

The Senate

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Standing  
Committee for the  
Scrutiny of Bills

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# Introduction

## Terms of reference

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

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

## Nature of the committee's scrutiny

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

### Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023<sup>1</sup>

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

#### Broad scope of offence provisions

##### Freedom of expression<sup>2</sup>

1.2 This bill seeks to introduce new criminal offences relating to the public display and trading of prohibited symbols. A 'prohibited symbol' is defined as the Islamic State flag, the Nazi hakenkreuz, the Nazi double sig rune, and something that so nearly resembles these things that it is likely to be confused with, or mistaken for, that thing.<sup>3</sup>

1.3 Item 5 of Schedule 1 to the bill introduces proposed section 80.2H, which provides that a person commits an offence if they intentionally<sup>4</sup> cause a prohibited symbol to be displayed in a public place and certain circumstances apply.<sup>5</sup> A prohibited

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023, *Scrutiny Digest 9 of 2023*; [2023] AUSStaCSBSD 138.

2 Schedule 1, item 5, proposed sections 80.2H, 80.2J and 80.2M. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

3 Schedule 1, item 5, proposed section 80.2E.

4 Section 5.6 of the *Criminal Code Act 1995*, the fault element of intention would apply to the conduct in paragraph 80.2H(1)(a). See also explanatory memorandum, p. 29.

5 Schedule 1, item 5, new section 80.2H. The circumstance elements of the offence are set out in subsections 80.2H(3), (4) or (7) (as referred to in paragraph 80.2H(1)(c)). See explanatory memorandum, pp.29–34.

symbol is 'displayed in a public place' if it is capable of being seen by a member of the public who is in a public place or the prohibited symbol is included in a document, such as a newspaper or magazine, film, video or television program, that is available or distributed to the public or a section of the public (including via the internet).<sup>6</sup> Proposed subsection 80.2H(9) provides that the offence would not apply where a reasonable person would consider that the public display of the prohibited symbol is for a religious, academic, educational, artistic, literary or scientific purpose and not contrary to the public interest; or for the purposes of making a news report or a current affairs report that is in the public interest and made by a professional journalist.<sup>7</sup> Proposed subsection 80.2H(10) sets out various defences to the offence, such as where the conduct is necessary for enforcing, monitoring compliance with, or investigating contravention of, a law.<sup>8</sup> The defendant bears an evidential burden in relation to these defences.

1.4 Proposed section 80.2J provides that a person commits an offence if they trade in goods that depict or contain a prohibited symbol; the person knows that, or is reckless as to whether, the prohibited symbols are associated with Nazi ideology or global jihadist ideology; and one or more jurisdictional requirements apply. A person trades in goods if they sell or prepare for supply, transport, guard or conceal, or possess the goods with the intention of selling the goods.<sup>9</sup> There are also several defences to the offence, such as if the traded goods contain commentary on public affairs, the prohibited symbol only appears in the commentary and the making of the commentary is in the public interest.<sup>10</sup>

1.5 The maximum penalty applicable for the offences of publicly displaying and trading in prohibited symbols is 12 months imprisonment.

1.6 Additionally, proposed section 80.2M provides that a person commits an offence if a person is given a direction under subsection 80.2K(1) to cease displaying a prohibited symbol in a public place and the direction is not complied with before the time specified in the direction.<sup>11</sup> Proposed subsections 80.2M(3)–(5) set out a number of defences to this offence, such as where the recipient takes all reasonable steps to cause the prohibited symbol to cease to be displayed or there are no such steps that can be taken by the recipient. The defendant bears an evidential burden in relation to these defences. The maximum penalty applicable is 20 penalty units.

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6 Schedule 1, item 5, proposed section 80.2F.

7 Schedule 1, item 5, proposed subsection 80.2H(9).

8 Schedule 1, item 5, proposed subsection 80.2H(10).

9 Schedule 1, item 5, proposed section 80.2G.

10 Schedule 1, item 5, proposed subsections 80.2J(6)–(8).

11 Schedule 1, item 5, proposed section 80.2M.

1.7 The committee considers that there is a lack of clarity in some of these provisions. Without clear definitions in the bill, there may be substantial variation in the way the legislation is interpreted and applied in practice. This lack of clarity may unduly trespass on an individual's rights and liberties, as it is uncertain what an individual is and is not able to do. The committee considers that any offence provisions should be clearly drafted and sufficiently precise to ensure that any person may understand what may constitute an offence and the explanatory memorandum should explain what key terms mean and how they are intended to operate.

1.8 The committee considers that it is unclear exactly what symbols may be prohibited in practice, noting that the bill does not define each of the prohibited symbols or provide a graphic depiction of the symbols. Rather, a description of the symbols is contained in the explanatory memorandum. It states that the legislation is not intended to be so prescriptive as to exclude variations in the ways in which the prohibited symbols are depicted.<sup>12</sup> This lack of clarity may further cause difficulties for the police who are empowered to issue directions to persons to cease displaying a prohibited symbol.

1.9 The committee also considers that there is a lack of clarity regarding the full range of circumstances that would be captured by the phrase 'displayed in a public place'. The explanatory memorandum provides some guidance as to conduct that constitutes displaying a prohibited symbol in a public space such as the wearing of a hat containing a Nazi double rig rune symbol as part of a party costume and the display of a symbol on a website that is publicly available.<sup>13</sup> However, the committee notes that it is not clear whether a symbol posted on a social media platform, including on a private account, would be taken to be displayed in a public place.

1.10 With respect to the offence relating to a direction to cease displaying a prohibited symbol, the committee considers that the use of the term 'reasonable' in relation to the period of time by which the prohibited symbol must cease being displayed and the steps that must be taken to cause the symbol to cease being displayed, creates uncertainty as to the practical operation of the offence. The committee has concerns regarding the lack of clarity in the term 'reasonable'.

1.11 The committee notes that while the explanatory memorandum provides some guidance as to the meaning of 'reasonable', there is no guidance in the text of the bill as to how a police officer issuing a direction is to determine what is a 'reasonable' period of time to comply with a direction or whether 'reasonable steps' have been taken by the recipient to comply with the direction. As there is no guidance as to how 'reasonable' may be understood and may vary based on factual circumstances, it is the committee's understanding that a person is only able to contest reasonableness by

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12 Explanatory memorandum, pp. 24–26.

13 Explanatory memorandum, p. 26–27.

either waiting for a prosecution or by seeking a declaration. The bill currently does not allow for a person to contest the understanding of 'reasonable' by any other means.

1.12 As noted, the committee considers that any offence provisions should be clearly drafted and sufficiently precise to ensure that any person may understand what may constitute an offence. The committee considers that insufficiently defined terms and concepts contained within offence provisions may impact on the predictability and guidance capacity of the law, undermining fundamental rule of law principles. This is particularly so when the offence provisions contain a custodial penalty, as is the case with respect to the above offences. Given the substantial penalties that would apply to the offences of publicly displaying and trading in prohibited symbols, the committee considers that it would be appropriate to clarify with a higher level of precision the above matters.

1.13 The committee further notes that the offences seek to restrict forms of expression and as such, would trespass on the right to freedom of expression. The committee notes that the Parliamentary Joint Committee on Human Rights is considering this issue in detail and as such makes no further comment on this aspect of the bill.<sup>14</sup>

**1.14 In light of the above, the committee requests the Attorney-General's advice as to:**

- **whether the bill can be amended to include a written description of the symbols that are sought to be prohibited (such as that contained in the explanatory memorandum) and a graphic depiction of the symbols;**
- **whether the meaning of 'displayed in a public place' can be clarified further;**
- **whether the bill can be amended to include a safeguard on the exercise of a police officer's discretion to determine a reasonable period of time to comply with a direction, such as allowing an affected person opportunity to give an explanation as to why compliance is not possible in a proposed period of time; and**
- **whether the explanatory memorandum can be amended to include guidance as to what would constitute 'reasonable steps' in the context of a person causing the prohibited symbol to cease to be displayed.**

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14 Parliamentary Joint Committee on Human Rights, *Report 8 of 2023* (2 August 2023) pp. 28–45.

