The Hon Clare O'Neil MP
Minister for Home Affairs
Minister for Cyber Security

Ref No: MC23-015482

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Chair

Response to the Senate Scrutiny of Bills Committee – Scrutiny Digest 5/23 – Australian Security Intelligence Organisation Amendment Bill 2023

I refer to the matters raised by the Senate Scrutiny of Bills Committee (the Committee) in the Scrutiny Digest 5 of 2023 for advice in relation to the Australian Security Intelligence Organisation (ASIO) Amendment Bill 2023 (the Bill). I welcome the opportunity to respond to the Committee's comments, as outlined below.

Espionage and foreign interference is now Australia's principal security concern. Based on what ASIO is seeing, more Australians are being targeted than at any previous time in Australia's history. In this environment, we—as a nation—must take security seriously. The ASIO Amendment Bill 2023, and the reforms it enables, will uplift and harden Australia's highest-level of security clearances in response to the unprecedented threat from espionage and foreign interference.

As the Director-General of Security said in his Annual Threat Assessment, our greatest strength will always be our democratic values and principles. As we address threats, it is right we consider civil liberties and keep under review the right mix of powers to protect people's rights. We cannot fall into the trap of imagining there is a simple sliding scale of trade-offs between security and rights. This tension between individual and collective makes national security hard by design in democracies and must be embraced.

The Government recognises the impact an adverse clearance decision can have on an individual. The nature and scope of review rights provided by the Bill seeks to balance the importance of independent review with the risk that foreign powers and their proxies will use any review rights to 'game the system' for the purpose of intelligence collection. The Bill therefore proposes a two-stage combination of internal merits review and either independent review or external merits review in the Administrative Appeals Tribunal (AAT) to ensure that affected persons have the benefit of a multilayered and comprehensive, yet efficient and effective, review process that protects individual rights by ensuring access to review rights, while ensuring that risks to security can be appropriately mitigated.

Internal review

The Committee has requested detailed advice as to whether an individual serving as the internal reviewer under an internal merits review process should be of at least the same level of seniority as the initial decision-maker. The Committee also requested detailed advice as to why Australian citizens who are not normally resident in Australia do not have access to internal merits review under proposed section 82H; and whether non-citizens who normally reside in Australia have access to internal merits review and, if not, why this is considered necessary and appropriate.

Level of seniority of decision makers

In recognition of the need for ASIO to be able to respond flexibly to manage a high volume of decisions and requests for review, proposed subsection 82H(1) does not contain a requirement that the internal reviewer be at least of the level of seniority as the original decision-maker. The legislation provides that security clearance decisions can be made by ASIO employees and affiliates of at least the EL1 level or equivalent. The sensitivity and complexity of the matter will determine the level of the original delegate and, in some circumstances, a first instance decision may be made at the most senior levels where only a few individuals have comparable seniority. While decisions would ordinarily be reviewed by a person at least as senior as the original decision maker, the sensitivity and complexity of the matter will determine the appropriate level of the alternate delegate.

Review rights for non-Australians and non-residents

The Bill has been drafted to balance access to review rights with the protection of sensitive capabilities and operations. At a time when the threat to Australians from espionage and foreign interference is higher than at any time in Australia's history, it is important that we strike the right balance on merits review to ensure that foreign intelligence services do not use the right of review to game our clearance system.

The Protective Security Policy Framework (PSPF) requires a person to be an Australian citizen to be eligible for a security clearance. Sponsoring agencies may, on a case-by-case basis and subject to annual review, seek an eligibility waiver to seek a security clearance for a non-citizen. Under proposed section 82H, non-citizens normally resident in Australia will have access to internal review, provided they are engaged for employment within Australia for duties within Australia.

Proposed subsection 82H(3), which limits access for internal review for persons engaged, or proposed to be engaged, for employment outside Australia for duties outside Australia if they are not Australian citizens or are not normally resident in Australia, is necessary, reasonable and proportionate given the heightened risk that persons engaged in these circumstances may pose in relation to espionage and foreign interference, including that these persons may be exploited by foreign powers and their proxies. The exception is narrow by design, so as to only apply in a limited number of cases where this risk is highest.

Independent Review

The Committee has requested detailed advice as to whether the bill can be amended to remove the independent review and instead provide for external review to the AAT for individuals who are non-Commonwealth employees or who do not hold security clearances or, in the alternative, whether the bill can be amended to require an independent review to review a decision if requested to do so under section 83EB.

The Committee has also requested a detailed justification as to why the independent review framework is necessary and appropriate, with particular reference to why the standard for review is that an independent reviewer consider a decision to be 'reasonably open' rather than the correct or preferable decision; and what safeguards are in place to ensure the independence of an independent reviewer.

Whether AAT review could replace Independent Review

The Bill would provide new applicants who are not Commonwealth employees or existing clearance holders with a right to seek independent review. The rationale for limiting external review rights to existing security clearance holders or Commonwealth employees as defined in the Bill is in response to the complex, challenging and changing security environment that is confronting Australia. The threat to Australians from espionage and foreign interference is higher than at any time in Australia's history. In this context, the threats posed are higher for new applicants who do not hold a security clearance and are not existing Commonwealth employees. Additionally, such applicants may not yet have a sufficient understanding of their security obligations and may unwittingly or knowingly already be vulnerable to approaches from adversaries which they are less able to manage. The Bill would therefore provide these persons with a right to seek independent review by a person appointed by the Attorney-General, where the risks associated with the threat posed by espionage and foreign interference can be mitigated. As such, the independent reviewer has been determined to be the most appropriate review mechanism for this cohort.

'Reasonably open' test

Independent review maintains independent oversight of ASIO's security clearance decisions and provides a further opportunity for ASIO to make a new security clearance decision for an affected person. This is because a security clearance decision is a national security decision made by the Commonwealth about the level of risk it is willing to bear in relation to its people, capabilities and operations. Subsection 83ED(4) requires the independent reviewer to give the Director-General, in writing, their opinion as to whether a security clearance decision was 'reasonably open' to have been made. The 'reasonably open' test has been deliberately chosen to reflect that the independent reviewer's role is to provide advice to ASIO, and not to replace ASIO as a decision-maker, given the depth of ASIO's knowledge and expertise, including ASIO's security intelligence functions, holdings and capabilities.

Whether the Bill could be amended to require the independent reviewer to consider certain cases

The Bill enables the independent reviewer to decide whether to review a decision (proposed section 83EB(3)). This approach seeks to maximise the independent reviewer's ability to account for all factors they consider relevant in making such a decision, and to ensure the independent reviewer has flexibility to manage their caseload. It is appropriate that there is no power in the Bill requiring the independent reviewer to review a decision if requested to do so under section 83EB, so that the independent reviewer has broad discretion to decide to not take on a matter if it is vexatious or if the facts of the case otherwise do not merit further review.

