
# Senate Standing

# Committee for the Scrutiny of Bills

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# Membership of the committee

**Current members**

| | |
|---|---|
| Senator Dean Smith (Chair) | LP, Western Australia |
| Senator Raff Ciccone (Deputy Chair) | ALP, Victoria |
| Senator Nick McKim | AG, Tasmania |
| Senator Paul Scarr | LP, Queensland |
| Senator Tony Sheldon | ALP, New South Wales |
| Senator Jess Walsh | ALP, Victoria |

**Secretariat**

Anita Coles, Secretary
Hannah Wilkins, Principal Research Officer
Nidhi Venkatesan, Senior Research Officer
Kieran Knox, Legislative Research Officer

**Committee legal adviser**

Professor Leighton McDonald

# Contents

# 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 nonpartisan 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 in the Senate Chamber, the responsible minister, for an explanation as to why the committee has not received a response.

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

## Publications

It is the committee's usual practice to table a *Scrutiny Digest* (the Digest) each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

**General information**

Any senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant Senate legislation committee for information.

# Report snapshot[1]

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|---|---|
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[1] This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report Snapshot, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 212.

# 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.

## Better and Fairer Schools (Funding and Reform) Bill 2024[2]

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|---|---|
| **Purpose** | The bill seeks to amend the *Australian Education Act 2013* in relation to the grants of financial assistance to states and territories and in relation to the transparency and accountability of school funding. |
| **Portfolio** | Education |
| **Introduced** | House of Representatives on 10 October 2024 |
| **Bill status** | Before the Senate |

### Exemption from disallowance
### Significant matters in delegated legislation[3]

1.2 The bill would provide that the Commonwealth share of funding for a government school for a year will be the percentage set out in regulations.[4] Some guidance as to the allocation of this funding is set out on the face of the bill, including that the funding for schools in the Northern Territory from 2029 cannot be less than 40 per cent,[5] and for other jurisdictions, not less than 20 per cent or less than a percentage for a previous year for that school.[6] The bill also provides that these regulations would be exempt from disallowance.[7]

1.3 The committee considers that the allocation of amounts for Commonwealth funding is a significant matter that may be more suitable for primary legislation. The committee, however, notes the advice provided in the explanatory memorandum that providing for the allocation of funding in this matter will 'provide a more appropriate

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2 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Better and Fairer Schools (Funding and Reform) Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 213.

3 Schedule 1, item 7 proposed subsections 35A(1) and (5). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

4 Proposed subsection 35A(1).

5 Proposed subparagraph 35A(1)(2)(a)(i).

6 Proposed subparagraph 35A(2)(a)(ii) and proposed paragraph 35A(2)(b).

7 Proposed subsection 35A(5).

level of flexibility to support the varying funding trajectories required across jurisdictions'.[8]

1.4 In relation to the exemption from disallowance, the explanatory memorandum states:

> This exemption is appropriate due to the nature of the legislative instrument, as the Commonwealth shares prescribed in the regulations are the outcomes of negotiations and consultation between the Commonwealth and States and Territories ... Exempting instruments that are part of an intergovernmental scheme from disallowance is consistent with policy criteria previously accepted by Parliament. As content of the regulations made under subsection 35A(1) of the Act is predominantly determined by the outcome of negotiations set in agreements between the Commonwealth and State and Territory governments, exempting such regulations from disallowance ensures the key stakeholders for whom they affect are given efficacy and appropriately targeted.[9]

1.5 The explanatory memorandum states that the bill provides appropriate legislative safeguards as the minister is obliged to consult the states and territories before making the regulations and there is a 'funding floor' to ensure the regulations will be of benefit to the states and territories.[10] The explanatory memorandum also states:

> Additionally, ensuring these regulations made under subsection 35A(1) will not be disallowed makes sure significant funding amounts, as agreed on between Commonwealth and States and Territories be given legal effect swiftly, and with certainty. This is particularly important in the context of ensuring that a Commonwealth share is prescribed for the next year in a timely manner, to allow government schools and approved authorities properly plan and manage their funding. For example, should a State or Territory enter into an agreement with the Commonwealth for full and fair funding near the end of 2026, regulations prescribing a higher Commonwealth share for 2027 should be given legal effect as soon as possible so that schools in that State or Territory can efficiently forward plan tailored initiatives for the school year, based on the higher level of funding they would receive from the Commonwealth in 2027 and beyond. Disallowance of these regulations would be disruptive to government schools in funding initiatives that would help implement the school education reform initiatives set out in intergovernmental agreements.
>
> Furthermore, if the first set of regulations made under new subsection 35A(1) were disallowed after this Part of the Schedule to this Bill commences, payments of financial assistance under Division 2 of Part 3 of the Act could not be determined or made to States to Territory. This is

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8 Explanatory memorandum, p. 2

9 Explanatory memorandum, p. 16.

10 Explanatory memorandum, p. 16.

> because if regulations are not in force, there would be no Commonwealth shares provided for in the Act or regulations— therefore no percentage figure by which to calculate the amount of recurrent funding. The consequence would be that significant amounts of Commonwealth funding are delayed from reaching government schools across all States and Territories, for at least 6 months from 2025. Exempting this provision from disallowance is appropriate in order to prevent this situation from occurring.[11]

1.6 While acknowledging the justification for the exemption as outlined in the explanatory memorandum, the committee considers that disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the Executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny.

1.7 In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance unless exceptional circumstances can be shown which would justify an exemption.[12] In addition, the Senate resolved that any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.

1.8 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in its recent review of the *Biosecurity Act 2015,*[13] and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[14] Of particular relevance, in this inquiry the Senate Standing Committee for the Scrutiny of Delegated Legislation found that instruments that facilitate expenditure of public money should not be exempt from disallowance.[15]

1.9 The committee does not consider the fact that an instrument is made to facilitate the operation of an intergovernmental scheme is reason, in itself, for

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11 Explanatory memorandum, pp. 16-17.

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

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

14 Senate Standing Committee for the Scrutiny of Delegated Legislation, Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report (2 December 2020); and Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report (16 March 2021).

15 Senate Standing Committee for the Scrutiny of Delegated Legislation, Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report (2 December 2020); and Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report (16 March 2021), para 7.93.

exempting an instrument from the usual disallowance or sunsetting processes. Moreover, the committee does not consider the fact that a number of executive governments have reached agreement in relation to a particular matter precludes the need for parliamentary oversight of the laws resulting from such agreement. It is not apparent here how subjecting an instrument made under this provision to the ordinary parliamentary oversight processes would cause uncertainty, undermine confidence or be in conflict with multilateral agreements reached by states and territories. While the committee acknowledges the necessity of an immediate, clear and certain legal basis for entities to know their obligations, the committee considers this is achievable while allowing parliamentary oversight. The committee notes that a legislative instrument has effect from the day of commencement, which may be the day of registration, thereby establishing an immediate legal basis, and will continue to have effect unless it is disallowed within the disallowance period. The committee does not consider the need for certainty in this context to be an indication of exceptional circumstances that warrant an exemption from disallowance. The committee also notes the point made by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its final report into the exemption of delegated legislation from parliamentary oversight:

> A well-formed instrument that is made according to its enabling legislation and enjoys broad support will not be disallowed, and is thus unlikely to manifest any of the consequences suggested by departments. Many rationales that point to the possibility of negative outcomes call for such a significant stretch to the credulity of the Parliament that they cannot be seriously considered.[16]

**1.10 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the bill providing for the amount of the Commonwealth funding share for government schools to be determined in delegated legislation that is exempt from disallowance.**

**1.11 The committee also draws these matters to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.**

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16 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: final report* (16 March 2021) p. 109.

# Cyber Security Bill 2024[17]

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| **Purpose** | The bill seeks to:<br>• mandate cyber-security standards for specified classes of products which can connect, directly or indirectly, to the internet;<br>• mandate reporting obligations for specific Australian businesses to the Australian Signals Directorate (the ASD) and the Department of Home Affairs (the Department) in the wake of a cyber security incident;<br>• establish another limited use reporting obligation to restrict how information provided by industry to the ASD and the Department is shared and used by other government entities; and<br>• create an independent statutory advisory body, the Cyber Incident Review Board, which will undertake post-incident review of cyber security events in Australia and provide recommendations to industry and government from the review. |
| **Portfolio** | Home Affairs |
| **Introduced** | House of Representatives on 9 October 2024 |
| **Bill status** | Before the House of Representatives |

## Incorporation of external materials as existing from time to time[18]

1.12 The bill provides that the rules may legislate security standards for specified classes of relevant connectable products,[19] broadly meaning products 'that can directly or indirectly connect to the internet.'[20] In addition, the bill seeks to enable the rules to make provision in relation to a matter, such as the security standards, by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time.[21]

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17 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Cyber Security Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 214.

18 Subclause 14(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

19 Subclause 14(1).

20 Explanatory memorandum, pg. 24.

21 Subclause 14(3).

1.13 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

1.14 The explanatory memorandum notes that as Australia does not oversee the relevant internationals standards, to ensure consumers in Australia are protected from cyber security risks by updates to standards as they arise it is necessary to adopt them as in force or existing from time to time.[22] It also explains the necessity to incorporate such documents, noting the need to follow global best practise and providing the government with the flexibility to respond to technological evolution in smart devices or the underlying technology.[23]

1.15 In relation to whether the relevant standards would be publicly available, the committee notes the explanatory memorandum's statement that:

> Security standards established under this Part will be made available to manufacturers and suppliers free of charge and in English.[24]

1.16 While it is welcome that standards will be available to manufacturers and suppliers free of charge, the committee reiterates its consistent scrutiny view that where material is incorporated by reference into the law it should be freely and readily available to *all* those who may be interested in the law and not only to the entities required to comply with the measures.

1.17 The committee understands that, in instances where incorporated documents are not otherwise freely available, it is not uncommon for the documents to be made available by departments in other manners, such as via access through public library

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22 Explanatory memorandum, p. 26.

23 Explanatory memorandum, pp. 26–27.

24 Explanatory memorandum, p. 27.

systems, the National Library of Australia, or at departmental offices, for free viewing by interested parties.[25]

**1.18 Noting the above comments, the committee requests the minister's advice as to whether documents incorporated by reference under subclause 14(3) will be made freely available to all persons interested in the law.**

## Tabling of documents in Parliament[26]

1.19 The bill provides that the proposed Cyber Incident Review Board[27] (the Board) may cause a review to be conducted in relation to a cyber security incident or a series of cyber security incidents after satisfying various requirements outlined in the bill.[28] The Chair of the Board, in the process of conducting the review, may request information or documents from entities, Commonwealth bodies or State bodies, as well as officers or employees of a Commonwealth or State body.[29] The Chair may also provide a notice to non-Commonwealth and State entities to produce documents.[30] The bill provides that the Board must publish the final review report in any way the Board considers appropriate, but does not require the report be tabled in both Houses of the Parliament.[31]

1.20 The committee's consistent scrutiny view is that the tabling of documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online.

1.21 The explanatory memorandum does not provide any reasoning as to why there is no requirement to table in Parliament the final report prepared and published under clause 52.

**1.22 As such, the committee requests the minister's advice as to why the final review report of the Cyber Incident Review Board in relation to its proposed reviews into cyber security incidents is not appropriate for tabling in the Parliament.**

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25 See, for example, correspondence between the Attorney-General and the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the Disability (Access to Premises – Buildings) Amendment Standards 2020 [F2020L01245].

26 Clause 52. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

27 See clause 45.

28 Clause 46.

29 Clause 48.

30 Clause 49 and 50.

31 Subclause 52(6).

# Free TAFE Bill 2024[32]

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|---|---|
| **Purpose** | The bill seeks to enable the minister to provide grants under section 16 of the *Federal Financial Relations Act 2009* on behalf of the Commonwealth to States and Territories to secure free placements for prospective students in TAFE or the vocational education and training sector. This intergovernmental agreement would be conditional on States and Territories compliance with conditions agreed to between the executive and the State or Territory government. |
| **Portfolio** | Skills and Training |
| **Introduced** | House of Representatives on 7 November 2024 |
| **Bill status** | Before the House of Representatives |

## Section 96 grants to the states
## Exemption from disallowance[33]

1.23 The bill provides that if a state or territory[34] is a party to a Free Tafe (FT) agreement the Commonwealth is to make a grant of financial assistance under the *Federal Financial Relations Act 2009* (FFR Act) in accordance with the FT agreement.[35] A FT agreement is defined as an agreement between the Commonwealth and one or more States which set out terms and conditions for the financial assistance provided by the Commonwealth for the delivery of free TAFE and VET places.[36] The bill also sets out a non-exhaustive list of the terms and conditions that a FT agreement must deal with, however, provides that a FT agreement is not invalid if it does not deal with certain matters.[37]

1.24 As these payments are made under section 16 of the FFR Act, the mechanism enabling payments will be a determination made by the minister. This determination is a legislative instrument that is exempt from disallowance.[38]

1.25 The committee's view is that the power to make grants to the states and to determine the terms and conditions attaching to them is conferred on the *Parliament*

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32 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Free TAFE Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 215.

33 Clauses 6, 7 and 8. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

34 Clause 5 defines 'State' as including the Australian Capital Territory and the Northern Territory.

35 Clause 6.

36 Clause 7.

37 Clause 8.

38 *Federal Financial Relations Act 2009*, subsection 16(5).

by section 96 of the Constitution. While the Parliament has largely delegated this power to the Executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory. In this regard, the committee welcomes the inclusion of clause 8 of the bill which sets out specific matters a FT agreement must deal with, which assists with parliamentary oversight of these agreements. However, this is undermined by subclause (2) providing that failure to deal with most of these matters will not result in the invalidity of the agreement.

1.26 Further, disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the Executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance unless exceptional circumstances can be shown which would justify an exemption. In addition, the Senate resolved that any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.[39] The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum.

1.27 In this instance, the explanatory memorandum does not offer any justification for this exemption, nor does the bill or the explanatory memorandum acknowledge that the minister's determinations will be exempt from disallowance. In this regard, while the determination would enable the operation of an intergovernmental scheme, the committee has not, and does not, accept that as a basis for exempting it from the usual parliamentary disallowance process. Moreover, the committee notes that it does not consider the fact that a number of executive governments have reached agreement in relation to a particular matter precludes the need for parliamentary oversight of the laws resulting from such agreement. The committee is of the view that the importance of a matter set out in a determination to the overall operation of an intergovernmental scheme would be appropriately weighed by a House of the Parliament and would inevitably be a subject of debate should a proposal to disallow the instrument be put to that house.

**1.28 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing a FT agreement (rather than Parliament) to determine the terms and conditions under which payments may be made to the States and Territories, and the appropriateness of exempting relevant determinations from the usual disallowance process.**

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

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

# Help to Buy Bill 2023 [No. 2][40]

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| **Purpose** | The bill seeks to establish a shared equity program, overseen by Housing Australia, which would make contributions, on behalf of the Commonwealth, for individuals in the purchase of residential property in participating States and Territories. The bill also provides provisions to oversee Housing Australia's interaction with the Help to Buy program in situations where States or Territories remove themselves from the program. |
| **Portfolio** | Treasury |
| **Introduced** | House of Representatives on 8 October 2024 |
| **Bill status** | Before the House of Representatives |

## Standing appropriation[41]

1.30 This bill seeks to provide for Help to Buy arrangements, relating to a residential property that Housing Australia enters into on behalf of the Commonwealth.[42] As part of the arrangement, Housing Australia would make contributions to part of the cost of the individual or the individuals acquiring the property and would be entitled to a return on that contribution.[43] The bill provides that amounts payable by the Commonwealth are to be paid out of the Consolidated Revenue Fund which would be appropriated accordingly.[44] As this appropriation would cover amounts payable by the Commonwealth for funding Help to Buy arrangements, this appropriation likely represents a significant amount of Commonwealth expenditure, which once established as a standing appropriation will be administrated without parliamentary oversight.

1.31 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis, usually for indefinite amounts and duration. Unlike annual appropriations which require the executive to periodically request the Parliament to appropriate money for a particular purpose, once a standing appropriation is enacted any expenditure under it does not require regular parliamentary approval and therefore escapes direct parliamentary control. The amount of expenditure authorised by a standing appropriation may grow significantly over time, but without any mechanism for review included in the bill alongside the

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40 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Help to Buy Bill 2023 [No. 2], *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 216.

41 Subclause 27(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

42 Subclause 6(1).

43 Subclause 7(1)

44 Subclause 27(4).

appropriation it is difficult for the Parliament to assess whether a standing appropriation remains appropriate.

1.32 Given the difficulty of ongoing parliamentary oversight over enacted standing appropriations, the committee expects a robust justification for why a standing appropriation should be established or expanded in the first place. To this end, the committee expects the explanatory memorandum to a bill that establishes or expands a standing appropriation to explain why it is appropriate to include a standing appropriation (rather than providing for the relevant appropriations in the annual appropriation bills) and provide details of mechanisms that enable reporting to Parliament.

1.33 In relation to this, the explanatory memorandum explains that the appropriation is necessary to enable Housing Australia to make contributions under the Help to Buy arrangements.[45] However, it is unclear if any other mechanisms have been considered to provide parliamentary oversight of the amount of money expended under this standing appropriation. The committee appreciates the importance of ensuring ongoing funding for these Help to Buy arrangements, but notes that once established as a standing appropriation, Parliament retains limited oversight of this expenditure.

**1.34 The committee therefore requests the minister's advice as to what mechanisms are in place to report to the Parliament on any expenditure authorised by the standing appropriation.**

45 Explanatory memorandum, p. 17.

# Migration Amendment Bill 2024[46]

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| **Purpose** | The bill seeks to amend the *Migration Act 1958* (Migration Act) to enable various matters relating to Bridging (Removal Pending) Visas (BVR), their cessation, and the subsequent movement of non-citizens who once held a BVR. These matters include:<br>• The minister giving notice to a non-citizen who has permission to enter and remain in a foreign country party to a reception arrangement, thereby nullifying that non-citizen's BVR;<br>• broad immunity from civil liability for officers, offices of the Commonwealth and the Commonwealth as a whole;<br>• collection, use and disclosure of 'criminal history information' for purposes of directly or indirectly informing the function or the exercise of a power under the Migration Act or Migration Regulations 1994 (Regulations); and<br>• the imposition of curfews and monitoring devices on BVR holders. |
| **Portfolio** | Home Affairs |
| **Introduced** | House of Representatives on 7 November 2024 |
| **Bill status** | Before the House of Representatives |

## Undue trespass on rights and liberties
## Procedural fairness
## Broad delegation of administrative powers[47]

1.35 The bill proposes inserting a new section 76AAA into the *Migration Act 1958* (Migration Act) to provide that if a non-citizen (referred to hereafter as an individual), who holds a Subclass 070 (Bridging (Removal Pending) visa, has permission to enter and remain in a foreign country, and that foreign country is party to a 'third country reception arrangement', the minister must give them notice under this section.[48] The effect of the notice would be that the person's visa would immediately cease to be in effect on receipt, or deemed receipt, of the notice. Without a valid visa, they would be

46 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 217.

47 Schedules 1 and 5. The committee draws senators' attention to these Schedules pursuant to Senate standing order 24(1)(a)(i), (ii) and (v).

48 Schedule 1, item 1, proposed section 76AAA.

subject to immigration detention, and subsequent removal from Australia.[49] The bill provides that this provision does not apply to a child aged under 18; a person whose protection claim has not yet been determined; or a person who cannot be removed to that country as they have had a protection finding made in respect of that specific country.[50] Further, proposed subsection 76AAA(6) provides that permission to enter the foreign country may be unconditional or subject to the individual doing one or more things required by the foreign country that the individual is capable of doing.

1.36 In addition, proposed subsection 76AAA(5) provides that the rules of natural justice do not apply to the giving of a notice under subsection 76AAA(2). In relation to this, the explanatory memorandum explains that the exclusion of natural justice is appropriate as the giving of notice is mandatory.[51] This would mean that individuals who are given a notice and have their visa cancelled as a result would not be provided with an opportunity for a hearing in which they could argue that they do not meet the criteria of proposed section 76AAA. This may be problematic in respect to proposed subsection 76AAA(6), which provides that permission to enter the foreign country may be subject to the individual doing one or more things required by the foreign country that the individual is capable of doing. Whether or not the individual is capable of doing something appears to be an issue which may involve contestable conclusions and the exclusion of natural justice would prevent the individual from mounting a case against the presumption that they are capable of fulfilling the criteria or requirements set by the third country.

1.37 Schedule 5 to the bill sets out that a 'third country reception arrangement' (arrangement) is an arrangement entered into by the Commonwealth with a foreign country in relation to the removal of the individual from Australia and their acceptance, receipt or ongoing presence in the foreign country. If such an arrangement is in place, proposed section 198AHB provides that the Commonwealth may do all or any of the following:

- take, or cause to be taken, any action (not including exercising restraint over the liberty of a person) in relation to the arrangement or the 'third party reception functions'. The 'third party reception functions' means the implementation of any law or policy, or the taking of any action, by the foreign country (including, if the foreign country so decides, exercising restraint over the liberty of a person);
- make payments, or cause payments to be made in relation to the arrangement or the third country reception functions;

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49 See *Migration Act 1958*, sections 189 and 198.

50 See Schedule 1, item 1, proposed paragraph 76AAA(1)(d), and *Migration Act 1958*, section 197C. However, note that the bill also proposes widening the groups of people whose protection findings may be reopened, see Schedule 1, Part 2.

51 Explanatory memorandum, p. 6.

- do anything else incidental or conducive to the taking of such action or making of such payments.[52]

1.38 The committee notes that the immediate cancellation of an individual's visa, once they are given notice that a foreign country has given 'permission (however described)' to enter and remain, would result in the immediate detention of that individual pending removal to that country. The detention of a person imposes a serious encroachment on the fundamental common law right to liberty. The committee notes there is no requirement in the bill that the permission to enter and remain need relate to an immediate permission. The explanatory materials do not provide any information as to what is meant by 'permission'. As such, it is unclear if permission may be granted, yet an individual may remain in Australian immigration detention for a lengthy period before the arrangement is fully operational in the foreign country. It appears possible that once Australia enters into a third country reception arrangement with a foreign country, that country could give permission to all relevant individuals, but could make this contingent on a number of matters occurring before the individual would be able to enter the country (for example, receipt of certain funds or construction of detention facilities in that country). The statement of compatibility to the bill recognises that a person to whom a foreign country has granted permission will be liable for immigration detention as there would then be a real prospect that the person may be removed in the reasonably foreseeable future.[53]

1.39 The bill also states that permission could be unconditional or could be subject to the individual doing 'one or more things required by the foreign country that the individual is capable of doing'. It is not clear what this could encompass. The explanatory memorandum gives as an example 'a requirement for the individual to provide evidence of their identity'.[54] However, the committee notes that the bill is not limited in this way, leaving the scope of what may be required unclear. Further, the committee notes, if the individual were to refuse to co-operate to do that which is asked of them by the foreign country, they could be indefinitely detained pending their removal.[55] The explanatory materials are silent on the effect on liberty of this potential indefinite detention.

1.40 Further, the committee is concerned that the bill confers significant powers on the Commonwealth to enter into arrangements with a foreign country in relation to the removal of individuals, without providing any legislative guidance as to the terms that may be entered into. The committee is concerned that this provides a broad

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52 Schedule 5, item 1, proposed section 198AHB.

53 Statement of compatibility, p. 30.

54 Explanatory memorandum, p. 6.

55 See *ASF17 v Commonwealth* [2024] HCA 19, which held that if a person fails to cooperate to effect their removal, immigration detention will not exceed the constitutional limitation set out in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005.

delegation of wide administrative powers to the executive in circumstances where individual rights and liberties may be unduly trespassed on. The explanatory materials provide no information as to why this measure is considered necessary and appropriate. The bill itself provides that while the Commonwealth cannot directly take action that will exercise restraint over the liberty of a person, it can take any action in relation to a 'third party reception function', which provides that a foreign country may exercise restraint over the liberty of a person.[56] This appears to provide the authority for the Commonwealth to take action, such as paying a foreign country to detain, perhaps indefinitely, the individuals removed to that country. The statement of compatibility states that once an individual is removed to the foreign country they would be outside Australia's territory and there is no intention that Australia will exercise 'effective control' of that person, and so Australia would not, at least directly, be detaining or otherwise exercising physical control over persons subject to this arrangement.[57] The statement of compatibility also provides that it is 'intended' that other safeguards will be used and/or implemented as a matter of practice, policy and procedure to ensure that Australia is prepared and able to comply with some of its international obligations.[58]

1.41 The committee is concerned that there are extremely limited safeguards in the bill setting out the extent of the Commonwealth's powers regarding these arrangements and considers it highly concerning that this would appear to authorise the Commonwealth to take any action to assist a third country to implement any action over the individuals removed there, including the potential for indefinite detention in that country. The committee is concerned that Schedule 5 of the bill would delegate to the executive an almost unlimited power, subject to very limited parliamentary oversight. These concerns are heightened by the fact that Schedule 2 of the bill (as set out below) provides a broad immunity from liability for all officers and the Commonwealth as a whole for any acts done by a foreign country or any person in a foreign country as part of this third party reception arrangement.