**Reversal of the evidential burden of proof (Schedule 1)<sup>15</sup>****Absolute liability offences**

1.15 Proposed subsection 80.2H(10) provides a number of defences to the offence under proposed subsection 80.2H(1), which include causing a public display of a prohibited symbol if it is necessary for enforcing a law of the Commonwealth, a State or Territory, a foreign country or part of a foreign country.<sup>16</sup> This can also include conduct that is necessary for monitoring compliance with or investigating a contravention of a law of the same. Other defences under proposed subsection 80.2H(10) include:

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

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

- under proposed subsection 80.2J(6), if the goods traded contain commentary on public affairs, that the prohibited symbols only appear in the commentary and if the trade is in relation to the commentary in which a prohibited symbol appears, making the commentary in the public interest; and
- under proposed subsection 80.2J(7), if the trading is for the purpose of enforcing, monitoring compliance with or investigation of a contravention of a law of the Commonwealth, a State or Territory, or a foreign country; and

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

16 Schedule 1, item 5, proposed paragraph 80.2H(10)(a).

- under proposed subsection 80.2J(8), if the trading is in connection with the performance of a public official's duties or functions and is reasonable in the circumstances for the purpose of the public official performing that duty or function.

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

1.18 Under general principles of the criminal law, for each physical element of an offence a fault (mental) element must be proved before a person can be found guilty of the offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill provides that an offence is one of absolute liability, this removes the requirement for the prosecution to prove the defendant's fault. The application of absolute liability also prevents the defence of honest and reasonable mistake of fact from being raised, a defence that remains available where strict liability is applied.

1.19 As the application of absolute liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of absolute liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.<sup>17</sup> In this instance, the explanatory memorandum states:

The public interest requirement and the requirement that the journalist is working in a professional capacity are intended to operate to exclude goods that have been traded by organisations for the purpose of, for example, inciting violence or promoting hatred, while purporting to be journalism. The offence would not apply where a reasonable person would consider that the dissemination of the report as a whole is in the public interest, rather than a particular aspect of the report being in the public interest. Public interest is intentionally not defined, as what is in the public interest will be informed by the circumstances of the particular dissemination.<sup>18</sup>

1.20 The committee welcomes the clarity on the operation of the element but considers that this explanation does not sufficiently justify the need to apply absolute liability in accordance with the requirements of the *Guide to Framing Commonwealth Offences*. It is not apparent to the committee that this element of the offence (that the traded goods contain one or more news reports or current affairs reports and each prohibited symbol appearing only appears in such a report, and that a reasonable person would consider that the report was made by a person working in a professional capacity as a journalist and was disseminating the report in the public interest) is a

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17 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, p. 23.

18 Explanatory memorandum, p. 40.

jurisdictional element and does not relate to the accused's culpability. Further, it is unclear to the committee why the prosecution is not required to prove the accused was reckless as to the news or current affairs reports bearing prohibited symbols being prepared by someone other than a person working in a professional capacity as a journalist or was distributed for a reason other than in the public interest.

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

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

1.22 Further, proposed subsection 80.2M(4) provides that for the purposes of the defence under proposed subsection 80.2M(3), it does matter if the conduct referred to above is the conduct of the person given the direction.

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

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

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>19</sup>

1.25 It is not clear to the committee that, in this instance, the matters are peculiarly within the knowledge of the defendant and are significantly more difficult and costly for the prosecution to disprove.

1.26 In the case of the defences available under proposed subparagraphs 80.2H(10)(a) and 80.2H(1)(b), as well as proposed subsection 80.2J(7), it is not apparent to the committee that the public display of a hate symbol being made in

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

order to enforce a law would be peculiar to the defendant's knowledge as any requirement to comply with a law cannot be peculiar to a defendant's knowledge. With regard to this, the explanatory memorandum states:

a police officer may need to publicly display a knife inscribed with the Nazi double sig rune for a short period of time after confiscating it from a dangerous individual to allow other law enforcement personnel or witnesses to examine it, before they are able to cover or remove it from public display.<sup>20</sup>

1.27 The committee considers that in this instance, it would be apparent that the public display was in the course of enforcing a law and would not necessarily be peculiar to the defendant's knowledge.

1.28 It is also the committee's understanding that while the information relating to these defences may not always be readily available to prosecution, it is still possible for the prosecution to ascertain these matters in the course of investigation. If a public display is caused in the course of enforcing a law of the Commonwealth, State, Territory or a foreign country or is in the course of a public official's duties or functions if that is reasonable in the circumstances, the committee considers that it is possible for this information to be identified and disproved by the prosecution.

1.29 The committee maintains similar concerns in relation to other defences available under proposed subsections 80.2H(10) and 80.2J(8). It is the committee's understanding that where public displays of prohibited symbols occur as a result of the course of a public official's duties, as the duties of a public official are not peculiar to a defendant's knowledge and can be identified by prosecution in the course of investigation, it is not appropriate to reverse the burden of proof.

1.30 The committee maintains similar concerns in relation to the defences under proposed subparagraphs 80.2H(10)(f), 80.2H(10)(g) and 80.2J(6). The explanatory memorandum, in relation to proposed subparagraph 80.2H(10)(f) states:

New paragraph 80.2H(10)(f) would provide that the offence in subsection 80.2H(1) does not apply if the conduct involves the public display of the Islamic State flag, or something that so nearly resembles the Islamic State flag that it is likely to be confused with or mistaken for the Islamic State flag, and the person genuinely engages in the conduct for the purpose of opposing global jihadist ideology or a related ideology. This defence is intended to ensure that prohibited symbols can continue to be used and displayed for the purpose of opposing the harmful ideologies that the Islamic State flag represents, consistent with the implied constitutional freedom of political communication.<sup>21</sup>

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20 Explanatory memorandum, p. 34.

21 Explanatory memorandum, p. 35.

1.31 Although the committee acknowledges the necessity of using prohibited symbols for the purpose of opposing global jihadist or Nazi ideology, the committee considers that this explanation does not address the requirements of the *Guide to Framing Commonwealth Offences* and does not justify the need for reversing the evidential burden of proof with regard to whether the knowledge is peculiarly within the defendant's mind and whether the matter is significantly more difficult and costly for prosecution to disprove than for the defendant to establish.

1.32 The explanatory memorandum states:

The offence in new subsection 80.2H(1) carries a low maximum penalty (12 months imprisonment) relative to those that apply to the other offences in Division 80 of the Criminal Code (5-7 years imprisonment).<sup>22</sup>

1.33 The committee notes that the maximum penalty is not high but reiterates that this is not sufficient as a justification for reversing the evidential burden of proof in relation to the defences outlined above.

1.34 The committee maintains similar concerns in relation to the defence under subsection 80.2M(3). Where a direction is being provided to cease the display of a public symbol, it is the committee's understanding that it may be readily available to the officer providing the direction that the display may be for a religious, academic, educational, artistic, literary, or scientific purpose or is for the purpose of making a news report or current affairs report that is in the public interest.

1.35 Further, the committee notes that under proposed subsection 80.2M(4), the conduct that forms the public display does not need to have been caused by the person who is the subject of the direction. The committee queries how any information relating to the purpose of the display that forms the bases of the defences under 80.2M(3) can therefore be peculiarly in the knowledge of the person required to provide evidence.

1.36 The committee notes that rather than reversing the evidential burden of proof in accordance with section 13.3 of the *Criminal Code*, it is possible to disapply section 13.3.<sup>23</sup> In such an instance, it is the committee's understanding that although a provision may be drafted as a defence, the evidential burden of proof does not shift to the defendant.

**1.37 As the explanatory materials do not adequately address this issue, the committee requests the Attorney-General's detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) under proposed subsections 80.2H(10), 80.2J(6), 80.2J(7), 80.2J(8), 80.2M(3) and 80.2M(4). The committee's consideration of the appropriateness of a provision**

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22 Explanatory memorandum, p. 36.

