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Committee for the Scrutiny of Bills

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Committee information

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a 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.

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1 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report Snapshot, *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 231.

2 The committee has deferred its consideration of the Health Legislation Amendment (Modernising My Health Record—Sharing by Default) Bill 2024.

3 The committee has deferred its consideration of amendments moved to the Aged Care Bill 2024.

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.

Electoral Legislation Amendment (Electoral Communications) Bill 2024[4]

Purpose	The bill seeks to make amendments to multiple Acts, but primarily to the *Commonwealth Electoral Act 1918*, for the purposes of legislating and prohibiting electoral matters which contain written statements, visual depictions, or audio depictions, which may depict candidates, and are inaccurate or misleading to a material extent. The bill seeks to establish an Electoral Communications Panel which will require electoral matter authorising persons or entities to disclose whether their content was created or modified using digital technology, such as deep fakes. The bill further seeks to repeal requirements for licenced broadcasters and the SBS to not broadcast election or referendum advertising in the last three days of voting in an election or referendum.
Portfolio	Finance
Introduced	House of Representatives on 18 November 2024
Bill status	Before the House of Representatives

Privacy[5]

1.2 The bill provides that a Decision Panel may conduct investigations in relation to contraventions of civil penalty provisions under Division 2 of the bill,[6] which relate to authorising communication of authorisable electoral matter containing inaccurate and misleading content. Following these investigations, a decision panel may make

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4 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Electoral Legislation Amendment (Electoral Communications) Bill 2024, *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 232.

5 Schedule 1, item 27, proposed section 321RC. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

6 Proposed subsection 321R(1).

and publish decisions.[7] A publication of a decision can include the reasons for the decision, and any remedial action that the panel intends to request.[8]

1.3 It is unclear whether the information that may be published in relation to a decision could include personal information about an individual involved in the contravention, such as information about a person who authorised the communication of electoral matter containing inaccurate and misleading content. The committee considers that where a bill provides for the collection, use or disclosure of personal information, the explanatory materials to the bill should address why it is appropriate to do so, what safeguards are in place to protect the personal information, and whether these safeguards are set out in law or policy (including whether the *Privacy Act 1988* applies).

1.4 In this instance, the explanatory memorandum does not clarify whether personal information, such as information that may identify persons involved in the contravention will be published. The statement of compatibility only provides that 'publishing Panel decisions publicly will ensure transparency.'[9]

1.5 The committee acknowledges the need for publishing decisions to ensure transparency but considers that the explanatory memorandum should have provided a clarification as to what information will be published and whether there is an impact on privacy. If there is an impact on privacy, the committee considers that a justification for this should also have been included in the explanatory memorandum.

1.6 The committee requests that an addendum to the explanatory memorandum containing this information 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.[10]

1.7 The committee otherwise draws to the attention of senators and leaves to the Senate as a whole the lack of clarity as to what information may be published by a Decision Panel under proposed section 321RC, and whether it may impact on personal privacy.

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7 Proposed subsection 321R(1).

8 Proposed subsection 321RC(2).

9 Statement of Compatibility with Human Rights, p. 6.

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

Electoral Legislation Amendment (Electoral Reform) Bill 2024[11]

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to require caps on gifts and electoral expenditure, expedited disclosure of gifts and reducing the threshold for disclosure of donations to $1,000. It also seeks to make amendments in relation to disclosure of information on the transparency register and in relation to public funding available to parties and candidates.
Portfolio	Finance
Introduced	House of Representatives on 18 November 2024
Bill status	Before the House of Representatives

Parliamentary scrutiny

Undue trespass on personal rights and liberties[12]

1.8 At the outset, the committee notes with some concern from a parliamentary scrutiny perspective, the speed with which this bill is anticipated to pass the Parliament (potentially within two sitting weeks of its introduction). This expedited timeline for the passage of this significant bill reduces the committee's capacity to undertake its usual scrutiny process, which includes meaningful dialogue with the executive over any concerns it identifies.

1.9 One of the scrutiny concerns raised by the bill relates to the implementation of the core proposal in the bill to impose caps on political donations and expenditure. Schedules 3 and 4 would place annual caps on the amount of money that may be gifted to a political party or a political candidate[13] and on the amount that may expended by a party or a candidate for electoral purposes.[14] Further, the bill provides that registered political parties and candidates may be eligible for election funding. That funding is payable as an advance to any candidate who received at least 4 per cent of the total from first preference votes cast in the prior election.[15]

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11 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Electoral Legislation Amendment (Electoral Reform) Bill 2024, *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 233.

12 Schedules 3 and 4. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (v).

13 Schedule 3.

14 Schedule 4.

15 Schedule 6.

1.10 In relation to the introduction of gift caps, the explanatory memorandum provides:

> Gift caps are being introduced with the objectives of:
>
> • preventing Australian elections from being unfairly skewed by organisations or individuals with large amounts of money;
>
> • promoting equal opportunity for all individuals and other entities to participate in political debate; and
>
> • minimising the risk or perception of undue influence in Australian federal elections due to the corrupting influence of extreme financial power in electoral financing.
>
> The introduction of gift caps also implements part of commitment 7 of Australia's Third Open Government Partnership National Action Plan 2024 2025, relating to strengthening transparency of political donations.[16]

1.11 The committee acknowledges that diminishing the influence of political donations could promote the right to vote, rule of law values and freedom of expression. The committee acknowledges in particular the importance of ensuring transparency, minimising the risk of perception of undue influence and promoting equal opportunities for all individuals and entities to participate in political debate. However, the committee's primary concern in relation to this bill is if the ability of independent candidates and minor parties to run effective campaigns may be limited by the imposition of gift caps per candidate. The committee is concerned if these caps could impact the capacities of these candidates to disseminate to the public political matters, information, opinions and arguments concerning government.

1.12 The committee notes that the annual gift cap is proposed to be $20,000 per candidate per calendar year.[17] There is also proposed to be a state and territory gift cap that is five times the annual gift cap, amounting to $100,000 per calendar year.[18] However, these figures may be misleading in practice for individual electorates as the bill imposes an overall gift cap that is 32 times the amount of the annual gift cap at $640,000 per calendar year.[19] The committee understands this means that major parties with a higher number of candidates could receive up to $640,000 in gift amounts per year from donors, whereas an independent candidate would be limited to a $20,000 gift per year, and minor parties would seem to receive a lower amount of money in gifts.

1.13 The committee notes that placing a ceiling on the amount of political donations which may be made and on the amount which may be expended on electoral communications could place a burden on freedom of political

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16 Explanatory memorandum, p. 59.

17 Schedule 3, item 1, proposed section 302B.

18 Schedule 3, item 1, proposed section 302CJ.

19 Schedule 3, item 1, proposed section 302B.

communication. The committee notes the importance, with respect to its scrutiny principle of undue trespass on rights and liberties, of ensuring legislation does not favour incumbents or major political parties.

1.14 While the committee understands that this scheme is intended to ensure transparency and may be an improvement on current funding arrangements, the committee remains concerned if a consequence of it may be that it could impact representative government by affecting the diversity of opinions, arguments and other political matters that can be disseminated in electoral communications. As the explanatory memorandum does not address this matter, it is unclear what measures have been or will be taken to ensure this effect is minimised. It is also unclear what measures are in place to ensure there is a 'level playing field' noting that these amendments will place a blanket limit on all political donations and electoral expenditure rather than proportionately limiting it with regard to party size to ensure independents and minor parties are not at a disadvantage.

1.15 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 caps on gifts and electoral expenditure if this could have any adverse impact on independent candidates and minor parties.

Significant matters in delegated legislation[20]

1.16 The bill seeks to provide that certain persons and entities have obligations to ensure that each gift of money that satisfies certain requirements must take all reasonable steps to ensure that the gift is credited to a federal account kept for the purposes of incurring electoral expenditure or creating or communicating electoral matter.[21] Further, it seeks to provide that a person or entity subject to this obligation must ensure that the federal account is maintained in a way that satisfies the matters prescribed by the regulations.[22] The failure to maintain the account in accordance with the matters prescribed by the regulations would result in a civil penalty of 200 penalty units.[23]

1.17 Further, the bill also provides the regulations can make provision in relation to the amount to be paid after a qualifying election is held as an advance on election funding and in relation to making claims for advance amounts; when and how advance amounts are payable; reporting obligations in relation to advance amounts; and any other matters necessary or convenient to be prescribed for carrying out or giving effect

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20 Schedule 6, item 4, proposed section 292FB; Schedule 7, Part 3. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

21 Schedule 6, item 4, proposed subsection 292FA(2).

22 Schedule 6, item 4, proposed section 292FB.

23 Schedule 6, item 4, proposed section 292FB.

to advance amounts.[24] Proposed subsection 298J(10) provides that an advance amount paid under the regulations is a relevant payment for the purposes of the appropriation of money under an existing standing appropriation.

1.18 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. In this instance, the explanatory memorandum does not provide any justification as to why it is necessary and appropriate that the regulations may provide for the matters that federal accounts must satisfy or matters relating to the payment of advance amounts for election funding.

