safety is viewed seriously.³⁷

1.45 The third exacerbating feature is that a number of conditions attaching to the BVR, which are listed in Schedule 8 of the Migration Regulations 1994, are not conditions that relate to monitoring, remaining at a specified address, or the wearing or maintenance of a monitoring device, which are the conditions captured by the offence provisions in the bill. As such, it is unclear to the committee from the bill and the explanatory memorandum which conditions will lead to an offence if breached and which conditions will not.

1.46 Given the significant custodial penalties attaching to the offences under the bill, the committee considers it crucial for the bill to expressly state which visa conditions, if breached, will lead to the commission of an offence. The committee also considers it important to state on the face of the bill the consequence of breaching a

³⁷ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, explanatory memorandum, p. 21.

visa condition that does not attach to an offence provision, as visa cancellation and immigration detention are not possible consequences.

1.47 Further to the matter above, the committee notes that a number of the conditions that must be imposed on the BVR are drafted in unclear terms. For example, condition 8303 requires that the visa holder must not become involved in activities disruptive to the Australian community, but it is unclear how 'disruptive' is intended to be understood in this context. In this instance, it is also unclear what the consequence of engaging in a disruptive activity would be, as this is a condition that is not attached to an offence provision. As such, visa holders are left uncertain as to possible criminal liability for an offence under this bill and which may also result in incurring a significant custodial penalty.

1.48 In relation to offences, the committee acknowledges that subsections 76B(2), 76C(2) 76D(5), proposed subsection 76DAA(2), proposed subsection 76DAB(2), and proposed subsection 76DAC(2) introduce defences of reasonable excuse in relation to the offences under subsections 76B(1), 76C(1), 76D(1), 76D(2), 76D(3), 76D(4), and proposed subsections 76DAA(1), 76DAB(1) and 76DAC(1). The effect of the defence of reasonable excuse is that the defendant would be required to provide evidence suggesting a reasonable probability that the conduct that resulted in the breach of the visa condition, and constitutes the offence, is conduct that forms a 'reasonable excuse' for breaching the condition.

1.49 Although this defence has the potential to ameliorate the likely undue trespass on liberty interests by the operation of offences for the breach of visa conditions discussed above, two matters limit that potential. First, at common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions, such as in these defences, 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.

1.50 Second, and significantly, it is not clear in this instance what conduct is intended to fall within the scope of 'reasonable excuse'. The explanatory memorandum does not provide guidance as to how a defence of reasonable excuse should be understood, other than explaining that imposition of an evidential burden on the non-citizen:

The note under new subsection 76B(2) provides that the non-citizen will bear the evidential burden of establishing they have a reasonable excuse consistent with subsection 13.3(3) of the Criminal Code. An evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. If the non-citizen discharges that evidential burden, the prosecution must disprove that matter beyond reasonable doubt.³⁸

1.51 'Reasonable excuse' is an overly broad term that can encompass a wide range of conduct. In the context of these offences, where no risk to the community must be realised by the breach of a visa condition and where a defendant can be liable for imprisonment for a minimum of 1 year and a maximum of 5 years for each offence, the lack of clarity in the ambit of the term 'reasonable excuse' is likely to promote a very conservative interpretation of the defence by visa holders given the substantial penalties they may face. As such, the defence of 'reasonable excuse' is unlikely to ensure that liberty is only restricted in a proportionate way.

1.52 In relation to the 'reasonable excuse' defence in proposed subsection 76DAC(3) for the offence in proposed subsection 76DAC(1), as introduced by the second bill, the committee notes that some further guidance as to the operation of the provision has been provided when compared to the other reasonable excuse defences.

1.53 In light of the above, the committee is also concerned as to the chilling effect these conditions may have on individuals. The committee considers that individuals may fail to attend to normal tasks out of a fear that doing so may lead to a breach of a visa condition that does not constitute a 'reasonable excuse' and consequently, that they may face imprisonment. The unclear nature of the conditions heightens this risk.

1.54 **The committee requests the minister's detailed justification as to:**

- **why it is proposed to have conditions that result in a serious deprivation of personal rights and liberties, such as a requirement to remain in a specified address for a specified period of time³⁹ and a requirement to wear a monitoring device at all times⁴⁰ mandatorily apply to all holders of the Bridging (Removal Pending) Visa.**

³⁸ Migration Amendment (Bridging Visa Conditions) Bill 2023, Explanatory memorandum, p. 14.

³⁹ Regulation 8620 of the Migration Regulations 1994.

⁴⁰ Regulation 8621 of the Migration Regulations 1994.

- why it is proposed to have significant penalties of a mandatory minimum sentence of 1 year imprisonment and a maximum penalty of 5 years imprisonment applicable to the offences under subsections 76B(1), 76C(1), 76D(1), 76D(2), 76D(3) and 76D(4), and proposed subsections 76DAA(1), 76DAB(1) and 76DAC(1), when these offences relate to breach of visa conditions and do not require consideration as to whether the conditions are reasonably necessary for the protection of the Australian community. The committee's consideration of this matter would be assisted by reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*;⁴¹
- whether a list confirming the visa conditions under Schedule 8 of the Migration Regulations that attach to the offence provisions under subsections 76B(1), 76C(1), 76D(1), 76D(2), 76D(3) and 76D(4), and proposed subsections 76DAA(1), 76DAB(1) and 76DAC(1) can be provided;
- what the consequences of breaching a visa condition that does not attach to the offences under subsections 76B(1), 76C(1), 76D(1), 76D(2), 76D(3) and 76D(4), or proposed subsections 76DAA(1), 76DAB(1) and 76DAC(1) are; and
- what conduct may fall within the scope of 'reasonable excuse', whether examples can be provided of such conduct, and what measures will be implemented to minimise the risk that visa holders are likely to be overly cautious in considering whether the reasonable excuse defence is applicable to their circumstances.

Procedural fairness⁴²

1.55 Item 4 of Schedule 1 to the first bill introduces subsection 76E(3), which provides that once a non-citizen has been granted a BVR, the minister must notify the non-citizen of the decision. The minister must then invite the person to make representations within a period and manner specified by the minister, as to why one or more of the conditions attaching to the BVR should not apply.⁴³ Under subsection 76E(4), if the non-citizen makes representations in accordance with the invitation, and the minister is satisfied that the visa conditions are not reasonably

⁴¹ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011) pp. 37–38.

⁴² Schedule 1, item 4, subsection 76E(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

⁴³ Paragraphs 76E(3)(a) and 76E(3)(b).

necessary for the protection of any part of the Australian community,⁴⁴ the minister must grant a visa that is not subject to the BVR conditions.⁴⁵

1.56 A number of scrutiny concerns arise in relation to this process. First, it is unclear what information, if any, other than a written notice setting out the decision must be disclosed to the applicant.⁴⁶ Second, there is no guidance provided to the minister in determining whether ‘the conditions are not reasonably necessary for the protection of any part of the Australian community’. The process cannot, therefore, be considered to adequately address the concerns raised above regarding the potential that conditions will be applied in a disproportionate manner.

1.57 This problem is exacerbated by the practical burden resting on a non-citizen being able to convince the minister that visa conditions are not reasonably necessary for the protection of the community. Not only is it difficult to prove a negative, but this problem is also amplified in all instances where a person has previously been convicted of an offence, unless some effort is made to specify what is considered not reasonably necessary for the protection of the community.

1.58 The committee notes that applying this standard to citizens who have been released after serving a custodial sentence would not be consistent with the assumptions of the common law criminal justice system. Finally, without more detailed criteria to guide the minister’s satisfaction of whether a person is not a risk to the community, that assessment may be applied overly cautiously as a matter of practical decision-making by a minister.

1.59 In this context, the committee notes that there are no criteria for the visa holder to address in their representations, and no stated considerations the minister must consider in order to be satisfied that the conditions are not reasonably necessary for the protection of any part of the Australian community. The committee is therefore concerned that subsections 76E(3) and 76E(4) provide the appearance that a visa holder has the option to make representations in order to be subjected to fewer conditions, but that the minister’s judgement is not subject to meaningful procedural requirements nor, given the breadth of the subjective criterion to be applied, to substantive constraints.

⁴⁴ Paragraph 76E(4)(b) as it is proposed to be amended by item 3 of schedule 1 to the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023. The provision as amended and passed both Houses of Parliament on 16 November 2023 required the minister be satisfied that the individual does not pose a risk to the community. The original provision when the bill was introduced in the House of Representatives earlier that day required that the minister be satisfied that there are compelling and compassionate reasons to grant the second visa, and that it is not contrary to the public interest to grant the second visa.

⁴⁵ Subsection 76E(4).

⁴⁶ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, paragraph 76(3)(a).

1.60 In light of the above, the committee requests the minister's detailed justification as to the fairness of the process in section 76E. The committee requests that the justification include:

- what information must be provided to the visa-holder by the minister when inviting the visa-holder to make representations;
- what information must be disclosed by visa-holders when making representations to the minister regarding the application of conditions;
- why 'the conditions are not reasonably necessary for the protection of any part of the Australian community' is an appropriate test for removing mandatory visa conditions, noting it is a subjective standard and that broad and restrictive conditions are applied on all individual visa holders within the class;
- why 'are not reasonably necessary for the protection of any part of the Australian community' is the only criterion considered relevant to the relaxation of conditions;
- why more guidance has not been included in the legislation to guide the minister's determination of whether conditions of 'are not reasonably necessary for the protection of any part of the Australian community'; and
- whether decisions made by the minister under subsection 76E(4) are eligible for independent merits review by the Administrative Appeals Tribunal and, if not, why not.

