The Senate

# Standing Committee for the Scrutiny of Bills

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# Membership of the committee

**Current members**

| | |
|---|---|
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| Senator Raff Ciccone (Deputy Chair) | ALP, Victoria |
| Senator Nick McKim | AG, Tasmania |
| Senator Paul Scarr | LP, Queensland |
| Senator Tony Sheldon | ALP, New South Wales |
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# Contents

# Introduction

## Terms of reference

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

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

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

## Nature of the committee's scrutiny

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

## Appropriation Bill (No. 1) 2023-2024

## Appropriation Bill (No. 2) 2023-2024

## Appropriation Bill (No. 3) 2022-2023

## Appropriation Bill (No. 4) 2022-2023[1]

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|---|---|
| **Purpose** | The Appropriation Bill (No. 1) 2023-2024 seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government.<br><br>The Appropriation Bill (No. 2) 2023-2024 seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure.<br><br>The Appropriation Bill (No. 3) 2022-2023 seeks to appropriate additional money out of the Consolidated Revenue Fund for the ordinary annual services of the government, in addition to the appropriations provided for by the *Supply Act (No. 1) 2022-2023*, *Supply Act (No. 3) 2022-2023* and *Appropriation Act (No. 1) 2022-2023*.<br><br>The Appropriation Bill (No. 4) 2022-2023 seeks to appropriate additional money out of the Consolidated Revenue Fund for certain expenditure, in addition to the appropriations provided for by the *Supply Act (No. 2) 2022-2023*, *Supply Act (No. 4) 2022-2023* and *Appropriation Act (No. 2) 2022-2023*. |
| **Portfolio** | Finance |
| **Introduced** | House of Representatives on 9 May 2023 |

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Appropriation Bill (No. 1) 2023-2024, Appropriation Bill (No. 2) 2023-2024, Appropriation Bill (No. 3) 2022-2023, Appropriation Bill (No. 4) 2022-2023, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 89.

## Parliamentary scrutiny—ordinary annual services of the government[2]

1.2 Under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation.

1.3 Appropriation Bill (No. 1) 2023-2024 (Appropriation Bill No. 1) seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation to certain measures may have been inappropriately classified as ordinary annual services.

1.4 The inappropriate classification of items in appropriation bills as ordinary annual services, when they in fact relate to new programs or projects, undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.[3]

1.5 The Senate Standing Committee on Appropriations and Staffing[4] has also actively considered the inappropriate classification of items as ordinary annual services of the government.[5] It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.[6]

1.6 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 the Senate resolved:

1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]

2) That appropriations for expenditure on:

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2 Various provisions of Appropriation Bill (No.1) 2023-2024. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

3 See Senate standing order 24(1)(a)(v).

4 Now the Senate Standing Committee on Appropriations, Staffing and Security.

5 Senate Standing Committee on Appropriations, Staffing and Security, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and annual reports of the committee from 2010-11 to 2014-15.

6 Senate Standing Committee on Appropriations, Staffing and Security, *45th Report: Department of the Senate's Budget Ordinary annual services of the government Parliamentary computer network*, 2008, p. 2.

a) the construction of public works and buildings;

b) the acquisition of sites and buildings;

c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);

d) grants to the states under section 96 of the Constitution;

e) new policies not previously authorised by special legislation;

f) items regarded as equity injections and loans; and

g) existing asset replacement (which is to be regarded as depreciation),

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

1.7 The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

> completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas.[7]

1.8 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies, for which money has not been appropriated in previous years, are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.[8]

1.9 Despite these comments, and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than individual assessments as to whether a particular appropriation relates to a new program or project, continues. The committee notes that in recent years the Senate has routinely agreed to annual appropriation bills

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7 Senate Standing Committee on Appropriations, Staffing and Security, *45th Report: Department of the Senate's Budget Ordinary annual services of the government Parliamentary computer network*, 2008, p. 2.

8 Senate Standing Committee on Appropriations, Staffing and Security, *45th Report: Department of the Senate's Budget Ordinary annual services of the government Parliamentary computer network*, 2008, p. 2.

containing such broadly categorised appropriations, despite the potential that such expenditure may have been inappropriately classified as 'ordinary annual services'.[9]

1.10 Based on the Senate resolution of 22 June 2010, it appears that at least part of the initial expenditure in relation to the following measures may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2023-2024:

- Nuclear-Powered Submarine – initial implementation;[10]
- Australian Skills Guarantee – implementation;[11] and
- National Clinical Quality Registry Program.[12]

1.11 While it is not the committee's role to consider the policy merit of these measures, the committee considers that they may have been inappropriately classified as 'ordinary annual services', thereby impacting upon the Senate's ability to subject the measures to an appropriate level of parliamentary scrutiny. The committee considers that Appropriation Bill (No. 3) 2022-2023 likely raises similar concerns regarding measures inappropriately classified as 'ordinary annual measures'.

1.12 The committee has previously written to the Minister for Finance in relation to inappropriate classification of items in other appropriation bills on a number of occasions;[13] however, the government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

1.13 The committee again notes that the government's approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010.

1.14 The committee notes that any inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the

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9 See, for example, debate in the Senate in relation to amendments proposed by Senator Leyonhjelm to Appropriation Bill (No. 3) 2017-18, *Senate Hansard*, 19 March 2018, pp. 1487-1490.

10 Budget Measures 2023-24 – Budget Paper No. 2, pp. 94–96.

11 Budget Measures 2023-24 – Budget Paper No. 2, pp. 104–105.

12 Budget Measures 2023-24 – Budget Paper No. 2, pp. 140–141.

13 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014*, pp. 402–406; *Fourth Report of 2015*, pp. 267–271; *Alert Digest No. 6 of 2015*, pp. 6–9; *Fourth Report of 2016*, pp. 249–255; *Alert Digest No. 7 of 2016*, pp. 1–4; *Scrutiny Digest 2 of 2017*, pp. 1–5; *Scrutiny Digest 6 of 2017*, pp. 1–5; *Scrutiny Digest 12 of 2017*, pp. 89–95; *Scrutiny Digest 2 of 2018*, pp. 1–7, *Scrutiny Digest 2 of 2019*, pp. 1–4, *Scrutiny Digest 3 of 2020*, pp. 1–4, *Scrutiny Digest 15 of 2020*, pp. 10–13, *Scrutiny Digest 8 of 2021*, pp. 5–8, *Scrutiny Digest 2 of 2022*, pp. 12–15; *Scrutiny Digest 7 of 2022*, pp. 10-21; *Scrutiny Digest 1 of 2023*, pp. 78–80.

ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects. The committee considers that Appropriation Bill (No. 3) 2022-2023 may raise similar issues regarding measures inappropriately classified as 'ordinary annual measures', and therefore repeats its scrutiny concerns in relation to that bill.

**1.15 The committee draws this matter to the attention of senators as it appears that the initial expenditure in relation to certain items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in bills which should only contain appropriations that are not amendable by the Senate).**

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## Parliamentary scrutiny—appropriations determined by the Finance Minister[14]

1.16 Clause 10 of Appropriation Bill (No. 1) enables the Finance Minister to allocate additional funds to entities when satisfied that there is an urgent need for expenditure and the existing appropriations are inadequate. The allocated amount is referred to as the Advance to the Finance Minister (AFM). The additional amounts are allocated by a determination made by the Finance Minister (an AFM determination). AFM determinations are legislative instruments, but they are not subject to disallowance.

1.17 Subclause 10(2) of Appropriation Bill No. 1 provides that when the Finance Minister makes such a determination the Appropriation Bill has effect as if it were amended to make provision for the additional expenditure. Subclause 10(3) caps the amounts that may be determined under the AFM provision in Appropriation Bill No. 1 at $400 million. Identical provisions appear in Appropriation Bill (No. 2) 2023-2024 (Appropriation Bill No. 2), with a separate $600 million cap in that bill.[15]

1.18 The amount available under the AFM provisions in these bills is closer to the levels available under previous annual appropriation bills before the COVID-19

14 Clause 10 of Appropriation Bill (No. 1) 2023-2024; clause 12 of Appropriation Bill (No. 2) 2023-2024. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

15 Clause 12 of Appropriation Bill (No. 2) 2023-2024.

pandemic.[16] However, while the explanatory memorandum states the bills 'return the AFM provisions to conventional (pre-2020) levels',[17] the committee notes that the AFM provisions in *Appropriation Act (No. 1) 2019-2020* and *Appropriation Act (No. 2) 2019-2020* together set a limit of $675 million which is typical of AFM provisions in other pre-pandemic appropriation bills, while the caps in the Appropriation Bills No. 1 and No. 2 together add up to $1 billion. The committee notes that no explanation has been given in the explanatory memorandum as to why a higher amount than typical pre-pandemic levels is needed.

1.19 The explanatory memoranda to both bills explain that allowing these determinations to be disallowable 'would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.[18] Nevertheless, the committee considers that, in allowing the Finance Minister to allocate additional funds to entities via non-disallowable delegated legislation, the AFM provisions in Appropriation Bills Nos. 1 and 2 delegate significant legislative power to the executive.

1.20 While this does not amount to a delegation of the power to create a new appropriation, the committee notes that one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[19] The AFM provisions leave the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

1.21 The committee's significant scrutiny concerns in relation to these provisions are heightened given that AFM determinations are not subject to the usual parliamentary disallowance process. In this regard, the committee notes that the explanatory memorandum to Appropriation Bill (No. 1) 2023-2024 suggests that exempting AFM determinations from disallowance:

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16 For example, subsection 10(3) of *Appropriation Act (No. 1) 2019-2020* set a cap of $295 million and subsection 12(3) of *Appropriation Act (No. 2) 2019-2020* set a cap of $380 million. Compare *Appropriation Act (No. 1) 2020-2021*, *Appropriation Act (No. 2) 2020-2021, Appropriation Act (No. 1) 2021-2022*, *Appropriation Act (No. 2) 2021-2022, Appropriation (Coronavirus Response) Act (No. 1) 2021-2022*, *Appropriation (Coronavirus Response) Act (No. 2) 2021-2022*, Appropriation *Act (No. 1) 2022-2023* and *Appropriation Act (No. 2) 2022-2023* which set Advance to the Finance Minister caps at $4 billion, $6 billion, $2 billion, $3 billion, $2 billion, $3 billion, $2.4 billion and $3.6 billion respectively.

17 Explanatory memorandum, p. 9.

18 Explanatory memorandum, p. 10.

19 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017) [91].

> …would reduce an entity's appropriation to its original level. Yet the urgent expenditure it had already undertaken validly prior to disallowance, in reliance upon the determination, would count towards the newly reduced appropriation…
>
> Accordingly, disallowance would leave the entity with a shortfall in the appropriation available to fund the ongoing expenditure for which the Government originally budgeted and which the Parliament approved when it passed the Appropriation Act.[20]

1.22 While noting this explanation, the committee is of the view that 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 there are exceptional circumstances, and 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.[21]

1.23 The committee concurs with the view expressed by the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the disallowance status of AFM determinations. In particular, the committee agrees that if the AFM is used for a genuine emergency situation, the likelihood of it subsequently being disallowed would be virtually non-existent, and therefore insufficient to justify an exemption from disallowance. Instead, the potential for disallowance would simply operate to ensure that the AFM is only utilised in genuinely urgently circumstances, as intended by the Parliament.[22]

1.24 Finally, following previous correspondence between the committee and the minister, the committee welcomes the inclusion of additional information in the explanatory memoranda about transparency measures applying to AFMs.[23] The explanatory memorandum notes that:

> The following strong accountability and transparency arrangements that were put in place for the extraordinary AFM provisions will continue to apply to AFM determinations made during 2023-24, including:

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20 Explanatory memorandum, p. 10.

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

22 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2022* (25 January 2022) pp. 4–6.

23 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021* (16 June 2021) pp. 8–11 and *Scrutiny Digest 13 of 2021* (25 August 2021) pp. 20-21.

