



Senate Standing

Committee for the Scrutiny of Bills

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Membership of the committee

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Senator Nick McKim	AG, Tasmania
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Committee information

Terms of reference

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

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

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a 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 and Other Legislation Amendment Bill 2023¹

Purpose	<p>This bill seeks to extend, for three years, the following Australian Federal Police counter-terrorism powers that are scheduled to sunset on 7 December 2023:</p> <ul style="list-style-type: none"> • the stop, search and seizure powers in Division 3A of Part IAA of the <i>Crimes Act 1914</i>; • the control order regime in Division 104 of the <i>Criminal Code Act 1995</i>; and • the preventative detention order regime in Division 105 of the <i>Criminal Code Act 1995</i>. <p>The bill also seeks to extend by 12 months the operation of section 122.4 of the <i>Criminal Code Act 1995</i>, which makes it an offence for a current or former Commonwealth officer to disclose information without authorisation.</p>
Portfolio	Attorney-General
Introduced	House of Representatives on 10 August 2023
Bill status	Before House of Representatives

Coercive powers

Broad discretionary powers

Deferral of sunset²

1.2 Schedules 1 and 2 to the bill seek to extend, by three years, the operation of significant counter-terrorism measures that are due to sunset on 7 December 2023.

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Counter-Terrorism and Other Legislation Amendment Bill 2023, *Scrutiny Digest 10 of 2023*; [2023] AUSStaCSBSD 149.

² Schedules 1 and 2. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i), (ii) and (v).

1.3 Specifically, the bill is seeking to extend the operation of the following measures:

- the **stop, search and seizure powers**, which allow a police officer to stop, question and search persons and seize items in a Commonwealth place or prescribed security zone without a warrant (and, in relation to prescribed security zones, without the need for reasonable suspicion);³
- the **control order regime**, which allows courts to impose conditions on a person without charge, restricting their ability to do certain things;⁴ and
- the **preventative detention order regime**, which allows a person to be taken into custody and detained for up to 48 hours if it is suspected, on reasonable grounds, that they are preparing to engage in a terrorist act.⁵

1.4 These measures were first introduced in 2005, pursuant to the Anti-Terrorism Bill (No. 2) 2005, and their operation has been extended several times. The committee has previously raised scrutiny concerns regarding these broad coercive powers and the continued extension of these measures.⁶

1.5 The committee has previously raised concerns that the power to stop, search and question a person in a 'prescribed security zone' without the need for any reasonable suspicion has the potential to be highly coercive. Once a prescribed security zone is declared, everyone in that zone is subject to stop, question, search and seizure powers, regardless of whether there are reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act.

1.6 The committee has also previously noted that the control order regime constitutes a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction.⁷ That traditional approach

³ In Part 1AA, Division 3A of the *Crimes Act 1914*. Item 9 of Schedule 1 to the bill seeks to extend the operation of this measure.

⁴ In Part 3, Division 104 of Schedule 1 to the *Criminal Code Act 1995* (the Criminal Code). Item 42 of Schedule 2 to the bill seeks to extend the operation of this measure.

⁵ In Division 105 of the Criminal Code. Item 51 of Schedule 2 to the bill seeks to extend the operation of this measure.

⁶ See, most recently, the committee's comments on the Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022 which extended these measures for 12 months in Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 5 of 2022* (28 September 2022) pp. 4–6; and the Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021 which extended these measures for three years in Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 12 of 2021* (11 August 2021) pp. 1–4.

⁷ Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2016* (12 October 2016) p. 20; Senate Standing Committee for the Scrutiny of Bills, *Report No. 8 of 2016* (9 November 2016).

involves a number of steps: investigation, arrest, charge, remand in custody or bail, and then sentence on conviction. In contrast, control orders allow restraints to be placed on personal liberty without there being any criminal conviction, or without even a charge being laid. Protections of individual liberty, built into ordinary criminal processes, are necessarily compromised.

1.7 Similarly, preventative detention orders raise significant scrutiny concerns as they permit a person's detention by the executive without charge or arrest, and without even a necessary intention to charge the subject with an offence.

1.8 The committee notes that some measures have been introduced to provide limited safeguards to the extraordinary counter-terrorism powers. For example, the bill amends the *Crimes Act 1914* (Crimes Act) to require the minister to consider particular matters before declaring a 'prescribed security zone'. This includes notification requirements of any declaration of a 'prescribed security zone' and requires the minister to provide a written statement of reasons in relation to such a declaration after it has been made.⁸ The bill also amends the *Criminal Code Act 1995* (Criminal Code) to narrow the definition of 'issuing court' to restrict the issue of control and preventative detention orders to only the Federal Court of Australia (FCA) and limits the class of persons who may be appointed as an issuing authority for preventative detention orders to judges of the FCA or a State or Territory Supreme Court judge. It also requires the FCA to consider whether each of the conditions imposed, or the combined effect of conditions imposed, are reasonably necessary, appropriate and adapted for the purpose for which the order is issued.⁹

1.9 While welcoming the inclusion of these safeguards, the committee notes that nevertheless the extraordinary nature of the regimes outlined above is recognised in the current legislation by the inclusion of a sunset period. The committee expects the explanatory memorandum for any bill deferring a sunset date for extraordinary or emergency measures to address why that deferral is necessary and appropriate. Where the relevant measures trespass in significant ways on personal rights and liberties, as in this case, the committee's expectations in this regard are even higher. The committee's expectations will also be higher where the sunset date has been repeatedly extended. The explanatory materials accompanying such a bill should provide a comprehensive justification for the continued need for extraordinary coercive powers, including outlining what exceptional circumstances justify the extension and whether those exceptional circumstances are expected to continue into the future.

1.10 In this case, the explanatory memorandum explains that these measures are extended in response to reviews by the Parliamentary Joint Committee on Intelligence

⁸ Items 3 and 5 of Schedule 1.

⁹ Item 2, 43 and 45 of Schedule 2.

and Security (PJCIS) and the Independent National Security Legislation Monitor (INSLM):

Division 3A of Part IAA of the Crimes Act will sunset on 7 December 2023. The Bill would extend the operation of the Division by a further three years, until 7 December 2026.

In reviewing the operation, effectiveness and implications of Division 3A of Part IAA, the PJCIS found that these powers are an important part of Australia's counter-terrorism response framework. The PJCIS recognised that although the Division 3A powers have not been used since their introduction, there is a continued need for the powers.

In his 2017 Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers (2017 Review), the then INSLM, Dr James Renwick SC, also supported the ongoing utility and importance of these powers. The INSLM's 2017 Review concluded that the police powers are consistent with Australia's human rights, counter-terrorism and international security obligations, contain appropriate safeguards for protecting the rights of individuals, are proportionate to the current threats of terrorism and to national security, and are necessary.

...

The control order regime in Division 104 of the Criminal Code will sunset on 7 December 2023. The Bill would extend the operation of the Division by a further three years, until 7 December 2026. This would ensure these powers do not sunset, in line with the recommendations of the PJCIS's AFP Powers Review.

...

The PDO regime in Division 105 of the Criminal Code will sunset on 7 December 2023. The Bill extends the operation of the Division by a further three years, until 7 December 2026, in line with the recommendation of the PJCIS's AFP Powers Review. The PJCIS concluded that in light of the current national security threat environment the PDO powers should be extended, noting that non-use of the powers does not indicate a lack of usefulness.¹⁰

1.11 While the committee acknowledges this explanation, it is unclear whether these measures are sufficiently justified given that they displace the careful balance between the rights of accused and the public interest represented by the operation of the ordinary criminal law process. Prior to the introduction of this bill, Australia's National Terrorism Threat Level (threat level) was downgraded for the first time since 2014. From 2014 to November 2022, Australia's threat level was rated as 'probable', meaning there was 'credible intelligence assessed by Australia's security agencies indicating that individuals and groups have the intent and capability to conduct a

¹⁰ Explanatory memorandum, pp. 5, 8 and 12.

terrorist act in Australia'¹¹. This threat level was in place when the operation of these measures was last extended by the Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022. It was also Australia's threat level when the PJICIS last reviewed these powers in 2021.¹²

1.12 However, on 28 November 2022, the Australian Security Intelligence Organisation (ASIO) reduced Australia's threat level to 'possible'. This threat level indicates that 'there is credible intelligence that, whilst Australia is a possible target of terrorists, there is limited intention or capability to conduct an attack'¹³.