Procedural fairness⁴⁷

1.61 Items 9, 10, 11 and 12 of Schedule 2 to the bill amend regulations 8401, 8542, 8543 and 8561 of Schedule 8 to the regulations. The effect of these amendments is that the minister is able to direct visa holders to report at a specified time at a specified location either orally or by writing.⁴⁸

1.62 As neither the bill nor its explanatory memorandum provide a justification for why a visa holder may be directed orally, the committee queries the inclusion of the term 'orally' in relation to these conditions. Requiring an individual to comply with a certain direction provided to them orally may result in that individual not having sufficiently clear information as to what they are required to comply with, such as the location they must report to. The committee considers that it may also be possible that an individual in these circumstances would require a written record of the

⁴⁷ Schedule 2, items 9, 10, 11 and 12. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

⁴⁸ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, items 9, 10, 11 and 12, clauses 8401, 8542, 8543 and 8561.

specifications they were required to comply with, in order to provide to a legal representative or for the purpose of raising evidence to rely on the 'reasonable excuse' defence under sections 76B, 76C and 76D.

1.63 In this instance, the committee's concerns are heightened as these conditions are monitoring conditions that are not prescribed under subsection 76B(1). For example, condition 8401 requires an individual to report to a location at a time specified by the minister. Breaching these conditions will result in a visa holder becoming liable for an offence to which significant custodial penalties are attached.

1.64 The committee expects that in relation to matters that may affect an individual's liberty, at a minimum, information must be provided in writing so the affected individual has a written record of obligations they must comply with in order to avoid facing a term of imprisonment. The committee also notes that the desire for administrative efficiency or flexibility is not sufficient as a justification, particularly as in this context, the matter relates to an individual facing criminal liability. It is unclear to the committee why oral notice is considered sufficient in light of the serious consequences an individual may face if they are unable to comply with a BVR condition.

1.65 In light of the above, the committee requests the minister's detailed justification as to why items 9, 10, 11 and 12 of Schedule 2 have been amended to allow for the minister to orally specify matters for a visa holder to comply with, noting that oral notice is not as clear as written notice.

Significant matters in delegated legislation⁴⁹

1.66 Schedule 2 of the bill provides amendments that are made to the Migration Regulations. These include amendments to regulation 070 of the regulations,⁵⁰ which relate to amendments to the visa subclass itself and amendments to Schedule 8 of the regulations, which list general visa conditions that may be applied to any subclass of visa.⁵¹

1.67 Although in this instance the amendments to the regulations have been made by the primary legislation, the committee notes that the minister is empowered to make changes to regulations through delegated legislation. While the elements of the offence of breaching a visa condition are contained within sections 76B, 76C and 76D of the bill, the general conditions listed under Schedule 8 of the regulations include the conditions that must be complied with in order to not commit an offence under the above sections. Effectively, the conduct that may constitute an offence is a significant matter that has been left to delegated legislation. As such, there is an

⁴⁹ Schedule 2. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

⁵⁰ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, items 3-8.

⁵¹ Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, items 9-13.

ongoing legislative power reposed in the executive government to change the nature of the offences under sections 76B, 76C and 76D by amending the regulations.

1.68 The committee's view is that significant matters 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.

1.69 **In light of the above, the committee requests the minister's detailed advice as to why it is considered necessary and appropriate to allow delegated legislation to change the visa conditions that form elements of the offences under sections 76B, 76C and 76D.**

Broad delegation of administrative powers and functions

Significant matters in delegated legislation

Privacy

Retrospective application⁵²

1.70 Item 4 to schedule 1 to the second bill seeks to introduce proposed new section 76F which seeks to provide new powers relating to monitoring devices and the collection, use and disclosure of information by 'authorised officers'. An 'authorised officer' is defined to be anyone authorised in writing by the minister, secretary or the Australian Border Force Commissioner to act as such, as per schedule 1, item 4, proposed subsection 76F(6).

1.71 In relation to a person who is subject to monitoring, proposed subsection 76F(1) provides that an authorised officer may do all things necessary or convenient to be done to:

- install, fit or remove the person's monitoring device or related equipment;⁵³
- maintain, repair or otherwise keep the device in good working order;⁵⁴
- operate or use the person's monitoring device or related equipment;⁵⁵ and

⁵² Schedule 1 to the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i), (ii) and (iv).

⁵³ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, proposed paragraph 76F(1)(a).

⁵⁴ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, proposed paragraph 76F(1)(b).

⁵⁵ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, proposed paragraph 76F(1)(c).

- determine or monitor the location of the person or an object relating to them through the operation of a monitoring device or equipment.⁵⁶

1.72 Proposed subsection 76F(2) provides that an authorised officer may collect, use or disclose to any other person, information (including personal information) for the following purposes:

- determining whether a requirement of a condition of a visa held by a person who is subject to monitoring is being, or has been complied with;⁵⁷
- whether a person who is subject to monitoring has committed an offence against this Act or the regulations;⁵⁸
- protecting the community in relation to persons who are subject to monitoring;⁵⁹
- facilitating the location of a person subject to monitoring who is suspecting of having failed to comply with a requirement of a condition of a visa held by the person;⁶⁰
- facilitating the location of a person who is or has been subject to monitoring in the event that either or both of the following apply:
 - there is a real prospect of the removal of the person from Australia becoming practicable in the reasonably foreseeable future;⁶¹
 - a visa held by the person ceases to be in effect;⁶²
- facilitating the performance of functions, and exercise of powers, of authorised officers under this Act (including this section) and the regulations in relation to persons who are or have been subject to monitoring.⁶³

⁵⁶ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, proposed paragraph 76F(1)(d).

⁵⁷ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, proposed paragraph 76F(2)(a).

⁵⁸ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, proposed paragraph 76F(2)(b).

⁵⁹ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, proposed paragraph 76F(2)(c).

⁶⁰ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, proposed paragraph 76F(2)(d).

⁶¹ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, proposed subparagraph 76F(2)(e)(i).

⁶² Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, proposed subparagraph 76F(2)(e)(ii).

⁶³ Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, proposed paragraph 76F(2)(f)

1.73 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 as to why these are considered necessary should be included in the explanatory memorandum.

1.74 The explanatory memorandum to the second bill does not provide any further information to clarify the operation of these provisions beyond describing the clauses.

1.75 The committee is concerned that these power which trespass on the visa holder's rights and liberties, are liable to be performed by anyone who is authorised to do so by the minister, secretary or the Australian Border Force Commissioner, regardless of their skills, qualifications and training.

1.76 These powers include sensitive actions such as physically installing a monitoring device on a person. This may require, in the committee's view, specially trained personnel who are equipped with the skills, knowledge and experience to both operate such devices and to recognise and appropriately navigate the sensitivities of such intrusive conduct. It is therefore concerning to the committee that it appears that any person could be employed to do such a task.

1.77 In addition, the committee is concerned that the wording in proposed subsection 76F(1) is overly broad, as it empowers the authorised officer to 'do all things necessary or convenient' in relation to the prescribed powers. This is an extremely broad authorisation as nearly any requirement could be justified on the grounds that it is convenient for the officer to impose in this context. This could encompass, for example, requirements that a person subject to monitoring travel vast distances to facilitate the authorised person maintaining the monitoring equipment, at unreasonable times and for unreasonable amounts of time. The committee notes that there is no requirement for reasonableness attached to these powers, nor does the explanatory memorandum provide any further information as to how these powers may be exercised in practice and whether any safeguards or limitations apply to prevent 'convenience' from justifying unreasonable requirements.

1.78 The committee's scrutiny concerns in relation to these provisions are heightened by the impact they have on an individual's right to privacy. Enabling an authorised officer under proposed subsection 76F(1) to do all things 'necessary or convenient' to be done relating to a person's monitoring device likely limits the right to privacy. This is due to a person required to wear the device being required to make the device (which is attached to them) available to the authorised officer in order for them to maintain the device. Further, providing the authorised officer the power to

determine or monitor the location of the person through the operation of the monitoring device also limits the visa holder's right to privacy.

1.79 Additionally, proposed subsection 76F(2) likely limits an individual's right to privacy as it provides an authorised officer with the power to collect, use or disclose personal information to any person for a wide variety of purposes. This would relate to the personal information of the person subject to monitoring but would also include any other person if that information was related to any of the broadly listed purposes.

1.80 Further, proposed subsection 76F(2) provides that personal information may be shared with 'any other person' for the broad purpose of 'protecting the community in relation to persons who are subject to monitoring'. Noting that this is stated to operate despite any other law,⁶⁴ this would appear to allow authorised officers to share information about the person with the media, including their name and address, if they consider it would help protect the community.