- registration of each AFM determination with an explanatory statement on the Federal Register of Legislation (legislation.gov.au);
- a media release by the Finance Minister in weeks when AFMs are issued;
- an annual assurance review by the Australian National Audit Office (ANAO); and
- an annual report on the AFM allocations tabled in the Parliament, inclusive of the ANAO's assurance review report.[24]

1.25 The committee considers that the provision of this additional information provides the Parliament with important details to assist in scrutiny of the AFM provisions and welcomes its continued inclusion.

**1.26 The committee requests the minister's detailed advice as to why the caps to the additional amounts that may be allocated by the Finance Minister (AFM) in Appropriation Bills (No. 1) and (No. 2) 2023-2024 are significantly higher than the pre-pandemic AFM caps.**

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## Parliamentary scrutiny—measures marked 'not for publication'[25]

1.27 Clause 4 of both Appropriation Bill (No. 1) and Appropriation Bill (No. 2) provide that portfolio budget statements (PBS) are relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*. That is, clause 4 provides that the PBS may be considered in interpreting the provisions of each bill. Moreover, the explanatory memoranda to the bills state that they should be read in conjunction with the PBS.[26]

1.28 Noting the important role of the PBS in interpreting Appropriation Bills No. 1 and No. 2, the committee has scrutiny concerns in relation to the inclusion of measures within the portfolio statements that are earmarked as 'not for publication' (nfp), meaning that the proposed allocation of resources to those budget measures is not published within the PBS. Various reasons are provided for marking a measure as nfp, including that aspects of the relevant program are commercial-in-confidence or relate to matters of national security.

1.29 Given the importance of parliamentary scrutiny over the appropriation process, the committee considers that the default position should be to publish the

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24 Explanatory memorandum to Appropriation Bill (No. 1) 2023-2024, pp. 9–10.

25 Clauses 4 and 6 and Schedule 1 to Appropriation Bill (No. 1) 2023-2024; clauses 4 and 6 and Schedule 2 to Appropriation Bill (No. 2) 2023-2024. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

26 Explanatory memorandum to Appropriation Bill (No. 1) 2023-2024, p. 2; explanatory memorandum to Appropriation Bill (No. 2) 2023-2024, p. 2.

full amount of funding allocated to each budget measure. However, where it is necessary and appropriate not to publish the total funding amount for a measure, the committee considers that an explanation should be included within the portfolio statements. The committee therefore has significant scrutiny concerns in relation to the inclusion of measures within the portfolio statements that are earmarked as nfp where there is either no, or only a very limited, explanation as to why it is appropriate to mark the measure as nfp.

1.30 In *Scrutiny Digest 16 of 2021*, the committee requested that future Department of Finance guides on preparing portfolio budget statements be updated to include guidance that, where a measure is marked as nfp, at least a high-level explanation should be included within the portfolio budget statements explaining why this is appropriate.[27] As a result, the Department of Finance updated the Guide to Preparing the Portfolio Budget Statements to reflect the committee's scrutiny concerns.[28] The committee notes that the most recent Department of Finance *Guide to Preparing the 2023-24 Portfolio Budget Statements* also includes advice reflecting the committee's scrutiny concerns.[29]

1.31 The committee notes that despite the inclusion of this advice it nevertheless has scrutiny concerns in relation to the lack of detailed explanation provided within the PBS. For example, the majority of explanations for measures marked as nfp within the 2023-24 portfolio statements merely state that the funding for a measure is not for publication due to commercial-in-confidence considerations, or due to national security reasons.

1.32 The committee notes that the high-level nature of these explanations makes it difficult to assess whether several of the measures categorised as nfp within the portfolio statements are appropriately categorised. More detailed explanations as to why it is appropriate to mark a budget measure as nfp would allow for a greater level of parliamentary scrutiny over these explanations. For example, it is unclear to the committee why it is appropriate not to publish total amounts in relation to the Disaster Support[30] or the Capacity Investment Scheme.[31]

1.33 To this end, the committee notes that the mere existence of a commercial element in relation to a budget measure is likely insufficient, of itself, as a justification

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27 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2021* (21 October 2021) pp. 47–51.

28 See comments on Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2022* (18 March 2022) pp. 19–21.

29 Department of Finance, *Guide to preparing the 2023-24 Portfolio Budget Statements*, p. 34.

30 Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Portfolio Budget Statements 2023-24*, pp. 33 and 35.

31 Department of Climate Change, Energy, the Environment and Water, *Portfolio Budget Statements 2023-24*, pp. 26 and 28.

for not publishing any of the funding amount for that measure. The lack of detailed explanation makes it difficult for the Parliament and others to interrogate the rationale behind the classification of a measure as nfp. The committee considers that high-level explanations as to why a measure may be marked as nfp, beyond simply stating that commercial elements apply, could be included within the budget documents without compromising commercial sensitivities.

1.34 Finally, the committee notes that there has been a significant upwards trend in the number of nfp measures being included within Budget Paper No. 2. For example, Budget Paper No. 2 for the 2004-05 budget contained seven references to the term nfp, while last year's Budget Paper No. 2 for the 2022-23 budget contained 196 references. Budget Paper No. 2 for the current 2023-24 budget contains 240 nfp references.

1.35 Parliament has a fundamental constitutional role to scrutinise and authorise the appropriation of public money. As outlined by the High Court, the appropriation process is intended to 'give expression to the foundational principle of representative and responsible government that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself.'[32] Given the parliament's fundamental scrutiny role over the appropriation of money from the Consolidated Revenue Fund, the committee has scrutiny concerns in relation to the proliferation of measures within the PBS for which the proposed allocation of resources is not published. Any decision not to publish the total amount for a budget measure must be weighed against the significance of abrogating Parliament's fundamental scrutiny role.

1.36 The committee considers that Appropriation Bills (No. 3) and (No. 4) 2022-2023 may raise similar issues regarding the inclusion of measures within the portfolio additional estimate statements that are earmarked as 'not for publication' (nfp) and reiterates its scrutiny concerns in relation to these bills.

**1.37 In light of the above, the committee reiterates its significant concerns that the Parliament is being asked to authorise appropriations without clear information about the amounts that are to be appropriated under each individual budget measure. The committee's concerns in relation to measures marked as 'not for publication' (nfp) are heightened in light of the upwards trend in the number of measures marked as nfp.**

**1.38 The committee considers that, notwithstanding the welcome guidance in the Department of Finance's *Guide to Preparing the 2023-24 Portfolio Budget Statements*, it would be appropriate to include more detailed explanations within the portfolio budget statements explaining why it is appropriate to mark a measure as nfp, where possible.**

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32 *Wilkie v Commonwealth* (2017) 263 CLR 487, 523 [61].

**1.39 The committee will continue to consider this important matter in its scrutiny of future Appropriation bills.**

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

1.40 Clause 16 of Appropriation Bill No. 2 deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the states. Section 96 states that 'the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*'.

1.41 Clause 16 seeks to delegate this power to the relevant minister and, in particular, provides the minister with the power to determine:

- terms and conditions under which payments to the states, the Australian Capital Territory and the Northern Territory or a local government authority may be made;[34] and
- the amounts and timing of those payments.[35]

1.42 Subclause 16(4) provides that determinations made under subclause 16(2) are not legislative instruments. The explanatory memorandum states that this is:

> …because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 16(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.[36]

1.43 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.[37]

1.44 The committee takes this opportunity to reiterate that the power to make grants to the states and to determine terms and conditions attaching to them is conferred on the Parliament by section 96 of the Constitution. While the Parliament

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33 Clause 16 and Schedules 1 and 2 to Appropriation Bill (No. 2) 2023-2024. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

34 Paragraph 16(2)(a) of Appropriation Bill (No. 2) Bill 2023-2024.

35 Paragraph 16(2)(b) of Appropriation Bill (No. 2) Bill 2023-2024.

36 Explanatory memorandum to Appropriation Bill (No. 2) 2023-2024, p. 13.

37 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, pp. 511–516; *Ninth Report of 2015*, pp. 611–614; *Fifth Report of 2016*, pp. 352–357; *Eighth Report of 2016*, pp. 457–460; *Scrutiny Digest 3 of 2017*, pp. 51–54; *Scrutiny Digest 6 of 2017*, pp. 7–10; *Scrutiny Digest 12 of 2017*, pp. 99–104; *Scrutiny Digest 2 of 2018*, pp. 8–11; *Scrutiny Digest 6 of 2018*, pp. 9–12; *Scrutiny Digest 4 of 2019*, pp. 9–12; *Scrutiny Digest 15 of 2020*, pp. 16–17, *Scrutiny Digest 8 of 2021*, pp. 13–14; *Scrutiny Digest 2 of 2022*, pp. 21–22, *Scrutiny Digest 7 of 2022*, pp. 20–21.

has largely delegated this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.45 The committee notes that important progress has been made to improve the provision of information regarding section 96 grants to the states since the 2017-18 budget, following suggestions originally made by the committee in *Alert Digest 7 of 2016*.[38] These improvements include: the addition of an Appendix E to Budget Paper No. 3,[39] which provides details of the appropriation mechanism for all payments to the states and the terms and conditions applying to them; and a mandatory requirement for the inclusion of further information in portfolio budget statements where departments and agencies are seeking appropriations for payments to the states, territories and local governments.[40]

1.46 The committee considers that these measures improve the ability of the Parliament to scrutinise the executive's use of the delegated power to make grants to the states and to determine terms and conditions attaching to them under section 96 of the Constitution.

1.47 Nevertheless, the committee notes that while these measures improve transparency to some degree, the committee remains concerned about the broad discretion provided to ministers to determine terms and conditions for grants to the states. The committee also notes that the Parliament's ability to scrutinise the terms and conditions of these grants varies depending on the appropriation mechanism used for the payments.

**1.48 The committee leaves to the Senate as a whole the appropriateness of clause 16 of Appropriation Bill (No. 2) 2023-2024, which allows ministers to determine terms and conditions under which payments to the states, territories and local government may be made and the amounts and timing of those payments.**

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## Parliamentary scrutiny—debit limits[41]

1.49 Clause 13 of Appropriation Bill (No. 2) 2023-2024 specifies debit limits for both general purpose financial assistance and national partnership payments.

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38 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2016*, pp. 7–10; and *Eighth Report of 2016*, pp. 457–460.

39 Appendix E of Budget Paper No. 3.

40 See Department of Finance, *Guide to Preparing the 2023-24 Portfolio Budget Statements*, p. 25.

41 Clause 13 of Appropriation Bill (No. 2) 2023-2024. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

1.50 The *Federal Financial Relations Act 2009* sets up a standing appropriation through which the Commonwealth is able to provide financial assistance for the delivery of services to the states for general purpose financial assistance (funding to the states with no conditions on how they use the funding),[42] and national partnership payments (funding to support the delivery of specified outputs or projects, facilitate reforms, or to reward the states for nationally significant reforms).[43]

1.51 The minister may make a determination under sections 9 or 16 of the *Federal Financial Relations Act 2009* to provide this financial assistance.[44] These ministerial determinations are legislative instruments which are not subject to disallowance.[45]

1.52 Further, the amounts payable under these determinations are subject to the debit limit prescribed in the Appropriation Acts. A debit limit must be set each financial year otherwise grants under these programs cannot be made.[46] The total amount of grants cannot exceed the relevant debit limit set each year.[47]

1.53 The explanatory memorandum explains the purpose of setting debit limits:

> Specifying a debit limit in clause 13 is an effective mechanism to manage expenditure of public money as the official or Minister making a payment of public money cannot do so without this authority. The purpose of doing so is to provide Parliament with a transparent mechanism by which it may review the rate at which amounts are committed for expenditure.[48]

1.54 This bill proposes the following debit limits for 2023-24:

- General purpose financial assistance to the states—$5 billion;[49] and
- National partnership payments to the states—$35 billion.[50]

1.55 In *Scrutiny Digest 13 of 2021*, the committee welcomed the minister's advice that additional information about the expected level of expenditure against debit

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42 *Federal Financial Relations Act 2009*, section 9.