1.19 The committee's concerns are heightened in this instance as the bill provides that the regulations may make provision for the expenditure of public money by providing for the payment advance amounts for election funding. The committee has previously expressed its view that such important matters be included in primary legislation[25] and generally remains of the view that, consistent with the views expressed by the High Court in *Williams v Commonwealth*[26] about the need for parliamentary scrutiny of expenditure,[27] authorisation of expenditure is more appropriately enacted in primary legislation rather than delegated to the executive. Noting this, the committee considers at a minimum the explanatory memorandum should provide a justification for the inclusion of both of these matters in delegated legislation.

1.20 The committee requests that an addendum to the explanatory memorandum containing a justification for the inclusion of these significant matters 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.[28]

1.21 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 that the payment of advance amounts for election funding, and the requirements that federal accounts must satisfy, be determined by delegated legislation.

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24 Schedule 7, item 11, proposed section 298J.

25 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2012* (27 June 2012) p. 5.

26 *Williams v Commonwealth* (2012) 248 CLR 156.

27 See, for instance, the remarks of Hayne J in *Williams v Commonwealth* (2012) 248 CLR 156 [288] that 'sound governmental and administrative practice may well point to the desirability of regulating programs of the kind in issue in this case by legislation'.

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

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

Strict liability offences
Significant penalties[29]

1.23 The bill seeks to create an offence for failing to comply with a notice provided to give information or produce a document or another thing.[30] The fault-based offence would result in a penalty of imprisonment of up to six months or 30 penalty units, while the strict liability offence could result in a penalty of 10 penalty units. Existing section 316 of the *Commonwealth Electoral Act 1918*, which the bill seeks to replace, provides that the maximum penalty for the offence of failing to comply with a notice is 10 penalty units.[31]

1.24 The bill also seeks to create an anti-avoidance provision to make it an offence to enter into a scheme, begin or carry out a scheme or carry out a scheme where the sole or dominant purpose of the scheme is to avoid the operation of certain provisions of the bill, including the caps on gifts and electoral expenditure.[32] The maximum penalty for the fault-based offence in relation to this would be imprisonment for three years or 180 penalty units or both.[33]

1.25 In relation to the imposition of strict liability, the committee notes that under general principles of the common law, fault is required to be proven before a person can be found guilty of a criminal offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant had the intention to engage in the relevant conduct or was reckless or negligent while doing so. As the imposition of strict liability undermines fundamental common law principles, the committee expects the explanatory memorandum to provide a clear

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29 Schedule 9, item 3, proposed subsections 314AN(14) and 314AN(15); Schedule 9, item 10, proposed subsection 314AS(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

30 Schedule 9, item 3, proposed subsections 314AN(14) and 314AN(15).

31 *Commonwealth Electoral Act 1918*, subsections 316(5) and 316(5A).

32 Schedule 9, item 10, proposed subsection 314AS(1).

33 Schedule 9, item 10, proposed subsection 314AS(2).

justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[34]

1.26 Similarly, the committee's expectation is that the rationale for the imposition of significant penalties will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties.

1.27 In this instance, the explanatory memorandum does not provide any justification for why strict liability is appropriate for the offence of failing to comply with a notice. It also does not explain why it is necessary to increase an existing penalty from 10 penalty units to up to six months imprisonment, nor why a three years imprisonment penalty is appropriate. The explanatory memorandum merely restates the operation of these provisions.

1.28 Further, the committee notes that under existing section 316, a defence of reasonable excuse is applicable to the offence of failing to comply with a notice,[35] which is no longer provided by this bill. The committee considers a justification for this removal should also have been included in the explanatory memorandum.

1.29 The committee considers that a justification for the application of strict liability, the imposition of penalties of imprisonment and the removal of the defence of reasonable excuse should have been included in the explanatory memorandum and requests that an addendum to the explanatory memorandum containing this information 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.[36]

Henry VIII clause – modification of primary legislation by delegated legislation[37]

1.30 The bill provides that the minister may make rules prescribing matters of a transitional nature and that the rules may have effect, despite the commencement of an item of the Act in specified circumstances.[38] In particular, it provides that the rules

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34 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, pp. 24–26.

35 *Commonwealth Electoral Act 1918*, subsection 316(5C).

36 See section 15AB of the *Acts Interpretation Act 1901*. The justification should explicitly address relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

37 Schedule 11. The committee draws senators' attention to this Schedule pursuant to Senate standing order 24(1)(a)(iv).

38 Schedule 11, subitem 2.

can specify that a provision amended, inserted or substituted by this Act does not apply at all, or in relation to specified matters or classes of matters, for a specified period, or a repealed item continues to apply, in general or in relation to specified matters, for a specified period.

1.31 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make amendments to primary legislation (generally the relevant parent statute). The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive. The committee expects the explanatory memorandum in these instances to provide a justification for the ability for the delegated legislation to modify the operation of primary legislation.

1.32 In relation to this, the explanatory memorandum merely states that the provision clarifies that 'the rules can defer operation of an item in this bill after its commencement'.[39] It does not explain why this is necessary and appropriate.

1.33 The committee considers that a justification for enabling the rules to modify the operation of the Act should have been included in the explanatory memorandum and requests that an addendum to the explanatory memorandum containing this justification be tabled in the Parliament noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.[40]

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39 Explanatory memorandum, p. 179.

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

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2024[41]

Purpose	The bill seeks to amend the *Migration Act 1958* to expand on search and seizure powers exercised by authorised officers. These powers would be able to be exercised to seize 'prohibited things', which is to be determined by the minister (examples include mobile phones or other communication devices). The bill also seeks to expand circumstances in which search and seizure powers may be exercised by authorised officers without warrant or reasonable suspicion both within and without detention facilities.
Portfolio	Home Affairs
Introduced	House of Representatives on 21 November 2024
Bill status	Before the House of Representatives

Undue trespass on rights and liberties[42]

1.34 The bill seeks to amend the *Migration Act 1958* (Migration Act) to allow the minister to determine, by legislative instrument, that a thing is a 'prohibited thing' in relation to immigration detention facilities and detainees (whether or not they are in an immigration detention facility). The minister may make such a determination if satisfied that possession is prohibited by law, or possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility or to 'the order of the facility' (known as an 'immigration detention facility risk').[43] An example is given in the bill of the 'things' that may be determined to be a prohibited thing, including mobile phones, SIM cards or computers and other internet-capable electronic devices.[44] The explanatory memorandum states that prescription and non-prescription medications, as well as health care supplements, may also be determined to be prohibited things if the person in possession of them is not the person to whom they have been prescribed or supplied for use.[45]

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41 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2024, *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 234.

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

43 Schedule 1, item 2, proposed section 251A.

44 Schedule 1, item 2, proposed subsection 251A(2) example.

45 Explanatory memorandum, p. 11.

1.35 If a thing is determined to be a prohibited thing, the bill sets out (or amends) powers enabling an authorised officer to search for the prohibited thing if they believe on reasonable grounds that it is necessary to prevent or lessen an immigration detention facility risk,[46] including to:

- search a detainee's person, clothing and property to find out whether a prohibited thing is hidden on the person, in the clothing or in their property;
- require a detainee to be strip-searched or to require their possessions be screened by screening equipment to find out whether a prohibited thing is hidden on the person, in their clothing or in their possessions;
- enable authorised officers and their assistants to search, without a warrant, the rooms and personal effects of immigration detainees to find out if a prohibited thing, weapon or other thing capable of being used to inflict injury or help a detainee escape is in the detention facility (and to use detector dogs for this purpose); and
- require authorised officers to seize a prohibited thing, weapon or escape aid or any documents or other thing that may be evidence or grounds for cancelling the visa of the person being searched.

1.36 The bill also indirectly empowers authorised officers to use force against a person or property when conducting a search so long as it is reasonably necessary in order to conduct the search.[47]

1.37 The explanatory memorandum states that immigration detention facilities accommodate an increasing number of 'higher risk detainees', including members of organised crime groups with serious criminal histories. Accordingly, it notes that the amendments sought to be made by the bill are intended to prevent the use of mobile phones and other internet-capable devices to organise criminal activities inside and outside immigration detention facilities, to coordinate and assist escape efforts, as a commodity for exchange, to aid the movement of contraband, and to convey threats to other detainees and staff.[48] The statement of compatibility further explains that the existing search and seizure powers in the Migration Act are not sufficient to prevent the increasing prevalence of illegal and anti-social behaviour in immigration detention facilities.[49]

1.38 The committee notes that the bill seeks to introduce powers substantially similar to those introduced and considered by the committee in 2020.[50] The

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46 Schedule 1, item 2, proposed section 251AA.

47 Schedule 1, item 19, proposed subsection 252BA(7).

48 Explanatory memorandum, p. 3.

49 Explanatory memorandum, p. 52.

50 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2020* (10 June 2020) pp. 16–21 and *Scrutiny Digest 11 of 2020* (2 September 2020) pp. 19–28.

committee notes that this bill, while including some additional safeguards, raises substantially the same scrutiny concerns as raised by the earlier bill. In particular, the committee considers that the proposed amendments, in expanding search powers and thereby effectively restricting the possessions a detainee may have inside immigration detention facilities, and further empowering authorised officers to search without a warrant (including strip searches and searches of a detainee's room and personal effects), may unduly trespass on the detainee's rights and liberties, particularly their right to privacy (and if mobile phones are unduly limited, also potentially their right to freedom of expression).[51]

1.39 While the committee acknowledges the stated difficulties posed by detainees with serious criminal histories and that there may be a need to restrict access for high-risk detainees to items that could be used to attempt to commit offences, the committee notes that the proposed amendments in the bill would apply to all immigration detainees equally. While the committee notes that searches may only be conducted if the authorised officer believes that exercising the power is necessary to prevent or lessen an 'immigration detention facility risk', the committee notes that this is defined broadly to include searching for any prohibited thing that 'might be a risk' to the 'order of the facility'. As such, this does not specify that possession of the thing by a specific detainee poses a risk, just that there might be a risk to the general order of the facility by a detainee possessing the prohibited thing. In this regard, the committee notes that persons detained in immigration detention facilities are detained on the basis that they are non-citizens who do not possess a valid visa, and not as punishment for having committed a crime.