1.13 The explanatory memorandum states that, in announcing this change, the Director-General of ASIO had noted that lowering the threat level does not mean that the threat of terrorism is extinguished, and that terrorism 'is an enduring and evolving threat'¹⁴. The explanatory memorandum further notes Australia's current threat level, and states that the proposed amendments:

...would support Australia's counter-terrorism framework, ensuring that the Government and agencies continue to have appropriate tools to protect the community from the risk of terrorism, and improve the operational effectiveness of, and safeguards that apply in relation to the use of, those tools.¹⁵

1.14 However, no specific information is provided to demonstrate the continuing need for these powers *despite* this reduction in the terrorism threat level in the intervening period. While the explanatory memorandum states that the threat of terrorism is not extinguished, it is doubtful that the threat of terrorism could ever be said to be entirely extinguished. Further, the committee notes that the stop, search and seizure powers in Division 3A of the Crimes Act, and the preventative detention order powers in the Criminal Code, have never been used since their introduction, notwithstanding the elevated threat levels throughout that period.¹⁶

¹¹ Australia's National Terrorism Threat Level is a five-level scale advising as to the likelihood of an act of terrorism in Australia consisting of: certain; expected; probable; possible; and not expected. See, www.nationalsecurity.gov.au.

¹² See, explanatory memorandum accompanying the Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022, p. 3. See also, Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime* (October 2021), [2.56].

¹³ Explanatory memorandum, p. 4.

¹⁴ Explanatory memorandum, p. 4.

¹⁵ Explanatory memorandum, p. 4.

¹⁶ The Hon Mark Dreyfus KC MP, Attorney General, the Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022, [Second Reading speech](#), *House of Representatives Hansard*, 8 September 2022, p. 3.

1.15 The PJCIS considered it was necessary to evaluate the ESO scheme before determining that the control order scheme was no longer necessary.¹⁷ The PJCIS is currently undertaking a review of the operation and effectiveness of post-sentence terrorism orders in Division 105A of the Criminal Code (including ESOs).¹⁸ It is unclear to the committee why it is necessary to extend the control order regime for three years, given that a relevant review of related powers is currently underway.

1.16 Noting that some of these measure have been in effect for nearly 20 years the committee reiterates its previous concern that there is a risk that measures that were originally introduced on the basis of being a temporary response to an emergency situation may become permanent by their continual renewal.¹⁹ The committee considers the measures being extended by this bill raise significant scrutiny concerns and may, in some instances, unduly trespass on personal rights and liberties. In particular, the committee is concerned that several of the measures give the power to detain and restrain persons who may not have been convicted of, or even charged with, a criminal offence. The committee remains concerned that these measures are no longer adequately justified as extraordinary and temporary given their continued renewal and the acknowledged reduction in the level of threat of terrorist offences being committed.

1.17 In light of the above concerns, the committee requests the Attorney-General's detailed advice as to why it is considered necessary and appropriate to extend, by a further three years, the operation of broad coercive powers within the Crimes Act 1914 and the Criminal Code Act 1995.

Undue trespass on personal rights and liberties²⁰

1.18 Item 2 of Schedule 1 to the bill seeks to insert proposed subsections 3UD(1A) and (1B) into the Crimes Act. Proposed subsection 3UD(1A) provides that a police officer who stops and detains a person under section 3UD of the Crimes Act (relating to powers to stop and search a person for a terrorism related item) must inform the person of any right they have to make a complaint to the Commonwealth Ombudsman or a State or Territory policy oversight body about the conduct of the police officer in exercising the powers conferred by this section. Proposed subsection 3UD(1B)

¹⁷ Parliamentary Joint Committee on Intelligence and Security, [Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime](#), October 2021, [3.64]–[3.67].

¹⁸ Parliamentary Joint Committee on Intelligence and Security, [Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995](#) (referred 11 May 2023).

¹⁹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, 20 June 2018, pp. 13–16; *Scrutiny Digest 12 of 2021*, 11 August 2021, pp. 1–4.

²⁰ Schedule 1, item 2, proposed subsections 3UD(1A) and (1B). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

provides that the obligation to inform a person of a right to make a complaint under proposed subsection 3UD(1A) does not require a police officer to inform a person of a right if it is not reasonably practicable to do so due to urgency.

1.19 Where a bill empowers a decision-maker to make decisions which have the capacity to affect rights, liberties or obligations, those decisions should ordinarily be subject to independent merits review and procedural fairness. In this case, an individual has a right to make a complaint regardless of whether the police notify the individual of this right. While the proposed requirement for a police officer to inform an individual of their right is welcomed, it is concerning that the obligation to inform a person of their right to complain does not apply in circumstances of urgency. The explanatory memorandum explains:

New subsection 3UD(1B) would provide that new subsection 3UD(1A) does not require a police officer to inform a person of a right if it is not reasonably practicable to do so because of circumstances of urgency. The phrase 'circumstances of urgency' is intended to take the same meaning in new subsection 3UD(1B) as it carries in section 19AU – that is, that there is a need for immediate action. An exemption to the obligation to inform the person of their right to complain is appropriate in circumstances of urgency. The use of the powers under section 3UD may be exercised in time-sensitive situations, where, for instance a terrorist act may be imminent. In these circumstances, police should not be delayed in efforts to prevent an imminent terrorist offence by an obligation to provide this information.

A person would still have a right to complain to the Commonwealth Ombudsman or applicable State or Territory police oversight body about the conduct of a police officer exercising Division 3A powers even if the police officer did not advise them of this right due to circumstances of urgency. This would ensure that a person does not forfeit their right to make a complaint due to the police officer failing to notify the person of this right.²¹

1.20 While the committee acknowledges this explanation and notes it is likely not reasonable to require a police officer to inform a person of their right to complain in circumstances of urgency, the committee considers it may nevertheless be appropriate to provide that a person be told of their right as soon as is practicable after the event. Given the extraordinary powers in section 3UD, the committee would welcome this safeguard to ensure that individuals are informed of their right to complain to appropriate bodies.

1.21 The committee requests the Attorney-General's detailed advice as to whether the bill could be amended to the effect that it requires a person be told of their right to make a complaint as soon as it is practicable in circumstances of urgency under proposed subsection 3UD(1B) of the *Crimes Act 1914*.

²¹ Explanatory memorandum, p. 42.

Members of Parliament (Staff) Amendment Bill 2023²²

Purpose	The bill seeks to amend the <i>Members of Parliament (Staff) Act 1984</i> to implement certain recommendations of the review by the Department of Prime Minister and Cabinet in relation to the Act's employment framework. It also seeks to make consequential amendments to the establishment of the Parliamentary Workplace Support Service and seeks to make consequential amendments to 18 Acts.
Portfolio	Special Minister of State
Introduced	House of Representatives on 10 August 2023
Bill status	Before House of Representatives

Broad delegation of administrative powers²³

1.22 The bill seeks to amend the *Members of Parliament (Staff) Act 1984* (MOPS Act) to implement 11 of the 15 recommendations of the 7 October 2022 Review of the MOPS Act undertaken by the Department of Prime Minister and Cabinet.

1.23 Item 14 of Schedule 1 to the bill seeks to insert proposed section 31 into the MOPS Act. Proposed subsection 31(1) would empower a parliamentarian or office-holder to authorise another person to exercise all or any of their functions or powers under the MOPS Act, provided that they are satisfied that it is appropriate. Proposed subsection 31(2) requires an authorised person to comply with any directions of the authoriser.

1.24 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated.

1.25 Where broad delegations are provided for, the committee considers that an explanation as to why these are considered necessary should be included in the explanatory memorandum. In this regard, the explanatory memorandum states:

New section 31 reflects section 32 in the current Act, with minor changes to modernise and clarify the provision. Subsection 31(1) similarly allows a

²² This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, *Members of Parliament (Staff) Amendment Bill 2023*, *Scrutiny Digest 10 of 2023*; [2023] AUSStaCSBSD 150.

²³ Schedule 1, item 14, proposed subsection 31(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

parliamentarian or office-holder to, in writing, authorise another person to exercise their powers or functions under the Act on their behalf.

There is an additional requirement that the parliamentarian or office-holder be satisfied it is appropriate for the person to have such functions or exercise such powers.

Subsection 31(2) also introduces an express requirement that the authorised person comply with any directions of the authoriser.²⁴

1.26 The explanatory memorandum does not attempt to justify why it is necessary and appropriate for parliamentarians and office holders to authorise an unlimited class of persons to exercise their powers under the MOPS Act. This is of particular concern given the sensitive nature of the powers granted including powers to suspend and terminate employment.

1.27 In light of the above the committee requests the minister's advice as to:

- **why it is necessary and appropriate to allow for any authorised person to carry out a parliamentarian or office-holders' functions or powers under the *Members of Parliament (Staff) Act 1984*;**
 - **who it is anticipated that a parliamentarian or office holder may authorise to exercise their powers or functions under the *Members of Parliament (Staff) Act 1984*; and**
 - **whether authorised persons will be expected to hold specific or relevant experience, training or qualifications.**
-

²⁴ Explanatory memorandum, p. 28.

