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Committee for the
Scrutiny of Bills

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Introduction

Terms of reference

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against certain accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament as to whether the bills, by express words or otherwise:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

Publications

It is the committee's usual practice to table a *Scrutiny Digest* (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.

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.

Australian Security Intelligence Organisation Amendment Bill 2023¹

Purpose	This bill seeks to enable the Australian Security Intelligence Organisation to implement a consistent approach to issuing, maintaining and revoking Australia's highest-level security clearances that ensures Australia's most sensitive information, capability and secrets remain protected.
Portfolio	Home Affairs
Introduced	House of Representatives on 29 March 2023

Availability of merits review²

1.2 Item 12 of Schedule 1 proposes to introduce Part IVA into the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) which deals with security vetting and security clearance related activities. Proposed division 3 of Part IVA provides a review framework for certain security clearance decisions and prejudicial security clearance suitability assessments. Broadly, subdivision A provides a mechanism for internal review, subdivision B provides a mechanism for external review through the Administrative Appeals Tribunal (AAT), and subdivision C provides for review by an independent reviewer. These types of review apply to different categories of individuals.

1.3 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided. Generally speaking, the committee's preference is that independent review is available through the AAT. The committee expects any justification for excluding merits review to be set out clearly within the

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Australian Security Intelligence Organisation Amendment Bill 2023, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 72.

2 Schedule 1, item 12, proposed division 3 of Part IVA. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii).

explanatory materials to the bill. The committee has questions in relation to all types of review provided for in the bill and outlines its concerns below.

Internal review

Adequacy of internal review

1.4 Proposed subdivision A of division 3 of Part IVA of the bill provides a mechanism for internal review. Proposed subsection 82H(1) provides for internal merits review for decisions to deny, revoke, or impose or vary a condition imposed upon, a security clearance. The explanatory memorandum explains that:

As a matter of practice the delegate would normally be at the same classification or higher than the original decision-maker. Given the operational nature of this requirement whether the alternate decision-maker is more senior or not may be determined on a case-by-case basis.³

1.5 It is unclear to the committee why it is not a requirement that the individual remaking the decision be at least of the same classification level and why it is considered appropriate to determine this on a case-by-case basis.

1.6 The committee requests the minister's detailed advice as to whether the bill can be amended to include a requirement that internal merits review be made at least at the same classification level as the initial decision-maker.

Access to internal review

1.7 The committee further notes that internal merits review is not available for all classes of individuals. Proposed subsection 82H(3) provides that internal review is not available for individuals who are not Australian citizens or who do not normally reside in Australia, and are engaged or proposed to be engaged for duties outside Australia.⁴

1.8 The explanatory memorandum explains that:

This limitation is necessary, reasonable and proportionate to achieve the legitimate objective of protecting Australia's national security by ensuring that persons in these circumstances, noting the heightened risk that persons engaged in these circumstances may pose in relation to espionage, are not able to access sensitive information about Australia's security clearance processes by engaging in merits review to exploit potential vulnerabilities.⁵

1.9 While acknowledging there may be a heightened risk in engaging particular classes of individuals, the committee is unclear as to why the fact that an Australian citizen may not normally be resident in Australia is sufficient to deny them access to

3 Explanatory memorandum, p. 49.

4 Proposed subsection 82H(3).

5 Explanatory memorandum, p. 51.

internal merits review. The committee is also unclear as to whether non-citizens normally resident in Australia have access to internal merits review.

1.10 The committee requests the minister's 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.**

External review

Access to external review

1.11 Proposed subdivision B of division 3 of Part IVA of the bill sets out the framework for externally reviewable decisions through the AAT. Proposed subsection 83(1) provides that a decision by an internal reviewer under paragraph 82L(1) to deny, revoke, or impose or vary certain conditions upon a security clearance in respect of a person who, immediately before the time the internal reviewer made the decision, held a security clearance or was a Commonwealth employee, is an externally reviewable decision. Proposed subsection 83(2) provides that a prejudicial security clearance suitability assessment given by the Australian Security Intelligence Organisation (ASIO) in respect of a person is also an externally reviewable decision.

1.12 However, under proposed subsection 83(3), a security clearance decision or a prejudicial security clearance suitability assessment is not externally reviewable in respect of individuals who are not Australian citizens or who do not normally reside in Australia, and are engaged or proposed to be engaged for duties outside Australia. The explanatory memorandum explains:

Non-Australians and non-residents being engaged or proposed to be engaged for duties outside Australia would not have access to external merits review for assessments or decisions. Merits review would be excluded, for example, for locally engaged staff at Australian embassies outside Australia where they required an Australian security clearance to perform their role. In those circumstances, in the interests of security, there should not be an obligation to afford a foreign national external review rights. However, SCSAs in relation to the employment of a non-citizens or non-residents inside Australia would be not excluded from notification and review rights. This is consistent with existing section 36(1)(a) of the ASIO Act.⁶

1.13 The committee is concerned that Australian citizens who do not normally reside in Australia are not able to access external review in relation to a security clearance decision or a prejudicial security clearance suitability assessment, and

6 Explanatory memorandum, p. 56.

considers that the explanatory memorandum has not adequately explained why this is not available.

1.14 Further, a decision is not externally reviewable if it is in respect of an individual who does not already hold a security clearance or is not a Commonwealth employee immediately before the time an internal reviewer made the decision. The explanatory memorandum explains:

The policy rationale for excluding external review for new applicants who do not hold a current security clearance or are not Commonwealth employees is that Australia is confronted by a security environment that is complex, challenging and changing. The threat to Australians from espionage and foreign interference is higher than at any time in Australia's history. In this context, the threats are higher for new applicants who would not yet have a sufficient understanding of their security obligations or have not participated in security awareness training and are therefore less able to manage these threats. New applicants also bring a lower level of assurance, in that they have not previously undergone an organisational suitability assessment and do not have an existing track record as a Commonwealth employee.⁷

1.15 While noting this explanation, the committee does not consider that it adequately justifies why a lack of understanding of security obligations or training is sufficient to exclude external merits review for this category of individuals. The committee considers that it would be more appropriate to explore alternative ways to ensure individuals who do not already hold a security clearance or are not already Commonwealth employees are made aware of and understand their security obligations.

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

- **whether the bill can be amended to extend external merits review through the Administrative Appeals Tribunal to individuals who are Australian citizens but do not normally reside in Australia, do not currently hold a security clearance or who are not Commonwealth employees; and**
- **whether the bill can be amended to include a requirement that a process be developed to ensure applicants have a sufficient understanding of their security obligations.**

7 Explanatory memorandum, p. 57.

*Adequacy of external review – broad discretionary power*⁸

1.17 While external review is available in principle for some categories of individuals, the design of the review framework in the bill means that in practice some decisions remain unreviewable.

1.18 Under proposed section 83E, the minister may, in exceptional circumstances, issue a conclusive certificate in relation to a security clearance decision or security clearance suitability assessment, that is an externally reviewable decision, if the minister believes that it would be prejudicial to security to change or review the decision or assessment. The effect of a conclusive certificate being issued in these circumstances is that the AAT cannot review, or continue to review, such a decision.⁹

1.19 Given the lack of guidance as to what constitutes an 'exceptional circumstance' or whether review would be prejudicial to security, the committee considers that the bill provides the minister with a broad discretionary power to issue a conclusive certificate. Where a bill contains a broad discretionary power, the committee expects the explanatory memorandum to the bill to address the purpose and scope of the discretion, including why it is considered necessary, and whether there are appropriate criteria or considerations that limit or constrain the exercise of any power, including whether they are contained in law or policy. The explanatory memorandum explains:

This reflects that decisions and assessments under Part IVA would generally impact Australian citizens and therefore a higher threshold is appropriate. This higher threshold is necessary to address scenarios where the foreign intelligence threat is extreme, or where the circumstances involved are so serious that it would not be in Australia's security interests to enable external merits review.¹⁰

1.20 The committee is concerned that this ministerial power is effectively unreviewable and does not consider that the explanation has adequately justified why it is appropriate and necessary in the circumstances for the power to exist. The committee considers that other provisions in the bill may operate to safeguard against some of the concerns outlined in the explanatory memorandum, for example the power to limit the amount of information that is disclosed to the AAT and the particular processes of the Security Division of the AAT in dealing with confidential material.¹¹ At the very least, the committee considers it appropriate to include additional criteria or considerations that limit or constrain the exercise of the power,

8 Schedule 1, item 12, proposed section 83E. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii) and (iii).

9 Proposed subsection 83E(2).

10 Explanatory memorandum, p. 63.

11 Item 28, proposed sections 39BA and 39C.

for example a requirement that the minister balance the extent of prejudice with the unfairness to the individual prior to issuing a certificate. Moreover, it is not clear why the criteria listed in the explanatory memorandum could not instead be listed as considerations within the bill. Namely, that the minister must consider whether the circumstances involved are so serious that it would not be in Australia's security interests to enable external merits review.

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

- **whether the bill can be amended to remove the power in proposed section 83E for 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. For example by, at a minimum, requiring the minister to balance the extent of prejudice with the unfairness to the individual prior to issuing a certificate; and**
- **whether a more detailed justification can be provided as to why this power is appropriate and necessary and what, if anything, is in place to constrain the exercise of the minister's power.**

Adequacy of external review – procedural fairness; broad discretionary power¹²

1.22 Proposed subsection 83A(4) seeks to provide that the minister may, by writing signed by the minister and given to the Director-General of Security, certify that the minister is satisfied that:

- the withholding of notice of the prejudicial security clearance suitability assessment in respect of the affected person is essential to the security of the nation; or
- the disclosure to an affected person of the statement of grounds for their assessment, or a part of the assessment, would be prejudicial to the interests of security.

1.23 A similar power is proposed in subsection 83C(6) which provides that, in relation to a security clearance decision, the minister may certify that the minister is satisfied that the disclosure to an affected person of the statement of grounds, or a particular part of that statement, would be prejudicial to the interests of security.

1.24 Further, item 28 of Schedule 1 to the bill seeks to insert proposed subsection 39BA into the *Administrative Appeals Tribunal Act 1975* (AAT Act). Proposed 39BA outlines the new procedure in the Security Division of the AAT for the review of security clearance decisions or security clearance suitability assessments.

12 Schedule 1, item 12, proposed subsections 83A(4) and 83C(6); item 28, proposed subsection 39BA. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii) and (iii).

1.25 Proposed subsection 39BA(11) provides that the ASIO Minister may, by signed writing, certify that evidence proposed to be adduced or submissions proposed to be made by or on behalf of the Director-General of Security or the relevant body are of such a nature that the disclosure of the evidence or submissions would be contrary to the public interest because it would prejudice security or the defence of Australia. Where this certificate is given, the applicant must not be present when the evidence is adduced or submissions made, and a person representing the applicant must not be present when the evidence is adduced or submissions made unless the ASIO minister consents.¹³

1.26 The effect of the minister's broad discretionary power to withhold notice or a statement of grounds is that an individual will have limited or no access to merits review as they will be unaware of the basis upon which the initial decision has been made. While the committee considers this approach may be appropriate in some circumstances, the committee considers that the explanatory materials for the bill have not adequately addressed why it is appropriate in this case. Where a bill contains a discretionary power, the committee expects the explanatory memorandum for the bill to address the purpose and scope of the discretion, including why it is considered necessary, and whether there are appropriate criteria or considerations that limit or constrain the exercise of any power, including whether they are contained in law or policy.

1.27 Further, procedural fairness is a fundamental common law right that ensures fair decision-making. Amongst other matters, it includes requiring that people who are adversely affected by a decision are given an adequate opportunity to put their case before the decision is made (known as the 'fair hearing rule'). The fair hearing rule includes not only the right of a person to contest any charges against them but also to test any evidence upon which any allegations are based. Where a bill limits or excludes the right to procedural fairness the committee expects the explanatory memorandum to the bill to address the nature and scope of the exclusion or limitation, and why it is considered necessary and appropriate to restrict a person's right to procedural fairness. The explanatory memorandum explains:

Subsection 83A(4) is consistent with existing practices in Part IV of the ASIO Act. Withholding notice of the assessment means the affected person would not be made aware that advice from ASIO was involved in making the decision by the other security vetting agency, and that may be appropriate where it is essential to the security of the nation.

The lack of notice of the PSCSA would not preclude the relevant security vetting agency that used the PSCSA to inform their security clearance decision from giving the affected person notice of their decision – for example, of a decision by that agency to deny the clearance. The effect of not notifying the affected person about a PSCSA is that they would not be

13 Proposed subsection 39BA(12) to the *Administrative Appeals Tribunal Act 1975*.

able to access external merits review. However, subsection 83A(5) would provide a safeguard in that the Minister must consider whether to revoke a certificate 12 months after the certificate to withhold notice is given.

Depending on any risks associated with disclosing information in the statement of grounds, the Minister has the option to certify that the statement of grounds, in full or in part, be withheld from the affected person, if the Minister is satisfied that it would be prejudicial to the interests of security. This is critical in the protection of sensitive national security information that would be prejudicial to the interests of security if disclosed to the affected person.¹⁴

1.28 The explanatory memorandum provides the same explanation in relation to proposed subsection 83C(6).¹⁵ No explanation is provided in relation to proposed subsection 39BA(11), other than that 'subsections 39BA(6) to 39BA(21) would mirror subsections 39A(6) to 39A(18) of the AAT Act to ensure consistency with the existing legislative regime...'.¹⁶

1.29 The committee is concerned about the breadth of the minister's discretion to withhold the statement of grounds in whole or part. The committee considers that it would be appropriate to similarly include a requirement that the minister must consider the extent of the prejudice in light of the extent to which withholding information will have on the applicant.