**1.42 The committee considers this measure grants extremely broad administrative powers to the Commonwealth to take actions relating to entering into arrangements with a foreign country for the removal of certain individuals, which may unduly trespass on personal rights and liberties, particularly the right to be free from arbitrary detention. The committee therefore seeks the minister's advice as to:**

- **why is it considered necessary and appropriate to establish a new basis for the cessation of a Subclass 070 (Bridging (Removal Pending)) visa;**

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56 Schedule 5, item 1, proposed section 198AHB.

57 Statement of compatibility, p. 31.

58 Statement of compatibility, pp. 27 and 30.

- **why is it considered necessary and appropriate to provide legislative authority for the Commonwealth to take action in relation to third country reception arrangements;**
- **what is likely to constitute 'permission' by a foreign country for a person to enter and remain in that country, and could this permission be granted without there being an entitlement for immediate entry;**
- **the appropriateness of excluding natural justice from the giving of a notice under proposed subsection 76AAA(2), and whether this would impact on the procedural rights of an individual who does not believe they are capable of doing one or more things required by a foreign country;**
- **is it likely that an individual would be detained for a significant period of time before being removed to a third country, and if so, is this a proportionate limit on the common law right to liberty;**
- **what type of 'things' is it envisaged that a foreign country may require an individual to do if the permission is conditional (apart from providing identity documents), and why are these not specified in the bill;**
- **if an individual did not do one of the 'things' required of them by the foreign country that they are capable of doing, would they be subject to indefinite immigration detention in Australia, and if so, is this a proportionate limit on the right to liberty;**
- **is it envisaged that a foreign country would indefinitely detain individuals sent to it under this proposed power, and if so, what involvement would the Commonwealth likely have in that arrangement;**
- **why it is appropriate to delegate to the executive broad powers to take action in relation to third country reception arrangements or functions and could the bill be amended to specify some limits on this power.**

## Immunity from civil liability[59]

1.43 Schedule 2 of the bill seeks to insert two new provisions into the Migration Act to provide a broad immunity from civil liability for officers,[60] officers of the Commonwealth (including the minister) and the Commonwealth as a whole. In particular, it provides that no civil liability would be incurred by officers, or the Commonwealth as a whole, in relation to a person whose visa is not granted, or is cancelled, on certain grounds, mainly relating to character concerns or in relation to

[59] Schedule 2. The committee draws senators' attention to this Schedule pursuant to Senate standing order 24(1)(a)(i).

[60] As defined by subsection 5(1) of the *Migration Act 1958*.

taking a person to a regional processing country.[61] Further, it provides for civil immunity in relation to the acceptance or receipt, or ongoing presence, of a person removed from Australia pursuant to the new powers set out in Schedules 1 and 5 (as described above) or under existing regional processing country arrangements, relating to any act or thing done, or not done:

- by the officer in good faith in the exercise of the officer's powers, functions or duties;
- by a foreign country or a regional processing country;
- by any person in a foreign country or a regional processing country.[62]

1.44 This therefore removes any common law right to bring an action to enforce legal rights, unless, in relation to officers, it can be demonstrated that lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances. Further, the committee notes that there is no requirement that any action taken by another country, or a person in another country, be taken in good faith, in order for the immunity to apply to the Commonwealth.

1.45 The committee notes that the immunity is expressed very broadly as applying to all acts or things done, or not done, in the exercise of powers, functions or duties under the Migration Act relating to removing a person to a foreign country or regional processing country or keeping them there. This would appear to extend to all actions by officers, including those involving the use of force (noting that officers may carry firearms in approved circumstances[63] and the power to detain a person under the Migration Act, which applies up until the person is removed, includes a power to use reasonable force).[64] Further, the committee notes that the immunity from liability is extended to apply to the Commonwealth as a whole. The committee's position is that it is appropriate for the Commonwealth to remain liable for the actions of its officers and delegates, even those taken in good faith, where there is likely to be an adverse impact on an individual's rights and liberties. This is to ensure appropriate avenues of recourse are available for affected individuals who are prevented from bringing claims for damages against officers of the Commonwealth.

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61 Schedule 2, item 1, proposed subsection 198(12).

62 Schedule 2, items 1 and 2.

63 See *Customs Act 1901*, section 189A and Australian Border Force, Operational Safety Order (2021).

64 See *Migration Act 1958*, section 5(1) definition of 'detain'

1.46 In relation to this, the explanatory memorandum provides no justification as to why this immunity is necessary and appropriate, merely stating that the purpose is to make it clear no civil liability attaches in the circumstances set out in the bill. The committee notes that the powers relating to regional processing countries have existed since 2012,[65] without any corresponding immunities, and it is not clear why it is now necessary to provide for this. There is also no reason provided as to why it is necessary for the immunity to extend to the Commonwealth as a whole. The explanatory memorandum states, in relation to remedies, that the immunities do not preclude remedies through the criminal justice system, administrative law remedies or constitutional remedies, or the bringing of complaints to the Commonwealth Ombudsman or Australian Human Rights Commission. However, the committee notes that these stated remedies preclude recourse for any negligent action taken by the Commonwealth (including where there may be a loss of life or serious injury), any breach of contract and, it appears, would also limit the right of persons to seek a writ of habeas corpus (which allows for review of unlawful detention). The explanatory memorandum provides no justification as to the appropriateness of removing these important common law rights.

**1.47 The committee seeks the minister's advice as to:**

- **why the proposed immunity is expressed so widely, and why it is necessary to provide an immunity to all actions by an officer or the Commonwealth (including, for example, an action which caused the death of, or serious injury to, a person during removal);**
- **whether all the actions taken by an officer which are granted immunity must have complied with guidelines as to conduct or other internal regulatory procedures (including those in a foreign or regional processing country);**
- **why there is no requirement that any action taken by another country, or a person in another country, be taken in good faith, in order for the immunity to apply;**
- **why it is necessary and appropriate for the immunity to extend to the Commonwealth as a whole; and**
- **what recourse is available to affected individuals who have their right to bring a claim abrogated as a result of the immunity, including in relation to fundamental common law claims of habeas corpus.**

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65 See amendments made by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.

## Privacy

### Retrospective validation[66]

1.48 Schedule 3 of the bill seeks to insert proposed section 501M to provide that the minister or an officer of the department may collect, use or disclose 'criminal history information' to a person or body for the purpose of directly or indirectly informing the function or the exercise of a power under the Migration Act or the Migration Regulations 1994 (Regulations).[67] In addition to information about individuals regarding convictions for offences, 'criminal history information' is defined as including any charge against the individual, whether they are found to have committed the offence or not; any finding that the individual committed such an offence, whether the individual has been convicted of the offence or not; and any other result of a proceeding for the prosecution of the individual for an offence.[68] It also includes information in relation to spent convictions.[69]

1.49 Additionally, any criminal history information disclosed to a person or body may be further disclosed to other persons or bodies for the purpose of providing advice or recommendations, directly or indirectly, to the minister or an officer in relation to the performance of functions or the exercise of powers under the Migration Act or Regulations.[70] This information may also be collected, used or disclosed under other provisions of the Migration Act, Regulations or any other law of the Commonwealth.[71]

1.50 Any disclosures of criminal history information prior to the commencement of the bill would also be retrospectively validated by this bill.[72] This would have effect despite any impact on the accrued rights of any person and would apply to any action that may have had the effect of disclosure of criminal history information, such as the making of a decision under the Migration Act or Regulations.[73] This provision would also apply to civil and criminal proceedings instituted before the commencement of the item, even where those proceedings have been concluded before the commencement of the bill.[74]

1.51 Further, Schedule 4 of the bill seeks to insert proposed section 198AAA to allow for the collection, use and disclosure of information in relation to current or

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66 Schedules 3 and 4. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

67 Schedule 3, item 2, proposed subsection 501M(1).

68 Schedule 3, item 1, proposed subsection 5(1).

69 Schedule 3, item 1, proposed paragraph 5(1)(c).

70 Schedule 3, item 2, proposed subsection 501M(2).

71 Schedule 3, item 2, proposed subsection 501M(4).

72 Schedule 3, item 4, subitem 2.

73 Schedule 3, item 4, subitem 4(3).

74 Schedule 3, item 4, subitem 4(4).

former removal pathway individuals who do not hold a substantive visa or a criminal justice visa (referred to below as affected individuals) to the governments of foreign countries.[75] The bill specifies the purposes for which these disclosures may be made, which include:

- determining whether there is a real prospect of the removal of the affected individual from Australia becoming practicable in the reasonably foreseeable future;
- facilitating the removal of the affected individual; and
- taking action or making payments in relation to a third country reception arrangement or the third country reception functions of a foreign country.[76]

1.52 However, the bill also provides that the purposes for which this information may be disclosed include doing a thing that is incidental or conducive to the taking of an action or the making of a payment or a purpose directly or indirectly connected with or incidental to any of the purposes specified above.[77] These broaden the purposes for which information may be disclosed. Further, it is not specified what information may be collected, used or disclosed under proposed section 198AAA, except that it can include personal information,[78] which a note to the provision states includes criminal history information.[79] The disclosure may be made to any level of government of a foreign country, including a local or regional government body or an agency or authority of the government of the foreign country.[80]

1.53 The committee reiterates its longstanding view that intrusions to an individual's privacy and the collection, use and disclosure of personal information should be accompanied by a sound justification as to the necessity and appropriateness of the scope of the information collected, used and disclosed, and the purposes for which these actions are taken. In this instance, personal information, including an amended definition of criminal history information, may be disclosed to any person or body within Australia, which may then be further disclosed to any other person or body, and the same information may also be disclosed to any foreign

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75 Schedule 4, item 1, proposed subsection 198AA. A 'removal pathway non-citizen' is defined in Schedule 1, item 4, as an unlawful non-citizen who is required to be removed as soon as is reasonably practicable; a lawful non-citizen who holds a Subclass 070 (Bridging (Removal Pending)) visa; a lawful non-citizen who holds a Subclass 050 (Bridging (General)) visa and is subject to acceptable arrangements to depart Australia; and a lawful non-citizen who holds a visa prescribed by the regulations and satisfies a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia.

76 Schedule 4, item 1, proposed subsection 198AAA(2).

77 Schedule 4, item 1, proposed paragraphs 198AAA(2)(d) and 2(e).

78 Schedule 4, item 1, proposed subsection 198AA(1).

79 Schedule 4, item 1, proposed subsection 198AAA(1) (note) and (5).

80 Schedule 4, item 1, proposed subsection 198AAA(6).

government (except for a government of a country that an affected person cannot be removed to on protection grounds).[81]

1.54 In relation to disclosures to persons or bodies in Australia, the explanatory memorandum provides the following justification:

> This ensures that there is clear statutory authority for the Minister or an officer of the Department to use criminal history information, including spent convictions, for purposes under the Migration Act and Regulations. This includes to inform decisions whether to grant or refuse a visa; whether to cancel a visa; and whether certain visa conditions may or must be imposed on a visa having regard to matters such as a non-citizen's criminal history and the extent to which they pose a risk to any part of the Australian community.[82]

1.55 While criminal history information may be required to inform certain actions under the Migration Act and Regulations, it is not apparent to the committee from this justification why it is necessary and appropriate to disclose personal information, including criminal history information, to *any* person or body, and allow for it to be further disclosed to any person or body. It is not apparent to the committee that constraining the recipients of disclosed information would affect the ability to inform the listed decisions or a determination as to the extent to which an affected individual may pose a risk to any part of the Australian community. The committee notes that the current drafting of proposed section 501M would allow for disclosures to any person or body for very broad purposes.

1.56 In relation to disclosures of personal information to governments of foreign countries the explanatory memorandum provides no justification as to the necessity of the provision, merely restating the operation of the provision.[83] As such, the committee has no basis on which to determine if the intrusion on privacy is necessary or appropriate.

1.57 The committee does not consider it has been established that disclosures only for the purposes specified under proposed sections 501M or 198AAA are sufficient to protect against the overly-broad disclosure of sensitive personal information. The committee notes personal information may be disclosed for any purpose, even indirectly linked, relating to the performance of a function or exercise of a power under the Migration Act or Regulations, or for any purpose indirectly connected with or incidental to the broad purposes listed under proposed subsection 198AAA(2). The committee does not consider that it has been established that the purposes for which information may be disclosed under this bill are sufficiently constrained to act as a safeguard.

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81 Schedule 4, item 1, proposed subsection 198AAA(3).

82 Explanatory memorandum, p. 14.

83 See explanatory memorandum, pp. 18–20.

1.58 Noting the definition of 'criminal history information' provided by proposed subsection 5(1), the committee also queries the necessity and appropriateness of disclosing information relating to charges and findings against a person, even when no conviction is recorded, and information relating to spent convictions. The committee notes, in relation to spent convictions, that under section 85ZM of the *Crimes Act 1914* (Crimes Act), only convictions for offences for which imprisonment is not imposed as a penalty or where imprisonment does not exceed 30 months are suitable to become spent. Further, an individual subject to this scheme must wait ten years without having committed another offence in order for that conviction to become spent.[84] The committee considers it is unclear how information regarding an individual who has not offended for a period of ten years following a conviction for a minor offence is relevant to an assessment as to whether they would pose a risk to the Australian community, and why it is necessary and appropriate for this information to be disclosed to any person or body or any level of a government of a foreign country.

1.59 The committee also queries the necessity of disclosing information in relation to charges that may have been applied or a finding that may have been made against an affected individual, noting that in these instances, in the absence of a conviction, it is unclear if this information is relevant to a conclusion as to the risk that individual may pose to any part of the Australian community. The committee also queries what information is intended to be disclosed as part of a 'finding', as it is not entirely clear what a 'finding' is intended to encompass. The committee considers it is not clear if a finding, for example, could include an observation as to the likelihood of the commission of an offence in a civil proceeding, or if this definition is limited to findings in judgments for criminal proceedings.

1.60 The committee's concerns are heightened in this instance by the retrospective validation of any disclosure of personal information in relation to affected individuals, including criminal history information, that may have occurred prior to the commencement of item 4 of Schedule 3. Generally, where proposed legislation will have a retrospective effect which disadvantages individuals and their rights, the committee expects the explanatory materials to strongly justify the imposition of retrospectivity, including the exceptional circumstances that apply in this instance. This is on the basis that a core concept of the rule of law is that all government action be authorised by law. A corollary of this is that people are entitled to have the legality of any governmental interference with their rights and obligations determined by reference to the legality of government action at the time they allege their rights have been adversely affected.

1.61 To the extent that such authorisation for actions which affect individual rights or obligations is provided retrospectively, the claim that the governors (along with the governed) are bound by the law is weakened. Although it can be accepted that there will be rare circumstances in which unlawful government decisions and actions should

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84 *Crimes Act 1914*, section 85ZL.

be retrospectively validated, so doing undermines the legal system's adherence to these fundamental values.

1.62 In this instance, the explanatory memorandum merely restates the operation of the provision and does not acknowledge the significant intrusion on privacy that may have occurred in relation to affected individuals. The committee is of the view that the explanatory memorandum should have set out the case for the necessity or appropriateness of the retrospective validation of government decision-making in sufficient detail for the Senate to make informed judgements about the proposed approach.

1.63 Not only is there an absence of explanation of the background context (including litigation challenging the legality of the arrangements and the reasons why the government had considered that prior legislative authorisation for the arrangements was not required), but the fairness of retrospectivity in this context is also not addressed. This is particularly the case in relation to the proposal to apply this retrospectively to cases that have already commenced or have even concluded. It is not clear how, in practice, the retrospective validation of such disclosures would affect any cases that may have been decided in favour of an applicant. The committee does not consider that changing the law retrospectively to seek to put the Commonwealth's authority beyond doubt is, of itself, sufficient justification for retrospective validation.

**1.64 The committee considers the disclosure of criminal history information and personal information relating to an individual may unduly trespass on the right to privacy. As such, the committee seeks the minister's advice as to:**

- **why it is necessary and appropriate for proposed section 501M to authorise disclosure of criminal history information to any person or body, and for those persons or bodies to further disclose the relevant information to any person or body;**
- **why it is necessary and appropriate for proposed section 198AAA to authorise the disclosure of personal information to any government of a foreign country, including at any level (such as local government);**
- **why it is necessary and appropriate to allow for disclosures that are indirectly connected to the performance of a function or exercise of a power under the Migration Act or Regulations, or are incidental or conducive to the purposes for which disclosures may be made, to the government of a foreign country;**
- **how the terms 'incidental' and 'conducive' in the context of proposed subsection 198AAA(2) should be understood, and whether any guidance or examples can be provided;**
- **what safeguards are applicable to protect against overly-broad disclosures of personal information, noting in particular when**

**information is disclosed to a government of a foreign country it is not possible to control how the information may be further disclosed;**

- **why it is necessary and appropriate that information in relation to spent convictions, offence charges and findings as to offences may be disclosed as part of 'criminal history information'; and**
- **how the term 'findings' is intended to be understood and whether this can include judgments from civil proceedings;**

**1.65 The committee also expresses concerns that the bill seeks to retrospectively validate the disclosure of criminal history information (suggesting such disclosures were occurring without a lawful basis), and seeks the minister's advice as to:**

- **why it is necessary and appropriate that disclosures of personal information in relation to lawful or unlawful non-citizens be retrospectively validated;**
- **what detrimental impact the disclosure of personal information, including criminal history information, occurring without a lawful basis would have had on lawful or unlawful non-citizens; and**
- **whether there are any criminal or civil cases that have been concluded, or are currently before the courts, relating to the disclosure of criminal history information that would be validated by item 4 of Schedule 3. If there are any cases that have concluded, what effect would subitem 4(4) have on those proceedings (would any person be liable to refund any damages payable etc).**

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## Undue trespass on rights and liberties
## Procedural fairness
## Significant matters in delegated legislation
## Retrospective application[85]

### *Overview*

1.66 Schedule 6 of the bill seeks to respond to a recent High Court decision, *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (YBFZ), that ruled that visa conditions imposing curfews and electronic monitoring on certain individuals were unconstitutional, as they amounted to a form of extrajudicial punishment.[86] In order to understand the background to the making of this Schedule, it is useful to set out the recent legislative history regarding this matter. In order to provide a full

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85 Schedule 6, items 2 and 5. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i), (iii) and (iv).

86 See *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, at [87].

understanding of how the amendments in Schedule 6 are intended to operate, it is also necessary to consider amendments made to the Migration Regulations, as much of the detail of how this scheme applies is set out in those regulations.

1.67 On 16 November 2023, the Migration Amendment (Bridging Visa Conditions) Bill 2023 (the first bill) was introduced and passed. This bill was in response to a High Court ruling in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[87] (*NZYQ*). The first bill amended the *Migration Act 1958* to create a new framework for Subclass 070 Bridging (Removal Pending) Visa ('BVR') holders for whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future.

1.68 A number of conditions were attached to the BVR, including requirements to report at specified locations or report specified information to the minister, requirements to remain at a specified address at certain times (curfews) and requirements to wear monitoring devices (referred to as the 'monitoring' condition).[88] Under this scheme, the monitoring and curfew conditions were automatically applied to any holder of a BVR unless the minister was satisfied that those conditions were not reasonably necessary for the protection of any part of the Australia community.[89] Further, section 76E of the Migration Act was introduced that provided that the rules of natural justice did not apply to the making of this visa with such conditions imposed. Subsections 76E(3) and (4) provided that a person subject to a BVR may make representations to the minister to relax the application of the conditions automatically attached to their visa.[90] If the minister is satisfied that the visa conditions are 'not reasonably necessary for the protection of any part of the Australian community', the minister must grant a visa that is not subject to the BVR conditions (including the monitoring and curfew conditions).[91] It also created new offences for breach of certain BVR conditions, each carrying maximum penalties of five years imprisonment and mandatory minimum sentences of one year.[92]

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87 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.

88 Migration Amendment (Bridging Visa Conditions) Act 2023, Schedule 2, item 7, subclause 070.612(1).

89 See Migration Regulations, 070.612A (as it existed prior to 7 November 2024).

90 *Migration Act 1958*, subsections 76E(3) and (4).

91 *Migration Act 1958*, paragraph 76E(4)(b).

92 Migration Amendment (Bridging Visa Conditions) Act 2023, Schedule 1, item 4, subsections 76B(1), 76C(1), 76D(1), 76D(2), 76D(3) and 76D(4) and section 76DA. Note that Migration Amendment (Bridging Visa Conditions and Other Measures) Act 2024 also created three additional offences for breach of conditions; powers for authorised officers to administer monitoring devices worn by non-citizens; and power for courts to make a Community Safety Order (CSO) that would allow for the preventative detention or supervision (including curfews and electronic monitoring) of non-citizens holding a BVR.

1.69 The committee noted its scrutiny concerns in relation to these powers in *Scrutiny Digest 15 of 2023*.[93] These scrutiny concerns included the significant penalties for breaching BVR conditions, the undue trespass on personal rights and liberties in relation to the imposition of curfews and monitoring devices, the infringement of privacy through the use of monitoring devices and the retrospective authorisation of officers to administer monitoring devices. Specifically, the committee expressed concern that the automatic imposition of these conditions would prove to be a disproportionate response to community risk due to the lack of any mechanism to consider individual circumstances and risk posed by the affected person. The committee also expressed concern about the practical burden resting on an individual to convince the minister that the BVR conditions are not reasonably necessary for the protection of the community, due to the difficulty in proving a negative and where a person may have been convicted of an offence previously, that would prejudice them in being able to make representations as to why the conditions are not reasonably necessary.[94]

1.70 On 6 November 2024, the High Court delivered its judgment in relation to the YBFZ matter and determined the BVR conditions, namely, the monitoring and curfew conditions, imposed by the minister are:

> …prima facie punitive and there is no legitimate non-punitive purpose justifying the power to impose these conditions. This therefore infringes on the exclusively judicial power of the Commonwealth in Chapter III of the Constitution.[95]

1.71 In response to this decision, on 7 November 2024, the Migration Amendment (Bridging Visa Conditions) Regulations 2024 (2024 Regulations) were registered and came into force. This amended clause 070.612A of the Migration Regulations, to relevantly provide that prior to imposing the relevant conditions under Schedule 8 of the Migration Regulations, the minister must now:

- be satisfied on the balance of probabilities that the BVR holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and
- be satisfied on the balance of probabilities that the imposition of the condition is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.[96]

1.72 The 2024 Regulations also introduce a definition of 'serious offence' for the purposes of the above test, which includes an offence punishable by imprisonment for

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93 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023), pp. 7–27.

94 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023), pp. 7–27.

95 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 at [83].

96 Migration Amendment (Bridging Visa Conditions) Regulations 2024, item 2, subclause 070.612A(2).

a period of at least five years and where the conduct constituting the offence involves or would involve loss, or serious risk of loss, of life; serious personal injury or serious risk of serious personal injury; sexual assault; dealing with child abuse material; domestic or family violence; and various other specified matters.[97]

1.73 Schedule 6 of the bill seeks to provide that after the curfew and monitoring conditions are imposed under the Migration Regulations, if the individual makes representations to the minister as to why the visa should not be subject to such conditions, the minister would now either have to be not satisfied that the individual poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence or, if the minister is satisfied of this, be not satisfied that on the balance of probabilities the imposition of the condition(s) is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.[98] This is the same test as in the 2024 Regulations (although posed in the negative).

1.74 Item 5 of Schedule 6 also provides that these amendments are applicable to visas that were granted on or after the commencement of this Act, to the commencement of the 2024 Regulations, and to visas granted before the commencement of the 2024 Regulations but where the affected individual was still within the period to make representations to the minister or where they had already made representations but the minister had not yet made a decision.

***Undue trespass on rights and liberties***

1.75 The committee notes that, under the 2024 Regulations, while the minister must now consider a number of factors prior to imposing any conditions on a BVR holder, a number of the committee's initial concerns remain. The committee remains concerned that conditions including curfews and electronic monitoring can be imposed on affected persons without first affording the affected person an opportunity to be heard, and that breach of these conditions results in the commission of an offence carrying a maximum penalty of five years imprisonment and a mandatory minimum sentence of one year imprisonment.

1.76 The committee remains concerned that individuals will continue to be subject to significant deprivations of personal rights and liberties, such as to the freedom of movement which would be caused by the curfew condition and the intrusions to privacy by monitoring conditions. The committee is also concerned that the onus still remains on the individual to make representations under subsection 76E(3) of the Migration Act to have these conditions relaxed, though the matters the minister must be satisfied of in order to revoke the conditions will be amended by proposed paragraph 76E(4)(b) of this bill.