43 *Federal Financial Relations Act 2009*, section 16.

44 If the minister determines an amount under sections 9(1) and 16(1) of the *Federal Financial Relations Act 2009*, the amount must be credited to the Council of Australian Governments (COAG) Reform Fund. The COAG Reform Fund is automatically debited via the special appropriation mechanism in section 80 of the *Public Governance, Performance and Accountability Act 2013*.

45 *Federal Financial Relations Act 2009*, subsections 9(4) and 16(4).

46 *Federal Financial Relations Act 2009*, subsections 9(5) and 16(5).

47 *Federal Financial Relations Act 2009*, subsections 9(3) and 16(3).

48 Explanatory memorandum to Appropriation Bill (No. 2) 2023-24, p. 11.

49 Subclause 13(1) of Appropriation Bill (No. 2) 2023-2024.

50 Subclause 13(2) of Appropriation Bill (No. 2) 2023-2024.

limits can be included in the explanatory memoranda to future Appropriation Bills where appropriate.[51]

1.56 In relation to the $5 billion debit limit for general purpose financial assistance to the states, the explanatory memorandum explains that it is expected the payments will be $934.3 million.[52] This means that over $4 billion in general purpose financial assistance can be made without the need to seek further parliamentary approval.

1.57 In relation to the $35 billion debit limit for national partnership payments, the committee notes that the explanatory memorandum states that it is expected that national partnership payments will be $24.7 billion in 2023-24, while the budget papers state that it is expected that national partnership payments will be $26.1 billion.[53] In either case, it appears that the debit limit proposed in this bill would allow approximately $9-10 billion in national partnership payments to be made without the need to seek further parliamentary approval.

1.58 The committee further notes that a $35 billion debit limit was initially introduced for national partnership payments in *Appropriation Act (No. 4) 2021-2022*,[54] and the explanatory memorandum to that Act explained that this was increased on a one-off basis given the ongoing nature of the COVID-19 pandemic.[55] The explanatory memorandum to this bill does not acknowledge the ongoing large increase in the debit limit, instead it explains that:

> Since 2014-15, the debit limit has generally been between $10,000 million and $15,000 million above the expected level of spending under section 16 of the FFR [Federal Financial Relations] Act. The debit limit provided in subclause 13(2) would mitigate the risk of reaching the limit in the event that unexpected circumstances arise. The limit is set to ensure the Government has appropriate provision in place to fund existing undertakings to the States, new programs that may be required between Appropriation Acts, and to respond to major unexpected events such as large-scale natural disasters.[56]

1.59 While the committee acknowledges this rationale, it considers that setting a debit limit substantially higher than expected expenditure may undermine the stated intention of the debit limit regime—that is, to provide Parliament with a 'transparent

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51 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2021* (25 August 2021) p. 24.

52 *Federal Financial Relations: Budget Paper No. 3 2023-24*, p. 114.

53 Explanatory memorandum to Appropriation Bill (No. 2) 2023-2024, p. 12; *Federal Financial Relations: Budget Paper No. 3 2023-24*, p. 13.

54 Subsection 13(1) of *Appropriation Act (No. 4) 2021-2022*.

55 Explanatory memorandum to *Appropriation Act (No. 4) 2021-2022*, p. 12.

56 Explanatory memorandum to Appropriation Bill (No. 2) 2023-2024, p. 12

mechanism by which it may review the rate at which amounts are committed for expenditure'.[57] Setting such high limits, alongside the power of the minister to authorise the funding of further grants by non-disallowable determination, means that significant new expenditures can be made without oversight by the Parliament and therefore greatly reduces transparency over expenditure of public money.

1.60 The committee considers it is appropriate for the debit limit to more closely match the expected level of expenditure and for new appropriation bills to be introduced for parliamentary consideration where the debit limit may be exceeded.

**1.61 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of setting debit limits for these grant programs well above the expected level of expenditure, noting that this practice appears to undermine the effectiveness of the debit limit regime as a mechanism for ensuring meaningful parliamentary oversight of these grant programs.**

57 Explanatory memorandum to Appropriation Bill (No. 2) 2023-2024, p. 11.

# Creative Australia Bill 2023[58]

| | |
|---|---|
| **Purpose** | This bill seeks to put in place legislation to provide for Creative Australia as a modern entity with expanded functions, responsibilities and a new governance structure. |
| **Portfolio** | Infrastructure, Transport, Regional Development, Communications and the Arts |
| **Introduced** | House of Representatives on 25 May 2023 |

## Exemption from disallowance[59]

1.62 Subclause 14(1) of the bill allows the minister to, by legislative instrument, give directions to the Australia Council Board in relation to: the performance of functions, and the exercise of powers of, Creative Australia; or requiring the provision of a report or advice on a matter that relates to any of Creative Australia's functions or powers. A note to subclause 14(1) clarifies that any direction given by the minister is not subject to the usual parliamentary disallowance procedure due to the operation of regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003*.[60]

1.63 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.[61]

1.64 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in

58 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Creative Australia Bill 2023, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 90.

59 Subclause 14(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

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

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

its recent review of the *Biosecurity Act 2015*,[62] and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[63]

1.65 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 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.

1.66 Broadly, the committee does not consider that an instrument falling within one of the classes of exemption in the Legislation (Exemptions and Other Matters) Regulation 2015 to be, of itself, a sufficient justification for excluding parliamentary disallowance.[64] 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'.[65]

1.67 In this instance, the explanatory memorandum provides no explanation, merely restating the effect of the provision. The committee further notes that the explanatory memorandum states that the directions are subject to disallowance, thereby creating an inconsistency with the primary legislation.

**1.68 In light of the above, the committee suggests that it may be appropriate for the bill to be amended to provide that directions made under subclause 14(1) are subject to disallowance. The committee also requests the minister's advice in relation to this matter.**

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62 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.

63 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).

64 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.

65 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.

## Significant matters in delegated legislation[66]

1.69 Subclause 80(1) provides that Creative Australia must not, without the written approval of the minister, acquire or dispose of any property, right or privilege, or enter into a contract for the construction of a building for Creative Australia, exceeding in amount or value the amount mentioned in subclause 80(2). Subclause 80(2) provides that the amount available to Creative Australia is either $5 million or any other amount prescribed by the rules.

1.70 Where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. A legislative instrument made by 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 a financial limit on transactions entered into by Creative Australia may be one such significant matter.

1.71 In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow the rules to prescribe any amount for the purposes of Creative Australia's financial transactions.

**1.72 In light of the above, the committee requests the minster's detailed advice as to why it is considered necessary and appropriate to leave a financial limit on transactions entered into by Creative Australia to delegated legislation rather than including it within the primary legislation.**

66 Subclause 80(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

# Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023[67]

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *Inspector-General of Live Animal Exports Act 2019* by expanding the existing office of the Inspector-General of Live Animal Exports to provide an enhanced focus on animal welfare. |
| **Portfolio** | Agriculture, Fisheries and Forestry |
| **Introduced** | House of Representatives on 24 May 2023 |

## Broad discretionary powers

### Privacy[68]

1.73 Proposed subsection 10(2A) provides that the Inspector-General of Animal Welfare and Live Animal Exports (Inspector-General) has the power to do all things necessary or convenient to be done for, or in connection with, the performance of the Inspector-General's functions. Under substituted subsection 10(1) one of the functions of the Inspector-General is to conduct reviews of the performance of functions, or exercise of powers, by livestock export officials under the animal welfare and live animal export legislation and standards in relation to the export of livestock.

1.74 Proposed subsection 10C(2) provides that the Inspector-General is not subject to direction in relation to: the conduct of a review including the terms of reference for a review; how a review is to be conducted; the timing of a review; the priority to be given to a review; or the content of a report.

1.75 Where a bill contains a 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.

1.76 The explanatory memorandum states that:

> This would ensure that the Inspector-General is empowered to do all things necessary or convenient to be done for, or in connection with, the

67 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 91.

68 Schedule 1, Part 1, proposed subsections 10(2A) and 10C(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (ii).

> performance of the Inspector-General's functions, without providing the Inspector-General with substantive powers outside of that scope.
>
> …
>
> In particular, proposed subsection 10C(2)…would clarify that the Inspector-General is not subject to direction in relation to (amongst other things) the conduct of a review (including its terms of reference, how it is to be conducted, its timing and priority) and the content of its report. In effect, this means that the Minister cannot direct the Inspector-General on how to conduct the review or to make a particular finding or include anything in a report of the review. The direction is limited only to requiring the Inspector-General to conduct a particular review.[69]

1.77 While acknowledging the importance of maintaining the independence of the office of the Inspector-General, the committee's concerns about the breadth of the Inspector-General's power to conduct reviews is heightened as it appears to include the collection, use or disclosure of personal information of livestock export officials which may trespass on an individual's right to privacy.

1.78 The committee commented on similar issues in relation to the Inspector-General of Live Animal Exports Bill 2019 in *Scrutiny Digest 5 of 2019*.[70] In that instance, the committee was concerned about the minister's rule-making power to prescribe the process to be followed by the Inspector-General in conducting a review and the content of reports of reviews. For example, it was unclear to the committee: whether certain information could be redacted or omitted from the report; whether livestock export officials have a right of reply to any criticisms contained in the report; and whether livestock export officials have a right to be heard prior to the publication of any criticisms contained in a report. The committee reiterates these same scrutiny concerns, in relation to the Inspector-General's discretionary power in the bill currently before the committee.

1.79 In relation to privacy considerations, the statement of compatibility states that:

> …the Inspector-General may require the provision of information or documents from various persons in undertaking any such review. As noted above, the Inspector-General must then publish a report for each review undertaken.
>
> …
>
> Any information or documentation, required by the Inspector-General to be provided in order to conduct a review, will be managed in compliance with both the Act and the *Privacy Act 1988*. The Act contains an existing

69 Explanatory memorandum, pp. 13 and 16.

70 Senate Standing committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2019* (11 September 2019) pp. 8–9.

> information management framework in sections 23 to 31 (inclusive) which would provide robust protection for information provided under or in accordance with the Act. In conducting any of the expanded reviews provided for in proposed new subsection 10(1) in the Bill, the collection of information that may be personal information is incidental to the Inspector-General's primary function of carrying out its reviews in order to meet the objects of the Act.[71]

1.80 While acknowledging that information or documentation required will be managed in compliance with the Act and the *Privacy Act 1988*, the committee remains concerned about the apparent lack of constraint in the bill on the Inspector-General's discretionary powers under subsections 10(2A) and 10C(2) and the implications this may have on a livestock official's privacy in reports published for each review.

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

- **what criteria or considerations exist that limit or constrain the exercise of the Inspector-General's broad discretionary powers in proposed subsections 10(2A) and 10C(2), including whether these are contained in law or policy; and**
- **whether the bill can be amended to include safeguards to protect the disclosure of livestock export official's personal information.**

71 Statement of compatibility, pp. 27–28.

# Migration Amendment (Giving Documents and Other Measures) Bill 2023[72]

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *Migration Act 1958* to improve and clarify the intended operation of the legislative framework for the giving of notices and other documents, and to remove restrictions on certain non-citizens from lodging a valid application for a protection visa. |
| **Portfolio** | Home Affairs |
| **Introduced** | House of Representatives on 24 May 2023 |

## Procedural fairness[73]

1.82 Item 24 of Schedule 1 to the bill seeks to insert proposed section 494E which provides when documents are taken to comply with content requirements. Content requirements are the relevant statutory requirements for including particular information in the document.[74] Where a document does not strictly comply with the relevant content requirements under the *Migration Act 1958* or the Migration Regulations 1994, the document is nevertheless taken to have complied with those requirements if there is substantial compliance and the failure to strictly comply does not, or is not likely to, cause substantial prejudice to the person's rights (including, but not limited to, rights to seek review in connection with the matter to which the document relates).[75]

1.83 As the operation of the provision means that it could validate a notice which does not state particular information required to be given to the person subject to the notice, the committee considers that this provision engages the right to procedural fairness.