1.30 The committee further does not consider that consistency with existing practices in Part IV of the ASIO Act is a sufficient justification, in itself, for excluding notice or a statement of grounds for a decision. Similarly, it does not consider that mirroring provisions in the AAT Act is a sufficient justification for limiting procedural fairness in this new scheme.

1.31 The committee also considers it would have been helpful for the explanatory memorandum to discuss any alternative ways that were considered to ameliorate the denial of procedural fairness, both in relation to the lack of a statement of grounds and the lack of ability to be present when evidence is adduced or submissions made in the AAT. In the absence of such a justification, the committee considers that it is likely not appropriate to deny procedural fairness in these circumstances, particularly where the effect of the certificates under subsections 83A(4) and 83C(6) is to effectively deny access to external review.

14 Explanatory memorandum, p. 58.

15 Explanatory memorandum, p. 62.

16 Explanatory memorandum, p. 74.

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

- **whether the bill can be amended to require the minister to balance the extent of prejudice with the unfairness to the individual prior to issuing a certificate under proposed subsections 83A(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.**

Independent review

1.33 Proposed subdivision C of Division 3 of Part IVA of the bill seeks to provide for review by an independent reviewer. Under the framework introduced by the bill, independently reviewable decisions are decisions in respect of non-Commonwealth employees who do not hold security clearances to affirm or vary an internally reviewable decision or deny, revoke or impose a condition on a security clearance.¹⁷ These are decisions which are not externally reviewable by the AAT. Independent review is not available to a person who is not an Australian citizen or does not normally reside in Australia and who is engaged, or proposed to be engaged, for duties outside Australia.¹⁸

1.34 An independent reviewer is a person engaged by the Attorney-General who has appropriate skills or qualifications to perform the role, holds the Commonwealth's highest level of security clearance, and is not a current or former ASIO employee or ASIO affiliate.¹⁹ For an independently reviewable decision to be reviewed, the independent reviewer must decide under proposed subsection 83EB(3) to review it. There are no criteria set out on the face of the bill that the independent reviewer must consider before they decide whether or not to review a decision.

1.35 After reviewing the decision, the independent reviewer must give the Director-General, in writing, the independent reviewer's opinion as to whether the independently reviewable decision was reasonably open to have been made by the internal reviewer who made the decision.²⁰

1.36 The independent review framework set up in the bill is unlike other typical internal or external review mechanisms. The committee expects that the explanatory

17 Proposed subsection 83EA(1).

18 Proposed subsection 83EA(2).

19 Proposed section 83EF.

20 Proposed subsection 83ED(4).

materials would explain how this framework would operate and why it is considered appropriate.

1.37 The explanatory memorandum states that:

The proposed model for independent review mechanism ensures that those persons who do not have access to external merits review in the AAT because they are not Commonwealth employees and do not have security clearances may seek further recourse independent of ASIO in respect of decisions made by an internal reviewer within ASIO.²¹

1.38 The committee considers this to be a very brief justification which does not sufficiently explain why the independent review framework is set up as it is and why it is considered appropriate.

1.39 Unlike review under the AAT Act in which an external reviewer considers what the correct or preferable decision is, in this case the independent reviewer can only consider whether the decision by the internal reviewer was 'reasonably open'. The independent reviewer's consideration is also non-binding. Their opinion is given to the Director-General, who must, in as timely a manner as is possible, consider the decision and decide whether to take any action.²²

1.40 The explanatory memorandum provides no comment on why a different standard of review is applied under this framework to that set out under the AAT Act. It is therefore unclear to the committee as to why this standard has been adopted. Moreover, given that any decision made by an independent reviewer is non-binding, the committee is concerned that this approach may not be effective in preserving an individual's right to have appropriate review of a decision.

1.41 In relation to the independence of the independent reviewer, section 83EF does not contain any provisions to secure independence other than the requirement that current and former ASIO employees or affiliates are ineligible, that the Attorney-General must be satisfied they have an appropriate skill set and that they hold the Commonwealth's highest level of security clearance. Again, the explanatory memorandum provides no comment as to why these safeguards are considered appropriate in the circumstances and whether they adequately afford independence of the independent reviewers.

1.42 Further, under subsection 83EB(3), independent reviewers have a broad discretion whether to review an independent reviewable decision. The explanatory memorandum explains that:

The Bill does not stipulate criteria that the independent reviewer must consider when deciding whether to conduct a review of a security clearance decision in order to provide them with complete discretion in determining

21 Explanatory memorandum, p. 23.

22 Proposed subsection 83EE(1).

the value in undertaking a review on a case-by-case basis. This discretion will allow an independent reviewer to consider a wide range of factors when considering whether to undertake a review.²³

1.43 It is unclear to the committee from this explanation why it is appropriate to provide such a broad discretion to independent reviewers to determine whether they review a decision. The committee considers it would be appropriate, at a minimum, to require the independent reviewer to review an independently reviewable decision if requested to do so under section 83EB.

1.44 Given the limited justification in the explanatory materials for the independent review mechanism, it remains unclear to the committee why this form of review is being provided and how effective it would be. The committee considers it would be appropriate to extend external review in the AAT to this category of individuals, being non-Commonwealth employees and individuals who do not hold security clearances.

1.45 The committee requests that the minister provide 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 review 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.**

1.46 The committee requests the minister's detailed advice as to whether the bill can be amended to remove independent review and instead provide for external review to the Administrative Appeals Tribunal for individuals who are non-Commonwealth employees and do not hold security clearances or, in the alternative, whether the bill can be amended to require an independent reviewer to review a decision if requested to do so under section 83EB.

Broad delegation of administrative powers or functions

Broad powers authorising use of administrative powers or functions²⁴

1.47 The bill provides for numerous delegations and authorisations of power to an ASIO employee or an ASIO affiliate who holds or is acting in a position in ASIO that is equivalent to or higher than a position occupied by a Senior Executive Service (SES)

23 Explanatory memorandum, p. 22.

24 Numerous provisions in Schedule 1, part 1, divisions 1 and 2. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii).

employee.²⁵ For example, proposed section 82F(6) would allow the Director-General to suspend, vary or impose a condition on a person's security clearance in certain circumstances. Under proposed subsection 82F(6), this decision by the Director-General can be delegated to an ASIO employee or an ASIO affiliate equivalent to at least an SES position. An ASIO affiliate is defined in the ASIO Act to mean a person performing functions or services for ASIO in accordance with a contract, agreement or other arrangement.²⁶

1.48 Where a bill allows for broad delegation of administrative powers and functions, or provides broad authorisation powers, the committee expects the explanatory memorandum to the bill to address:

- the purpose and scope of the power, including why it is considered necessary;
- an explanation of who will be exercising the powers and functions, including whether they possess the appropriate training, qualifications, skills or experience; and
- if a delegation or authorisation extends beyond members of the Australian Public Service—why this is appropriate, what safeguards are in place to ensure that powers are delegated only to appropriate persons and whether there will be any impact on an individual's right to judicial or merits review if decisions are made by persons who are not government officials.

1.49 In relation to subsection 82F(6), the explanatory memorandum explains that:

Subsection 82F(6) would provide that the Director-General may, in writing, authorise a person for the purposes of subsection 82F(4) if the person is an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee. The effect of this is to provide a delegation floor to ensure that any persons authorised by the Director-General are of an appropriate level of seniority and experience. This will support administrative efficiency given the volume of security clearance decisions and assessments it is anticipated ASIO will need to make.²⁷

1.50 The explanatory memorandum either does not offer a justification or provides a similar justification to this example in relation to other delegations or authorisations within the bill.

1.51 While the committee acknowledges the necessity of administrative efficiency particularly given the expected volume of decisions and assessments to be made, it is

25 See, for example, Schedule 1, item 12, proposed subsections 82F(6), 82G(4), 82J(5), 82L(9), 83A(7), 83C(8), 83EC(7) and 83EE(4) and Schedule 1, item 28, proposed subsections 39BA(22), 39B(12), 39B(13) and 39C(9).

26 *Australian Security Intelligence Organisation Act 1979*, section 4.

27 Explanatory memorandum, p. 48.

unclear: why it is necessary and appropriate in all these circumstances to be able to delegate decisions to ASIO affiliates or provide authorisations; 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, particularly given the breadth of individuals who may be considered an ASIO affiliate.

1.52 The committee requests the minister's 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's consideration of this issue will be assisted if the minister's response addresses 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.

Crimes and Other Legislation Amendment (Omnibus) Bill 2023²⁸

Purpose	This bill seeks to amend crime related legislation to update, improve and clarify the intended operation of key provisions administered by the Attorney-General's portfolio.
Portfolio	Attorney-General
Introduced	House of Representatives on 29 March 2023

Broad discretionary powers

Procedural fairness²⁹

1.53 Schedule 6 to the bill seeks to amend the *International Transfer of Prisoners Act 1997* (ITP Act) to enable the Attorney-General to refuse to provide consent to requests or applications for the transfer of prisoners to or from Australia at an earlier stage in the process. Item 2 of Schedule 6 to the bill seeks to introduce proposed section 19 which provides that, if the transfer country consents to a transfer of a prisoner from Australia on terms it proposes, the Attorney-General may decide to refuse consent to the transfer on those terms.

1.54 This provision allows the Attorney-General to refuse consent earlier in the process compared to the current law where the Attorney-General is required to seek and receive consent from the relevant state or territory minister, the prisoner (or prisoner's representative) and the transfer country (or Tribunal) in respect of all requests or applications for transfers to or from Australia before they can decide whether to consent to the transfer.³⁰

1.55 Under proposed subsection 19(2), before deciding to refuse consent, the Attorney-General must 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.

1.56 The committee notes that there does not appear to be any matters contained in the bill that the Attorney-General must, or may, consider when making a decision

28 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Crimes and Other Legislation Amendment (Omnibus) Bill 2023, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 73.

29 Schedule 6, item 2, proposed section 19. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii) and (iii).

30 *International Transfer of Prisoners Act 1997*, section 20.

to refuse consent. Where a bill contains a broad discretionary power, such as this, the committee expects the explanatory materials for the bill to address the purpose and scope of the discretion, including why it is considered necessary, and whether there are appropriate criteria or considerations that limit or constrain the exercise of any power. The committee also expects the explanatory materials to explain whether these criteria or considerations are contained in law or policy.

1.57 The statement of compatibility explains that:

...the Attorney-General would continue to consider the requirements set out in the ITP Act, the relevant treaty, the circumstances of the case, the Australian Government's ITP Statement of Policy, and any other relevant information. Further, the requirement in section 52 of the ITP Act for the Attorney-General to arrange for the prisoner to be kept informed of the progress of any application or request remains.

The ITP Statement of Policy is a published document provided to all applicants and available on the Attorney-General's Department's website that expressly sets out the matters that the Attorney-General may consider when making a decision in respect of a transfer to or from Australia.³¹

1.58 While welcoming this advice, the committee considers that it would be more appropriate to include these matters as relevant considerations within the primary legislation. The committee also considers that it would have been helpful to more explicitly set out the relevant requirements that are included within the ITP Act within the explanatory memorandum.

1.59 The committee's concerns are heightened in this instance as it appears that requirements to provide procedural fairness are limited within the bill. In particular, the committee is concerned that a lack of matters in the bill that the Attorney-General must consider may mean that, for example, prisoners and their representatives may not have the opportunity to make or have any submissions considered before a decision is made.

1.60 The committee notes that while notification must be provided to the prisoner or the prisoner's representative before deciding to refuse consent under proposed subsection 19(2), neither the bill nor the principal Act provides for any timing requirements between when notification and a decision must occur, nor is there any requirement for the Attorney-General to consider any submissions from the prisoner before deciding whether to make a refusal.

1.61 Procedural fairness is a fundamental common law right that ensures fair decision-making. Amongst other matters, this requires decision-makers to ensure that people who are adversely affected by a decision are given an adequate opportunity to put their case before the decision is made (known as the 'fair hearing rule'). The fair hearing rule includes not only the right of a person to contest any charges against them

31 Statement of compatibility, p. 9.

but also the right to test any evidence upon which any allegations are based. Where a bill limits or excludes the right to procedural fairness the committee expects the explanatory memorandum to the bill to address the nature and scope of the exclusion or limitation, and why it is considered necessary and appropriate to restrict a person's right to procedural fairness.

1.62 In this case, the explanatory memorandum explains that procedural fairness is provided because:

The prisoner will continue to have the opportunity to make representations to the Attorney-General when making their application, including on matters which the Attorney-General may consider when deciding whether to provide or refuse consent to a transfer. This includes in relation to any matters listed in the ITP Statement of Policy, which is publicly available on the Attorney-General's Department's website and is provided to the prisoner at the time his or her application is received.

In respect of a transfer from Australia, procedural fairness is further embedded through new subsection 19(2), which imposes a mandatory obligation on the Attorney-General to notify the prisoner of the transfer country's proposed terms of transfer before making a decision to refuse consent under new subsection 19(1). This provides the prisoner with an opportunity to comment or make representations to the Attorney-General on the proposed terms of transfer, or to provide any further information for the Attorney-General to consider before making a decision to refuse consent.