23 See for example: *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*, subsection 122.5(12).

which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>24</sup>

**1.38** The committee suggests that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence. However, the committee also requests the Attorney-General's advice as to whether it is possible to disapply section 13.3. of the Criminal Code as an alternative to specifying these abovementioned defences as offence elements.

**1.39** The committee also requests the Attorney-General's detailed justification as to the application of absolute liability to proposed subsection 80.2J(5). The committee's consideration of the appropriateness of a provision to which absolute liability is applied is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.<sup>25</sup>

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## Broad scope of offence provisions

### Freedom of expression<sup>26</sup>

**1.40** The bill seeks to create offences relating to the use of a carriage service<sup>27</sup> (such as an internet or mobile telephone service) for violent extremist material, including accessing, obtaining, distributing, possessing and controlling such material.<sup>28</sup> Violent extremist material includes, for example, material that describes, depicts, supports or facilitates 'serious violence' and is intended to advance a political, religious or ideological cause, and assist, encourage or induce a person to engage in, plan or prepare for an 'intimidatory act'.<sup>29</sup> The term 'serious violence' encompasses a range of actions, including actions that cause serious physical harm or death to a person; cause serious damage to property; or seriously interfere with, disrupt or destroy an

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

25 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011) pp. 23.

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

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

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

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

electronic system.<sup>30</sup> A maximum penalty of five years imprisonment would apply to these offences<sup>31</sup>.

1.41 The committee considers that the term 'violent extremist material' could conceivably cover a broad range of material. The explanatory memorandum states that the offence is intended to capture 'extremist' material that depicts conduct so serious as to engender public harm purely through its possession or distribution.<sup>32</sup> The examples provided in the explanatory memorandum are of an extremist nature, such as images and videos depicting terrorist incidents such as violent extremist manifestos and propaganda.<sup>33</sup> If the intention is to cover only 'extremist' material, it is unclear why the term 'serious violence' has been attributed such a broad meaning.

1.42 The committee also considers that the circumstances in which dealing with violent extremist material would be an offence are also drafted in broad terms. The explanatory memorandum states that the offences are intended to cover a broad range of activities that a person could undertake in relation to violent extremist material, such as sending an electronic link that can be used to access the material.<sup>34</sup> The term 'access' in this context is to take its ordinary meaning, which includes obtaining or acquiring data or gaining access to a system or network.<sup>35</sup> The committee considers that the full scope of activities that may fall within the meaning of 'access' is unclear.

1.43 As noted above at paragraph [1.6], the committee considers that offence provisions should be drafted with precision and clarity. The committee's concerns are heightened in this instance given the significant penalties that apply to these offences and considers that it would be appropriate to clarify with a higher level of precision the material that the offence is intended to cover and the circumstances in which accessing such material would constitute an offence.

1.44 The committee further notes that the offences seek to restrict forms of expression and access to certain ideas and information, and as such, would trespass on the right to freedom of expression. The committee notes that the Parliamentary Joint Committee on Human Rights is considering this issue in detail and as such makes no further comment on this aspect of the bill.<sup>36</sup>

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

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

32 Explanatory memorandum, pp. 52–53.

33 Explanatory memorandum, p. 55.

34 Explanatory memorandum, p. 56.

35 Explanatory memorandum, p. 56. See [Oxford English Dictionary](#).

36 Parliamentary Joint Committee on Human Rights, *Report 8 of 2023* (2 August 2023) pp. 28–45.

**1.45 In light of the above, the committee requests the Attorney-General's advice as to:**

- **whether the bill can be amended to include clarity as to what material is intended to be captured by the term 'violent extremist material' so as to constitute the offences under proposed subsections 474.45B(1) and 474.45C(1); and**
- **whether the bill can be amended to include clarity as to what is meant by 'accessing' violent extremist material.**

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### **Reversal of legal burden of proof (Schedule 2)<sup>37</sup>**

1.46 In relation to the proposed offence of possessing or controlling violent extremist material, proposed subsection 474.45C(5) provides that if the prosecution proves possession or control of violent extremist material in the form of computer data, a presumption applies that the person used a carriage service to obtain or access the material, unless the defendant proves to the contrary. A legal burden of proof is proposed to be placed on the defendant to rebut this presumption, requiring the defendant to prove, on the balance of probabilities, that they did not use a carriage service to obtain or access the material. The explanatory memorandum states that a defendant could rebut this presumption, for example, by producing evidence that proved they obtained or accessed the material from a portable data storage device that another person physically gave them.<sup>38</sup>

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

1.48 As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification each time the burden is reversed, with the rights of people affected being the paramount consideration. In this instance, the explanatory memorandum states:

The purpose of this presumption would be to address problems encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the relevant criminal conduct. Often, evidence that a carriage service was used to engage in the relevant criminal conduct is highly technical. Such evidence can be circumstantial, including for example that the defendant's computer had

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

38 Explanatory memorandum, p. 60.

chat logs saved on the hard drive, the computer was connected to the internet, and records show the computer accessed particular websites that suggest an association with the material saved on the hard drive. A presumption in this instance is appropriate, given it is not an element that goes to the substance of the offence or to the person's criminal culpability. Rather, it is a jurisdictional element; that is, an element marking a boundary between matters that fall within the legislative power of the Commonwealth, and those that do not.<sup>39</sup>

1.49 The committee considers that the explanatory memorandum has provided a justification as to why the *evidential* burden of proof needs to be reversed but has not established why it is necessary to reverse the *legal* burden of proof. It would appear that if the facts relating to how the material was obtained are peculiarly within the knowledge of the defendant, it would be sufficient to require the defendant to raise evidence that suggests a reasonable possibility that the material was obtained by means other than a carriage service, and the prosecution could then be required to disprove the matters that had been raised beyond reasonable doubt.

**1.50 As the explanatory materials do not sufficiently justify this matter, the committee requests the minister's advice as to why it is proposed to reverse the legal burden of proof in relation to proposed subsection 474.45C(5).**

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## Broad scope of offence provisions

### Significant penalties in primary legislation (Schedule 3)<sup>40</sup>

1.51 This bill seeks to amend the existing offence of advocating terrorism by expanding the definition of 'advocates' to include the additional conduct of:

- providing instruction on the doing of a terrorist act or the commission of a terrorism offence; and
- praising the doing of a terrorist act or the commission of a terrorism offence in circumstances where there is a substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or to commit a terrorism offence.<sup>41</sup>

1.52 The bill retains the current definition for 'advocates' under existing subsection 80.2C(3), which includes the counselling, promoting, encouraging or urging the doing of a terrorist act or the commission of a terrorism offence. The bill also seeks to

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39 Explanatory memorandum, p. 59.

40 Schedule 3, item 1, proposed subsection 80.2B(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

41 Schedule 3, item 2, substituted section 80.2C(3).

increase the maximum penalty for the offence of advocating terrorism from 5 years to up to 7 years.<sup>42</sup>

1.53 The committee considers that there is some ambiguity as to the meaning of key terms, such as 'praises', 'substantial risk' and 'might' (in the context of whether praising a terrorist act would lead another person to engage in terrorism). There is also uncertainty as to the scope of conduct that would be covered by the amended definition of 'advocates'.

1.54 The explanatory memorandum states that the term 'praises' is to have its ordinary meaning.<sup>43</sup> As to whether 'praise' has occurred in circumstances where there is a substantial risk that it might lead to another person committing terrorism, the explanatory memorandum states that it is a matter to be considered on a case-by-case basis and the legislation is intentionally silent on how this is to be determined to give the court maximum discretion in making this assessment.<sup>44</sup> The committee considers that without clearer guidance as to how these terms should be interpreted, it appears that they could conceivably cover a broad range of conduct from relatively minor actions to more serious conduct.

1.55 The committee's concerns regarding the use of imprecise terms are heightened by the fact that the actions to which the conduct of praising would relate are also very broad. That is, actions that constitute a terrorist act or terrorism offence include a wide range of conduct such as serious damage to property and seriously interfering with electronic systems.<sup>45</sup> The committee's concerns regarding imprecise and ambiguous definitions of offence provisions have been detailed above at paragraph [1.6].