Safeguards to ensure the independence of the independent reviewer
Safeguards are in place to ensure the reviewer's independence. These include that the independent reviewer is appointed by the Attorney-General. The Attorney-General must be satisfied that the person has appropriate skills or qualifications, and the highest level of security clearance. The independence of the reviewer is further enshrined in legislation, given the proposed provisions would provide that the reviewer cannot be a current, or former, ASIO employee or affiliate.

The Bill also provides that the independent reviewer must have appropriate skills or qualifications to perform the role, and the highest level of security clearance. These threshold requirements in the Bill are designed to ensure that the independent reviewer will not just be appropriately skilled or qualified, but also be a person of integrity. In particular, the standards required to hold the highest level of security clearance will ensure high levels of integrity.

Terms of engagement would govern the independent reviewer's conduct and include a framework for managing conflicts of interest. The terms of engagement would also govern termination. In the event of a breach of the terms of engagement, including any real or apparent interests that could improperly influence the independent reviewer's conduct, which have not been managed in accordance with the conflict of interest framework, the engagement could be terminated.

<u>External review</u>
The Committee has requested detailed advice as to whether external merits review through the AAT could be provided to individuals who are Australian citizens but who do not normally reside in Australia who are engaged, or proposed to be engaged, for employment outside Australia for duties outside Australia, as well as to individuals who do not currently hold a security clearance or who are not Commonwealth employees. The Committee has also asked if the Bill should include a requirement for a process to be developed to ensure applicants have a sufficient understanding of their security obligations.

Whether AAT review could be provided for excluded persons
Proposed subsection 83(3) provides that a security clearance decision or security clearance suitability assessment is not externally reviewable in the AAT if it is in respect of a person who is engaged, or proposed to be engaged, for employment outside Australia for duties outside Australia; and is not an Australian citizen or is not normally resident in Australia. This provision mirrors the one excluding these persons from internal review; and is in recognition of the heightened risk that persons engaged in these circumstances may pose in relation to espionage and foreign interference.

Similarly, but to a lesser extent, the threats posed are higher for new applicants who do not have a security clearance and are not existing Commonwealth employees. Such applicants do not yet have a sufficient understanding of their security obligations and may not have participated in security awareness training. They are therefore less able to manage these threats. New applicants also bring a lower level of assurance, in that they do not have existing track records as Commonwealth employees. It is for these reasons that persons who do not hold a security clearance or who are not Commonwealth employees are provided with an alternate, review pathway—independent review (paragraph 83EA(1)(c)).

Processes to ensure applicants have a sufficient understanding of security obligations
The Bill provides for a new function for the Office of National Intelligence (ONI) in the *Office of National Intelligence Act 2018*. ONI will be responsible for uplifting the insider threat capability of Commonwealth agencies through the Quality Assurance Office (QAO) to independently assure the quality, consistency and transferability of TS-PA security clearances, and drive the uplift of the insider threat capability for the sponsors of such security clearances across the Commonwealth. This will assist sponsoring agencies in ensuring that their applicants for highest-level security clearances have a sufficient understanding of their security obligations.

Conclusive certificates
The Committee has requested detailed advice as to whether the Bill can be amended to remove the power in proposed section 83E for the Minister for Home Affairs (the Minister) to issue conclusive certificates; or in the alternative, whether the Bill can be amended to provide further guidance in relation to the exercise of the power.

The Bill contains the ability for the Minister, in exceptional circumstances, to issue a conclusive certificate in relation to a security clearance decision or security clearance suitability assessment, preventing review of the decision or assessment in the AAT where it would be prejudicial to security to change or review the decision or assessment (section 83E). The 'exceptional circumstances' threshold ensures that this power will be used sparingly in respect of decisions or matters raising grave concerns about the decision or assessment prejudicing security. An example of such exceptional circumstances would be if ASIO had identified that the applicant was assisting foreign powers and their proxies seeking to use a merits review process to identify sensitive information, methods, or capabilities, including potentially the identities of ASIO officers involved in any proceedings. Introducing further prescription about the application of this power would limit the utility of a power designed to protect Australia's national interest from grave threats to security. A decision to issue a conclusive certificate would also be subject to judicial review.

Certificates concerning notice and statements of grounds
The Committee has requested detailed advice as to whether the Bill can be amended to require the Minister to balance the extent of prejudice to security with consideration of potential unfairness to the individual prior to issuing a certificate under proposed subsections 82A(4) and 83C(6); whether the bill can be amended to include additional mechanisms to provide for procedural fairness, or, at a minimum, ameliorate the denial of procedural fairness, without compromising national security; and whether a more detailed explanation can be provided as to what other mechanisms have been considered to redress the denial of procedural fairness and, if they are considered not appropriate to include in the bill, why this is the case.

Procedural fairness and certificates to withhold notice or statements of grounds
Procedural fairness has been a key consideration through the development of the Bill. ASIO, as a matter of course, provides procedural fairness throughout the process to applicants for its security clearances and security assessments, including through vetting interviews and, to the extent possible without prejudicing security, by providing applicants with reasonable opportunities to respond to potentially prejudicial findings before a final decision is made.

The review framework in the Bill has been designed to recognise the impact a prejudicial security clearance outcome can have on an individual and their need to access information to understand that outcome. The Bill seeks to balance these matters with the requirements of security, including the possibility that hostile foreign powers and their proxies will exploit any review rights. It is considered that the current review framework achieves this outcome most effectively in balancing an individual's access to review rights with the requirements of security.

The proposed certificates to withhold notice or statements of grounds (subsections 83A(4) and 83C(6)) are highly limited and contain thresholds commensurate with the potential adverse impact on the applicant.

Proposed subsection 83A(4)(a) sets out that it must be 'essential to the security of the nation' for the Minister to issue a certificate to withhold notice of a prejudicial security clearance suitability assessment from an applicant—this has the effect of preventing a person from seeking merits review while the certificate is in effect. This threshold is high in recognition of the potentially adverse impact this may have. The Bill however contains a safeguard at section 83A(6) that the Minister must consider whether to revoke a certificate given under paragraph (4)(a) if the certificate remains in force either 12 months after it was given or at each 12 month period after the Minister last considered whether to revoke it.