1.40 The explanatory memorandum sets out the government's intention regarding the use of these powers:

> It is the Government's intention that the search and seizure powers in relation to prohibited things will not be exercised in relation to all detainees by way of a blanket application, and will only be exercised where a detainee possesses a prohibited thing, determined by the Minister in an instrument in writing, that poses a risk to the health, safety or security of persons in the facility or to the order of the facility.[52]

1.41 While the committee notes this intention, it is not clear to the committee that this is appropriately provided for in the bill itself. As set out above, a thing will be

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[51] It is noted that Schedule 1, item 2, proposed section 251AB provides that if a prohibited things used to communicate with a person has been seized from a detainees, they must be given access to an alternative means of communication sufficient to enable them to communicate with a member of the family unit or for the purpose of obtaining legal advice or communicating governmental or political matters. This assists with ensuring freedom of expression is not unduly limited, but it is noted that this does not apply to detainees communicating with friends or their wider family, and much will depend on how this is applied in practice.

[52] Explanatory memorandum, p. 5.

prohibited for all detainees regardless of the risk that detainee may pose. All detainees would be subject to searches (including potentially strip searches and the use of force) if an authorised officer believed there might be a risk to the good order of the facility. For example, it may be that all low-risk detainees will be prevented from possessing mobile phones on the basis that to have mobile phones in the facility might cause a risk to the good order of the facility. There appears to be nothing on the face of the bill that would prevent such a scenario from occurring, despite the advice in the explanatory memorandum that there will be no blanket application. This concern is heightened by the minister's broad power to direct authorised officers to seize a thing (as described below), that could apply to all persons in a specified facility or all persons in a specified class of persons.[53]

1.42 The committee also considers the bill provides authorised officers with broad discretionary powers to search for and seize prohibited things. While the committee considers the bill provides some additional safeguards (compared to those originally introduced in 2020), the committee considers the risk of arbitrariness in how these powers are administered remains.

1.43 The committee notes it has previously considered the effect of very similar proposed measures on personal rights and liberties.[54] The committee retains concerns as to the breadth of the proposed powers and as such seeks the minister's advice as to:

- **why the power to search or seize 'prohibited things' applies to all detainees, regardless of whether possession of such a thing by that individual detainee poses a specific risk;**
- **would the legislation enable authorised officers to seize prohibited things (such as mobile phones) from all detainees, even where only certain detainees pose a risk of possessing them, on the basis that the authorised officer considers seizing the thing to be necessary to lessen a risk to the good order of the facility;**
- **when would the search or seizure of a prohibited thing be likely to be considered necessary to prevent or lessen a risk to 'the order of the immigration detention facility', and why is it appropriate to include 'order of the detention facility' in addition to risks to health, safety or security or persons;**
- **why the bill does not provide that strip searches to seize 'prohibited items' are only conducted when absolutely necessary;**

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53 See Schedule 1, item 2, proposed subsection 251B(6).

54 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2020* (10 June 2020) pp. 16–21 and *Scrutiny Digest 11 of 2020* (2 September 2020) pp. 19–28.

- **why there is no requirement that the authorised officer have formed a reasonable suspicion that the person to be searched possesses them prior to the search occurring; and**
- **whether there exists any monitoring and oversight of the use of force by authorised officers and their assistants, including access to review for detainees to challenge the use of force and the strip search powers.**

Significant matters in delegated legislation[55]

1.44 As noted above, proposed subsection 251A(2) provides that the minister may, by disallowable legislative instrument, determine that a 'thing' is prohibited in an immigration detention facility. While proposed subsection 251A(3) provides that a medication or health care supplement prescribed or supplied for a detainee's individual use may not be determined to be a prohibited thing, there is otherwise no limit on the type of things that the minister may determine to be prohibited.

1.45 The committee notes that the terms in proposed subsection 251A(2) are not defined and it is not clear on the face of the primary legislation what might constitute an item that might pose a risk to the 'order of the facility'. While the bill provides certain examples, it does not directly prohibit any 'thing' but leaves it to the discretion of the minister to determine these details in delegated legislation.

1.46 The committee's general view is that significant matters, such as what is prohibited in immigration detention facilities, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum notes that the list of examples in the bill is non-exhaustive and only an indicator and that specifying prohibited things in delegated legislation will give the minister flexibility to respond quickly if operational requirements change.[56]

1.47 Generally, the committee expects that matters left to be dealt with in delegated legislation should be technical or administrative in nature and should not involve substantive policy questions. The committee considers that determining what are prohibited in immigration detention facilities delegates to the executive important policy decisions, which have not been adequately justified in the explanatory materials. In this regard, the committee does not generally consider that administrative flexibility alone justifies the inclusion of such significant policy matters in delegated legislation.

1.48 The committee's scrutiny concerns in this instance are heightened by the potential consequences flowing from declaring an item to be a prohibited item. As set

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55 Schedule 1, item 2, proposed subsection 251A(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

56 Explanatory memorandum, p. 10.

out above, the bill provides authorised officers with broad coercive powers to search for and seize prohibited items, and that the exercise of the minister's power to determine a prohibited thing may have the effect of expanding the scope of the discretion that an authorised officer may use in exercising these coercive powers.

1.49 Noting the above, the committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to allow the minister to determine, by legislative instrument, what things are to be prohibited in immigration detention facilities and why is it not appropriate to set these out in primary legislation.

Broad discretionary powers
Significant matters in delegated legislation
Broad delegation of administrative powers[57]

1.50 Proposed subsection 251B(6) provides that the minister may, by non-disallowable legislative instrument, direct an authorised officer (or an authorised officer in a specified class of relevant officers) to seize a prohibited thing by exercising the relevant seizure powers when conducting searches of facilities and screenings and strip searches of detainees. The minister may give a direction, to prevent or lessen an immigration detention facility risk,[58] in relation to:

- a person in a specified class of persons, or all persons, to whom the relevant seizure power relates;
- a specified thing, a thing in a specified class of things, or all things, to which the relevant seizure power relates;
- a specified immigration detention facility, an immigration detention facility in a specified class of such facilities, or all immigration detention facilities; or
- any circumstances specified in the directions.

1.51 The committee considers that this provision[59] provides the minister with broad discretionary powers to authorise the seizure of items from persons in immigration detention in circumstances where there is limited guidance on the face of the bill as to when those powers may be exercised. The committee acknowledges that proposed section 251AA, which is new to this version of the bill, provides some guidance to the minister – namely that the exercise of the power must be to prevent or lessen an immigration detention facility risk. However, as set out above, this

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57 Schedule 1, item 2, proposed subsection 251B(6). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii) and (iv).

58 See Schedule 1, item 2, proposed subsection 251AA(1).

59 Along with proposed subsection 251A(2).

includes a risk to the good order of the facility, which is so broad that it does not appear likely to greatly constrain the exercise of the minister's powers.

1.52 The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum. In this instance, the explanatory memorandum contains no information regarding why such a broad discretionary power has been provided to the minister to direct an authorised officer to exercise the relevant seizure powers.

1.53 The committee also notes that the minister's determination under this provision would be made the via a non-disallowable legislative instrument.[60] Disallowance plays 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.

1.54 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.[61]

1.55 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*,[62] and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[63]

1.56 In cases of disallowance, the committee expects the explanatory memorandum to outline the circumstances that justify the limit on parliamentary oversight and scrutiny. In this regard, the explanatory memorandum simply states that it is appropriate for this to be non-disallowable 'as it provides immediate certainty for an authorised officer in relation to the effect and status of a direction given by the

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60 This is on the basis that the provisions are to be inserted into Part 2 of the Migration Act 1958 which are not subject to disallowance: see *Legislation Act 2003*, paragraph 44(2)(b) and table item 20 in section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015.

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

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

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

Minister'.[64] However, any action by an authorised officer would be taken under a determination that was in effect. Merely being disallowable would not create any uncertainty for an authorised officer taking action under a valid determination. Should the legislative instrument be disallowed by a house of the Parliament authorised officers would be made aware of this before exercising such powers.

1.57 Noting the above, the committee requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to provide the minister with broad discretionary powers to require an authorised officer to exercise seizure powers; and**
- **why is it appropriate that the minister's determination should not be subject to disallowance.**

Delegation of administrative powers[65]

1.58 Proposed section 252BA provides that an authorised officer may, without a warrant, conduct a search of a wide range of areas in immigration detention facilities operated by or on behalf of the Commonwealth, including of detainees' personal effects and rooms, to find out whether certain things, including a prohibited thing, are at the facility. Proposed sections 252C, 252CA and 252CB further provide for the seizure (and return) of prohibited things found during a search, strip search or screening procedure.