1.56 In this instance, the explanatory memorandum states:

The increase in penalty would more appropriately account for the potential severity of offending under section 80.2C, which would be broadened further by the addition of instructing on, and praising, terrorism at new paragraphs 80.2C(3)(b) and (c) to the list of conduct that may constitute the offence. Increasing the maximum penalty would also allow courts greater discretion to impose longer sentences where the circumstances of the offending fall short of imposing the maximum penalty, but are nonetheless very serious.<sup>46</sup>

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42 Schedule 3, item 1, substituted subparagraph 80.2C(1)(a).

43 Explanatory memorandum, p. 64.

44 Explanatory memorandum, p. 64.

45 *Criminal Code Act 1995*, subsections 80.2C(2) and (3). Terrorism offence is defined in subsection 3(1) of the *Crimes Act 1914* and terrorist act is defined in section 100.1 of the *Criminal Code Act 1995*.

46 Explanatory memorandum, p. 63.

1.57 The explanatory memorandum further states that the increased penalty reflects the fact that the offence of advocating terrorism is of equivalent seriousness to other offences in Division 80 of the *Criminal Code*, such as urging violence against groups and advocating genocide.<sup>47</sup>

1.58 The committee considers that given the significant penalties that apply to the offence of advocating terrorism, it would be more appropriate to clarify with a higher level of precision the scope of conduct that the term 'praises' is intended to cover and the circumstances in which there is likely to be a 'substantial risk' that such praise 'might' lead another person to engage in terrorism. The committee considers that further clarification on these key terms would assist people in prospectively knowing the scope of their potential criminal liability.

1.59 Further, the committee considers that the offences seek to restrict forms of expression, such as praising and instructing, and as such, would engage the right to freedom of expression.<sup>48</sup>

1.60 The committee notes that when the offence of advocating terrorism was first introduced, the committee raised scrutiny concerns with respect to the breadth of the definition of 'advocates' and its consequential impact on personal rights and liberties. The committee stated that given the substantial custodial penalty, the offence may have a chilling effect on the exercise of the right of free expression.<sup>49</sup> The committee considers that these same scrutiny concerns are applicable with respect to this bill. Further, the committee refers to its previous comments that the *Criminal Code* appears to include other offences which may cover the conduct intended to be captured by the offence of advocating terrorism.<sup>50</sup> The committee notes that this appears to remain the case, raising questions as to the necessity of this proposed amendment.

**1.61 In light of the above, the committee requests the Attorney-General's advice as to:**

- **whether 'advocates' may be able to be defined with more specificity;**

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47 Explanatory memorandum, p. 63.

48 The committee notes that the Parliamentary Joint Committee on Human Rights is also considering this issue in detail. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2023* (2 August 2023) pp. 28-45.

49 Senate Standing Committee for the Scrutiny of Bills, *Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2013* (23 October 2014) p. 47.

50 For example, section 80.2 (urging violence against the Constitution, etc.), section 80.2A (urging violence against groups), section 80.2B (urging violence against members of groups), section 101.5 (collecting or making documents likely to facilitate terrorist acts), and section 102.4 (recruiting for a terrorist organisation).

- **whether the explanatory memorandum can be amended to include guidance with respect to the interpretation of key terms, including 'praises' and whether there is a 'substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence'; and**
  - **what conduct is intended to be captured by the amended offence that is not already captured by current offences.**
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### **Reversal of the evidential burden of proof (Schedule 2)<sup>51</sup>**

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

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

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

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

1.64 The committee's concerns in relation to reversing the evidential burden of proof have been detailed above at paragraphs [1.22] and [1.23]. As detailed above, the committee expects any such reversal of the evidential burden of proof to be

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51 Schedule 2, item 3, proposed section 474.45D. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

justified and for the explanatory memorandum to address whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*.

1.65 The committee's concerns are heightened in this instance due to the significant penalties attaching to the offences under proposed subsections 474.45B(1) and 474.45C(1), which include a maximum of 5 years imprisonment.

1.66 In relation to the defences under proposed section 474.45D, the explanatory memorandum generally outlines their operation and states:

The offence-specific defences in section 474.45D recognise that the defendant's purpose in dealing with violent extremist material is uniquely within the knowledge of the defendant. The defendant is best placed to adduce evidence demonstrating their purpose. For example, if the defendant is employed as a law enforcement officer and was investigating radicalised persons or terrorists who had dealt with violent extremist material, the defendant could readily adduce evidence that they used a carriage service for violent extremist material, or possessed or controlled such material in the course of their employment. Information of this nature is unlikely to be readily available or able to be obtained by the prosecution.<sup>52</sup>

1.67 As these defences are of a similar nature to the defences outlined above (under Schedule 1), the committee reiterates its concerns that the matters relating to these defences are not of a nature that is peculiar to the defendant's knowledge or would be significantly more difficult or costly for prosecution to disprove than for the defendant to establish. The committee also considers that the need to reverse the burden of proof in relation to the defences under Schedule 2 of the bill has not sufficiently been justified with reference to the requirements in the *Guide to Framing Commonwealth Offences*.

1.68 The committee considers that in relation to the defence under proposed paragraphs 474.45D(1)(a) and (b), it would be apparent that the violent extremist material was accessed, possessed, controlled or obtained in the course of enforcing a law and would not necessarily be peculiar to the defendant's knowledge as any requirement to comply with a law cannot be peculiar to a defendant's knowledge.

1.69 The committee further considers that if violent extremist material is possessed, controlled, accessed or obtained in the course of enforcing a law of the Commonwealth, State, Territory or a foreign country or is in the course of a public official's duties or functions if that is reasonable in the circumstances, it is possible for this information to be identified and disproved by the prosecution.

1.70 The committee maintains similar concerns regarding the defence under proposed paragraphs 474.45D(d), 474.45(e) and 474.45(h). Where violent extremist material is possessed, controlled, accessed or obtained, it is the committee's

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52 Explanatory memorandum, pp. 61–62.

understanding that it may be readily available to the officer investigating to determine its purpose.

**1.71 As the explanatory materials do not adequately address this issue, the committee requests the Attorney-General's detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in relation to an offence under proposed subsections 474.45B(1) and 474.45C(1). The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.**

**1.72 The committee suggests that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence. However, the committee also requests the Attorney-General's advice as to whether it is possible to disapply section 13.3. of the Criminal Code as an alternative to specifying these abovementioned defences as offence elements.**

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### **Exemption from sunseting (Schedule 4)<sup>53</sup>**

1.73 Item 5 of Schedule 4 to the bill seeks to introduce proposed section 12, which amends the Legislation (Exemptions and Other Matters) Regulation 2015 (the LEOM) by inserting table item 18C. Table item 18C has the effect of exempting regulations made under subsection 102.1(1) of the Criminal Code from the default 10-year sunseting period. Instruments that would be exempt from sunseting as a result of this amendment include terrorist organisation listings that would not expire unless delisted by the Australian Federal Police minister.<sup>54</sup>

1.74 Sunseting plays a key role in ensuring legislative instruments are regularly reviewed to determine whether they are still fit for purpose. Once they have sunset, instruments must be remade and tabled in the Parliament, which promotes parliamentary oversight and scrutiny through debate and discussion. Where exemptions to sunseting are created, such as through proposed amendments to the LEOM or primary legislation, the committee expects the explanatory memorandum to outline the circumstances that justify the limit on parliamentary oversight and scrutiny.

1.75 In this instance, the explanatory memorandum only provides an outline of the anticipated effect and does not provide a justification for the exemption from sunseting itself. It is not apparent to the committee why regulations made under subsection 102.1(1) of the Criminal Code must be exempt from sunseting under section 12 of the LEOM and therefore exempt from being regularly reviewed every 10

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53 Schedule 4, item 3, proposed section 12, table item 18C. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

54 Explanatory memorandum, p. 66.

years. The committee also notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has commented on this matter, stating that:

Given the passage of time, few instruments would not benefit from amendments to take regard of events and developments in the intervening years, if they are in fact remade after this time.