1.81 Where a bill contains provisions for the collection, use or disclosure of personal information, the committee expects the explanatory memorandum to the bill to address why it is appropriate for the bill to provide for the collection of personal information. The committee also expects the explanatory memorandum to detail what safeguards are in place to protect the personal information, and whether these are set out in law or policy (including whether the *Privacy Act 1988* applies).

1.82 In this case, the explanatory memorandum explains that information collected by an authorised officer in relation to a person who has committed an offence is protected under the *Privacy Act 1988* and the Australian Privacy Principles (APP).⁶⁵ The explanatory memorandum explains that under APP 6, an APP entity (of which the explanatory memorandum states that an authorised officer is one) must not use or disclose personal information that was collected for a particular purpose for another purpose, unless the individual has consented or an exception applies. An exception is where a disclosure is required or authorised by or under Australian law, and as this bill proposes to enact 'required disclosures', the explanatory memorandum explains that these provisions are lawful exceptions to the APP 6.

1.83 The committee considers that while the explanatory memorandum has sought to justify why such exceptions are lawful in relation to the *Privacy Act 1988*, it does not explain whether any privacy safeguards are available to protect an individual's personal information, including the person subject to monitoring and any other person.

1.84 Further, proposed subsection 76F(4) provides that an authorised officer's exercise of powers under subsection 76F(1) is subject to any conditions, restrictions or limitations prescribed by regulations. These are potentially significant matters that could affect the rights and liberties of individuals and the committee is concerned that

⁶⁴ See proposed subsection 76F(3).

⁶⁵ Explanatory memorandum, pg. 13.

the scope of these already extensive powers may be extended via delegated legislation.

1.85 The committee also notes the effect of subitem 7(1) of schedule 1 to the second bill which provides that the new powers for authorised officers in proposed subsection 76F apply in relation to persons who became subject to monitoring, or to monitoring devices and equipment issued, before commencement of the bill. Retrospective application challenges a basic principle of the rule of law that laws should only operate prospectively. The committee therefore has long-standing scrutiny concerns in relation to provisions which have the effect of applying retrospectively. These concerns will be particularly heightened if the legislation will, or might, have a detrimental effect on individuals.

1.86 Generally, where proposed legislation will have a retrospective effect, the committee expects that the explanatory materials will set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. If an individual's interests will, or may, be affected by the retrospective application of a provision, the explanatory memorandum should set out the exceptional circumstances that nevertheless justify the use of retrospectivity. In this instance, the explanatory memorandum does not address any impact the retrospectivity may have on affected individuals.

1.87 **The committee requests the minister's advice as to:**

- **why it is necessary and appropriate to allow powers relating to monitoring devices and equipment to effectively be delegated to any person;**
- **whether the bill can be amended to provide legislative guidance as to the categories of people to whom those powers might be delegated;**
- **whether any safeguards or limitations exist on the operation of an authorised officer's powers under proposed subsection 76F(1), noting that there appears to be no limits on what may be 'convenient' for an authorised officer to require a person subject to monitoring to do;**
- **why it is necessary and appropriate to provide that an authorised officer can disclose information, including personal information, to any other person for such a wide range of purposes under proposed subsection 76F(2);**
- **what safeguards are in place to protect the personal information of both individuals subject to monitoring and any other person whose information has been collected, used or disclosed; and**
- **why it is considered necessary and appropriate to leave conditions, restrictions or limitations on an authorised officer's exercise of powers under subsection 76F(1) to delegated legislation.**

1.88 The committee also requests the minister's advice as to whether actions provided for under proposed section 76F undertaken prior to the commencement of the bill had lawful basis, noting that the bill appears to retrospectively validate such actions.

National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2023⁶⁶

Purpose	The National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2023 (the bill) seeks to amend the <i>National Redress Scheme for Institutional Child Sexual Abuse Act 2018</i> (the Redress Act). The bill seeks to amend existing provisions of the Redress Act, and also introduces new provisions and concepts to further strengthen the National Redress Scheme for Institutional Child Sexual Abuse (the Scheme).
Portfolio	Social Services
Introduced	House of Representatives on 15 November 2023
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Instruments not subject to an appropriate level of parliamentary oversight⁶⁷

1.89 Item 12 of Schedule 1 to the bill seeks to introduce proposed section 96A, which authorises the National Redress Scheme Operator⁶⁸ (the Operator) to disclose protected information to the public trustee or other government institutions in relation to financial management orders to which a person under the scheme may be subject.⁶⁹ Proposed subsection 96A(6) allows the Operator of the scheme to impose conditions to be complied with in relation to protected information disclosed under subsection 96A(1). Proposed subsection 96A(8) provides that the Operator may do so in an instrument that is not a legislative instrument.

1.90 Where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. A legislative instrument made by

⁶⁶ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2023, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 233.

⁶⁷ Schedule 1, item 12, proposed subsections 96A(6) and 96A(8). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

⁶⁸ The National Redress Scheme Operator is the person who is the Secretary of the Department, in the person's capacity as Operator of the scheme under section 6 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*.

the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill.

1.91 However, as instruments made under proposed subsection 96A(8) are specified to not be legislative instruments, they are not even subject to the tabling, disallowance or sunset requirements that apply to legislative instruments. Noting the importance of parliamentary scrutiny, the committee expects the explanatory materials to include a justification for why instruments made under proposed subsection 96A(8) are not legislative in character.

1.92 In this instance, the committee notes that the explanatory memorandum provides the following justification relating to the content of the instruments:

New subsection 96A(8) clarifies that an instrument made under new subsection 96A(6) is not a legislative instrument.

New subsection 96A(8) clarifies that an instrument made under new subsection 96A(6) is not a legislative instrument. This provision is included to assist the reader. It is declaratory of the law and conveys that such an instrument is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act* as conditions on the disclosure of protected information do not determine or alter the content of the law.⁷⁰

1.93 However, it is unclear to the committee that the content of an instrument under proposed subsection 96A(8) is 'declaratory of the law' and that its contents do not 'determine or alter the content of the law'. The committee notes the instruments will determine conditions to be complied with in relation to the disclosure of protected information under the *Redress Act*, which is a significant matter to include in delegated legislation. Further, failure to comply with these conditions constitutes an offence carrying a maximum penalty of 2 years imprisonment or 120 penalty units.⁷¹

1.94 The committee therefore considers that these instruments determine the content of the law by setting out conditions that must be complied with and have the potential to directly affect privileges or interests and impose an obligation.⁷² The committee also notes that subsection 8(4) of the *Legislation Act 2003* does not preclude the minister from prescribing these matters be set out in legislative instruments.

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

- **why it is considered appropriate that instruments made under proposed subsection 96A(8) are not legislative instruments; and**

⁷⁰ Explanatory memorandum, p. 17.

⁷¹ Proposed subsection 96A(7).

⁷² *Legislation Act 2003*, paragraph 8(4)(b).

- **whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**
-

Private senators' and members' bills that may raise scrutiny concerns⁷³

The committee notes that the following private senators' and members' bills may raise scrutiny concerns under Senate standing order 24. Should these bills proceed to further stages of debate, the committee may request further information from the bills' proponents.

Bill	Relevant provisions	Potential scrutiny concerns
Commonwealth Electoral Amendment (Voter Protections in Political Advertising) Bill 2023	Clauses 321K and 321Q	The provisions may raise scrutiny concerns under Principle (i) reversal of the evidential burden of proof.
Lobbying (Improving Government Honesty and Trust) Bill 2023	Clauses 11, 12 and 13	The provisions may raise scrutiny concerns under Principle (i) significant penalties.
	Clauses 28 and 29	The provisions may raise scrutiny concerns under Principle (i) vicarious liability.

⁷³ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 234.

Bills with no committee comment⁷⁴

The committee has no comment in relation to the following bills:

- Attorney-General's Portfolio Miscellaneous Measures Bill 2023
- Australian Human Rights Commission Amendment (Costs Protection) Bill 2023
- Superannuation (Objective) Bill 2023
- Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023

⁷⁴ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 235.

Commentary on amendments and explanatory materials⁷⁵

Disability Services and Inclusion Bill 2023

1.96 On 17 November 2023, the Senate agreed to two Government amendments and one Greens amendment to the bill. The Minister for Finance (Senator the Hon Katie Gallagher) also tabled an addendum to the explanatory memorandum to the bill.

1.97 The committee thanks the Minister for tabling an addendum to the explanatory memorandum which includes key information requested by the committee in relation to the availability of independent merits review. The committee also welcomes the two Government amendments as they respond to the committee's request that the bill be amended to include an accrediting authority that has appropriate internal controls and complaints processes in place under subclause 25(1).⁷⁶

Treasury Laws Amendment (2023 Measures No. 1) Bill 2023

1.98 On 16 November 2023 the House of Representatives agreed to 16 Government amendments to the bill, and the Assistant Treasurer and Minister for Financial Services (the Hon Stephen Jones MP) circulated a supplementary explanatory memorandum to the bill. The committee thanks the Assistant Treasurer for providing a supplementary explanatory memorandum which includes key information requested by the committee in relation to automated decision making.⁷⁷

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

- Disability Services and Inclusion (Consequential Amendments and Transitional Provisions) Bill 2023
- On 14 November 2023 the House of Representatives agreed to one Government amendment to the bill, and the Minister for Social Services (the Hon Amanda Rishworth MP) tabled a supplementary explanatory memorandum to the bill.