Parliamentary Workplace Support Service Bill 2023²⁵

Purpose	This bill seeks to establish the Parliamentary Workplace Support Service (the PWSS) as an independent statutory agency to provide human resources and certain other services for parliamentarians and persons employed under the <i>Members of Parliament (Staff) Act 1984</i> . This bill also gives effect to the recommendations of the Australian Human Rights Commission.
Portfolio	Finance
Introduced	House of Representatives on 10 August 2023
Bill status	Before the House of Representatives

Privacy²⁶

1.28 Clause 61 of the bill seeks to introduce information sharing between the Parliamentary Workplace Support Service (the PWSS) and other Commonwealth entities or an individual who holds any office or appointment under a law of the Commonwealth.²⁷ Information may also be disclosed by a Commonwealth entity to the PWSS if the disclosure is reasonably necessary to assist the PWSS or the CEO of the PWSS to perform any of their functions or exercise any of their powers.²⁸

1.29 Before disclosing any of the information obtained in the course of its review function under clause 19, the PWSS must have regard to whether the disclosure would be likely to result in harm to an individual to whom the information relates, other than mere damage to the individual's reputation.²⁹

1.30 In this instance, the explanatory memorandum provides that clause 61 is intended to facilitate the disclosure of information between entities on a voluntary basis.³⁰ It also states:

These provisions would allow the PWSS and other Commonwealth entities or relevant individuals to share information that is required to support their statutory obligations. For example, under subclause 61(1), the PWSS could share information about notifiable incidents under work health and safety laws with Comcare, in order to fulfil its work health and safety obligations.

²⁵ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Parliamentary Workplace Support Service Bill 2023, *Scrutiny Digest 10 of 2023*; [2023] AUSStaCSBSD 151.

²⁶ Clause 61. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

²⁷ Subclause 61(1).

²⁸ Proposed paragraphs 61(1)(c) and 61(1)(d), and subclause 61(2).

²⁹ Subclause 61(6).

³⁰ Explanatory memorandum, p. 76.

Similarly, under subclause 61(2), the Department of Finance could share information with the PWSS that is necessary for the PWSS to perform its human resources functions, noting that the Department of Finance would retain some human resources functions (such as payroll services for MOPS employees). Efficient information sharing between these entities and individuals would enable them to effectively undertake their function and would facilitate enhanced service delivery across Commonwealth parliamentary workplaces.³¹

1.31 The committee notes that while the explanatory memorandum provides insight into the purpose of clause 61, and a justification for the disclosure of information, it is not apparent to the committee under what circumstances the information may be disclosed under subclauses 61(1) and (6). For instance, neither the bill nor the explanatory memorandum identify when disclosure would be reasonably necessary from the PWSS to enable a Commonwealth entity to perform its functions or activities. It is also unclear to the committee the nature of information that may be disclosed as this can encompass any information obtained by the PWSS in the course of performing its review function under clause 19. The committee's concerns are heightened as the PWSS will obtain personal information in the course of its review function and it is not apparent to what extent this information may be disclosed. For example, it is not clear whether names and other identifying information may be disclosed or if it will be limited to statistical data.

1.32 Further, in relation to subclause 61(6), the explanatory memorandum states:

Subclause 61(6) provides that before disclosing information obtained in the course of performing its review function to another Commonwealth entity or to an individual who holds a relevant office or appointment, the PWSS must have regard to whether the disclosure would be likely to result in harm to an individual to whom the information relates (other than mere damage to the individual's reputation). This requirement is intended to ensure that due consideration is given to any harm that may result from the disclosure of this information and therefore minimise this potential harm to individuals.

1.33 It is unclear to the committee in this instance how the term 'harm' should be understood and what level or nature of harm is sufficient to prevent disclosure of information, except that it must not result in 'mere damage to the individual's reputation'. The committee also queries the lack of any further considerations that must be made by the PWSS before disclosing information.

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

- **the nature of information, particularly personal information, that may be disclosed by the PWSS and Commonwealth entities or individuals holding**

³¹ Explanatory memorandum, p. 77.

office or appointments under the law of the Commonwealth with each other pursuant to subclauses 61(1) and 61(2);

- whether guidance can be provided regarding what circumstances are expected to necessitate disclosing information because disclosure is reasonably necessary to assist the PWSS or Commonwealth entity to perform its functions or exercise its powers;
 - what level or nature of harm is sufficient to prevent disclosure of information under subclause 61(6); and
 - what other considerations must be made by the PWSS prior to disclosing information under subclause 61(6).
-

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

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

Bill	Relevant provisions	Potential scrutiny concerns
Electoral Legislation Amendment (Restoring Trust) Bill 2023	Schedule 3, Part 3, item 6, proposed section 321JF	The provisions may raise scrutiny concerns under Principle (i) Trespass unduly on personal rights and liberties in relation to reversal of the evidential burden of proof.
	Schedule 1, Part 2, item 4, proposed paragraphs 307AB(4)(a), 307AC(6)(a), 307AC(6)(b), 307AD(5)(a), 307AD(5)(b).	The provisions may raise scrutiny concerns under Principle (i) Trespass unduly on personal rights and liberties in relation to significant penalties.
	Schedule 2, item 1, proposed sections 314AGE and 314AGF	
Legalising Cannabis Bill 2023	Clause 53	The provisions may raise scrutiny concerns under Principle (i) Trespass unduly on personal rights and liberties in relation to immunity from civil liability.
	Subclauses 23(2) and 24(3)	The provisions may raise scrutiny concerns under Principle (i) Trespass unduly on personal rights and liberties in relation to reversal of the evidential burden of proof.
	Subclauses 27(1), 27(2) and clause 31	The provisions may raise scrutiny concerns under Principle (iv) Inappropriate delegation of legislative powers in relation to significant matters in delegated legislation.

Bills with no committee comment

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

- Parliamentary Workplace Support Service (Consequential Amendments and Transitional Provisions) Bill 2023
- Protecting the Spirit of Sea Country Bill 2023
- Social Services and Other Legislation Amendment (Australia's Engagement in the Pacific) Bill 2023

Commentary on amendments and explanatory materials

Greenhouse and Energy Minimum Standards Amendment (Administrative Changes) Bill 2023

1.1 On 8 August 2023, the Assistant Minister for Climate Change and Energy (Senator the Hon Jenny McAllister) circulated an addendum to the explanatory memorandum to the bill.

1.2 The committee thanks the minister for providing an addendum to the explanatory memorandum, which includes key information requested by the committee in relation to significant matters in delegated legislation.³²

Aboriginal Land Grant (Jervis Bay Territory) Amendment (Strengthening Land and Governance Provisions) Bill 2022

1.3 On 10 August 2023, four Government amendments were made to the bill in the Senate. On the same day, the Minister for Indigenous Australians (the Hon Linda Burney MP) circulated a supplementary explanatory memorandum to the bill.

1.4 The committee welcomes the Senate amendments to the bill which appear to address the committee's scrutiny concerns related to the broad delegation of administrative power, and thanks the minister for providing a supplementary explanatory memorandum.³³

Inspector-General of Aged Care Bill 2023

1.5 On 8 August 2023, five Australian Greens' amendments were made to the bill in the Senate.

1.6 On 8 August 2023, the Assistant Minister for Indigenous Australians (Senator Malarndirri McCarthy) tabled an addendum to the explanatory memorandum to the bill.

³² Senate Standing Committee for the Scrutiny of Bills, Digest 7 of 2023 (21 June 2023) pp. 1–2; Senate Standing Committee for the Scrutiny of Bills, Digest 8 of 2022 (2 August 2023) pp. 47–49.

³³ Senate Standing Committee for the Scrutiny of Bills, Digest 7 of 2022 (23 November 2022) pp. 2–3; Senate Standing Committee for the Scrutiny of Bills, Digest 1 of 2023 (8 February 2023) p. 77; Senate Standing Committee for the Scrutiny of Bills, Digest 7 of 2023 (21 June 2023) p. 12.

1.7 The committee thanks the minister for tabling an addendum to the explanatory memorandum, which includes key information requested by the committee in relation to coercive powers.³⁴

National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill 2023

1.8 On 7 August 2023, the Minister for Agriculture Fisheries and Forestry (Senator the Hon Murray Watt) tabled an addendum to the explanatory memorandum relating to the bill.

1.9 The committee thanks the minister for tabling an addendum to the explanatory memorandum, which includes key information requested by the committee in relation to privacy safeguards that exist regarding spent convictions information.³⁵

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

- Classification (Publications, Films and Computer Games) Amendment (Industry Self-Classification and Other Measures) Bill 2023
 - On 9 August 2023, the House of Representatives agreed to 14 government amendments to the bill.
- Jobs and Skills Australia Amendment Bill 2023
 - On 7 August 2023, the Senate agreed to one Australian Greens amendment and one Jacquie Lambie Network amendment to the bill.

³⁴ Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 4 of 2023 (30 March 2023) pp. 5-12; Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2023 (10 May 2023) pp. 61-68.

³⁵ Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2022 (10 May 2023) pp. 29-22; Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 7 of 2022 (21 June 2023) pp. 14-19.

Chapter 2

Commentary on ministerial responses

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

Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2023³⁶

Purpose	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.
Portfolio	Employment and Workplace Relations
Introduced	House of Representatives on 3 August 2023
Bill status	Before the House of Representatives

Broad discretionary powers

Parliamentary scrutiny – section 96 grants to the states

Instruments not subject to an appropriate level of parliamentary oversight³⁷

2.2 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 (the 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 Secretary.