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97 Migration Amendment (Bridging Visa Conditions) Regulations 2024, item 1, subclause 070.111.

98 Schedule 6, item 2, proposed paragraph 76E(4)(b).

1.77 The committee also remains concerned that these conditions will continue to be imposed on the basis of the risk of future offending. The committee notes that it is a fundamental principle of our system of law that persons should not be punished for crimes that they may commit in the future. The justification for inverting this fundamental principle in this instance is that the imposition of the conditions is protective, and not punitive. This same rationale was used to justify the measures as originally introduced and which were recently invalidated by the High Court on the basis that they *were* punitive. The committee remains concerned that the trigger for assessing whether a person poses a substantial risk to the community is likely prior conviction (or perhaps merely allegations of) an offence, and as such, the additional imposition of strict curfew and monitoring conditions may be characterised as retrospectively imposing additional punishment.

1.78 The committee does not consider that its substantial concerns with this scheme have been addressed, although some concerns have been ameliorated. The committee notes that its concerns were initially raised one year ago in *Scrutiny Digest 15 of 2023.*[99] This committee sought a response from the minister to these concerns which was requested by 22 January 2024. Despite repeated correspondence with the minister's office, a response has never been provided to the committee by the minister. The committee expresses its disappointment that the minister (and former minister) has failed to engage on this matter, noting that the committee's scrutiny function can only be performed effectively with cooperation from the executive government. The committee considers that the lack of engagement on this matter is particularly alarming given the significant and undue trespass on personal rights and liberties (some of which have now been found by the High Court to have never been lawful).

1.79 The committee draws on the jurisprudence of the High Court in outlining its next concern. The majority in the YBFZ decision noted that the monitoring and curfew conditions are 'prima facie punitive'[100] when imposed by the executive government and 'there is no legitimate non-punitive purpose justifying the power'.[101] The explanatory memorandum does not provide an explanation as to how the new considerations that must be undertaken by the minister, and the new criteria against which representations must be made, satisfy the requirement of being a legitimate non-punitive purpose that is in line with the High Court's decision. Further, the committee notes that 'if protection from harm of any nature, degree or extent were a legitimate non-punitive purpose, the very point of the legitimacy requirement would be undermined.'[102] While the committee acknowledges that the minister must now consider whether there is a 'substantial risk' of 'serious harm' caused by a 'serious offence', the committee considers that an explanation should be provided in the

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99 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023), pp. 7–27.

100 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 at [83].

101 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 at [83].

102 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 at [82].

explanatory memorandum as to how the more constrained definition of harm and the imposition of conditions following more specific considerations of individuals aligns with the High Court's judgment in relation to being for a legitimate non-punitive purpose. Further, the committee notes that even if the bill is thought to meet the constitutional objections raised by the High Court the committee's concerns would still remain, noting that the High Court did not consider the matter from the point of view of undue trespass on personal rights and liberties, but on the basis on much narrower questions about the nature of judicial power.

1.80 Further, it is unclear to the committee why the provision requires that there be a 'substantial risk' of harm to the community. The committee notes that under the *Criminal Code Act 1995*, the court must only make a Community Safety Supervision Order (relating to the same cohort of BVR holders) if satisfied the individual poses an 'unacceptable risk' of seriously harming the community'.[103] The committee considers 'unacceptable'[104] to be a higher threshold than 'substantial'[105] and queries why the approach provided for by proposed paragraph 76E(4)(b) is not aligned with paragraph 395.13(1)(c) of the Criminal Code.

***Procedural fairness***

1.81 As noted above, the committee is concerned that the conditions regarding curfew and monitoring can be imposed on an affected individual without providing them with any procedural fairness. Although the minister must be satisfied of the conditions in subclause 070.612A(2) of the Migration Regulations, the committee notes that this still results in affected persons potentially being subject to monitoring or curfew conditions without the minister having ever heard submissions from that individual.

1.82 The committee also queries what evidence the minister will consider prior to imposing these conditions, noting that in the absence of evidence from the affected person, it is unclear to the committee how the minister is able to assess the substantial risk that may be imposed by that individual and how any conditions that are imposed are reasonably appropriate and adapted for the purpose of protecting the community. The committee notes that the minister is assisted by a Community Protection Board when deciding whether to impose conditions[106] but it remains unclear as to how this is sufficient in assessing individual future risks that may be posed to the community. The committee considers that affected persons should be able to make submissions

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103 *Criminal Code Act 1995*, paragraph 395.13(1)(c).

104 'So far from a required standard, norm, expectation, etc., as not to be allowed', Macquarie Dictionary, 2024.

105 'Of ample or considerable amount, quantity, size', Macquarie Dictionary, 2024.

106 Migration Amendment (Bridging Visa Conditions) Regulations 2024, statement of compatibility, p. 9.

as to their risk levels prior to the imposition of any conditions, and that this evidence should be taken into consideration in deciding the imposition of any conditions.

1.83 The committee also notes that proposed paragraph 76E(4)(b) of the bill imposes a negative test that the affected person will be required to meet when making representations to the minister in order to be issued a visa that is not subject to restrictive conditions. Drawing on the majority judgment of the High Court, it can be observed that this test may still result in 'a positive state of mind about a negative stipulation' meaning that if the minister cannot be so satisfied that the conditions must be imposed, the provision 'resolves all doubt and uncertainty in favour of the imposition of the conditions.'[107] As the relevant threshold under proposed paragraph 76E(4)(b) is that the minister is *not* satisfied on the balance of probabilities that the visa holder poses a substantial risk of harming any part of the Australian community, the committee remains concerned that even if there were doubt as to the level of risk posed by an individual, the question could then resolve in the imposition of conditions.

1.84 Finally, the committee notes that under current section 76E of the Migration Act, there is no requirement for the minister to make a decision within a specified timeframe following representations made by an affected individual. The committee notes that the continued imposition of conditions that significantly intrude on a person's rights and liberties is likely to have a detrimental impact on that BVR holder. In light of this, the committee considers the current section 76E should be amended to include a requirement that the minister's decision be made in a specified timeframe.

***Significant matters in delegated legislation***

1.85 The committee notes that the 2024 Regulations contain a number of significant matters, including the definition of 'serious offence' and the test the minister must take prior to imposing these conditions. Noting that the conditions that may be imposed on individuals lead to significant trespasses of personal rights and liberties, and that the breach of these conditions constitutes a separate offence carrying a mandatory minimum sentence, the committee does not consider any matters relating to the imposition of these conditions should be included in delegated legislation which is not subject to the same level of parliamentary scrutiny as primary legislation, and could be amended by the minister at any time.

1.86 In relation to this bill, the committee is concerned that the bill incorporates purported safeguards only by reference to delegated legislation, rather than setting these safeguards out on the face of the bill. In particular, the bill provides that in determining whether to grant a second visa after a person has made representations about the first visa, the minister must decide whether to impose the prescribed conditions in the same order as required by the Migration Regulations.[108] The Migration Regulations currently provide that the conditions must be imposed in the

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107 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 at [85].

108 Schedule 6, item 3, proposed subsection 76E(4A).

following order: use of a monitoring device; notification of monetary matters; incurring a debt; and curfews.[109] However, there is nothing to prevent the Migration Regulations being amended to change the order in which these conditions must be considered, which would then effectively amend the operation of proposed section 76E(4A). In addition, the definition of 'serious offence' for the purpose of proposed paragraph 76E(4)(b) is stated as having the same meaning as in the Migration Regulations – again, there would be nothing to prevent the Migration Regulations being amended to change the current definition, and potentially expand it to encompass a broader range of crimes.

***Retrospective application***

1.87 The committee notes that the amendments proposed by item 5 of Schedule 6 mean that these amendments apply to visas issued prior to the commencement of Schedule 6, namely to visas granted on commencement of the 2024 Regulations, or to visas made before then where a person has either not made representations yet or whose visa statuses have not been decided following representations. As such, these amendments apply retrospectively.

1.88 Generally, where proposed legislation will have a retrospective effect, the committee expects that the explanatory materials will set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. If an individual's interests will, or may, be affected by the retrospective application of a provision, the explanatory memorandum should set out the exceptional circumstances that nevertheless justify the use of retrospectivity. In this instance, the explanatory memorandum does not address any impact the retrospectivity may have on affected individuals. The committee notes that while the amendments in Schedule 6 may, on the face of it, appear to be beneficial to BVR holders as they tighten the test the minister must apply when deciding to impose conditions, without these legislative changes the High court's ruling that these conditions were invalid would otherwise have applied to ensure the monitoring and curfew conditions were not applicable. As such, it is not clear that the retrospective effect of these amendments would be entirely beneficial.

**1.89 The committee reiterates its concern as to the significant trespass on personal rights and liberties posed by the imposition of monitoring and curfew visa conditions, without the requirement for procedural fairness and based on the risk of future offending, the breach of which is punishable by a mandatory minimum sentence of one year imprisonment.**

**1.90 The committee notes it raised these concerns when the bill providing for these powers was introduced a year ago and requested detailed information from**

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109 See Migration Regulations 1994, section 070.612A(1) and (2), conditions 8621, 8617, 8618 and 8620.

**the minister in relation to these scrutiny concerns. The committee expresses its disappointment that the minister (and former minister) has failed to provide a response to these concerns which has now been overdue for 10 months. The committee notes that its scrutiny function can only be performed effectively with cooperation from the executive government. The committee considers that the lack of engagement on this matter is particularly alarming given the significant and undue trespass on personal rights and liberties posed by this scheme. The committee reiterates its request for a response in relation to matters previously raised.[110]**

**1.91 The committee requests that an addendum to the explanatory memorandum be tabled in the Parliament as soon as practicable providing an explanation as to how the amendments introduced by item 2 of Schedule 6 align with the High Court's judgment as to a legitimate non-punitive purpose that may justify the imposition of monitoring and curfew conditions, 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.[111]**

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

- **why procedural fairness is not afforded to BVR holders to allow them to make submissions prior to the conditions being imposed and how the minister is currently able to effectively undertake an individualised assessment of future risk without hearing from the affected individual or their representative;**
- **why a negative test continues to be imposed by proposed paragraph 76E(4)(b) of the bill, noting that the relevant standard for the minister's satisfaction is on the balance of probabilities which may still result in any doubt or uncertainty being resolved in the favour of the imposition of conditions;**
- **why the proposed test is to assess a 'substantial' risk, rather than 'unacceptable' risk (as is required by the courts when imposing curfew or monitoring conditions);**
- **why there is no timeframe by which the minister must make a decision under subsection 76E(4);**
- **why is it necessary and appropriate for the definition of 'serious offence', and the order in which conditions may be imposed, to be set out in delegated legislation; and**
- **whether the retrospective application of Schedule 6 of the bill may have a detrimental impact on any BVR holders, noting that without the**

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110 See Senate Committee for the Scrutiny of Bills, in *Scrutiny Digest 15 of 2023* (29 November 2023) pp. 7–27.

111 See section 15AB of the *Acts Interpretation Act 1901*.

**legislative amendments proposed by Schedule 6 the High Court's judgment rendered the imposition of monitoring and curfew conditions by the executive government invalid.**

## Parliamentary scrutiny[112]

1.93 From a scrutiny perspective, the committee notes it appears likely that this bill will pass the Parliament swiftly, without necessarily the benefit of full consideration by the Parliament and its committees. The committee makes this observation on the basis of previous timeframes for the passage of migration related legislation[113] and the minister's second reading speech advising the bill needs to be passed relatively quickly.[114] The committee notes that the High Court handed down its judgment in *YBFZ*,[115] which Schedule 6 of the bill seeks to respond to, on 6 November 2024. This bill was introduced into the House of Representatives the next day, on 7 November 2024.

1.94 The Senate, as an institution, acts as a balance in Australia's democracy by allowing debate and oversight on the government of the day's legislation. While legislation may pass through the House of Representatives (the House) quickly, due to the House's majority control by the government of the day, the Senate generally slows this passage by referring legislation to committee as well as general debate and committee of the whole amendment. In this context, the committee supports review, oversight and accountability through its scrutiny of bills. However, the committee, and by extension the Senate, is not able to perform this function when legislation passes too swiftly.[116] This is of concern to the committee, particularly in the context of legislation which may unduly impact on individuals' rights and liberties.

1.95 The committee also notes that regulations were made in response to the High Court's decision on 7 November 2024. This is before this bill has passed, meaning the primary legislation is, in the words of the minister, 'not consistent with the new

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112 The committee draws senators' attention to the bill and its passage through the Parliament as a whole pursuant to Senate standing order 24(1)(a)(v).

113 See Migration Amendment (Bridging Visa Conditions) Bill 2023,which was introduced, and passed the same day, on 16 November 2023. See the committee's comments regarding the impact on parliamentary scrutiny in *Scrutiny Digest 15 of 2023* (29 November 2023) pp. 8–9.

114 See *House of Representatives Hansard*, 7 November 2024, p. 37: 'while it is important for this legislation to go through within a reasonable time, it does not have to be rushed through this week.'

115 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40.

116 In this regard, note the Parliament's procedural mechanisms to limit time for debate: *Bills considered under a limitation of time*, 22 August 2024, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_considered_under_a_limitation_of_time (accessed 12 November 2024).

regulations.'[117] Subsection 504(1) of the Migration Act provides that the Governor-General may only make regulations not inconsistent with the Migration Act.[118] This raises concerns that the regulations, in operation before the passage of any amendments that may be made by this bill, may not be authorised by statute.

**1.96 The committee notes its concern as to whether this bill will be afforded adequate time for proper parliamentary scrutiny. While the procedure to be followed in the passage of legislation is ultimately a matter for each house of the Parliament, the committee reiterates its consistent scrutiny view that legislation, particularly legislation that may trespass on personal rights and liberties, should be subject to a high level of parliamentary scrutiny.**

**1.97 The committee draws to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation the making of regulations that are inconsistent with existing primary legislation.**

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117 *House of Representatives Hansard*, 7 November 2024, pp.36–37.

118 *Migration Act 1958*, subsection 504(1).

# Scams Prevention Framework Bill 2024[119]

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| **Purpose** | The bill seeks to establish a legislative basis to react to, and prevent, scams known as the Scam Prevention Framework (SPF). To do so, the bill seeks to primarily amend the *Competition and Consumer Act 2010*, to:<br>• Establish a legislative basis to require service providers to undertake certain actions in combatting scams which relate to, are connected to, or used by their services;<br>• provide for codes, to be developed by the minister, to set out sector-specific requirements for governance arrangements, prevention, detection, disruption and responses to scams;<br>• establish mechanisms for regulation and enforcement, as well as penalties; and<br>• set out powers of regulators, including the use of consumer information to inform responses to scams, sharing of information between regulators, and to agencies of foreign governments where applicable. |
| **Portfolio** | Treasury |
| **Introduced** | House of Representatives on 7 November 2024 |
| **Bill status** | Before the House of Representatives |

## Significant matters in delegated legislation

## Henry VIII clause – modification of primary legislation by delegated legislation[120]

1.98 The bill seeks to set out a new legislative framework to prevent and respond to scams. Significant aspects of the new Scam Prevention Framework (SPF) are to be set out in delegated legislation, including:

- SPF codes for regulated sectors;[121]

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119 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Scams Prevention Framework Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 218.

120 Schedule 1, item 1, proposed sections 58AC, 58CB, 58AD and 58FH. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

121 Schedule 1, item 1, proposed section 58CB.

- the businesses or services that are designated regulated sectors and therefore subject to the SPF;[122]
- exceptions which specify that persons, businesses or services are not regulated entities and therefore are not subject to the SPF;[123] and
- modifications to the operation of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).[124]

1.99 The committee considers that these matters are integral to the operation of the scheme and, as a general rule, are more appropriate for inclusion in primary legislation, unless a sound justification for their inclusion in delegated legislation is provided. This is because a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.100 In relation to the designation of businesses or services as regulated sectors the explanatory memorandum has provided a justification for the need to include tis in delegated legislation, stating:

> This legislation-making power is appropriate as the designation instrument may contain complex and specific details to ensure the relevant businesses and services are appropriately described for the purposes of sector designation. This may involve designating an individual person, business or service and is therefore more suited to being set out in delegated legislation.
>
> The legislation-making power also ensures there is sufficient flexibility for the Government to respond quickly to changing scam methods and trends which may target particular sectors of the economy. A legislative instrument can be made quickly to bring additional sectors into the SPF to require regulated entities in those sectors to uplift their anti-scam practices.[125]

1.101 Exemptions for persons or businesses from being SPF regulated entities can also be set out in delegated legislation. In relation to this the explanatory memorandum notes this power may be used 'where an entity within a regulated sector is unlikely to be susceptible to a risk of scam harm due to the limited number of SPF consumers that interact with its services'.[126] The explanatory memorandum provides that excluding certain regulated entities or services within a sector is appropriate as the SPF is an economy-wide reform and 'there may be instances where

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122 Schedule 1, item 1, proposed section 58AC. The explanatory memorandum on p. 5 notes that "The Government has committed to initially designating telecommunications services, banking services and digital platform services relating to social media, paid search engine advertising and direct messaging, as each of these sectors represent a significant vector of scam activity".

123 Schedule 1, item 1, proposed subsections 58AD(4) and (5).

124 Schedule 1 item 1, proposed subsection 58FH(3).

125 Explanatory memorandum, p. 9.

126 Explanatory memorandum, p. 14.

some of the obligations under the SPF are unsuitable for a particular sector or entity'.[127]

1.102 The bill also proposes that sector-specific codes, which will provide prescriptive obligations for each regulated sector, will be set out in delegated legislation, and the explanatory memorandum notes that each regulated sector has a different role within the scam framework with sector-specific challenges to address.[128] While the explanatory memorandum explains the operation and purpose of the codes, it does not provide a justification as to why these matters are necessary and appropriate for inclusion in delegated legislation.

1.103 Lastly, in relation to delegated legislation modifying the operation of the ASIC Act the explanatory memorandum explains:

> The instrument may specify modifications to one or more of the alternative power provisions to remove doubt as to how those powers would apply in the context of the SPF code. Where there is any uncertainty, this modification is necessary and appropriate to ensure that the SPF sector regulator can effectively enforce the SPF code, which is aimed at preventing and responding to scams impacting the Australian community. The intended effect is that the modification is limited only to ensuring that the application of SPF sector regulator's existing powers would apply to the SPF effectively, and in a corresponding way. It is not intended to modify the existing powers as they ordinarily apply.[129]

1.104 In relation to the designation and exception of business and services as either being under the SPF framework or outside the scope, the committee considers that the explanatory memorandum has provided a sufficient justification for the inclusion of these matters in delegated legislation. However, the committee remains concerned that the sector-specific codes are proposed to be set out in delegated legislation, and considers that the explanatory memorandum fails to justify the inclusion of these significant matters in delegated legislation. These concerns are heightened as a breach of the code would result in civil penalties[130] under the bill and the committee considers that this matter should have been more fully justified in the explanatory memorandum.

1.105 Further, in relation to empowering delegated legislation to modify the operation of the ASIC Act, the committee retains its consistent scrutiny concerns in relation to these type of Henry VIII provisions. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary

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127 Explanatory memorandum, p. 14.

128 Explanatory memorandum, p. 63.

129 Explanatory memorandum, p. 8.

130 Schedule 1, part 1, subdivision C.

scrutiny and may subvert the appropriate relationship between the Parliament and the Executive.

**1.106 The committee draws these matters to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving matters integral to the operation of the scheme to delegated legislation.**

**1.107 The committee requests that an addendum to the explanatory memorandum containing a justification for the inclusion of codes of conduct in delegated legislation 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.[131]**

**1.108 The committee also draws these matters to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.**

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## No-invalidity clause[132]

1.109 The bill provides a list of matters that the minister must consider before making an instrument designating one or more businesses or services to be a regulated sector, including consideration of scam activity in that sector and the interests of the sector's customers.[133] The minister must also consult the business and services within the sector or relevant associations, and other associations or bodies representing the potential SPF customers of that sector as the minister thinks appropriate.[134] However, the bill further provides that a failure to consider the matters set out does not invalidate an instrument.[135]

1.110 The bill further provides that the minister may, by legislative instrument, authorise an external dispute resolution scheme for the purposes of the SPF framework and one or more regulated sectors.[136] Requirements that must be met before making the instrument are specified and include, for example, that the minister must consider the accessibility, independence and fairness of the scheme.[137] However, failure to comply with these requirements in making the instrument does not invalidate the instrument.[138]

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131 See section 15AB of the *Acts Interpretation Act 1901*.

132 Schedule 1, item 1, proposed subsections 58AE(2) and 58DB(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

133 Schedule 1, item 1, proposed paragraph 58AE(1)(a).

134 Schedule 1, item 1, proposed paragraphs 58AE(1)(b) and (c).

135 Schedule 1, item 1, proposed subsection 58AE(2).

136 Schedule 1, item 1, proposed subsection 58DB(1).

137 For all the matters that the minister must be satisfied of before making the instrument see proposed subsection 58DB(2).

138 Schedule 1, item 1, proposed subsection 58DB(2).

1.111 A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. The committee therefore expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum.

1.112 In relation to the no-invalidity clause for instruments designating one or more businesses to be regulated services, the explanatory memorandum states:

> Failure by the Treasury Minister to consult consumer groups or the relevant businesses or services, or to consider the above matters in making a designation, does not invalidate the designation instrument. This provides certainty on the regulated sectors within the scope of the SPF. The provision reflects the general position in section 19 of the *Legislation Act 2003* that the validity or enforceability of a legislative instrument is not affected by a failure to consult. This approach also ensures certainty for regulated entities who may have undertaken investment and preparatory work to comply with the SPF.[139]

1.113 In relation to the no-invalidity clause for instruments designating dispute resolution schemes, the explanatory memorandum merely restates the operation of the provision and provides no explanation as to why the no-invalidity clause is necessary and appropriate.

1.114 In relation to the failure to consult in relation to the first no-invalidity clause, while the committee notes the explanation as to why the no-invalidity clause may be needed from a policy perspective, the explanatory memorandum does not explain what recourse (if any) is available for persons who may be affected by decisions made under the instrument. The committee acknowledges that section 19 of the *Legislation Act 2003* (the Legislation Act) is a no-invalidity clause relating to the requirement under section 17 of the Legislation Act for rule-makers to consult before making legislative instruments. However, the committee is of the view that the specific procedural requirements to be imposed on the minister by the bill are not analogous to the broad consultation requirement applied to all legislative instruments under section 17 of the Legislation Act. This is made clear by the construction of the relevant clauses. For instance, the heading to section 17 is 'Rule-makers should consult before making legislative instruments', and the procedural requirement imposed by the section is for the rule-maker to be satisfied that consultation has been undertaken that is 'considered by the rule-maker to be appropriate'. In circumstances where only a weak obligation is imposed on a rule-maker (to be satisfied that such consultation has been undertaken as they consider appropriate), a provision, that states that if

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139 Explanatory memorandum, pp. 11-12.

consultation does not occur this does not affect the validity or enforceability of the instrument, may be viewed as declaratory and of limited concern.

1.115 On the other hand, the consultation requirements prescribed in the bill are specifically tailored to the relevant circumstances of legislative instruments which declare sectors and businesses as regulated and are aimed at achieving a particular purpose. In this regard, it can be considered that the consultation requirements set out in these amendments are not analogous with the consultation required by section 17 of the Legislation Act.

1.116 The committee also notes that these no-invalidity clauses go further than only requiring the minister to consult. They also require the minister to consider various matters, such as when making an instrument about a sector of the economy, to consider scam activity in the sector, existing industry initiatives, the risks and benefits to the public and business or services.[140] In addition, when authorising an external dispute resolution scheme the minister must consider various matters such as the accessibility, independence, accountability, effectiveness and fairness of the scheme. However, a failure to comply with this will not invalidate the instrument as a result of the proposed no-invalidity clause. The committee notes that these no-invalidity clauses thereby appear to limit the practical efficacy of judicial review to provide a remedy for legal errors. In this regard, it is unclear, if a court were to rule on judicial review grounds that any instrument made under these provisions was unlawful (although not invalid), whether the minister would be obliged to remake the instrument.

**1.117 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of the bill providing, in subsections 58AE(2) and 58DB(2), that instruments will remain valid regardless of whether the minister met specified requirements in making the instrument.**

**1.118 The committee requests that an addendum to the explanatory memorandum containing a justification for the no-invalidity clause in proposed subsection 58DB 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.[141]**

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## Privacy[142]

1.119 The bill provides that the SPF general regulator may disclose information relating to a scam (as defined in section 58AG of the bill or a scam within the ordinary

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140 Schedule 1, item 1 proposed subsection 58A(1).