By contrast, subsections 83A(4)(b) and 83(C)(6) set out that it must be 'prejudicial to the interests of security' for the Minister to withhold from an affected person all, or part, of the statement of grounds for a prejudicial security clearance suitability assessment or security clearance decision. The ability of the Minister to withhold information that would be prejudicial to security allows the protection of the classified information included in such assessments, where security concerns would arise should the information be disclosed to the affected person.

Delegation of administrative powers or functions

The Committee has requested detailed advice as to why it is considered necessary and appropriate to delegate various powers in the Bill to ASIO affiliates, or to authorise the use of various administrative powers. The Committee has further requested advice as to whether affiliates will be required to possess the appropriate training, qualifications, skills or experience, and what other safeguards are in place to ensure powers are only exercised by appropriate persons.

ASIO affiliates

The Bill enables the Director-General to delegate powers in the Bill to ASIO employees and affiliates in order to respond flexibly to manage a high volume of decisions by maximising ASIO's ability to exercise its security vetting functions from within and outside of ASIO in specific and controlled circumstances. The approach proposed ensures secondees to ASIO and contractors engaged by ASIO for security vetting purposes–and who are subject to the same standard, policies and procedures as ASIO employees–are able to undertake security vetting and security clearance related activities on ASIO's behalf. While secondees to ASIO may be delegated or authorised to exercise certain powers, functions or duties, external service providers will not. Both secondees and external service providers will be required, as a matter of policy, to possess the appropriate training, qualifications, skills and/or experience.

Minister's guidelines
ASIO activities are further bound by the Minister's Guidelines, which are applicable to both ASIO employees and affiliates. The Guidelines include a number of requirements relating to ASIO's treatment of personal information, including that ASIO's collection, retention, use, handling and disclosure of personal information is limited to what is reasonably necessary to perform its function.

I thank the Committee for its consideration of this important Bill and trust this information will be of assistance

Yours sincerely

CLARE O'NEIL

1 / 6 / 2023

Attorney-General

Reference: MC23-017716

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
Canberra ACT 2600

By email: scrutiny.sen@aph.gov.au

Dear Chair

I refer to the Senate Standing Committee for the Scrutiny of Bills' (the Committee) request in the *Scrutiny Digest 5/23* for further information on the Crimes and Other Legislation Amendment (Omnibus) Bill 2023.

I appreciate the time the Committee has taken to consider the Bill. Please find below my response in relation to the questions raised by the Committee.

Amendments to the *International Transfer of Prisoners Act 1997* (ITP Act)

Paragraph 1.65 – Broad discretionary powers and procedural fairness

The Committee has sought further advice regarding:

- what matters are contained in the ITP Act, or elsewhere, to constrain the Attorney-General's discretion to refuse a decision to transfer a prisoner from Australia
- whether the Bill can be amended to provide that the considerations listed in the Explanatory Memorandum are set out as matters that the Attorney-General must, or may, consider prior to deciding whether to refuse a decision to transfer a prisoner
- whether the Bill can be amended to provide for additional mechanisms to afford procedural fairness.

There are a range of mandatory threshold conditions under the ITP Act which must be satisfied before the Attorney-General can decide whether or not to consent to a transfer from Australia. These include that:

- the prisoner is eligible for transfer from Australia (in broad terms, that the person is a national or has community ties with the country they are transferring to) (**subsections 10(a) and 12**)
- the relevant transfer conditions are satisfied (which includes that the sentence not be subject to appeal, that dual criminality is satisfied and that there is at least 6 months remaining to be served on the sentence) (**subsections 10(e) and 14(1)**), and
- the transfer of the prisoner is not likely to prevent the prisoner's surrender to an extradition country (**subsection 10(f)**).

The Attorney-General has a residual broad discretion to consent or refuse a transfer from Australia, which may be exercised once these threshold conditions and other requirements under

the ITP Act and relevant treaty are satisfied. The ITP Statement of Policy sets out factors that the Attorney-General may consider when making a decision on whether or not to consent to a transfer. These factors include:

- sentence enforcement
- the extent to which the transfer would assist the prisoner's rehabilitation and reintegration
- community safety
- humanitarian considerations
- dual citizenship, and
- relevant law enforcement and prosecutorial agency views.

The ITP Statement of Policy is publicly available on the Attorney-General's Department's website and is provided to the prisoner at the time their application is received. The prisoner is therefore provided with an opportunity to make representations to the Attorney-General on the factors listed in the policy before the Attorney-General makes a decision on whether or not to consent to a transfer, including under proposed subsection 19(1). In the event that the Attorney-General was to consider a factor not listed in the ITP Statement of Policy or otherwise depart from the policy, the department would write to the prisoner to inform them of any departure and provide them with the opportunity to make further representations. This ensures that the prisoner continues to be afforded procedural fairness throughout the entire process.

Decisions under the ITP Act are made on a case-by-case basis in accordance with the ITP Act, relevant treaty, ITP Statement of Policy and all the circumstances of the case. Each case is unique including, but not limited to, the extent to, and conditions in, which a prisoner's sentence will be enforced in the transfer country, the potential impacts of a transfer on community safety in both countries, and the level of family and community support the prisoner may have in the transfer country. It would not be possible for the legislation to deal exhaustively with all of the factors that may arise in individual cases or stipulate the appropriate weighting of each factor in the circumstances of each case.

It is therefore appropriate and important for robust decision-making that the Attorney-General retains a broad residual discretion and be provided with flexibility when making decisions to provide or refuse consent to transfers, while maintaining the core procedural fairness protections outlined above. This flexibility is additionally important as a decision on a transfer application may have broader implications for Australia's relationship with a foreign country and involve consideration of political and diplomatic sensitivities. It is therefore more appropriate to grant a general discretion in legislation and supplement that with a policy that can be reviewed regularly and amended expeditiously in order to ensure it remains fit for purpose and responsive to individual cases and broader trends across applications.

Further, amending the Bill to set out factors that may form part of the Attorney-General's discretion under proposed subsection 19(1) would be inconsistent with existing section 20(3), which provides the Attorney-General with a general discretion in consent decisions at the final stage of the transfer process.

I therefore do not consider it necessary to amend the Bill to expressly set out the considerations contained in the ITP Statement of Policy.

Proposed subsection 19(2) provides that the Attorney-General must, before deciding to refuse consent under subsection 19(1), notify the prisoner (or the prisoner's representative) of the proposed terms on which the transfer country has consented to the transfer, including the proposed method by which the sentence of imprisonment will be enforced by the transfer country. The intent of proposed subsection 19(2) is to ensure that the applicant is afforded procedural fairness in these circumstances, and it is therefore not solely a procedural notification. This intention is set out in paragraph 173 of the Explanatory Memorandum which states that

proposed subsection 19(2) 'practically ensures that the prisoner continues to be afforded procedural fairness and has the opportunity to make representations to the Attorney-General on the terms of transfer before the Attorney-General makes a decision under new subsection 19(1).'