³⁶ 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 10 of 2023*; [2023] AUSStaCSBSD 152.

³⁷ Schedule 1, item 4, proposed subsections 1062A(1A) and (1B). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii) and (v).

2.3 In *Scrutiny Digest 9 of 2023*, the committee requested the minister's 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.³⁸

Minister for Employment and Workplace Relations' response³⁹

2.4 The Minister for Employment and Workplace Relations (the minister) advised that the bill, if passed, would constrain the broad power conferred on the Secretary so that legislative support for grants and arrangements can only be provided for a program specified in a new notifiable instrument made by the Secretary. The minister advised that otherwise, the wording of section 1062A of the *Social Security Act* reflects the wording of section 32B of the *Financial Framework (Supplementary Powers) Act 1997*.

2.5 The minister also advised that it is important for the Secretary to maintain a broad power to make arrangements or grants on terms most suited to an individual program and to enable the Commonwealth to respond flexibly to changing labour conditions. The minister also stated that even high-level guidance may unnecessarily restrict the ability to respond to labour market changes and community needs.

2.6 In relation to the prescription of programs to be administered by a grant or an arrangement in notifiable instruments, the minister advised that the use of a notifiable instrument appropriately balances transparency without impeding on the ability to respond quickly and flexibly to changing labour conditions and community needs. Further, the minister advised that these instruments are not legislative in character as they do not affect any privilege or interest, create a right or impose an obligation. The minister also advised that every legislative instrument would need to be registered

³⁸ Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 9 of 2023](#) (9 August 2023) p. 25.

³⁹ The minister responded to the committee's comments in a letter dated 24 August 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

and accompanied by a detailed explanatory statement, including a statement of compatibility with human rights, and each new measure may be delayed due to the risk of disallowance.

2.7 Finally, the minister advised that grants or arrangements under section 1062A are rarely made to states or territories because of the nature of the programs in which these grants or arrangements may be made.

Committee comment

2.8 The committee thanks the minister for this response.

2.9 The committee notes the minister's advice in relation to the above matters of broad discretionary powers and the use of notifiable instruments.

2.10 The committee remains concerned that there is no high-level guidance on the face of the bill in relation to the Secretary's broad power to make grants and arrangements in respect of various programs. Although the requirement to determine a program by notifiable instrument streamlines the exercise of the power, it is the committee's understanding that any program can be determined to be a program for the purposes of section 1062A and consequently an arrangement or a grant can be made in respect of the program. The committee does not consider this to limit or provide any guidance as to the exercise of the Secretary's broad discretionary power. Further, the committee does not consider the need for flexibility to be a justification for the conferral of a broad discretionary power.

2.11 While the committee acknowledges the use of notifiable instruments may promote greater transparency than the current provisions, the committee reiterates that notifiable instruments, unlike legislative instruments, are not subject to a range of parliamentary processes such as disallowance, sunseting or the requirement to be tabled in Parliament. The use of legislative instruments would promote greater transparency.

2.12 The committee notes that while subsection 8(4) of the *Legislation Act 2003*⁴⁰ provides that an instrument is a legislative instrument if it determines or alters the law, this does not preclude the minister from prescribing these matters be set out in legislative instruments.

2.13 Finally, the committee does not accept that the requirement to prepare accompanying explanatory statements or statements of compatibility with human rights while registering legislative instruments to be an appropriate justification for the use of notifiable, rather than legislative, instruments. The committee's position is that the requirement to provide these explanatory materials improves parliamentary oversight and supports the inclusion of these measures in legislative instruments.

2.14 The committee reiterates its longstanding view that significant matters in delegated legislation should, at the very least, be subject to an appropriate level of

⁴⁰ Legislation Act 2003, subsection 8(4).

parliamentary oversight. In this instance, as subsection 1062A of the Social Security Act relates to the expenditure of public monies, the use of legislative instruments to determine programs is preferable as that would allow for parliamentary oversight to be maintained over this expenditure.

2.15 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of the conferral of a broad discretionary power and the use of notifiable instruments.

Telecommunications (Interception and Access) Amendment Bill 2023⁴¹

Purpose	This bill seeks to amend the <i>Telecommunications (Interception and Access) Act 1979</i> in relation to the communication of foreign intelligence information.
Portfolio	Attorney General
Introduced	House of Representatives on 7 August 2023
Bill status	Royal Assent on 10 August 2023

Broad discretionary powers

Broad authorisation powers

Privacy⁴²

2.16 Item 1 of Schedule 1 inserts subsection 65(1A) into the *Telecommunications (Interception and Access) Act 1979* (the TIA Act). This section 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). 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.

2.17 Item 7 of Schedule 1 introduces subsection 137(1A) which provides 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.

2.18 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. Subsection 65(1A) also provides for a broad authorisation power, as it allows the Director-General of Security to authorise

⁴¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Telecommunications (Interception and Access) Amendment Bill 2023, *Scrutiny Digest 10 of 2023*; [2023] AUSStaCSBSD 153.

⁴² Schedule 1, items 1 and 7, subsections 65(1A), 65(1B), 137(1A) and 137(1B). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (ii).

a person to communicate foreign intelligence information to a second person, subject to the purposes or conditions if any specified by the Attorney-General.

2.19 In *Scrutiny Digest 9 of 2023*⁴³, the committee requested 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
- 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.

Attorney-General's response

2.20 The Attorney-General advised that the Director-General of Security can only authorise ASIO (Australian Security Intelligence Organisation) employees and affiliates performing ASIO's functions to communicate foreign intelligence information. The bill also allows the Attorney-General to limit or constrain the exercise of this power by specifying conditions. The Attorney-General advised that any person approved to communicate this information must operate in accordance with relevant protective security policies, privacy rules, guidelines, and sensitive handling practices to protect this information from unauthorised disclosure, including the *Minister's guidelines in relation to the performance by the Australian Security Intelligence Organisation of its functions and the exercise of its powers* (Minister's Guidelines). The Attorney-General also noted that ASIO is subject to robust and independent oversight by the Inspector-General of Intelligence and Security.

2.21 In relation to why it is considered necessary and appropriate to confer such a broad power on the Director-General of Security, the Attorney-General advised that the ability to use and disclose foreign intelligence information is critical to ASIO's ability to achieve its functions. Further, the Director-General of Security is limited by section 20 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) which

⁴³ Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2023* (9 August 2023) pp. 26–29.

requires them to take all reasonable steps to ensure that the work of ASIO is limited to what is necessary for the purposes of the discharge of its functions. Similarly, there are requirements in the Minister's Guidelines requiring the Director-General of Security to take all reasonable steps to ensure that ASIO's collection, retention, use, handling and disclosure of personal information is limited to what is reasonably necessary to perform its functions. The Attorney-General advised that these measures constitute appropriate safeguards on the Director-General of Security's discretionary powers in this regard, in addition to the Act's requirement that information sharing is subject to conditions imposed by the Attorney-General. In relation to the breadth of the power to share information to a 'second person' and whether any safeguards exist to limit that power, the Attorney-General advised that foreign intelligence information plays a critical role in enabling intelligence agencies to identify threats to Australia's national security, and information sharing is necessary to identify and mitigate these threats. The Attorney-General advised that the amendments enable agencies to use or communicate foreign intelligence information to persons who are best placed to take actions, mitigate risk and protect Australia's national security interests.

Committee comment

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

2.23 While the Attorney-General's response has indicated this broad discretionary power is limited by any conditions imposed by the Attorney-General, the ASIO Act, the Minister's Guidelines and other policies, it appears to the committee that many of these limitations nevertheless allow the communication of information where it is necessary for the discharge of ASIO's functions or otherwise authorised by law. As this Act authorises such a broad discretion to communicate foreign intelligence information, it appears to the committee that these safeguards will not operate in practice to limit the broad discretion to communicate foreign intelligence information.

2.24 In relation to the Director-General of Security's power to authorise another person to communicate foreign intelligence information to a 'second person', the committee reiterates that this power is broad and applicable to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. It would be preferable 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.

2.25 The committee considers that the Attorney-General's response has not adequately justified why it is necessary and appropriate to confer such a broad power to share foreign intelligence information to a 'second person', and further, why it is not appropriate to limit the power for the second person to communicate that information to another person, use that information, or make a record of it. The committee considers that Australia's national security interests could still be protected with more rigorous safeguards on the sharing of foreign intelligence information,

particularly in relation to the sharing of information to a 'second person' and the second person's scope to communicate, use or record that information.

2.26 As the bill has already passed both Houses of the Parliament and received Royal Assent, the committee makes no further comment on this matter.