The committee is of the view any exemption from sunseting must be established in primary legislation and justified in the bill's explanatory memorandum, and in the explanatory statement for the instrument itself.<sup>55</sup>

**1.76 The committee requests the Attorney-General's detailed advice as to what circumstances justify the exemption from sunseting for regulations made under subsection 102.1(1) of the Criminal Code.**

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55 Scrutiny of Delegated Legislation Committee, [Exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) p. 112.

## Housing Australia Future Fund Bill 2023 [No. 2] Treasury Laws Amendment (Housing Measures No. 1) Bill 2023 [No. 2]<sup>56</sup>

<b>Purpose</b>	<p>The Housing Australia Future Fund Bill 2023 [No. 2] seeks to establish the Housing Australia Future Fund to create a funding source to support and increase social and affordable housing, as well as other acute housing needs.</p> <p>The Treasury Laws Amendment (Housing Measures No. 1) Bill 2023 [No. 2] seeks to amend the <i>National Housing Finance and Investment Corporation Act 2018</i> to improve the affordability and accessibility of housing for Australians.</p>
<b>Portfolio</b>	Finance
<b>Introduced</b>	2 August 2023

### Significant matters in delegated legislation

#### Exemption from disallowance

#### Section 96 grants to the states<sup>57</sup>

1.77 The Housing Australia Future Fund Bill 2023 [No.2] and the Treasury Laws Amendment (Housing Measures No. 1) Bill 2023 [No. 2] are identical to the Housing Australia Future Fund Bill 2023 (HAFF Bill) and Treasury Laws Amendment (Housing Measures No. 1) Bill 2023 (Treasury Laws Housing Bill) which were introduced on 9 February 2023 in the House of Representatives and are currently before the Senate.

1.78 The committee sought further advice from the Minister for Finance (the minister) in relation to both of these bills in *Scrutiny Digest 2 of 2023* in relation to the following issues:

- exempting ministerial determinations which specify amounts to be credited into the Housing Australia Future Fund Special Account from disallowance,

56 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Housing Australia Future Fund Bill 2023 [No. 2]; Treasury Laws Amendment (Housing Measures No. 1) Bill 2023 [No. 2], *Scrutiny Digest 9 of 2023*; [2023] AUSStaCSBSD 139.

57 Clause 11, subclause 18(3) and clause 41 of the Housing Australia Future Fund Bill 2023 [No. 2]; Schedule 2, item 5, proposed subsection 8(2) of the Treasury Laws Amendment (Housing Measures No. 1) Bill 2023 [No. 2]. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

particularly when this allows the crediting of a potentially significant amount of public money;

- the provision of a grant of financial assistance to a state or territory in relation to acute housing needs, social housing or affordable housing, and whether there is appropriate parliamentary scrutiny and oversight;
- exempting Housing Australia Future Fund Investment Mandates from disallowance; and
- the tabling in Parliament of any submission made by the Future Fund Board on a draft direction within a specified period of time.<sup>58</sup>

1.79 The minister responded to the committee's comments in a letter dated 20 March 2023.<sup>59</sup> In *Scrutiny Digest 4 of 2023*, the committee expressed its concerns relating to the lack of adequate justification for the exemptions from disallowance, and the lack of requirement for written agreements with the states to be tabled in the Parliament along with no explicit requirements in the bill to set out what the terms and conditions of a grant may be. Nevertheless, the committee concluded its examination of the bills.<sup>60</sup>

1.80 The reintroduction of these bills represented an important opportunity for the minister to closely engage with the concerns the committee had raised previously, and the committee is disappointed this does not appear to have occurred. The committee therefore reiterates its scrutiny concerns outlined in previous Scrutiny Digests.

**1.81 The committee draws its scrutiny concerns to the attention of senators and, reiterating its previously expressed concerns, leaves to the Senate as a whole the appropriateness of:**

- **providing the responsible ministers with a power to make non-disallowable legislative instruments under subclause 11(2) of the Housing Australia Future Fund Bill 2023 [No. 2];**
- **conferring a broad power to make grants to the states in circumstances where there is no guidance in the Housing Australia Future Fund Bill 2023 [No. 2] as to the terms and conditions on which grants may be made, and no requirement to table written agreements with the states containing those terms and conditions in the Parliament; and**

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58 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2023](#) (8 March 2023) pp. 1–8.

59 A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2023* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest).

60 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2023](#) (8 March 2023) pp. 22–30.

- **providing the ministers with a power to make non-disallowable Investment Mandates under subclause 41 of the Housing Australia Future Fund Bill 2023 [No. 2].**

## Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2023<sup>61</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Social Security Act 1991</i> , the <i>Veterans' Entitlements Act 1986</i> and the <i>Administrative Decisions (Judicial Review) Act 1977</i> to clarify that payments supported by Chapter 2D of the <i>Social Security Act 1991</i> are treated in the same way as if they were supported by section 32 of the <i>Financial Framework (Supplementary Powers) Act 1997</i> and ensure certainty as to the programs supported.
<b>Portfolio</b>	Employment and Workplace Relations
<b>Introduced</b>	House of Representatives on 3 August 2023

### Broad discretionary powers

#### Parliamentary scrutiny – section 96 grants to the states

#### Instruments not subject to an appropriate level of parliamentary oversight<sup>62</sup>

1.82 Item 4 of Schedule 1 to the bill seeks to introduce proposed subsections 1062A(1A) and (1B) into the *Social Security Act 1991* (the Social Security Act). Section 1062A currently provides that the Employment Secretary may make, vary or administer an arrangement for the making of payments by the Commonwealth or make, vary or administer a grant of financial assistance, in relation to various activities aimed at assisting unemployed or other persons to obtain and maintain paid work. Proposed subsections 1062A(1A) and (1B) provide that the making, varying or administering of an arrangement or grant must be for the purposes of a program that is specified in a notifiable instrument made by the Employment Secretary.

1.83 While proposed subsections 1062A(1A) and (1B) do not introduce the power to make payments or grants, they nevertheless rely on the broad discretionary power of the Employment Secretary to make arrangements and grants without any guidance on the face of the bill as to how this is to be exercised. Such an instrument effectively authorises the spending of public monies on the relevant grant or program. Scrutiny of such an instrument is therefore important for parliamentary oversight and control of Commonwealth expenditure.

61 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2023, *Scrutiny Digest 9 of 2023*; [2023] AUSStaCSBSD 140.

62 Schedule 1, item 4, subsections 1062A(1A) and (1B). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii) and (v).

1.84 Where a bill provides for a broad discretionary power to make an arrangement for granting financial assistance, including to the states and territories, the committee expects the explanatory memorandum to: justify why a broad discretionary power is necessary; address what limits or terms and conditions will apply to the making of the grants; and explain how an appropriate level of parliamentary scrutiny will be maintained.

1.85 Further, as instruments made under proposed subsection 1062A(1A) are specified to be notifiable instruments, they are not subject to the tabling, disallowance or sunseting 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 1062A(1A) are not legislative in character.

1.86 In this instance, the explanatory memorandum explains:

Presently, Chapter 2D [of the Social Security Act] automatically provides legislative authority for spending where it applies. This can make it difficult to determine which programs are supported by Chapter 2D. The proposed amendments would therefore provide that Chapter 2D can only support a program if it is listed in a notifiable instrument, which would be publicly available.

The amendments promote transparency and would dovetail with the new reporting requirements that item 11 of Schedule 1 to the Bill would insert into Chapter 2D.<sup>63</sup>

1.87 While acknowledging this explanation, no justification is provided as to why the Employment Secretary has such a broad discretionary power to specify programs or why instruments made under proposed subsection 1062A(1A) should be notifiable rather than legislative.

1.88 The committee previously commented on section 1062A when it was initially introduced in the Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021.<sup>64</sup> At that time, the committee expressed its view that, where it is proposed to allow the expenditure of a potentially significant amount of public money, the expenditure should be subject to appropriate parliamentary scrutiny and oversight. The committee was concerned that there did not appear to be any guidance on the face of the bill as to how the Employment Secretary's broad power to make arrangements and grants under section 1062A is to be exercised, or any requirement to table in the Parliament written agreements with the states and territories about arrangements or grants made.