1.59 Proposed section 252BB provides that an authorised officer may be assisted by other persons in exercising powers or performing functions or duties in conducting a search of an immigration detention facility under section 252BA (other than subsection 252BA(4)) or in relation to the seizure of prohibited things found during a search, strip search or screening of a detainee under sections 252C, 252CA or 252CB, if that assistance is necessary and reasonable. Proposed subsection 252BA(7) also indirectly empowers authorised officers to use force against a person or property when conducting a search so long as it is reasonably necessary in order to conduct the search.

1.60 The explanatory memorandum provides no information as to the persons that will be authorised to exercise these coercive powers. The committee notes that section 5 of the Migration Act defines 'authorised officer' as an officer authorised in writing by the minister, the Secretary or the Australian Border Force Commissioner. An 'officer' is defined in the same section as including any person, or classes of persons, authorised in writing by the minister to be an officer. There is no requirement that

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64 Explanatory memorandum, p. 22.

65 Schedule 1, item 19, proposed sections 252BA and 252BB. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

these are to be government employees. The explanatory memorandum states in general terms that authorised officers 'will be provided with training and guidance in relation to the circumstances and conditions for exercising the search and seizure powers',[66] but there is no requirement in the legislation regarding this.

1.61 In relation to an authorised officer's assistant, there appears to be no legislative guidance as to who these persons are, whether they are to have any particular expertise or training, or how they are to be appointed.

1.62 The committee's consistent scrutiny position is that coercive powers should generally only be conferred on government employees with appropriate training. This is particularly so when powers authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the Attorney-General's Departments *Guide to Framing of Commonwealth Offences, Infringement Notices and Enforcement Powers*[67] indicates that there may be rare circumstances in which it is necessary for an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required. The examples provided relate to the need to appoint technical specialists in the collection of certain types of information.

1.63 The committee therefore requests the minister's advice as to:

- **who it is intended will be authorised as an 'authorised officer' and an 'authorised officer's assistant' to exercise coercive powers and whether these will include non-government employees;**
- **why it is necessary to confer coercive powers on 'other persons' to assist an authorised person and how such persons are to be appointed; and**
- **what specific training and qualifications will be required of persons conferred with these powers, and why the bill does not provide any legislative guidance about the appropriate training and qualifications required of authorised officers and assistants.**

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66 Explanatory memorandum, p. 49.

67 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, pp. 68–70.

Online Safety Amendment (Social Media Minimum Age) Bill 2024[68]

Purpose	This bill seeks to amend the *Online Safety Act 2021* to impose a civil penalty obligation on certain providers (once specified by the minister) to prevent Australian children aged under 16 from having accounts with that provider
Portfolio	Communications
Introduced	House of Representatives on 21 November 2024
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Parliamentary scrutiny[69]

1.64 This bill provides that providers of certain kinds of social media platforms must take reasonable steps to prevent children under 16[70] from having accounts. It would do so by applying a civil penalty to these providers if they do not take reasonable steps to prevent children under 16 from having accounts with their social media platforms.[71] The civil penalty would be up to 30,000 penalty units (currently $9.9 million, or for body corporates $49.5 million).[72]

1.65 At the outset, the committee notes with concern, from a scrutiny perspective, the speed with which this bill is anticipated to pass the Parliament. The bill was introduced in the House of Representatives on 21 November 2024. While senators had an opportunity to hear from submitters in a hearing of the Senate Standing Committee on Environment and Communications on 25 November, the committee notes that the truncated time between introduction of the bill and the hearing may have diminished the ability of senators to scrutinise the bill to the fullest extent.

1.66 The committee notes that the timeline for the passage of the bill also diminishes the ability of this committee to undertake its usual scrutiny process,

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68 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Online Safety Amendment (Social Media Minimum Age) Bill 2024, *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 235.

69 Schedule 1. The committee draws senators' attention to this Schedule pursuant to Senate standing order 24(1)(a)(iv) and (v).

70 Being children ordinarily resident in Australia, see the definition of 'age-restricted user' in item 2 and existing definition of 'Australian child' in the *Online Safety Act 2021*, section 5.

71 Schedule 1, item 7, proposed section 63D.

72 See *Regulatory Powers (Standard Provisions) Act 2014*, subsection 82(5).

including to engage in meaningful dialogue with the executive to address any concerns.

1.67 The committee notes that the standing orders of both houses of the Parliament with respect to legislation are designed to provide members of the Parliament with sufficient time to consider and reconsider the proposals contained in bills. The committee is of the view that truncated parliamentary processes by their nature limit parliamentary scrutiny and debate. This is of particular concern in relation to bills that may trespass on personal rights and liberties.

1.68 The committee is also concerned that much of the detail of this legislative scheme has not yet been developed. In part this is due to significant reliance on delegated legislation, but it is also the case that the online platforms are delegated the task of developing the mechanisms and procedures to verify a user's age. The social media platforms on whom the obligation would be imposed is stated to be an electronic service (accessible in Australia) that has as its sole or significant purpose enabling online social interaction between two or more end-users; allows end-users to post material and link to, or interact with, other end-users; and satisfies 'such other conditions (if any) as are set out in the legislative rules'. The rules may specify the inclusion or exclusion of any electronic services for the purposes of this definition.[73]

1.69 As such, much of the detail as to which social media platforms will be covered by this scheme may be set out in delegated legislation. The committee's view is that matters that may be significant to the operation of a legislative scheme should be included in primary legislation unless sound justification for the use of delegated legislation is provided. The committee notes that providing for a broad range of matters to be provided for in delegated legislation provides the minister with a broad power to determine the scope and operation of significant aspects of the bill.

1.70 In this instance, the explanatory memorandum states that the bill 'casts a wide net' in terms of which platforms are captured, but provides that 'flexibility to reduce the scope or further target the definition will be available through legislative rules'.[74] It goes on to state that the use of delegated legislation allows the government 'to be responsive to changes and evolutions in the social media ecosystem'.[75] It states that in the first instance, the government proposes to make rules to exclude messaging apps, online gaming services and services with the primary purpose of supporting the health and education of end-users.[76] The committee acknowledges that the social media landscape is likely to quickly evolve and the use of delegated legislation in these circumstances may be necessary. However, the committee notes that the question of which social media providers are covered by this scheme is a significant matter that is worthy of proper parliamentary consideration. In this regard, if the government's

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73 Schedule 1, item 7, proposed section 63C.

74 Explanatory memorandum, p. 3.

75 Explanatory memorandum, p. 3.

76 Explanatory memorandum, p. 4.

intention is that messaging apps, online gaming services and services supporting health and education are not to be captured by this bill, it is not clear to the committee why this cannot be included in the bill currently before the Parliament.

1.71 Further, the committee notes that the mechanisms and processes for age assurance or verification will be determined by the relevant social media platforms. The bill provides that one of the functions of the eSafety Commissioner is to formulate written guidelines for the taking of reasonable steps to prevent children under 16 from having relevant accounts, but that these guidelines are not legislative instruments.[77] The explanatory memorandum notes that these guidelines will not be binding but 'are intended to give regulated entities practical guidance' on how they can meet the minimum age obligation, 'including by setting out what age assurance methodologies could satisfy the obligation'.[78] The committee notes that as these guidelines are not legislative instruments, Parliament would have no oversight of the content of the guidelines. The committee considers parliamentary scrutiny over the operation of this scheme would be improved if these guidelines were to be made binding by way of a disallowable legislative instrument.

1.72 Finally, the committee's concerns regarding parliamentary oversight are triggered by proposed section 63E. This provision provides that the civil penalty to be imposed on certain social media platforms for failure to take reasonable steps to prevent children under 16 from having accounts will only take effect if the minister specifies, by notifiable instrument, a day for it to take effect. While there is a minimum period before the minister could bring the civil penalty into effect (namely, not before 12 months after the Act commences), it is open-ended as to when the penalty provision may come into effect. The explanatory memorandum explains the reason for this as follows:

> This flexibility reflects the novel nature of the Bill, and the inherent uncertainties with taking forward world-leading legislation. It also provides for flexibility for the Commissioner to establish the necessary guidance and enforcement framework with an appropriate lead-time for effective operation of the law. It is the Government's intention to give effect to the minimum age obligation as soon as practicable, balancing the need to act quickly to minimise risks of harm to young Australians online, with realistic timeframes for regulatory compliance.[79]

1.73 While the committee acknowledges the likely need for greater consultation and time to consider how this legislation is to be implemented, it is concerned that by providing on open-ended ability for the minister to determine when the social media minimum age requirements are to commence, Parliament has no oversight of whether these requirements ultimately will ever commence. While the committee

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77 Schedule 1, items 6 and 6.

78 Explanatory memorandum, p. 18.

79 Explanatory memorandum, p. 5.

acknowledges the government's intention to give effect to these obligations as soon as practicable, as a matter of law, there is no requirement that these obligations need ever commence should the executive government choose not to proceed. The committee's view is that legislation should not give the executive unfettered control over whether or when provisions in an Act passed by the Parliament should come into force.

1.74 The committee notes with concern the anticipated speed at which this bill may pass the Parliament. 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 where it may trespass on personal rights and liberties, should be subject to thorough parliamentary scrutiny.