1.84 Procedural fairness is a fundamental common law principle 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'). Where a bill limits or

72 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Giving Documents and Other Measures) Bill 2023, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 92.

73 Schedule 1, item 24, proposed section 494E. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

74 Proposed paragraph 494E(1)(b).

75 Item 24, proposed subsection 494E(2).

excludes the right to procedural fairness the committee expects the explanatory memorandum to the bill to address the following matters:

- 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.

1.85 The explanatory memorandum explains that the substantial compliance framework in proposed section 494E seeks to address instances where the minister has substantially complied with the relevant content related requirements for the document given, and the recipient suffers no substantial prejudice related to their rights.[76] In relation to the substantial prejudice test, the explanatory memorandum further explains:

> Even where a document substantially complied with the content requirements, paragraph 494E(2)(b) prevents the document from being taken to have complied with the content requirements where the person's rights…are substantially prejudiced. Use of the term 'substantial prejudice to the person's rights' is intended to be distinguishable from general disadvantage that may be suffered by the person.[77]

1.86 The statement of compatibility further explains that 'an example of where the threshold of substantial prejudice would not be met is where a document may give rise to some level [of] confusion on the part of the recipient, where that confusion does not have any material consequences'.[78]

1.87 In both the bill and explanatory memorandum, examples are provided where documents would be considered to either comply or not comply with the content requirements.[79] The committee considers that while the examples are helpful in understanding the operation of the provision to some degree, they are examples where it is clear that there has been no material prejudice at all. The committee considers that the current test of 'substantial prejudice' suggests a qualitative assessment of the extent of prejudice and thus may extend beyond the examples given which are limited to instances of no material prejudice.

1.88 The committee considers that it may be appropriate to narrow the statutory language to frame the test in terms of 'material prejudice' rather than 'substantial prejudice'. In the context of judicial review applications, the High Court of Australia has developed a narrowly confined presumption that immaterial errors (errors which could have made no difference to the decision that was made in the circumstances

76 Explanatory memorandum, p. 13.

77 Explanatory memorandum, p. 14.

78 Statement of compatibility, p. 27.

79 Explanatory memorandum, pp. 16-17.

that it was made) will not be invalidating errors.[80] In the context of the fair hearing rule, this approach encompasses the notion that there will be no breach without a 'practical injustice'.[81] A test of 'material prejudice' would, in the view of the committee, be more narrowly directed and better aligned with the accepted judicial approach to immaterial error by asking whether or not the error could have made *no difference* to any adverse effect that might, or has been occasioned by, the error in the notice.

**1.89 The committee requests the minister's detailed advice as to whether consideration has been given to framing the test of complying with content requirements in proposed section 494E in terms of the materiality of the error and, if not, why it is considered necessary and appropriate to adopt a broader standard than what has been considered by the courts to result in jurisdictional error.**

80 *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34, [72].

81 See the discussion in *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40.

# Veterans' Affairs Legislation Amendment (Miscellaneous Measures No. 2) Bill 2023[82]

| | |
|---|---|
| **Purpose** | This bill seeks to amend the following veterans' affairs legislation to modernise and streamline its operation:<br>• *Veterans' Entitlements Act 1986*;<br>• *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*; and<br>• *Military Rehabilitation and Compensation Act 2004*. |
| **Portfolio** | Veterans' Affairs |
| **Introduced** | House of Representatives on 25 May 2023 |

## Instruments not subject to an appropriate level of parliamentary oversight[83]

1.90 Item 1 of Schedule 2 to the bill seeks to substitute subsection 8(8AC) of the *Social Security Act 1991* (Social Security Act) to provide that the Secretary of the Employment Department (the Secretary) may, by notifiable instrument, determine programs to be employment programs for the purposes of paragraphs 8(8)(zv) and (zw) of the Social Security Act and paragraphs 5H(8)(zzf) and (zzg) of the *Veterans' Entitlements Act 1986* (Veterans' Entitlements Act). The effect of determining a program to be an employment program is that income generated by that program will not be considered income for income testing purposes under these Acts.

1.91 The power to determine programs to be employment programs under the Social Security Act is not a new power. Subsection 8(8AC) currently allows the Secretary to make determinations in relation to employment programs as exempt income for the purposes of the Social Security Act. However, this provision seeks to extend this arrangement regarding what is considered income to eligible veterans under the Veterans' Entitlements Act.

1.92 Item 2 of Schedule 2 to the bill seeks to insert paragraphs 5H(8)(zzf) and (zzg) into the Veterans' Entitlements Act to provide that a payment made by the Commonwealth (or a state or territory) to an individual under a program that is established by the Commonwealth (or a state or territory), and is determined in an instrument under subsection 8(8AC) of the Social Security Act to be an employment

82 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Veterans' Affairs Legislation Amendment (Miscellaneous Measures No. 2) Bill 2023, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 93.

83 Schedule 2, item 1, proposed subsection 8(8AC). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

program, is not considered income in relation to a person for the purposes of the Veterans' Entitlements Act.

1.93 As instruments made under subsection 8(8AC) are specified to be notifiable instruments, they are not subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments. As such, there is no parliamentary scrutiny of notifiable instruments. Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to include a justification for why instruments made under subsection 8(8AC) are not legislative in character. The explanatory memorandum provides no justification as to why these instruments should be notifiable rather than legislative.

1.94 The committee previously commented on the *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Act 2022*, which introduced the power for the Secretary to determine programs to be employment programs by notifiable instrument.[84] In *Scrutiny Digest 11/2021*, the committee considered that the minister had not sufficiently justified why the instrument was a notifiable instrument and considered that the bill should be amended to provide that instruments made under subsection 8(8AC) are legislative instruments to ensure that they are subject to appropriate parliament oversight.[85]

1.95 Noting the previous correspondence on this issue, the committee expresses its disappointment that subsection 8(8AC) of the Social Security Act is not proposed to be amended such that determinations made are legislative instruments, and that no justification is included in the explanatory memorandum as to why it is considered appropriate that the instruments are notifiable instruments.

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

- **why it is considered appropriate that instruments made under subsection 8(8AC) of the *Social Security Act 1991* are notifiable instruments; and**
- **whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

84 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021* (16 June 2021) pp. 43-44*, Scrutiny Digest 10 of 2021* (13 July 2021) pp. 59-60, and *Scrutiny Digest 11 of 2021* (4 August 2021) pp. 28-30.

85 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2021* (4 August 2021) p. 30.

# Private senators' and members' bills that may raise scrutiny concerns[86]

1.97 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 |
|---|---|---|
| **Criminal Code Amendment (Prohibition of Nazi Symbols) Bill 2023 (No. 2)** | Schedule 1, item 1, proposed subsection 81.1(1) | The provisions may raise scrutiny concerns under principle (i) in relation to significant penalties which have not been adequately justified within the explanatory memorandum. |
| | Schedule 1, item 1, proposed subsection 81.1(3) | The provision may raise scrutiny concerns under principle (i) in relation to the reversal of the evidential burden of proof. |
| **Defence Capability Assurance and Oversight Bill 2023** | Clause 58 | The provision may raise scrutiny concerns under principle (i) in relation to procedural fairness. |
| | Clause 62 | The provision may raise scrutiny concerns under principle (v) in relation to documents not required to be tabled in the Parliament. |
| | Subclauses 85(1), 86(1), 86(4), 86(6), 88(1) and clause 87 | The provisions may raise scrutiny concerns under principle (i) in relation to significant penalties which have |

86 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 6 of 2023*; [2023] AUSStaCSBSD 94.

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|---|---|
| | not been justified within the explanatory memorandum. |
| Clause 105 | The provision may raise scrutiny concerns under principle (i) in relation to immunity from civil penalty. |

# Bills with no committee comment[87]

1.98 The committee has no comment in relation to the following bills which were introduced into the Parliament between 9 May – 1 June 2023:

- Acts Interpretation Amendment (Aboriginality) Bill 2023
- Appropriation (Parliamentary Departments) Bill (No. 1) 2023-2024
- Appropriation (Parliamentary Departments) Bill (No. 2) 2022-2023
- Australian Organ and Tissue Donation and Transplantation Authority Amendment (Disclosure of Information) Bill 2023
- Broadcasting Services Amendment (Prohibition of Gambling Advertisements) Bill 2023
- Creative Australia (Consequential and Transitional Provisions) Bill 2023
- Customs Tariff Amendment (Product Stewardship for Oil) Bill 2023
- Defence Legislation Amendment (Naval Nuclear Propulsion) Bill 2023
- Excise Tariff Amendment (Product Stewardship for Oil) Bill 2023
- Family Assistance Legislation Amendment (Child Care Subsidy) Bill 2023
- Health Insurance Amendment (Professional Services Review Scheme) Bill 2023
- Social Services and Other Legislation Amendment (Strengthening the Safety Net) Bill 2023
- Statute Law Amendment (Prescribed Forms and Other Updates) Bill 2023
- Student Loans (Overseas Debtors Repayment Levy) Amendment Bill 2023
- Trade Support Loans Amendment Bill 2023
- Treasury Laws Amendment (2023 Measures No. 2) Bill 2023

87 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 95.

# Commentary on amendments and explanatory materials[88]

**Public Interest Disclosure Amendment (Review) Bill 2022**

1.99 On 10 May 2023, Senator Watt tabled a replacement explanatory memorandum to the bill.

1.100 **The committee thanks the minister for providing the replacement explanatory memorandum, which appears to address the committee's scrutiny concerns relating to the broad delegation of administrative powers or functions.**[89]

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1.101 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 2023;[90]
- Jobs and Skills Australia Amendment Bill 2023.[91]

88 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 96.

89 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 33–35; and
Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2023* (8 March 2023) pp. 52–55.

90 On 10 May 2023, the Minister for Education (Hon Jason Clare MP) circulated a supplementary explanatory memorandum to the bill.

91 On 11 May 2023, 2 Government amendments were agreed in the House. Additionally, the Minister for Skills and Training (Hon Brendan O'Connor MP) presented a supplementary explanatory memorandum 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.

## Australian Security Intelligence Organisation Amendment Bill 2023[1]

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| **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 |
| **Bill status** | Before the House of Representatives |

### Availability of merits review[2]

2.2 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 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 97.

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).

### *Internal review*

*Adequacy of internal review*

2.3 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.

2.4 In *Scrutiny Digest 5 of 2023* the committee requested the minister's 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.[3]

*Access to internal review*

2.5 The committee further noted 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]

2.6 In *Scrutiny Digest 5 of 2023* the committee requested the minister's 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.[5]

### *Minister for Home Affairs' response*[6]

2.7 In relation to the seniority of the reviewer, the minister for Home Affairs (the minister) advised that the sensitivity and complexity of the matter will determine the level of the original delegate and in some circumstances, a first instance decision may be made at the most senior levels where only a few individuals have comparable seniority. The minister advised that while decisions would ordinarily be reviewed by a person at least as senior as the original decision maker, the sensitivity and complexity of the matter will determine the appropriate level of the alternate delegate.

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3 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) p. 2.

4 Proposed subsection 82H(3).

5 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 2–3.

6 The minister responded to the committee's comments in a letter dated 1 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.8 In relation to access to internal review 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, the minister advised that the bill has been drafted to balance access to review rights with the protection of sensitive capabilities and operations. The minister advised that the Protective Security Policy Framework requires a person to be an Australian citizen to be eligible for a security clearance and sponsoring agencies may, on a case-by-case basis and subject to annual review, seek an eligibility waiver to seek a security clearance for a non-citizen. The minister further advised that there is a heightened risk that persons engaged in these circumstances may pose in relation to espionage and foreign interference, including that these persons may be exploited by foreign powers and their proxies. The minister advised that this exception is narrow by design so as to only apply in a limited number of cases where this risk is highest.

***Committee comment***

2.9 The committee thanks the minister for this response.

2.10 The committee notes the minister's advice that the sensitivity and complexity of a matter will determine the level of the original delegate and the person reviewing a decision. While the committee notes there may be few individuals of comparable seniority where a first instance decision is made at a senior level, the committee considers it appropriate – particularly given the potential for the process of external AAT review to exclude or limit aspects of an individual's right to a fair hearing – that the individual remaking the decision be at least of the same classification level as the original decision-maker.