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63 Explanatory memorandum, p. 9.

64 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 8 of 2021](#) (16 June 2021) pp. 41–43, [Scrutiny Digest 10 of 2021](#) (13 July 2021) pp. 56–58 and [Scrutiny Digest 11 of 2021](#) (4 August 2021) pp. 30–32.

**1.89** The committee reiterates its scrutiny concerns and requests the minister's detailed advice as to:

- why it is considered necessary and appropriate to confer on the Employment Secretary a broad power to make arrangements and grants in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised;
- whether the bill can be amended to include at least high-level guidance as to the terms and conditions on which arrangements or grants can be made;
- why it is considered appropriate that instruments made under proposed subsection 1062A(1A) 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.

**1.90** The committee again draws to the attention of senators and leaves to the Senate as a whole the appropriateness of not including a requirement that written agreements with the states and territories about arrangements or grants made under proposed section 1062A be tabled in the Parliament.

## Telecommunications (Interception and Access) Amendment Bill 2023<sup>65</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Telecommunications (Interception and Access) Act 1979</i> in relation to the communication of foreign intelligence information.
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives on 7 August 2023

### Broad discretionary powers

### Broad authorisation powers

### Privacy<sup>66</sup>

1.91 Item 1 of Schedule 1 seeks to introduce subsection 65(1A) into the *Telecommunications (Interception and Access) Act 1979* (the TIA Act). This provision provides that the Director-General of Security may, personally, or by a person authorised by the Director-General of Security, and for the purposes (if any) approved by the Attorney-General in writing, and subject to the conditions (if any) specified by the Attorney-General in writing, communicate foreign intelligence information to another person (the second person). Proposed subsection 65(1B) provides that the second person, and any other person to whom that foreign intelligence information is communicated, may communicate it to another person, and use and make a record of it.

1.92 Item 7 of Schedule 1 seeks to introduce proposed subsection 137(1A) which introduces a similar power for the Director-General of Security to communicate different kinds of foreign intelligence information to another person for the purposes (if any) approved by the Attorney-General in writing and subject to the conditions (if any) specified by the Attorney-General in writing.

1.93 These provisions provide a broad discretion for the Director-General of Security to communicate foreign intelligence information, subject to any purposes and conditions imposed by the Attorney-General, and an even broader discretion for the second person to whom such information has been communicated to share this with any other person and use and make a record of it. Proposed subsection 65(1A) also

65 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, *Telecommunications (Interception and Access) Amendment Bill 2023*, *Scrutiny Digest 9 of 2023*; [2023] AUSStaCSBSD 141.

66 Schedule 1, items 1 and 7, subsections 65(1A), 65(1B), 137(1A) and 137(1B). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (ii).

provides for a broad authorisation power, as it allows the Director-General of Security to authorise a person to communicate foreign intelligence information to a second person, subject to the purposes or conditions if any specified by the Attorney-General.

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

1.95 In relation to the broad authorisation power, the committee has concerns where there is a broad authorisation or delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that a person may be authorised to have, or on the categories of people to whom those powers might be authorised.

1.96 In this instance, the committee's concerns are heightened given the effect of these provisions is to share foreign intelligence information (which could include personal information) and therefore engages an individual's right to privacy.

1.97 The statement of compatibility explains that there are a number of safeguards in the bill:

- The amendments would permit the Attorney-General to choose to approve the purposes for which foreign intelligence information is used by a person to whom foreign intelligence is communicated under subsection 65(1) and 137(3) of the TIA Act (first person) and extend this approval requirement to the communication of this information to another person (the second person).
- The Attorney-General can choose to approve the purposes, if any, for which foreign intelligence information can be communicated to another person other than a person to whom the Director-General of Security could communicate the information under subsection 65(1), 64(2), 137(1) or 136(2). In respect of persons who receive foreign intelligence information under subsections 65(1) or 137(1) of the TIA Act, there is a further requirement that the recording, use and communication of foreign intelligence information be in the proper performance or exercise of the person's functions, duties or powers.
- The Attorney-General can additionally impose conditions on the communication and use of foreign intelligence information. Conditions could include specifying the manner in which such information can be

communicated and used, or matters that must be considered before foreign intelligence information may be shared.<sup>67</sup>

1.98 The explanatory materials do not provide any information in relation to the power of the Director-General of Security to authorise a person to communicate foreign intelligence information.

1.99 While the committee acknowledges that there are some safeguards within the bill, given the breadth of the powers it is unclear to the committee whether these are sufficient. In this case, it appears to the committee that any purposes or conditions approved or specified by the Attorney-General may, in itself, be very broad, and the Attorney-General is not required to provide any at all. It is unclear to the committee why the scope of persons to whom such information is communicated cannot be limited at least to a position level. Further, once information is communicated to a second person, there appears to be no limitation on the scope of the second person to communicate that information to another person, use that information, or make a record of it.

1.100 The committee also notes with concern the speed with which this bill has been introduced and passed. The bill was introduced in the House of Representatives on 7 August 2023 and passed the Senate on 9 August 2023. The committee seeks to consider and report on all bills while still before the Parliament in order to inform debate. The committee considers that this quick process inappropriately limited parliamentary scrutiny and debate.

**1.101 In light of the above, the committee requests the Attorney-General's detailed advice as to:**

- **why is it necessary and appropriate to allow the Director-General of Security to authorise any person to communicate foreign intelligence information in accordance with proposed subsection 65(1A);**
- **why it is considered necessary and appropriate to confer a broad power on the Director-General of Security to communicate foreign intelligence information;**
- **what further limitations or safeguards have been considered in limiting the broad discretionary power of the Director-General of Security, and why these have been considered inappropriate to include in the bill;**
- **why it is considered necessary and appropriate to confer a broad power on a 'second person' to communicate foreign intelligence information to another person, and use and make a record of it; and**

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67 Statement of compatibility, p. 6.

- what safeguards exist in the *Telecommunications (interception and Access) Act 1979* or elsewhere to limit the broad power of a second person to communicate, use and make a record of foreign intelligence information.

**1.102** The committee leaves to the attention of the Senate as a whole the appropriateness of passing a bill within two days, noting the implications this has for detailed scrutiny and parliamentary debate.

## Treasury Laws Amendment (2023 Measures No. 3) Bill 2023<sup>68</sup>

<b>Purpose</b>	<p>This bill seeks to amend various Acts to:</p> <ul style="list-style-type: none"> <li>• prohibit schemes designed to avoid the application of a product intervention order relating to a credit facility;</li> <li>• remove tertiary education requirements for financial advisers with 10 or more years' experience and a clean disciplinary record;</li> <li>• address certain limitations in the education requirements for new entrants into the financial advice profession and financial advisers who are registered tax agents;</li> <li>• implement and enforce requirements on a monopoly provider of clearing and settlement services to achieve competitive outcomes;</li> <li>• provide the Australian Competition and Consumer Commission with the power to conduct binding arbitration to resolve disputes regarding access to certain clearing and settlement services; and</li> <li>• make amendments to the First Home Super Saver Scheme.</li> </ul>
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives on 14 June 2023

### Significant matters in delegated legislation

#### Broad discretionary power<sup>69</sup>

1.103 Item 1 of Schedule 1 to the bill seeks to insert proposed section 1023S into Part 7.9A of the *Corporations Act 2001* (the Corporations Act) to provide for a general prohibition to prevent persons from engaging in conduct to enter into, begin to carry out, or carry out a scheme with the intention of avoiding the application of a credit

68 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (2023 Measures No. 3) Bill 2023, *Scrutiny Digest 9 of 2023*; [2023] AUSStaCSBSD 142.

69 Schedule 1, item 1, proposed section 1023U; Schedule 3, item 8, proposed section 828R. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii) and (v).

product intervention order. Proposed section 1023U of the bill provides that the Australian Securities and Investments Commission (ASIC) may, by disallowable legislative instrument, exempt a scheme, or a class of schemes, from this general prohibition. The exemption is subject to any conditions imposed by ASIC.