Further, as a matter of course, the Attorney-General's Department would continue to seek the prisoner's comment and afford the prisoner an opportunity to respond to any adverse comments made about them in materials that the Attorney-General receives during the ITP process, as well as seek updated representations from the prisoner in the event that a considerable period of time had passed between the point the application was received and the time in which the Attorney-General makes a decision under the ITP Act. This ensures the prisoner has the opportunity to inform the Attorney-General of any additional matters that the prisoner would like the Attorney-General to consider, particularly where circumstances may have changed from the time the initial application or request was made.³²

1.63 While the committee welcomes this process to ensure procedural fairness, it is unclear to the committee why these steps cannot be included as requirements within the ITP Act. The committee notes, for example, that there is no timing requirement between notification under subsection 19(2) to the prisoner or the prisoner's representative of the proposed terms on which the transfer country has consented to the transfer and the Attorney-General making a decision to refuse consent under subsection 19(1). In the absence of a timing requirement, it is unclear

32 Explanatory memorandum, pp. 48–49.

whether notification to the prisoner or prisoner's representative is solely procedural or whether the Attorney-General has time to consider any representations made by the prisoner. Further, as there is no requirement in the bill to consider submissions from the prisoner, it appears that any procedural fairness afforded may rely upon departmental policies and procedures.

1.64 The committee considers that it is generally appropriate to include mechanisms to afford procedural fairness within the bill itself.

1.65 The committee requests the Attorney-General's detailed advice as to:

- **what matters are contained in the *International Transfer of Prisoners Act 1997*, or elsewhere, to constrain the Attorney-General's discretion to refuse a decision to transfer a prisoner from Australia; and**
- **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; and**
- **whether the bill can be amended to provide for additional mechanisms to afford procedural fairness.**

Merits review³³

1.66 As noted above, item 2 of Schedule 6 to the bill seeks to introduce proposed subsection 19(1) which provides that, if the transfer country consents to a transfer of a prisoner from Australia on terms it proposes, the Attorney-General may decide to refuse consent to the transfer on those terms.

1.67 It is unclear in the bill whether a decision by the Attorney-General to refuse transfer to or from Australia is a reviewable decision. Where a bill empowers a decision-maker to make decisions which have the capacity to affect rights, liberties or obligations, the committee considers that those decisions should ordinarily be subject to independent merits review. Where a bill contains such a decision, the committee expects the explanatory memorandum for the bill to address whether independent merits review is available, and if independent merits review is not available, the characteristics of the relevant decisions which justify the omission of merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merit review?*.

1.68 In this case, the explanatory memorandum makes reference to the availability of judicial review but does not comment on merits review:

33 Schedule 6, item 2, proposed section 19. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

Consistent with other decisions by the Attorney-General under the ITP Act, a decision to refuse consent under new subsection 19(1) will be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) 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 where there are grounds to do so.³⁴

1.69 The committee requests the Attorney-General's detailed advice as to whether independent merits review is available for decisions made under proposed subsection 19(1) and, 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?*.

Merits review³⁵

1.70 Schedule 9 to the bill amends the *Witness Protection Act 1994* to, amongst other matters, allow for the temporary suspension or reinstatement of protection and assistance under the National Witness Protection Program (NWPP). Item 4 seeks to insert proposed sections 17A and 17B which provide for decisions to suspend protection and assistance on request by the participant, or by the Commissioner, respectively. Proposed subsection 17C(1) seeks to provide for review of a decision to suspend protection and assistance under subsection 17B(1), other than a decision made as a result of a review under that section or a decision made personally by the Commissioner. Proposed subsection 17C(2) provides that a participant who receives notification of a suspension decision may, within 7 days after receiving the notification, apply in writing to a Deputy Commissioner for a review of the decision.

1.71 The effect of proposed section 17C is that decisions made under subsection 17B(1) are not subject to external review, and decisions made personally by the Commissioner are not subject to external or internal review. As noted above, where a bill empowers a decision-maker to make decisions which have the capacity to affect rights, liberties or obligations, the committee considers that those decisions should ordinarily be subject to independent merits review, and where independent merits review is not available, for the explanatory memorandum for the bill to address the characteristics of the relevant decisions which justify the omission of merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merit review?*.

34 Explanatory memorandum, pp. 50–51.

35 Schedule 9, item 4, proposed section 17C. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

1.72 The explanatory memorandum explains:

The provision for internal review of these decisions reflects the need to limit knowledge of the participant's individual circumstances and of the broader administration of the NWPP. This is essential to protect the identity of the participant as well as the integrity of the NWPP generally.

Consistent with existing provisions in the Witness Protection Act (for example, in relation to termination of a participant's participation in the NWPP under section 18), decisions made by the Commissioner to suspend protection and assistance are not subject to review. This reflects the reality of operational circumstances and the intent of the delegation powers provided in new subsections 25(4), (5) and (6), which provide for the Commissioner's powers under new sections 17A and 17B to be delegated to an Assistant Commissioner. The Assistant Commissioner may subdelegate these powers to a Commander or Superintendent (new subsection 25(5)), who may only exercise these powers in serious and urgent circumstances (new subsection 25(6)).³⁶

1.73 While the committee considers that in the circumstances it may be appropriate to exclude external merits review, it is unclear from this explanation why internal merits review for decisions made personally by the Commissioner is not available. The committee acknowledges the need to limit knowledge of a participant's individual circumstances and the broader administration of the NWPP, but does not consider the explanatory memorandum has sufficiently justified why a decision made by the Commissioner cannot be reviewable by some positions in the Australian Federal Police, particularly as the bill provides for the ability to delegate the power to make decisions under sections 17A and 17B to an Assistant Commissioner, who may then sub-delegate the power to a Commander or Superintendent.

1.74 The committee therefore requests the Attorney-General's detailed advice as to why internal merits review will not be available in relation to a decision made personally by the Commissioner as per proposed paragraph 17C(1)(b).

Administrative power not defined with sufficient precision³⁷

1.75 Item 5 of Schedule 9 seeks to amend subsection 25(4) to allow the Commissioner to delegate their powers under sections 17A and 17B to an Assistant Commissioner. Proposed subsection 25(5) further provides that if the Commissioner delegates a power under section 17A or 17B to an Assistant Commissioner, the

36 Explanatory memorandum, p. 67.

37 Schedule 9, item 5, proposed subsections 24(4) and 25(5). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii).

Assistant Commissioner may sub-delegate the power to a Commander or Superintendent in the Australian Federal Police.

1.76 While 'Commissioner' and 'Deputy Commissioner' are both defined terms in the *Witness Protection Act 1994*, 'Assistant Commissioner' does not appear to be defined. Moreover, the explanatory memorandum contains no guidance as to the meaning of this term. Given the significant impact that a decision under sections 17A and 17B may have on an individual, the committee considers that it would be appropriate to clearly define the position of the decision-maker in law.

1.77 The committee requests the Attorney-General's advice as to the intended meaning of the term 'Assistant Commissioner' and whether this definition is set out in law or policy.

Family Law Amendment Bill 2023³⁸

Purpose	This bill seeks to amend the <i>Family Law Act 1975</i> , with some consequential amendments to the <i>Federal Circuit and Family Court of Australia Act 2021</i> . These amendments will make the family law system safer and simpler for separating families to navigate, and ensure the best interests of children are placed at its centre.
Portfolio	Attorney-General
Introduced	House of Representatives on 29 March 2023

Reversal of the evidential burden of proof³⁹

1.78 Item 6 of Schedule 6 to the bill seeks to insert proposed Part XIVB into the *Family Law Act 1975* (the Act) which aims to simplify and clarify the scope and operation of the restrictions on the public communicating identifiable information that relates to family law proceedings.

1.79 Proposed subsection 114Q(1) provides that it is an offence for a person to communicate to the public an account of family law proceedings and the account identifies certain people involved in the proceedings. 'Communicate' means communicate by any means, including by publication in a book, newspaper, magazine or other written publication; broadcast by radio or television; public exhibition; broadcast or publication or other communication by means of the internet.⁴⁰ Proposed subsection 114Q(2) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if the communication of an account of family law proceedings was in accordance with a direction of a court or otherwise approved by a court.

1.80 Similarly, proposed subsection 114R(1) provides that it is an offence for a person to communicate to the public a list of proceedings that are to be dealt with under the Act that identifies the parties to the proceedings by reference to their names. Proposed subsection 114R(2) provides that this offence does not apply if the communication is the publication by the court, officer or tribunal of a list of proceedings which that court, officer or tribunal is dealing with, or if the

38 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Family Law Amendment Bill 2023, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 74.

39 Schedule 6, item 6, proposed subsections 114Q(2) and 114R(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

40 Proposed subsection 114P(1).

communication was in accordance with a direction of a court or the applicable Rules of Court.

1.81 Both offences would be punishable by up to one year imprisonment. A defendant would bear the evidential burden of proof in relation to the defences listed above.

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

1.83 The committee expects any such reversal of the evidential burden of proof to be justified and for the explanatory memorandum to address whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*, which states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁴¹

1.84 The explanatory memorandum does not justify why the matters in proposed subsections 114Q(2) and 114R(2) have been included as a defence, with the consequence that the defendant bears the evidential burden of proof. It simply restates the provisions and refers to the principle codified in subsection 13.3(3) of the Criminal Code.⁴² Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. While the Criminal Code provides that it is the defendant who bears the evidential burden when relying on a defence, this is not in itself a justification for including the matter as a defence rather than being specified as an element of the offence. If the matter were included as an element of the offence, the defendant would not bear the evidential burden.

1.85 In this case, it is not apparent that the relevant matters would be *peculiarly* within the defendant's knowledge, or that it would be more difficult or costly for the prosecution to establish the matters than for the defendant to establish them. For example, it appears that whether a court has published a list of proceedings or whether a communication was in accordance with the applicable Rules of Court, would

41 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011) p. 50.

42 Explanatory memorandum, pp. 77–78.

be matters that are readily ascertainable by the prosecution. It is therefore not clear why these matters are included as defences rather than as elements of the offence.

1.86 As the explanatory materials do not adequately address this issue, the committee requests 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). The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.⁴³

1.87 The committee suggests that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence. The committee also requests the Attorney-General's advice in relation to this matter.

Undue trespass on personal rights and liberties⁴⁴

1.88 Proposed section 114T provides that proceedings against subsections 114Q(1) or 114R(1) must not be commenced without the written consent of the Director of Public Prosecutions (DPP).⁴⁵ This has the effect of limiting private prosecutions to individuals who have received the written consent of the DPP.

1.89 As noted in the Prosecution Policy of the Commonwealth:

The right of a private individual to institute a prosecution for a breach of the law has been said to be "a valuable constitutional safeguard against inertia or partiality on the part of authority" (per Lord Wilberforce in *Gouriet -v- Union of Post Office Workers* [1978] AC 435 at 477). Nevertheless, the right is open to abuse and to the intrusion of improper personal or other motives.⁴⁶

1.90 The committee considers that restricting the ability of an individual to initiate a private prosecution on their own volition risks unduly trespassing personal rights and liberties and expects this to be justified in the explanatory materials. In this case, the explanatory memorandum explains that proposed section 114T is 'an important safeguard in addition to the Prosecution Policy of the Commonwealth which requires

43 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011) pp. 50–52.

44 Schedule 6, item 6, proposed section 114T. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

45 This reflects the current law in subsection 121(8) of the *Family Law Act 1975*.

46 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth – Guidelines for the making of decisions in the prosecution process* (August 2014) p. 11.

that a prosecution only be pursued where there is sufficient evidence to prosecute the case, and the prosecution would be in the public interest'.⁴⁷

1.91 While the committee considers that it may be justifiable to restrict private prosecutions in some circumstances, it is not clear to the committee what proposed section 114T is intended to safeguard against. If the concern is that an individual may bring a case with little evidence, the committee notes that this may more appropriately be dealt with by the courts and, further, that the DPP has the power to intervene in a private prosecution where there is insufficient evidence to justify the prosecution. It is therefore unclear to the committee why it is considered necessary and appropriate to rely on the DPP to provide consent to commence a proceeding under subsections 114Q(1) and 114R(1).

1.92 In light of the above, the committee requests 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 written consent of the Director of Public Prosecutions.

Significant matters in delegated legislation⁴⁸

1.93 Proposed section 11K seeks to allow regulations to be made to prescribe standards and requirements for family report writers. Proposed subsection 11K(2) provides for a non-exhaustive list of matters that may be included in regulations, including paragraph 11K(2)(i) which allows 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.

1.94 The committee considers that it is for the Parliament, rather than the makers of delegated legislation, to set rates of tax. At a minimum, some guidance in relation to the amount of a fee that may be imposed in delegated legislation should be included in the enabling Act. Where a bill leaves the setting of the rate of a fee to delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to do so. Further, 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. The committee also expects that the bill will include a provision clarifying that the fee must not be such as to amount to taxation.

1.95 In this instance, the explanatory memorandum explains that any fees set in regulations under proposed paragraph 11K(2)(i) would reflect the services provided to

47 Explanatory memorandum, p. 78.

48 Schedule 7, item 4, proposed paragraph 11K(2)(i). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

family report writers to recognise their compliance with prescribed standards and requirements. The regulations would not establish fees to recover other costs associated with the general administration of a regulatory scheme.⁴⁹

1.96 While acknowledging the explanation in the explanatory memorandum, the committee expects that, at a minimum, the bill should include a provision stating that the fee must not be such as to amount to taxation.

1.97 In light of the above, the committee requests the Attorney-General's advice as to whether the bill can be amended to clarify that any fee made in regulations under proposed paragraph 11K(2)(i) must not be such as to amount to taxation.