2.11 In relation to access to internal merits review, the committee notes the minister's view that access to review rights has been appropriately limited for this cohort given the increased security risk posed by individuals who are not Australian citizens, or who are not residing in Australia, and are engaged or proposed to be engaged for duties outside of Australia.

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

- **providing for internal merits review where there is no requirement that the decision be reconsidered by an individual at the same classification level or higher; and**
- **not providing access to internal review for individuals who are not Australian citizens or who do not reside in Australia, and who are engaged or proposed to be engaged for duties outside of Australia.**

2.13 **The committee draws this matter to the attention of the Parliamentary Joint Committee on Intelligence and Security.**

### *External review*

*Access to external review*

2.14 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 subsection 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.

2.15 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.

2.16 In *Scrutiny Digest 5 of 2023* the committee requested the minister's 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]

### *Minister for Home Affairs' response*[8]

2.17 The minister advised that proposed subsection 83(2) mirrors the provision excluding this category of persons from internal review and is in recognition of the heightened risk that persons engaged in these circumstances may pose in relation to espionage and foreign interference. The minister advised that similarly, but to a lesser extent, the threats posed are higher for new applicants who do not have a security clearance and are not existing Commonwealth employees, as such applicants do not yet have a sufficient understanding of their security obligations and may not have

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 3–4.

8 The minister responded to the committee's comments in a letter dated 1 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

participated in security awareness training. The minister advised that because of this, this cohort is provided with independent review as an alternate review pathway.

2.18 The minister further advised that the Office of National Intelligence (ONI) will be responsible for uplifting the insider threat capability of Commonwealth agencies through the Quality Assurance Office, and this will assist sponsoring agencies in ensuring that their applicants for highest-level security clearances have a sufficient understanding of their security obligations.

***Committee comment***

2.19 The committee thanks the minister for this response.

2.20 The committee notes the minister's advice that this cohort of individuals is considered to pose a higher risk to espionage and foreign interference, and that similarly these threats are considered higher for new applicants who are not existing Commonwealth employees. Nevertheless, as discussed below, it is unclear to the committee whether independent review offers an effective alternate review pathway, and therefore the committee is particularly concerned about the lack of external review offered to individuals who are Australian citizens not residing in Australia and who are engaged or proposed to be engaged in duties outside of Australia, and individuals who do not currently hold a security clearance or who are not Commonwealth employees.

2.21 The committee also notes the minister's advice regarding ONI's role in ensuring applicants for highest-level security clearances have a sufficient understanding of their security obligations. However, this reply does not indicate whether consideration has been given to a process being developed to ensure all Australian citizens who wished to seek external merits review were appropriately apprised of their security obligations.

2.22 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of excluding 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.**

2.23 **The committee draws this matter to the attention of the Parliamentary Joint Committee on Intelligence and Security.**

*Adequacy of external review – broad discretionary power*[9]

2.24 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.

2.25 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.[10]

2.26 In *Scrutiny Digest 5 of 2023* the committee requested the minister's 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.[11]

***Minister for Home Affairs' response***[12]

2.27 The minister advised that the 'exceptional circumstances' threshold ensures that this power will be used sparingly in respect of decisions or matters raising grave concerns about the decision or assessment prejudicing security. The minister further advised that:

> An example of such exceptional circumstances would be if ASIO had identified that the applicant was assisting foreign powers and their proxies seeking to use a merits review process to identify sensitive information, methods, or capabilities, including potentially the identities of ASIO officers

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9 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).

10 Proposed subsection 83E(2).

11 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 5–6.

12 The minister responded to the committee's comments in a letter dated 1 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

involved in any proceedings. Introducing further prescription about the application of this power would limit the utility of a power designed to protect Australia's national interest from grave threats to security. A decision to issue a conclusive certificate would also be subject to judicial review.

***Committee comment***

2.28 The committee thanks the minister for this response.

2.29 The committee notes the minister's advice that conclusive certificates will only be issued sparingly where there are 'exceptional circumstances' and that prescribing the application of this power would limit its utility. The committee remains unclear as to why further guidance in relation to the exercise of this power cannot be provided for in the bill and does not consider that the response has satisfactorily explained why it is necessary and appropriate for the minister to have such a broad discretionary power to issue conclusive certificates.

2.30 While a decision to issue a conclusive certificate is subject to judicial review, the committee notes that the grounds on which such review is possible are tightly limited in the context of national security decision-making, meaning that judicial review is in most instances of limited practical utility.

2.31 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the minister with a broad discretionary power to issue a conclusive certificate, in circumstances where there is little guidance or constraint on the exercise of this power.**

2.32 **The committee draws this matter to the attention of the Parliamentary Joint Committee on Intelligence and Security.**

*Adequacy of external review – procedural fairness; broad discretionary power*[13]

2.33 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.

13 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).

2.34 A similar power is proposed in proposed subsections 83C(6) and 39BA(11).

2.35 In *Scrutiny Digest 5 of 2023* the committee requested the minister's 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.[14]

***Minister for Home Affairs' response***[15]

2.36 The minister advised that the review framework in the bill has been designed to recognise the impact a prejudicial security clearance outcome can have on an individual and their need to access information to understand that outcome. The minister advised the bill seeks to balance these matters with the requirements of security, including the possibility that hostile foreign powers and their proxies will exploit any review rights. The minister advised that it is considered that the current review framework achieves this outcome most effectively and that the proposed certificates to withhold notice or statements of grounds are highly limited and contain thresholds commensurate with the potential adverse impact on the applicant.

2.37 The minister advised that the threshold for withholding notice of a prejudicial security clearance suitability assessment from an applicant is that it is 'essential to the security of the nation', which is a high threshold in recognition of the potentially adverse impact this may have. The minister also advised that the bill includes a safeguard that the minister must consider whether to revoke a certificate if it remains in force either 12 months after it was given or at each 12-month period after the minister last considered whether to revoke it. The minister further advised that the threshold for withholding all or part of the statement of grounds for a prejudicial security clearance suitability assessment or security clearance decision from an applicant is 'prejudicial to the interests of security' and advised that this allows the

14 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 6–9.

15 The minister responded to the committee's comments in a letter dated 1 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

protection of the classified information included in such assessments, where security concerns would arise should the information be disclosed to the affected person.

***Committee comment***

2.38 The committee thanks the minister for this response.

2.39 The committee notes the minister's advice that the withholding of notice of a prejudicial security clearance suitability assessment, or all or part of the statement of grounds for a prejudicial security clearance suitability assessment or security clearance decision, is considered appropriately balanced between the outcome on an individual and the requirements of national security. However, the committee does not consider that this response has adequately addressed what other procedural mechanisms may be available or have been considered for an affected individual. While balancing the rights of an individual with national security is necessary, the response has not explained what has been considered to redress the denial of procedural fairness for an individual.

2.40 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the minister with broad discretionary powers (which may be exercised to severely limit the capacity of applicants to make their case to the Administrative Appeals Tribunal) to:**

- **withhold notice of a prejudicial security clearance suitability assessment from an applicant; and**
- **withhold all, or part of, the statement of grounds for a prejudicial security clearance suitability assessment or security clearance decision from an applicant.**

2.41 **The committee draws this matter to the attention of the Parliamentary Joint Committee on Intelligence and Security.**

***Independent review***

2.42 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.[16] 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.[17]

16 Proposed subsection 83EA(1).

17 Proposed subsection 83EA(2).

2.43 In *Scrutiny Digest 5 of 2023* the committee requested the minister's 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.

2.44 The committee requested 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.[18]

### *Minister for Home Affairs' response*[19]

2.45 In relation to whether AAT review could replace independent review, the minister advised that the rationale for limiting external review rights to existing security clearance holders or Commonwealth employees is in response to the complex, challenging and changing security environment that is confronting Australia, and that the threats posed are higher than at any time in Australia's history and are higher for new applicants. The minister further advised that such applicants may not yet have a sufficient understanding of their security obligations and may unwittingly or knowingly already be vulnerable to approaches from adversaries which they are less able to manage. The minister advised that the risks associated with the threat posed by espionage and foreign interference can be mitigated through independent review and is the most appropriate review mechanism for this cohort.

2.46 In relation to the standard of review for independent review, the minister advised that the 'reasonably open' test has been deliberately chosen to reflect that the independent reviewer's role is to provide advice to ASIO and not to replace ASIO as a decision-maker, given the depth of ASIO's knowledge and expertise, including ASIO's security intelligence functions, holdings and capabilities.

2.47 In relation to whether the bill could be amended to require the independent reviewer to consider certain cases, the minister advised that this approach seeks to maximise the independent reviewer's ability to account for all factors they consider relevant in making such a decision, and to ensure the independent reviewer has

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18 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 9–11.

19 The minister responded to the committee's comments in a letter dated 1 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

flexibility to manage their caseload. The minister advised it is appropriate that the independent reviewer has broad discretion to decide to not take on a matter if it is vexatious or if the facts of the case otherwise do not merit further review.

2.48 In relation to the independent reviewer, the minister advised that safeguards are in place to ensure their independence, including that the independent reviewer is appointed by the Attorney-General who must be satisfied the person has appropriate skills or qualifications and the highest level of security clearance. The minister advised that requiring the highest level of security clearance will ensure high levels of integrity and that the legislation would also provide that the reviewer cannot be a current, or former, ASIO employee or affiliate. The minister further advised that terms of engagement would govern the independent reviewer's conduct and include a framework for managing conflicts of interest and termination of the independent reviewer's engagement.

***Committee comment***

2.49 The committee thanks the minister for this response.

2.50 The committee notes the minister's advice that AAT review is not considered appropriate for this cohort given the heightened risks to security and that independent review is considered the most appropriate review mechanism. The committee further notes the minister's advice that the 'reasonably open' test has been chosen as the independent reviewer's function is to provide advice and not remake the decision. As the independent reviewer's function is to provide non-binding advice on cases the reviewer has discretion to provide advice on, it is not clear to the committee how independent review can be considered an effective review mechanism.

2.51 The committee notes the minister's advice that an independent reviewer should have broad discretion about which cases they choose to review to manage their caseload and also so they do not need to take on a matter if it is vexatious or if the facts of the case otherwise do not merit further review. The committee considers this discretion to be overbroad and not satisfactorily justified, and considers it would be more appropriate if the independent reviewer was required to consider cases when requested to do so unless certain circumstances exist, for example, if the independent reviewer is satisfied that the matter is vexatious.

2.52 The committee notes the minister's advice that safeguards are in place in the bill to ensure the independence of the independent reviewer and, further, that terms of engagement would govern the independent reviewer's conduct. The committee considers this response provides no further information as to why these safeguards in the bill alone are considered appropriate in the circumstances and whether they adequately afford independence of the independent reviewer. It is also unclear to the committee how the terms of engagement would relate to the independence of the independent reviewer.

2.53 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the independent review framework.**

2.54 **The committee draws this matter to the attention of the Parliamentary Joint Committee on Intelligence and Security.**

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## Broad delegation of administrative powers or functions
## Broad powers authorising use of administrative powers or functions[20]

2.55 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) employee.[21] 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.[22]

2.56 In *Scrutiny Digest 5 of 2023* the committee requested the minister's 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.[23]

### *Minister for Home Affairs' response*[24]

2.57 The minister advised that:

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20 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).

21 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).

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

23 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 11–13.

24 The minister responded to the committee's comments in a letter dated 1 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

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

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

***Committee comment***

2.59 The committee thanks the minister for this response.

2.60 The committee notes the minister's advice that the delegation of powers is necessary to respond flexibly to manage a high volume of decisions and that secondees and external service providers will be required to possess the appropriate training, qualifications, skills and/or experiences and are further bound by ministerial guidelines which include various requirements regarding ASIO's treatment of privacy information. While the committee considers it necessary to ensure that delegates and individuals authorised to exercise various powers in the bill have appropriate training, qualifications, skills and/or training, the committee is nevertheless concerned about the reliance on non-legislative (and therefore non-enforceable) policy guidance to ensure the adequate protection of privacy information by secondees and external service providers.