Biosecurity Amendment (Advanced Compliance Measures) Bill 2023⁴⁴

Purpose	This bill seeks to amend the Biosecurity Act 2015 to: provide for greater access to information related to the biosecurity risk of travellers; alter provisions relating to approved arrangements; increase certain civil penalties; and create strict liability offences.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 21 June 2023
Bill status	Passed Both Houses

Privacy⁴⁵

2.27 Schedule 1 to the bill seeks to introduce proposed subsection 196(3A) to the *Biosecurity Act 2015* (Biosecurity Act) which alters the Director of Biosecurity (the Director)'s existing power to require a person on an incoming aircraft or vessel to provide information to assess the biosecurity risk associated with them or goods in their possession. Proposed subsection 196(3A) grants the Director the power to require any person included in a class of persons intending to enter or entering Australian territory on an incoming aircraft or vessel to produce an Australian travel document (which includes a passport), or a passport or travel document issued by another country for the purpose of assessing the level of biosecurity risk associated with the person or for the 'future profiling, or future assessment, of biosecurity risks'. The Director is also empowered to retain information collected for these purposes.

2.28 The explanatory materials to the bill do not clarify the nature of personal information that may be collected or how this information will inform the level of biosecurity risk associated with a person or the future profiling or assessment of biosecurity risks.

2.29 In *Scrutiny Digest 8 of 2023*, the committee requested the minister's advice as to the nature of personal information that can be collected and used, and to whom that information can be disclosed. The committee also requested advice as to the

⁴⁴ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Biosecurity Amendment (Advanced Compliance Measures) Bill 2023, *Scrutiny Digest 10 of 2023*; [2023] AUSStaCSBSD 154.

⁴⁵ Schedule 1, item 7. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

meaning of future profiling or future assessment of biosecurity risks and whether the *Privacy Act 1988* (Privacy Act) applies to personal information.⁴⁶

Minister for Agriculture, Fisheries and Forestry's response⁴⁷

2.30 The Minister for Agriculture, Fisheries and Forestry (the minister) advised that the nature of personal information that may be collected from the production or scanning of a person's passport or travel document includes 'a person's name, place of birth, date of birth, date of issuance, date of expiry, document number, photo and signature'⁴⁸.

2.31 The minister confirmed that only information that is contained in a passport or travel document can be collected under proposed subsection 196(3A).

2.32 The minister further advised that the Australian Privacy Principles in the Privacy Act are applicable to the department and to information collected under proposed subsection 196(3A). Any disclosure of this information will be subject to the information management provisions in Division 3 of Part 2 of Chapter 11 of the Biosecurity Act, which are authorisations for the purposes of the Privacy Act.

2.33 In relation to the meaning of 'future profiling, or future assessment, of biosecurity risks', the minister advised that the department develops traveller cohort profiles which enable better prediction and management of the biosecurity risks posed by future cohorts. The minister advised that the data is used to determine the likelihood that a cohort of travellers will fail to declare high biosecurity risk goods to enable prioritising these cohorts for biosecurity intervention.

Committee comment

2.34 The committee thanks the minister for this response.

2.35 The committee notes the minister's advice regarding the nature of personal information that may be collected, and confirmation that the Privacy Act applies. The committee also welcomes that such disclosures may only be in accordance with the information management provisions of the Biosecurity Act, which are authorisations for the purposes of the Privacy Act.

2.36 The committee retains concerns in relation to the definition of 'future profiling, or future assessment, of biosecurity risks'. As such, the committee queries the necessity of collecting personal information from every person of a certain class (rather than collecting information from specified individuals) and the necessity of collecting personal information in general (rather than collecting information on the

⁴⁶ Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 8 of 2023](#) (2 August 2023) p. 3.

⁴⁷ The minister responded to the committee's comments in a letter dated 17 August 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2023* available at: http://www.aph.gov.au/senate_scrutiny_digest.

⁴⁸ See minister's response.

number of people posing biosecurity risks in a certain traveller cohort) in order to do so.

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

2.38 The committee draws the definition of 'future profiling, or future assessment, of biosecurity risks' to the attention of senators and leaves to the Senate as a whole the appropriateness of collecting personal information from every person in a class of persons to inform this matter.

Intelligence Services Legislation Amendment Bill 2023⁴⁹

Purpose	<p>The bill would amend the <i>Intelligence Services Act 2001</i> and the <i>Inspector-General of Intelligence and Security Act 1986</i> to expand the jurisdictions of the Inspector-General of Intelligence and Security (IGIS) and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to include four additional agencies: the Australian Criminal Intelligence Commission, the Australian Federal Police, Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Department of Home Affairs.</p> <p>The bill also seeks to strengthen the relationship between the PJCIS, the IGIS and the Independent National Security Legislation Monitor, including by providing the PJCIS with a power to request the IGIS conduct an inquiry, providing an own-motion power to the PJCIS to review certain legislation and a requirement that the IGIS and the Director-General of National Intelligence provide briefings to the PJCIS.</p>
Portfolio	Attorney-General
Introduced	House of Representatives on 22 June 2023
Bill status	Before the House of Representatives

Significant matters in delegated legislation⁵⁰

2.39 Item 6 of Schedule 1 to the bill seeks to insert proposed section 3A into the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). Proposed section 3A would provide definitions for the intelligence functions of three national intelligence community agencies: the Australian Federal Police, Australian Transaction Reports and Analysis Centre (AUSTRAC), and the Department of Home Affairs (the Department). Under subsection 8(3A) of the IGIS Act the Inspector-General of Intelligence and Security (IGIS) has the function of inquiring into certain matters to the extent that they relate to an intelligence function of an agency. The definition of intelligence function is therefore relevant to establishing the jurisdiction of the IGIS.

2.40 The intelligence functions of the Australian Federal Police and of AUSTRAC are set out in some detail in proposed subsections 3A(1) to (3). By contrast, subsection

⁴⁹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Intelligence Services Legislation Amendment Bill 2023, *Scrutiny Digest 10 of 2023*; [2023] AUSStaCSBSD 155.

⁵⁰ Schedule 1, item 6, proposed subsections 3A(4) to (6). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

3A(4) states that the intelligence function for the Department of Home Affairs has the meaning given by the regulations.

2.41 In *Scrutiny Digest 8 of 2023* the committee requested the Attorney-General's advice as to:⁵¹

- why it is considered both necessary and appropriate to set the meaning of 'intelligence functions', as it applies to the Department of Home Affairs, out within delegated legislation; and
- whether the bill could be amended so that:
 - any intelligence functions of the Department of Home Affairs which are already legislated are set out within the bill; and
 - to provide further high-level guidance about the use of the regulation-making powers set out at proposed subsections 3A(4) and (5).

Attorney-General's response⁵²

2.42 The Attorney-General advised that defining the Department's intelligence functions in regulations would allow for as much detail as required, and would provide certainty to Parliament and agencies as to the scope of oversight. The Attorney-General further advised that Department's functions are provided for in the Administrative Arrangements Order and as such they are subject to more rapid and frequent change than agencies established by legislation.

2.43 The Attorney-General also advised that timely updates to the Department's intelligence functions are needed to 'ensure there are no gaps in oversight and to provide assurance to the public that Home Affairs' intelligence functions are subject to ongoing robust oversight'.

Committee comment

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

2.45 The committee notes the minister's advice that prescribing the definition of the Department's intelligence services functions in regulations would allow for oversight, flexibility and certainty. However, this advice does not dissuade the committee of its view that the definition of the Department's intelligence services is a significant matter better suited to primary legislation.

2.46 It is unclear to the committee that the inclusion of such significant matters would be afforded greater parliamentary oversight via inclusion in delegated legislation. The Department's intelligence services functions could be defined with as

⁵¹ Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2023* (2 August 2023) pp. 14–20.

⁵² The minister responded to the committee's comments in a letter dated 23 August 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

much detail to accurately characterise those functions and to provide certainty to agencies, the Parliament and the public about the scope of any oversight provide IGIS, on the face of the bill.

2.47 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of prescribing the definition of the intelligence functions of the Department of Home Affairs in regulations rather than the face of the bill.

Reversal of the evidential burden of proof⁵³

2.48 The bill seeks to establish several offence-specific defences for which the evidential burden of proof are reversed. All of the defences established by the bill will apply to existing information disclosure offences, which make it an offence for persons to make a record of, disclose or use certain kinds of information in certain circumstances. It is a defence for each of these offenses if the person used, disclosed or made a record of the information in connection with the performance of their functions or duties or exercising their powers. The bill would also provide additional defences whereby the relevant offence does not apply if the affected person uses or discloses the information for the purpose of an IGIS official exercising a power or performing a function or duty.

2.49 In *Scrutiny Digest 8 of 2023*⁵⁴ the committee requested the minister's advice as to:

- why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance.

2.50 The committee also noted that its consideration of the appropriateness of a provision which reverses the burden of proof is assisted if the advice explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences* (the Guide).⁵⁵

⁵³ Various provisions of Schedule 1. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

⁵⁴ Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2023* 2 August 2023, pp. 14–20.

⁵⁵ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, pp. 50–52.

Attorney-General's response⁵⁶

2.51 The Attorney-General advised that, as per the Guide, the relevant defences in schedule 1 of the bill contain matters which are peculiarly within the knowledge of the defendant.