49 Explanatory memorandum, p. 85.

Family Law Amendment (Information Sharing) Bill 2023⁵⁰

Purpose	<p>This bill seeks to amend the <i>Family Law Act 1975</i> to operationalise key aspects of the National Strategic Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems.</p> <p>The bill seeks to establish an enhanced court-led information sharing framework for information relating to family violence, child abuse and neglect risks in parenting proceedings before the Federal Circuit and Family Court of Australia, and the Family Court of Western Australia.</p>
Portfolio	Attorney-General
Introduced	House of Representatives on 29 March 2023

Significant matters in delegated legislation⁵¹

1.98 Item 7 of Schedule 1 to the bill seeks to insert subdivision DA into the *Family Law Act 1975*. Subdivision DA provides that the court can make orders for an information sharing agency⁵² to provide particulars of documents or information in child-related proceedings,⁵³ including matters relating to abuse, neglect or family violence to which a child has been, or there is a risk or potential risk of being, subject or exposed.⁵⁴ The court may also order that the information sharing agency provide the documents or information relating to those matters to the court.⁵⁵ Proposed subsection 67ZBI(1) provides that an information sharing agency must, when

50 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Family Law Amendment (Information Sharing) Bill 2023, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 75.

51 Schedule 1, item 7, proposed section 67ZBI. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

52 Proposed section 67ZBC defines 'information sharing agency' to mean an agency or part of an agency of a State or Territory, or part of a Commonwealth agency that provides services on behalf of a State or Territory, prescribed in regulations.

53 Proposed subsection 67ZBD(1).

54 Proposed subsection 67ZBD(2).

55 Proposed subsection 67BZE(1).

providing particulars, documents or information to the court,⁵⁶ have regard to matters prescribed by the regulations.

1.99 The committee's consistent scrutiny view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee considers that safeguards related to the sharing of documents or information about abuse, neglect or family violence are likely significant matters as they may have a significant impact on an individual's privacy.

1.100 Where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address the following matters:

- 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.

1.101 The explanatory memorandum includes detailed information on what the regulations are expected to include, explaining that:

The information sharing safeguards to be prescribed by the Regulations would build upon protections within this Bill by ensuring that information shared is collected, used, disclosed and stored in an appropriate manner. The types of information sharing safeguards to be prescribed are expected to include matters to ensure:

- a. information is only requested, ordered, and shared to the extent necessary to identify, assess, manage and respond to family violence, child abuse and neglect risk
- b. information sharing is conducted in good faith, avoiding conflicts of interest and with reasonable care to the safety of staff, parties to proceedings and relevant third parties
- c. information is sent and received in a secure manner, which limits further disclosure
- d. reasonable steps are taken to ensure that parties who may pose, or are alleged to pose, a family safety or child abuse risk cannot access sensitive information that may prejudice the safety of another person, while ensuring access to natural justice, and
- e. if discovered that information recorded and shared is incorrect, best efforts are made to correct the information shared and update relevant records.

56 In accordance with an order under sections 67ZBD or 67ZBE, or under subsections 67ZBD(5) and 67ZBE(5) which relate to the information sharing agency providing the court with particulars, documents or information on its own initiative.

These information sharing safeguards are intended to provide a minimum standard of safeguards for the protection of information when it is used, shared and accessed. It is expected that these safeguards will complement existing practices within the courts and information sharing agencies, providing greater assurances and transparency for families and individuals about how this information is being shared and used.⁵⁷

1.102 While acknowledging the information provided in the explanatory memorandum, the committee generally expects there to be appropriate safeguards within the primary legislation that guide and constrain the sharing of personal information. In this regard, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.103 The statement of compatibility explains that including these additional safeguards in the regulations allows greater capacity to ensure the safeguards remain up to date with current best practice and ensures the safeguards are not overly prescriptive, recognising differences in jurisdictional systems and practices.⁵⁸

1.104 Nevertheless, it is not clear to the committee why these safeguards cannot be included within the bill itself, potentially with provision for regulations to be able to be made for additional safeguards if considered necessary to remain up to date. The committee considers this would provide greater parliamentary oversight over significant safeguards to the sharing of personal information.

1.105 The committee further notes that proposed section 67ZBL provides that the relevant minister must arrange for the conduct of a review of the operation of subdivision DA and regulations made under it within 12 months of commencement. The committee considers that this review would be an appropriate time to consider the operation of the safeguards and their operation in different jurisdictions which could then be considered for amendment.

1.106 In light of the above, the committee requests the Attorney-General's detailed advice as to why it is considered necessary and appropriate to leave the proposed information sharing safeguards to delegated legislation rather than including them within the primary legislation.

57 Explanatory memorandum, pp. 25–26.

58 Statement of compatibility, p. 11.

National Security Legislation Amendment (Comprehensive Review and other Measures No. 2) Bill 2023⁵⁹

Purpose	<p>This bill seeks to amend the:</p> <ul style="list-style-type: none"> • <i>Acts Interpretation Act 1901</i> • <i>Administrative Appeals Tribunal Act 1975</i> • <i>Archives Act 1983</i> • <i>Australian Security Intelligence Organisation Act 1979</i> • <i>Crimes Act 1914</i> • <i>Criminal Code Act 1995</i> • <i>Freedom of Information Act 1982</i> • <i>Inspector-General of Intelligence and Security Act 1986</i> • <i>Intelligence Services Act 2001</i> • <i>Law Officers Act 1964</i> • <i>Ombudsman Act 1976</i> • <i>Public Interest Disclosure Act 2013</i> • <i>Telecommunications (Interception and Access) Act 1979</i> <p>to implement ten recommendations of the Comprehensive Review of the Legal Framework of the National Intelligence Community.</p>
Portfolio	Attorney-General
Introduced	House of Representatives on 29 March 2023

59 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Security Legislation Amendment (Comprehensive Review and other Measures No. 2) Bill 2023, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 76.

Reversal of the evidential burden of proof⁶⁰

1.107 Items 6, 8 and 9 of Schedule 1 to the bill seeks to amend the *Criminal Code Act 1995* to introduce defences for various telecommunication-related offences.⁶¹ Proposed subsection 474.6(4A) provides that a person is not criminally responsible for an offence against subsections (1) and (3) if:

- (a) the person is, at the time of the offence, an ASIO officer acting in good faith in the course of the person's duties; and
- (b) the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

1.108 Proposed subsections 477.2(2) and 477.3(2) insert similar defences. A defendant bears an evidential burden of proof in relation to all of these defences.

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

1.110 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The committee expects the explanatory memorandum to address whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*, which states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁶²

60 Schedule 1, part 2, items 6, 8 and 9, proposed subsections 474.6(4A), 477.2(2) and 477.3(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

61 Subsections 474.6(1) and (3) of the *Criminal Code Act 1995* provide for offences for tampering with, or interfering with, a facility owned or operated by a carrier, a carriage service provider or a nominated carrier. Subsection 477.2(1) provides an offence for unauthorised modification of data to cause impairment. Subsection 477.3(1) provides an offence for unauthorised impairment of electronic communication.

62 Attorney-General's Department, [*A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*](#) (September 2011), p. 50.

1.111 In this instance, the explanatory memorandum states:

It is appropriate for the defendant to bear the evidential burden in relation to the matters in subsection 474.6(4A) of the Criminal Code as those matters concern the actions of a person in the course of their duties for ASIO, which will be highly classified to protect operational security. The matters to be proved would be both peculiarly within the knowledge of the defendant and proof by the prosecution of the matters would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused.⁶³

1.112 The same explanation is provided for the reversal of the evidential burden of proof in relation to proposed subsections 477.2(2) and 477.3(3).⁶⁴

1.113 The committee considers that, under paragraph 474.6(4A)(a), whether the person is acting in good faith may be an appropriate matter to require a defendant to adduce, in certain circumstances, as it appears to be peculiarly within the knowledge of the defendant.

1.114 However, the committee considers that, under paragraph 474.6(4A)(b), whether conduct of the ASIO officer is 'reasonable' is likely not a matter peculiarly within the knowledge of the defendant but is an objective test. Determining whether conduct is a reasonable is therefore something knowable to the prosecution and is a question of law.

1.115 The committee considers that it may therefore be appropriate for paragraph 474.6(4A)(b) to be included as an element of the offence, rather than as an offence-specific defence (which reverse the evidential burden of proof).

1.116 The committee requests the Attorney-General's advice as to why determining whether conduct of an ASIO officer is reasonable is considered *peculiarly* within the knowledge of the defendant.

1.117 The committee suggests that it may be appropriate for the bill to be amended to provide that reasonable conduct by an ASIO officer is specified as not an element of the offence under subsections 474.6(1), 474.6(3), 477.2(1) and 477.3(1) in the *Criminal Code Act 1995*, rather than as exceptions to the offence. The committee also requests the Attorney-General's advice in relation to this matter.

63 Explanatory memorandum, p. 17.

64 Explanatory memorandum, pp. 18–19.

Privacy⁶⁵

1.118 Item 14 of Schedule 1 to the bill seeks to add proposed section 85ZZJA into the *Crimes Act 1914* to expand the exclusions in the spent convictions scheme. The provision allows ASIO, or an ASIO officer, to disclose, file or record, or use information relating to spent convictions for the purpose of performing its functions or exercising its powers.

1.119 Under proposed subsection 85ZZJA(2), an ASIO officer is defined to mean the Director-General of Security, an ASIO employee or an ASIO affiliate (which includes consultants, contractors and persons seconded to ASIO).⁶⁶

1.120 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.

1.121 The statement of compatibility explains:

The measures allowing ASIO to access spent conviction information are proportionate to the objective of protecting the lives and security of Australians and mitigating national security risks. ASIO is only able to access, disclose or use spent conviction information for the purposes or performance of its functions or the exercises of its powers. ASIO's interest in protecting Australia, its people and its interests from threats to security should outweigh the privacy of an individual's spent conviction information in these circumstances.⁶⁷

1.122 The explanatory memorandum further states that proposed section 85ZZJA implements recommendation 136 of the Comprehensive Review of the Legal Framework of the National Intelligence Community.⁶⁸

1.123 While the committee acknowledges the importance of balancing national security threats with the privacy of individuals in many circumstances, the committee considers that further explanation should be provided to justify why that consideration applies in this case. In particular, the committee considers that it would have been appropriate for the explanatory materials to provide greater detail as to what safeguards exist for individuals affected by the disclosure, recording or use of their personal information. The committee particularly notes that ASIO is not subject to the protections in the *Privacy Act 1988*, and further explanation as to whom ASIO

65 Schedule 1, part 4, item 14, proposed section 85ZZJA. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

66 *Australian Security Intelligence Organisation Act 1979*, section 4.

67 Statement of compatibility, p. 10.

68 Explanatory memorandum, p. 21.

can disclose an individual's spent conviction information would be useful to allow a fulsome analysis of the proposed power.

1.124 The committee requests the Attorney-General's more detailed advice as to why it is appropriate for ASIO or an ASIO officer to have the power to disclose, file or record, or use information relating to spent convictions. The committee's consideration of this issue will be assisted if the Attorney-General's response details what safeguards exist for individuals who may be affected by proposed section 85ZZJA of the *Crimes Act 1914*, whether these safeguards are contained in law or policy, and to whom ASIO officers may disclose information about an individual's spent conviction.

Nature Repair Market Bill 2023⁶⁹

Purpose	This bill seeks to provide a framework for a voluntary national market that delivers improved biodiversity outcomes. This framework would facilitate private investment in biodiversity, including where carbon storage projects have biodiversity co-benefits.
Portfolio	Climate Change, Energy, the Environment and Water
Introduced	House of Representatives on 29 March 2023

Significant matters in delegated legislation⁷⁰

1.125 This bill sets out the framework for the new nature repair market. The nature repair market allows for eligible landholders to undertake projects to enhance or protect biodiversity through a tradeable certificate scheme and creates a public register to track biodiversity projects and certificates.

1.126 Much of the detail of how the nature repair market will operate is not set out within the bill but is instead left to delegated legislation. Details that are left to delegated legislation include several matters which appear to relate directly to the scope and operation of the scheme. For example, Part 4 of the bill establishes a framework for the minister to, via legislative instrument, make, vary or revoke methodology determinations, which set out requirements on how registered biodiversity projects are to be carried out.⁷¹ Part 4 also establishes a framework for making, varying or revoking biodiversity assessment instruments which set out requirements for how methodology determinations measure and assess biodiversity.⁷²

1.127 Other examples of matters left to delegated legislation include:

- the definition of 'excluded biodiversity projects';⁷³

69 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Nature Repair Market Bill 2023, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 77.

70 The committee draws senators' attention to the framework nature of the bill pursuant to Senate standing order 24(1)(a)(iv).

71 Part 4, division 2.

72 Part 4, division 4.

73 Clause 33.

- an assessment of whether a person is a fit and proper person;⁷⁴
- rules relating to what information is included in the Biodiversity Market Register (which records biodiversity projects);⁷⁵ and
- rules relating to the disclosure of certain information in the Biodiversity Market Register.⁷⁶

1.128 The committee is concerned that the bill is characterised by the inclusion of 'framework provisions' which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scheme's scope and operation. The committee has longstanding concerns with framework provisions because they considerably limit the ability of Parliament to have an appropriate oversight over new legislative schemes.