2.61 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of delegating, or authorising the use of, various powers in the bill to ASIO affiliates.**

2.62 **The committee draws this matter to the attention of the Parliamentary Joint Committee on Intelligence and Security.**

# Crimes and Other Legislation Amendment (Omnibus) Bill 2023[25]

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| **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. |
| **Bill status** | Before the House of Representatives. |

## Broad discretionary powers
## Procedural fairness[26]

2.63 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.

2.64 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.[27]

2.65 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.

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25 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Crimes and Other Legislation Amendment (Omnibus) Bill 2023 *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 98.

26 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).

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

2.66 In *Scrutiny Digest 5 of 2023*, the committee noted 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 to refuse consent. The committee also noted its concerns are heightened in this instance as it appears that requirements to provide procedural fairness are limited within the bill.

2.67 The committee requested the Attorney-General's 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.[28]

***Attorney-General's response***[29]

2.68 The Attorney-General advised that there are a range of mandatory threshold conditions under the ITP Act which must be satisfied before the Attorney-General can decide whether or not to consent to a transfer from Australia, which include that: the prisoner is eligible for transfer from Australia; the relevant transfer conditions are satisfied; and the transfer of the prisoner is not likely to prevent the prisoner's surrender to an extradition country. The Attorney-General also advised that the Attorney-General has a residual broad discretion to consent or refuse a transfer from Australia, and that the ITP Statement of Policy sets out factors that the Attorney-General may consider when making such a decision. The Attorney-General further advised that the ITP Statement of Policy is publicly available and is provided to the prisoner at the time their application is received. The prisoner is therefore provided with an opportunity to make representations to the Attorney-General on the factors listed in the policy before a decision is made.

2.69 The Attorney-General advised that it would not be possible for the legislation to deal exhaustively with all the factors that may arise in individual cases. As a result, it is appropriate and important for robust decision-making that the Attorney-General retains a broad residual discretion and be provided with flexibility when making

28 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 14–17.

29 The minister responded to the committee's comments in a letter dated 19 May 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.

decisions to provide or refuse consent to transfers, while maintaining the core procedural fairness protections.

2.70 Further, as a decision on a transfer application may have broader implications for Australia's relationship with a foreign country and involve consideration of political and diplomatic sensitivities, the Attorney-General advised that it is more appropriate to grant a general discretion in legislation which is supplemented by a policy that can be reviewed regularly and amended expeditiously. This ensures it remains fit for purpose and responsive to individual cases and broader trends across applications.

2.71 The Attorney-General advised that notifying an applicant is not solely procedural and that the explanatory memorandum sets out the process the department practically undertakes to afford procedural fairness to applicants under proposed section 19.

***Committee comment***

2.72 The committee thanks the Attorney-General for this response.

2.73 The committee notes the Attorney-General's advice that the ITP Act includes a number of conditions the Attorney-General must be satisfied of before consenting to a transfer, and that there are additional considerations set out in the ITP Statement of Policy which is provided to the prisoner. The committee notes that the explanatory memorandum provides detail as to the process undertaken to afford procedural fairness.

2.74 While the committee considers it would be preferable that the matters that the Attorney-General may consider when making a decision be set out in legislation, rather than a policy document, the committee notes the Attorney-General's advice that procedural fairness is afforded to the prisoner throughout the process and that notifying applicants is not solely procedural.

2.75 **In light of the information provided by the Attorney-General, the committee makes no further comment on this matter.**

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## Merits review[30]

2.76 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.

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

2.77 The bill does not identify whether a decision by the Attorney-General to refuse transfer to or from Australia is a reviewable decision.

2.78 In *Scrutiny Digest 5 of 2023* the committee requested 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 merits review*?[31]

***Attorney-General's response***[32]

2.79 The Attorney-General advised that independent merits review is not available for decisions made under proposed subsection 19(1), which includes the decision to refuse consent to a transfer of a prisoner from Australia. The Attorney-General advised this is consistent with other decisions under the ITP Act to provide or refuse consent to transfers to or from Australia and is consistent with comparable decisions made in respect of interstate transfer of Commonwealth prisoners under the *Transfer of Prisoners Act 1983* and sentencing and parole of federal offenders under the *Crimes Act 1914*.

2.80 The Attorney-General further advised that such a decision: involves considering the broader policy factors listed in the ITP Statement of Policy; has the potential to impact Australia's relations with other countries; and is similar to the examples of decisions that may justify excluding merits review cited in Chapter 4 of the Administrative Review Council's guide under the 'policy decision of a high political content' exception.

***Committee comment***

2.81 The committee thanks the Attorney-General for this response.

2.82 The committee notes the Attorney-General's advice that the lack of merits review for transfer decisions is consistent with other decisions under the ITP Act and prisoner transfer processes within Australia. The committee notes that consistency with other legislation is generally not considered a sufficient justification, in itself, for excluding merits review.

2.83 The committee notes the Attorney-General's advice that the kinds of decisions being made have broader implications for Australia's international relations and may therefore be considered 'policy decisions of a high political content', likely making

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31 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 17–18.

32 The minister responded to the committee's comments in a letter dated 19 May 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.

them appropriate for exclusion from merits review, in line with the Administrative Review Council's guide.

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

2.85 **In light of the information provided by the Attorney-General, the committee makes no further comment on this matter.**

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## Merits review[33]

2.86 Schedule 9 to the bill seeks to amend 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 review of the decision.

2.87 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.

2.88 In *Scrutiny Digest 5 of 2023* the committee requested 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).[34]

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

34 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 18–19.

***Attorney-General's response***[35]

2.89 The Attorney-General advised that under the *Witness Protection Act 1994*, some decisions made personally by the Commissioner are not subject to merits review, and that consistent with this, a decision made personally by the Commissioner under new subsection 17A(1) should not be subject to merits review. This is because decisions to suspend the provision of protection and assistance at the request of the participant are unlikely to have a significant adverse impact on the rights and interests of the individual.

2.90 The Attorney-General further advised that it is appropriate to provide for internal review of suspension decisions made under new section 17B of the bill, where protection and assistance may be suspended as a result of the actions or intended actions of the participant. The Attorney-General undertook to amend the bill to ensure these decisions may be subject to internal review.

***Committee comment***

2.91 The committee thanks the Attorney-General for this response.

2.92 **The committee welcomes the Attorney-General's undertaking to amend the *Witness Protection Act 1994* to provide for internal review of decisions made personally by the Commissioner under proposed section 17B.**

2.93 **In light of the information provided by the Attorney-General, the committee makes no further comment on this matter.**

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## Administrative power not defined with sufficient precision[36]

2.94 Item 5 of Schedule 9 to the bill 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 Assistant Commissioner may sub-delegate the power to a Commander or Superintendent in the Australian Federal Police (AFP).

2.95 While 'Commissioner' and 'Deputy Commissioner' are both defined terms in the *Witness Protection Act 1994*, 'Assistant Commissioner' does not appear to be defined.

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35 The minister responded to the committee's comments in a letter dated 19 May 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.

36 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).

2.96 In *Scrutiny Digest 5 of 2023* the committee requested 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.[37]

***Attorney-General's response***[38]

2.97 The Attorney-General advised that in response to the committee's comments, the bill will be amended to provide for a definition of 'Assistant Commissioner' in the *Witness Protection Act 1994*. This amendment would clarify that the term 'Assistant Commissioner' is taken to mean an Assistant Commissioner of the AFP, consistent with the definitions of 'Commissioner' and 'Deputy Commissioner'.

***Committee comment***

2.98 The committee thanks the Attorney-General for this response.

2.99 **The committee welcomes the Attorney-General's advice that the bill will be amended to define the term 'Assistant Commissioner' in the *Witness Protection Act 1994*.**

2.100 **In light of the information provided by the Attorney-General, the committee makes no further comment on this matter.**

37 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 19–20.

38 The minister responded to the committee's comments in a letter dated 19 May 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.

# Education Legislation Amendment (Startup Year and Other Measures) Bill 2023[39]

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *Higher Education Support Act 2003* (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.<br>The bill also seeks to amend the *Australian Research Council Act 2001* to apply current indexation rates to existing appropriation amounts and to insert a new funding cap for the financial year commencing 1 July 2025. |
| **Portfolio** | Education |
| **Introduced** | House of Representatives on 9 March 2023 |
| **Bill status** | Before the Senate |

## Availability of merits review[40]

2.1 Item 25 of Schedule 1 to the bill seeks to amend the *Higher Education Support Act 2003* to introduce Part 3-7 Startup Year Help (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.

2.2 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.

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39 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 6 of 2023*; [2023] AUSStaCSBSD 99.

40 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) .

2.3 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 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.[41]

2.4 The person is also discharged from all liability to pay or account for the amount of SY-HELP assistance received.[42] 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.

2.5 The committee initially scrutinised this bill in *Scrutiny Digest 3 of 2023* and requested the minister's advice as to why independent merits review is not available in relation to a decision made under subsection 128B 30(6) and section 128E-30.[43] The committee considered the minister's response in *Scrutiny Digest 5 of 2023* and requested 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.[44]

### *Minister for Education's response*[45]

2.6 The Minister for Education (the minister) advised that a decision under proposed subsection 128B-30(6) is not reviewable in order to ensure consistency with

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

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

43 Senate Standing Committee for Scrutiny of Bills, *Scrutiny Digest 3 of 2023* (22 March 2023) pp. 1–3.

44 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 56–60.

45 The minister responded to the committee's comments in a letter dated 26 May 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

other Higher Education Loans Program (HELP) assistance available. The minister also advised that decisions under proposed subsection 128B-30(6) are procedural in nature and involve the allocation of finite resources between competing applicants and consequently, is not suitable for merits review. Further, the time to undertake a particular Accelerator Program Course would likely have passed by the time a decision under subsection 128B-30(6) was reconsidered.

2.7 With regard to proposed section 128E-30, the minister advised that decisions under this section are unsuitable for merits review as the Secretary's power to reverse an amount of SY-HELP is dependent on an individual's factual circumstances being such that the person is not eligible to receive SY-HELP assistance, and it is therefore an automatic decision. The minister advised that the Secretary does not have discretion to qualitatively assess the facts of a particular matter. For example, if an individual does not meet citizenship or residency requirements, misses the census date or otherwise does not meet other eligibility criteria, the Secretary must reverse the SY-HELP loan.

***Committee comment***

2.8 The committee thanks the minister for this response.

2.9 The committee notes the minister's advice that, with regard to proposed subsection 128B-30(6), decisions made under this subsection are not suitable for merits review as these decisions are procedural in nature and involve the allocation of finite resources between competing applicants. The committee also notes the minister's advice that the decision is unsuitable for review as the time to undertake the course will likely have passed by the time the decision is considered.

2.10 It remains unclear to the committee how the decision under proposed subsection 128B-30(6) varies from other decisions under Part 3-7, which are considered suitable for merits review. It is the committee's understanding that other reviewable decisions under Part 3-7 would also involve the allocation of finite resources between applicants and the course would also likely have passed by the time the decision is reconsidered. Further, the committee remains concerned that a decision under this section is characterised as procedural in nature. As decisions under Part 3-7 are determinative of whether a student is able to receive an educational loan, in line with the Administrative Review Council's guidance document *What decisions should be subject to merit review?,* the committee considers that these decisions are substantive in nature.[46]

2.11 The committee notes the minister's advice that decisions under proposed section 128E-30 are not suitable for merits review as the Secretary's power to reverse

46 Administrative Review Council, *What Decisions Should be Subject to Merits Review*? (1999) [4.3]-[4.7].

a SY-HELP loan must be exercised if an applicant does not meet certain eligibility criteria.