1.75 The committee is also concerned that the bill leaves key elements of the scheme to delegated legislation, namely which social media providers will, or will not, be subject to the scheme. The committee notes that the mechanisms and processes for the verification of a user's age is left entirely to providers, and any guidance from the eSafety Commissioner will be non-binding and not subject to parliamentary oversight.

1.76 The committee is particularly concerned that the bill gives the executive unfettered control over whether and when the substantive provision of the bill will come into force and considers proposed section 63E should be amended to provide a specified day by which section 63D must come into force.

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

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

Privacy
Freedom of expression[80]

1.79 As set out above, the bill leaves to the providers of certain social media platforms the method by which they are to comply with their obligation to prevent children under 16 from having accounts. As the explanatory memorandum states, while the bill does not prescribe the reasonable steps a platform must take, 'it is expected that at a minimum, the obligation will require platforms to implement some form of age assurance'. The explanatory memorandum them provides:

> Section 63D would not preclude a platform from contracting with a third party to undertake age assurance on its behalf. Similarly, it would be open

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

> to a platform to enter into an agreement with app distribution services or device manufacturers, to allow for user information to be shared for age assurance purposes (subject to the consent of users and compliance with Australian privacy laws).
>
> In addition to age assurance, compliance with the minimum age obligation is also likely to require platforms to implement systems and procedures to monitor and respond to age-restricted users circumventing age assurance.[81]

1.80 To avoid breach of the civil penalty provision, providers will need to implement measures to ascertain a user's age. Presumably, this will require providers to subject all users, not just those under 16, to age verification or assurance processes– whether undertaken directly or via a third party. Requiring all people in Australia who have, or wish to have, a social media account to provide evidence of their age appears to limit the right to privacy. It may also have a chilling effect on freedom of expression to the extent users may be deterred from accessing social media accounts if they have concerns as to how their private information may be treated.

1.81 In this regard, the bill provides some safeguards to protect the privacy of information collected for the purposes of verifying a person's age. Proposed section 63F provides that if an entity holds personal information collected for these purposes, the use or disclosure of that information is taken to be in breach of the *Privacy Act 1988* (Privacy Act) (and therefore subject to civil penalty provisions) unless the use or disclosure:

- is for the purpose of determining whether the user is a child under 16; or[82]
- is with the voluntary, informed, current, specific and unambiguous consent of the individual; or[83]
- is in circumstances where certain aspects of the Australian Privacy Principles apply:[84]
    - when required or authorised by law or a court or tribunal order;
    - when necessary to lessen or prevent a serious threat to life, health or safety;
    - when the entity has reason to suspect that unlawful activity or misconduct of a serious nature relating to their functions or activities have been engaged in and it is necessary to take appropriate action in relation to the matter;

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81 Explanatory memorandum, pp. 21–22.

82 Schedule 1, item 7, proposed subparagraph 63F(1)(b)(i).

83 Schedule 1, item 7, proposed subparagraph 63F(1)(b)(iii) and subsection 63F(2).

84 Schedule 1, item 7, proposed subparagraph 63F(1)(b)(ii) when read together with paragraphs 6.2(b), (c), (d) and (e) of the Australian Privacy Principles and the *Privacy Act 1988*, sections 16A and 16B.

- when the entity reasonably believes it necessary to locate a missing person;
- when reasonably necessary for the establishment, exercise or defence of a legal or equitable claim; of a confidential dispute resolution process; for diplomatic or consular functions; or for any war or warlike operations, peacekeeping, humanitarian assistance etc;
- for organisations where a permitted health situation exists (including for the provision of health services and research); and
- when the entity reasonably believes it is reasonably necessary for one or more enforcement related activities by an enforcement body (such as the police, the immigration department or corruption commissions).

1.82 Further, if an entity holds personal information collected for the purposes of assessing a person's age, the entity must destroy the information after using or disclosing it for the purpose for which it was collected. The failure to do this is taken to be an interference with the Privacy Act.

1.83 The explanatory memorandum states that the bill introduces robust privacy protections 'including prohibiting platforms from using information collected for age assurance purposes *for any other purpose, unless explicitly agreed* to by the individual'.[85] However, the committee notes that this is not how the bill is drafted, given the exception to allow the use and disclosure when certain aspects of the Australian Privacy Principles apply (as set out above). The explanatory memorandum provides no explanation of why these exceptions have been included. The committee is concerned that the broad exception to these privacy protections undermine the effectiveness of the proposed safeguards.

1.84 The committee notes that the privacy of all Australians wishing to access social media will be affected by leaving age verification methods and processes to relevant social media providers. If users are deterred from accessing social media accounts because of concerns regarding the collection of their private information, this may also have an impact on the right to freedom of expression.

1.85 The committee considers the right to privacy would be better protected if the broad exceptions as to when personal information collected for age assurance purposes were removed,[86] so that the bill reflects the explanatory memorandum's statement that such information can only be used for the purposes for which it was collected, unless explicitly agreed to by the individual.

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85 Explanatory memorandum, p. 7, emphasis added. See also statement of compatibility, p. 13. Compare this to the explanatory memorandum, p. 24 which briefly sets out the Australian Privacy Principle exceptions (without explanation).

86 Namely, Schedule 1, item 7, proposed subparagraph 63F(1)(b)(ii).

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

Surveillance Legislation (Confirmation of Application) Bill 2024[87]

Purpose	This bill seeks to confirm that information obtained under specified warrants issued under the *Surveillance Devices Act 2004* was not intercepted while passing over a telecommunications system; and that information obtained in reliance on specified warrants issued under that Act or the *Crimes Act 1914* was obtained under a warrant issued under the relevant Act.
Portfolio	Attorney-General
Introduced	House of Representatives on 21 November 2024
Bill status	Before the House of Representatives

Retrospective validation[88]

1.88 This bill seeks to provide that information, or a record obtained, under a 'relevant warrant' issued to the Australian Federal Police in connection with Operation Ironside is taken to not have been, and always not to have been, intercepted while passing over a telecommunications system. This bill also seeks to provide that such information, or a record obtained, is taken to have been, and to always have been, obtained under a relevant warrant, which is defined as specified warrants issued under the *Surveillance Devices Act 2004*. The effect of these provisions is to retrospectively validate the collection of information or making of a record as always to have been done under a warrant rather than intercepted or collected in a manner that might be considered wholly or partly invalid or unlawful.

1.89 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.90 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected

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87 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Surveillance Legislation (Confirmation of Application) Bill 2024, *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 236.

88 Clauses 5 and 6. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

and the extent to which their interests are likely to be affected. In relation to the retrospective validation provisions the statement of compatibility notes:

> Challenges to evidence obtained from [the application, AN0M, used in Operation Ironside] have arisen in several proceedings and may continue to be raised in future proceedings. The Bill is consistent with the decision at first instance, in *R v TB & Anor* (2023) 413 ALR 514, and of the South Australian Court of Appeal, in *Questions of Law Reserved (Nos. 1 and 2 of 2023)* [2024] SASCA 82.[89]

1.91 Further, the explanatory memorandum provides:

> The Bill would be consistent with the position of the Supreme Court of South Australia and the Court of Appeal of the Supreme Court of South Australia, that, information or a record obtained under the relevant warrants was not information or a record that was intercepted, and would clarify that such information was validly and lawfully obtained under the relevant warrants.[90]

1.92 While the committee notes that in some instances, the retrospective validation of actions may be justified, the committee remains concerned that this may be seen to undermine a core concept of the rule of law that all government action is authorised by the law. In general, the committee considers that retrospective validation of government action should be kept to a minimum and only provided for where exceptional circumstances justify such validation.

1.93 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of retrospectively validating the collection or the recording of information as part of Operation Ironside as never having been intercepted and having taken to always have been obtained under a relevant warrant.

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89 Statement of compatibility, p. 4.

90 Explanatory memorandum, p. 2.

Workplace Gender Equality Amendment (Setting Gender Equality Targets) Bill 2024[91]

Purpose	The bill seeks to amend the *Workplace Gender Equality Act 2012* to expand on designated relevant employers' reporting obligations to include gender equality indicators and targets which the designated relevant employer must make progress towards, or complete, within a set timeframe.
Portfolio	Women
Introduced	House of Representatives on 20 November 2024
Bill status	Before the House of Representatives

Significant matters in delegated legislation[92]

1.94 The bill seeks to expand on reports relating to gender equality indicators by providing that designated relevant employers (employers)[93] must also include gender equality targets which they are to commit to achieving.[94] Once these targets are selected, a target cycle begins[95] and the employer will report their selected targets at the end of that reporting period. The employer will have three years to make progress on, or achieve, their chosen target before the cycle repeats.[96]

1.95 Proposed section 17B provides that the minister may, by legislative instrument, set targets in relation to specified gender equality indicators and specified target cycles, and specify rules for the selection of targets by employers in specified target cycles.[97] Failure to comply with these gender equality targets without reasonable excuse will result in the employer being named in a report given to the minister by the Workplace Gender Equality Agency and tabled in Parliament.[98]

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91 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Workplace Gender Equality Amendment (Setting Gender Equality Targets) Bill 2024, *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 237.

92 Schedule 1, item 11, proposed section 17B. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

93 Schedule 1, item 5, proposed subsection 4A(1) provides that designated relevant employers are defined as employing 500 or more employees at any time and is not already a designated relevant employer at that time.