2.52 It is the Attorney-General's position that the defendant, as an IGIS official, is best placed to adduce evidence to indicate the purpose of their conduct. Further, the Attorney-General notes that IGIS officials are privy to sensitive information which is likely to be highly classified, which may make it difficult evidence for the prosecution to adduce.

Committee comment

2.53 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the reversal of the evidential burden in relation to relevant Schedule 1 offence-specific defence provisions is appropriate as the evidentiary matters are uniquely suited to be addressed by the defendant.

2.54 While noting this, the committee does not consider that the explanation provided adequately justifies why it is proposed to use offence-specific defences in relation to several offences. The committee reiterates that the Guide provides that a matter should only be included in an offence-specific defence 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.⁵⁷

2.55 The committee is not persuaded that the relevant evidence would be peculiarly within the knowledge of the defendant. It is unclear to the committee why there would be no relevant evidence or records arising in relation to the performance of an IGIS official's duties. In addition, given there are a range of offence-specific defences in the bill, the committee's expectation is that a discrete justification should be provided for each defence for which the evidential burden is reversed, and does not consider a general response sufficient to address the nuances of each relevant offence provision.

2.56 The committee also notes that the response does not address the second limb of the test set out in the Guide. That is, whether these matters would be significantly more difficult and costly for the prosecution to disprove.

⁵⁶ The minister responded to the committee's comments in a letter dated 23 August 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

⁵⁷ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

2.57 As the Attorney-General's advice does not explain how the matters in each of the offence-specific defences in Schedule 1 of the bill are peculiarly within the knowledge of the defendant, the committee remains of the view that it does not appear to be appropriate to reverse the evidential burden of proof in relation to these matters.

2.58 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to matters that do not appear to be peculiarly within the knowledge of the defendant.

Immunity from civil liability⁵⁸

2.59 Item 4 of Schedule 4 to the bill seeks to insert proposed section 476.7 into the *Criminal Code Act 1995*, the effect of which would be to exempt persons from civil and criminal liability for certain 'computer related conduct'.

2.60 More specifically, the new section would provide immunities in two different circumstances. Proposed subsection 476.7(1) provides that a defence official would not be liable for engaging in conduct where the official held a reasonable belief that the conduct was likely to cause a computer-related act, event, circumstance or result to take place outside Australia. 'Defence official' refers to a wide range of persons, and would include a member of the ADF, a defence civilian, an employee of the Department of Defence, a consultant or contractor to the department, or any other person specified in a class of persons by the Secretary or Chief of the ADF by legislative instrument.⁵⁹

2.61 Proposed subsection 476.7(2) provides that a person is not subject to any civil or criminal liability for undertaking conduct related to authorised ADF activities taking place outside Australia, where the conduct taken together with a computer-related act, event or circumstance, could amount to an offence and would not have amounted to an offence in the absence of the computer-related conduct.

2.62 'Computer related conduct' is defined under proposed section 476.1 to mean a range of acts, events, circumstances or results involving the use of computers, including electronic communication, or the act of possessing, controlling, modifying, accessing, producing, supplying, or obtaining computer data.

2.63 In *Scrutiny Digest 8 of 2023*⁶⁰ the committee requested the Attorney-General's advice as to:

⁵⁸ Schedule 4, item 4, proposed section 476.7. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

⁵⁹ Schedule 4, item 4, proposed subsection 476.7(8).

⁶⁰ Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2023* (2 August 2023) pp. 14–20.

- why the immunities conferred under proposed subsections 476.7(1) and 476.7(2) are both necessary and appropriate; and
- the committee noted that consideration of this matter will be assisted if the Attorney-General's response justifies why the immunity conferred by the bill differs from that recommended in the National Intelligence Review. Namely, the committee requested the Attorney-General's advice as to:
 - why conferring civil immunity is both necessary and appropriate;
 - why conferring criminal immunity beyond the offences set out in Part 10.7 of the Criminal Code is both necessary and appropriate;
 - why it is necessary and appropriate to provide that the immunity would extend to persons other than ADF members, including employees of the Department of Defence, consultants, contractors, or persons specified by legislative instrument;
 - why it is necessary and appropriate to confer immunity on persons who are undertaking actions inside Australia, including why the threshold test of whether a computer-related event is 'likely' to take place outside of Australia is the appropriate test;
 - whether processes are in place to ensure that decisions as to whether the relevant conduct is likely to cause a computer-related event to take place outside of Australia are undertaken in a robust and consistent manner; and
 - why it is necessary and appropriate to confer an immunity on persons who are undertaking conduct that is preparatory to, in support of, or otherwise directly connected with, authorised ADF activities outside Australia.

Attorney-General's response

2.64 The Attorney-General advised that the immunity is necessary to protect defence officials from legal risk arising from the course of their duties, and that immunity is only conferred on ADF activities that are 'authorised by the Chief of the Defence Force and connected with the defence or security of Australia.' In relation to why conferring criminal immunity beyond the offences set out in Part 10.7 of the Criminal Code is both necessary and appropriate, the Attorney-General noted that relevant conduct may attract civil or criminal liability under other laws.

2.65 Further, the Attorney-General advised that the activity covered by the immunity is limited by the definitions of a computer-related act, event, circumstance or result. Written notification is mandatory for conduct that has caused damage to a computer within Australia, which will be assessed at the most senior levels within Defence to update procedures and guidelines and undertake disciplinary action where appropriate.

2.66 In relation to why it is necessary and appropriate for the immunity to extend to Department of Defence employees, consultants, contractors or specific persons, the Attorney-General advised that 'the term 'defence officials' intends to capture the various members of the integrated defence workforce'.

2.67 In relation to why it is necessary and appropriate to confer immunity on persons undertaking actions in Australia, the Attorney-General advised that immunity only applies to a defence official with a reasonable belief that the conduct was likely to take place outside Australia.

2.68 In relation to why the threshold test of whether a computer-related event is 'likely' to take place outside Australia is appropriate, the Attorney-General advised that it is not always possible to determine the geographic location of a computer. The Attorney-General further advised that the immunity does not apply where it is not reasonable for a defence official to consider it likely that a target device is located outside Australia.

2.69 In relation to the processes in place to ensure decisions are undertaken in a robust and consistent manner, the Attorney-General advised that these include 'context-specific legal advice that addresses domestic and international law, targeting directives, and rules of engagement'.

2.70 In relation to why it is necessary and appropriate to confer immunity on persons undertaking preparatory conduct for authorised ADF activities, the Attorney-General advised that this is needed as complex cyber operations may require the ADF to undertake pre-positioning computer-related activities prior to armed conflict.

Committee comment

2.71 The committee thanks the Attorney-General for this information.

2.72 While noting this advice, the committee considers that the response does not sufficiently justify why the immunity conferred by the bill differs from that recommended in the National Intelligence Review. The committee notes that the response does not substantively improve upon the information already provided about these matters in the explanatory memorandum.

2.73 The committee reiterates its concerns that the immunity from civil and criminal liability in proposed section 476.7 of the bill differs in a number of respects and appears broader than that recommended in the *Comprehensive Review of the Legal Framework of the National Intelligence Community* (National Intelligence Review). It is unclear to the committee why it is appropriate for the bill to differ from the recommendations of the Review.

2.74 In light of the above, the committee retains its scrutiny concerns in relation to this matter, and draws its concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the broad civil and criminal immunity provided for in proposed section 476.7.

Migration Amendment (Strengthening Employer Compliance) Bill 2023⁶¹

Purpose	<p>The Bill seeks to strengthen the legislative framework in the <i>Migration Act 1958</i> to improve employer compliance and protect temporary migrant workers from exploitation.</p> <p>New employer sanctions introduced by the bill include criminal offences and civil penalties related to exploitative work arrangements. The bill also increases existing maximum penalties relating to sponsorship obligations.</p> <p>The bill implements recommendations 19 and 20 from the <i>Report of the Migrant Workers' Taskforce (March 2019)</i>.</p>
Portfolio	Home Affairs
Introduced	House of Representatives on 22 June 2023
Bill status	Before the House of Representatives

Privacy

Significant matters in delegated legislation⁶²

2.75 Part 2 of Schedule 1 to the bill introduces a number of amendments which would allow the minister, or their delegate, to prohibit certain employers from employing any additional non-citizens. These persons are designated as 'prohibited employers'.

2.76 Such a declaration may be made where the person is subject to a 'migrant worker sanction', and the sanction was imposed no more than five years prior. A person may become subject to a migrant worker sanction for a variety of reasons including upon being convicted of a range of work-related offences under the *Fair Work Act 2009* (Fair Work Act), being subject to certain civil penalties or contraventions of the Act, or contravening enforceable undertakings imposed under that Act. In addition, a migrant worker sanction may be imposed on the basis of the minister being satisfied of certain matters, including that the person had failed to satisfy their sponsorship or that the person failed to comply with a compliance notice without reasonable excuse.

⁶¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Strengthening Employer Compliance) Bill 2023, *Scrutiny Digest 10 of 2023*; [2023] AUSStaCSBSD 156.