2.12 The committee considers that, as a matter of typical statutory construction, for a decision-maker to be satisfied of something they are required to form a particular state of mind based on the evidence before them. In this case, the minister has advised that whether a person is eligible to receive SY-HELP assistance is a matter of fact and the Secretary does not have the discretion to qualitatively assess the facts. The committee therefore considers it necessary that the explanatory memorandum be updated to reflect the intended meaning of this provision.

2.13 **The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister regarding proposed section 128E-30 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*).**

2.14 **The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not providing merits review in relation to decisions made under proposed subsection 128B-30(6) and proposed section 128E-30 of the *Higher Education Support Act 2003*.**

# Family Law Amendment Bill 2023[47]

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

## Reversal of the evidential burden of proof[48]

2.15 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. 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.

2.16 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 *Family Law Act 1975* 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 communication was in accordance with a direction of a court or the applicable Rules of Court.

2.17 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.

2.18 In *Scrutiny Digest 5 of 2023*, the committee requested the Attorney-General's advice as to why it is proposed to use offence-specific defences (which reverse the

47 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Family Law Amendment Bill 2023, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 100.

48 Schedule 6, item 6, proposed sections 114Q and 114R. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

evidential burden of proof) in relation to an offence under proposed subsections 114Q(2) and 114R(2).[49]

### *Attorney-General's response*[50]

2.19 The Attorney-General advised that the approval of a court permitting communication may, in some cases, not be contained within reported judgments or court orders. Instead, approval of the court may be provided in other forms of communication, including non-written forms, and may have been provided only to a party connected to proceedings and would therefore be peculiarly within the knowledge of the defendant. The Attorney-General advised that an example of this situation is a Registrar conducted Dispute Resolution Conference, where no transcript is recorded, and the conference is conducted in a closed environment and knowledge of any approval given in that context is likely to be restricted. In such a case, that knowledge is unlikely to be readily available to the prosecution and it is anticipated it would result in substantial cost for prosecutorial and investigating agencies to obtain the information due to the lack of visibility of all family court communication and the volume of materials that would need to be investigated to acquit the burden.

2.20 The Attorney-General advised that the explanatory memorandum will be amended to include the above advice and that further consideration will be given as to whether any amendment to the bill might be appropriate once the Senate Legal and Constitutional Affairs Legislation Committee has concluded its inquiry into the bill.

### *Committee comment*

2.21 The committee thanks the Attorney-General for this response.

2.22 The committee notes the Attorney-General's advice that there may be cases where approval of a court may not be readily available to the prosecution as the approval is in a non-written form and may have been provided only to the defendant. However, the committee notes that this is not the case in every instance and that only a portion of matters in the family court system may involve court approval that is provided in a non-written form and is not recorded by transcript. Where court approval is recorded by transcript, the committee considers it is likely that the prosecution will be able to readily access that information.

2.23 The committee reiterates that 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

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49 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 21–23.

50 The minister responded to the committee's comments in a letter dated 19 May 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

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.

2.24 While some matters heard by the family court may occur in a closed environment where a transcript is not produced and non-written orders are made, proposed subsections 114Q(1) and 114R(1) have been broadly drafted to apply in all instances where a person has communicated a family court matter to the public. The committee considers that the exceptions to these offences could be more specific to relate to matters where, for example, no transcript is made or non-written orders have been made, rather than reversing the evidential burden of proof in all instances where this information is available to the prosecution to establish.

2.25 **The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to offences under proposed subsections 114Q(2) and 114R(2) of the bill.**

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## Undue trespass on personal rights and liberties[51]

2.26 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). This has the effect of limiting private prosecutions to individuals who have received the written consent of the DPP.

2.27 In *Scrutiny Digest 5 of 2023*, the committee requested the Attorney-General's 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 DPP.

### *Attorney-General's response*

2.28 The Attorney-General advised that the requirement to seek the written consent of the DPP to commence prosecution is a prosecutorial safeguard. The Attorney-General advised that the right to private prosecution can be open to abuse and to the intrusion of improper personal or other motives. The potential for systems abuse is particularly important in the context of family law, where the incarceration of a parent may impact parental capacity and may lead to another party perpetrating systems abuse by seeking increased parenting time. The written consent of the DPP also ensures that prosecutorial discretion is exercised as parents in family law proceedings may inadvertently breach provisions that may not justify prosecution.

### *Committee comment*

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51 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Family Law Amendment Bill 2023, *Scrutiny Digest 6 of 2023*; [2023]

2.29 The committee thanks the Attorney-General for this response.

2.30 The committee notes the Attorney-General's advice that the prosecutorial safeguard of written consent from the DPP is required to prevent systems abuse as parties may commence private prosecutions for improper reasons.

2.31 Noting the Attorney-General's advice, the committee considers it would be appropriate to include this justification in the explanatory memorandum.

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

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

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## Significant matters in delegated legislation[52]

2.34 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.

2.35 The committee requested 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.

***Attorney-General's response***

2.36 The Attorney-General advised that it is not desirable for the bill to include a proposed fee or a limit on the fee that may be imposed. The Attorney-General advised that delegating the setting of fees to regulation enables such fees to be aligned with the future regulatory scheme as it is established and keep pace with industry changes and community expectations.

2.37 In response to the committee's request that the bill be amended to clarify that a fee must not amount to taxation, the Attorney-General advised that it is not necessary as the explanatory memorandum to the bill already provides that the fees proposed would reflect services provided to family report writers in connection with

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52 Schedule 7, item 4, proposed section 11K. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

their compliance, and that regulations would not establish fees to recover other costs associated with general administration of the regulatory scheme.

2.38 The Attorney-General further advised that the explanatory memorandum will be amended to clarify why it is not appropriate to include a limitation on the amount of the fee that may be imposed in the bill and to clarify that any fee imposed on a family report writer must not be such as to amount to a tax.

***Committee comment***

2.39 The committee thanks the Attorney-General for this response.

2.40 The committee notes the Attorney-General's advice that it would not be appropriate to amend the provision to include a proposed fee or a limit on the fee in the bill itself. The committee agrees with this approach and notes it did not expect such a provision to be included.

2.41 The committee also notes the Attorney-General's advice that rather than the bill stating that any fee made must not be such as to amount to taxation, it is sufficient that the explanatory memorandum be updated to provide greater clarity on this point. The committee welcomes the undertaking to amend the explanatory memorandum reflecting the advice provided by the Attorney-General.

2.42 While noting the minister's advice, the committee reiterates its view that this kind of guidance should be included on the face of the bill and that, at a minimum, the bill should include a provision stating that the fee must not be such as to amount to taxation. While as the Attorney-General has noted, there is no legal need to include such a provision, the committee considers that it is nonetheless important to include it to avoid confusion and to emphasise the point that the amount calculated under the regulations will be a fee and not a tax. In this regard, the committee notes the advice set out in the Office of Parliamentary Counsel Drafting Direction 3.6 which states that:

> AGS has advised that it is inherent in the concept of a 'fee' that the liability does not amount to taxation. However, it is quite common to put such a provision in anyway to avoid confusion and to emphasise the point that we are dealing with fees and not taxes. AGS has expressed the view that such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed.[53]

2.43 **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.**

53 Office of Parliamentary Counsel, *Drafting Direction 3.6*, October 2012, p. 38.

# Family Law Amendment (Information Sharing) Bill 2023[54]

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|---|---|
| **Purpose** | Introduced with the Family Law Amendment Bill 2023, the bill seeks to give effect to the National Strategic Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems by amending the *Family Law Act 1975*. It seeks to expand the framework for sharing 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. |
| **Portfolio** | Attorney-General |
| **Introduced** | House of Representatives on 29 March 2023 |
| **Bill status** | Before the House of Representatives |

## Significant matters in delegated legislation[55]

2.44 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 agency[56] to provide particulars of documents or information in child-related proceedings,[57] 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.[58] The court may also order that the information sharing agency provide the documents or information relating to those matters to the court.[59] Proposed subsection 67ZBI(1) provides that an information sharing agency must, when

54 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Family Law Amendment (Information Sharing) Bill 2023, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 101.

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

56 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.

57 Proposed subsection 67ZBD(1).

58 Proposed subsection 67ZBD(2).

59 Proposed subsection 67BZE(1).

providing particulars, documents or information to the court,[60] have regard to matters prescribed by the regulations.

2.45 While the explanatory memorandum to the bill provides detailed information about what the regulations are expected to include, the committee generally expects there to be appropriate safeguards within the primary legislation itself to guide and constrain the sharing of personal information.

2.46 In *Scrutiny Digest 5 of 2023* the committee requested 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.[61]

***Attorney-General's response***[62]

2.47 The Attorney-General advised that the bill contains a number of express protections which limit the shareability of highly sensitive information, including information which could pose a risk to safety if disclosed. The Attorney-General advised that these express provisions include:

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

2.48 The Attorney-General advised that these express protections will be complemented by the prescription of additional information sharing safeguards in the

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60 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.

61 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 26–28.

62 The minister responded to the committee's comments in a letter dated 19 May 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.

Family Law Regulations 1984. The Attorney-General advised that the inclusion of the information sharing safeguards within the regulations provides flexibility for amendments to reflect emerging best practices, if required, whilst still ensuring the proposed information sharing safeguards remain subject to sufficient parliamentary oversight and scrutiny.

2.49 The Attorney-General further advised that the review of the legislation, which will commence within 12 months of commencement of the bill, is expected to consider and provide advice on the inclusion of settled information sharing safeguards within primary legislation as part of any further legislative amendments identified.

***Committee comment***

2.50 The committee thanks the Attorney-General for this response.

2.51 The committee notes the Attorney-General's advice that the expected information sharing safeguard regulations are in addition to, and complement, the existing safeguards in the bill, and that the regulations are designed to provide flexibility to adapt the safeguards to emerging best practice.

2.52 The committee notes this explanation, and acknowledges the detail provided in the explanatory memorandum and in the Attorney-General's response about the expected content of information sharing safeguards in regulations. Nevertheless, the committee considers that the kinds of safeguards envisioned appear likely to be appropriately adapted and suitable for inclusion within the primary legislation.

2.53 The committee reiterates that 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 these safeguards could be included within the bill itself and provision could be made for regulations to include additional safeguards if considered necessary to remain up to date.

2.54 Nevertheless, the committee welcomes the information sharing safeguards that are included within the bill, the explanation in the explanatory memorandum about what the regulations are expected to include, and the Attorney-General's advice that the review of the legislation will include consideration of the inclusion of settled information sharing safeguards within primary legislation.

2.55 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including significant matters in delegated legislation.**

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

# Infrastructure Australia Amendment (Independent Review) Bill 2023[63]

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *Infrastructure Australia Act 2008* to clarify Infrastructure Australia's role, redefine Infrastructure Australia's functions and products and establish a new governance structure. |
| **Portfolio** | Infrastructure, Transport, Regional Development, Communications and the Arts |
| **Introduced** | House of Representatives on 22 March 2023 |
| **Bill status** | Before the House of Representatives |

## Tabling of documents in Parliament[64]

2.57 Item 4 of Schedule 1 to the bill seeks to replace sections 5A to 5C and add proposed sections 5D and 5E to the *Infrastructure Australia Act 2008* to clarify and update the functions of Infrastructure Australia. These functions include:

- conducting audits to determine the adequacy, capacity and condition of nationally significant infrastructure;[65]
- developing a national planning and assessment framework;[66]
- developing Infrastructure Priority Lists and Infrastructure Plans;[67] and
- providing advice on infrastructure matters.[68]

2.58 Some of these functions require the creation of documents and are coupled with requirements for this information to be published on the Infrastructure Australia website.

63 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Infrastructure Australia Amendment (Independent Review) Bill 2023, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 102.

64 Schedule 1, item 4, proposed sections 5A, 5B, 5C and 5D. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

65 Schedule 1, item 4, proposed subsection 5A(1).

66 Schedule 1, item 4, proposed subsection 5B(1).

67 Schedule 1, item 4, proposed subsections 5C(1) and 5C(3).

68 Schedule 1, item 4, proposed section 5D.

2.59 The bill does not require any of the documents created under proposed sections 5A-5D to be tabled in the Parliament.