The Explanatory Memorandum further sets out the process that the department practically undertakes to afford procedural fairness to applicants under proposed section 19 as well as more broadly, including providing an opportunity to respond to adverse comments or information. The Explanatory Memorandum confirms that the Bill will maintain these core procedural fairness protections and does not intend to exclude or otherwise limit the right to procedural fairness. A failure to practically afford procedural fairness in the circumstances may also be grounds for a judicial review application under the *Administrative Decisions (Judicial Review) Act 1977* or more broadly under section 39B of the *Judiciary Act 1903* or in the High Court's original jurisdiction under paragraph 75(v) of the Constitution.

I am therefore satisfied that there are sufficient mechanisms to ensure procedural fairness is afforded to all applicants across the ITP process, including in relation to decisions made under proposed subsection 19(1), and that the Bill does not require further amendments in this regard.

Paragraph 1.69 – Merits Review

The Committee has sought further advice regarding whether independent merits review is available for decisions made under proposed subsection 19(1). If not, why it is considered necessary and appropriate to exclude merits review, with reference to the Administrative Review Council's guide, *What decisions should be subject to merit review?*

Independent merits review is not available for decisions made under proposed subsection 19(1) to refuse consent to a transfer of a prisoner from Australia. This is consistent with other decisions under the ITP Act to provide or refuse consent for transfers to or from Australia. Proposed subsection 19(1) provides the Attorney-General with a discretion to refuse consent to a transfer from Australia on terms of transfer proposed by the transfer country. This decision will not be delegated.

A decision under proposed subsection 19(1) would also involve considering the broader policy factors listed in the ITP Statement of Policy. This includes how the foreign country would enforce the prisoner's Australian sentence, humanitarian considerations, and community safety in the relevant foreign country. It also involves considering information provided by state and territory corrective services, Australian law enforcement agencies and the government of the foreign country. These decisions therefore have the potential to impact Australia's relations with other countries, and are similar to the examples of decisions that may justify excluding merits review cited in Chapter 4 of the Administrative Review Council's guide under the 'policy decision of a high political content' exception. External merits review of this decision would therefore be inappropriate.

The absence of merits review for decisions under proposed subsection 19(1) is also consistent with comparable decisions made in respect of interstate transfer of Commonwealth prisoners under the *Transfer of Prisoners Act 1983* and sentencing and parole of federal offenders under the *Crimes Act 1914*.

I therefore consider it necessary and appropriate for merits review not to be available for decisions made under proposed subsection 19(1).

Amendments to the *Witness Protection Act 1994* (WP Act)

Paragraph 1.74 – Merits Review

The Committee has sought further advice regarding why internal merits review will not be

available for decisions to temporarily suspend protection and assistance under proposed paragraph 17C(1)(b), where the decision is made personally by the Commissioner.

I note the Committee's comment that where a decision has the capacity to affect rights, liberties or obligations, those decisions should be subject to merits review, and where merits review is not provided for, the Explanatory Memorandum must include sufficient justification.

As outlined in paragraph 280 of the Explanatory Memorandum, it is already the case under the Witness Protection Act that some decisions made personally by the Commissioner are not subject to merits review. One example of this is the Commissioner's power under paragraph 18(1)(a) to terminate an individual's participation in the NWPP.

Consistent with this approach, it is my view that decisions made personally by the Commissioner under new subsection 17A(1), should not be subject to merits review, as decisions to suspend the provision of protection and assistance at the request of the participant are unlikely to have a significantly adverse impact on the rights and interests of the individual.

I agree that for suspension decisions made under new section 17B of the Bill, in situations where protection and assistance may be suspended as a result of the actions (or intended actions) of the participant, that it is appropriate to provide for internal review of these decisions. I will undertake to amend the Bill to ensure these decisions may be subject to internal review.

Further, I agree with the Committee's comment that in these circumstances, external merits review would not be appropriate due to the need to limit knowledge of a participant's individual circumstances and the broader administration of the NWPP.

Paragraph 1.77 – Administrative power not defined with sufficient precision

The Committee has sought further advice on the intended meaning of the term 'Assistant Commissioner', noting this term is not currently defined in the Witness Protection Act, and whether this definition is set out elsewhere in law or policy.

I note the Committee's comment that it would be appropriate to clearly define the position of the decision-maker under proposed sections 17A and 17B.

In response to the Committee's comments on this matter, I will undertake to amend the Bill to provide for a definition of 'Assistant Commissioner' in the Witness Protection Act. This amendment would clarify that the term 'Assistant Commissioner' is taken to mean an Assistant Commissioner of the AFP, consistent with the definitions for 'Commissioner' and 'Deputy Commissioner'.

I trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
19 / 5 /2023

The Hon Jason Clare MP
Minister for Education

Reference:

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600
By email: scrutiny.sen@aph.gov.au

Dear Senator Smith,

I am writing in response to correspondence of 11 May 2023 on behalf of the Senate Standing Committee for the Scrutiny of Bills, regarding Scrutiny Digest 5 of 2023 in relation to the Education Legislation Amendment (Startup Year and Other Measures) Bill 2023 (the Bill).

Following my previous response to questions from the Committee, the Committee has requested the following further advice about certain provisions in the Bill:

- what distinguishes a decision under proposed subsection 128B-30(6), which is considered unsuitable for independent merits review, from other decisions under Part 3-7 which are subject to review; and
- why a decision under proposed section 128E-30 is considered an automatic decision when it relies on the Secretary to be satisfied that the person was not entitled to receive SY-HELP assistance.

Subsection 128B-30(6) outlines that a student does not meet the citizenship or residency requirements in relation to an accelerator course if the higher education provider reasonably expects that the student will not undertake any of the accelerator course in Australia. Section 128E-30 relates to reversal of STARTUP-HELP assistance if the Secretary is satisfied that the person was not entitled to receive STARTUP-HELP assistance for a course with a provider.

Subsection 128B-30(6)

The choice to not make a decision under subsection 128B-30(6) reviewable ensures consistency with other forms of Higher Education Loan Program (HELP) assistance available under the *Higher Education Support Act 2003* (HESA), and ensures consistency of administration for HELP. Regardless, I reiterate the view that I explained in my previous response to the Committee – namely that decisions under subsection 128B-30(6) are not suitable for merits review because such decisions are procedural in nature, and involve the allocation of finite resources between competing applicants.