1.104 A similar exemption power is introduced in item 8 of Schedule 3 to the bill, which seeks to insert proposed section 828R into proposed Part 7.3A of the Corporations Act. Proposed Part 7.3A seeks to regulate competition in the clearing and settlement (CS) of cash equities and seeks to introduce the power for ASIC to make rules that deal with CS services and facilities. Proposed section 828R seeks to provide ASIC with the power to, by disallowable legislative instrument, exempt a person or class of persons from all or specified provisions in proposed Part 7.3A and regulations and rules made under it.

1.105 There is no further guidance within the bill setting out how these broad exemption powers will be used. For example, the bill does not set out any relevant criteria or considerations that may, or must, be considered prior to granting an exemption. Further, the bill does not contain any limits on the exercise of the power.

1.106 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Broad powers allowing exemptions to be granted to significant regulatory requirements are one such matter.

1.107 In this instance, the explanatory memorandum provides the following justification for the use of delegated legislation in relation to proposed section 1023S:

This instrument making power ensures that ASIC is able to promptly provide clarity and certainty to industry and consumers where the scheme:

- does not cause harm to consumers or regulated industry participants; and
- has a legitimate (non-avoidance) purpose.

The use of delegated legislation is critical to ensure that the legislative framework can respond promptly to changing circumstances.<sup>70</sup>

1.108 It is not clear to the committee from this explanation why it is necessary and appropriate to provide a broad power to include exemptions within delegated legislation. It would be preferable to clarify on the face of the bill that schemes which have a legitimate purpose, and do not cause harm to consumers or regulated industry participants, are not included within the general prohibition.

1.109 In relation to proposed section 828R, the explanatory memorandum explains:

The exemption power has been included to ensure that there is sufficient power to address, in a timely way, any unforeseen consequences of the implementation of the requirements under this Part. Given the systemic

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70 Explanatory memorandum, p. 13 of Chapter 1.

importance and evolving nature of CS services it is necessary that the rule-making power provide flexibility as to the matters CS services rules deal with, and the persons on whom requirements may be imposed. This includes the event of material changes to the operating environment or market structure for CS services, such as the emergence of a competitor in the provision of CS services.

The exemption power is also provided to deal with circumstances where the determinations, regulations or rules may operate inadvertently or in a perverse manner, contrary to the underlying intention of the regime. While the framework seeks to provide a high degree of flexibility, there may be cases where it cannot be adapted (without legislative reform) to an unanticipated scenario, or at least not adapted within a sufficiently short time frame to avoid the unintended result.<sup>71</sup>

1.110 The committee acknowledges that it is sometimes appropriate to include broad exemption powers in order to ensure an appropriate level of flexibility in complex regulatory schemes. However, it is not clear to the committee why at least high-level guidance in relation to the conditions which may apply to an exemption cannot be included within the bill.

1.111 At a minimum, the committee considers that it would be beneficial if the bill included a non-exhaustive list of criteria specifying circumstances in which an exemption may be granted, and general guidance in relation to the conditions which may apply to an exemption.<sup>72</sup> For example, the bill could provide that an exemption is no longer in force if the circumstances under which it was originally granted no longer exist.

1.112 The committee is concerned about the use of delegated legislation to provide for exemptions, particularly noting the limited guidance in the bill about how the exemptions framework will operate. As drafted, it appears that ASIC will have a broad discretionary power to determine, via delegated legislation, when the general prohibition in proposed section 1023S and the regulation of CS services in proposed Part 7.3A will no longer apply. In this regard, the committee notes that delegated legislation is not subject to the same level of parliamentary scrutiny as amendments to primary legislation.

1.113 In addition, the committee considers that instruments made under proposed sections 1023U and 828R should be time-limited. In this regard, the committee notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has

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71 Explanatory memorandum, p. 13 of Chapter 3.

72 See, for example, Part 2 of Chapter 2 of the *Export Control Act 2020* which provides high-level guidance as to the circumstances in which an exemption may be granted alongside a general rulemaking power, including setting out high-level circumstances in which an exemption may be granted and a requirement that an application for a new exemption must be made where changes to the exemption are required.

routinely expressed concerns when instruments granting exemptions to requirements in primary legislation are not time-limited in this way. It considers that in such cases either the instrument, or the exemptions themselves, should sunset after a period of three years to facilitate appropriate parliamentary oversight.<sup>73</sup>

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

- **why it is considered necessary and appropriate to provide a broad power to exempt schemes or classes of schemes from proposed sections 1023U and 828R in delegated legislation;**
- **whether the bill can be amended to provide that instruments made under proposed section 1023U and 828R are time-limited; and**
- **whether the bill can be amended to include at least high-level guidance on the face of the primary legislation as to the circumstances in which an exemption may be granted, and general guidance in relation to the conditions which may apply to an exemption.**

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### **Availability of merits review<sup>74</sup>**

1.115 Item 9 of Schedule 3 to the bill seeks to insert proposed subsection 1317C(gcd) which has the effect of excluding merits review for a decision by ASIC to make CS services rules under proposed section 828A or give a direction under subsection 828G(1). Proposed section 828A provides that ASIC may, by legislative instrument, make rules that deal with matters including, but not limited to, the activities, conduct or governance of persons in relation to CS services and the specification of persons who are required to comply with requirements imposed by the rule. Proposed subsection 828G(1) provides ASIC with the power to give directions to persons not complying with obligations to comply with CS services rules.

1.116 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided. The committee's usual expectation is that such justifications are provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* The

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73 For example, the Senate Standing Committee for the Scrutiny of Delegated Legislation requested that the exemptions specified in the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 cease to operate three years after they commence. For further information, see Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 9 of 2022](#) (30 November 2022) pp. 21–24.

74 Schedule 3, item 9, proposed subsection 1317C(gcd). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

committee expects any justification for excluding merits review to be set out clearly within the explanatory materials to the bill.

1.117 The explanatory memorandum explains:

Decisions by ASIC to make CS services rules under section 828A and provide directions under section 828G to a person not complying with their obligations under the rules are exempt from merits review. The matters that would be regulated by CS services rules touch on significant aspects of financial markets. Market certainty is crucial to the efficient functioning of financial markets. A process of merits review with respect to the making of CS services rules and directions to ensure their compliance may create uncertainty around expectations with respect to provision of CS services. This would have a negative impact upon the efficient functioning of financial markets.<sup>75</sup>

1.118 While the explanatory memorandum separately provides a justification for excluding merits review for *other* decisions with reference to the Administrative Review Council, it is not apparent to the committee from the explanation provided that it has been sufficiently justified why merits review should be excluded from decisions by ASIC to make CS services rules under section 828A and provide directions under section 828G. It appears to the committee that these decisions have the capacity to affect an individual's rights, liberties or obligations and the need for market certainty is not, in itself, considered sufficient justification for removing merits review from these kinds of decisions.

**1.119 In light of the above, the committee requests the minister's advice as to why it is necessary and appropriate not to provide that independent merits review will be available in relation to a decision by ASIC to:**

- **make clearing and settlement services rules under section 828A; and**
- **provide directions to a person under subsection 828G(1).**

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75 Explanatory memorandum, p. 16 of Chapter 3.

## **Private senators' and members' bills that may raise scrutiny concerns<sup>1</sup>**

1.120 The committee made no comment on any private members' or senators' bills.

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1 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 9 of 2023*; [2023] AUSStaCSBSD 143.

## Bills with no committee comment<sup>1</sup>

1.121 The committee has no comment in relation to the following bills which were introduced into the Parliament between 31 July – 3 August 2023:

- Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023
- Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023
- Higher Education Support Amendment (Response to the Australian Universities Accord Interim Report) Bill 2023
- National Housing Supply and Affordability Council Bill 2023 (No. 2)
- Public Governance, Performance and Accountability Amendment (Vaccine Indemnity) Bill 2023

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1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 9 of 2023*; [2023] AUSStaCSBSD 144.

## Commentary on amendments and explanatory materials<sup>1</sup>

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

- Nature Repair Market Bill 2023.<sup>2</sup>

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1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 9 of 2023*; [2023] AUSStaCSBSD 145.