1.129 In relation to the framework nature of the bill, the explanatory memorandum explains:

The Bill would establish a flexible framework to allow for market innovation and enable new issues to be addressed as the market evolves. It would allow all landholders to participate, including Aboriginal persons and Torres Strait Islanders, and would enable certificates to be issued for a wide range of project types. This would recognise that landholders have different circumstances, interests and aspirations, and would encourage participation and increase supply.

...

The Bill would allow elements of the scheme, such as the information on biodiversity certificates and the different methods for undertaking projects, to be detailed in subordinate legislation. Legislative instruments for these purposes would be made by the Minister, informed by close consultation with stakeholders and across government. It is intended that project methods would be co-designed with stakeholders, including Aboriginal persons and Torres Strait Islanders. The Minister would be responsible for making, varying or revoking methods, appointing Committee members and making rules to support the administration of the scheme.⁷⁷

1.130 Elsewhere, the explanatory memorandum justifies individual delegated legislation making powers. For example, in relation to the power to prescribe eligibility

74 Part 8, paragraphs 97(1)(k), 97(2)(c), 98(1)(l), 98(2)(d), 99(1)(j), 99(2)(c), 99A(1)(j), 99A(2)(c). If found not to be a fit and proper person, the affected person may not hold a biodiversity certificate and is therefore effectively banned from participation in the scheme.

75 Clause 167.

76 Clause 168.

77 Explanatory memorandum, p. 3.

criteria for the registration of a biodiversity project within the rules, the explanatory memorandum states:

It is appropriate that the rules be able to prescribe additional eligibility criteria to allow the scheme to tailor the criteria to different kinds of projects (where appropriate) and to be able to respond to changing circumstances (including technological advances and changes in the environment).⁷⁸

1.131 The committee acknowledges that it is sometimes appropriate to include certain administrative and technical matters within delegated legislation, particularly when establishing new legislative schemes. However, the committee is concerned that much of the detail of the nature repair market scheme itself is being left to delegated legislation. The committee does not consider that the explanatory memorandum has sufficiently justified the framework nature of the bill. While some individual delegated legislation making powers may be justified on the basis of a need for flexibility in the face of ongoing technological advances, this does not justify the overall framework nature of the bill.

1.132 The explanatory memorandum notes that the bill is at least partly modelled on the *Carbon Credits (Carbon Farming Initiative) Act 2011*.⁷⁹ The committee notes that this Act has also been criticised for its framework nature,⁸⁰ and that a desire for consistency with the model established by that Act is therefore likely not a sufficient justification for the framework nature of the bill.

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

- **why it is considered necessary and appropriate to leave much of the information relating to the scope and operation of the nature repair market scheme to delegated legislation; and**
- **whether the bill can be amended to include further detail in relation to the scheme on the face of the primary legislation.**

78 Explanatory memorandum, p. 22.

79 Explanatory memorandum, p. 2.

80 See, for example, comments by the Australian Law Reform Commission: ALRC, 'Examples of laws that delegate legislative power' in *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129) 2016, pp. 453–456.

Exemption from disallowance⁸¹

1.134 Clause 55 of the bill provides that the Climate Change Minister may, by legislative instrument, direct the Nature Repair Market Committee to have regard to one or more specified matters in giving advice about the making, variation, or revocation of a methodology determination. A note under clause 55 clarifies that a direction given by the Climate Change Minister is not subject to the usual parliamentary disallowance or sunseting procedure due to the operation of regulations made for the purposes of paragraphs 44(2)(b) of the *Legislation Act 2003*.⁸²

1.135 A similar power is set out at clause 65A of the bill. Clause 65A seeks to provide that a direction made by the Climate Change Minister is exempt from disallowance or sunseting.

1.136 Disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance unless exceptional circumstances can be shown which would justify an exemption. In addition, the Senate resolved that any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.⁸³

1.137 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in its recent review of the *Biosecurity Act 2015*,⁸⁴ and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.⁸⁵

1.138 In light of these comments and the resolution of the Senate, the committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. This justification

81 Clauses 55 and 65A. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

82 See table item 2, section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015.

83 Senate resolution 53B. See *Journals of the Senate*, No. 101, 16 June 2021, pp. 3581–3582.

84 See Chapter 4 of Senate Standing Committee for the Scrutiny of Bills, [Review of exemption from disallowance provisions in the Biosecurity Act 2015: Scrutiny Digest 7 of 2021](#) (12 May 2021) pp. 33–44; and [Scrutiny Digest 1 of 2022](#) (4 February 2022) pp. 76–86.

85 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020); and [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021).

should include an explanation of the exceptional circumstances that are said to justify the exemption and how they apply to the circumstances of the provision in question.

1.139 In this instance, the explanatory memorandum provides no justification in relation to both clauses 55 and 65A, merely restating the effect of the provisions and noting they are exempt from disallowance because of the operation of the Legislation (Exemptions and Other Matters) Regulation 2015.⁸⁶

1.140 Generally, the committee does not consider the fact that an instrument will fall within one of the classes of exemption in the Legislation (Exemptions and Other Matters) Regulation 2015 is, of itself, a sufficient justification for excluding parliamentary disallowance.⁸⁷ The committee agrees with the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation that 'any exclusion from parliamentary oversight...requires that the grounds for exclusion be justified in individual cases, not merely stated'.⁸⁸

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

- **why it is considered necessary and appropriate to provide that directions made under clauses 55 and 65A are not subject to disallowance; and**
- **whether the bill could be amended to provide that these directions are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.**

Tabling of documents in Parliament⁸⁹

1.142 Clause 172 provides that the Clean Energy Regulator (the Regulator) must, as soon as practicable after the end of a financial year, publish on its website a report about the activities of the Regulator during the financial year.

1.143 Similarly, clause 175 provides that the Secretary may publish on the Department's website a report, for a financial year, on certain matters pertaining to

86 Explanatory memorandum, pp. 72 and 86.

87 The committee further notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has recommended that the blanket exemption of instruments that are 'a direction by a Minister to any person or body' should be abolished. See Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (16 March 2021) p. 101.

88 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (16 March 2021) pp. 75–76.

89 Proposed sections 172 and 175. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

biodiversity certificates purchased by the Commonwealth and biodiversity conservation contracts.

1.144 The bill does not require the above reports to be tabled in the Parliament. The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability. As such, the committee expects there to be appropriate justification for not requiring documents to be tabled.

1.145 In relation to clause 172, the explanatory memorandum states that the purpose of publishing reports about activities of the Regulator is to ensure that the Regulator provides regular and accurate information to the market about the issuing of biodiversity certificates but does not explain why it is appropriate not to require the reports to be tabled.⁹⁰

1.146 The explanatory memorandum provides a similar explanation in relation to clause 175, stating that such reports would assist in providing transparency in relation to biodiversity certificates purchased by the Commonwealth and biodiversity conservation contracts.⁹¹

1.147 The committee requests the minister's advice as to why it is appropriate not to include a requirement that reports written under clauses 172 and 175 be tabled in the Parliament.

Immunity from civil liability⁹²

1.148 Clause 228 provides that certain persons listed at paragraphs 228(a) to (l) are protected from civil liability for damages for, or in relation to, an act or matter done, or omitted to be done, in good faith in the performance of functions or the exercise of powers under the bill.

1.149 This has the effect of removing any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown. The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified.

90 Explanatory memorandum, p. 173.

91 Explanatory memorandum, p. 175.

92 Clause 228. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

1.150 The explanatory memorandum states that:

This provision would ensure that persons with functions or powers under the legislation are able to perform their functions or exercise their powers without fear of legal action being taken against them, as long as they act in good faith when doing so.⁹³

1.151 While acknowledging this explanation, the explanatory memorandum does not provide any information on what recourse, if any, affected persons may have to bring an action to enforce their legal rights.

1.152 If an affected person is barred from commencing civil proceedings in accordance with clause 228, the committee further considers that it would have been more appropriate had the explanatory materials addressed the limited nature of the 'good faith' safeguard and why providing the immunity is nevertheless justified in light of this limited nature. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.153 The committee's concerns are also heightened in this instance given the broad range of persons upon whom immunity is conferred under clause 228 and as such the committee expects the explanatory materials to address why it is necessary and appropriate for such a broad class of persons to be protected from civil liability for damages.

1.154 In light of the above, the committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to confer immunity from liability for damages on such a broad class of persons, such that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

1.155 The committee's consideration of this issue will be assisted if the minister's advice addresses what, if any, alternative protections are afforded to an affected individual given that the normal rules of civil liability have been limited by the bill.

93 See explanatory memorandum, p. 209.

Nature Repair Market (Consequential Amendments) Bill 2023⁹⁴

Purpose	<p>This bill seeks to amend the <i>Clean Energy Regulator Act 2011</i> and the <i>National Greenhouse and Energy Reporting Act 2007</i> to support the commencement of the Nature Repair Market Bill 2023.</p> <p>The bill seeks to provide a framework for a voluntary national biodiversity market that would enable eligible landholders to undertake projects that enhance or protect biodiversity in native species and receive a tradeable certificate for doing so.</p>
Portfolio	Climate Change, Energy, the Environment and Water
Introduced	House of Representatives on 29 March 2023

Broad delegation of administrative powers and functions⁹⁵

1.156 Item 7 of Schedule 1 to the bill seeks to insert proposed paragraphs 35(1)(f) and 35(1)(g) into the *Clean Energy Regulator Act 2011* (the Act) to expand the Regulator's delegation power. The amendments allow the Regulator to delegate any of its powers and functions to a person assisting the Regulator under section 37 and who is an SES employee or acting SES employee, or an APS employee who holds or performs the duties of an Executive Level 2 position or an equivalent position, in the Biodiversity Department.

1.157 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 expects the explanatory memorandum to include an explanation as to the purpose and scope of the delegated power, including why these are considered necessary, and, where a delegation extends beyond members of the Senior Executive Service, an explanation as to why this is appropriate, what safeguards are in place to

94 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Nature Repair Market (Consequential Amendments) Bill 2023, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 78.

95 Schedule 1, item 7, proposed paragraphs 35(1)(f) and 35(1)(g). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii).

ensure that any powers are appropriately delegated, and whether these safeguards are contained in law or policy.

1.158 In this instance, the explanatory memorandum states that:

Limiting delegations to officials at Executive Level 2 ensures that only persons with appropriate seniority and expertise in the Biodiversity Department would be exercising the Regulator's powers. Delegating powers and functions to Executive Level officers is consistent with the Australian Administrative Law Guide which provides that it may be appropriate for such officers to make decisions, particularly where there is a limited exercise of discretion (such as many of the powers Regulator's functions and powers in the NRM Bill [Nature Repair Market Bill 2023]).

Limiting delegations to officials at Executive Level 2 is also consistent with existing section 35 of the *Clean Energy Regulator Act 2011* in relation to staff of the Regulator and the Department.⁹⁶

1.159 The explanatory memorandum further notes some safeguards to this power, including that significant decisions are intended to be made by persons of higher classifications and these limitations would be operationally imposed in the administration of the Nature Repair Market Bill 2023.⁹⁷

1.160 While the committee welcomes the advice that, in practice, delegations will be limited to employees with appropriate seniority and expertise in the Biodiversity Department, the committee considers it would be appropriate for the bill itself to specify or limit the functions and powers it is intended that an Executive Level 2 employee may exercise. The committee also considers that the explanatory memorandum could provide a greater justification as to why a delegation to officials at the Executive Level 2 level is necessary and appropriate rather than limiting the delegation to the Senior Executive Service, particularly given the breadth of powers that may be delegated under proposed paragraph 35(1)(g).

1.161 The committee further notes the advice that these delegation powers are consistent with the *Australian Administrative Law Guide* and the existing powers under section 35 of the Act. However, the committee does not generally consider consistency with existing provisions to be sufficient justification for allowing a broad delegation of administrative powers and functions.⁹⁸

96 Explanatory memorandum, pp. 8–9.

97 Explanatory memorandum, p. 9.

98 See Senate Standing Committee for the Scrutiny of Bills, [Guidelines](#), 2nd edition (July 2022) p. 11 for further guidance.

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

- **why it is considered necessary and appropriate to empower the Regulator to delegate any or all of its functions or powers to an Executive Level 2 employee in the Biodiversity Department rather than limiting the delegation to the Senior Executive Service level; and**
- **whether the bill could be amended to limit the functions and powers that may be delegated to an Executive Level 2 employee in the Biodiversity Department.**

Social Services Legislation Amendment (Child Support Measures) Bill 2023⁹⁹

Purpose	<p>This bill seeks to amend the <i>Child Support (Assessment) Act 1989</i>, and the <i>Child Support (Registration and Collection) Act 1988</i>, to:</p> <ul style="list-style-type: none"> • extend the application of the Child Support Registrar’s employer withholding collection powers; • allow the Registrar to refuse to issue a departure authorisation certificate where a security is offered unless satisfied it is likely that the parent will make suitable arrangements to pay their outstanding liabilities; and • introduce a new default income for parents not required to lodge a tax return, to simplify the income reporting requirements for payers and payees.
Portfolio	Social Services
Introduced	House of Representatives on 29 March 2023

Coercive powers

Conferral of broad discretionary powers¹⁰⁰

1.163 Item 8 of Schedule 1 to the bill seeks to insert an amended form of paragraph 72L(3)(a) into the *Child Support (Registration and Collection) Act 1988* (the Act). Currently, section 72L of the Act provides for when the Child Support Registrar (the Registrar) must issue departure authorisation certificates.