Students apply for STARTUP-HELP to undertake particular accelerator program courses at higher education providers, which are bespoke and determined by the availability of particular educators. Noting this, decisions under subsection 128B-30(6) are not suitable for merits review as the time to undertake a particular Accelerator Program Course would very likely have passed by the time that such a decision was considered.

As announced by the Government, there will be up to 2000 STARTUP-HELP loans allocated each year, and overturning a decision under subsection 128B-30(6) that an individual is not eligible for STARTUP-HELP would result in a STARTUP-HELP loan being unavailable for another eligible student.

Section 128E-30

As noted in my previous response to the Committee, decisions under section 128E-30 are unsuitable for merits review, as the Secretary's power to reverse an amount of STARTUP-HELP assistance is a consequence of an individual being assessed as not entitled to receive such assistance. Whether or not a person is entitled is a matter of fact, and therefore is an automatic decision for the Secretary.

If the factual circumstances are such that the person is not entitled to receive STARTUP-HELP assistance, the Secretary must act in a certain way, that is, to reverse the STARTUP-HELP loan. The reference to the Secretary being 'satisfied' does not provide a degree of discretion for the Secretary to qualitatively assess the facts of a particular matter. As an example, it is a condition of eligibility that a person has not received more than one amount of STARTUP-HELP assistance previously (s.128B-1(1)(c)). This is a question of fact – a person either has or has not received more than one amount previously – there would be little value in making this decision subject to merits review. Similarly, a person either meets the citizenship or residency requirements or they do not; the census date for the accelerator program course is or on or after 1 July 2023 or it is not and so on.

I trust this information is of assistance.

Yours sincerely

JASON CLARE

26 / 5 / 2023

Attorney-General

Reference: MC23-017713

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

By email: scrutiny.sen@aph.gov.au

Dear Senator

I am writing in response to correspondence received on 11 May 2023 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding Scrutiny Digest 5 of 2023 in relation to the Family Law Amendment Bill 2023 (the Bill). I thank the Committee for consideration of the Bill and address questions raised by the Committee below.

Reversal of the evidential burden of proof

The Committee requested the Attorney-General's detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in relation to an offence under proposed subsections 114Q(2) and 114R(2) (Schedule 6 of the Bill). The Guide to Framing Commonwealth Offences sets out that offence-specific defences should only occur where a matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Sections 114Q(2) and 114R(2) of the Bill specify that the offences contained in proposed Part XIVB, that prohibit public communication of accounts of family law proceedings that identify persons, do not apply if the communication is in accordance with a direction of a court or otherwise approved by a court. Further, in the case of section 114R(2), they need to be in accordance with Rules of Court or specific communications by the court directly. This is consistent with the existing law contained in section 121 of the *Family Law Act 1975 (Cth)*. Section 121 states the offences do not apply if publication of accounts of family law proceedings have been approved by the court, for court lists and other permitted publications.

The approval of a court permitting communication is considered peculiarly within the knowledge of the defendant. This is on the basis that, under the proposed Part, approval of a court may not necessarily be contained in reported judgements or court orders and may have been provided in other forms of communication. These could include non-written forms of communication to a person connected to proceedings, including where only that party has received that communication. For example, in the case of Registrar conducted Dispute Resolution Conferences, no transcripts are recorded, the conferences are conducted in a closed environment and knowledge of any approval given in that context is likely to be restricted. In such a case, that knowledge is unlikely to be readily available to the prosecution. It is therefore considered appropriate that the evidential burden for the permitted communications contained in 114Q(2) and 114R(2) of the Bill rests with the defendant due to the significant difficulty for the prosecution to disprove such a matter due to the lack of visibility about whether the court has approved communication under the Part, particularly where that approval is in non-written form.

If such matters were to rest with the prosecution, it is anticipated that this would also result in substantial costs for prosecutorial and investigating agencies due to the lack of visibility of all communication occurring within the family court system and the volume of materials that would need to be investigated to acquit the burden. The matters contained in sections 114Q(2) and 114R(2) are likely to render the offences in the proposed Part significantly more difficult to prosecute for these reasons. Further, sections 114Q(2) and 114R(2) are intended to set out the circumstances that fall outside of the offence provisions, and it is intended that these would be considered in any exercise of discretion to prosecute alleged breaches of the proposed Part before proceedings would be commenced.

The Government will amend the explanatory memorandum to explain the need for the offence-specific defences contained in the proposed Part and the reasons for the evidential burden resting with the defendant.

The Government notes the Committee's suggestion that it may be appropriate for the Bill to be amended to provide that the matters contained in sections 114Q(2) and 114R(2) are specified as elements of the offence. The Government will give further consideration to the Committee's proposal in the context of any additional recommendations for amendments to the Bill that might result from the inquiry of the Senate Legal and Constitutional Affairs Legislation Committee into the Bill's provisions.

Undue trespass on personal rights and liberties

The Committee requested the Attorney-General's detailed advice as to why it is considered necessary and appropriate to restrict the commencement of proceedings under subsections 114Q(1) and 114R(1) by requiring the Director of Public Prosecutions (DPP) written consent.

Subsections 114Q(1) and 114R(1) of Part XIVB of the Bill maintain the current requirement in section 121 of the Family Law Act 1975 that proceedings for an offence against that section shall not be commenced except by, or with the written consent of, the DPP. This does not preclude private prosecutions but instead imposes an important safeguard to prosecutions under the new Part. As noted in the DPP's, Prosecution Policy of the Commonwealth Guidelines, the right to private prosecution can be open to abuse and to the intrusion of improper personal or other motives. This is particularly important in the context of family law where a lack of prosecutorial safeguard may result in avenues for systems abuse.

The consent of the DPP to commence proceedings under proposed Part XIVB is therefore critical to prevent parents or other relevant persons in family law proceedings from pursuing proceedings for a breach of the new Part for improper reasons. Given the potential for a term of imprisonment for offences under new Part XIVB, the incarceration of a parent may also impact parental capacity, which may ultimately favour a perpetrator of systems abuse who seeks increased parenting time.

The consent of the DPP is also an important safeguard to ensure that the offences in the Part are operating as intended, primarily to protect the privacy of those involved in family law proceedings. Parents in family law proceedings may inadvertently breach provisions under the Part in a way that may not justify prosecution, therefore the consent of the DPP is necessary to ensure proper prosecutorial discretion is exercised before proceedings occur.