⁷⁵ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 236.

⁷⁶ Senate Standing Committee for the Scrutiny of Bills, *Digest 14 of 2023* (15 November 2023) pp. 4 – 9.

⁷⁷ Senate Standing Committee for the Scrutiny of Bills, *Digest 6 of 2023* (14 June 2023) pp. 69 – 73.

- Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023
 - On 17 November 2023, the Senate agreed to one amendment circulated by the Jacqui Lambie Network and the Minister for Finance (Senator the Hon Katie Gallagher) tabled an addendum to the explanatory memorandum relating to the bill.
- Migration Amendment (Bridging Visa Conditions) Bill 2023
 - On 16 November 2023, nine Government and two opposition amendments (Senator James Paterson) were agreed to in the Senate and the House. These amendments have been considered as part of the committee's scrutiny of the Migration Amendment (Bridging Visa Conditions) Bill 2023 in Chapter 1 of this Digest.
- Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2023
 - On 17 November 2023, the Minister for Finance (Senator the Hon Katie Gallagher) tabled an addendum to the explanatory memorandum relating to the bill, addressing key concerns of the Parliamentary Joint Committee on Human Rights.

Chapter 2

Commentary on ministerial responses

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

Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023⁷⁸

Purpose	This bill seeks to amend the <i>Criminal Code Act 1995</i> to further strengthen Australia's counter-terrorism legislative framework to respond to new and evolving national security threats, including the complex motivations, strategies and tactics of violent extremists.
Portfolio	Attorney General
Introduced	House of Representatives on 14 June 2023
Bill status	Before the House of Representatives

Broad scope of offence provisions

Freedom of expression⁷⁹

2.2 This bill seeks to introduce new criminal offences relating to the public display and trading of prohibited symbols. A 'prohibited symbol' is defined as the Islamic State flag, the Nazi hakenkreuz, the Nazi double sig rune, and something that so nearly resembles these things that it is likely to be confused with, or mistaken for, that thing.

2.3 Item 5 of Schedule 1 to the bill introduces proposed section 80.2H, which seeks to provide that a person commits an offence if they intentionally cause a prohibited symbol to be displayed in a public place and certain circumstances apply. A prohibited symbol is 'displayed in a public place' if it is capable of being seen by a member of the public who is in a public place or the prohibited symbol is included in a document, such as a newspaper or magazine, film, video or television program, that is available or distributed to the public or a section of the public (including via the internet). Proposed subsection 80.2H(9) provides that the offence would not apply where:

⁷⁸ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 237.

⁷⁹ Schedule 1, item 5, proposed subsections 80.2H(10), 80.2J(6), 80.2J(7), 80.2J(8), 80.2M(3) and 80.2M(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

- a reasonable person would consider that the public display of the prohibited symbol is for a religious, academic, educational, artistic, literary or scientific purpose and not contrary to the public interest; or
- for the purposes of making a news report or a current affairs report that is in the public interest and made by a professional journalist.

2.4 Proposed section 80.2J provides that a person commits an offence if:

- they trade in goods that depict or contain a prohibited symbol;
- the person knows that, or is reckless as to whether, the prohibited symbols are associated with Nazi ideology or global jihadist ideology; and
- one or more jurisdictional requirements apply.

2.5 A person is taken to trade in goods if they sell or prepare for supply, transport, guard or conceal, or possess the goods with the intention of selling the goods. There are also several defences to the offence, such as if the traded goods contain commentary on public affairs, the prohibited symbol only appears in the commentary and the making of the commentary is in the public interest.

2.6 Additionally, proposed section 80.2M provides that a person commits an offence if a person is given a direction from a police officer under subsection 80.2K(1) to cease displaying a prohibited symbol in a public place and the direction is not complied with before the time specified in the direction. Proposed subsections 80.2M(3)–(5) set out a number of defences to this offence, such as where the recipient takes all reasonable steps to cause the prohibited symbol to cease to be displayed or there are no such steps that can be taken by the recipient. The defendant would bear an evidential burden in relation to these defences and the maximum possible penalty applicable is 20 penalty units.

2.7 In *Scrutiny Digest 13 of 2023* the committee requested that the Attorney-General table an addendum to the explanatory memorandum containing examples of reasonable and unreasonable steps to be taken to cease public display of a prohibited symbol 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

Attorney-General's response⁸¹

2.8 In a letter dated 27 November 2023, the Attorney-General confirmed that the Government will table an addendum to the explanatory memorandum to the bill

⁸⁰ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 57–60.

⁸¹ The Attorney-General responded to the committee's comments in a letter dated 27 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

including examples of reasonable and unreasonable steps to be taken to cease public display of a prohibited symbol.

Committee comment

2.9 In light of the above the committee makes no further comment on this matter.

Reversal of the evidential burden of proof (Schedule 1)

Absolute liability offences⁸²

2.10 Proposed subsection 80.2H(10) provides a number of defences to the offence under proposed subsection 80.2H(1), which include causing a public display of a prohibited symbol if it is necessary for enforcing a law of the Commonwealth, a State or Territory, a foreign country or part of a foreign country. This can also include conduct that is necessary for monitoring compliance with or investigating a contravention of a law of the same. Other defences under proposed subsection 80.2H(10) include:

- a person engaging in the conduct for the purposes of proceedings in a court or a tribunal;
- a person engaging in the conduct in connection with performance by a public official of the official's duties and functions and engaging in conduct that is reasonable in the circumstances for the purpose of the public official performing that duty or function;
- a person engaging in the conduct in connection with an individual assisting a public official in relation to the performance of the public official's duties or functions and engaging in the conduct is reasonable in the circumstances for the purpose of the public official performing that duty or function; and
- a person displays a hate symbol or something that so nearly resembles a symbol and genuinely engages in this conduct for the purpose of opposing global jihadist ideology, Nazi ideology, fascism or a related ideology.

2.11 Similarly, proposed section 80.2J of the bill also provides that it is an offence to trade in goods that depict or contain a prohibited symbol which the person knows to be or is reckless as to being a prohibited symbol. Proposed subsections 80.2J(6), 80.2J(7) and 80.2J(8) provide various defences to this offence, including the following:

- under proposed subsection 80.2J(6), if the goods traded contain commentary on public affairs, that the prohibited symbols only appear in the commentary and if the trade is in relation to the commentary in which

⁸² Schedule 1, item 5, proposed subsections 80.2H(10), 80.2J(6), 80.2J(7), 80.2J(8), 80.2M(3) and 80.2M(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

a prohibited symbol appears, making the commentary in the public interest; and

- under proposed subsection 80.2J(7), if the trading is for the purpose of enforcing, monitoring compliance with or investigation of a contravention of a law of the Commonwealth, a State or Territory, or a foreign country; and
- under proposed subsection 80.2J(8), if the trading is in connection with the performance of a public official's duties or functions and is reasonable in the circumstances for the purpose of the public official performing that duty or function.

2.12 Additionally, absolute liability applies to proposed paragraph 80.2J(1)(e), which requires proposed subsection 80.2J(5) to not apply in order for the offence of trading in prohibited symbols to be made out.

2.13 Proposed section 80.2M provides that it is an offence if a person fails to comply with a direction to cease the display of a prohibited symbol in public. Proposed subsection 80.2M(3) provides that it is a defence to this offence if:

- the conduct that caused the public display of the prohibited symbol was engaged for a purpose that is religious, academic, educational, artistic, literary or scientific; or
- the conduct was engaged in for the purpose of making a news report or current affairs report that is in the public interest and is made by a person working in a professional capacity.

2.14 Further, proposed subsection 80.2M(4) provides that for the purposes of the defence under proposed subsection 80.2M(3), it does not matter if the conduct referred to above is the conduct of the person given the direction.

2.15 In *Scrutiny Digest 9 of 2023*, the committee requested the Attorney-General's advice as to why it is appropriate to use offence-specific defences, which reverse the evidential burden of proof under proposed subsections 80.2H(10), 80.2J(6), 80.2J(7), 80.2J(8), and 80.2M(3) and 80.2M(4).⁸³ In response, the Attorney-General advised that the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Guide to Framing Commonwealth Offences)* provides guidance on when offence-specific defences are appropriate, and that the offence-specific defences in the proposed subsections are consistent with this as they include matters peculiarly

⁸³ Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2023* (9 August 2023) pp. 5–10.

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.⁸⁴

2.16 In *Scrutiny Digest 13 of 2023*, the committee noted that for a number of the offences the matters did not appear to be peculiarly within any person's knowledge, and while knowledge or information relating to these evidentiary matters may be more readily available to the defendant, this does not necessarily mean that it is significantly more costly or difficult for prosecution to disprove. The committee requested the Attorney-General's further justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) under proposed subsections 80.2H(10)(a) and (b), 80.2J(6), 80.2J(7), 80.2J(8), and 80.2M(4).⁸⁵

Attorney-General's response⁸⁶

2.17 The Attorney-General reiterated his advice that the *Guide to Framing Commonwealth Offences* provides guidance on when offence-specific defences are appropriate. The Attorney-General also stated that the offence-specific defences in the proposed subsections are consistent with this as they include matters 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. The Attorney-General noted the relevant parts of the explanatory memorandum and statement of compatibility which justify the inclusion of these offence-specific defences.