94 Schedule 1, item 8, proposed subsection 13(3AA).

95 Schedule 1, item 11, proposed section 17A.

96 Explanatory memorandum, pp. 16–18.

97 Schedule 1, item 11, proposed section 17B.

98 Schedule 1, item 11, proposed section 17C, in conjunction with existing sections 12 and 19D of the *Workplace Gender Equality Act 2012.*

1.96 The targets and selection rules for gender equality indicators are an essential part of the workplace gender equality scheme. The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow significant matters to be set out in delegated legislation.[99]

1.97 The committee requests that an addendum to the explanatory memorandum containing a justification for the use of delegated legislation, to set gender equality targets and selection rules, 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.[100]

1.98 The committee otherwise draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of including significant matters in delegated legislation.

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

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99 Explanatory memorandum, p. 18.

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

Private senators' and members' bills that may raise scrutiny concerns[101]

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
National Organic Standard Bill 2024	Part 5, Division 2, Subdivision B	The provisions may raise scrutiny concerns under principle (i) in relation to privacy.

101 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 15 of 2024*; [2024] AUSStaCSBSD 238.

Bills with no committee comment[102]

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

- Abolition of Special Prospecting Authorities (Ocean Protection) Bill 2024
- Aged Care (Consequential and Transitional Provisions) Bill 2024
- Anti-Money Laundering and Counter-Terrorism Financing Amendment (Making Gambling Businesses Accountable) Bill 2024
- Broadcasting Services Amendment (Healthy Kids Advertising) Bill 2024
- Competition and Consumer Amendment (Australian Energy Regulator Separation) Bill 2024
- Electoral Legislation Amendment (Fair Territory Representation) Bill 2024
- Health Insurance (Pathology) (Fees) (Repeal) Bill 2024
- Housing Legislation Amendment (Fair Share for Regional Housing) Bill 2024
- Lobbying (Improving Government Honesty and Trust) Bill 2024
- Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment Bill 2024
- Requiring Energy Infrastructure Providers to Obtain Rehabilitation Bonds Bill 2024

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102 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 15 of 2024*; [2024] AUSStaCSBSD 239.

Commentary on amendments and explanatory materials[103]

Migration Amendment Bill 2024

1.100 On 20 November 2024, the House of Representatives agreed to two government amendments. The Minister for Home Affairs (the Hon Mr Tony Burke MP) also tabled a supplementary explanatory memorandum.

1.101 Item 2 of the amendments inserts a new Schedule 7 into the bill. It would have the effect of providing that if a certain type of bridging visa is granted to an unlawful non-citizen under the minister's personal powers under section 195A of the *Migration Act 1958*, those visa holders would be subject to the same visa conditions, including electronic monitoring and curfews, as those applicable to non-citizens released from detention following a High Court decision in 2023.[104]

1.102 The expansion of curfew and electronic monitoring conditions to a wider range of visa holders raises the same significant scrutiny concerns as are raised by the visa condition scheme as a whole.

1.103 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed Schedule 7 in light of its comments regarding the Migration Amendment Bill 2024 in Chapter 2 of this Digest.

Security of Critical Infrastructure and Other Legislation Amendment (Enhanced Response and Prevention) Bill 2024

1.104 On 19 November 2024, the bill was referred to the Federation Chamber where the Assistant Minister for Citizenship and Multicultural Affairs (Mr the Hon Julian Hill MP) presented a supplementary explanatory memorandum to the bill detailing six government amendments to the bill.

1.105 The government amendments were agreed to on 20 November 2024 by the House of Representatives and the bill read a third time.

Availability of judicial and merits review

1.106 Currently, section 38 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) provides that when the Australian Security Intelligence Organisation (ASIO) gives an adverse or qualified assessment about a person to a

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103 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 240.

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

government department, that department should notify the person about the assessment and tell them they can apply to the Administrative Review Tribunal. However, section 38 provides that the minister can override this and not provide the person with any notice if they consider that withholding the notice is essential to the security of the nation or the disclosure of a statement of grounds (or part of it) would be prejudicial to the interests of security.

1.107 However, this provision does not apply if section 38A applies.[105] Section 38A currently provides that if the ASIO assessment is in relation to certain decisions under the *Telecommunications Act 1997* or the *Security of Critical Infrastructure Act 2018*, the assessment must be given to the person. The minister is able to exclude any matter in the assessment if the disclosure of it would be prejudicial to the interests of security. However, the person would still be notified that an adverse assessment was made and of their right to seek review of that decision by the ART (and be able to bring a judicial review claim if applicable).

1.108 The above amendments seek to repeal section 38A and ensure the general approach in section 38 applies. This means that the minister could decide to not provide any notification to an affected person.

1.109 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*[106] In this case the committee acknowledges that the measure does not specifically exclude review, however, if an affected person is not notified of an adverse assessment made against them, in practice they would be unable to seek merits or judicial review of this as they would be unaware that such an assessment had been made.

1.110 The statement of compatibility acknowledges that this limits right to fair hearing but states that this is:

> to ensure that where there are pressing and substantial national security concerns about the affected person, sensitive information is not disclosed and able to be used by persons identified as a national security risk, such as foreign intelligence actors seeking to exploit sensitive information regarding Australia's security assessments process.[107]

1.111 However, it is not clear to the committee why this amendment has now become necessary (noting that section 38A has existed since 2004) or why the existing

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105 See *Australian Security Intelligence Organisation Act 1979*, subsection 38(1A).

106 Administrative Review Council, *What decisions should be subject to merit review?* (1999).

107 Supplementary explanatory memorandum, statement of compatibility p. 8.

power under section 38A, which already empowers the minister not to provide certain information if it would be prejudicial to security, is insufficient.

1.112 The committee therefore seeks the minister's advice as to:

- **the necessity of removing section 38A from the ASIO Act, in particular why the amendment has become necessary now (noting section 38A was introduced as a safeguard 20 years ago);**
- **why the power of the minister to exclude matter if it would be prejudicial to the interests of security from the information given to an affected person is insufficient to protect national security risks; and**
- **how will the right to seek review of administrative decisions be afforded to a person if they are never notified that an adverse ASIO assessment was made against them.**

Chapter 2
Commentary on ministerial responses

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

Cyber Security Bill 2024[108]

Purpose	The bill seeks to: • mandate cyber-security standards for specified classes of products which can connect, directly or indirectly, to the internet; • 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; • 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 • 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	Passed both Houses on 25 November 2024

Incorporation of external materials as existing from time to time[109]

2.2 The bill provides that the rules may legislate security standards for specified classes of relevant connectable products,[110] broadly meaning products 'that can

108 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Cyber Security Bill 2024, *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 241.

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

110 Subclause 14(1).

directly or indirectly connect to the internet.'[111] 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.[112]

2.3 In *Scrutiny Digest 14 of 2024,* the committee requested the minister's advice as to whether the documents incorporated by reference would be made freely available to all persons interested in the law. [113]

Minister for Home Affairs' response[114]

2.4 The minister advised that any proposed rules intended for prescribing matters under Part 2 of the bill are subject to mandatory consultation lasting for a period of at least 28 days. The minister provided that the first security standards to be prescribed will be the first three principles of the 'ETSI EN 303 645 Standard – Cyber Security for Consumer Internet of Things: Baseline Requirements'. This standard's contents are proposed to be prescribed in the rules rather than incorporated by reference. As such, the standard will be freely available through the Federal Register of Legislation.

2.5 For future standards, including those incorporated by reference, the minister advised that the government would take into account the committee's view that any member of the public should be able to freely and readily access the terms of the law.

2.6 Additionally, the minister advised that the Department of Home Affairs will publish guidance material on its website related to the operation of any newly prescribed security standards for relevant connectable devices. The material will be freely available, providing additional detail and context about consultation on rules to establish security standards.

Committee comment

2.7 The committee thanks the minister for this response.

2.8 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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111 Explanatory memorandum, pg. 24.

112 Subclause 14(3).

113 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 6–8.

114 The minister responded to the committee's comments in a letter dated 25 November 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 15 of 2024*).

Tabling of documents in Parliament[115]

2.9 The bill provides that the proposed Cyber Incident Review Board[116] (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.[117] 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.[118] The Chair may also provide a notice to non-Commonwealth and State entities to produce documents.[119] 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.[120]

2.10 In *Scrutiny Digest 14 of 2024,* the committee requested the minister's advice as to why the final review report of the Cyber Incident Review board was not appropriate for tabling in the Parliament. [121]

Minister for Home Affairs' response[122]

2.11 The minister advised that it is fundamental to the purpose of the Board that its final review report is freely available to all parties interested or that could benefit from the report's dissemination. To that end, the report will be published on the Board's website to 'ensure a large cross-section of society—including industry, government and the Parliament—have this access and can utilise the recommendations'. Further, the minister advised that Parliament would receive details on the Board's activities and reviews through the Home Affairs Portfolio annual report. This will include the number of reviews commenced, completed and discontinued in the reporting period, alongside a brief description and other details of the reviews. The minister stated that each review will be made readily available for public scrutiny and easily accessed and referenced by the Parliament.

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

116 See clause 45.

117 Clause 46.

118 Clause 48.

119 Clause 49 and 50.

120 Subclause 52(6).

121 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024) p. 8.

122 The minister responded to the committee's comments in a letter dated 25 November 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 15 of 2024*).