141 See section 15AB of the *Acts Interpretation Act 1901*.

142 Schedule 1, item 1, proposed sections 58BV and 58EI. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

meaning of that expression) to named entities.[143] A note to the relevant provision confirms this includes personal information. The information can be disclosed by the SPF regulator to a regulated entity,[144] a Commonwealth agency or authority involved in developing government policy relating to the SPF,[145] a law enforcement agency of the Commonwealth or a State or Territory,[146] and an agency of a foreign country that is a law enforcement agency or regulatory agency responsible for scam prevention.[147] In disclosing information to an agency of a foreign country, the SPF general regulator must be satisfied that the agency has given an undertaking relating to controlling the storage, handling and use of the information, and ensuring the information will be used only for the purpose disclosed, and that it is appropriate, in all circumstances to disclose the information to the agency.[148] Information disclosed to a Commonwealth agency or authority involved in developing government policy relating to the SPF must be de-identified, unless the SPF general regulator reasonably believes that doing so would not achieve the object of the SPF framework.[149]

1.120 The bill further provides that the SPF rules may prescribe a scheme for authorising third parties to operate data gateways, portals or websites that give access to reports provided by regulated entities containing actionable intelligence about scams.[150] Persons authorised under the scheme may use or disclose SPF information, including personal information, to the extent that it is reasonably necessary to achieve the objects of the SPF scheme.[151]

1.121 In relation to the information sharing between the SFP regulator and listed entities, the explanatory memorandum details how these information sharing arrangements will work and the policy justification for imposing them.[152] However, noting that the personal information that may be collected relating to scam activities could include personal, and potentially vulnerable, information about victims of scams, the committee is concerned that little to no information has been provided in the explanatory memorandum or the statement of compatibility as to the privacy implications and safeguards on the use of this power.

1.122 The committee notes with concern that the relevant provision does not specify a purpose, linked to the objects of the bill, for sharing the personal SPF

143 Schedule 1, item 1, proposed subsection 58BV(1).

144 Schedule 1, item 1, proposed paragraph 58BV(2)(a).

145 Schedule 1, item 1, proposed paragraph 58BV(2)(b).

146 Schedule 1, item 1, proposed paragraph 58BV(2)(c).

147 Schedule 1, item 1, proposed paragraph 58BV(2)(d).

148 Schedule 1, item 1, proposed paragraphs 58BV(3)(a) and (b).

149 Schedule 1, item 1, proposed subsection 58BV(4).

150 Schedule 1, item 1, proposed section 58BT.

151 Schedule 1, item 1, proposed subsection 58BT(3).

152 Explanatory memorandum, pp. 46-7.

information. This means that there is essentially no limit to the reason for which the SPF regulator may choose to share SPF information with entities. This lack of a limit is especially concerning to the committee given that there has been no justification provided in either the explanatory memorandum or the statement of compatibility as to why such a broad purpose disclosure is necessary and appropriate. The committee also notes that it should be relatively simple to amend the provision to require that the disclosure is linked to achieving the objectives of the SPF scheme and that such an amendment should not constrain the ability of the SPF regulator to fulfil its functions of detecting, preventing and disrupting scams.

1.123 The committee welcomes the safeguard that personal information shared to a Commonwealth agency or authority involved in developing government policy relating to the SPF must be de-identified, unless the SPF general regulator reasonably believes that doing so would not achieve the object of the SPF framework. The committee considers that this safeguard should be extended to all disclosures permitted under this power in the bill, namely, disclosures to SPF regulated entities, law enforcement agencies, and, in particular, foreign government agencies. It is unclear to the committee why the bill was not drafted to provide this safeguard to all disclosures as it does not appear necessary that, in all instances, information that has not been de-identified be disclosed to fulfil the SPF's purposes. While the committee recognises that in some instances it may be necessary to disclose personal identifying information (particularly of alleged scammers), the committee considers that the bill could require the SPF information be de-identified unless the SPF general regulator reasonably believes that doing so would not achieve the object of the SPF framework.

1.124 In relation to the bill's provision for authorised persons who operate data gateways, portals or websites to have access to personal information contained in scam reports, the committee notes that the explanatory memorandum merely restates the operation of the provision without providing any justification as to why it is necessary and appropriate for this personal information to be shared with few safeguards provided. The committee again considers that this provision could be amended to ensure either that the reports provided by regulated entities provide de-identified personal information, or the authorised person may only disclose de-identified personal information, unless doing so would not reasonably achieve the object of the SPF framework.

1.125 Without justifications or explanations provided as to the lack of appropriate safeguards the committee cannot assess whether the public benefit in permitting disclosures of SPF information to relevant entities outweighs the potential considerable intrusion on an individual's privacy, especially in the case of potential victims of scams who have already suffered significant intrusions into their privacy and personal information by the alleged scammer.

1.126 The bill further provides that an SPF regulator need not notify any person that they have collected SPF personal information/documents, disclosed or plans to

disclose the information, or used or plans to use the information.[153] In relation to this the explanatory memorandum states:

> This has the effect of removing procedural fairness from the use or disclosure of information by SPF regulators. This approach is necessary to enable the quick flow of information between SPF regulators and drive efficient and expedient enforcement action. This ensures that any inadequate action by regulated entities in complying with the SPF is promptly addressed. Given the fast-moving nature of scams, timely enforcement action in response to potential breaches of the SPF is critical to prevent and respond to scams impacting SPF consumers.
>
> Removing notification requirements will also ensure that a suspected scammer, who may be the subject of the SPF personal information, is not given notice that an SPF regulator has become aware of their suspected activities, which could otherwise reasonably prejudice a law enforcement investigation. [154]

1.127 The committee recognises the need for the SPF regulator to act quickly and to prevent potential scammers from becoming aware that they are being investigated. However, the committee also notes that the relevant provision could have been drafted in a way to prevent notice of use or disclosure to only the alleged scammer. This would, in the committee's view, allow the SPF regulator to fulfil its purpose while ensuring that alleged victims of scams are notified about the way their personal information is being used.

1.128 Further, the committee notes that the bill does not provide any requirement for the SPF regulator to notify affected parties of the use or disclosure of their personal information *after* the investigation has been finalised. The committee considers that the bill could be amended to provide this safeguard which would allow the SPF regulator to investigate scam activity quickly and without tipping off potential scammers, while still ensuring that individuals have some measure of oversight of the use of their personal information.

1.129 Again, the committee regrets that the explanatory memorandum does not engage with these matters from the perspective of an individual's right to privacy and procedural fairness, as it focuses only on the policy justifications behind these powers.

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

- **whether the power to use or disclose personal information under sections 58BT and 58BV contains sufficient safeguards to appropriately protect the right to privacy;**

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153 Schedule 1, item 1, proposed section 58EI.

154 Explanatory memorandum, p. 78.

- **the appropriateness and necessity of providing that the SPF regulator need not notify any person (including potential victims of scams) that they have collected, used or disclosed their personal information;**
- **the appropriateness of amending the bill:**
  - **to require that disclosures of SPF information containing personal information pursuant to proposed section 58BV can only be made by the SPF general regulator for specific purposes linked to the achieving the objectives of the SPF framework;**
  - **to require that all SPF information be de-identified when shared under proposed section 58BV, unless doing so would not achieve the object of the SPF framework;**
  - **to require regulated entities to de-identify personal information when reporting on actionable intelligence regarding scams, unless to do so would not achieve the object of the SPF framework, and/or requiring the authorised person under proposed section 58BT to specifically consider the need for de-identification; and**
  - **to provide that notice need not be given under proposed 58EI of the collection, use or disclosure of the personal information of alleged scammers only (enabling scam victims to be notified), and provide all persons to be notified once any investigation is complete.**

## Incorporation of external materials as existing from time to time[155]

1.131 The bill seeks to provide that SPF codes may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.[156]

1.132 At a general level, the committee is concerned where provisions in a bill allow the incorporation of legislative provisions by reference to other documents as such an approach:

- raises the prospect of changes being made to the law in the absence of parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- can create uncertainty in the law; and

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155 Schedule 1, item 1, proposed subsection 58CC(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

156 Schedule 1, item 1, proposed subsection 58CC(4).

- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

1.133 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. The committee reiterates its consistent scrutiny view that where material is incorporated by reference into the law, it should be freely and readily available to all those who may be interested in the law.

1.134 In this instance, the explanatory memorandum does not contain any explanation of how the provision is intended to operate nor examples of what documents are envisaged to be applied, adopted or incorporated by reference under the relevant provisions.

**1.135 Noting the above comments and the lack of explanation provided in the explanatory memorandum, the committee requests the minister's advice as to:**

- **the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed subsection 58CC(4);**
- **whether documents applied, adopted or incorporated by reference under proposed subsection 58CC(4) will be made freely available to all persons interested in the law; and**
- **why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.**

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## Privacy

### Procedural fairness[157]

1.136 The bill provides that the SPF general regulator or the SPF regulator for a regulated sector may issue a public written notice containing a warning about the conduct of a person if the regulator:

- reasonably suspects that the person's conduct may constitute a contravention of a specified provision of the SPF principles;[158]
- is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct;[159] and
- is satisfied that it is in the public interest to issue the notice.[160]

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

158 Schedule 1, item 1, proposed paragraph 58FZL(1)(a) and (2)(a).

159 Schedule 1, item 1, proposed paragraph 58FZL(1)(b) and (2)(b).

160 Schedule 1, item 1, proposed paragraph 58FZL(1)(c) and (2)(c).

1.137 The public warning notice will be published on the regulator's website.[161] In relation to the public warning notices the explanatory memorandum states:

> Public warning notices allow SPF regulators to inform the public about a person engaged in business practices that may amount to a contravention of the SPF. Such notices are intended to stop or reduce the detriment caused by regulated entities engaging in conduct that may be in breach of the SPF. They provide SPF regulators with an enforcement tool that can be used in a preventative manner to avoid consumers being adversely affected by conduct that may breach the SPF.[162]

1.138 Noting the explanation above the committee understands the necessity for public warning notices as part of the broader scam prevention framework. However, the committee is primarily concerned with the lack of safeguards provided for the use of public warning notices, and the general lack of information in both the explanatory memorandum and the statement of compatibility in relation to the adverse impact they may have on individuals.

1.139 The committee's understanding and expectation is that the standard protections and safeguards of procedural fairness apply to the issuing of public warning notices. However, there is no confirmation of this in the explanatory memorandum nor any exploration as to how procedural fairness protections will apply in practice in this context. The committee also considers that the explanatory memorandum should have specifically set out the relevant administrative measures that will be put in place to ensure a fair hearing is provided.

1.140 Further, the committee' general expectation in relation to public notices such as these is that the bill should require the relevant entity, in this case the SPF regulator, to remove within a reasonable timeframe any warning notices that may have been incorrectly issued. While noting the safeguards in the matters that the regulator must be satisfied of before issuing a notice, the committee considers that it is still plausible that an incorrect notice may be issued. Taking into account the significant impact this may have on a person and or/business, the committee considers that the bill should provide a requirement that the regulator remove any notices that have been incorrectly issued. Again, there is no exploration of this safeguard in either the bill, the explanatory memorandum or the statement of compatibility.

1.141 While welcoming that the bill provides for matters that the regulator must be satisfied of before issuing a notice, the committee's position is that requirements that the regulator 'reasonably suspects' conduct *may* constitute a contravention is a relatively low threshold to meet. This therefore undermines the quality of these safeguards. These concerns are heightened due to the potential impact a public warning notice may have on individual privacy. Again, the committee notes that the

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161 Schedule 1, item 1, proposed subsection 58FZL(3).

162 Explanatory memorandum, p. 102.

explanatory materials fail to assess the impact these measures will have on privacy rights.

1.142 In this instance, the committee is primarily concerned that the explanatory memorandum has failed to provide sufficient justification for these matters which may cause detriment to individuals. The committee is also concerned that these matters, which relate to individual rights, were not identified as issues in the statement of compatibility with human rights. A failure to properly engage with these issues in the explanatory materials makes it difficult for the committee to assess the efficacy of the safeguards provided and to determine whether the benefit to the public outweigh the trespass on rights and liberties of persons subject to a warning notice.

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

- **the appropriateness of proposed section 58FZL enabling the SPF general regulator to issue public warning notices, with consideration provided to the impacts of such a notice on both procedural fairness and individual privacy, and how procedural fairness will be provided in practice to a person likely to be affected by a public warning notice;**
- **whether SPF regulators will be required to take down, within a reasonable time, any public warning notices that were issued but which, upon review, are incorrect;**
- **what type of matters may lead the regulator to reasonably suspect conduct may constitute a contravention of the SPF framework, and whether consideration was given to applying a higher threshold to the issuing of a public warning notice, or, if not, why not.**

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## Immunity from civil liability[163]

1.144 The bill provides a limited immunity from civil liability where regulated entities have actionable scam intelligence about an activity relating to, connected with, or using a regulated service of the entity.[164] The immunity applies to actions taken by regulated entities (such as banks and telecommunications companies) to disrupt the scam activity if the action is:

- taken in good faith;
- taken in compliance with the SPF provisions;
- reasonably proportionate to the activity and to information that would reasonably be expected to be available to the entity about the activity;

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

164 Schedule 1, item 1, proposed subsections 58BZA(1) and (2).

- taken within 28 days from the intelligence becoming actionable scam intelligence for the entity; and
- promptly reversed if the entity identifies the activity is not a scam and it is reasonably practicable to reverse the action.[165]

1.145 Civil immunities remove any common law right to bring an action to enforce legal rights (for example, a claim of negligence or defamation). In relation to the immunity provision (called in the explanatory memorandum, a 'safe harbour' provision) the explanatory memorandum states:

> In assessing the likely loss or damage to SPF consumers if no action is taken and the activity is a scam, a regulated entity may consider the number of consumers that have interacted with the suspected scam conduct, the information available providing the reasonable suspicion about the conduct, and the suspected losses associated with the activity (if known). This information provides the regulated entity with an understanding of the potential risk to SPF consumers if no action is taken.
>
> In assessing the likely loss or damage if the action is taken and the activity is not a scam, the regulated entity may consider the potential economic, commercial, and social impacts of the disruption based on the nature of the activity. The safe harbour does not provide a protection for blunt and disproportionate action, such as stopping all real-time payments, blocking calls and text messages at mass based on a word or phrase (for example, blocking all texts that say 'mum' following the 'hi mum' scam), or taking down a small business's social media page after receiving a single report that suggests it may be associated with scam without any other corroborating evidence. Action taken that constitutes a proportionate step will depend on the level of certainty the regulated entity has that the identified activity is a scam.
>
> Whether an action is reasonably proportionate should also involve some consideration of competitive interests. Anti-competitive action is not proportionate action, and it is expected that regulated entities will have regard to the circumstances and information available in determining what action is appropriate. The safe harbour protection will not apply where the action taken is not considered to be proportionate and in good faith.[166]

1.146 The committee notes the explanation provided and recognises the necessity of ensuring that entities can take action to prevent scammers from affecting SPF customers without fear of being sued for civil remedies. The committee also welcomes the limited nature of this immunity and the matters that the court would be able to take into account, particularly whether the action taken by an entity in response to a scam is reasonably proportionate.

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165 Schedule 1, item 1, proposed subsection 58BZA(2).

166 Explanatory memorandum, pp. 50-51.

1.147 However, the committee notes that affected persons would appear to have no remedies for actions taken by regulated entities which could significantly affect them or their businesses, including due to a mistaken belief regarding suspected scam activity. For example, this provision could mean that a small business owner, who conducts all their business online and has their website blocked for up to 28 days due to wrongly suspected scam activity, may have no redress for the impact this may have had their business and finances.

**1.148 In light of the information provided in the explanatory memorandum the committee acknowledges the need for the limited immunity from civil liability in the bill. However, noting the potential impact of anti-scam activity (including activity in relation to mistakenly identified scams) on persons who will be prevented from pursuing any civil remedies, such as damages, the committee draws this matter to the attention of senators and leaves for the Senate as a whole to consider the appropriateness of this immunity.**

# Security of Critical Infrastructure and Other Legislation Amendment (Enhanced Response and Prevention) Bill 2024[167]

| | |
|---|---|
| **Purpose** | The bill seeks to make amendments to the *Security of Critical Infrastructure Act 2018*, including to expand the definition of a 'critical infrastructure asset'; expand information gathering powers; amend directions to protect assets from hazards; and varying risk management programs to address 'deficiencies' within critical infrastructure risk management programs. |
| **Portfolio** | Home Affairs |
| **Introduced** | House of Representatives on 9 October 2024 |
| **Bill status** | Before the House of Representatives |

## Immunity from civil liability[168]

1.149 This bill seeks to provide that an entity responsible for a critical telecommunications asset must, so far as it is reasonably practicable to do so, protect the asset from certain types of hazards.[169] In addition to this, the bill also seeks to provide that an entity is not liable to an action or other proceedings for damages for, or in relation to, an act done or omitted in good faith in the performance of this obligation.[170]

1.150 The bill also seeks to provide that the minister may give directions to the responsible entity to not use or supply or to cease using or supplying a carriage service that may be prejudicial to security.[171] Similarly, the bill would provide that an entity is not liable to an action or other proceedings for damages in relation to an act done or omitted in good faith in compliance with a direction given by the minister.[172]

1.151 This therefore removes any common law right to bring an action to enforce legal rights, unless it can be demonstrated that a lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has

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167 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Security of Critical Infrastructure and Other Legislation Amendment (Enhanced Response and Prevention) Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 219.

168 Schedule 5, item 27, proposed subsections 30EB(4) and 30EF(6). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

169 Proposed subsection 30EB(2).

170 Proposed subsection 30EB(4).

171 Proposed subsection 30EF(2).

172 Proposed subsection 30EF(6).

not engaged in good faith will therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.152 The committee expects that if a bill seeks to provide immunity from civil liability this should be soundly justified. In this instance, the explanatory memorandum merely restates the operation of the provisions without providing any justification for the immunity.[173]

1.153 Although the committee acknowledges the likely need for immunity in this instance, as the responsible entity would be acting in accordance with either a direction from the minister or to prevent a hazard from impacting a critical telecommunications asset, the committee considers that a justification for conferring immunity from civil liability on the entity should have been included in the explanatory memorandum. Further, the committee is concerned that in taking measures to protect a critical telecommunications asset or in acting in accordance with a minister's direction, the entity may act in a manner that affects individuals' access to telecommunications services. In the event this occurs, the committee queries what recourse is available for affected individuals, including from the Commonwealth.

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

- **why an immunity from civil liability for entities responsible for a critical telecommunications asset is included in proposed subsections 30EB(4) and 30EF(6);**
- **what recourse is available for affected individuals, other than by demonstrating a lack of good faith by the entity; and**
- **whether affected individuals will be able to seek recourse from the Commonwealth or whether it is intended that the immunity from civil liability will extend to the Commonwealth as a whole.**

[173] Explanatory memorandum, pp. 55, 65.

# Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024[174]

| | |
|---|---|
| **Purpose** | The bill seeks to amend the *Competition and Consumer Act 2010* to reform how mergers and acquisitions operate in Australia, by placing the Australian Competition and Consumer Commission (the Commission) as the centre point of a mandatory and suspensory administrative system. This system would require mergers and acquisitions, unless otherwise defined as not notifiable, to be presented to the Commission prior to fulfillment of the merger or acquisition. |
| **Portfolio** | Treasury |
| **Introduced** | House of Representatives on 10 October 2024 |
| **Bill status** | Before the House of Representatives |

## Exemption from disallowance[175]

1.155 The bill provides that entities are required to notify the Australian Competition and Consumer Commission (the Commission) of a proposed acquisition of certain shares or assets in specific circumstances.[176] The bill further provides that the minister may determine the form for the notification and the information or documents necessary to accompany the notification.[177] The Commission may determine that the notification is materially incomplete, misleading or false having had regard to a number of matters, including the extent to which the notification of the acquisition was in the required form and the extent to which the notification includes, or is accompanied, by the requisite information or documents.[178] The bill provides that the minister's determination, regarding the form and what information or documents must accompany the notification, is a legislative instrument but is exempt from disallowance.[179] The bill provides a similar process in relation to public benefit

174 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 220.

175 Schedule 1, item 35, proposed subsections 51ABY(5) and 51ABZQ(6). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

176 See proposed sections 51ABW and 51ABX.

177 Proposed subsection 51ABY(5).

178 Proposed paragraph 51ABY(4)(a) and (b).

179 Proposed subsection 51ABY(7).

applications,[180] whereby the minister may determine the form or the information or documents for such an application, and that this determination is also a legislative instrument but not subject to disallowance.[181]

1.156 The power of Parliament to disallow a legislative instrument is a key role in the review of legislative power delegated to the executive by the Parliament. Disallowance is the primary manner by which the Parliament exercises control of its delegated power.

1.157 As a body, the Senate acknowledged, in June 2021, the significant implications exemptions from disallowance have for parliamentary scrutiny and resolved that delegated legislation should be subject to disallowance unless exceptional circumstances can be shown which would justify an exemption. In addition, the Senate resolved that any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.[182]

1.158 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in its recent review of the *Biosecurity Act 2015*,[183] and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[184]

1.159 In cases of disallowance, the committee expects the explanatory memorandum to outline the circumstances that justify the limit on parliamentary oversight and scrutiny. In relation to the exemption from disallowance for notifications of proposed acquisitions, the explanatory memorandum merely restates the operation of the provision.[185] In relation to the public benefit applications the explanatory memorandum justifies the exemption from disallowance on the basis of commercial certainty for time-critical transactions.[186]

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180 In a public benefit application, the Commission will undertake an economic and legal assessment of whether the acquisition is likely to substantially lessen competition in a market or if it is of public benefit.

181 Proposed section 51ABZQ.

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

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

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

185 Explanatory memorandum, p. 43.

186 Explanatory memorandum, p. 67.

1.160 The committee's consistent scrutiny position is that any exemptions from parliamentary disallowance should be well justified. In this instance, the committee's concerns revolve around the lack of substantive justification as opposed to the nature of the instruments themselves (which appear likely to be more machinery in nature).

**1.161 The committee requests that an addendum to the explanatory memorandum containing a justification for these exemptions from disallowance 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.[187]**

**1.162 The committee draws its concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the exemptions from disallowance in proposed sections 51ABY and 51ABZQ of the bill.**

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

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## Abrogation of privilege against self-incrimination[188]

1.164 The bill provides for new information gathering powers in relation to potential mergers and acquisitions. These engage an existing provision in the *Competition and Consumer Act 2010* (CCA) which abrogates the privilege against self-incrimination.[189]

1.165 Currently, section 155 of the CCA provides that the Commission, the Chairperson or Deputy Chairperson can require a person to provide information, documents or evidence relating to specified matters[190] if they have reason to believe the person is capable of doing so.[191] Under these provisions, a person is not excused from providing the information, documents or evidence on the grounds that it may tend to incriminate them, but the information cannot be used as evidence in proceedings against the person except in limited proceedings.[192] The bill seeks to amend section 155 of the CCA to add to the list of specified matters, to provide that the Commission may require the person to provide the information, documents or evidence if it is relevant to the making of an acquisition determination by the Commission.[193]

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187 See *Acts Interpretation At 1901*, section 15AB.

188 Schedule 1, item 66. The committee draws senators' attention to this item pursuant to Senate standing order 24(1)(a)(i).

189 *Competition and Consumer Act 2010,* section 155.

190 *Competition and Consumer Act 2010,* subsection 155(2).

191 *Competition and Consumer Act 2010,* subsection 155(1).

192 *Competition and Consumer Act 2010,* subsection 155(7).

193 Schedule 1, item 66, proposed subparagraph 155(2)(b)(iia).

1.166 This provision therefore expands the basis on which information or evidence can be required in circumstances that override the common law privilege against self-incrimination, which provides that a person cannot be required to answer questions or produce material which may tend to incriminate them.[194]

1.167 The committee recognises there may be certain circumstances in which the privilege can be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty. The committee considers that any justification for abrogating the privilege against self-incrimination will be more likely to be considered appropriate if accompanied by both a 'use immunity' and a 'derivative use immunity'. A use immunity provides that information or documents produced are not admissible in evidence in most proceedings. By contrast, a derivative use immunity provides that anything obtained as a direct, or indirect, consequence of the information or documents is not admissible in most proceedings. The committee will also consider the extent to which safeguards to protect individual rights and liberties, such as a use or a derivative use immunity, are included within the bill.