Committee comment

2.18 The committee expresses its concern regarding the lack of engagement with the concerns the committee has raised in relation to these particular provisions. The committee reiterates its position that reversing the burden of proof interferes with the common law right to be presumed innocent and the ordinary duty of the prosecution to prove all elements of an offence.

2.19 Any reversal of the burden of proof should be adequately justified, and in this case the Attorney-General's response did not provide any further information, and therefore has not satisfied the committee that these offence-specific defences are appropriate.

2.20 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential

⁸⁴ The Attorney-General responded to the committee's comments in a letter dated 30 October 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 13 of 2023*).

⁸⁵ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 60–64.

⁸⁶ The Attorney-General responded to the committee's comments in a letter dated 27 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

burden of proof under proposed subsections 80.2H(10)(a) and (b), 80.2J(6), 80.2J(7), 80.2J(8), and 80.2M(4) rather than including these matters as elements of the offence.

Broad scope of offence provisions

Freedom of expression⁸⁷

2.21 The bill seeks to create offences relating to the use of a carriage service⁸⁸ (such as an internet or mobile telephone service) for violent extremist material, including accessing, obtaining, distributing, possessing and controlling such material.⁸⁹ Violent extremist material includes, for example, material that describes, depicts, supports or facilitates 'serious violence' and is intended to advance a political, religious or ideological cause, and assist, encourage or induce a person to engage in, plan or prepare for an 'intimidatory act'.⁹⁰ The term 'serious violence' encompasses a range of actions, including actions that cause serious physical harm or death to a person; cause serious damage to property; or seriously interfere with, disrupt or destroy an electronic system.⁹¹ A maximum penalty of five years imprisonment would apply to these offence.⁹²

2.22 In *Scrutiny Digest 9 of 2023*, the committee requested the Attorney-General's advice as to whether the bill can be amended to, amongst other things, include clarity as to what is meant by 'accessing' violent extremist material.⁹³ The Attorney-General advised that the *Criminal Code Act 1995* (Criminal Code) defines 'access' for the purpose of Part 10.6 of the Criminal Code, in which the new violent extremist material provisions will be located.

2.23 In *Scrutiny Digest 13 of 2023*, the committee considered that including in the explanatory memorandum the definition of 'access' under section 473.1 of the

⁸⁷ Schedule 2, item 3, proposed sections 474.45B and 474.45C. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

⁸⁸ Carriage service means a service for carrying communications by means of guided and/or unguided electromagnetic energy: *Telecommunications Act 1997*, section 7 and *Criminal Code Act 1995*, Dictionary.

⁸⁹ Schedule 2, item 3, proposed section 474.45B.

⁹⁰ Schedule 2, item 3. An 'intimidatory act' is defined in proposed subsection 474.45A(3) as violent action, or threat of violent action, where the action is done, or the threat is made, with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country (or part of the government); or intimidating the public or a section of the public.

⁹¹ Schedule 2, item 3, proposed subsection 474.45A(2); *Criminal Code Act 1995*, subsection 100.1(2).

⁹² Schedule 2, item 3, proposed subsections 474.45B(1) and 474.45C(1).

⁹³ Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2023* (9 August 2023) pp. 10–12.

Criminal Code that is applicable to the offences under Schedule 2 of the bill would be helpful. As it remained unclear to the committee whether the definition of access could encompass inadvertently accessing violent extremist material that is displayed on a computer or some other output, such as through social media, the committee also requested the Attorney-General's further advice as to whether:

- the definition of 'access' provided under section 473.1 of the Criminal Code can include inadvertently accessing violent extremist material through the ordinary use of a computer or carriage service; and
- what, if any, safeguards are in place for persons who contravene proposed subsection 474.45B(1) by inadvertently accessing violent extremist material, including, for example, whether any specific defences are available for a defendant to rely on.⁹⁴

Attorney-General's response⁹⁵

2.24 The Attorney-General advised that the government will table an addendum to the explanatory memorandum which includes information on the applicable definition of 'access'.

2.25 The Attorney-General further advised that the new offence would not criminalise inadvertent access of violent extremist material because new paragraph 474.45B(2)(b) would provide that the fault element attached to paragraph 474.45B(1)(c) is recklessness. By operation of this fault element, a person who accidentally comes across violent extremist material on the internet without any warning from the context would not be caught by the offence, because they would not have been aware of a substantial risk that the material was violent extremist material. Further, the Attorney-General advised that section 474.45D sets out the defences that would be available in relation to this offence.

Committee comment

2.26 The committee thanks the Attorney-General for this response and for clarifying that the new offence would not criminalise inadvertent access of violent extremist material.

2.27 The committee welcomes the Attorney-General's undertaking to table an addendum to the explanatory memorandum, while retaining its scrutiny concerns in relation to the broad scope of this offence provision.

⁹⁴ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 64–66.

⁹⁵ The Attorney-General responded to the committee's comments in a letter dated 27 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

Reversal of the evidential burden of proof (Schedule 2)⁹⁶

2.28 Item 3 of Schedule 2 of the bill seeks to create two offences in relation to the use of a carriage service to access, possess or control violent extremist material. These offences include:

- using a carriage service to access violent extremist material, which carries a maximum penalty of 5 years (Division 474.45B of the Criminal Code); and
- possessing or controlling violent extremist material obtained or accessed using a carriage service, which carries a maximum penalty of 5 years (Division 474.45C of the Criminal Code).

2.29 Proposed section 474.45D provides various defences in respect of both offences. These defences include:

- that the conduct is necessary for enforcing, monitoring compliance with or investigation of a contravention of a law of the Commonwealth, a State or Territory, or a foreign country; or
- the conduct is necessary for conducting scientific, medical, academic or historical research, and is reasonable in the circumstances for the purpose of conducting such research; or
- the conduct is in connection with the performance of a public official's duties or functions and is reasonable in the circumstances for the purpose of the public official performing that duty or function; or
- the conduct is for the purpose of advocating the lawful procurement of a change to any matter established by law, policy or practice.

2.30 In *Scrutiny Digest 9 of 2023*, the committee requested the Attorney-General's advice as to why it is proposed to use offence-specific defences in relation to offences under proposed subsections 474.45B(1) and 474.45C(1); and whether it is possible to disapply section 13.3 of the Criminal Code as an alternative to specifying these abovementioned defences as offence elements.⁹⁷ The Attorney-General advised the matters are uniquely within the defendant's knowledge and as such the defendant is best placed to adduce evidence demonstrating their purpose.

2.31 In *Scrutiny Digest 13 of 2023*, the committee considered that the matters relating to some of these defences are not of a nature that is peculiar to the defendant's knowledge, for example as any material relating to the monitoring, compliance or enforcement of a law cannot be peculiar to a person's knowledge and would be readily apparent to police in the course of investigation. The committee requested the Attorney-General's further detailed justification as to why it is proposed

⁹⁶ Schedule 2, item 3, proposed subsection 474.45C(5). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

⁹⁷ Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2023* (9 August 2023) pp. 16–18.

to use offence-specific defences (which reverse the evidential burden of proof) under proposed paragraphs 474.45D(1)(a), (b) and (g).⁹⁸

Attorney-General's response⁹⁹

2.32 The Attorney-General advised that the Guide to Framing Commonwealth Offences provides guidance on when offence-specific defences are appropriate. Further, that the offence-specific defences in the proposed subsections are consistent with this as they include matters 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. The Attorney-General noted the relevant parts of the explanatory memorandum and statement of compatibility which justify the inclusion of these offence-specific defences.

Committee comment

2.33 As with the Attorney-General's response in relation to the reversal of the evidential burden of proof in particular provisions in Schedule 1 to the bill, the committee expresses its concern regarding the lack of engagement with the scrutiny issues the committee has raised in relation to proposed paragraphs 474.45D(1)(a), (b) and (g).

2.34 The committee reiterates its position that reversing the burden of proof interferes with the common law right to be presumed innocent and the ordinary duty of the prosecution to prove all elements of an offence. Any reversal of the burden of proof should be adequately justified, and in this case the Attorney-General's response has not satisfied the committee that these offence-specific defences are appropriate.

2.35 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof under proposed paragraphs 474.45D(1)(a), (b) and (g) rather than including these matters as elements of the offence.

⁹⁸ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 68–70.

⁹⁹ The Attorney-General responded to the committee's comments in a letter dated 27 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

Primary Industries Levies and Charges Collection Bill 2023¹⁰⁰

Purpose	The bill seeks to establish a collection and compliance framework for levies and charges collected under the agriculture levy system.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 18 October 2023
Bill status	Before the Senate

Coercive powers

Infringement notices

Broad delegation of administrative powers¹⁰¹

2.36 Clause 20 seeks to empower a compliance officer to exercise a range of monitoring powers under Part 2 of *the Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) in relation to: the provisions of this bill or the rules; or an offence against the *Crimes Act 1914* (Crimes Act) or the *Criminal Code 1995* (Criminal Code) that relates to this bill or its rules.