2 On 31 July 2023, the Assistant Minister for Education (Senator the Hon Anthony Chisholm) tabled a revised explanatory memorandum relating to amendments agreed to by the House of Representatives.



## Chapter 2

### Commentary on ministerial responses

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

## Migration Amendment (Aggregate Sentences) Bill 2023<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Migration Act 1958</i> to amend the approach taken in that Act to sentencing for offences. This is being done in response to the decision of the Full Court of the Federal Court of Australia in <i>Pearson v Minister for Home Affairs</i> [2022] FCAFC 203.
<b>Portfolio</b>	Home Affairs
<b>Introduced</b>	Senate on 7 February 2023
<b>Bill status</b>	Finally passed both Houses on 13 February 2023

### Retrospective validation<sup>2</sup>

2.2 This bill amended the *Migration Act 1958* (the Migration Act) to respond to the decision of the Federal Court in *Pearson v Minister for Home Affairs* (Pearson).

2.3 In Pearson, the Federal Court unanimously held that an aggregate sentence imposing a term of imprisonment does not, in and of itself, constitute a 'substantial criminal record' within the meaning given by paragraph 501(7)(c) of the Migration Act. In making this decision, the Court noted that an aggregate sentence 'will say little to nothing about the seriousness of the individual offences for which indicative sentences have been given'.

2.4 The practical effect of this decision was that a person who was subject to an aggregate sentence imposing a term of imprisonment and who was the holder of a

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1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Aggregate Sentences) Bill 2023, *Scrutiny Digest 9 of 2023*; [2023] AUSStaCSBSD 146.

2 Schedule 1, item 1, proposed section 5AB; Schedule 1, item 4. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

visa would not have that visa automatically cancelled under subparagraph 501(3A)(a)(i) of the Migration Act.

2.5 This bill amended the Migration Act to reverse the Pearson decision by instead providing that the Act applies in the same way to a single sentence, irrespective of whether the sentence was for one offence or multiple offences. The explanatory memorandum states that this outcome was intended to apply regardless of the perceived seriousness of any individual offence. In the context of section 501, this means that any person who has received a single sentence of 12 months imprisonment, or more, automatically fails the character test even if that term of imprisonment was imposed for multiple convictions.

2.6 Item 3 of Schedule 1 to the bill provides that the amendment introduced by the bill applies in relation to things that came into existence or were obtained before commencement of the bill, offences that occurred before commencement, and applications made before commencement. Additionally, item 4 of Schedule 1 to the bill retrospectively validates decisions which were rendered invalid by the decision in Pearson.

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

- what alternative approaches were available to respond to the Pearson decision and the general concern for community safety; and
- in light of the potential effect of retrospective validation on the integrity of Australia's rule of law system and the significant impact of this bill on individuals, why these alternative approaches could not have been implemented in this case; and
- how the retrospective validation of decisions under the Migration Act 1958 is intended to interact with decisions which have been successfully invalidated by a court or where proceedings have been instituted.<sup>3</sup>

#### ***Minister for Immigration, Citizenship and Multicultural Affairs' response***<sup>4</sup>

2.8 The Minister for Immigration, Citizenship and Multicultural Affairs (the minister) advised that the amendments introduced by this bill were the only option that was sufficient to address the issues raised by the Court's decision in Pearson. The minister therefore did not respond to the committee's question as to why alternative approaches could not have been implemented, beyond noting that the amendments

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3 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 3 of 2023](#) (22 March 2023) p. 13.

4 The minister responded to the committee's comments in a letter dated 11 May 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest).

introduced by the bill align with the government's policy as it existed prior to the Pearson decision.

2.9 In relation to the retrospective effect of the bill, the minister noted that the bill makes provision for refreshed review periods for impacted individuals, as long as they were within the appropriate timeframe to seek review prior to the Pearson decision.

### **Committee comment**

2.10 The committee thanks the minister for this response.

2.11 However, it is not clear to the committee from the minister's explanation that there were no alternative options other than the approach taken within this bill. In this context, the committee reiterates that the 'automatic' cancellation for visas under subparagraph 501(3A)(a)(i) on the basis of a substantial criminal record is not the only path available under the Migration Act for visa cancellation. The committee notes that despite a delay of many months in responding to the committee's questions, the minister did not address this point.

2.12 The committee also notes that it is not sufficient to re-state that the amendments introduced by the bill align with the government's policy as it existed prior to the Pearson decision. As the committee noted in *Scrutiny Digest 2 of 2023*:

The mere fact that a court interpretation was not expected or is considered by the executive to introduce anomalies into a legislative scheme is not sufficient, in and of itself, to justify retrospective validation. The fact that a court's interpretation of the law may differ from the understanding of the executive is part and parcel of the routine operation of Australia's constitutional system of government which is premised on the separation of judicial power.<sup>5</sup>

2.13 The minister's response also did not address the committee's concerns relating to the potential inconsistencies introduced into the character test by this bill. These concerns related to the introduction of a fixed rule and to the fact that this new rule will apply differently to persons charged in different Australian jurisdictions. As the committee noted in *Scrutiny Digest 2 of 2023*:

The approach taken by the bill is to introduce a fixed rule leading to automatic cancellation of a visa for persons who have received a sentence of 12 months or greater, regardless of the circumstances of the particular case at hand. This approach is explicitly intended to reduce the flexibility available to the Minister, noting that it would still have been available to the Minister to exercise their discretionary powers under either subsections 501(2) or 501(3) to cancel a visa. The committee notes, however, that the

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5 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2023](#) (8 March 2023) p. 12.

introduction of a fixed rule leading to automatic cancellation of a visa is likely to introduce anomalies given the particularity and fact specificity involved in sentencing decisions.

In addition, the committee notes that in some ways the approach taken by the bill reduces consistency, noting that certain jurisdictions do not allow for aggregate sentences to be imposed, with the effect that paragraph 501(7)(c) of the Migration Act may apply differently to persons who were convicted in different jurisdictions.<sup>6</sup>

2.14 Finally, the committee considers that it would have been more appropriate had the minister's response dealt with the committee's concerns that too-frequent use of retrospectivity can impact on Australia's rule of law system. As noted in *Scrutiny Digest 2 of 2023*:

[a] core tenet of the rule of law is that government decision-makers are subject to the law. Retrospective validation of administrative decisions, if overused, can also undermine public confidence in this element of the rule of law. Related to this point, the committee also notes that retrospective validation of decisions made by officers of the Commonwealth is apt to deprive the constitutionally entrenched minimum provision of judicial review of its practical utility. The committee therefore has long-standing scrutiny concerns in relation to provisions which have the effect of applying retrospectively or retrospectively validating administrative decisions. These concerns will be particularly heightened if the legislation will, or might, have a detrimental effect on individuals.<sup>7</sup>

2.15 Given the significant concerns relating to both the trespass on personal rights and liberties and on Australia's rule of law system, the committee considers that it would have been more appropriate had the minister's response provided a more thorough explanation as to why alternative approaches were not appropriate in this case and what impact it is expected the retrospective effect of this bill will, or might, have on individuals. This is particularly so in light of the considerable speed with which the bill passed through the Parliament.

**2.16 The committee draws its concerns to the attention of the Senate.**

**2.17 In light of the fact that this bill has passed both Houses of the Parliament the committee makes no further comment.**

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6 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2023](#) (8 March 2023) p. 11.

7 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2023](#) (8 March 2023) p. 10.

## Chapter 3

### Scrutiny of standing appropriations<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

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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 9 of 2023*; [2023] AUSStaCSBSD 147.

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](#).

- 3.4 The committee draws the following bill to the attention of Senators:
- Housing Australia Future Fund Bill 2023 (No. 2)<sup>4</sup>

**Senator Dean Smith**

**Chair**

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4 Clause 10 provides for the establishment of the Housing Australia Future Fund Special Account and clause 25 provides for the establishment of the Housing Australia Future Fund Payments Special Account, for the purposes of the *Public Governance, Performance and Accountability Act 2013*.