1.168 In this case, section 155 provides for only a use immunity. A derivative use immunity (which prevents information or evidence indirectly obtained from being used in criminal proceedings against the person) has not been included in the existing provision of the CCA. The explanatory memorandum does not explain why a derivative use immunity has not been included, only noting that the 'information which would be obtained by the Commission is critical in it performing its regulatory functions, specifically seeking to prevent anti-competitive acquisitions that would harm the competitiveness of Australian markets'.[195] In this instance, the committee considers it would be more appropriate if a derivative use immunity were included to ensure information or evidence indirectly obtained from a person compelled to answer questions or provide information or documents under the new powers of the bill could not be used in evidence against them.

**1.169 The committee requests the Treasurer's advice as to the appropriateness of:**

**(a) abrogating the privilege against self-incrimination when requiring a person to give or produce information, documents or evidence relating to the making of an acquisition determination; and**

**(b) not providing for a derivative use immunity in this context.**

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194 *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

195 Explanatory memorandum, p. 119.

**1.170 The committee's consideration of the appropriateness of this response will be assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[196]**

196 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, pp. 86–90.

# Private senators' and members' bills that may raise scrutiny concerns[197]

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 |
|---|---|---|
| **Interactive Gambling Amendment (Ban Gambling Ads) Bill 2024** | Division 5 | This Division may raise scrutiny concerns under principles (iv) and (v) in relation to significant matters in delegated legislation. |
| **Accountability of Grants, Investment Mandates and Use of Public Resources Amendment (End Pork Barrelling) Bill 2024 [No. 2]** | Schedule 1, items 14 and 16 | See *Scrutiny Digest 4 of 2024* for the committee's comments in relation to an identical bill.[198] |

197 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 221.

198 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2024* (20 March 2024) p. 16.

# Bills with no committee comment[199]

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

- Aged Care Legislation Amendment Bill 2024
- Competition and Consumer Amendment (Tougher Penalties for Supermarket and Hardware Businesses) Bill 2024
- Corporations Amendment (Streamlining Advice Process) Bill 2024
- Customs Amendment (ASEAN-Australia-New Zealand Free Trade Area Second Protocol Implementation and Other Measures) Bill 2024
- Customs Tariff Amendment (Incorporation of Proposals and Other Measures) Bill 2024
- Environment Protection and Biodiversity Conservation Amendment (Reconsideration of Decisions) Bill 2024
- Food and Grocery (Mandatory) Code of Conduct Bill 2024
- Help to Buy (Consequential Provisions) Bill 2023 [No. 2]
- Higher Education Support Amendment (Fair Study and Opportunity) Bill 2024
- Intelligence Services and Other Legislation Amendment (Cyber Security) Bill 2024
- National Broadband Network Companies Amendment (Commitment to Public Ownership) Bill 2024
- Navigation Amendment Bill 2024
- Oversight Legislation Amendment (Robodebt Royal Commission Response and Other Measures) Bill 2024
- Sydney Airport Demand Management Amendment Bill 2024

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199 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 222.

# Chapter 2
## Commentary on ministerial responses

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

## Aged Care Bill 2024[200]

| | |
|---|---|
| **Purpose** | This bill seeks to amend the legislative framework for the Commonwealth aged care system, including by:<br>• providing legislative authority for the delivery of funded aged care services to individuals;<br>• setting out the eligibility requirements for individuals seeking to access funded aged acre services;<br>• setting out conditions of registration for providers and key obligations of registered providers and aged care workers;<br>• providing for funding arrangements for funded aged care services;<br>• establishing the governance and regulatory framework for the Commonwealth aged care system;<br>• authorising the use and disclosure of protected information in certain circumstances and providing for whistleblower protections; and<br>• providing pathways for review of decisions made under the bill. |
| **Portfolio** | Health and Aged Care |
| **Introduced** | House of Representatives on 12 September 2024 |
| **Bill status** | Before the Senate |

### Undue trespass on rights and liberties
### Significant matters in delegated legislation

200 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Aged Care Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 223.

## Broad discretionary powers
## Immunity from civil and criminal liability[201]

2.2 The bill provides that a restrictive practice in relation to an individual is any practice or intervention that has the effect of restricting the rights or freedom of movement of that individual.[202] The practices or interventions that are to be classified as restrictive practices will be set out in the rules made under the bill.[203] The bill further provides that when specifying restrictive practices, the rules must require that the practice is only used as a last resort to prevent harm to the individual or other persons, and after consideration of the likely impact of the use of the practice on the individual.[204] Further safeguards that must be set out in the rules on the use of restrictive practices are provided on the face of the bill.[205] The bill also provides that the rules may set out the persons or bodies who may give informed consent to the use of a restrictive practice for individuals who lack capacity to consent,[206] and may also provide that requirements in the rules do not apply if the use of a restrictive practice is necessary in an emergency.[207] Further, the bill provides that it would be a condition of registration for aged care providers to comply with any requirements prescribed by the rules in relation to the use of restrictive practices.[208]

2.3 Additionally, the bill provides that the rules may provide that a requirement of the rules does not apply if the use of a restrictive practice is necessary in an emergency. Further, the bill provides that the persons and bodies who may consent to the use of restrictive practices for individuals deemed to lack capacity will be left to delegated legislation.

2.4 The bill also provides civil and criminal immunity for entities who use restrictive practices if informed consent was given by a person or body as prescribed by the rules (where individuals are deemed to lack capacity to consent) and the practice was used in accordance with these requirements.[209]

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201 Clause 17. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i),(ii) and (iv).

202 Subclause 17(1).

203 Subclause 17(2)

204 Paragraph 18(1)(a).

205 Paragraphs 18(1)(b)-(g).

206 Subclause 18(2).

207 Subclause 18(3).

208 Clause 162.

209 Clause 163.

2.5 In *Scrutiny Digest 13 of 2024,*[210] the committee noted the potential for the use of restrictive practices to impact on personal rights and liberties and requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the details of when restrictive practices can be used in an aged care setting to delegated legislation;
- whether the bill could be amended to include additional high-level guidance about when restrictive practices can be used on the face of the primary legislation; and
- whether the bill could be amended to include:
    - at least a broad definition of 'emergency'; and
    - limits around which considerations set out in clause 18 can be overridden in an emergency.

2.6 The committee also drew the attention of senators and left to the Senate as a whole the appropriateness of the immunity from civil and criminal liability in clause 168 of the bill.

***Minister for Aged Care's response***[211]

2.7 The minister noted that the provisions regarding restrictive practises mirror those in the existing *Aged Care Act 1997* (the Aged Care Act) and will reflect the current Quality of Care Principles 2014.

2.8 The minister advised that safeguards on the use of restrictive practices are set out in clause 18, and that guidance is provided on further safeguards to be set out in the rules, including:

- that alternative strategies must be used before the use of restrictive practices;
- that informed consent must be given to the use of a restrictive practice;
- provisions for monitoring and reviewing of the use of restrictive practices; and
- that the use of a restrictive practice complies with the person's behaviour support plan.

2.9 The minister noted it is necessary and appropriate that these measures continue to be set out in delegated legislation as they deal with operational details

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210 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) pp. 5-8.

211 The minister responded to the committee's comments in a letter received via email on 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

which intersect with state and territory legislative frameworks. This will allow for the flexibility to quickly amend arrangements if they have any unintended consequences.

2.10 Further, the minister advised restrictive practice use in the event of an emergency should be rare and only in serious or dangerous situations that are unanticipated or unforeseen and require urgent action, and that after their use in an emergency the rules will require the following:

- for individuals who are deemed to lack capacity to consent, their substitute decision maker must be informed of the use of the restrictive practice; and
- documentation of the use in the individual's behaviour support plan, including the reason for the use, alternatives considered, and care to be provided in relation to the person's behaviour.

2.11 Finally, the minister advised that by using the ordinary meaning of the word 'emergency' providers can take appropriate urgent action when there is an immediate risk or harm.

***Committee comment***

2.12 The committee thanks the minister for this information. However, the committee does not consider that the information provided substantially adds to, or improves on, the information already available to the committee on the face of the bill and in its accompanying explanatory memorandum. While noting the advice that the current bill replicates the relevant matters in the existing Aged Care Act, the committee does not consider that consistency with existing measures is a sufficient justification for providing for such significant matters in delegated legislation. The committee also notes that the current bill provides the government with the opportunity to consider and implement advice provided by this committee in the past in relation to these powers, and considers that its previous concerns have been largely unaddressed. Further, the committee notes that the response generally relies on the justification that the bill is replicating measures in the existing Aged Care Act in response to a range of the committee's scrutiny concerns. The committee reiterates that the fact that the bill is replicating existing matters is not a sufficient justification for including matters which may amount to scrutiny issues in the bill, and that the committee considers this was a missed opportunity to rectify some of the committee's previous concerns.

2.13 Further, the committee notes that the response did not directly address whether the bill could be amended to limit what considerations set out in clause 18 may be overridden in an emergency, nor whether it could be amended to provide a broad definition of an 'emergency'. The committee notes that the current Quality of Care Guidelines 2014 provide that, in an emergency, most of the specified safeguards do not apply in an emergency, except requirements that the restrictive practice is used only to the extent necessary and in proportion to the risk of harm,[212] and that it is used

[212] As provided for in paragraphs 18(1)(d) and (e) of this bill.

in the least restrictive form for the shortest time, remain. Noting that the existing practice is for the majority of the safeguards to be overturned in situations of emergency, the committee considers the bill should explicitly specify which safeguards must continue to apply even in an emergency.

2.14 While the committee welcomes the advice that the use of restrictive practices is intended to be rare and only occur in unforeseen serious or dangerous situations where there is a risk of harm, this requirement is not set out on the face of the bill itself. The committee notes that those using restrictive practices will be aged care workers who may not necessarily have a clear understanding of what is permitted by the use of the term 'emergency' and considers it would likely be of assistance to such workers, and subsequently aged care residents, were the legislation to clearly set these matters out. The committee also remains concerned that delegated legislation is liable to change and there is no guarantee that the stated expected protections will remain in force in the future.

**2.15 The committee remains concerned about the use of delegated legislation in setting out key measures relating to the use of restrictive practices and considers that such significant matters should regulated by primary legislation (not rules) to ensure appropriate parliamentary scrutiny.**

**2.16 The committee recommends that consideration be given to amending the bill to require:**

**(a) that the rules must not allow the following requirements to be disregarded in the event of an emergency:**

**(i) that restrictive practices are used only to the extent necessary and proportionate; and**

**(ii) that if a restrictive practice is used it is used in the least restrictive form and for the shortest time necessary to prevent harm;[213] and**

**(b) that the use of a restrictive practice will only be considered 'necessary in an emergency' if there is an unforeseen risk of harm to a care recipient or other person that requires immediate action.**

**2.17 The committee otherwise draws these concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving significant matters, which trespass on individual rights and liberties, to delegated legislation.[214]**

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

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213 See paragraphs 18(1)(d) and (e) of this bill.

214 See clause 18.

## Undue trespass on rights and liberties
## No-invalidity clause[215]

2.19 The bill sets out a Statement of Rights of persons seeking and receiving aged care.[216] The Statement includes rights such as independence, equitable access, and quality and safe funded aged care services. However, the bill also provides that while an individual is entitled to these rights and that Parliament's intention is for providers to take all reasonable and proportionate steps to act compatibly with these rights, the rights and duties are not enforceable by proceedings in a court or tribunal.[217]

2.20 The bill also sets out a Statement of Principles (Principles) of the core values that underpin the aged care system, including, for example, a person-centred approach, valuing workers and carers, transparency and financial sustainability.[218] As with the Statement of Rights, the bill provides that while Parliament's intention is for stakeholders to have regard to the Principles, the rights and duties are not enforceable by proceedings in a court or tribunal.[219] Further, the bill provides that a failure to comply does not affect the validity of any decision and is not a ground for the review or challenge of any decision.[220]

2.21 Further, the committee notes that the bill provides a no-invalidity clause for a failure to comply with the Statement of Principles.[221]

2.22 In *Scrutiny Digest 13 of 2024,*[222] the committee sought the minister's advice as to:

- whether a complaint could be made to the Complaints Commissioner for a breach of all aspects of the Statement of Rights (or would it be required to be linked to a violation of the Code of Conduct or Aged Care Quality Standards), and if not, why it is not appropriate to amend the bill to allow for this;
- how subclauses 26(1) and (3) interact, and whether clause 26 of the bill can be amended to require *consideration* of the Statement of Principles when making a decision as a condition of validity.

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

216 Clause 23.

217 Clause 24.

218 Clause 25.

219 Subclauses 26(1) and (2).

220 Subclause 26(3).

221 Subclause 26(3).

222 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) pp. 8-11.

***Minister for Aged Care's response[223]***

2.23 The minister advised that the Complaints Commissioner is empowered to deal with complaints or feedback in relation to aged care providers who act incompatibly with the Statement of Rights. The minister confirmed that the bill will allow for complaints to be made against breaches of the Statement of Rights without the matters needing to be linked to a violation of the Code of Conduct, the Aged Care Quality Standards or another provision of the bill.

2.24 In relation to the no-invalidity clause, the minister advised that the provision does not negate bodies bound by the Statement of Principles from being required to consider the Principles when exercising powers and functions. The minister further noted that the no-invalidity clause does not prevent judicial review under paragraph 75(v) of the Constitution or under section 39B of the *Judiciary Act 1903* on the grounds of a jurisdictional error, nor would the provision provide immunity from claims against broader failures (such as fraud, bribery or dishonesty).

2.25 On this basis the minister advised that it would not be appropriate to amend clause 26 of the bill to require *consideration* of the Statement of Principles when making a decision as a condition of validity. The minister concluded that there may be issues outside the control of the person that require them to make a decision not wholly in line with the Principles, but that is in line with the bill or other legislation.

***Committee comment***

2.26 The committee welcomes the advice that complaints and feedback can be considered by the Complaints Commissioner solely in relation to failures to adhere to the Statement of Rights, without the need to demonstrate a breach of the Code of Conduct or the Aged Care Quality Standards. The committee considers that this advice would be a useful inclusion to the explanatory memorandum.

2.27 However, the committee remains concerned in relation to the no-invalidity provision in clause 26 of the bill. The committee considers that even if a party is able to seek judicial review, the operation of the no-invalidity clause is apt to limit the practical efficacy of judicial review to provide a remedy for significant legal errors. The conclusion that a decision is not invalid (despite a legal error) means that the decision-maker had the power (i.e. jurisdiction) to make it. In such circumstances, the standard judicial review remedies available under s 75(v) of the Constitution and s 39B of the *Judiciary Act 1903* would not be available. For this reason, the committee considers that the bill should be amended to clarify that the statutory obligation to consider the Principles (acknowledged to be an *obligation* by the Minister's response) is a condition for valid decision-making despite the no-invalidity clause. It is noted that doing so

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223 The minister responded to the committee's comments in a letter received via email on 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

would not *require* that decision-making is always 'wholly in line' with the Principles but only that decision-makers give active intellectual *consideration* to the principles.

2.28 The committee is concerned that although judicial review is available where there has been a failure to meet procedural requirements resulting in jurisdictional error, it is not apparent that seeking judicial review will result in an effective remedy for an affected party.

**2.29 The committee draws these concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing for a no-invalidity clause in subclause 26(3) of the bill.**

**2.30 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.[224]**

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## Tabling of documents in Parliament[225]

2.31 Clause 342 of the bill provides that the System Governor must, at the end of each financial year, prepare a report for the Inspector-General of Aged Care in relation to reports received by the department from coroners about the death of an individual accessing funded aged care services which include a recommendation to the Department.[226]

2.32 The report by the System Governor to the Inspector-General of Aged Care must contain the recommendations made to the department, a summary of actions taken by the department in response to said recommendations as well as an evaluation of the effectiveness of those actions.

2.33 In addition, clauses 373 and 374 provide that the minister may, by notice in writing to the Commissioner and the Complaints Commissioner, request the relevant Commissioner to inquire into and report to the minister on their functions.[227]

2.34 However, none of the provisions specify a requirement for the reports to be tabled in the Parliament, nor does the explanatory memorandum contain any further

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224 See section 15AB of the *Acts Interpretation Act 1901*.

225 Clauses 342, 373 and 374. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

226 Subclause 341(1).

227 See clause 348 for functions of the Commissioner and clause 357 for functions of the Complaints Commissioner.

information on whether it is intended that these reports will be tabled in the Parliament.

2.35 In *Scrutiny Digest 13 of 2024*[228] the committee requested the minister advice as to why the bill did not provide for reports produced under clauses 342, 373 and 374 to be tabled in the Parliament.

***Minister for Aged Care and Sport's response*[229]**

2.36 The minister advised that these reports may contain sensitive information concerning individuals and, as such, would not be appropriate for tabling in the Parliament.

2.37 For example, a report may include details from coroner's reports which would contain sensitive information concerning the deceased person and their family members. The minister further provided that, while these reports would not be tabled in the Parliament, a public register of these reports will exist.[230] The register would be subject to protections preventing certain types of information from being shared unless considered appropriate or in the public interest by the System Governor.[231]

***Committee comment***

2.38 The committee thanks the minister for this response.

**2.39 In light of the information provided, the committee considers its concerns have been addressed and makes no further comment in relation to this matter.**

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## Coercive powers[232]

2.40 The bill seeks to trigger the standard search, entry and seizure powers provided by the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). It also seeks to modify and extend this framework to provide that an authorised person, or a person assisting an authorised person, may bring to the premises any equipment reasonably necessary for the examination or processing of a thing found at the premises in order to determine whether the thing may be seized.[233] The bill also provides that a thing found at the premises may be moved to another place to

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228 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) p. 14.

229 The minister responded to the committee's comments in a letter received via email on 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

230 Clause 341.

231 Subclauses 341(3), (4), and (5).

232 Clauses 436 and 437. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

233 Subclause 436(1).

determine whether it may be seized if it is significantly more practical to do so and the authorised person or person assisting suspects on reasonable grounds that the thing contains or constitutes evidential material.[234] Once the thing has been moved, it may remain there for examination or processing for 14 days, which may be extended by periods of seven days at a time.[235]

2.41 Further, the bill also provides that if electronic equipment is moved, an authorised person or the person assisting may copy any or all of the data associated by operating the electronic equipment if they suspect on reasonable grounds that any data accessed by operating the electronic equipment constitutes evidential material.[236] An authorised person or person assisting may also seize the equipment or seize any material obtained from the equipment if, after operating the equipment, they find that evidential material is accessible.[237] Equipment or data may also be seized if possession of the equipment by the occupier could constitute an offence.[238]

2.42 From these provisions, it does not appear that a warrant must be obtained in order to move or seize things, equipment or data associated with equipment that has been recorded in another form.

2.43 Finally, while clause 436 specifies that a thing that has been moved to another place for examination or processing may only be done so for 14 days, this can be extended by seven-day periods on application.[239] The bill does not limit the number of extensions that may be sought and does not impose a requirement for evidential material that has been seized to be returned if it is not determined to be used as evidence.

2.44 In *Scrutiny Digest 13 of 2024*,[240] the committee requested the minister's advice as to:

- why it is necessary and appropriate that clauses 436 and 437 allow for an authorised person, or a person assisting an authorised person, to move things to determine if they may be seized, and then seize a thing or data contained in the thing without a warrant;
- why it is necessary and appropriate for clauses 436 and 437 to confer powers that are beyond what is already provided for by Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014*;

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234 Subclause 436(2).

235 Subclauses 436(5), 436(6) and 436(8).

236 Subclause 437(2).

237 Subclause 437(4).

238 Subclause 437(4).

239 Subclauses 436(5), 436(8).

240 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) pp. 14-17.

- whether section 66 of the *Regulatory Powers (Standard Provisions) Act 2014* is taken to apply to these provisions;
- why there currently is no statutory limit on the number of times an extension may be applied for in order to retain a thing that has been moved to another location to be examined; and
- why the bill does not contain a requirement that a thing that has been moved or seized must be returned after a certain period or once it is no longer required for evidential purposes.

***Minister for Health and Aged Care's response[241]***

2.45 The minister advised that the additional powers are necessary and appropriate to ensure electronic equipment may be examined thoroughly for evidential material whether on site or elsewhere and by an expert user if required.

2.46 The minister noted the committee's concerns and undertook to consider amending the bill to constrain the operation of these additional powers to only where an investigation warrant has been issued. The minister noted that if these powers are confined in this way, this would cause the Regulatory Powers Act to apply to the exercise of these powers as it does to all other powers related to the investigation and seizure of evidential material under warrant, including obligations to return seized items and limitations on extensions to hold items.

***Committee comment***

2.47 The committee thanks the minister for this response. The committee welcomes the minister's undertaking to consider amending the bill to require the powers contained in clauses 436 and 437 to apply only where an investigation warrant has been issued.

2.48 The committee also notes the minister's advice that if this amendment is made, the Regulatory Powers Act will apply to the exercise of these powers as it does to all other powers relating to investigation and seizure of evidential material under warrant. However, the committee notes that the minister did not address the question as to the necessity of these additional powers and it remains unclear what circumstances may make it necessary and appropriate to require the movement of equipment to a separate location.

**2.49 The committee welcomes the minister's undertaking to consider amending the bill to constrain the operation of coercive power to only where an investigation warrant has been issued. Until these amendments are progressed, the committee leaves to the senate as a whole the appropriateness of providing for the movement,**

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241 The minister responded to the committee's comments in a letter received via email on 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

**examination and potential seizure of items without the occupier's consent and without a warrant.**

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## Procedural fairness
## Privacy
## Significant matters in delegated legislation[242]

2.50 The bill provides that the Aged Care Quality and Safety Commissioner (the Commissioner) may make an order prohibiting or restricting a registered provider or an individual aged care worker or a responsible person of the aged care provider from involvement in the delivery of funded aged care generally or in a specified service type or in a specified activity of a registered provider (banning orders).[243] These orders may apply generally or be of limited application, be permanent or for a specified period and be made subject to specified conditions.[244] The grounds for making a banning order include where:

- the Commissioner has revoked the registration of the entity as a registered provider;
- the Commissioner reasonably believes that the entity has been involved in, or is likely to become involved in, a contravention of the bill by another entity;
- the Commissioner reasonably believes that the entity or the individual is unsuitable to deliver funded aged care services generally or of a specified service type;
- the Commissioner reasonably believes there is a severe risk to the safety, health or wellbeing of an individual accessing funded aged care services if the entity continues to be a registered provider or if the individual is involved or continues to be involved in a matter to which the order relates; or
- the entity has been convicted of an offence involving fraud or dishonesty or the individual has been convicted of an indictable offence involving fraud or dishonesty.[245]

2.51 The Commissioner must provide the entity (which can include an individual)[246] a notice of an intention to make a banning order prior to making a banning order under clause 497 or 498, which invites the entity to make submissions.[247] However, in the event that the Commissioner reasonably believes that there is an immediate and

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242 Clauses 141, 497, 498, 499, 501 and 507. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

243 Subclauses 497(1) and 498(1).

244 Clause 501.

245 Subclauses 497(2) and 498(2).

246 Explanatory memorandum, p. 372.

247 Subclause 499(1).

severe risk to safety, health or wellbeing of one or more individuals accessing funded aged care, this requirement does not apply.[248]

2.52 Information that must be included on these registers as well as other matters relating to the publication of both registers may be provided for by the rules.[249] These matters include publication of the registers in whole or in part, matters relating to the administration and operation of the registers and the correction of information on the register.[250]

2.53 In *Scrutiny Digest 13 of 2024*,[251] the committee requested the minister's advice as to:

- why it is necessary and appropriate to allow a final banning order to be made against a person in emergency circumstances, noting that this will result in a banning order being made against the individual without providing a chance to make submissions, and whether the bill could be amended to instead provide for the making of an interim banning order and allow submissions to be made before a final banning order is made;
- how the register of banning orders will be published, including who will have access to this register, and, if it will be published in full on a public website, why this is necessary and appropriate;
- why it is necessary and appropriate that information relating to banning orders that have ceased remain published;
- why it is necessary and appropriate to include matters in relation to information that can be included on these registers and in relation to the administration and operation of the registers in delegated legislation; and
- whether the bill can be amended to provide further guidance as to the types of matters the rules may make provision for in relation to the registers.

***Minister for Health and Aged Care's response[252]***

2.54 The minister advised that the provisions within the bill seek to maintain the existing framework for the Commissioner in relation to making banning orders and establishing and maintaining a register of these orders. The minister also advised that it is anticipated that the register of banning orders will continue to be published on the Aged Care Quality and Safety Commission's website, however the minister noted

248 Subclause 499(2).

249 Paragraphs 141(3)(p) and 507(1)(i), subclauses 141(8), 507(5) and 507(6).

250 Subclauses 141(8), 507(5) and 507(6).

251 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) pp. 17-21.

252 The minister responded to the committee's comments in a letter received via email on 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

that the rules will provide that the Commissioner must not publish a part of the register of banning orders if publication is contrary to public interest.