1.164 The Registrar may make a departure prohibition order which prohibits a person from departing from Australia under subsection 72D(1) of the Act. A person subject to this order can apply for a departure authorisation certificate under section 72K of the Act. A departure authorisation certificate is a certificate authorising a person subject to a departure prohibition order to depart from Australia for a foreign country.¹⁰¹ Currently, the Registrar must issue a departure authorisation certificate if either satisfied that the person will depart from and return to Australia in a period the

99 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Social Services Legislation Amendment (Child Support Measures) Bill 2023, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 79.

100 Schedule 1, item 8, proposed paragraph 72L(3)(a). The committee draws senators’ attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (ii).

101 *Child Support (Registration and Collection) Act 1988*, subsection 72K(1).

Registrar considers appropriate,¹⁰² or the person provides security for their return to Australia.¹⁰³

1.165 Proposed paragraph 72L(3)(a) would require the Registrar to issue a departure authorisation certificate if satisfied that:

- if the certificate is issued, 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,¹⁰⁴ and
- the person has provided a security for their return to Australia.

1.166 The effect of this provision is that even if a person has provided a security for their return to Australia, the Registrar must also be satisfied of this additional criterion before issuing a certificate. Proposed paragraph 72L(3)(a) therefore 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*.

1.167 Where a bill contains a discretionary power, such as this, the committee expects the explanatory memorandum for the bill to address whether there are appropriate criteria or considerations that limit or constrain the exercise of any power, including whether they are contained in law or policy.

1.168 In relation to proposed paragraph 72L(3)(a), the explanatory memorandum merely restates the operation of the provision, noting that:

Substituted subparagraph 72L(3)(a)(i) provides that a certificate must be issued if the Registrar is satisfied that if the departure authorisation certificate is issued it is likely, within a period that the Registrar considers appropriate, that subsection 72I(1) will be satisfied, and the Registrar will be required to revoke the departure prohibition order. This is similar to considerations already before the Registrar under subparagraph 72L(2)(a)(ii). In contrast, substituted subparagraph 72L(3)(a)(i) does not require that arrangements satisfactory to the Registrar to revoke the departure prohibition order are in place, but instead that it is likely that they will be in place within a period that the Registrar considers appropriate.

102 *Child Support (Registration and Collection) Act 1988*, subsection 72L(2).

103 *Child Support (Registration and Collection) Act 1988*, paragraph 72L(3)(a).

104 Under subsection 72I(1), the Registrar must revoke a departure prohibition order if the person will no longer have a child support or carer liability, satisfactory arrangements have been made for the liability to be discharged, or the liability is irrecoverable.

This is in addition to the requirement, replicated in new subparagraph 72L(3)(a)(ii), that the person has given security under section 72M for the person's return to Australia.¹⁰⁵

1.169 The committee notes that neither the bill nor the explanatory memorandum provides any guidance on what the Registrar may consider is an appropriate period in which they will likely be required under subsection 72I(1) to revoke a departure prohibition order. The committee is therefore concerned about the breadth of the discretion afforded to the Registrar under this provision. From the limited explanation provided, it appears that it would be more appropriate if the bill limited this discretion. For example, by including guidance as to how the Registrar's discretion should be exercised, such as a list of factors that the Registrar must consider in determining what an appropriate period is, or by providing a definition of 'appropriate period'. The committee's concerns are heightened in this instance given the effect of this provision is to prevent a person from leaving Australia and therefore impacts their right to freedom of movement.

1.170 In light of the above, the committee requests the minister's advice as to whether the bill could be amended to provide guidance in relation to the Registrar's power to issue a departure authorisation certificate. For example, by providing a list of matters the Registrar must consider in determining what an appropriate period is for the purpose of issuing a departure authorisation certificate under proposed paragraph 72L(3)(a), or by defining the term 'appropriate period'.

105 Explanatory memorandum, p. 4.

Private senators' and members' bills that may raise scrutiny concerns¹⁰⁶

1.171 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 bill proponent.

Bill	Relevant provisions	Potential scrutiny concerns
Digital Assets (Market Regulation) Bill 2023		The bill may raise scrutiny concerns under principle (iv) in relation to significant matters in delegated legislation. The bill proposes to establish a new regulatory framework for digital assets, but leaves substantial elements of the scope and operation of the scheme to delegated legislation. The committee has longstanding concerns with such 'framework bills' because such bills generally have significant implications for parliamentary scrutiny.
	Subclauses 9(3), 14(3), 18(3), and 33(2)	The provisions may raise scrutiny concerns under principle (i) in relation to significant penalties which have not been adequately justified within the explanatory memorandum.
	Subclause 46(1)	The provision may raise scrutiny concerns under principle (ii) in relation to the broad delegation of administrative powers or functions.

¹⁰⁶ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 80.

**Interactive Gambling
Amendment (Credit Card Ban
and Acknowledgement of
Losses) Bill 2023**

Schedule 1, item 4, proposed
paragraph 15K(5)(b); and
Schedule 2, item 2, proposed
subsection 61RD(5)

The provisions may raise
scrutiny concerns under
principle (i) in relation to the
reversal of the evidential
burden of proof.

Bills with no committee comment¹⁰⁷

1.172 The committee has no comment in relation to the following bills which were introduced into the Parliament between 20 – 30 March 2023:

- Australia Day Bill 2023
- Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023
- Ending Poverty in Australia (Antipoverty Commission) Bill 2023
- Fair Work Amendment (Right to Disconnect) Bill 2023 [No. 2]
- Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023
- Online Safety Amendment (Breaking Online Notoriety) Bill 2023
- Renewable Energy (Electricity) Amendment (Cheaper Home Batteries) Bill 2023

107 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 81.

Commentary on amendments and explanatory materials¹⁰⁸

National Reconstruction Fund Corporation Bill 2022

1.173 On 27 March 2023, the Minister for Industry and Science (the Hon Ed Husic MP) presented a supplementary explanatory memorandum to the bill.

1.174 On 28 March 2023, the Senate agreed to government amendments to the bill.¹⁰⁹ Additionally, the Minister for Trade and Tourism, Senator Don Farrell, tabled a supplementary explanatory memoranda relating to the government amendments moved to the bill.

1.175 The committee welcomes the government amendments to the bill which appear to address the committee's scrutiny concerns relating to the broad delegation of administrative powers or functions.¹¹⁰

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

- Education Legislation Amendment (Startup Year and Other Measures) Bill 2023¹¹¹
- Safeguard Mechanism (Crediting) Amendment Bill 2022¹¹²

108 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 82.

109 On 28 March 2023, the Senate agreed to 10 Government, 3 Jacqui Lambie Network and 2 Independent amendments to the bill. The committee draws its attention to amendments on sheet UC140.

110 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 1 of 2023](#) (8 February 2023) pp. 28–29; and Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2023](#) (8 March 2023) pp. 45–46.

111 On 27 March 2023, Senator Brown tabled a revised explanatory memorandum relating to the bill.

112 On 27 March 2023, the Senate agreed to 6 Government amendments to the bill and Mr Bowen presented a supplementary explanatory memorandum to the bill.

On 28 March 2023, Senator Gallagher tabled a revised explanatory memorandum to the bill.

On 29 March 2023, the Senator McAllister tabled a supplementary explanatory memorandum relating to the government amendments to be moved to the bill.

On 30 March 2023, the Senate agreed to 14 Government and 2 Australian Greens amendments to the bill.

Chapter 2

Commentary on ministerial responses

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

Customs Legislation Amendment (Controlled Trials and Other Measures) Bill 2022¹

Purpose	This bill seeks to amend the <i>Customs Act 1901</i> to facilitate time-limited trials with approved entities in a controlled regulatory environment.
Portfolio	Home Affairs
Introduced	House of Representatives on 30 November 2022
Bill status	Before the Senate

Significant matters in delegated legislation²

2.2 The bill seeks to amend the *Customs Act 1901* (the Act) to insert proposed Part XB. Part XB is intended to set up a framework to facilitate trials of new technology, business models and approaches in relation to Australian trade and customs practices, with a view to inform the policy development and evidence base for future regulatory reform.

2.3 The committee noted that proposed Part XB is characterised by the inclusion of 'framework provisions' which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scheme's scope and operation. The committee has longstanding concerns with framework provisions because they considerably limit the ability of Parliament to have appropriate oversight over new legislative schemes.

2.4 Many significant elements of the scope and operation of the approach that will be taken under the new time-limited trial scheme are left to delegated legislation.

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Customs Legislation Amendment (Controlled Trials and Other Measures) Bill 2022, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 83.

2 Schedule 1, proposed Part XB. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

2.5 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice regarding:

- why it is considered necessary and appropriate to leave almost all of the information relating to the scope and operation of the new Customs time-limited trial scheme to delegated legislation; and
- whether the bill can be amended to include further guidance regarding these matters on the face of the primary legislation.³

Minister for Home Affairs' response⁴

2.6 The Minister for Home Affairs (the minister) advised that the use of delegated legislation within the bill is intended to ensure that the scheme is flexible enough to respond to rapid developments in international trade. The minister noted that this is necessary to support continued efforts under the Simplified Trade System agenda. The minister also advised that placing the framework for the establishment of trials in delegated legislation ensures that potential applicants are not accidentally or unreasonably excluded.

2.7 The minister considered that the framework provisions set out in Part XB of the bill provide necessary limits on the scope of how sandboxes are established and monitored and advised that it would not be reasonably possible nor practical to anticipate every possible future sandbox in primary legislation. The minister listed a number of these safeguards, including that the scope of the bill is intentionally contained to those areas in which Controlled Trials are considered appropriate. In particular, provisions that relate to prohibited imports and exports or international obligations have been specifically excluded, as any flexibility in the operation of these provisions may create unacceptable risk to the Australian community. The minister also noted that the Comptroller-General of Customs will approve the making of trial rules and that this power cannot be delegated.

2.8 The minister also noted that participation within the trial will take place on a voluntary basis.

Committee comment

2.9 The committee thanks the minister for this response.

2.10 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory

3 Senate Scrutiny of Bills Committee, [Scrutiny Digest 1 of 2023](#) (8 February 2023) pp. 1–3.

4 The minister responded to the committee's comments in a letter dated 30 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

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

2.11 In light of the information provided by the minister the committee makes no further comment on this issue.

Exemption from disallowance⁵

2.12 Schedule 2 to the bill seeks to amend existing customs legislation to make a number of technical amendments, intended to align the Act with current legislative practice. Currently, subsection 273EA(1) of the Act allows the Minister to, by notice in the *Gazette*, announce an intention to propose in the Parliament a Customs Tariff or Customs Tariff alteration at any time when the Parliament is prorogued or the House of Representatives has expired by effluxion of time, has been dissolved or is adjourned otherwise than for a period not exceeding 7 days. Schedule 2 would amend section 273EA to clarify that notices of intention are legislative instruments.

2.13 Proposed subsection 273EA(3) to the bill seeks to amend the Act to provide that a legislative instrument made under subsection 273EA(1) is not subject to disallowance.

2.14 In *Scrutiny Digest 1 of 2023* the committee requested the minister's detailed advice as to whether the bill could be amended to provide that legislative instruments made under subsection 273EA(1) of the *Customs Act 1901* are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.⁶

Minister for Home Affairs' response⁷

2.15 The Minister for Home Affairs (the minister) advised that *Notices of Intention to Propose a Customs Tariff Alterations* (a Notice) have not previously been subject to disallowance and are the first step in a process that is already subject to Parliamentary scrutiny. To this end, the minister advised that a Notice ceases unless the related Customs Tariff Proposal is tabled within seven sitting days of Parliament and, to be made permanent, Parliament must pass a bill within twelve months past the tabling of the related Customs Tariff Proposal.

2.16 The minister advised that disallowance would not necessarily add an extra level of scrutiny as the House of Representatives can already consider and debate the

5 Schedule 2, item 10, proposed subsection 273EA(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

6 Senate Scrutiny of Bills Committee, [Scrutiny Digest 1 of 2023](#) (8 February 2023) pp. 3–5.

7 The minister responded to the committee's comments in a letter dated 30 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

related Customs Tariff Proposal, the timing of which would overlap with disallowance timeframes. The minister also noted that it would be open to the Scrutiny of Delegated Legislation Committee to ask questions about a Notice.

2.17 The minister advised that if a Notice is disallowed before the equivalent Customs Tariff Proposal could be moved in Parliament, the legislative intention of the process would be undermined. The minister further advised that because, in certain cases, these legislative instruments can enable measures to commence retrospectively by up to six months, disallowance may have a substantial impact on businesses and on the government's revenue collection processes. For instance, the minister considered that importers would be required to change their processes with little forewarning, as there would be little capacity to provide greater certainty through communication or to mitigate the impact on businesses.

2.18 Finally, the minister advised that the Notices are often used where the timing and requirements of drafting legislation and Parliamentary debate make the passage of legislation impractical, and therefore that disallowance could impose barriers in situations of emergency, for example in response to a global pandemic or an international conflict.

Committee comment

2.19 The committee thanks the minister for this response.

2.20 The committee welcomes the minister's additional information regarding the Customs Tariff Scheme. The committee also notes that Notices of Intention were previously not legislative instruments and that the effect of this bill therefore improves scrutiny over the instruments in some respects. However, the committee also notes its longstanding position that legislative instruments should be subject to disallowance unless exceptional circumstances are demonstrated. Given that the bill signals the government's intention that a Notice is considered to be of a legislative nature, it would therefore be appropriate to subject the Notice to disallowance unless there are exceptional circumstances.