⁶² Schedule 1, Part 2. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

2.77 Importantly, the circumstances in which conviction for a particular offence, or contravention of a civil penalty provision or enforceable undertaking, could result in a person being subject to a migrant worker sanction would be set out in regulations rather than within the bill itself. Breach of the prohibition would be an offence punishable by imprisonment for two years or 360 penalty units or both, or a civil penalty punishable by 240 penalty units.

2.78 In addition, under proposed section 245AYM, the minister is required to publish identifying information in relation to a prohibited employer online, except in prescribed circumstances.⁶³ This information includes the name of the person, the reasons they have been declared a prohibited employer and any other information that the minister considers is reasonably necessary to identify the person. Under subsection 245AYM(5), the minister is not required to arrange for the removal of this information when the person stops being a prohibited employer.

2.79 In *Scrutiny Digest 8 of 2023*⁶⁴ the committee requested the minister's advice as to:

- why it is considered both necessary and appropriate to include the regulation making powers set out in Part 2 of Schedule 1 to the bill;
- whether high-level guidance about the use of these powers can be included within the bill;
 - the committee noted that its consideration of this issue will be assisted if the minister provides examples demonstrating what kinds of circumstances it is contemplated may be prescribed within the regulations.
- the committee also requested advice as to why it is considered necessary and appropriate to include proposed subsection 245AYM(5), so that the minister is not required to arrange for the removal of information when a person stops being a prohibited employer; and
- what safeguards are in place to ensure the appropriate exercise of publication powers under section 245AYM, and whether these are set out in law or policy.

⁶³ Schedule 1, Part 2, item 5, proposed section 245AYM.

⁶⁴ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2023* (2 August 2023) pp. 21–26.

Minister's response⁶⁵

2.80 In relation to the inclusion of the power to prescribe Fair Work Act criminal offences and additional civil contraventions as migrant worker sanctions via regulations, the minister advised that this is necessary for flexibility. Further, the minister advised that this is to ensure changes to workplace laws are more easily incorporated into migration law, noting that currently only civil offences under the Fair Work Act are considered appropriate in this context. As an example, the minister noted that the Government has committed to introducing a criminal offence for wage theft and the regulation-making power in the bill would allow for the consideration of including this offence in the migrant worker sanction regime.

2.81 The minister noted that the bill empowers regulations which prescribe circumstances that may apply in relation to a criminal offence or civil contravention of the Act to enable different types of legal liability to be included or excluded as appropriate.

2.82 The minister advised that he will consider possible amendments to the bill and its explanatory memorandum, including the committee's request for the inclusion of high-level guidance on the regulation-making powers on the face of the bill. This consideration will take place after the handing down of the report on the bill by the Legal and Constitutional Affairs Legislation Committee.

2.83 In relation to privacy, the minister advised that proposed subsection 245AYM(5) reflects the need to absolve the minister of responsibility where it may not be practicable for all relevant information to be removed from the internet where it may have been shared beyond the Departmental website. Further, unforeseen delays may prohibit the removal of information by a specified date.

2.84 In relation to safeguards, the minister noted that in accordance with Australian Privacy Principles the Department will take reasonable steps to ensure the accuracy of published information and will review a person's published information upon request or where a review appears necessary. The minister further noted that the commencement of the provisions is delayed to ensure time to develop and embed policies and training to safeguard the accuracy of published information.

Committee comment

2.85 The committee welcomes the minister's further advice about the operation of offence provisions in this context. The committee also welcomes the minister's explanation that the bill prescribes circumstances relevant to prescribed Act offences by regulation to allow for different types of legal responsibility to be applied, but notes that examples of such circumstances would have been beneficial.

⁶⁵ The minister responded to the committee's comments in a letter dated 28 August 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.86 In relation to the privacy of published personal information, the committee notes the wording of proposed subsection 245AYM(5) would absolve the minister of responsibility for removing information published only on the Department's website and not any subsequent reproductions or republications of personal information across other internet sources. It therefore appears that the need to absolve the minister of the responsibility for removing information spread beyond the Department's website is irrelevant as this would not be captured in the provision as drafted. Requiring the minister to remove relevant personal information from the Departmental website appears to the committee to be a reasonably practical and straightforward step to safeguard personal information, and in line with the Department's intention to take reasonable steps to ensure the accuracy of published information.

2.87 The committee welcomes the minister's advice as to the steps that will be taken within the Department to ensure the accuracy and relevancy of published personal information. The committee also welcomes that the Department will embed relevant procedures and training to ensure that published information is safeguarded.

2.88 The committee welcomes the minister's undertaking to consider possible amendments to the bill in light of the committee's request for high-level guidance on the regulation-making powers set out in Part 2 of Schedule 1 to the bill. In light of this, the committee makes no further comment on this matter.

2.89 The committee retains its view that it is not necessary and appropriate for proposed subsection 245AYM(5) to provide that the minister is not required to arrange for the removal of information from the Department's website when a person stops being a prohibited employer, given the removal of relevant information appears to be a relatively straightforward and practical safeguard.

2.90 In light of the above, the committee draws its concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed subsection 245AYM(5).

Immunity from civil liability⁶⁶

Retrospective application⁶⁷

2.91 Proposed section 245AYM requires the minister to publish certain information relating to prohibited employers on the Department's website. Proposed subsection 245AYM(4) provides that no civil liability arises in relation to the publication of information under section 245AYM, so long as the publication was undertaken in good

⁶⁶ Schedule 1, item 5, proposed subsection 245AYM(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

⁶⁷ Schedule 1, item 36. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

faith. In *Scrutiny Digest 8 of 2023*⁶⁸ the committee drew concerns to the attention of senators, and left to the Senate as a whole the appropriateness of providing an immunity from civil liability, such that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

2.92 Item 36 of Schedule 1 to the bill provides that the amendments introduced under Part 5 of that Schedule apply to conduct engaged in before, on or after commencement. Part 5, which introduces the concept of compliance notices into the Migration Act, would therefore have a retrospective application. In *Scrutiny Digest 8 of 2023*⁶⁹ the committee drew its concerns to the attention of senators, and left to the Senate as a whole the appropriateness of providing that the amendments introduced by Part 5 of Schedule 1 to the bill, relating to compliance notices, have a retrospective application.

Minister's response

2.93 The minister advised that the delayed commencement of the relevant provisions affords sufficient time to the Department to establish policies and procedures to ensure any information published is done so in good faith and with accuracy.

2.94 The minister further advised that compliance notices will direct an employer or business to undertake or cease certain activities. They are therefore not a penalty or punitive in nature, although punitive measures may be applicable to failure to comply. The minister also advised that without the proposed compliance notices '...only the current compliance measures in the Migration Act would be available. This would mean that the available compliance options in respect of that non-compliant conduct would be less timely and more onerous and costly (e.g. an infringement or court process).'

Committee comment

2.95 The committee thanks the minister for providing this information, and, noting the committee has already drawn its concerns in relation to these matters to the attention of the Senate, makes no further comment.

⁶⁸ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2023* (2 August 2023) pp. 21–26.

⁶⁹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2023* (2 August 2023) pp. 21–26.

National Occupational Respiratory Disease Registry Bill 2023⁷⁰

Purpose	This bill seeks to create a legislative framework for the establishment and ongoing management of the National Occupational Respiratory Disease Registry (the National Registry). The National Registry will provide access to information about occupational respiratory diseases and support the identification of industries, occupations, job tasks and workplaces where there is a risk of exposure to respiratory disease-causing agents.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 21 June 2023
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Privacy

Broad discretionary powers⁷¹

2.96 The bill seeks to create a legislative framework for the establishment and ongoing management of the National Occupational Respiratory Disease Registry (the National Registry).

2.97 The bill is characterised by the inclusion of 'framework provisions' which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scheme's scope and operation. For example, the bill would require a prescribed medical practitioner to notify diagnoses of a prescribed occupational respiratory disease and would allow for the voluntary notification of other occupational respiratory diseases.⁷² Rather than substantively defining these terms which are integral to the operation of the scheme in the bill, clause 8 defines 'prescribed medical practitioner' and a 'prescribed occupational respiratory disease' to mean as prescribed in the rules.⁷³ The scheme further relies on these terms to determine penalties. For example, a medical practitioner who fails to notify of a

⁷⁰ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Occupational Respiratory Disease Registry Bill 2023, *Scrutiny Digest 10 of 2023*; [2023] AUSStaCSBSD 157.

⁷¹ The committee draws senators' attention to the framework nature of the bill pursuant to Senate standing orders 24(1)(a)(i), (ii), and (iv).

⁷² Clauses 14 and 15.