2.55 Finally, the minister advised that the publication of the banning orders register enables providers and recipients of aged care services to ensure a person subject to a banning order is not engaged in the delivery of funded aged care services. Further, the minister advised that this also ensures a person subject to a banning order is not able to move to another arm of the care services sector and continue to engage in behaviours or conduct that has warranted regulatory action.

2.56 The minister did not address the question as to why it is necessary and appropriate to allow a *final* banning order to be made against a person in emergency circumstances, and whether the bill could be amended to instead provide for the making of an interim banning order and allow submissions to be made before a final banning order is made.

***Committee comment***

2.57 The committee thanks the minister for this advice. The committee acknowledges the important need to ensure persons subject to banning orders are not involved in the delivery of funded aged care services and are not able to simply move to another arm of the care services sector. However, it remains unclear to the committee why the banning order register must be published on the Aged Care Quality and Safety Commission's website, rather than establishing a more private means of storing this information that is accessible to recipients and providers of various care services on request. The committee reiterates that if personal details of individuals are accessible on a public website via a general internet search, this would appear to be a bigger intrusion on privacy than is necessary to achieve the stated intention of the measure. Further, the committee remains concerned that information in relation to banning orders made against individual workers can remain published even after the order has ceased to have effect. As noted earlier, the committee also does not accept the justification that this maintains the existing framework, noting again that the development of this bill provides an opportunity to review the appropriateness of existing practices.

2.58 Further, while the committee notes the minister's advice that the rules will provide that a part of the register cannot be published if the publication would be contrary to the public interest, the committee considers that this protection should be included on the face of the bill. The inclusion of this protection in delegated legislation is not subject to the full range of parliamentary oversight processes that primary legislation is subject to, and the requirement can therefore be more easily removed. Noting that this would be a key protection against the unnecessary publication of banning orders, the committee suggests that consideration be given to amending the relevant clauses to limit the publication of banning order information where that is contrary to the public interest.

2.59 The committee also notes that its concerns in relation to procedural fairness have not been addressed. While acknowledging the importance of acting in a timely manner where there is an immediate and severe risk of harm to safety, life or wellbeing, the committee queries the necessity of making a final banning order against an individual which can have significant consequences for that individual's employment (noting information in relation to banning orders is made publicly available and remains published even after the order has ceased to have effect) without providing an opportunity for the individual to make submissions. The committee considers an interim banning order would allow for an individual to temporarily be removed from providing care in a funded aged care service while the Commissioner is able to determine whether to issue a final banning order, against which the affected individual would be able to make submissions.

2.60 Finally, the committee remains concerned that the rules may provide for the operation and administration of the registers that include banning order information, and can prescribe what information is to be included on the registers. It is unclear why it is necessary and appropriate that these matters be provided for by delegated legislation, rather than primary legislation.

**2.61 The committee recommends that, at a minimum, consideration be given to amending the bill:**

**(a) to require the Commissioner to not publish information if the Commissioner considers publication would be contrary to the public interest or the interests of one or more care recipients;[253]**

**(b) requiring the removal of information from the public register where the banning order is no longer in operation;[254] and**

**(c) to provide for the making of an interim banning order where there is an immediate and severe risk to the safety, health or well-being of care recipients, in order to allow an affected person the opportunity to make submissions before a final banning order is made (while preventing the person from being involved in the provision of funded aged care services until the matter is resolved).[255]**

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

**(a) making final banning orders against an individual without affording the affected individual an opportunity to make submissions;**

**(b) publishing the register of banning orders on the Aged Care Quality and Safety Commission website which will be accessible by the public at**

253 See clauses 141 and 507 of the bill.

254 See clause 507 of the bill.

255 See clause 499 of the bill.

**large and will include banning orders that have ceased to have effect (noting that this is not time-limited and can remain published indefinitely); and**

**(c) including significant matters such as the operation, administration and publication of this register in delegated legislation.**

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## Immunity from civil liability[256]

2.63 The bill seeks to provide that authorised officers and persons assisting authorised officers are not liable in relation to civil proceedings for all actions done in good faith in relation to powers exercised and actions taken for the purpose of the regulatory mechanisms of the bill.[257] Similarly, the bill would provide that a person is not liable to civil proceedings as a result of the person using or disclosing relevant information in a circumstance that is authorised by the bill.[258] Finally, the bill seeks to provide that the Systems Governor is not liable to civil proceedings as a result of the publication of information about the quality of funded aged care services and the performance of registered providers of such services.[259]

2.64 In *Scrutiny Digest 13 of 2024*,[260] the committee requested the minister's advice as to what recourse is available for affected individuals, other than demonstrating a lack of good faith, for actions taken by authorised persons, persons assisting authorised persons and the System Governor.

### *Minister for Health and Aged Care's response*[261]

2.65 The minister advised that clause 533 is intended to protect authorised officers and persons acting under their direction or authority against personal civil liability. As this immunity relates to individuals, but not the Commonwealth, the minister advised that an affected person could seek a remedy from the Commonwealth.

2.66 Further, the minister advised that remedies would also be available to an affected person under the Scheme for Compensation for Detriment caused by Defective Administration (the CDDA scheme). Finally, the minister advised that clauses

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256 Clauses 533, 536 and 541. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

257 Clause 533.

258 Subclause 536(3).

259 Subclause 541(6).

260 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) pp. 21-22.

261 The minister responded to the committee's comments in a letter received via email on 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

536 and 541 are intended to only protect persons from civil liability (and not criminal liability).

***Committee comment***

2.67 The committee thanks the minister for this advice. The committee notes the minister's advice that an affected individual is able to seek a remedy under the CDDA scheme. The committee also notes the minister's advice that in relation to clause 533, an affected person is not barred from seeking a remedy from the Commonwealth as the immunities relate only to individual officers (or persons assisting).

2.68 However, the committee notes that the jurisprudence in relation to vicarious liability and immunities suggests that when an officer has been provided with an immunity, the Commonwealth (as employer) would also be immune from liability.[262] As such, in the absence of a contrary intention in the legislation, the committee considers there is a risk that the Commonwealth would also be held to be immune from liability, despite the minister's advice that it is not intended that an affected person be barred from seeking a remedy from the Commonwealth.

**2.69 Noting the minister's advice that it is not intended that the Commonwealth be immune from liability and that affected individuals may seek a remedy from the Commonwealth, the committee considers clause 533 of the bill should be amended to provide that the proposed immunities for officers or persons assisting do not extend to the Commonwealth.**

**2.70 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.[263]**

## Privacy[264]

2.71 The bill creates offences for the unauthorised use or disclosure of protected information, which includes personal information obtained or generated for the purposes of this bill. The bill provides for exceptions to these privacy requirements,

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262 See, for example, *Dunstan v Orr (No. 2)* [2023] FCA 1536 at [113]; *Commonwealth of Australia v Griffiths & Anor* [2007] NSWCA 370 at [115]; *Bell v State of Western Australia* [2004] WASCA 205 [34].

263 See section 15AB of the *Acts Interpretation Act 1901*.

264 Clauses 538 and 539. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

including for entrusted persons[265] who are authorised to use or disclose information in specified circumstances.[266] Entrusted persons are permitted to disclose relevant information to the minister for the purposes of the minister's performance of their functions,[267] and to disclose information for obtaining legal advice[268] or for the purposes of delivering or providing access to aged care services.[269] In relation to disclosures to the minister, the bill provides the safeguard that personal information is not authorised for disclosure if the purpose for which is it being disclosed can be achieved by the disclosure of de-identified information.[270]

2.72 The bill also provides for circumstances in which the System Governor and Appointed Commissioners may use or disclose information.[271] These exceptions are numerous and include, for example:

- to a wide range of specified bodies (such as Services Australia or the Fair Work Commission) for the purpose of facilitating performance of their functions or duties, or the exercise of their powers;[272]
- for research purposes to an entity that is carrying out research into funded aged care on behalf of the Commonwealth if reasonably believed to be necessary for the research;[273] and
- for purposes necessary in the public interest.[274]

2.73 Further, the bill provides that entrusted persons are permitted to disclose relevant information relating to an individual accessing or seeking to access funded aged care for the purposes of delivering aged care services, assessing the individual's need for services, and assessing the individual's level of care needs relative to the needs of other recipients.[275]

2.74 In relation to the exceptions for the System Governor,[276] the bill provides exceptions for disclosures to at least 20 specified Commonwealth bodies, with more

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265 The definition of an entrusted person is very broad, with clause 7 of the bill specifying persons such as the minister, the system governor, an APS departmental employee, and any person engaged by the Commonwealth to provide services in connection with the department or the Commission.

266 Clause 538.

267 Subclause 538(1).

268 Subclause 538(3).

269 Subclause 538(4).

270 Subclause 538(2).

271 Clause 539.

272 Subclauses 539(3) and (4).

273 Subclause 539(7).

274 Subclauses 539(10) and (11).

275 Subclause 538(4).

276 Subclause 539(4)

that can be prescribed by the rules, for facilitating the performance of their functions and duties, without any explanation provided as to why each exception is justified.

2.75 Further, there are a range of exceptions where the System Governor can disclose information in the 'public interest', and it appears that matters relevant to the public interest exceptions may be set out in delegated legislation.

2.76 In *Scrutiny Digest 13 of 2024,*[277] the committee noted the impact on privacy of broad authorisations for the use and disclosure of personal information and sought the minister's advice as to:

- why each of the broad exceptions from privacy protections in clauses 538 and 539 are necessary and appropriate, in particular subclauses 538(1) and (4) and 539(4), (7), (10) and (11);
- whether the bill could be amended to require a person who is disclosing information for the same purpose for which it was disclosed to them (under subclause 537(9)) to de-identify the information where appropriate;
- whether the bill can be amended to require information disclosed for research purposes to be either de-identified or only shared with consent; and
- examples or guidance as to what would constitute a public interest reason for the System Governor to disclose information.

***Minister for Aged Care's response***[278]

2.77 The minister provided detailed justifications for the inclusion of the relevant provisions.

2.78 In relation to subclause 538(1) (disclosure to the minister), the minister advised:

- disclosure of identified information would not be authorised where de-identified information can fulfil the required function; and
- in relation to adverse comments made by the minister in the media, the Australian Privacy Principles permit disclosure of personal information in order to respond.[279]

2.79 In relation to subclause 538(4) (use or disclosure relating provision of services), the minister advised that the provision empowers disclosure of information by entrusted persons to enable the delivery of aged care and associated services. The

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277 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) pp. 24-27.

278 The minister responded to the committee's comments in a letter received via email on 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

279 As per paragraph 6.22 of the Office of the Australian Information Commissioner's Australian Privacy Principle Guidelines.

minister noted this is necessary as the individual may not have specifically consented to sharing information for that particular purpose, and information may also need to be shared with state and territory bodies in situations where consent may not be practical (such as cases of elder abuse concerns).

2.80 In relation to subclause 539(4) (disclosure to various listed bodies), the minister noted that the intent of this provision is to ensure consistency of information and data across government so that information does not become siloed, which was a key recommendation of the Aged Care Royal Commission, which emphasised the importance of sharing data between aged care providers and government agencies.

2.81 In relation to subclause 539(7) (disclosure for research), the minister advised that:

- identifiable information will only be disclosed for research purposes when de-identified information would not be sufficient to conduct the research; and
- to amend the provision to require only de-identified information will be shared will prevent the sharing of any identifiable information which is necessary for some important research projects.

2.82 In relation to subclauses 539(10) and (11) (use or disclosure if necessary in the public interest), the minister provided examples of what may constitute a public interest reason for the System Governor to disclose information, including health and safety concerns, emergency management, and transparency and accountability.

2.83 Finally, in relation to subclause 537(9) (use or disclosure for purpose it was disclosed to them), the minister undertook to consider amending the bill to require that persons who are disclosing information for the same purpose it was disclosed to them should de-identify that information where appropriate.

***Committee comment***

2.84 The committee thanks the minister for the detailed advice provided in relation to the committee's privacy concerns. The committee considers that the majority of the advice provided improves on the explanation of the relevant provisions in the explanatory memorandum, have largely addressed the committee's concerns, and should be included in an update to the explanatory materials.

2.85 In relation to the advice that the Australian Privacy Principles have been interpreted by the Office of the Australian Information Commissioner (OAIC) as allowing disclosure of personal information in the media to respond to adverse claims, the committee remains concerned about the power imbalance that could potentially occur and the chilling effect this may have in preventing individuals from publicising issues.

2.86 In relation to proposed subclause 537(9), the committee notes and welcomes the minister's undertaking to consider amending the bill to ensure that information which is further disclosed for the same purposes it was initially disclosed may be de-identified when appropriate.

**2.87 In light of the advice provided, including the minister's undertaking to consider amending the bill to require de-identification of disclosed information (for the purpose it was originally disclosed for) where appropriate, the committee makes no further comment on this matter.**

**2.88 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.[280]**

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## Broad delegation of administrative powers and functions[281]

2.89 The bill provides that the Commissioner may delegate any of their powers and functions under the bill, other than Parts 2-9 of Chapter 6 (in relation to regulatory mechanisms) to the Complaints Commissioner.[282] The Complaints Commissioner is then authorised to delegate those powers or functions to a member of the staff of the Commission.[283] There appears to be no limit as to the level of seniority to which these delegations can be made.

2.90 Similar delegation provisions in the bill include a requirement that the delegate consider whether the delegee has appropriate qualifications, skills or seniority.

2.91 In *Scrutiny Digest 13 of 2024,*[284] the committee sought the minister's advice as to why it is considered necessary and appropriate to allow for the delegation of any or all of the Commissioner's powers and functions under clause 575, and whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

### *Minister for Aged Care's response*[285]

2.92 The minister advised that the broad scope of functions and powers which may be delegated is due to the potential overlap of skills and experience of Commission

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280 See section 15AB of the *Acts Interpretation Act 1901*.

281 Clause 575. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii)

282 Subclause 575(1).

283 Subclause 575(2).

284 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) p. 27.

285 The minister responded to the committee's comments in a letter received via email on 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

staff in exercising complaints functions and other Commissioner functions. The minister advised that this delegation is intended to effectively administrate and allocate the Commission's resources.

2.93 The minister advised that they will consider amending subclause 572(2)[286] as suggested by the committee to limit the categories of people to whom the powers and functions of the Commissioner may be delegated.

***Committee comment***

2.94 The committee thanks the minister for their response, which has addressed the committee's queries as to the necessity of allowing for the delegation of the Commissioner's powers and functions.

2.95 The committee welcomes the minister's undertaking to consider amending the bill as suggested by the committee.

**2.96 In light of the advice provided, including the minister's undertaking to consider amending the bill to limit the categories of people to whom the Commissioner's powers may be delegated, the committee makes no further comment on this matter.**

**2.97 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.[287]**

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## Automated decision-making[288]

2.98 The bill seeks to provide that the System Governor may arrange for the use of computer programs to take relevant administrative action, which will be done under the System Governor's oversight.[289] The bill provides an exhaustive list of actions that are considered 'relevant administrative action', which include:

- making a decision under subsection 78(1) (dealing with classification levels);
- making a decision under subsection 86(1) (dealing with priority category decisions);

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286 Subclause 572(2) concerns subdelegation where the System Governor delegates a power or function to the Repatriation Commission, who, in writing, further subdelegates that power or function to any person to whom, under section 213 of the *Veterans' Entitlements Act 1986*, it may delegate powers to under that Act.

287 See section 15AB of the *Acts Interpretation Act 1901*.

288 Clause 582. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

289 Subclause 582(1).

- making a decision under subsection 92(1) (dealing with allocation of places to individuals);
- making a decision under subsection 93(1) (dealing with deciding the order of allocations of places to individuals);
- giving a notice under subsections 79(1), 88(1) or 92(3); or
- doing or refusing or failing to do, anything related to making a decision under subsections 78(1), 86(1), 92(1) or 93(1).[290]

2.99 The committee notes that a number of welcome oversight and safeguard mechanisms are set out in the bill, which include the following:[291]

- the System Governor may make a decision in substitution for a decision taken by the operation of a computer program if the decision taken by the operation of a computer program is not correct;[292]
- the System Governor must take all reasonable steps to ensure that relevant administrative action taken by the operation of a computer program is relevant administrative action the System Governor could validly take;[293]
- the System Governor must do the things prescribed by the rules in relation to oversight and safeguards for automation of administrative action;[294]
- if an arrangement for the use of a computer program is made, the System Governor must cause a statement to be published on the Department's website in relation to the arrangement;[295]
- the System Governor must include the total number of substituted decisions made, the kinds of substituted decisions made, and the kinds of decisions taken by the operation of the computer program that the System Governor was satisfied were not correct.[296]

2.100 Further, the committee noted that a failure to comply with some of the safeguards detailed above does not affect the validity of relevant administrative action taken by the operation of a computer program.[297]

290 Clause 582.

291 Clause 583.

292 Subclause 582(4).

293 Subclause 583(1).

294 Subclause 583(2).

295 Subclause 583(6).

296 Subclause 583(7).

297 Subclause 583(3).

2.101 In *Scrutiny Digest 13 of 2024*,[298] the committee requested the minister's advice as to:

- why each of the decisions included within the definition of 'relevant administrative decisions' are considered appropriate for automation and whether any are discretionary in nature; and
- whether the Attorney-General's Department was consulted to ensure a consistent legal framework regarding automated decision-making (as per recommendations 17.1 and 17.2 of the Royal Commission into the Robodebt Scheme).[299]

***Minister for Health and Aged Care's response[300]***

2.102 The minister advised that the department referred these provisions to the Attorney-General's Department to ensure a consistent legal framework regarding automated decision-making, and that these provisions were supported by the Attorney-General's Department as being consistent with the precedent provision on the use of automated decision-making.

2.103 The minister also advised that none of the actions listed under clause 582 are discretionary in nature. The minister advised that these decisions are made based on objectively ascertainable matters and that once relevant data is inputted into a computer program, there is no discretion involved. The minister noted particularly that the decisions made under subclauses 92(1) and 93(1) are only discretionary until rules providing for a method or procedure of allocating places are made, which would then render these decisions mandatory and based on objectively ascertainable matters.

***Committee comment***

2.104 The committee thanks the minister for this advice. The committee notes the minister's advice that the decisions listed under clause 582 are mandatory decisions which are made based on objectively ascertainable matters and that these decisions are not discretionary in nature. The committee also notes the advice that the Attorney-General's Department was consulted on this matter and consider these decisions to be appropriate to be made by use of a computer program.

**2.105 In light of the information provided, the committee considers its concerns have been addressed and makes no further comment in relation to this matter.**

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298 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) pp. 28-30.

299 Royal Commission into the Robodebt Scheme, July 2023, p. xvi.

300 The minister responded to the committee's comments in a letter received via email on 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

**2.106 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.[301]**

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## Standing appropriation[302]

2.107 The bill provides that amounts payable by the Commonwealth are to be paid out of the Consolidated Revenue Fund which is appropriated accordingly.[303] As this appropriation covers amounts payable by the Commonwealth for funding arrangements for funded aged care services, this appropriation likely represents a large amount of Commonwealth expenditure, which once established as a standing appropriation will be administrated without parliamentary oversight.

2.108 In *Scrutiny Digest 13 of 2024,*[304] the committee sought the minister's advice as to the mechanisms in place to report to the Parliament on any expenditure authorised by the standing appropriation.

### *Minister for Health and Aged Care's response*[305]

2.109 The minister provided that the bill replicates the existing Aged Care Act and the existing oversight mechanisms will continue to apply, as set out in clause 599 of the bill. This provision requires the System Governor to give the minister a report on the performance of the System Governor's functions each financial year, to be tabled in Parliament. The report includes oversight of spending, including:

- amount of unmet demand;
- waiting periods;
- number of providers entering and exiting the market;
- financial viability of providers;
- reliance on the bond guarantee scheme;
- amount of contributions including refundable deposits; and

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301 See section 15AB of the *Acts Interpretation Act 1901*.

302 Clause 598. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

303 Clause 598.

304 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) pp. 30-31.

305 The minister responded to the committee's comments in a letter received via email on 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

- building improvements in aged care homes.

***Committee comment***

2.110 The committee thanks the minister for providing advice on the parliamentary oversight available via the tabling of this report each financial year. The committee accepts the need for ongoing and flexible funding for the aged care system. The committee welcomes the minister's advice regarding the annual report on the operation of the Act which includes matters relevant to the appropriateness of the applicable funding.

2.111 The committee reiterates that the use of standing appropriations limits accountability and scrutiny by denying Parliament the opportunity to approve expenditure through its annual appropriations processes.[306] The committee expects explanatory memoranda to bills establishing or expanding standing appropriations to explain why it is appropriate to contain an ongoing standing appropriation and the mechanisms in place to report to the Parliament on any expenditure authorised by the standing appropriation.

**2.112 In this instance, in light of the need for ongoing and flexible funding for the aged care system and as clause 599 of the bill requires annual reporting to Parliament on the operation of the Act, the committee makes no further comment in relation to this matter.**

306 Senate Standing Committee for the Scrutiny of Bills, *Fourteenth Report of 2005: Accountability and Standing Appropriations* (30 November 2005) p. 271.

# Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024[307]

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|---|---|
| **Purpose** | The bill seeks to reform Australia's anti-money laundering and counter-terrorism financing regime through amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act), and the repealing of the *Financial Transaction Reports Act 1988* (FTR Act).<br><br>Schedule 1 seeks to replace Part 7 of the AML/CTF Act with outcomes-focused obligations for reporting entities.<br><br>Schedule 2 seeks to update procedures relating to customer due diligence for reporting entities.<br><br>Schedule 3 seeks to expand the AML/CTF regime to additional high-risk services such as real estate, professional services and dealers of precious metals and stones.<br><br>Schedule 4 seeks to institute changes regarding legal professional privilege.<br><br>Schedule 5 seeks to introduce new offences for 'tipping off' and provides for delegated legislation to determine which Commonwealth agencies, authorities, bodies and organisations are able to disclose Australian Transaction Reports and Analysis Centre (AUSTRAC) information to foreign governments and agencies.<br><br>Schedule 6 seeks to extend the AML/CTF regime to virtual asset-related services, and in doing so, amends and inserts new definitions related to virtual assets.<br><br>Schedule 7 seeks to repeal and substitute a new description of a 'bearer negotiable instrument'.<br><br>Schedule 8 seeks to reform frameworks which set out electronic fund transfer instructions and internation funds transfer instructions as well as the reporting requirements for these services.<br><br>Schedule 9 seeks to provide new powers for AUSTRAC, primarily an examination power which allows the AUSTRAC |

307 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 224.

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| | CEO to require an individual produce documents to AUSTRAC or appear before an examiner on oath or affirmation and answer questions.<br><br>Schedule 10 seeks to move exemptions from the AML/CTF Rules into the AML/CTF Act, while also amending exemption thresholds for various bodies.<br><br>Schedule 11 seeks to repeal the FTR Act.<br><br>Schedule 12 would provide for the making of transitional rules under the bill such as allowing the Attorney-General to make rules concerning any amendment introduced by the bill for up to four years after the bill's commencement. |
| **Portfolio** | Attorney-General |
| **Introduced** | House of Representatives on 11 September 2024 |
| **Bill status** | Before the Senate |

## Significant matters in delegated legislation[308]

2.113 Currently, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) provides that the heads of specified Commonwealth, State or Territory agencies, authorities, bodies and organisations are authorised to disclose AUSTRAC information to foreign governments and agencies.[309] AUSTRAC information includes financial reports and information relevant to anti-money laundering and counter-terrorism financing and financial intelligence.[310] This bill seeks to replace the existing limited list with a power for the Commonwealth, State or Territory agency to be prescribed by the rules.[311]

2.114 In *Scrutiny Digest 12 of 2024,*[312] the committee requested the Attorney-General's detailed advice as to why it is considered necessary and appropriate to leave the designation of Commonwealth, State and Territory entities who can disclose AUSTRAC information to foreign governments to delegated legislation.

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308 Schedule 5, items 4 and 5, section 127 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

309 Subsection 127(3).

310 Definition of 'AUSTRAC information; in section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* means information obtained by AUSTRAC entrusted persons under or for the purposes of that Act, another law, from a government body or information under the *Financial Transaction Reports Act 1988*.

311 See Schedule 5, items 4 to 6.

312 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2024* (18 September 2024), pp. 2-11.

***Attorney-General's response***[313]

2.115 The Attorney-General advised that a machinery of government change inadvertently resulted in the department being listed twice in the list of Commonwealth, State or Territory agencies whose departmental heads are empowered to disclose AUSTRAC information to foreign governments and agencies. The Department of Home Affairs was also inadvertently omitted as a result of the changes.

2.116 Further, the Attorney-General advised that the amendments will provide for flexibility and efficiency for any future machinery of government changes, and highlighted the importance of acting quickly when sharing information in relation to financial crimes. Providing for these agencies, authorities, bodies and organisations to be set out in delegated legislation would, the Attorney-General advised, facilitate swift action when provisions become outdated.