Committee comment

2.12 The committee thanks the minister for this response. The committee acknowledges that the minister has stated that the Board's final review report will be made available online. However, the committee reiterates its scrutiny view that requiring important government reports to be tabled in Parliament is important for parliamentary scrutiny. The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online.

2.13 However, as this bill has now passed both Houses of Parliament the committee makes no further comment on this matter.

Help to Buy Bill 2023 [No. 2][123]

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	Passed the Senate on 26 November 2024

Standing appropriation[124]

2.14 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.[125] 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.[126] The bill provides that amounts payable by the Commonwealth are to be paid out of the Consolidated Revenue Fund which would be appropriated accordingly.[127] 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.

2.15 In *Scrutiny Digest 14 of 2024*, the committee requested the minister's advice as to what mechanisms are in place to report to the Parliament on any expenditure authorised by the standing appropriation.[128]

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123 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Help to Buy Bill 2023 [No. 2], *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 242.

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

125 Subclause 6(1).

126 Subclause 7(1)

127 Subclause 27(4).

128 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 11–12.

Minister for Housing's response[129]

2.16 The minister advised that amounts spent under the new special appropriation will be reported in Budget Paper 4. The minister also advised that resourcing and budget estimates for the program will be included in the Portfolio Budget Statements and the Portfolio Additional Estimates Statements. Finally, the minister advised that actual transactions and balances will appear in the Treasury Annual Reports after the program has commenced.

Committee comment

2.17 The committee thanks the minister for this response and acknowledges the existing mechanisms in place to ensure reporting of expenditure to Parliament. However, the committee notes that the information provided in the Budget Papers and Portfolio Budget Statements relate to total expenditure under specified Acts, rather than in relation to each specific appropriation, making it difficult to identify each measure being funded. The committee also notes that while the information relating to expenditure under a standing appropriation is available to the Parliament, it is distributed across a range of sources that are not readily comprehensible.[130]

2.18 In light of this bill having passed both houses of Parliament, the committee concludes its examination of this matter and makes no further comment.

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129 The minister responded to the committee's comments in a letter dated 26 November 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 15 of 2024*).

130 In relation to this matter, the committee notes as an example of a more accessible manner of publishing this information the information contained in reports relating to Canadian standing appropriations, which includes more comprehensive figures and statutory forecasts for each program under a department, see: 2024–25 Estimates - Canada.ca and 2024–25 Statutory Forecasts - Canada.ca.

Migration Amendment Bill 2024[131]

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: • 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; • broad immunity from civil liability for officers, offices of the Commonwealth and the Commonwealth as a whole; • 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 • 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 Senate

Undue trespass on rights and liberties
Procedural fairness
Broad delegation of administrative powers[132]

2.19 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 (BVR), 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.[133] The effect of the notice would be that the person's visa would immediately

131 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment Bill 2024, *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 243.

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

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

cease to be in effect on receipt, or deemed receipt, of the notice. Without a valid visa, they would be subject to immigration detention, and subsequent removal from Australia.[134] 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.[135] 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.

2.20 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.[136] 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.

2.21 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;
- do anything else incidental or conducive to the taking of such action or making of such payments.[137]

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

135 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.

136 Explanatory memorandum, p. 6.

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

2.22 In *Scrutiny Digest 14 of 2024*[138] the committee requested the minister's advice as to the following:

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

Minister for Home Affairs' response[139]

2.23 In relation to why it is necessary and appropriate to establish a new basis for the cessation of a BVR visa, the minister reiterated the function of proposed

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138 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024), pp. 13–17.

139 The minister responded to the committee's comments in a letter dated 25 November 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 15 of 2024*).

section 76AAA, stating that it ensures that a BVR holder does not become an unlawful non-citizen in the community.

2.24 The minister advised that the Migration Act already provides statutory authority and capacity for the Commonwealth for arrangements with persons or bodies relating to the regional processing functions of a country. The bill replicates this approach in relation to third country reception arrangements, allowing the government, if it so chooses to enter such an arrangement, to take action without needing to determine if authority exists per each individual action or payment.

2.25 In relation to what 'permission' from a foreign country is envisioned to be, the minister advised that the term 'permission' is used in order to ensure flexibility about the type of mechanism used by various countries regulating the entry and stay of non-citizens. The minister noted most countries grant a 'visa', and where this is the case, the 'permission' would be constituted by the grant of the visa.' However, the details of when entry is actually permissible would be fact-specific.

2.26 Relating to the appropriateness of excluding natural justice from the giving of a notice, the minister advised that notification serves the purpose of advising a person of the existence of a fact, namely the grant of 'permission' by a third country. Where a person is required to do one or more of things required by the foreign country prior to their entry and does not have the capacity to do the things required, the minister advised there would be no power to cease the BVR. Further, a lack of capacity may inform, following cessation, whether the person can be detained.

2.27 Regarding whether individuals would be detained prior to removal for significant periods, the minister advised that a non-citizen would be detained in accordance with the Migration Act and removed as soon as reasonably practicable, in the same way as section 198 of the Migration Act operates for any other unlawful non-citizen.

2.28 The minister advised that, in response to questions on what 'things' are envisaged to be required by foreign countries for entry, that there are currently no third country reception agreements in effect. As such, possible requirements from a foreign country will not be known until an arrangement is reached. Examples of requirements could include signing an entry form or attending an appointment at a specified time and place dependent on the requirements of individual countries.

2.29 In relation to whether a person did not do a 'thing' required of them that they are capable of doing, the minister advised that a non-citizen would be detained in accordance with the Migration Act and the recent High Court decision in *ASF17 v Commonwealth of Australia* [2024] HCA 19 confirms the lawfulness of detention in the circumstances.

2.30 On whether it is envisaged that foreign countries would indefinitely detain individuals sent to them the minister advised that any proposed arrangement would not provide for detention in a foreign country, noting that the provision which

authorises the Commonwealth to undertake action in this manner expressly excludes the Commonwealth from exercising restraint over the liberty of a person.

2.31 Regarding the appropriateness of delegating to the executive broad powers for actions relating to third country reception arrangements or functions, the minister advised that these arrangements will be implemented by the executive, and as such, it is appropriate for the Migration Act to be amended to confirm the executive's capacity and authority for such actions.

Committee comment

2.32 The committee reiterates 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 minister's response did not provide any certainty as to what is meant by 'permission', saying that the details of when 'entry is actually permissible would be fact-specific'. As such, it is unclear whether after a permission may be granted, an individual may be held 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.[140] The minister's response provided no further clarity on this, noting that detention of a non-citizen whose visa is cancelled under these powers would operate in the same way as they do for any non-citizen.

2.33 The bill also states that permission could be unconditional or be subject to the individual doing 'one or more things required by the foreign country that the individual is capable of doing'. The minister's response provided no further clarity as to what this could encompass, stating that the type of things a foreign country may require is not known until a third country reception arrangement is entered into. Therefore, the scope of what could be required remains 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

140 Statement of compatibility, p. 30.

country, they could be indefinitely detained pending their removal.[141] The minister confirmed this approach but failed to answer the question as to whether this is a proportionate limit on the right to liberty.

2.34 In relation to proposed subsection 76AAA(5), which provides that the rules of natural justice do not apply to the giving of a notice, the committee asked 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 the foreign country that the individual is capable of doing. The minister advised that where an individual does not, as a matter of fact, have capacity to do the thing required, there would be no power to cease the visa. However, this did not address the question of whether the exclusion of the requirements of procedural fairness should apply in relation to the determination of this fact (noting that the nature of any requirements to be mandated remains unclear).

2.35 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 delegation of wide administrative powers to the executive in circumstances where individual rights and liberties may be unduly trespassed on. The minister did not answer the question as to why it is appropriate to delegate these broad powers to the executive and whether the bill could be amended to specify some limits on the power.

2.36 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.[142] 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.[143] 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.[144] The minister advised that any proposed arrangements

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141 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.

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

143 Statement of compatibility, p. 31.

144 Statement of compatibility, pp. 27 and 30.

would not provide for detention in the foreign country, but then went on to reference proposed section 198AHB expressly excluding authorising the *Commonwealth* exercising restraint over the liberty of a person. However, the committee's question went to whether the *foreign country* may indefinitely detain individuals.

2.37 The committee remains concerned that there are extremely limited safeguards in the bill setting out the extent of the Commonwealth's powers regarding these arrangements. The bill appears to authorise any action by the Commonwealth to assist a third country to implement any action over the individuals removed there, including arrangements for their potential indefinite detention in that country, in the absence of meaningful 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.

2.38 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 does not consider the bill contains sufficient safeguards to protect against any undue trespass on rights and liberties.

2.39 The committee draws its significant scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of these provisions.

Immunity from civil liability[145]

2.40 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,[146] 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[147] or in relation to taking a person to a regional processing country.[148] 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

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

146 As defined by subsection 5(1) of the *Migration Act 1958*.

147 Grounds that mainly relate to character concerns.

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

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 their 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.[149]

2.41 In *Scrutiny Digest 14 of 2024*,[150] the committee requested the minister's advice as to the following:

- why the proposed immunity is expressed so widely, and why it is necessary to provide an immunity for 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.

Minister for Home Affairs' response[151]

2.42 In response to why the immunity is expressed so widely, the minister advised that the Australian Government should not be held liable in damages for something that occurs to a person once they have been removed to another country, and these provisions operate to affirm this view of the current common law position.