⁷³ Clause 8.

diagnosis or treatment of a prescribed occupational respiratory disease would be liable to a civil penalty of up to 30 penalty units (currently \$9,390),⁷⁴ regardless of whether or not the patient has themselves consented to the notification.⁷⁵ Further, the register must include 'minimum notification information', and may include 'additional notification information', both of which may be determined by the Commonwealth Chief Medical Officer (CMO) by legislative instrument.⁷⁶

2.98 In *Scrutiny Digest 8 of 2023* the committee requested the minister's detailed advice as to:

- why it is considered necessary and appropriate to leave much of the information related to the scope and operation of the National Registry to delegated legislation;
- whether the bill can be amended to include detail in relation to the National Registry on the face of the primary legislation; and
- what criteria and considerations exist that limit or constrain the exercise of the CMO's broad discretionary powers in determining minimum and additional information.⁷⁷

Assistant Minister for Health and Aged Care's response⁷⁸

2.99 In relation to why it is considered necessary and appropriate to leave much of the information related to the scope and operation of the National Registry to delegated legislation the Assistant Minister for Health and Aged Care (the minister) advised that:⁷⁹

...the bill seeks to strike an appropriate balance between embedding the obligations and processes for the National Registry in primary legislation while ensuring operational detail, which may need to be amended to ensure the currency of the National Registry, is set out in disallowable instruments.

2.100 The minister also noted that bill 'embeds the fixed policy parameters recommended by the National Dust Disease Taskforce for notification of the diagnosis

⁷⁴ As of 1 July 2023, the value of one penalty unit increased to \$313, in accordance with subsection 4AA(3) of the *Crimes Act 1914*, which provides for indexation of penalty units.

⁷⁵ Clause 14.

⁷⁶ Clause 12.

⁷⁷ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2023* (2 August 2023) p. 29.

⁷⁸ The assistant minister responded to the committee's comments in a letter dated 15 August 2023. A copy of the letter is available on the committee's website: see correspondence related to *Scrutiny Digest 10 of 2023* available at: http://www.aph.gov.au/senate_scrutiny_digest.

⁷⁹ See the assistant minister's response.

of an occupational respiratory disease to the National Registry by prescribed medical practitioners'.⁸⁰

2.101 In relation to whether the bill can be amended to include detail in relation to National Registry on the face of the primary legislation, the minister advised that the ability to quickly mandate notification of a disease will ensure information, such as incidence, exposure, task, job and occupation, will be made available to work, health and safety agencies to facilitate early intervention and effective response to emerging occupational respiratory disease. The minister further advised that including further detail on the face of the bill would be contrary to strong feedback received from key stakeholders that the National Registry needs to be capable of pivoting to address future occupational respiratory disease threats.⁸¹

2.102 In relation to what criteria or considerations exist that limit or constrain the exercise of the CMO's broad discretionary powers in determining minimum and additional information, the minister stated:

It is intended the Commonwealth Chief Medical Officer will take into consideration:

- the implications for operational support of the National Registry from jurisdictions which currently operate mandatory disease registers
- the potential reporting burden on prescribed medical practitioners and their willingness to report non-prescribed occupational respiratory diseases and additional notification information
- the resourcing needs to implement changes to the functionality of the National Registry
- the outcomes of any consultations undertaken in compliance with s17 of the *Legislation Act 2003*.⁸²

2.103 The minister also noted that the CMO will take into account the extent of the burden placed on prescribed medical practitioners when considering amending the scope of information to be notified to the National Registry.

2.104 The minister stated that these considerations will ensure the Commonwealth Chief Medical Officer will be conservative when determining the scope of minimum and additional notification information and will undertake consultation with relevant stakeholders as required under section 17 of the *Legislation Act 2003*, in making any such determinations⁸³.

⁸⁰ See the assistant minister's response.

⁸¹ See the assistant minister's response.

⁸² See the assistant minister's response.

⁸³ See the assistant minister's response.

Committee comment

2.105 The committee thanks this minister for this response.

2.106 However, the committee reiterates its longstanding view that where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. A legislative instrument is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill.

2.107 The committee is concerned that in this instance, the explanatory memorandum has not sufficiently justified the framework nature of the bill and its reliance on delegated legislation for matters such as determining categories of information that must be included on the register. While some individual delegated legislation making powers may be justified on the basis of a need for flexibility in the face of ongoing developments in healthcare and disease management, this does not justify the overall framework nature of the bill.

2.108 The committee's concerns are heightened as the bill allows for the CMO to expand the categories of minimum and additional information by regulation. It is the committee's understanding that in this instance, this will also impact the privacy of patients diagnosed with respiratory diseases and will necessitate the disclosure of additional information (even without the patient's consent in the case of additional categories of minimum information).

2.109 The committee notes the minister's advice as to the considerations that constrain the exercise of the CMO's power and considers that this information is best placed in the explanatory memorandum.

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

2.111 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving much of the information related to the scope and operation of the National Registry to delegated legislation.

Treasury Laws Amendment (2023 Measures No. 3) Bill 2023⁸⁴

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

Significant matters in delegated legislation

Broad discretionary power⁸⁵

2.112 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

⁸⁴ 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 10 of 2023*; [2023] AUSStaCSBSD 158.

⁸⁵ 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.

2.113 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.

2.114 In *Scrutiny Digest 9 of 2023*⁸⁶, the committee requested 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.

Assistant Treasurer and Minister for Financial Services' response⁸⁷

2.115 The Assistant Treasurer and Minister for Financial Services (the Assistant Treasurer) advised that the exemptions power in proposed section 1023U is to address circumstances where the anti-avoidance legislation adversely captures products not intended to fall under the general prohibition. The Assistant Treasurer advised that, to ensure the prohibition does not stifle innovation or market participation through over regulation, it is appropriate that ASIC be able to respond in a timely manner to provide certainty to credit product providers.

2.116 The Assistant Treasurer further advised that it is not appropriate to have an overarching time-limit on instruments made under proposed section 1023U as the length of operation for such instruments needs to occur on a case-by-case basis to

⁸⁶ Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2023* (9 August 2023) pp. 30–34.

⁸⁷ The minister responded to the committee's comments in a letter dated 23 August 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2023* available at: www.apf.gov.au/senate_scrutiny_digest.

ensure each instrument operates as long as strictly necessary and ASIC can vary, revoke or set the length of such instruments depending on evolving market conditions.

2.117 In relation to the provision of high-level guidance on the face of the primary legislation, the Assistant Treasurer advised that the explanatory memorandum provides high-level and specific guidance, and it would not be appropriate to include guidance within the primary law as financial markets change quickly and, as a result, new products may emerge that the guidance may not foresee.

2.118 Similarly, in relation to section 828R, the Assistant Treasurer advised that the exemptions are needed to ensure it does not draw in entities that should not be subject to the CS service rules. Further, the bill does not prescribe mandatory or discretionary criteria or considerations when making an exemption because these are not foreseeable at the time, and sunseting is not considered appropriate as ASIC is in the best position to determine the appropriate length of any exemption based on the circumstances that necessitate the exemption.

Committee comment

2.119 The committee thanks the Assistant Treasurer for this response.

2.120 However, it is unclear to the committee how ASIC's power to create exemptions from the general prohibition, along with flexibility to determine the conditions and length of time the exemption is in place and to change this in response to market conditions, provides certainty to credit product providers. The committee reiterates that some amendments to the bill could assist with appropriately limiting ASIC's broad discretionary power. 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, and the inclusion of a time limit to exemptions which would require that it be reconsidered whether the exemption remains appropriate more regularly.

2.121 The committee considers that the Assistant Treasurer's response has not satisfactorily addressed the committee's concerns, and that the desire for both flexibility and certainty has led to a move away from adequate parliamentary oversight of law making, and instead relies on significant matters being provided for in delegated legislation. The committee further considers that ASIC's power to make exemptions from the primary law, in the context of numerous other powers to make exemptions from the operation of the *Corporations Act 2001*, makes it difficult from a clarity of law perspective to access and understand the law.

2.122 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing for delegated legislation to make exemptions to primary legislation, with limited guidance as to when an exemption may be granted and the conditions attached to it.

Availability of merits review⁸⁸

2.123 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.

2.124 In *Scrutiny Digest 9 of 2023*, the committee requested the minister's detailed 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).

Assistant Treasurer and Minister for Financial Services' response⁸⁹

2.125 The Assistant Treasurer advised that proposed section 828A allows ASIC to make CS services rules, and as this is subordinate legislation it is not considered appropriate or necessary for merits review to be available for legislative action. The Assistant Treasurer noted that this is in line with Commonwealth legislation and the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*.

2.126 The Assistant Treasurer further advised directions under proposed subsection 828G(1) would not affect the interests of a person or place any burden on a person that the person would not otherwise experience if they were complying with their obligations under the CS services rules. Further, as the decision to issue a direction is law enforcement in nature, in line with the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*, it should not be made subject to merits review.

Committee comment

2.127 The committee thanks the Assistant Treasurer for this response.

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

⁸⁸ 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).

⁸⁹ The minister responded to the committee's comments in a letter dated 23 August 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2023* available at: www.apf.gov.au/senate_scrutiny_digest.

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

Chapter 3

Scrutiny of standing appropriations

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.⁹⁰ 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.⁹¹

Senator Dean Smith

Chair

⁹⁰ 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*.

⁹¹ For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).