2.37 Subclause 20(10) seeks to provide that a compliance officer can be assisted by other persons in carrying out their duties or functions under the Regulatory Powers Act in relation to the bill. Subclause 20(11) seeks to provide that both an authorised person and a person assisting can use such force against things as is necessary and reasonable in the circumstances.

2.38 Clause 21 of the bill seeks to provide a mirroring provision enabling the investigatory powers in Part 3 of the Regulatory Powers Act to apply in relation to the bill's offence and civil offence provisions, and offences against the Crimes Act or the Criminal Code that relate to this bill or its rules.

2.39 Clause 23 of the bill seeks to provide that the following provisions of the bill are subject to an infringement notice under Part 5 of the Regulatory Powers Act:

- subclauses 17(1), (2), (3) or (4) (penalties for failure to give return or notice under the rules);
- subclauses 18(1) or (2) (penalties for failure to make or keep records under the rules);

¹⁰⁰ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Primary Industries Levies and Charges Collection Bill 2023, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 238.

¹⁰¹ Clauses 20, 21 and 23. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

- subclauses 26(4) or (5) (Secretary may require information or documents);
- subclauses 47(1),(3),(5) or (8) (civil penalty provisions for false or misleading information or documents).

2.40 Further, subclause 23(2) seeks to provide that for the purposes of Part 5 of the Regulatory Powers Act a compliance officer is an infringement officer.

2.41 Clause 4 of the bill seeks to define a compliance officer as either the Secretary or an Australian Public Service (APS) employee in the department appointed by the Secretary under clause 52 of the bill.

2.42 In *Scrutiny Digest 13 of 2023* the committee sought the minister's advice as to:

- why it is necessary and appropriate for any APS employee of the department to be conferred monitoring and investigative powers as a compliance officer, or person assisting a compliance officer, and as an infringement officer; and
- whether the bill can be amended to require that the only employees in possession of the appropriate training, qualifications, skills or experience be designated compliance officers or persons assisting compliance officers.¹⁰²

Minister for Agriculture, Fisheries and Forestry's response¹⁰³

2.43 The Minister for Agriculture, Fisheries and Forestry (the minister) responded to the committee in a letter dated 20 November 2023.

2.44 The minister advised that the bill seeks to replicate the existing practice of empowering the secretary to appoint APS employees with relevant training and experience to compliance officer roles. The minister advised that currently there are around 20 compliance officers, all of whom are specialised staff. The minister explained that this arrangement is intended to continue despite there being no legislative requirements for compliance officers to have specialised training, qualifications and experience. The minister also advised that experienced compliance officers will supervise any officers assisting, and there are safeguards which limit the powers of such assisting officers.

2.45 The minister further advised that due to the large volume of compliance related activities in this context it would not be feasible to restrict compliance officers to members of the Senior Executive Service.

¹⁰² Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 20–30.

¹⁰³ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to Scrutiny Digest 15 of 2023).

2.46 The minister advised that, in light of these reasons, it would not be necessary to amend the bill to expressly require that officers have particular skills, experience or training.

Committee comment

2.47 The committee thanks the minister for providing this further information in relation to compliance officers.

2.48 In light of the information provided the committee makes no further comment in relation to these matters.

2.49 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to vicarious liability be tabled in the Parliament as soon as practicable. The committee notes 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*).

Privacy¹⁰⁴

2.50 Division 3 of Part 5 of the bill seeks to set out authorised uses and disclosures of relevant levy/charge information. Levy/charge information is defined in clause 4 as information obtained by a person under the bill or rules, or obtained or generated by a person in the course of administering the bill or rules, or assisting another person to do so.

2.51 A note to Division 3 confirms that each provision in Division 3 that authorises the use or disclosure of information would also provide an authorisation for the purposes of the *Privacy Act 1988* (Privacy Act) and other laws.

2.52 There are a range of proposed authorised disclosures of levy/charge information by entrusted persons set out in Division 3. These would include: disclosures in the process of administering the bill; disclosures to Commonwealth entities; disclosures under other laws; disclosures for law enforcement; and other purposes.

2.53 Of these provisions, only two types of disclosures (permitted by clause 28) would be prevented from disclosing personal information, as per subclause 28(4). This is in relation to information disclosed for agricultural research and policy, and information disclosed by staff for the performance of functions of the Australian Bureau of Agricultural and Resource Economics and Sciences under subclauses 28(2) and (3).

¹⁰⁴ Division 3 of Part 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

2.54 Secondary use of information received by a declared recipient body or a statutory recipient body under clause 32 would also be permitted for a range of specified purposes under clause 42, such as for maintaining a register of levy or charge payers.

2.55 In *Scrutiny Digest 13 of 2023* the committee sought the minister's advice as to:

- whether personal information may be captured within the authorised uses and disclosures set out in relation to relevant levy/charge information in Division 3 of Part 5 of the bill; and, if so;
- the anticipated scope or type of personal information that would be collected, used and disclosed.¹⁰⁵

Minister's response¹⁰⁶

2.56 The minister advised that levy/charge information may include personal information such as names, residential addresses, and, in limited circumstances, sensitive information within the definition of the *Privacy Act 1988* (the Privacy Act). The minister also advised that this part of the bill provides appropriate safeguards against the unauthorised use and disclosure of personal information and sensitive information, and that the protections in the Privacy Act apply.

Committee comment

2.57 The committee thanks the minister for this response which clarifies the scope and limitations of personal and sensitive information that may be collected, used and disclosed under Division 3 of Part 5 of the bill.

2.58 In light of the information provided the committee makes no further comment in relation to this matter.

Reversal of the evidential burden of proof¹⁰⁷

2.59 Subclause 45(1) proposes to prescribe a criminal offence when: an entrusted person has obtained or generated information for the purposes of administering or assisting a person to administer the bill or the rules; the information is commercially sensitive and the disclosure of which could reasonably be expected to found an action by a person for a breach of a duty of confidence; and the entrusted person uses or

¹⁰⁵ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 20–30.

¹⁰⁶ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to Scrutiny Digest 15 of 2023).

¹⁰⁷ Clause 45. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

discloses the information. The offence carries a maximum penalty of 12 months imprisonment.

2.60 Subclauses 45(4) and (5) set out proposed offence-specific defences for the offences in subclauses 45(1) and (2). Subclause 45(4) seeks to provide that the offences do not apply if the use or disclosure of the information is required or authorised by the bill or another Commonwealth law, or a law of a State or Territory prescribed by the rules made for the purposes of this paragraph. Subclause 45(5) seeks to provide that the offences do not apply if the person uses or discloses the information in good faith for the purposes of administering or assisting a person to administer the bill or the rules, or monitoring compliance or assisting a person to monitor compliance with the bill or the rules. A note to each subclause confirms that the evidential burden of proof is reversed in relation to each of these proposed defences.

2.61 In *Scrutiny Digest 13 of 2023* the committee sought the minister's advice as to why it is proposed to use an offence-specific defence for the criminal offence in subclause 45(1).¹⁰⁸ The committee noted that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence, and consideration of the appropriateness of a provision which reverses the burden of proof is assisted if a response explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.¹⁰⁹

Minister's response¹¹⁰

2.62 In relation to the offence-specific defence in subclause 45(4) the minister advised that it would be 'both significantly more difficult and costly for the prosecution to disprove that for the defendant to establish the matter, and the relevant matter is peculiarly within the knowledge of the defendant'. The minister noted that the reversed burden means that the defendant needs to only prove that one law authorises the use or disclosure, and that if the burden were not reversed then the prosecution would need to prove that no law authorises the use or disclosure.

2.63 In relation to the offence-specific defence in subclause 45(5) the minister advised that:

whether a defendant acted in good faith would require consideration of the defendant's subjective belief about why they considered they were required to authorised to use or disclose the information...it would be

¹⁰⁸ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 20–30.

¹⁰⁹ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011.

¹¹⁰ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to Scrutiny Digest 15 of 2023).

significantly more difficult and costly for the prosecution to prove that the defendant did not act in good faith.

2.64 The minister further advised that these provisions are consistent with other portfolio legislation.

Committee comment

2.65 In relation to subclause 45(4), while noting the advice provided, it remains unclear to the committee how whether or not a disclosure was authorised by law is a matter *peculiarly* within the knowledge of the defendant. While the committee accepts such a matter may be more difficult or costly for the prosecution to establish, the committee reiterates its view that this does not in and of itself equate to these matters being peculiarly within the knowledge of the defendant. Further, whether information has been used or disclosed and is authorised or required by another law is something ascertainable by the prosecution.

2.66 In relation to subclause 45(5), the committee notes the minister's advice that whether the defendant acted in good faith is peculiarly within the knowledge of the defendant.

2.67 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof for the offence-specific defence in subclause 45(4).

2.68 In relation to the reversal of the evidential burden of proof for the offence-specific defence in proposed subclause 45(5), the committee makes no further comment.

Automated decision-making¹¹¹

2.69 Subclause 53(1) seeks to provide that the Secretary may arrange for the use, under the Secretary's control, of computer programs for any purposes for which the Secretary may, under the bill or the rules, make a decision of a kind specified in the rules for the purposes of this subsection. Subclause 53(2) would require the Secretary to take all reasonable steps to ensure that each decision made by a computer program is a decision the Secretary could validly make under the bill or rules. Subclause 53(4) also seeks to provide that the Secretary may substitute a computer-made decision if they are satisfied that the decision is not the correct or preferable decision.