2.117 The Attorney-General also noted the safeguard that exists in the AML/CTF Act that the head of an agency must be satisfied that the information will be protected and used for the disclosure purpose. Further, the Attorney-General noted that as the rules are legislative instruments they will be subject to tabling, disallowance and Parliamentary oversight.

***Committee comment***

2.118 The committee thanks the Attorney-General for this response and the additional reasoning for the amendment and welcomes the advice on the safeguards that will apply to the use of this power.

**2.119 The committee considers that it would have been more appropriate for the bill to set out the general functions and the specific type of entities to whom this information can be disclosed, to retain parliamentary oversight. However, the committee otherwise makes no further comment on this matter and has concluded its examination.**

**2.120 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist interpretation[314], the committee considers that this information should be included in the explanatory memorandum and requests that the explanatory memorandum be updated to include it.**

**2.121 The committee also draws these provisions to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.**

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313 The minister responded to the committee's comments in a letter dated 30 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

314 See *Acts Interpretation Act 1901*, section 15AB.

## Abrogation of privilege against self-incrimination[315]

2.122 The AML/CTF Act currently provides that an authorised officer may require a person to give information or documents relevant to the operation of the AML/CTF Act, regulations or rules.[316] Section 169 also provides that a person is not excused from giving that information or producing a document on the grounds that it might tend to incriminate them.[317] However, subsection 169(2) provides that the information or document is not admissible in evidence against the person in most civil or criminal proceedings (this provides a 'use' immunity). However, it then excludes certain proceedings, meaning the information or documents can be used against the person in those specified proceedings. This bill seeks to expand the proceedings that are excluded, in which case no use immunity would apply.[318] This is in relation to proceedings for an offence against a provision covered by the definitions of money laundering, the financing of terrorism, and proliferation financing in section 5 of the AML/CTF Act.

2.123 In addition, proposed section 172K of the bill provides that it would not be a reasonable excuse for an individual to refuse or fail to answer a question, produce a document or sign a record under new provisions in the bill on the grounds that doing so may incriminate them. However, the information would not be admissible in evidence against the individual in civil or criminal proceedings or in a proceeding for the imposition of a penalty other than in respect of making a false statement.[319] This provides a use immunity.

2.124 In *Scrutiny Digest 12 of 2024,*[320] the committee requested the Attorney-General's detailed advice as to:

- why it is necessary and appropriate to expand the abrogation of the privilege against self-incrimination in relation to all offences against a provision covered by the definitions of money laundering, the financing of terrorism, and proliferation financing;
- why is it necessary and appropriate not to provide for any use or derivative use immunity in this context; and
- why no derivative use immunity has been provided in proposed section 172K.

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315 Schedule 9, item 5, proposed section 172K and item 17, proposed subparagraphs 169(2)(d)(iii), (iv) and (v) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

316 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, section 167.

317 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, section 169.

318 Schedule 9, item 17, proposed subparagraphs 169(2)(d)(iii), (iv) and (v).

319 Proposed subsection 172K(3).

320 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2024* (18 September 2024), pp. 2-11.

2.125 The committee noted its consideration of the appropriateness of this response would be assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[321]

***Attorney-General's response***[322]

2.126 The Attorney-General advised that the expansion of the abrogation of the privilege is necessary to authorise relevant information compulsorily provided in response to a notice under the AML/CTF Act to be used in proceedings relating to offences against state and territory laws on money laundering, financing of terrorism and proliferation financing proceedings.

2.127 The Attorney-General advised that the current scope of section 169 (which excludes the use of compulsorily acquired information or document being admissible in evidence against the person in most civil or criminal proceedings) creates constraints on the prosecution of serious offences in state and territory legislation. The Attorney-General advised that the inclusion of a use and derivative use immunity would unacceptably fetter the investigation of AML/CTF offences and enforcement of the regime.

2.128 In relation to proposed section 172K the Attorney-General advised that it is not appropriate to include a derivative use immunity as it would 'unreasonably fetter' investigations and prosecution of money laundering and terrorism financing offences and 'significantly undermine' Australia's AML/CTF regime.

***Committee comment***

2.129 The committee thanks the Attorney-General for this response. The committee notes the advice that the Attorney-General has provided from the *Guide to Framing Commonwealth Offences* and the policy rationale for the abrogation of the privilege against self-incrimination provided.

2.130 However, while the committee recognises there may be certain circumstances in which the privilege can be overridden, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty. The committee has always considered that any justification for abrogating the privilege against self-incrimination will be more likely to be considered appropriate if accompanied by both a 'use immunity' and a 'derivative use immunity'.

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321 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, pp 86–88.

322 The minister responded to the committee's comments in a letter dated 1 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

2.131 In relation to the amendments proposed to section 169, neither a use nor a derivative use immunity is available. As a result, if an authorised officer has given a person a notice requiring them to produce information or documents, it would be a criminal offence for the person not to provide the information or documents, even if to do so would incriminate themselves, and that information or document could be directly used against them in the prosecution of a state or territory offence. The Attorney-General stated that the use and derivative use immunity unacceptably fetters the investigation of AML/CTF offences and the enforcement of the AML/CTF regime. However, the committee notes that the proposed amendment removes the use and derivative use immunity in relation to the enforcement of state and territory offences, not within the context of the federal AML/CTF regime. As such, it is not clear how providing such immunities would fetter AUSTRAC in its investigations.

2.132 Similarly, the committee does not consider the Attorney-General's response has demonstrated why it is appropriate that the abrogation of the privilege in proposed section 172K does not include a derivative use immunity (meaning anything obtained as a consequence of the requirement to produce a document or answer a question can be used against the person in criminal proceedings).

**2.133 As such, the committee does not consider it has been established that the loss of personal liberty in abrogating the privilege against self-incrimination in these instances are outweighed by the public benefit in doing so, in light of the limited safeguards applicable.**

**2.134 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding the abrogation of the privilege against self-incrimination in section 169 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, without providing any use or derivative use immunity, and proposed section 172K of the bill abrogating the privilege against self-incrimination without the provision of a derivative use immunity.**

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## Reversal of the evidential burden of proof
## Significant matters in delegated legislation[323]

2.135 The bill proposes inserting a new offence of 'tipping off' into the AML/CTF Act for specified persons,[324] such as reporting entities and their employees who disclose specified information[325] to a person other than an AUSTRAC entrusted person, where the disclosure would or could reasonably be expected to prejudice an investigation of

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323 Schedule 5, item 2, proposed subsections 123(4) and (5) of the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (iv).

324 Proposed paragraph 123(1)(a).

325 Proposed subsection 123(2).

a Commonwealth offence or one being undertaken under the *Proceeds of Crime Act 2002* or equivalent State and Territory laws.[326]

2.136 There are two exceptions to this offence. The first is where a person is a reporting entity or an officer, employee or agent of a reporting entity who is a lawyer, an accountant, or a person specified in the rules, and the information relates to a customer of that entity.[327] The information must be disclosed in good faith for the purpose of dissuading the customer from engaging in conduct that does or may constitute an offence.[328] The second exception is where the disclosure is made to another reporting entity for the purposes of detecting, deterring or disrupting money laundering, the financing of terrorism, proliferation financing or other serious crimes and the conditions prescribed in the regulations are met.[329] The evidential burden of proof is reversed for each of these offence-specific exceptions due to the operation of the Criminal Code.

2.137 In *Scrutiny Digest 12 of 2024,*[330] the committee requested that an addendum to the explanatory memorandum containing a justification for the reverse burden provisions be tabled in the Parliament as soon as possible.

***Additional correspondence from the Attorney-General***[331]

2.138 The Attorney-General provided additional information about the reverse burden provisions, noting that the matters are peculiarly within the defendant's knowledge as they go towards the defendant's intention to disclose information in good faith, dissuade prohibited conduct or detect, deter or disrupt various serious crimes. Further, the Attorney-General advised that the matters relevant to the defences would be significantly more costly for the prosecution to prove than for the defendant to disprove.

2.139 The Attorney-General also undertook to table the requested addendum to the explanatory memorandum containing the provided justifications.

***Committee comment***

2.140 The committee thanks the Attorney-General for this additional correspondence and welcomes the undertaking to table an addendum to the explanatory memorandum.

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326 Proposed paragraph 123(1)(d).

327 Proposed paragraphs 123(4)(a) and (b).

328 Proposed paragraph 123(4)(c).

329 Proposed subsection 123(5).

330 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2024* (18 September 2024) pp. 7–9.

331 The minister responded to the committee's comments in a letter dated 1 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

**2.141 Noting the Attorney-General's advice that an addendum to the explanatory memorandum will be prepared containing key information in the Attorney-General's response, the committee makes no further comment on this matter.**

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## Strict liability offences[332]

2.142 The bill provides that persons required to appear for examination in accordance with a notice given under the bill may be required by the examiner to take an oath or give an affirmation that the statements made will be true.[333] The bill proposed that this be an offence of strict liability to fail to comply with these requirements, which would carry a sentence of up to three months imprisonment.[334]

2.143 In *Scrutiny Digest 12 of 2024*,[335] the committee requested the Attorney-General's justification for applying strict liability to this offence and as to the necessity and appropriateness of imposing a period of imprisonment in relation to a strict liability offence.

### *Attorney-General's response*[336]

2.144 The Attorney-General advised that while the offence is punishable by a maximum of three months in prison, this is appropriately balanced against the importance of the relevant provisions to AUSTRAC's ability to enforce the AML/CTF regime. The Attorney-General advised it would impose an unnecessary burden on the regulator in conducting its enforcement investigations if AUSTRAC in its prosecution were required to respond where a person raises a defence to a fault element.

2.145 The Attorney-General referred to the formula under subsection 4B(2) of the *Crimes Act 1914* which converts a term of imprisonment to penalty units. The Attorney-General advised that using this approach, a term of three months imprisonment amounts to 15 penalty units, which is appropriate for a strict liability offence.

2.146 Further, the Attorney-General noted that contraventions of this offence will only occur in controlled environments where the person in question will be informed that any breach of the provision may result in a prison sentence, making it appropriate to confer strict liability under these conditions. Finally, the Attorney-General provided

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332 Schedule 9, item 5, proposed section 172C of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

333 Schedule 9, item 5, proposed subsections 172C(1) and (2).

334 Schedule 9, item 5, proposed subsection 172(3).

335 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2024* (18 September 2024), pp. 9-10.

336 The minister responded to the committee's comments in a letter dated 1 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

examples of provisions with similar strict liability offences punishable by imprisonment.

***Committee comment***

2.147 The committee thanks the Attorney-General for this response. The committee notes the necessity of AUSTRAC being able to conduct enforcement investigations and makes no further comment on the imposition of strict liability in relation to this offence.

2.148 However, the committee reiterates its concern at the imposition of a term of imprisonment as a penalty for an offence where strict liability is applied and does not consider that this response provides a justification in relation to this matter. First, the committee notes that the relevant provision of the *Crimes Act 1914* states the following:

> Where a natural person is convicted of an offence against a law of the Commonwealth punishable by imprisonment only, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the number of penalty units calculated using the formula:
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> Term of Imprisonment x 5.[337]

2.149 The committee understands that this provision allows the court, in circumstances the court considers appropriate, to only impose an equivalent pecuniary penalty either in addition to, or instead of, a term of imprisonment. It is not apparent to the committee that this formula may be used in the reverse to say that the penalty of 3 months imprisonment is the same as 15 penalty units and therefore 'sits comfortably below the 60 penalty units threshold' as stated by the Attorney-General, as the proposed penalty would allow the court to imprison a person (which could not occur if the penalty was set as a monetary amount).

2.150 Further, the committee considers that due to the detrimental impacts a term of imprisonment may have on an individual, the reverse conversion in this instance is not a justification for how the penalty is in compliance with the *Guide to Framing Commonwealth Offences.* The committee notes that the imposition of strict liability removes the requirement to prove a fault element in relation to this offence, which removes a necessary burden on the prosecution in proving that all elements of an offence have been satisfied. The committee reiterates its consistent scrutiny position that it is not appropriate to apply a period of imprisonment to an offence that does not require the prosecution to prove the fault of the accused. The committee also notes that the approach adopted by the Attorney-General is not in accordance with the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.

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337 *Crimes Act 1914*, subsection 4B(2).

**2.151 The committee considers its scrutiny concerns would be addressed if proposed section 172C of the bill were amended to replace the proposed period of imprisonment for the strict liability offence with a pecuniary penalty.**

**2.152 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of imposing strict liability on this offence.**

# Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024[338]

| | |
|---|---|
| **Purpose** | The bill seeks to amend the *Broadcasting Services Act 1992* to combat misinformation and disinformation via new requirements on digital communications platform providers. To ensure compliance with these new requirements, the bill also seeks to expand the Australian Communications and Media Authority's regulatory and legislative powers to make rules, set standards, approve codes, impose reporting conditions and more. The bill also introduces consequential and transitional amendments across the *Australian Communications and Media Authority Act 2005* and the *Online Safety Act 2021* to insert definitions and references to the provisions created by the bill. |
| **Portfolio** | Communications |
| **Introduced** | House of Representatives on 12 September 2024 |
| **Bill status** | Before the Senate |

## Significant matters in delegated legislation[339]

2.153 This bill seeks to amend the *Broadcasting Services Act 1992* to introduce a new Schedule 9 that would impose requirements on certain digital communications platform providers[340] (providers) relating to misinformation and disinformation. These providers would be required to make specified information publicly available and comply with any requirements set out in digital platform rules. These rules would be made by the Australian Communications and Media Authority (ACMA) and would include rules relating to:

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338 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 225.

339 Schedule 1, item 2, proposed Schedule 9, Division 2, Subdivisions B-D. The committee draws senators' attention to these Subdivisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

340 Schedule 1, item 2, proposed sections 5 and 7 set out the providers who would be bound by these requirements, as being those who provide a digital communications platform, which is a digital service that is a connective media service; a content aggregation service; an internet search engine service; a media sharing service; or a kind of digital service determined by legislative instrument, but does not include an internet carriage service, SMS service or MMS service.

- risk management;[341]
- media literacy plans;[342] and
- complaints and dispute handling processes.[343]

2.154 A provider who contravenes the digital platform rules would be subject to a civil penalty of up to 5,000 penalty units for a body corporate (currently $1.565 million) or 1,000 penalty units for a non-body corporate (currently $313,000).[344]

2.155 In *Scrutiny Digest 13 of 2024*[345] the committee requested the minister's advice as to the following matters:

- why it is considered necessary and appropriate to leave to the rules all detail regarding risk management, media literacy plans and complaints;
- why there is no requirement to make digital platform rules regarding complaints and dispute handling processes for misinformation complaints;
- whether further detail could be included on the face of the primary legislation, noting the importance of parliamentary scrutiny; and
- whether the bill could provide that all ACMA's decisions made under the rules are subject to merits review, unless ACMA specifically excludes merits review in individual cases.

***Minister for Communication's response***[346]

2.156 In relation to why it is necessary and appropriate to leave to the rules all details regarding risk management, media literacy and complaints, the minister advised that the matters that may be provided for in rules are not appropriate for inclusion in the bill noting:

- the need for such rules can be better identified by the ACMA once it obtains further information through the reporting and publication obligations and the ACMA's information gathering powers;
- the need for flexibility to respond to how the system is operating in practice;
- the need for such rules may also depend on the timing and nature of external events that are not possible to predict;

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341 Schedule 1, item 2, proposed Subdivision B, Division 2, Part 2, Schedule 9.

342 Schedule 1, item 2, proposed Subdivision C, Division 2, Part 2, Schedule 9.

343 Schedule 1, item 2, proposed Subdivision D, Division 2, Part 2, Schedule 9.

344 Schedule 1, item 2, proposed sections 20, 23 and 26 together with Schedule 2, item 20, proposed subsection 205F(5E).

345 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) pp. 32–35.

346 The minister responded to the committee's comments in a letter dated 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

- platforms differ significantly in the nature of their user-interfaces, their users and the shared content and therefore the risks and measures to address these in the rules may also differ significantly;
- the factors underpinning the rules may change rapidly with changes in technology (including new generative artificial intelligence technology) and new service offerings; and
- it might be appropriate to make rules for only some classes of providers, to ensure there is no undue regulatory burden on low-risk platforms.

2.157 In relation to the complaints and dispute handling processes for misinformation complaints the minister reiterated the above reasons as to why such matters are more appropriate for inclusion in the rules. The minister acknowledged that while there is no express requirement in the bill for a provider to publish the particulars of its complaint or dispute handling processes, providers which have such processes in place are required by the bill to publish them. The minister stated that the bill 'expressly authorises' the making of rules regarding complaint and dispute handling processes, and that while it may be possible to develop baseline requirements for this in the bill itself, this would be fraught with 'risks of overregulation and inflexibility', particularly prior to the ACMA gaining a thorough understanding of the sector through its information gathering powers.

2.158 In relation to whether the bill could provide that all of the ACMA's decisions made under the rules are subject to merits review, unless merits review is specifically excluded, the minister advised that 'it can be expected' that the ACMA will specify in the rules the administrative decisions where merits review will lie and that it would be impractical to require the rules to specify every action that might conceivably be held to be a 'decision' unless specifically excluded. The minister advised that providers (who will be extremely large corporations with ample resources to use litigation to delay administrative processes) might make applications for merits review of various actions taken by the ACMA on the basis that such action constitutes a 'decision'. The minister also advised that such rules would be subject to regular scrutiny by the Senate Standing Committee for the Scrutiny of Delegated Legislation and the disallowance process.

***Committee comment***

2.159 The committee thanks the minister for this response. The committee considers the response has largely established why matters relating to risk management and media literacy are appropriate for inclusion in delegated legislation, particularly noting that the area of digital technology is rapidly changing. As such, the

committee makes no further comment in relation to the inclusion of these matters in delegated legislation.[347]

2.160 In relation to complaints and dispute handling processes for misinformation complaints, it is clear there is no requirement under the bill for providers to have such processes in place. What is required is that if a provider has such a process, this is subject to publishing requirements, and the ACMA 'may' also make rules that could require providers to implement and maintain complaints and dispute handling processes. However, if the ACMA chooses not to make such rules, and providers choose not to implement complaint and dispute handling processes, providers could, acting in compliance with this scheme, remove content they classify as misinformation or disinformation and there would be no legal requirement on the provider to facilitate complaints. The committee considers the ability of persons to complain about the operation of this scheme is an integral part of ensuring the scheme does not overreach. The committee considers that the bill itself should set out, at a high level, that providers subject to this scheme must implement and maintain complaints and dispute handling processes for misinformation complaints, or at a minimum, that the ACMA must make rules requiring this.

2.161 In addition, under the bill, applications may be made to the Administrative Review Tribunal for review of decisions of the ACMA made under the rules, so long as the rules provide that the decision is a reviewable decision. The committee considers that, generally, administrative decision that will, or are likely to, affect the interests of a person should be subject to independent review unless a sound justification is provided. The committee notes the minister's advice that providers might frustrate the objectives of the legislation by applying for merits review of various actions on the basis that it might constitute a 'decision', if all decisions by the ACMA were subjected to merits review. However, the committee notes it would be possible for the ACMA in making the rules to specifically exclude any decision that was not appropriate for merits review. However, on the basis of the minister's advice, including that it is expected that the ACMA would provide for merits review where a decision affects personal interests and does not fall within a recognised class of administrative decisions unsuitable for merits review, the committee makes no further comment in relation to this.

**2.162 The committee considers the minister's response has largely addressed its concerns regarding the use of delegated legislation in relation to risk management and media literacy plans, and review of the ACMA's decisions under the rules. However, the committee retains scrutiny concerns that there is no requirement in the bill that providers must implement misinformation complaints and dispute**

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347 Government amendments that passed the House on 7 November 2024 (ZC302) also proposes to introduce additional rule making powers regarding a data access scheme for independent researchers. Noting the technical detail to be included in delegated legislation the committee makes no comment in relation to this.

**handling processes, which the committee considers as integral to the operation of the scheme.**

**2.163 The committee recommends that consideration be given to amending the bill to require digital communications platform providers to implement and maintain misinformation complaints and dispute handling processes, or at a minimum, to provide that rules *must* be made to establish this.**

**2.164 The committee otherwise draws these scrutiny concerns to the attention of senators and leaves this to the Senate as a whole.**

**2.165 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.**[348]

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

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## Privacy

### Significant matters in delegated legislation[349]

2.167 The bill also provides the ACMA with the power to make rules to place record keeping and reporting requirements on providers in relation to misinformation and disinformation.[350] Proposed section 30 states that the rules may require providers to make and retain records relating to misinformation or disinformation and measures implemented by providers to respond to this (the ACMA may also require providers to give records to the ACMA if necessary for it to perform its monitoring and compliance functions).[351] The bill provides that before making such rules the ACMA must consider the privacy of end-users, and that rules must not require providers to make or retain records of the content of 'private messages' or of VoIP communications (non-recorded real-time voice communication using the internet). What constitutes a private message is a message between two end-users or to numerous end-users that does not exceed the number specified in the rules, or if no number is specified, 1,000.[352] Failure

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348 See section 15AB of the *Acts Interpretation Act 1901*.

349 Schedule 1, item 2, proposed section 2, definition of 'private message' and section 30. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

350 Schedule 1, item 2, proposed sections 30–32.

351 Schedule 1, item 2, proposed section 34.

352 Schedule 1, item 2, proposed section 2, definition of 'private message'.

to comply with the rules would be subject to a civil penalty (up to 5,000 for a body corporate or 1,000 for a non-body corporate).[353]

2.168 In *Scrutiny Digest 13 of 2024*[354] the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave to the rules all details regarding record keeping relating to misinformation or disinformation;
- why privacy protections specified in the explanatory memorandum are not included in the bill itself, such as in relation to de-identification and that records should only be retained for as long as is reasonably necessary; and
- why the bill does not contain a minimum number of end-users as to what constitutes a 'private message' (noting that if the rules set a low number, important privacy protections would not apply to such messages).

***Minister for Communication's response***[355]

2.169 In relation to why the rules, rather than the bill itself, will include all details regarding record keeping relating to misinformation or disinformation, the minister advised that it would be impractical to develop appropriately targeted baseline requirements in the bill because of the need to make different provisions for different classes of providers. The minister advised that by not having any baseline requirements in the bill this removes the risk of regulatory overreach, enables regulation to be better tailored and respond more rapidly to emerging risk.

2.170 As to why privacy protections specified in the explanatory memorandum are not included in the bill itself, the minister advised that including such safeguards in all instances would not be feasible in every case and therefore it would not be possible for the bill to provide that the rules must include requirements for de-identification and time limits on record keeping. The minister advised that in making the rules the ACMA is expected to consider the extent to which those records are a necessary and reasonable means to achieve the regulatory objectives, and this would be scrutinised when the rules are put before Parliament.

2.171 Finally, the minister advised that in determining a different number of *maximum* end-users as to what constitutes a 'private message', this will be informed by information made available to the ACMA following operation of the provisions. In relation to the *minimum* number of end-users the minister advised that if the ACMA

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353 Schedule 1, item 2, proposed section 31 together with Schedule 2, item 20, proposed subsection 205F(5E).

354 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) pp. 35–38.

355 The minister responded to the committee's comments in a letter dated 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

specifies a lower number in the rules it will need to provide a justification at that time as to why such messages need to be brought into scope.

***Committee comment***

2.172 The committee thanks the minister for this response. The committee acknowledges the minister's concern regarding regulatory overreach, but notes that it is very common for primary legislation to provide that the rules may make different provisions for different classes of persons. The committee appreciates that different providers may need a different regulatory approach, but is concerned that all aspects of record-keeping requirements, including safeguards, are largely left to the rules.

2.173 Further, it remains unclear to the committee why more specific privacy safeguards cannot be included in the bill. Again, the committee appreciates it may not always be possible to de-identify all records or have the same time period for retention for all types of records. However, the committee considers it would be possible, for example, for the bill to require that the rules not require retention of identifiable information if the objectives of retention can be achieved by retaining de-identified information. This would build a baseline safeguard into the bill to better protect the right to privacy while ensuring it would only apply when it is reasonably appropriate. The committee does not consider it sufficient to leave the question of whether there are sufficient safeguards in the rules to the parliamentary scrutiny process, noting this occurs after the rules are already in force, and there is no requirement for concerns raised by the scrutiny committees to be resolved.