Significant matters in delegated legislation

Paragraph 11K(2)(i) provides that regulations may make provision for the charging of fees to family report writers for services provided to them in connection with recognition, and maintenance of recognition, of their compliance with standards and requirements.

Guidance on the amount of a fee

The Committee has reported that some guidance in relation to the amount of a fee that may be imposed in delegated legislation should be included in the enabling Act. The Committee has further stated that:

(a) where a bill leaves the setting of the rate of a fee to delegated legislation, the committee expects the explanatory memorandum to address why it is appropriate to do so; and
(b) if there is no limit on the amount of the fee that may be imposed, the explanatory memorandum should include why it would not be appropriate to include such a limitation on the face of the bill.

Any fees charged to professionals who prepare family reports must be appropriate, targeted and consistent with any future regulatory scheme established by regulations. Delegating the setting of fees to regulations will enable such fees to remain aligned with the future regulatory scheme as it is established, and keep pace with industry changes and community expectations over time. For this reason, it is not desirable for the Bill to include a proposed fee or a limit on the fee that may be imposed.

The Government will amend the Explanatory Memorandum to provide why it would not be appropriate to include a limitation on the amount of the fee that may be imposed on family report writers on the face of the bill.

A fee must not amount to taxation

The Committee has reported that at a minimum, the bill should include a provision stating that any fee made under regulations under proposed paragraph 11K(2)(i) must not be such as to amount to taxation. The Committee has requested the Attorney-General's advice as to whether the bill can be amended to clarify this.

It is not necessary to clarify in the Bill that any fees charged must not amount to taxation. The Government is aware that any fees charged to family report writers through regulations developed in connection with paragraph 11K(2)(i) must not amount to a tax, consistent with the Constitution. The Explanatory Memorandum provides that the fees proposed would reflect services provided to family report writers in connection with their compliance, and that regulations would not establish fees to recover other costs associated with the general administration of the regulatory scheme.

The Government will amend the Explanatory Memorandum to provide greater clarity to administrators of any future regulatory scheme that any fee imposed on a family report writer must not be such as to amount to a tax.

I thank the Committee and trust my response is of assistance. I note that as the Bill has been referred to the Legal and Constitutional Affairs Legislation Committee for report by 24 August 2023, any further amendments to the Bill are anticipated to be progressed upon receipt of that report, and in the context of consideration of its recommendations.

Yours sincerely

THE HON MARK DREYFUS KC MP
19 / 5 /2023

Attorney-General

Reference: MC23-017714

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

By email: Scrutiny.Sen@aph.gov.au

Dear Senator Smith

I refer to your correspondence of 11 May 2023 on behalf of the Senate Standing Committee for the Scrutiny of Bills, regarding *Scrutiny Digest 5 of 2023*, which contains comments on the Family Law Amendment (Information Sharing) Bill 2023. I appreciate the time the Committee has taken to consider the Bill, and have provided a response below.

The Committee has asked for further information on why it is necessary and appropriate to include proposed information sharing safeguards in delegated legislation, rather than including them within the primary legislation.

The Bill will implement key components of an expanded and enhanced information sharing framework, as envisaged by the *National Strategic Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems* (National Framework). The Australian Government recognises that it is critical that any new expanded and enhanced framework for sharing sensitive family violence, child abuse and neglect information is accompanied by a robust system of protections and safeguards.

The Bill therefore contains a number of express protections which limit the shareability of highly sensitive information, including information which could pose a risk to safety if disclosed. These express protections in the Bill include:

- the introduction of a new class of protected material, which is subject to legal exclusions from production under both new orders
- empowering information sharing agencies to redact documents, to remove otherwise protected material, and to protect personal information including addresses
- empowering information sharing agencies to provide express advice to the family law courts about any risks that should be considered when disclosing information shared under this Bill, and requiring the court to consider any such advice provided, and
- limiting the circumstances in which the identity of a notifier of suspected child abuse or family violence can be disclosed, and requiring the court to notify an agency of an intention to disclose the identity of a notifier and consider any advice provided.

These express protections will be complemented by the prescription of additional information sharing safeguards in the *Family Law Regulations 1984*, which the courts and information sharing agencies must have regard to in providing or using particulars, documents or information under the Bill. Strong safeguards are critical for ensuring information is shared, stored, accessed and used in a manner which is safe and risk aware.

As outlined in the Explanatory Memorandum of the Bill, at a minimum these safeguards will include provisions to ensure:

- information is only shared to the extent necessary for the identification, assessment and management of family violence, child abuse and neglect risk, restricting the amount of unnecessary or irrelevant personal information shared
- information sharing is conducted in good faith, showing reasonable care to the safety and wellbeing of all people involved, including information sharing officers in agencies and the courts, parties to proceedings, children and any other relevant individual
- information is sent, received and stored in an appropriate and secure manner
- reasonable steps are taken to ensure parties who pose, or are alleged to pose, a family safety or child abuse risk cannot access sensitive information, and
- if it is discovered that information shared is incorrect or misleading, that best efforts are made to correct the information shared and to update the relevant records.

These minimum safeguards have been developed in consideration of stakeholder feedback provided through the development of the National Framework, as well as a Privacy Impact Assessment (PIA) commissioned by the Attorney-General's Department.

It is necessary and appropriate to prescribe these safeguards in the Regulations as they are operational in nature, enhancing existing information handling procedures in the courts and information sharing agencies. This approach will ensure that the information sharing framework established by the Bill can be responsive to evolving best practice throughout its initial implementation and ongoing operation.

As they will impact on operational procedures, the information sharing safeguards must be responsive to the needs of a family and domestic violence sector which is evolving and requires nuances in operation across eight different State and Territory jurisdictions. To protect vulnerable families impacted by family violence and child abuse, the safeguards must remain current and effective in light of:

- the growing understanding of the complexity of family and domestic violence
- varying jurisdictional responses to family and domestic violence, particularly in relation to coercive controlling behaviour, and
- a rapidly developing technological environment.

The inclusion of the information sharing safeguards within the Regulations provides flexibility for amendments to reflect emerging best practices, if required, whilst still ensuring the proposed information sharing safeguards remain subject to sufficient Parliamentary oversight and scrutiny.

The express protections within the Bill, along with the additional prescribed information sharing safeguards, and existing practices of the family law courts and State and Territory agencies sharing existing family safety information will work together to provide a robust, multilayered system of protection for children, families and individuals within the family law system. These protections will also be available not only for information shared by State and Territory agencies to the family law courts in response to the new orders proposed in the Bill, but will also be applicable to information sharing from the courts to State and Territory agencies under the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*.