2.70 Clause 48 of the bill provides for internal merits review of listed decisions made under the bill, and clause 49 also provides for external merits review by the Administrative Appeals Tribunal of listed decisions. For example:

¹¹¹ Subclause 53(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

- decisions made under proposed clause 9 and proposed clause 11 to refuse to remit an amount that a person is liable to pay by way of penalty;
- decisions made under proposed subclause 31(4) to grant or refuse to grant a person or body an approval; or
- a decision made under proposed subclause 44(3) to specify conditions in an approval.

2.71 That provision has been made for these listed decisions made under the bill to be both internally and externally reviewable indicates that these decisions are complex and discretionary, and are therefore more vulnerable to legal error due to the imposition of automated decision-making.

2.72 In *Scrutiny Digest 13 of 2023* the committee sought the minister's advice as to:

- why it is considered necessary and appropriate to permit the Secretary to arrange for the use of computer programs to make decisions in relation to any decision specified in the rules; and
- whether consideration has been given to prohibiting the decisions listed in proposed clauses 48 and 49 from being prescribed by the rules as being decisions to which automated decision-making apply; and
- whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power).¹¹²

Minister's response¹¹³

2.73 The minister advised that there are appropriate safeguards in the bill to support the use of automated decision-making, including:

- legislative instruments which specify the decisions in the bill to be subject to automated decision-making will be scrutinised by Parliament, including the Senate Committee for the Scrutiny of Delegated Legislation, and will be subject to appropriate consultation; and
- the Secretary cannot delegate the power to make an instrument which specifies decisions to be subject to automated decision-making, and this would include consideration at the highest level in the department as to administrative law requirements; and

¹¹² Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 20–30.

¹¹³ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to Scrutiny Digest 15 of 2023).

- the Secretary can substitute an automated decision if they consider it was not the correct or preferable decision, and that this would provide a safeguard should the outcome of an automated decision be incorrect or undesirable; and
- the Secretary has discretion as to which decisions will be subject to automated decision-making.

Committee comment

2.74 While noting this advice, the committee reiterates its view that the decisions listed in clauses 48 and 49 may not be appropriate for automated decision-making, and the bill should provide that these decisions cannot be prescribed as such in legislative instruments made under subclause 53(1).

2.75 The committee reiterates its concerns regarding the impact of automated decision-making on the quality of administrative decisions. Administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error.

2.76 In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

2.77 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the bill providing that decisions subject to automated-decision making can be specified in a legislative instrument, including discretionary decisions.

Vicarious liability¹¹⁴

2.78 Subclause 56(1) seeks to provide that the bill and the rules apply to a partnership as if it were a person. Subclause 56(4) seeks to provide that an offence against the bill or rules is taken to have been committed by each partner in the partnership who, at the time of the offence, did the conduct or act, aided, abetted, counselled or procured the relevant act or omission, or was in any way knowingly concerned in, or party to, the relevant act or omission whether directly or indirectly.

¹¹⁴ Clauses 56, 57 and 58. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

Subclause 56(5) seeks to provide a mirror provision for the contravention of civil penalties in the bill and rules.

2.79 Clause 57 is a mirror provision seeking to impose vicarious liability in relation to trusts, and clause 58 is a mirror provision seeking to impose vicarious liability in relation to unincorporated bodies or associations.

2.80 In *Scrutiny Digest 13 of 2023* the committee sought the minister's advice as to the rationale for imposing vicarious liability in clauses 56, 57 and 58, and whether the principles identified in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*¹¹⁵ (*Guide to Framing Commonwealth Offences*) have been considered.¹¹⁶

Minister's response¹¹⁷

2.81 The minister advised that these clauses are based on standard provisions which are used in several other Commonwealth Acts that provide that partnerships, trusts and unincorporated bodies or associations are considered legal entities for the purposes of the bill and the rules.

2.82 The minister advised that a safeguard is included in each clause which provides that an offence will only be committed if the partner, trustee or member did the relevant act or made the relevant omission or aided, abetted, counselled or procured the relevant act or omissions or was in any way knowingly concerned in, or party to, the relevant act or omission.

2.83 The minister noted that this is consistent with the *Guide to Framing Commonwealth Offences* which holds that a person should only be responsible for their own acts or omissions, and that responsibility has traditionally been imposed on the partners of a partnership and members of an unincorporated association in the context of tax law.

Committee comment

2.84 The committee thanks the minister for this advice, and notes that this information is helpful in explaining the operation of these clauses.

2.85 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to vicarious liability be tabled in the Parliament as soon as practicable. The committee notes the importance of these explanatory materials as a point of access to

¹¹⁵ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, pp 32–33.

¹¹⁶ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 20–30.

¹¹⁷ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to Scrutiny Digest 15 of 2023).

understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

Instruments not subject to an appropriate level of parliamentary oversight¹¹⁸

2.86 Clause 59 of the bill would empower the secretary to make rules under the bill by way of legislative instrument. In addition, subclause 59(4) would provide that the rules may also confer on the minister or the secretary a power to make a legislative instrument, a notifiable instrument or other written instrument.

2.87 In *Scrutiny Digest 13 of 2023* the committee sought the minister's advice as to whether the bill can be amended to provide the power for the minister or secretary to make notifiable and other written non-legislative instruments on the face of the bill.¹¹⁹

***Minister's response*¹²⁰**

2.88 The minister advised that providing the power for the minister or secretary to make notifiable and other written non-legislative instruments on the face of the bill as opposed to in delegated legislation would 'inhibit the ability for the scheme to respond to evolving industry needs'.

2.89 The minister also advised that any instrument made under clause 59 which provided the minister or secretary with the power to make a non-legislative instrument would itself be subject to parliamentary scrutiny and disallowance. Further, the minister advised that only instruments which are not legislative in character could appropriately be made as notifiable instruments.

Committee comment

2.90 The committee notes the minister's response. However, the committee's scrutiny concern relates to the ability for delegated legislation to further delegate legislative power (devolving Parliament's law-making power), especially the power for rules to make provision for a power to make a notifiable instrument which is not subject to parliamentary oversight.

2.91 The committee considers that if there are particular matters the minister has in mind that may require instruments to be made in relation to them, these should be included on the face of the bill, rather than relying on delegated legislation to empower further instruments to be made.

2.92 The committee therefore reiterates its concerns and seeks the minister's further advice as to why it is necessary for subclause 59(4) to specifically authorise

¹¹⁸ Clause 59. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

¹¹⁹ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 20-30.

¹²⁰ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to Scrutiny Digest 15 of 2023).

rules made under the bill to further empower the minister or secretary to make instruments.

Primary Industries Levies and Charges Disbursement Bill 2023¹²¹

Purpose	The bill seeks to enable disbursement of amounts of agricultural levy and charge components for investment in strategic activities for the benefit of levied industries. It also seeks to provide a mechanism for the Commonwealth to make matching payments for research and development.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 18 October 2023
Bill status	Before the Senate

Instruments not subject to an appropriate level of parliamentary oversight¹²²

2.93 Subclause 39(1) seeks to provide that the minister may, by writing, declare a body to be a recipient body. The effect of being declared a recipient body is that a company can receive money from the Commonwealth under Part 2 of the bill (levy and charge amounts and matching payments). Subclause 39(8) of the bill seeks to provide that a declaration made under subclause 39(1) is not a legislative instrument.

2.94 Noting the impact that a declaration made under subclause 39(1) may have, the committee considered that it may be appropriate for the bill to specifically include consultation requirements around the declaration of a recipient body. In this instance, the committee considered it would be helpful for the bill to specify particular bodies to consult with, or to require that the minister must be satisfied that appropriate consultation has been undertaken, before making a declaration under subclause 39(1).

2.95 In *Scrutiny Digest 13 of 2023* the committee sought the minister's advice as to whether the bill can be amended to include a requirement for consultation to occur prior to the declaration of a body as a declared recipient under subclause 39(1) of the bill.¹²³

¹²¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Primary Industries Levies and Charges Disbursement Bill 2023, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 239.

¹²² Clause 39. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

¹²³ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 30–31.

Minister for Agriculture, Fisheries and Forestry's response¹²⁴

2.96 The Minister for Agriculture, Fisheries and Forestry (the minister) responded to the committee in a letter dated 20 November 2023.

2.97 The minister advised that the declaration of a body as a declared recipient body forms part of a process to enable the spending of amounts raised through levies and charges on research and development, marketing and other activities. The minister advised that as the imposition of a levy or charge, and the designation of a designated industry sector require the making of a legislative instrument, section 17 of the *Legislation Act 2003* requires that any consultation that is appropriate and reasonably practicable must be undertaken before these steps are taken. The minister further advised that under subclause 39(3) of the bill, the minister must have entered into a funding agreement with the body before making a declaration and this means that the body consents to abide by its obligations under both the legislation and the agreement.