2.174 Finally, the committee considers that the bill, in providing that the rules cannot require providers to make or retain records of the content of private messages, is a very important safeguard intended to protect the right to privacy. The committee would be alarmed if the content of private messages, for example, sent via Whatsapp, were required to be retained by providers. Yet, the bill allows the rules to potentially limit the effectiveness of this safeguard if they were to specify a low number of end-users that constitutes a 'private message'. If the rules stated that the number was five, then the content of, for example, family group messages sent between six people, would not be considered a private message and would therefore be required to be retained. While the committee appreciates there is no current intention to set the number this low, and that the rules would be subject to parliamentary oversight, as a matter of law there would be no constraint on the rules setting the number this low and therefore undermining an important privacy protection. The committee considers that it has not been established why the bill cannot provide a minimum number that the rules cannot go below. The committee notes that the explanatory memorandum (as reiterated in the minister's response) already sets out that 150 members of a group is the most cited number as to the limit on the number of meaningful relationships humans can maintain at a time, and it is therefore unclear why the bill cannot include this as the minimum number.

**2.175 The committee remains concerned that all aspects of record-keeping requirements, including safeguards, are largely left to the rules. The committee considers the bill should set out minimum privacy protections regarding record-keeping requirements. The committee also considers it an important privacy protection to require 'private messages' not to be retained by providers and so remains concerned that the rules can set out what constitutes a 'private message'.**

**2.176 As such, the committee recommends that consideration be given to amending the bill to:**

> **(c) provide that the rules (in addition to allowing different classes of providers to be treated differently):**
>
> > **(iv) must not require the retention of records containing personal identifying information if the objectives of retention can be achieved by retaining de-identified information; and**
> >
> > **(v) must provide that records be retained only for the period reasonably necessary to achieve the objectives of the legislation; and**
>
> **(d) require that the definition of 'private message' includes messages sent from an end-user to a number of end-users as specified in the rules, but that the rules must not specify a number lower than 150 end-users.**

**2.177 The committee otherwise draws these scrutiny concerns to the attention of senators and leaves this to the Senate as a whole.**

**2.178 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.**[356]

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

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## Freedom of expression
## Significant matters in delegated legislation[357]

2.180 The bill specifies that providers in the digital platform industry may develop misinformation codes. If the ACMA is satisfied that a body or association represents a particular section of the digital platform industry, the ACMA may request that they

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356 See section 15AB of the *Acts Interpretation Act 1901*.

357 Schedule 1, item 2, proposed Division 4. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (iv).

develop a misinformation code.[358] The ACMA may make a misinformation standard if such a request is not complied with; or the ACMA considers a particular section of industry is not represented by a body or association; a code is not providing adequate protection; or there are exceptional and urgent circumstances.[359]

2.181 The bill does not set out what must be in such codes or standards. Instead it provides examples of matters that *may* be included depending on which section of the digital platform industry is involved. Examples of what might be in codes or standards include:

- preventing or responding to misinformation or disinformation (including that which constitutes an act of foreign interference);
- preventing advertising that constitutes misinformation or disinformation;
- supporting fact checking;
- giving information to end-users about the source of political or issues-based advertising, improving media literacy of end-users, and allowing end-users to detect and report misinformation or disinformation; and
- policies and procedures for receiving and handling reports and complaints from end-users.[360]

2.182 The ACMA may approve a code developed by industry if the ACMA is satisfied that there has been appropriate consultation, the code requires participants to implement measures to prevent or respond to misinformation or disinformation, and enables assessment of compliance with the measures.[361] In addition, the ACMA may only approve a code, or make a standard, if the ACMA is satisfied that:

- it is reasonably appropriate and adapted to achieving the purpose of providing adequate protection for the Australian community from serious harm caused or contributed to by misinformation or disinformation; and
- goes no further than reasonably necessary to give that protection.[362]

2.183 Once the ACMA has approved a code, or made a standard, the code or standard would be a disallowable legislative instrument.[363]

2.184 If providers did not comply with a code or standard they would be subject to significant civil penalties. For non-compliance with a code, a body corporate provider could face a civil penalty of up to 10,000 units (or $3.13 million) or up to two per cent

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358 Schedule 1, item 2, proposed section 48.

359 Schedule 1, item 2, proposed sections 55–59.

360 Schedule 1, item 2, proposed sections 55–59.

361 Schedule 1, item 2, proposed sections 47.

362 Schedule 1, item 2, proposed sections 47 and 54.

363 Schedule 1, item 2, proposed subsections 47(6), 55(2), 56(2), 57(3), 58(3), and 59(2).

of their yearly annual turnover, whichever is greater. This increases to 25,000 units (or $7.825 million) or five per cent of annual turnover for non-compliance with a standard.[364]

2.185 In *Scrutiny Digest 13 of 2024*[365] the committee requested the minister's advice on the following matters:

- whether the definition of 'professional news content' is overly narrow in requiring that the person producing the content be bound by specific editorial standards, and how this is likely to operate in practice in relation to journalists producing content in countries that may not have analogous standards;
- why it is considered necessary and appropriate to leave to codes and standards all processes by which participants in a digital platform industry are to prevent or respond to misinformation or disinformation, including why there is no requirement as to what such a code or standard must contain; and
- whether the bill could be amended to require the ACMA to be satisfied that a misinformation code or standard appropriately balances the importance of protecting the community from serious harm with the right to freedom of expression.

***Minister for Communication's response***[366]

2.186 In relation to the definition of 'professional news content', the minister noted that the bill has aligned the definition of journalism to existing tests which contemplate journalism as a line of work subject to codes of practice or professional standards relating to the provision of quality journalism. The minister advised that where content originates from a person who meets the criteria of having produced 'professional news content', there are generally established complaint resolution processes that may address harms arising from that material, and additional commercial or regulatory levers that ensure high quality journalism for bodies captured by this exemption.

2.187 The minister advised it would be inconsistent with the policy intent of the bill to exclude content (that otherwise might be classified as misinformation or disinformation) by a person who might simply call themselves a journalist. The minister advised there is a greater potential for harm from the spread of content from self-described 'journalists' whose activities are not subject to any professional

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364 Schedule 1, item 2, proposed sections 52 and 62 together with Schedule 2, item 20, proposed subsections 205F(5G) and (5H). Note that a non-body corporate would face up to 2,000 penalty units for non-compliance with a code and up to 5,000 penalty units for non-compliance with a standard.

365 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024* (9 October 2024) pp. 38–43.

366 The minister responded to the committee's comments in a letter dated 24 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

standards, oversight or accountability mechanisms. The minister also stated that expanding the definition of journalism risks inadvertently covering activities of foreign interference operations driven by state-based actors that masquerade as producers of legitimate journalism.

2.188 In relation to leaving to the codes and standards all detail regarding the processes for providers to respond to misinformation or disinformation, the minister advised that the bill does not set out all matters which must be in a code as the level of risk will depend on the relevant industry and class of provider. The minister advised that this reflects the principle that regulation should only be imposed to the extent necessary to address any harm not being adequately mitigated by industry self-regulation. The minister advised that it is not intended that a code need be in force which deals with every matter which could be in a code, and as such it is not possible to specify the matters that a code or standard must contain without reducing the flexibility with which industry or the regulator may operate.

2.189 In relation to requiring the ACMA to be satisfied that a code or standard appropriately balances protection of the community with the right to freedom of expression, the minister advised that the ACMA will need to prepare a statement of compatibility with human rights with every legislative instrument and as such will need to consider the right to freedom of expression when doing so. The minister also advised that the right to freedom of expression, under international law, has an 'inherently indeterminate character' that makes them 'inappropriate for incorporation into Australian law as legal standards that limit the power of decision-makers'.

***Committee comment***

2.190 The committee thanks the minister for this response. The committee reiterates that this bill, in providing for substantial penalties for providers who do not comply with requirements regarding how they deal with concerns about misinformation and disinformation on their platform, could incentivise providers to take an overly cautious approach to the regulation of content. Ultimately, whether these measures will unduly trespass on the right to freedom of expression will depend on a mixture of how robust the free speech protections are in the codes or standards, and how they are applied in practice.

2.191 The committee reiterates that the breadth of the exceptions is relevant when considering the limit on freedom of expression. In this regard, the bill excludes the dissemination of professional news content from what constitutes misinformation or disinformation. The committee acknowledges the minister's advice that where a person is subject to quality standards and codes this helps to ensure quality, arms-length journalism that is less likely to constitute misinformation or disinformation. However, while the definition of misinformation and disinformation require that the content must be provided to one or more end-users in Australia, the person posting the content does not need to be in Australia. As such, it is likely that a significant amount of news content will be produced by persons located overseas, and it remains

unclear how providers, particularly individual fact-checkers, would be able to ascertain if the person who produced the content was subject to appropriate editorial standards. The committee reiterates that if this exception is interpreted overly narrowly there is the potential for news content produced by journalists from countries without established journalistic rules or standards to be blocked, despite the content potentially reporting news and current affairs.

2.192 The committee considers there are important protections in the bill but much of the detail as to how this is approached in practice will be set out in the codes and standards, rather than in primary legislation. While the committee acknowledges the minister's advice as to the need for flexibility as to what is included in a code or standard depending on the relevant industry or provider, without knowing the detail of what will be included in these codes or standards, including no *requirement* as to what must be included, it is difficult to adequately assess whether this measure may unduly trespass on rights and liberties.

2.193 Finally, the committee reiterates that the approach of this proposed scheme is to incentivise providers to remove content assessed to be misinformation or disinformation. Substantial penalties apply if inappropriate content is not adequately managed. Yet, no penalty is applicable if providers go too far in limiting freedom of expression. There is no legislation to prevent providers from blocking all content in relation to a topic they deem contentious. The bill seeks, in some degree, to address this by requiring the ACMA, when approving codes or making standards, to be satisfied that it is reasonably appropriate and adapted to achieve the purpose of protecting the community from serious harm and goes no further than is reasonably necessary.[367] However, the committee is concerned this may not be sufficient to fully protect the right to freedom of expression. Given the only oversight of what private providers do in response to this scheme is through the enforcement of these codes and standards, requiring those codes and standards to appropriately balance the right to freedom of expression is essential. The committee does not consider that consideration of the right to freedom of expression at the time a statement of compatibility is prepared is sufficient to protect this fundamental right, noting that the statement of compatibility forms part of the explanatory material only and does not require legislation to be compatible with rights.[368] The committee is not convinced by the minister's argument that the right to freedom of expression is inappropriate for incorporation as a legal standard that limits the power of decision-makers. The committee notes that freedom of expression has been characterised as one of the 'fundamental values protected by

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367 Schedule 1, item 2, proposed subparagraph 47(1)(d)(ii) and (iv), 50(1)(d)(ii) and (iv), section 54 and subsection 60(2).

368 See, for example, Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (30 May 2024), pp. 239–242 and 324–326, noting in particular at p. 241 '[a] persistent concern is that statements of compatibility with human rights will always state that a proposed law is consistent with human rights, regardless of the international law position'.

the common law'.[369] Chief Justice French has said that 'freedom of speech is a long-established common law freedom'.[370] There is considerable jurisprudence, including international jurisprudence, as to the operation of this right – undermining the argument that the right has an 'inherently indeterminate character'. The committee considers the bill would better balance the need to protect the community from harm, with the important common law right to freedom of speech, if it were to explicitly require the ACMA to consider whether this is appropriately balanced before approving a code or making a standard.

**2.194 While the committee notes that the bill includes safeguards, it cautions that the proposed scheme has the potential to unduly trespass on personal rights and liberties by potentially acting as a chilling effect on freedom of expression, as there are incentives for providers to remove content that might constitute misinformation or disinformation, while there is no incentive for providers to respect the right to freedom of expression. The committee also remains concerned that all processes by which participants in a digital platform industry are to prevent or respond to misinformation or disinformation are left to delegated legislation.**

**2.195 To better protect the right to freedom of expression the committee recommends that consideration be given to amending the bill to require the ACMA to be satisfied that a misinformation code or standard appropriately balances the importance of protecting the community from serious harm with the right to freedom of expression.[371]**

**2.196 The committee otherwise draws these scrutiny concerns to the attention of senators and leaves this to the Senate as a whole.**

**2.197 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.**[372]

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

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369 See *Nationwide News v Wills* (1992) 177 CLR 1, p. 31.

370 *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 at [43] (French CJ).

371 Schedule 1, item 2, proposed paragraphs 47(1)(d), 50(1)(d), section 54 and subsection 60(2).

372 See section 15AB of the *Acts Interpretation Act 1901*.

# Criminal Code Amendment (Hate Crimes) Bill 2024[373]

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| **Purpose** | The bill seeks to amend the *Criminal Code Act 1995* (the Criminal Code) by restructuring offences related to urging or threatening violence by replacing 'intent' with 'recklessness' to lower the threshold of prosecution. At the same time, the bill introduces new offences for threatening force or violence against groups or members of a group while expanding the definition of those groups to gender and disability-based identities. Finally, the bill removes the good faith defence for urging or threatening violence in relation to these offences. |
| **Portfolio** | Attorney-General |
| **Introduced** | House of Representatives on 12 September 2024 |
| **Bill status** | Before the House of Representatives |

## Undue trespass on rights and liberties[374]

2.199 The bill seeks to amend two existing offences in the Criminal Code[375] that make it an offence to urge violence against groups or members of groups with specified attributes. Currently it is an offence to target a group or member of a group as 'distinguished by race, religion, nationality, national or ethnic origin or political opinion'. This bill seeks to expand the list of protected attributes to also include 'sex, sexual orientation, gender identity, intersex status and disability'.[376] It also seeks to lower the fault element to provide that while a person must have intentionally urged another person or group to use force or violence, instead of doing so *intending* the force or violence will occur, the bill would amend this to provide that they be *reckless* as to whether the force or violence will occur.[377]

2.200 The bill also seeks to insert a new offence, punishable by up to five years imprisonment, of threatening to use force or violence (rather than urging) against a group on the basis of the expanded protected attributes (as set out above), where a reasonable member of the group would fear the threat would be carried out. It would also be an offence punishable by seven years imprisonment to do the same conduct

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373 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Criminal Code Amendment (Hate Crimes) Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 226.

374 Schedule 1, item 21. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

375 See Criminal Code, sections 80.2A and 80.2B

376 Schedule 1, items 4, 7, 12 and 15.

377 Schedule 1, items 3, 6, 11 and 14.

with the added requirement that the threat, if carried out, would threaten the peace, order and good government of the Commonwealth.[378]

2.201 Currently, section 80.3 provides defences to the existing urging force or violence offences, if the person who took the action, in good faith:

- tries to show that the Sovereign, Governor-General, State Governors, their advisers or a person responsible for the government of another country are mistaken;
- points out, with a view to reforming, errors or defects in the government, the Constitution, legislation or administration of justice;
- urges a person to attempt to lawfully procure a change in law, policy or practice in Australia or internationally;
- points out matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to remove that;
- does anything in connection with industrial dispute or matter; or
- publishes a report or commentary about a matter of public interest.

2.202 Item 21 of the bill seeks to remove this defence for the two existing offences and the proposed two new offences.

2.203 By removing this defence, this removes an existing safeguard that aims to ensure the offences are not overly broad, noting the potential impact of these offences on freedom of expression.

2.204 In *Scrutiny Digest 12 of 2024* the committee requested the Attorney-General's advice on:

- why is it necessary to seek to remove the application of the good faith defences in section 80.3 to these offences (noting the explanatory materials provide that no relevant speech could ever be made in good faith);
- why it is proposed to remove the defences in section 80.3 entirely without implementing the other part of the ALRC recommendation to reframe the criminal offences so that the court, in determining whether a person intends the urged force or violence will occur, must have regard to the context in which the circumstance occurred;
- what conduct would 'use of force' include and would it include use of force against property; and

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[378] Schedule 1, item 19, proposed new section 80.2BA.

- what type of groups or members of a group would be captured by the attribute of 'political opinion', and why the inclusion of this attribute is appropriate in the context of freedom of expression.[379]

***Attorney-General's response***[380]

2.205 In response to the committee's query on the removal of the good faith defence and consideration of the context in which the conduct occurred, the Attorney-General reiterated that it is the government's view that threatening or urging violence is not part of good faith discourse and that the removal of the defences in section 80.3 reflect that view. The Attorney-General advised that the urging violence offence requires it to be proven that the person intended to use force or violence, and in the absence of direct evidence, such as an admission, intent would need to be proved as a matter of inference from the facts and surrounding circumstances which would require consideration of the context of the conduct.

2.206 Additionally, the bill provides that the urging of violence offence would also require it be proven that the person was reckless as to whether force or violence will occur. In referencing the Criminal Code's definition of reckless,[381] the Attorney-General advised that establishing whether a person is reckless regarding conduct that may urge violence will necessarily require consideration of the context in which the conduct occurred.

2.207 In relation to the term 'use of force', the Attorney-General advised it is intended to take its ordinary meaning, which includes strength or power exerted on an object and physical coercion. In particular the Attorney-General noted that the offences apply where the force or violence is urged or threatened against a group or member of a group. The Attorney-General stated:

> It is not intended to apply to threatening or urging damage to property, except where that damage to property would also involve violence or force against a person.

2.208 Finally, on the inclusion of 'political opinion' as a protected attribute, the Attorney-General advised that the term is intended to take its ordinary meaning and it could include beliefs, judgements, attitudes and views that relate to government, governance, and political parties. The Attorney-General stated that the inclusion of

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379 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2024* (18 September 2024) pp. 11–15.

380 The minister responded to the committee's comments in a letter dated 8 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

381 Subclause 5.4(2) of the *Criminal Code Act 1995* states that a person is reckless with respect to a result if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

'political opinion' as a protected attribute would assist individuals and groups in expressing their political opinions without fear of force or violence.

***Committee comment***

2.209 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice in relation to the ordinary meaning of use of force, and that it is not intended to apply to threatening or urging damage to property, except where that would also involve violence or force against a person, and makes no further comment on this matter.

2.210 In relation to the removal of the defences in existing section 80.3, the committee retains some concerns that the defences are proposed to be removed in their entirety without expressly allowing the court to consider the context in which the conduct occurred. While noting the Attorney-General's advice that in proving the fault element for this offence the court will consider the circumstances of the offending, the committee remains concerned that there may be a small risk the offence provisions could capture behaviour that is not intended to be criminalised. This is particularly the case noting that the bill also proposes lowering the existing fault element, so that a person need not intend that force or violence will occur, only that they are reckless as to whether it would occur, which is a lower threshold to satisfy than intention.

2.211 The committee reiterates that it is unlikely there are many circumstances where a person could threaten the use of force or violence against a particular group in ways that would be considered legitimate. However, it is not possible for the committee, or the Parliament, to understand the full range of possibilities that could be captured by these provisions. For example, there may be circumstances where a person may encourage others in their group to use force in self-defence if they are aware another group (such as, for example neo-Nazis, who would have the protected attribute of 'political opinion') may seek to harm them at a protest or rally. In this example, the committee considers it is possible the elements of the offence, that is, threatening the use of force against a group (reckless as to whether the force or violence will occur) would likely satisfy the elements for conviction for this offence, but this context does not appear to accord with the intention of this legislation. In contrast, the inclusion of the defence for actions done in good faith may assist the court to consider the circumstances of the offending outside of the context of the fault element.

2.212 The committee's concerns are heightened in this instance as the offence carries a maximum penalty of five years imprisonment (or seven years if it would threaten the peace, order or good government of the Commonwealth). Although the committee accepts, in general, the Attorney-General's argument that violence or the use of force cannot be urged in good faith, the committee still considers that there may be circumstances where that may be possible (noting again that the legislature is unable to predict all instances in which this offence could occur). The committee

considers it has not been established why it is necessary to remove the defences entirely from these provisions, or why the Australian Law Reform Commission's approach of repealing the defence but incorporating it as an element of the offence was not adopted.

**2.213 While the committee acknowledges that generally it is not possible to urge or threaten the use of force or violence in good faith, the committee remains concerned that completely removing existing defence provisions may result in unintended consequences, particularly in circumstances where the threshold for intending that the force or violence will occur has been lowered to recklessness.**

**2.214 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of removing the defence of good faith provided in relation to the offences under sections 80.2A and proposed section 80.2B of the *Criminal Code Act 1995*, in conjunction with lowering the fault element associated with both offences from intention to recklessness.**

# Wage Justice for Early Childhood Education and Care Workers (Special Account) Bill 2024[382]

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|---|---|
| **Purpose** | The bill seeks to provide the legal framework for the establishment and operation of a special account, known as the Wage Justice for Early Childhood Education and Care Workers Special Account (the Account), which will be used to administer grant funding for the Early Childhood Education and Care (ECEC) Worker Retention Payment Program (the Program). The measures under this grant program are intended to fund a 15 per cent wage increase for ECEC workers over two years. |
| **Portfolio** | Education |
| **Introduced** | House of Representatives on 12 September 2024 |
| **Bill status** | Before the Senate |

## Broad discretionary powers[383]

2.215 The bill provides that the Secretary may, on behalf of the government, make a grant of financial assistance to a person or body that is an approved provider[384] in relation to the remuneration of workers engaged by the provider.[385] There are no criteria set out on the face of the bill by which the Secretary is to assess whether an application from a provider will be granted. The explanatory memorandum indicates that the criteria will be set out in non-legislative guidance.[386]

2.216 In *Scrutiny Digest 12 of 2024* the committee requested the minister's advice as to:

- why it is necessary and appropriate for the eligibility criteria for decisions to grant remuneration made under clause 10 of the bill to be left to non-legislative guidance;

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382 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Wage Justice for Early Childhood Education and Care Workers (Special Account) Bill 2024, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 227.

383 Subclause 10(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

384 A provider is an approved provider under the *A New Tax System (Family Assistance) Administration Act 1999*. Section 3 defines an approved provider as a provider for which an approval is in effect under Division 1 of Part 8.

385 Subclause 10(1).

386 Explanatory memorandum, p. 12.

- the eligibility criteria for decisions made under clause 10 of the bill; and
- whether the bill can be amended to include additional guidance on the exercise of the power on the face of the primary legislation.[387]

***Minister for Education's response***[388]

2.217 The minister advised that the Grant Opportunity Guidelines will be published shortly and will set out the categories of early childhood education workers who are eligible to apply for a grant under the scheme.

2.218 The minister noted that providing for the eligibility criteria in non-legislative guidance is a common practice for special accounts, and provided the example of the account established under the *Housing Australia Future Fund Act 2023*. The minister also noted that the grants for this scheme will initially be made under the *A New Tax System (Family Assistance) Act 1999* which does not contain eligibility criteria and therefore the current bill should adopt the same approach.

2.219 This practice, the minister advised, allows for flexibility to change criteria when necessary. The minister also provided a list of the eligibility criteria which will apply to the scheme which can be read in full in the attached response.

***Committee comment***

2.220 The committee thanks the minister for this response. While noting the advice that including eligibility criteria for grants under special accounts in non-legislative guidance is common, the committee considers that, at a minimum, the explanatory memoranda to bills establishing such schemes should set out the criteria in full to provide parliamentarians with the opportunity to review and assess the practical operation of the scheme. The committee considers that the eligibility criteria set out in the minister's response should have been included in the explanatory memorandum to increase parliamentary oversight of the scheme. However, the committee's preferred position is for such criteria to be set out in legislative guidance including via delegated legislation.

2.221 Further, the committee notes that in relation to the *Housing Australia Future Fund Act 2023* referenced in the minister's response, the eligibility criteria for grants under that scheme are made under the Housing Australia Investment Mandate, which is a legislative instrument.[389] Therefore, these two schemes are not comparable, noting that the wage justice grants will be made from criteria in non-legislative instruments. It remains unclear to the committee why the criteria, which is already

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387 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2024* (18 September 2024), pp. 19-20.

388 The minister responded to the committee's comments in a letter dated 3 October 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 14 of 2024*).

389 See subsection 41(7) of the *Housing Australia Future Fund Act 2023*, and page 66 of the explanatory memorandum to the bill.

known, could not be included on the face of the bill or, at a minimum, in a disallowable legislative instrument to ensure appropriate parliamentary oversight.

**2.222 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving entirely to a non-legislative instrument the criteria for the making of wage justice grants.**

**2.223 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to the eligibility criteria for the scheme 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.[390]**

390 See *Acts Interpretation Act 1901*, section 15AB.

# Chapter 3
## Scrutiny of standing appropriations[391]

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.[392] 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.[393]

3.4 The committee draws the following bills to the attention of senators:

- Help to Buy Bill 2023 [No. 2][394]

**Senator Dean Smith**
**Chair**

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391 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 14 of 2024*; [2024] AUSStaCSBSD 228.

392 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*.

393 For further detail, see Senate Standing Committee for the Scrutiny of Bills *Fourteenth Report of 2005*.

394 Subclause 27(4) of the bill provides that the Consolidated Revenue Fund is appropriated for the purposes of providing amounts payable under subclause 27(1), where the Commonwealth must pay to Housing Australia amounts to enable Housing Australia to make contributions on behalf of the Commonwealth under Help to Buy arrangements.