2.21 The minister has advised that the legislative process underpinning a Notice provides some level of scrutiny, even without subjecting the Notice to disallowance. The minister has also noted the considerable regulatory impact that may occur should an instrument be disallowed. In this context, the committee reiterates its view that while the possibility of disallowance presents some degree of uncertainty, this level of uncertainty is in many ways inherent to lawmaking within Australia's system of representative government and applies equally to primary legislation which is subject at any time to amendment or repeal by the Parliament.

2.22 The minister's concerns in relation to uncertainty would seemingly also apply to the subsequent bill which the Customs Tariff Scheme mandates should be introduced within 12 months, should it be proposed that the Tariff proposal be made permanent. Although the minister has indicated that amendments to primary

legislation occur with a greater degree of forewarning than would occur under the disallowance process, it is not clear to the committee why this would be the case.

2.23 In relation to the minister's advice regarding the level of scrutiny which already applies to Tariff Proposals, the committee welcomes this scrutiny. However, the committee notes that allowing review by the Senate, by subjecting the instruments to disallowance, would provide a greater degree of scrutiny than is currently the case.

2.24 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of exempting legislative instruments made under proposed subsection 273EA(3) from disallowance.

Education Legislation Amendment (Startup Year and Other Measures) Bill 2023⁸

Purpose	<p>This bill seeks to amend the <i>Higher Education Support Act 2003</i> (HESA) to create a new form of Higher Education Loan Program assistance, to be known as SY-HELP, and to list Avondale University as a Table B provider under HESA.</p> <p>The bill also amends the <i>Australian Research Council Act 2001</i> to apply current indexation rates to existing appropriation amounts and to insert a new funding cap for the financial year commencing 1 July 2025.</p>
Portfolio	Education
Introduced	House of Representatives on 9 March 2023
Bill status	Before the Senate

Availability of merits review⁹

2.25 Item 25 of Schedule 1 to the bill seeks to amend the *Higher Education Support Act 2003* to introduce Part 3-7 SY-HELP assistance which would provide for a new form of Higher Education Loan Program assistance, SY-HELP, for students in accelerator program courses at Australian universities and university colleges.

2.26 Proposed section 128B-1 outlines the criteria regarding who is entitled to SY-HELP assistance, including that the student meets the citizenship or residency requirements under proposed section 128B-30. Proposed section 128B-30 outlines the citizenship or residency requirements a student must meet to be entitled to SY-HELP assistance. Proposed subsection 128B-30(6) provides that, despite the other requirements in section 128B-30, a student does not meet the citizenship or residency requirements in relation to an accelerator program course if the higher education provider reasonably expects that the student will not undertake in Australia any of the accelerator program course.

2.27 Proposed section 128E-30 further provides that an amount of SY-HELP assistance that a person received for an accelerator program course with a higher

8 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Education Legislation Amendment (Startup Year and Other Measures) Bill 2023, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 84.

9 Schedule 1, item 25, proposed subsection 128B-30(6) and proposed section 128E-30. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii).

education provider is reversed if the Secretary of the Department of Education is satisfied that the person was not entitled to receive SY-HELP assistance for the course with the provider. The effect of a reversal of SY-HELP assistance is that the higher education provider must pay back to the Commonwealth the amount paid to the provider for the course, and pay to the person who received the assistance the amount the person paid in relation to the accelerator program course fee.¹⁰ The person is also discharged from all liability to pay or account for the amount of SY-HELP assistance received.¹¹ A decision to reverse SY-HELP assistance may therefore be beneficial in some circumstances, for example where a student is not able to complete the course. However, the decision may also be detrimental in other circumstances, for example where a person is relying on the SY-HELP assistance to undertake a course of study. A decision not to reverse SY-HELP assistance may similarly be detrimental or beneficial to an individual, depending on their specific circumstances.

2.28 In *Scrutiny Digest 3 of 2023* the committee requested the minister's advice as to why it is necessary and appropriate not to provide that independent merits review will be available in relation to a decision made under subsection 128B-30(6) and section 128E-30 of the bill.¹²

Minister for Education's response¹³

2.29 The Minister for Education (the minister) advised that the decisions under both subsections 128B-30(6) and 128E-30 are not suitable for merits review and that generally, the bill's provisions mirror equivalent provisions relating to FEE-HELP and HECS-HELP in the *Higher Education Support Act 2003*.

2.30 Regarding proposed subsection 128B-30(6), the minister advised that the decision is procedural and would lead to significant delay. The time to undertake the Accelerator Program Course would likely have passed by the time a decision regarding the student's citizenship or residency status is considered. Additionally, the minister advised that there will be 2000 SY-HELP loans allocated each year and overturning a decision under subsection 128B-30(6) would result in a SY-HELP loan being unavailable for another student. The minister therefore considered that this decision fell within one of the accepted grounds for excluding merits review recognised by the Administrative Review Council's guidance document *What Decisions Should be Subject to Merits Review*. Namely, that the decision relates to the allocation of a finite resource between competing applicants.

10 Schedule 1, item 25, proposed section 128D-5.

11 Schedule 1, item 25, proposed section 128D-10.

12 Senate Scrutiny of Bills Committee, [Scrutiny Digest 3 of 2023](#) (22 March 2023) pp. 1–3.

13 The minister responded to the committee's comments in a letter dated 6 April 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.31 Regarding proposed section 128E-30, the minister advised that as the Secretary's power to reverse an amount of SY-HELP assistance is a consequence of an individual being assessed as not entitled to receive such assistance, this is a matter of fact and therefore an automatic decision that is unsuitable for merits review. The minister further advised that higher education providers have student grievance and review procedures to deal with academic and non-academic matters, which include formal and informal internal and external review mechanisms by an independent body.

Committee comment

2.32 The committee thanks the minister for this response.

2.33 The committee notes the minister's advice that decisions made under subsection 128B-30(6) are considered not suitable for review due to the possibility of causing significant delay, to the extent that the course may be completed by the time a decision has been made, and overturning a decision may lead to a loan being unavailable to another student. The committee further notes the minister's advice that decisions under section 128E-30 are considered not suitable for review due to the automatic nature of the decision under section 128E-30.

2.34 While the committee acknowledges this advice, the committee is not satisfied that this explanation sufficiently justifies the exclusion of merits review in these circumstances.

2.35 In relation to proposed subsection 128B-30(6), it is unclear to the committee how the fact that review of a decision may lead to significant delay is a justification for the exclusion of review in this instance. While the committee accepts that review of a decision under this section could lead to such a delay, the committee considers it may be possible that a student affected by this decision may be able to apply for an accelerator program course in a future semester upon review of the decision. The committee notes that this decision has been characterised as procedural in the minister's response but considers that this decision is likely substantive in nature as it is determinative of whether SY-HELP assistance is provided to a student.

2.36 The committee notes that similar decisions in Part 3-7 which determine whether a student is entitled to SY-HELP assistance are reviewable decisions. These include a decision that a student is not a genuine student,¹⁴ that a study load is unreasonable,¹⁵ or that SY-HELP assistance can be reversed in special circumstances.¹⁶ It is unclear to the committee how the justifications provided in the minister's response are not equally applicable to the above decisions, which are reviewable. All

14 Schedule 1, item 9, proposed section 128B-10.

15 Schedule 1, item 21, proposed section 128B-50.

16 Schedule 1, item 3, proposed section 128E-10.

the decisions under Part 3-7 relate to the allocation of finite resources among competing applicants in the same sense as a decision under proposed subsection 128B-30(6) as all of these decisions relate to a limited number of available loans. The committee also notes that the mere fact that there is a limited pool of resources for distribution does not, of itself, make subsequent allocative decisions unsuitable for review.¹⁷ Rather, it will be considered appropriate not to provide for independent merits review of a decision which relates to a limited pool of resources when the following factors apply:

- there is an allocation of finite resources; and
- an allocation that has already been made to another party would be affected by overturning the original decision.¹⁸

2.37 The minister's response has not explained how these two factors apply in this case, nor how a decision under proposed subsection 128B-30(6) differs in this sense from other similar decisions under Part 3-7. It appears from the information available to the committee that the second limb of the test may not apply in this case. Even if this argument is made out, it is not clear why it would not also apply to other decisions under Part 3-7.

2.38 Further, review of any decision under this Part may cause significant delay.¹⁹ The committee considers that it has not been adequately explained what distinguishes a decision under proposed subsection 128B-30(6), such that it is unreviewable, from other decisions under Part 3-7.

2.39 In relation to proposed section 128E-30, it is unclear to the committee how a decision under this section is an automatic decision. Proposed section 128E-30 states that the Secretary must be *satisfied* that the student does not meet citizenship or residency requirements in order to exercise the power to reverse SY-HELP assistance. This indicates that the decision is not merely a matter of fact, but that the Secretary has discretion to determine the entitlement of a student to receive SY-HELP assistance. The Administrative Review Council's guidance document *What Decisions Should be Subject to Merits Review?* outlines that decisions where there is a 'statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances' are not suitable for review.²⁰ In this instance, the committee considers that rather than a

17 Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999) [4.12].

18 Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999) [4.13].

19 Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999) [3.8].

20 Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999) [3.8].

specified set of circumstances existing, the Secretary must make a decision regarding a student's entitlement to receive SY-HELP assistance, and therefore there is no statutory obligation to act in a certain way.

2.40 The committee requests the minister's further advice as to:

- **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.**

Inspector-General of Aged Care Bill 2023²¹

Purpose	This bill seeks to support the establishment of the new Inspector-General of Aged Care, which will provide independent oversight of the aged care system.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 22 March 2023
Bill status	Before House of Representatives

Reversal of the evidential burden of proof²²

2.41 The bill provides the new Inspector-General of Aged Care with extensive reporting functions, including to report to the Minister for Health and Aged Care and to the Parliament on the Commonwealth's administration of an aged care law, the operation of an aged care law, the exercise of functions and powers under an aged care law, systemic issues relating to an aged care law, any systems administering aged care laws, and the implementation by the Commonwealth of the recommendations of the Aged Care Royal Commission.²³ If the Inspector-General conducts a review into one of these matters they must prepare a draft report,²⁴ which must be provided to certain affected persons prior to being finalised.²⁵

2.42 Subclause 23(1) of the bill sets out a new offence if a person receives a draft report, an extract of a draft report, or a document relating to a preliminary finding or recommendation of a draft report and subsequently discloses that information.

2.43 Subclause 23(2) provides that it is a defence to this new offence if the disclosure was made:

- in accordance with subclause 21(3);
- in accordance with subclause 22(1);
- to a lawyer for the purpose of obtaining legal advice;

21 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Inspector-General of Aged Care Bill 2023, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 85.

22 Subclauses 23(2) and 63(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

23 See clause 10 and clause 17.

24 Subclause 21(1).

25 Subclauses 21(3) and (4).

- to the Commonwealth Ombudsman or an officer within the meaning of subsection 35(1) of the *Ombudsman Act 1976*; or
- with the consent of the Inspector-General.

2.44 Similarly, subclause 63(1) of the bill provides that an entrusted person²⁶ commits an offence if they have obtained protected information in the course of their duties as an entrusted person, and they use or disclose that information. It is a defence if the entrusted person uses or discloses the information under clause 64, which includes, among other things that the disclosure was:

- in accordance with their functions and duties;
- for the purposes of an enforcement related activity;
- required or authorised by an Australian law; or
- related to information which had already been lawfully made available to the public.²⁷

2.45 Both offences would be punishable by up to two years imprisonment, 120 penalty units, or both. A defendant bears an evidential burden in relation to these defences.

2.46 In *Scrutiny Digest 4 of 2023* the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance.²⁸

Minister for Aged Care's response²⁹

2.47 The Minister for Aged Care (minister) advised that it is appropriate to use offence-specific defences in subclauses 23(2) and 63(2) because it aligns with the *Guide to Framing Commonwealth Offences*, and it ensures consistency with secrecy offences in other aged care laws. The minister advised that the circumstances of a defendant's use or disclosure of information is peculiarly within their knowledge, as only the defendant would be aware of the information they disclosed, the recipient, and the manner and purpose of its disclosure. Further, it would impose significant cost and difficulty upon the prosecution to disprove that the conduct was not authorised under any circumstances.

2.48 The minister further advised that the use of offence-specific defences ensures consistency with other aged care laws, and this is likely to result in enhanced clarity

26 As defined at clause 5.

27 Subclause 63(2).

28 Senate Scrutiny of Bills Committee, [Scrutiny Digest 4 of 2023](#) (30 March 2023) pp. 5–7.

29 The minister responded to the committee's comments in a letter dated 19 April 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

and compliance, particularly for subclause 23(2) which is likely to apply to persons subject to the secrecy provisions in the *Aged Care Act 1997* (AC Act) and the *Aged Care Quality and Safety Commission Act 2018* (ACQSC Act).

Committee comment

2.49 The committee thanks the minister for this response.

2.50 The committee notes the minister's advice that it is considered that the use of offence-specific defences in this case aligns with the *Guide to Framing Commonwealth Offences* as the use and disclosure of information defendant would be peculiarly within the defendant's knowledge, and it would be significantly more costly for the prosecution to establish these matters.

2.51 The committee reiterates, however, that while some matters may be peculiarly within the defendant's knowledge, such as whether a disclosure was made to a person's lawyer, not all the matters listed in the defence are peculiarly within the defendant's knowledge. For example, whether the disclosure was required or authorised by an Australian law, whether it was made with the consent of the Inspector-General, or whether the information had already been lawfully made available to the public, would likely be matters readily ascertainable by the prosecution.