Committee comment

2.98 The committee thanks the minister for this response.

2.99 While the committee acknowledges the consultation requirements in the *Legislation Act 2003* and the funding agreement that must be entered into before making a declaration, the committee nevertheless considers that including more specific requirements on the face of the bill would be appropriate in this instance, particularly as a subsection 39(1) declaration is a notifiable instrument and therefore is subject to limited parliamentary scrutiny.

2.100 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of relying on the consultation requirements in the *Legislation Act 2003* before making a declaration under subsection 39(1), noting the limited scope for Parliament to scrutinise notifiable instruments.

Significant penalties¹²⁵

2.101 Subclause 72(1) seeks to provide that an entrusted person may disclose relevant National Residue Survey (NRS) information to a person who holds an approval in force under this section. Subclause 72(9) seeks to provide that a person commits an offence if, while the person holds an approval in force under this section, the person

¹²⁴ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

¹²⁵ Subclauses 72(9) and 81(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

receives relevant NRS information, the information is protected information,¹²⁶ the person uses or discloses that information, and the use or disclosure is not in accordance with the approval. The penalty would be 12 months imprisonment.

2.102 Similarly, subclause 81(1) seeks to create an offence for the use or disclosure of protected information if:

- the person is or has been an entrusted person;
- has obtained or generated information in the course of or for the purposes of carrying out or administering particular activities under the Act;
- the information is protected information;¹²⁷ and
- the person uses or discloses the information. The penalty is 12 months imprisonment.

2.103 In both cases, it is not sufficiently clear to the committee why a penalty of 12 months imprisonment has been set and whether it is appropriate.

2.104 As the explanatory memorandum does not appear to provide sufficient justification, in *Scrutiny Digest 13 of 2023* the committee sought the minister's detailed advice as to why it is considered appropriate to impose a significant penalty of 12 months imprisonment for the offences in subclause 72(9) and 81(1), by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Guide to Framing Commonwealth Offences)*.¹²⁸

Minister for Agriculture, Fisheries and Forestry's response¹²⁹

2.105 The minister advised that each of the proposed penalties are appropriate to effectively deter the commission of the relevant offence, and reflect the serious and potentially damaging consequences of each offence, which both involve the unauthorised use or disclosure of protected information. The minister advised that the proposed penalty in subclause 72(9) is consistent with the penalty for the equivalent

¹²⁶ Protected information, for the purpose of subclause 72(9), is defined in subclause 72(10) to mean information (including commercially sensitive information) the disclosure of which could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence, and information the disclosure of which could reasonably be expected to prejudice constitutional trade or commerce.

¹²⁷ Protected information, for the purpose of subclause 81(1), is defined in subclause 81(3) to mean information (including commercially sensitive information) the disclosure of which could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence, and information the disclosure of which could reasonably be expected to prejudice constitutional trade or commerce.

¹²⁸ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 31–32.

¹²⁹ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

offence in subsection 11(4) of the *National Residue Survey Administration Act 1992* which is being placed by this bill. The proposed penalty in subclause 81(1) is less significant than the penalty for the equivalent offence in subsection 11(1) of the *National Residue Survey Administration Act 1992*. The proposed penalties are also consistent with the penalty for the equivalent offences in subclause 45(1) of the *Primary Industries Levies and Charges Collection Bill 2023*.

Committee comment

2.106 The committee thanks the minister for providing this further information in relation to the appropriateness of the penalties for the offences under subclauses 72(9) and 81(1).

2.107 **The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to subclauses 72(9) and 81(1) be tabled in the Parliament as soon as practicable. The committee notes 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*).**

Reversal of the evidential burden of proof¹³⁰

2.108 Subclause 81(1) seeks to create an offence for the use or disclosure of protected information in particular circumstances. Subclauses 81(4) and (5) would provide exceptions to this offence.

2.109 Subclause 81(4) seeks to provide that the offence would not apply if the use or disclosure is authorised or required by a law of the Commonwealth, or a law of a state or territory prescribed by the rules made for the purposes of this paragraph.

2.110 Subclause 81(5) seeks to provide that the offence would not apply if: the person uses or discloses the information in good faith for the purposes of carrying out activities covered by paragraph 66(1)(a) and paid for with amounts debited from the National Residue Survey Special Account;¹³¹ or in the purported administering or assisting a person in the purported administering of Part 5 of the bill. A note to each subclause confirms that the evidential burden of proof is reversed in relation to each of these proposed defences.

2.111 In *Scrutiny Digest 13 of 2023* the committee sought the minister's advice as to why it is appropriate to reverse the evidential burden of proof under subclauses 81(4) and 81(5). The committee suggested that it may be appropriate for the bill to be

¹³⁰ Subclauses 81(4) and 81(5). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

¹³¹ Paragraph 66(1)(a) lists activities towards which payments from the National Residue Survey Special Account can be made.

amended to provide that these matters are specified as elements of the offence in subclause 81(1) and that its consideration of the appropriateness of a provision which reverses the burden of proof is assisted by explicitly addressing relevant principles as set out in the *Guide to Framing Commonwealth Offences*.¹³²

Minister for Agriculture, Fisheries and Forestry's response¹³³

2.112 The minister advised that, in relation to the exception in subclause 81(4), it is appropriate and justified on the basis that it would be both significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter, and the relevant matter is peculiarly within the knowledge of the defendant. The minister noted that the reversed burden means that the defendant needs to only prove one law authorises the use or disclosure, and that if the burden were not reversed then the prosecution would need to prove that no law authorises the use or disclosure.

2.113 In relation to the exception in subclause 81(5) the minister advised that:

whether a defendant acted in good faith would require consideration of the defendant's subjective belief about why they considered they were required or authorised to use or disclose the information...it would be significantly more difficult and costly for the prosecution to prove that the defendant did not act in good faith.

2.114 The minister further advised that these provisions are consistent with other portfolio legislation.

Committee comment

2.115 In relation to subclause 81(4), while noting the advice provided, it remains unclear to the committee how whether or not a disclosure was authorised by law is a matter *peculiarly* within the knowledge of the defendant. The committee notes that the exception states that the offence does not apply if the use or disclosure of the information is authorised or required by this Act or another law of the Commonwealth, or prescribed state or territory law, not whether the defendant used or disclosed information in purported reliance on such a law. While the committee accepts such a matter may be more difficult or costly for the prosecution to establish, the committee reiterates its view that this does not in and of itself equate to these matters being peculiarly within the knowledge of the defendant and whether information has been used or disclosed and is authorised or required by another law is something ascertainable by the prosecution.

¹³² Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 33–34.

¹³³ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

2.116 In relation to subclause 81(5), the committee notes the minister's advice that whether the defendant acted in good faith is peculiarly within the knowledge of the defendant.

2.117 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof for the offence-specific defence in subclause 81(4).**

2.118 **In relation to the reversal of the evidential burden of proof for the offence-specific defence in proposed subclause 81(5), the committee makes no further comment.**

Instruments not subject to an appropriate level of parliamentary oversight¹³⁴

2.119 Subclause 90(1) seeks to empower the minister to make rules under the Act by way of legislative instrument. In addition, subclause 90(2) would provide that the rules may also confer on the minister or the secretary a power to make a legislative instrument, a notifiable instrument or other written instrument.

2.120 In *Scrutiny Digest 13 of 2023*, the committee requested the minister's advice as to whether the bill can be amended to provide the power for the minister or secretary to make notifiable and other written non-legislative instruments in relation to particular matters on the face of the bill.¹³⁵

Minister for Agriculture, Fisheries and Forestry's response¹³⁶

2.121 The minister advised that providing the power for the minister or secretary to make notifiable and other written non-legislative instruments on the face of the bill as opposed to in delegated legislation would 'inhibit the ability for the scheme to respond to evolving industry needs'.

2.122 The minister also advised that any instrument made under subclause 90(2) which provided the minister or secretary with the power to make a non-legislative instrument would itself be subject to parliamentary scrutiny and disallowance. Further, the minister advised that only instruments which are not legislative in character could appropriately be made as notifiable instruments.

Committee comment

2.123 The committee notes the minister's response. However, the committee's scrutiny concern relates to the ability for delegated legislation to further delegate

¹³⁴ Subclause 90(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

¹³⁵ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 34–35.

¹³⁶ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

legislative power (devolving Parliament's law-making power), especially the power for rules to make provision for a power to make a notifiable instrument which is not subject to parliamentary oversight.

2.124 The committee considers that the bill already provides for the power to make legislative and non-legislative instruments under relevant clauses, and it is not clear to the committee why the power under subclause 90(2) is considered necessary beyond the general rule-making power in subclause 90(1). The committee considers that if there are particular matters the minister has in mind that may require instruments to be made in relation to them, these should be included on the face of the bill, rather than relying on delegated legislation to empower further instruments to be made.

2.125 The committee therefore reiterates its concerns and seeks the minister's further advice as to why it is necessary for subclause 90(2) to specifically authorise rules made under the bill to empower the minister or secretary to make further instruments.

Chapter 3

Scrutiny of standing appropriations¹³⁷

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.¹³⁸ 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.¹³⁹

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

Senator Dean Smith

Chair

¹³⁷ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 15 of 2023*; [2023] AUSStaCSBSD 240.

¹³⁸ 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*.

¹³⁹ For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).