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

- whether the bill can be amended to provide that the documents created under proposed sections 5A to 5D of the bill must be tabled in the Parliament; or
- if the minister considers these documents are not appropriate for tabling in the Parliament, whether a justification can be provided as to why it is appropriate that the documents are not tabled.[69]

### *Minister for Infrastructure, Transport, Regional Development, Communications and the Arts' response*[70]

2.61 The Minister for Infrastructure, Transport, Regional Development, Communications and the Arts (the minister) advised that the bill provides for Infrastructure Australia (IA) to create a wide range of documents that would give advice to the minister and the Commonwealth on nationally significant infrastructure. The minister noted that IA is an independent advisory body and does not represent the executive government's position, and is one source of information that may be considered by the government in making its decisions.

2.62 The minister further advised that IA will provide annual statements to the government and that this advice cannot be tabled given it informs deliberations of the Cabinet. The minister advised that tabling all of IA's advice has the potential to damage or prejudice the Commonwealth's negotiations with state and territory governments regarding priority projects for infrastructure investment.

2.63 The minister further noted that the bill requires publication of documents created by IA on its website and considered that this maintains an appropriate level of public transparency. The minister advised that the bill does not preclude the tabling of IA's reports or documents and therefore considered that the bill would not be improved by requiring IA's advice documents to be tabled in the Parliament.

### *Committee comment*

2.64 The committee thanks the minister for this response.

2.65 The committee notes the minister's advice that IA is an independent advisory body and may be one of multiple sources of information that may inform a

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69 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2023* (30 March 2023) pp. 3–4.

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

governmental decision. However, the committee does not consider the fact that IA is an independent body to be an adequate justification for not tabling documents provided by IA. The committee considers that documents that contain significant matters that can aid in debate may be appropriate to be tabled regardless of their origin.

2.66 The committee further notes the minister's advice that annual statements provided by IA to the government cannot be tabled as these statements inform deliberations of the Cabinet. The committee considers that where a document contains sensitive information it may be appropriate to redact information within the document, but the fact that a document may be considered by Cabinet is not a sufficient justification, in itself, for not requiring the document to be tabled.

2.67 The committee acknowledges that some (though not all) of these documents are required by the bill to be published on IA's website. Nevertheless, the committee reiterates its view that the process of tabling reports and other documents in the Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online.

2.68 In light of the above, the committee does not consider that the minister's response has adequately justified why documents produced by IA under proposed sections 5A-5D should not be required to be tabled in the Parliament.

2.69 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not requiring documents produced under proposed sections 5A, 5B, 5C and 5D to be tabled in the Parliament.**

# Social Services Legislation Amendment (Child Support Measures) Bill 2023[71]

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *Child Support (Assessment) Act 1989*, and the *Child Support (Registration and Collection) Act 1988*, to:<br>• extend the application of the Child Support Registrar's employer withholding collection powers;<br>• 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<br>• 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 |
| **Bill status** | Before the Senate |

## Coercive powers
## Conferral of broad discretionary powers[72]

2.70 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.

2.71 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

71 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 6 of 2023*; [2023] AUSStaCSBSD 103.

72 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).

country.[73] 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 Registrar considers appropriate,[74] or the person provides security for their return to Australia.[75]

2.72 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,[76] and
- the person has provided a security for their return to Australia.

2.73 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*.

2.74 In *Scrutiny Digest 5 of 2023* the committee requested the minister's advice as to 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'.[77]

### *Minister for Social Services' response*[78]

2.75 The minister for Social Services (minister) advised that the Department of Social Services will provide guidance as to how the Registrar should exercise their

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

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

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

76 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.

77 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 44–46.

78 The minister responded to the committee's comments in a letter dated 25 May 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

discretion in determining what an appropriate period is. This guidance will include a list of factors that will be set out in the Child Support Guide on 3 July 2023.

2.76 The minister further advised that, with regard to limiting the right to freedom of movement, the extent of the interference is marginal. The minister advised that a person affected by this measure is already subject to a departure prohibition order preventing them from departing Australia as they have persistently and without reasonable grounds failed to pay their child support liability.

***Committee comment***

2.77 The committee thanks the minister for this response.

2.78 The committee welcomes the minister's advice that the Department of Social Services will provide guidance as to how the Registrar should exercise their discretion by including a list of factors the Registrar must consider in determining what an appropriate period is. The committee notes that this guidance will be included in the Child Support Guide on 3 July 2023.

2.79 **The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister and a link to the updated Child Support Guide once it is available 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*).**

# Treasury Laws Amendment (2023 Measures No. 1) Bill 2023[79]

| | |
|---|---|
| **Purpose** | Schedule 1 to the bill seeks to amend the *Corporations Act 2001* to amend the process by which ASIC deals with applications for the Financial Advisers Register.<br><br>Schedule 2 to the bill seeks to provide the Australian Accounting Standards Board with functions to develop and formulate sustainability standards.<br><br>Schedule 3 to the bill seeks to implement several recommendations of the Tax Practitioners Board Review.<br><br>Schedule 4 to the bill seeks to amend the income tax system in relation to the tax treatment of off-market share buy-backs and in respect of selective share cancellations.<br><br>Schedule 5 to the bill seeks to amend the *Income Tax Assessment Act 1997* to prevent certain distributions that are funded by capital raisings from being frankable. |
| **Portfolio** | Treasury |
| **Introduced** | House of Representatives on 16 February 2023 |
| **Bill status** | Before the Senate |

## Automated decision-making[80]

2.80 Item 25 of Schedule 1 to the bill seeks to introduce proposed section 921ZF into the *Corporations Act 2001* to allow for the Australian Securities and Investments Commission (ASIC) to use assisted decision-making. Proposed subsection 921ZF(1) provides that ASIC may arrange for the use, under ASIC's control, of processes to assist decision making (such as computer applications and systems) for any purposes for which ASIC may make decisions in the performance or exercise of ASIC's functions or powers under Division 8C of the *Corporations Act 2001* (Corporations Act). Division 8C

79 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (2023 Measures No. 1) Bill 2023, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD 104.

80 Schedule 1, item 25, proposed section 921ZF. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

relates to the registration of relevant providers.[81] Proposed subsection 921ZF(2) provides that a decision made under subsection 921ZF(1) using assisted decision-making is taken to be a decision made by ASIC. Proposed subsection 921ZF(3) provides that ASIC may substitute a decision for a decision made with the assistance of a process under subsection 921ZF(1) if ASIC is satisfied that the initial decision is incorrect.

2.81 In *Scrutiny Digest 2 of 2023* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow the use of automated decision-making for *any* decision;
- what processes ASIC has in place to ensure the integrity and transparency of any assisted decision-making process, and whether these will be included in law or policy;
- whether all of the relevant decisions made using assisted decision-making processes will be non-discretionary and, if not, what processes are in place to ensure decision-making will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); and
- what processes ASIC has in place to identify potentially incorrect decisions made through an assisted decision-making process.[82]

***Assistant Treasurer's response***[83]

2.82 The Assistant Treasurer provided background information on the intention behind the Financial Service Licensee scheme set out in the Corporations Act, noting that:

> Registration on the Financial Adviser Register is not the determinant of whether someone is suitably qualified and eligible to provide financial advice. Responsibility for ensuring that a relevant provider meets the education and training standards and is a fit and proper person is the

81 A 'relevant provider' is defined in section 910A of the *Corporations Act 2001* to mean a person who is an individual and is either a financial services licensee, an authorised representative of a financial services licensee, an employee or director of a financial services licensee, or an employee or director of a related body corporate of a financial services licensee, and is authorised to provide personal advice to retail clients, as the licensee or on behalf of the licensee, in relation to relevant financial products.

82 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2023* (8 March 2023) pp. 18–20.

83 The minister responded to the committee's comments in a letter dated 8 May 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

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

2.83 The Assistant Treasurer also provided advice in relation to the specific nature of the decisions which may be made under Division 8C of the Corporations Act. Namely, that ASIC currently makes two decisions under Division 8C: a decision to grant a registration application; and a decision to refuse to grant an application. The Assistant Treasurer considered that because these decisions are based on objective criteria and do not involve discretion or qualitative assessment on the part of the decision-maker, the use of assisted decision-making technology is appropriate in this instance.

2.84 The Assistant Treasurer noted that the only substantive decision that ASIC will make using the proposed assisted decision-making power is whether to grant an application for registration. The Assistant Treasurer advised that if it appears that ASIC must refuse a registration application, ASIC staff will take over the decision-making process from any automated system that may be in place. The Assistant Treasurer noted that this may occur if, for example, the licensee has not made all required declarations, or the relevant provider is the subject of a banning order.

2.85 The Assisted Treasurer advised that the process of allowing ASIC staff to take over a decision to refuse an application is an important and appropriate safeguard to ensure that if the automated decision process were to incorrectly refuse an application it would not adversely affect a potential Australian financial services licensee. The Assistant Treasurer also advised of the existence of a number of other safeguards, including: that each decision is reviewable by the Administrative Appeals Tribunal; that ASIC must maintain appropriate records; and that all data is handled in accordance with ASIC's privacy policy, which is subject to review every two years.

2.86 In addition to these safeguards, the Assistant Treasured advised of a number of legislative safeguards relating to privacy and transparency. This included that ASIC will provide detailed public guidance about the registration obligation, and will also conduct webinars with industry prior to the commencement of the registration process.

2.87 Finally, the Assistant Treasurer advised that there is very low risk that ASIC will make an incorrect decision regarding a registration application. To this end, the Assistant Treasurer noted that:

> …responsibility for providing assurance that a relevant provider is qualified and a fit and proper person rests with the AFS licensee. The registration process that is the subject of this Bill does not look behind the declarations made by licensees. The only additional check conducted by ASIC is to check the relevant provider is not the subject of a banning order or disqualification as a relevant provider. However, post registration reviews may occur. As noted above, there will be involvement by ASIC staff in any decision to refuse a registration. Furthermore, ASIC must notify an applicant and the relevant provider of a decision to refuse to register a relevant provider within five business days. Similarly, ASIC must notify an applicant and the relevant provider as soon as practical that a relevant provider is registered in response to an application, and this registration is recorded on the public Financial Adviser Register. Taken in conjunction with the ASIC staff review process, these notification timeframes will assist in promptly identifying and rectifying any errors.

***Committee comment***

2.88 The committee thanks the Assistant Treasurer for this response.

2.89 The committee notes the Assistant Treasurer's advice that, in practice, assisted decision-making processes will only be used in relation to non-discretionary decisions and that ASIC staff will take over the decision-making process if it appears that a refusal decision will be made. The committee welcomes this advice but considers that it may have been appropriate to limit the breadth of the discretion conferred on ASIC under proposed subsection 921ZF(1) to explicitly include these limitations within the primary legislation.

2.90 Noting the breadth of the discretion currently set out in the bill, the committee considers that any future changes to the Financial Service Licensee scheme should avoid allowing the use of automated decision-making processes over non-discretionary decisions. If it is contemplated to use assisted decision-making processes for more complex decisions in the future, the committee considers that robust guidelines should be developed to ensure that potentially incorrect decisions can be identified by staff to support the appropriate exercise of the safeguard currently set out at proposed subsection 921ZF(3). High-level guidance in relation to such guidelines should also be included within the explanatory materials for the relevant bill.

2.91 The committee also welcomes the Assistant Treasurer's advice in relation to the existing safeguards intended to ensure the appropriate use of assisted decision-making processes, including the provision of procedural fairness by requiring ASIC to notify affected parties of a registration decision or a refusal decision.

2.92 **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*).**

2.93 **In light of the information provided by the Assistant Treasurer the committee otherwise makes no further comment on this issue.**

# Chapter 3

# Scrutiny of standing appropriations[1]

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**

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1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Scrutiny of standing appropriations, *Scrutiny Digest 6 of 2023*; [2023] AUSStaCSBSD AUSStaCSBSD 105.

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*.