2.52 The committee also takes this opportunity to note that consistency with existing aged care legislation is not a sufficient justification for reversing the evidential burden of proof.

2.53 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof under subclauses 23(2) and 63(2).

Coercive powers³⁰

2.54 Clause 50 of the bill provides that an authorised official may enter a premises for the purpose of performing the Inspector-General's monitoring, investigation and reporting functions under paragraphs 10(1)(a) to (d).

2.55 Paragraph 50(1)(a) provides that an authorised official may enter and remain on a premises controlled by the Commonwealth at all reasonable times. Paragraph 50(1)(b) provides that an authorised official may enter other kinds of premises at all reasonable times if the Inspector-General has issued a valid certificate stating that they may enter the premises. The Inspector-General may issue such a certificate if they are satisfied that it is reasonably necessary for the authorised official

30 Clause 50. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

to have access to the premises in order to carry out the reporting functions referred to above.

2.56 The authorised officer must provide notice that they intend to enter the premises.³¹ Once on the premises they must be given full and free access to documents or other property, and may examine and take copies of this material.³² In addition, the occupier must provide reasonable facilities and assistance.³³

2.57 In *Scrutiny Digest 4 of 2023* the committee requested the minister's advice as to why it is necessary and appropriate to provide a coercive power to enter non-Commonwealth premises without also providing that the framework set out at Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014* applies.³⁴

Minister for Aged Care's response³⁵

2.58 The minister advised that the scope of the entry power, and its alignment to a comparable oversight framework, are necessary and appropriate for the Inspector-General's functions and context. The scope is necessary and appropriate to enable the Inspector-General to perform their functions in clause 10, which relate to oversight of the Commonwealth's administration of aged care laws, systems and funding agreements. The minister considered that the Inspector-General could not properly fulfil these functions without access to non-Commonwealth premises involved in the operation of aged care laws and programs.

2.59 The minister advised that non-Commonwealth premises could include those of 'quality assessors' under the ACQSC Act, who conduct site audits on behalf of the Aged Care Quality and Safety Commission, and recipients of advocacy grants made under part 5.5 of the AC Act.

2.60 In relation to why the *Regulatory Powers (Standard Provisions) Act 2014* does not apply, the minister advised that:

Part 3 of the RP Act [*Regulatory Powers (Standard Provisions) Act 2014*] is not an appropriate framework because it cannot be used to perform the necessary oversight functions. Accordingly, the entry power in the Bill is aligned to the A-G Act [*Auditor-General Act 1997*] which establishes a comparable oversight framework.

31 Subclause 50(3).

32 Subclause 50(4).

33 Subclause 50(6).

34 Senate Scrutiny of Bills Committee, [Scrutiny Digest 4 of 2023](#) (30 March 2023) pp. 8–10.

35 The minister responded to the committee's comments in a letter dated 19 April 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

Section 38 of the RP Act provides that Part 3 powers only apply to investigating offence and civil penalty provisions that the triggering Act prescribes as 'subject to investigation'. The only offence and civil penalty provisions in the Bill which could be prescribed are facilitative in nature. They ensure the necessary information is obtained, persons assisting the Inspector General are protected, and information is not disclosed to support the oversight functions.

In contrast, the intended purpose of the entry power in clause 50 is to conduct oversight of the Commonwealth's administration of aged care. Rather than investigate individual compliance with an offence or civil penalty provision, this oversight would focus on the overall effectiveness of aged care legislation, funding agreements, and administrative systems.

The distinct oversight purpose of [the] Inspector-General makes the A-G Act the relevant comparator for the entry power in clause 50. Unlike the RP Act, the safeguard of entry by consent or warrant is unnecessary in an oversight context where the information gathered from a person or body is not being collected for the purpose of prosecuting that person or body. Likewise, the ability to take photos or video of the premises are unnecessary in an oversight context.

Committee comment

2.61 The committee thanks the minister for this response.

2.62 The committee notes the minister's advice that the A-G Act, rather than the RP Act, is considered to be a more appropriate comparable oversight framework in the context of the Inspector-General's broader oversight functions which do not include investigating individual compliance.

2.63 Nevertheless, the committee considers the power to enter and remain on premises without any explicit safeguards, such as requiring consent or a warrant, to be coercive in the context of non-Commonwealth premises. The committee does not consider that the minister's response has sufficiently justified why no safeguards are required in relation to the exercise of this power. While acknowledging the minister's advice that the concept of a non-Commonwealth premises is intended to be similar in scope to the term 'Commonwealth partner' within the A-G Act, the committee notes that there appears to be considerable potential for the wording at paragraph 50(1)(b) to be interpreted more broadly than this latter concept. As such, it would be appropriate to either introduce safeguards on the use of the power to enter a non-Commonwealth premises or to limit the scope of paragraph 50(1)(b) so that it explicitly covers entities related to the Commonwealth as in the A-G Act definition of 'Commonwealth partner'.

2.64 At a minimum, the intention that paragraph 50(1)(b) be read with a limited scope should be explicitly set out within the bill's explanatory memorandum.

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

2.66 The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of including a coercive power to enter non-Commonwealth premises in clause 50 of the bill.

Protection from civil and criminal liability

Reversal of the evidential burden of proof³⁶

2.67 Clause 58 of the bill provides that a person is not subject to any civil, criminal or administrative liability, or subject to a contractual or other remedy, for making a disclosure that qualifies for protection under clause 57. Clause 58 also grants a person qualified privilege in proceedings for defamation in certain circumstances. Clause 57 provides protection for disclosures made to an official of the Office of the Inspector-General of Aged Care, or a disclosure made in compliance with a request, or mandated requirement, of the Inspector-General. Clause 59 provides that the protection against liability does not apply if a person knowingly made a false or misleading statement.

2.68 This provision therefore removes any common law right to bring an action to enforce legal rights, unless it can be demonstrated that the person knowingly made a false or misleading statement.

2.69 Further, paragraph 61(1)(a) of the bill provides that if a person wants to rely on the protection afforded by clause 58 in respect of criminal proceedings, that person bears the onus of adducing or pointing to evidence that suggests a reasonable possibility that clause 58 applies to them. This has the effect of reversing the evidential burden of proof.

2.70 In *Scrutiny Digest 4 of 2023* the committee requested the minister's advice as to:

- why it is necessary and appropriate to provide civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations in which false or misleading conduct can be demonstrated; and

³⁶ Paragraph 61(1)(a). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

- why it is necessary and appropriate to reverse the evidential burden of proof in this instance.³⁷

Minister for Aged Care's response³⁸

2.71 The minister advised that the provision of comprehensive information to the Inspector-General is critical to effective oversight of the aged care system, addressing systemic issues, and ultimately achieving improved outcomes for older Australians receiving aged care. In the absence of strong protections for individuals who provide assistance, the minister advised there is a substantial risk that the Inspector-General's performance of their functions would be hampered due to an individual deciding to withhold important information.

2.72 The minister advised that clause 57 provides that only a disclosure made to an official of the Office of the Inspector-General can enliven the immunity, that is, where the Inspector-General is actively seeking information. The minister advised that an individual is still able to bring a legal action in circumstances where disclosures are made with malicious intent or are false or misleading as provided for in clause 59. The minister further advised that the immunity applies only to the act of disclosure itself, with any actions disclosed by the person and their liability for those actions remaining unaffected by the immunity as outlined in clause 60.

2.73 In relation to the reversal of the evidential burden of proof, the minister advised that clause 58 is not an offence-specific defence. The minister noted that it provides a broad immunity to persons who have made a qualifying disclosure from civil, criminal or administrative liability, or being subject to a contractual or other remedy. Given the breadth of possible criminal and civil matters in which a person could be involved, it is not reasonable to assume that a prosecutor or plaintiff would know that an immunity may apply.

Committee comment

2.74 The committee thanks the minister for this response.

2.75 The committee notes the minister's advice that the immunity is targeted in scope to disclosures made in response to a request by the Inspector-General, does not cover disclosures made with malicious intent or are false or misleading, and only applies to the act of disclosure itself.

37 Senate Scrutiny of Bills Committee, [Scrutiny Digest 4 of 2023](#) (30 March 2023) pp. 10–11.

38 The minister responded to the committee's comments in a letter dated 19 April 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.76 The committee further notes the minister's advice that given the breadth of possible criminal and civil matters a person may be involved in it is not reasonable for a prosecutor or plaintiff to know whether an immunity under clause 58 applies.

2.77 However, the committee notes that the relevant test is not whether it is reasonable to expect a prosecutor to know whether an immunity applies but, rather, whether this is a matter that would be peculiarly within the knowledge of the defendant. In this instance the matter does not appear to be one that would be peculiarly within the defendant's knowledge. However, given the significant difficulties in the prosecution obtaining this information the reversal may nevertheless be appropriate.

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

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

Social Security (Administration) Amendment (Income Management Reform) Bill 2023³⁹

Purpose	This bill seeks to amend the <i>Social Security (Administration) Act 1999</i> to reform the Income Management scheme. This builds on amendments already introduced under the <i>Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Act 2022</i> .
Portfolio	Social Services
Introduced	House of Representatives on 9 March 2023
Bill status	Before the Senate

Significant matters in delegated legislation⁴⁰

2.80 This bill is intended to introduce changes in relation to the Income Management regime (IM regime). Specifically, the bill aims to transition participants within this scheme to a new 'Enhanced Income Management regime' (Enhanced IM regime).

2.81 The approach taken within the bill largely mirrors the approach taken within Part 3B of the *Social Security (Administration) Act 1999* (the Social Security Act). That is, the Enhanced IM regime will set out the same criteria for scheme participants as exists under the IM regime. The explanatory memorandum states that all new entrants to income management will be directed to the new Enhanced IM regime.⁴¹

2.82 Much of the detail of the framework established by the bill is left to delegated legislation, or to non-legislative determinations. This is consistent with the approach taken within Part 3B of the Social Security Act. However, certain provisions within the bill introduce what appear to be new delegated legislation making powers.

2.83 In *Scrutiny Digest 3 of 2023* the committee requested the minister's advice in relation to:

39 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, *Social Security (Administration) Amendment (Income Management Reform) Bill 2023*, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD 86.

40 Schedule 1, item 32, proposed subsections 123SDA(2) and (6). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

41 Explanatory memorandum, p. 2; statement of compatibility, p. 64.

- whether the criteria for the entry of participants to the Enhanced Income Management Regime set out at proposed section 123SDA is new compared to the criteria set out for the Income Management Regime; and
- if this is the case, why additional criteria are necessary; and
- why it is necessary and appropriate to provide delegated legislation making powers at proposed subsections 123SDA(2) and 123SDA(6).⁴²

Minister's response⁴³

2.84 The minister advised that proposed section 123SDA does not introduce any new eligibility criteria or confer any additional discretionary powers on the Minister or Secretary for the Enhanced IM regime compared to the IM regime. In relation to the requirement to specify, by legislative instrument, areas in which these measures would apply, the minister clarified that proposed subsection 123SDA(2) is equivalent to subsection 123UCB(4) of the Social Security Act while proposed subsection 123SDA(6) is equivalent to subsection 123UCC(4).

2.85 In response to why it is necessary and appropriate to provide delegated legislation making powers at proposed subsections 123SDA(2) and 123SDA(6), the minister advised that the government is committed to consulting on, amongst other matters, the eligibility criteria. Pending the outcome of the consultation, the bill essentially recreates the same measures and powers for enhanced IM regime to ensure an effective and efficient transition between IM regime and enhanced IM regime whilst consulting on the long-term future of IM regime and enhanced IM regime. The minister further advised that any legislative instruments made under the proposed subsections must be consistent with best practice and the requirements of the *Legislation Act 2003*, and will not be made without robust consultation with affected groups and individuals.

Committee comment

2.86 The committee thanks the minister for this response.

2.87 The committee notes the minister's advice that the eligibility criteria for the enhanced IM regime is not new compared with the IM regime and that the power to specify areas in delegated legislation in which these measures would apply is not new. The committee further notes the minister's advice that the bill essentially recreates the same measures and powers while the government intends to further consult on the enhanced IM regime.

42 Senate Scrutiny of Bills Committee, [Scrutiny Digest 3 of 2023](#) (22 March 2023) pp. 17–19.

43 The minister responded to the committee's comments in a letter dated 5 April 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.88 While noting this advice, the committee considers that significant matters should generally be included in primary legislation unless a sound justification for the use of delegated legislation is provided. A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill. The committee considers that leaving significant elements of a legislative scheme to delegated legislation may considerably limit the ability of Parliament to exercise appropriate oversight of legislative schemes. Broad powers providing for the executive to specify areas in which individuals may be subject to the enhanced IM regime are one such significant matter.

2.89 In relation to the minister's advice on the consultation requirements within the *Legislation Act 2003*, the committee notes that it generally looks favourably on the inclusion of enforceable consultation requirements beyond the default requirements set out within that Act when significant matters are proposed to be included within delegated legislation.

2.90 The committee further takes this opportunity to note that consistency with existing legislation is not a sufficient justification for including significant matters within delegated legislation.

2.91 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving key details of the implementation of the Enhanced Income Management regime to delegated legislation.

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

Chapter 3

Scrutiny of standing appropriations¹

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.² 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.³

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

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Scrutiny of standing appropriations, *Scrutiny Digest 5 of 2023*; [2023] AUSStaCSBSD AUSStaCSBSD 87.

2 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*.

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