As highlighted by the Committee, the Bill includes a provision requiring a review of the legislation to be commenced within 12 months of commencement. I expect this review to consider, and provide advice on, the inclusion of settled information sharing safeguards within primary legislation as part of any further legislative amendments identified.

The Government recognises the importance of ensuring the safety of children, families, and

individuals at all stages of their engagement across the family law, family violence and child protection systems. The inclusion of information sharing safeguards in the Regulations is an appropriate step to ensure safe, best practice in sharing sensitive information, while fostering transparency, trust and integrity for all actors involved in information sharing.

I trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
19 / 5 /2023

The Hon Catherine King MP

Minister for Infrastructure, Transport, Regional Development and Local Government
Member for Ballarat

Ref: MC23-061010

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

via: Scrutiny.Sen@aph.gov.au

Dear Chair

I am writing in response to the correspondence from the Senate Standing Committee for the Scrutiny of Bills (the Committee), dated 31 March 2023, regarding the Committee's initial scrutiny of the Infrastructure Australia Amendment (Independent Review) Bill 2023, as set out in *Scrutiny Digest 4 of 2023*. My response to the Committee's comments are set out below. I apologise for the delay in responding.

Committee question related to tabling of documents in Parliament
The committee requests the minister's advice as to:

- whether the bill can be amended to provide that the documents created under proposed sections 5A to 5D of the bill must be tabled in the Parliament; or
- if the minister considers these documents are not appropriate for tabling in the Parliament, whether a justification can be provided as to why it is appropriate that the documents are not tabled

The Infrastructure Australia Amendment (Independent Review) Bill 2023 would provide for Infrastructure Australia (IA) to create a wide range of documents that would give advice to the Minister and the Commonwealth on nationally significant infrastructure. IA is an independent advisory body for the Commonwealth. Some of the documents IA would develop would give IA's independent opinion to inform government deliberations around investment in specific infrastructure projects and others would give IA's independent view on policy matters relating to nationally significant infrastructure.

Of note, IA's advice represents its independent expert opinion, but does not represent the executive government's position. IA advice is one source of information that may be considered by the executive government, including Cabinet, in making its decisions. In addition, and in accordance with the Government response to the independent review of IA, released on 8 December 2022, IA will provide annual statements to the Government. This advice will be provided on the basis of IA's powers under sections 5A to 5D. This advice cannot be tabled given it informs deliberations of the Cabinet. Tabling all of IA's advice also

has the potential to damage or prejudice the Commonwealth's negotiations with state and territory governments regarding priority projects for infrastructure investment.

Publication of documents created by IA on its website, as required by the bill, maintains an appropriate level of public transparency in relation to the work of IA. The transparency provisions included in the bill are consistent with provisions in the existing *Infrastructure Australia Act 2008*, so do not represent a diminution in transparency.
Importantly, the bill does not preclude the tabling of IA's reports or documents, and so there is discretion to table in appropriate circumstances, in accordance with usual parliamentary procedures.

For these reasons, I do not consider the bill would be improved by requiring IA's advice documents to be tabled in the Parliament.

I trust that this additional information will assist the Committee in finalising its consideration of the bill.

Yours sincerely

Catherine King MP

5 / 5 /2023

The Hon Amanda Rishworth MP

Minister for Social Services

Ref: MB23-000399

Ms Fattimah Imtoual
Committee Secretary (Acting)
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600
Scrutiny.Sen@aph.gov.au

Dear Ms Imtoual

Thank you for your email dated 11 May 2023 and the Committee's request for information about issues identified in the Social Services Legislation Amendment (Child Support Measures) Bill 2023 in the Committee's Scrutiny Digest 5 of 2023.

Child Support (Registration and Collection) Act 1988

As you know, the Bill proposes to amend the *Child Support (Registration and Collection) Act 1988* to allow the Child Support Registrar to refuse to issue a departure authorisation certificate where a security is offered, unless satisfied the person will make suitable arrangements to pay their child support liabilities.

As the Committee has noted, proposed paragraph 72L(3)(a) would require the Registrar to issue a departure authorisation certificate if 2 criteria are satisfied. First, that the Registrar is satisfied it is likely that, within a period that the Registrar considers appropriate, the Registrar will be required by subsection 72I(1) to revoke the departure prohibition order. Second, the person has given security for their return to Australia.

As the Committee has noted, the measure introduces a discretionary element to the Registrar's issuing of a departure authorisation certificate. Specifically, that they must be *satisfied* that it is likely that any of the matters under subsection 72I(1) will occur within a period that the Registrar *considers appropriate*. Those matters are the person no longer has a liability or has arranged for the discharge of the liability, or the liability is irrecoverable.

Guidance

I note the Committee is concerned about the breadth of the discretion afforded to the Registrar by this measure. As the Committee has suggested, the Department of Social Services will provide guidance as to how the Registrar should exercise their discretion. This guidance will include a list of factors the Registrar must consider in determining what an appropriate period is. This guidance will be set out in the Child Support Guide on 3 July 2023.

Right to freedom of movement

I note the Committee is also concerned about the breadth of the discretion in view of the affect the measure has on a person's right to freedom of movement.

The measure would expand the circumstances in which a person restricted from leaving Australia by a departure prohibition order could be refused a departure authorisation certificate to allow them to leave Australia. In this way, the measure engages a person's right to freedom of movement.

The extent of any interference with human rights is marginal. A person affected by the measure is already subject to a departure prohibition order preventing them from departing Australia for a foreign country (section 72D). They are prevented from departing Australia because they have persistently and without reasonable grounds failed to pay their child support liability (paragraph 72D(1)(c)). That order could be revoked if the person made arrangements for the child support liability to be discharged (paragraph 72I(1)(a)). This would also assist an application for a departure authorisation certificate (subparagraph 72L(2)(a)(ii)).

In addition, there is oversight of the measure. Affected people have access to merits and judicial review. A person may apply to the Administrative Appeals Tribunal for review of the Registrar's decision to refuse to issue a departure authorisation certificate – including because of the measure (sections 72T and 72L). A person may also appeal to courts against the making of departure prohibition orders (section 72Q).

It also remains that case that the Registrar may nevertheless issue a certificate on humanitarian grounds, even if they are not satisfied the person meets the criteria set by the measure (paragraph 72L(3)(b)(i)).

I appreciate you bringing this matter to my attention.

Yours sincerely

Amanda Rishworth MP

8/5/2023

THE HON STEPHEN JONES MP

ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS23-000521

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in relation to the Senate Standing Committee for the Scrutiny of Bill's comments in Scrutiny Digest 2 of 2023.

I have attached a detailed response to the Committee's enquiries about the Treasury Laws Amendment (2023 Measures No. 1) Bill 2023.

I trust that the information attached provides further context about the drafting of the bill and assists with the Committee's deliberations.

Yours sincerely

The Hon Stephen Jones MP

Enc

Parliament House Canberra ACT 2600 Australia
Telephone: (02) 6277 7230

ATTACHMENT A

In your letter, you sought my advice as to:

- why it is considered necessary and appropriate to allow the use of automated decision-making for any decision;
- whether all the relevant decisions made using assisted decision-making processes will be non-discretionary and, if not, what processes are in place to ensure decision-making will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power);
- what processes ASIC has in place to ensure the integrity and transparency of any assisted decision-making process, and whether these will be included in law or policy; and
- what processes ASIC has in place to identify potentially incorrect decisions made through an assisted decision-making process.

Background

Part 7.6 of the *Corporations Act 2001* deals with the licensing and authorisation of providers of financial services. Among other things, it sets out education and training standards, and authorisation processes for Financial Services Licensees to authorise relevant providers to provide financial services on their behalf.

Registration on the Financial Adviser Register is not the determinant of whether someone is suitably qualified and eligible to provide financial advice. Responsibility for ensuring that a relevant provider meets the education and training standards and is a fit and proper person is the responsibility of the Australian Financial Services licensee who authorises the person to provide financial advice. The Financial Adviser Register provides a central, publicly available record of relevant providers.

Currently, the licensees must notify ASIC within 15 business days of authorising a representative to provide financial advice. However, from 1 July 2023, it will be an offence for a relevant provider to provide advice without being registered on the Financial Adviser Register. The proposed assisted decision-making process in the Bill is necessary to ensure that ASIC is able to administer the enhanced registration obligations efficiently and effectively, and it will ensure that licensees and relevant providers are not delayed from providing financial advice by administrative processes.

Necessity and appropriateness of assisted decision-making

The proposed assisted decision-making power applies to decisions made by ASIC under Division 8C of the *Corporations Act 2001*. Division 8C sets out, amongst other things, how Australian financial services (AFS) licensees can apply to ASIC to register relevant providers (commonly known as 'financial advisers') and the circumstances in which ASIC must refuse or grant a registration application. As noted in the Explanatory Memorandum, the Bill prescribes circumstances in which ASIC must approve or refuse a registration application.

The legislation states that ASIC must grant an application for registration for an application made in accordance with sections 921ZA or 921ZB of the *Corporations Act 2001*. Those sections require AFS licensees to make a series of declarations about the relevant provider's fitness and propriety to provide personal financial advice, and their compliance with the professional standards. The required declarations are set out in the registration application in a prescribed form created by ASIC. The AFS licensee makes each declaration by checking a corresponding box.

Non-discretionary decision making

ASIC currently makes two alternative decisions under Division 8C. Where the AFS licensee makes all the declarations, ASIC must grant the registration application (the law does not require ASIC to scrutinise the validity of the declarations). Where the AFS licensee does not make the declarations, ASIC must refuse the application. ASIC must also refuse a registration application for a banned or disqualified relevant provider.

I consider it appropriate to allow ASIC to use assisted decision-making processes to enable ASIC to deliver a high standard of service in an effective and efficient manner. The nature of the decision, being based upon objective criteria and not involving discretion or qualitative assessment, lends itself to the use of assisted decision-making technology. In particular, the decision whether to register a person does not require ASIC to

make a substantive decision and confirm that they are qualified and a fit and proper person – the legislation requires the licensee to provide that assurance. ASIC's role is to confirm the making of the declarations (noting that it is an offence to make a false declaration and reviews may occur after registration).

The only substantive decision under Division 8C that ASIC will make using the proposed assisted decision-making power is whether to grant an application for registration. If the registration application is granted, the decision-making process will be fully automated. If it appears that ASIC must refuse a registration application because for example the licensee has not made all required declarations or the relevant provider is subject of a banning order, ASIC staff take over the decision-making process. This is an important and appropriate safeguard to ensure that if the automated decision process were to incorrectly refuse an application it would not adversely affect a potential AFS licensee.

The assisted decision-making processes will not require algorithmic decision-making, big data analytics or machine learning. Each decision is a reviewable by the Administrative Appeals Tribunal and ASIC must maintain appropriate records. ASIC will store information sourced as part of the application process in a secure environment and it will handle the data in accordance with ASIC's Privacy Policy, which is subject to review at least every two years.

Processes to ensure integrity and transparency
The Bill includes provisions to promote the appropriate use of assisted decision-making processes, including:

- ASIC must arrange the use of assisted decision-making processes, and these processes must be under ASIC's control;
- any decision made by such processes must comply with all the requirements of the legislative provisions under which ASIC made the decision (this means, for instance, that any review mechanism applicable to the decision remains in place); and
- ASIC has the power to change a decision made by an assisted decision-making process if it is satisfied that the decision is wrong (in this circumstance, ASIC can amend such a decision without the AFS licensee needing to commence a formal review process).

The following existing components of the regulatory regime support the integrity and transparency of the assisted decision-making process:

- ASIC must notify affected parties (the AFS licensee and the relevant provider the subject of the application) by sending out a notice of registration or notice of refusal;
- ASIC must display the registration status of a relevant provider on its Financial Adviser Register (a public register); and
- affected parties have a right of review of any registration decision in the Administrative Appeals Tribunal.

ASIC will provide detailed public guidance about the registration obligation, including when ASIC will approve or refuse an application for registration. ASIC will also conduct webinars with industry prior to the commencement of the registration process.

Identifying potentially incorrect decisions
The prescriptive nature of the registration regime means that there is a very low risk that ASIC will make an incorrect decision regarding a registration application. As noted above, responsibility for providing assurance that a relevant provider is qualified and a fit and proper person rests with the AFS licensee. The registration process that is the subject of this Bill does not look behind the declarations made by licensees. The only additional check conducted by ASIC is to check the relevant provider is not the subject of a banning order or disqualification as a relevant provider. However, post registration reviews may occur.

As noted above, there will be involvement by ASIC staff in any decision to refuse a registration. Furthermore, ASIC must notify an applicant and the relevant provider of a decision to refuse to register a relevant provider within five business days. Similarly, ASIC must notify an applicant and the relevant provider as soon as practical that a relevant provider is registered in response to an application, and this registration is recorded on the public Financial Adviser Register. Taken in conjunction with the ASIC staff review process, these notification timeframes will assist in promptly identifying and rectifying any errors.