2.43 Further, in relation to the question of whether all actions undertaken by officers which are granted immunity must have complied with guidelines for conduct or other regulatory procedures, the minister advised that non-compliance with guidelines or regulatory procedures does not, in itself, give rise to legal liability. The minister noted that the proposed immunities do not rely on complying with internal

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149 Schedule 2, items 1 and 2.

150 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024), pp. 17–19.

151 The minister responded to the committee's comments in a letter dated 25 November 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 15 of 2024*).

guidelines or other regulatory processes. As such, non-compliance would not always mean that the immunities are inapplicable. However, the minister noted that the proposed immunities rely on officers acting in good faith as well as exercise of powers, performance or duties under specific provisions, and so non-compliance with internal guidelines and procedures may be relevant, but this would be highly fact specific.

2.44 In response to there being no requirement that actions taken by another country, or person in another country, be taken in good faith for the immunity to apply, the minister advised that any such claim would face obstacles under existing general law principles, but that the immunity makes the legal position clear. The minister provided the following example as to how the immunity may operate in this context:

> By way of example, an affected person might be physically assaulted by a resident of another country in that country. Such an act would clearly not have been taken in good faith. If the immunity does not extend to acts taken in bad faith by persons other than the Commonwealth or its officers, the Commonwealth or its officers may be exposed to potential civil liability in respect of such acts.

2.45 In response to why it is necessary and appropriate to extend this immunity to the Commonwealth as a whole, the minister advised that this is a response to the risk of vicarious liability. The minister noted that, in the removal of a person from Australia, many individuals may be involved in actions taken for the acceptance or receipt of a person by a foreign country, or their ongoing presence in a foreign country. Not all these persons will be 'officers' as defined by the Migration Act. As such, the immunity is intended to ensure no vicarious civil liability risk arises for the Commonwealth, as if it were otherwise the Commonwealth would be exposed to potential liability.

2.46 Regarding what recourse is available to affected individuals who have their right to bring a claim affected by this immunity, the minister advised that the immunity only concerns civil liability. As such, the proposed immunities prevent an affected person being awarded damages as a result of a civil claim, but do not prevent an affected individual's right to seek other forms of relief by way of, for example, injunction or the writ of habeas corpus.

Committee comment

2.47 The committee reiterates that these immunities would remove 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 a 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. The committee notes the minister's advice that if the immunity does not extend to acts taken in bad faith by persons other than the Commonwealth or its officers, the Commonwealth or its officers may be exposed to criminal liability. The committee notes the minister's example of an affected person being potentially physically assaulted by a resident of another country, which would be an act taken in bad faith. However, it remains unclear to the committee how the Commonwealth or its officers could be liable for such an action in any event, and as such, why such a broadly framed immunity is necessary.

2.48 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[152] 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).[153] Further, the committee notes that the immunity from liability is extended to apply to the Commonwealth as a whole. The minister provided no advice as to the appropriateness of the immunity extending to the Commonwealth as a whole other than to state that otherwise the Commonwealth would be exposed to a potential liability. 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.

2.49 The committee reiterates that the powers relating to regional processing countries have existed since 2012,[154] without any corresponding immunities, and it is not clear why it is now necessary to provide for this. The committee notes that the minister's advice that the government should not be held liable for something that occurs to a person once they have been removed to another country does not address the question as to why the immunity is necessary now, or why such immunities are appropriate.

2.50 The committee does not consider it has been established why it is necessary for the Commonwealth and its officers to be provided with an extremely broad immunity from civil liability, which removes most common law rights to bring an action to enforce legal rights.

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

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

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

2.51 The committee draws its scrutiny concerns in relation to this to the attention of senators and leaves the appropriateness of this to the Senate as a whole.

Privacy

Retrospective validation[155]

2.52 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).[156] 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.[157] It also includes information in relation to spent convictions.[158]

2.53 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.[159] This information may also be collected, used or disclosed under other provisions of the Migration Act, Regulations or any other law of the Commonwealth.[160]

2.54 Any disclosures of criminal history information prior to the commencement of the bill would also be retrospectively validated by this bill.[161] 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.[162] This provision would also apply to civil and criminal proceedings instituted before the commencement of

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

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

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

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

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

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

161 Schedule 3, item 4, subitem 2.

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

the item, even where those proceedings have been concluded before the commencement of the bill.[163]

2.55 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 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.[164] 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.[165]

2.56 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.[166] 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,[167] which a note to the provision states includes criminal history information.[168] 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.[169]

2.57 In *Scrutiny Digest 14 of 2024*[170] the committee requested the minister's advice as to the following on issues of disclosure unduly trespassing on the right to privacy:

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

164 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.

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

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

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

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

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

170 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 20–25.

- 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.

2.58 Additionally, the committee requested the minister's advice as to the following on the bill retrospectively validating the disclosure of criminal history information:

- 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;
- 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; and
- 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).

Minister for Home Affairs' response[171]

2.59 The minister advised that it is important for delegates of the minister and bodies such as the Community Protection Board to consider criminal history information in addressing the protection and safety of the Australian community, to ensure that this use is lawful and not in breach of other legislation.

2.60 The minister further advised that it is necessary and appropriate to authorise the disclosure of personal information to any foreign government if it has agreed, or is considering agreeing, to allow an individual to enter and remain in its country. The minister advised that the authority for disclosure is limited by the purposes for which the disclosure can be made, which is a confined list. The minister also advised that it is necessary to encompass foreign government agencies at various levels to ensure authorised disclosures of personal information to the relevant level or entity of government.

2.61 The minister advised that it is necessary to authorise disclosures that are indirectly connected to the performance of functions or exercise of powers, as an officer may need to provide a person with this information in order to get advice about a particular issue relating to that non-citizen. In relation to authorising disclosures that are conducive to purposes, the minister advised this is necessary because officers may be required to disclose personal information, so further disclosures can occur. Incidental disclosures are necessary so that disclosures that occur because of a disclosure are considered lawful. In providing guidance for the terms 'incidental' and 'conducive', the minister advised that both terms should be given their ordinary meaning.

2.62 Regarding safeguards to protect against overly-broad disclosures of personal information, the minister advised that such disclosures are only authorised for purposes specified in proposed subsection 198AAA(2). The minister also advised that disclosure to foreign governments is discretionary and officers of the Department may therefore decline to provide all or some personal information if they deem it excessive. In addition, the minister advised that the *Privacy Act 1988* applies to these disclosures. Affected individuals would be able to make complaints to the Office of the Australian Information Commissioner.

2.63 In relation to the necessity and appropriateness of information relating to spent convictions, offence charges and findings as to offences being disclosed as part of 'criminal history information', the minister stated it is important that ministerial delegates and bodies like the Community Protection Board are able to lawfully consider all relevant information to address risks to the protection and safety of the Australian community.

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171 The minister responded to the committee's comments in a letter dated 25 November 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 15 of 2024*).

2.64 The minister advised that courts may make 'findings' where the outcome is not a conviction. This would be clearly expressed in a judgement as a finding. In addition, courts in civil proceedings finding a person had committed an offence, or engaged in particular conduct, are also captured by this definition.

2.65 In relation to the retrospective validation, the minster advised that because of different Commonwealth, State and Territory laws, uncertainty may arise as to whether disclosures of criminal history information have at all times been lawfully collected, used or disclosed, and the amendments put beyond doubt the lawfulness of such actions.

2.66 In relation to the detrimental impact of disclosing such information on non-citizens, the minister advised that the proposed amendments mitigate the legal risks.

2.67 In relation to whether there are any cases that have been concluded, or currently before the courts, regarding disclosure of criminal history being validated by the bill's provisions, the minister advised that it is not possible to answer with any certainty the impact amendments would have on proceedings that have been concluded. Comprehensive analysis would need to be undertaken to provide such an answer. Further, the minister advised that the Commonwealth's policy is not to comment on cases currently before the courts.

Committee comment

2.68 The committee reiterates its longstanding view that intrusions on 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 government (except for a government of a country that an affected person cannot be removed to on protection grounds).[172]

2.69 It is not apparent to the committee from the minister's response 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 also unclear to the committee how delimiting the recipients of disclosed information would unduly limit reference to that information in making the listed decisions or a determination as to the extent to which an affected individual may pose a risk to 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. Although the minister's response provides an example of a

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

conducive purpose, the committee remains concerned that the reasons for which disclosures may be made is not constrained.

2.70 The committee does not consider that it has been established that the purposes for which information may be disclosed[173] under this bill are sufficiently constrained to act as a safeguard. 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).

2.71 In relation to disclosures of personal information to governments of foreign countries, the minister's response stated that this is appropriate if the foreign country has agreed, or is considering agreeing, allowing an individual to enter and remain in their country. However, it remains unclear to the committee exactly why a person's past criminal history information, particularly relating to spent convictions, is relevant for this purpose. Again, while the committee appreciates some disclosure to appropriate officials may be necessary, the committee does not consider its concerns as to overly broad disclosure of personal information have been addressed. Further, the committee does not consider that the minister's response provides any information as to an actual safeguard against over-broad disclosure. The reliance on an officer's discretion is not sufficient as a safeguard and while the application of the *Privacy Act 1988* may allow for some recourse against unlawful disclosure, it does not prevent initial overly broad disclosures.

2.72 Noting the definition of 'criminal history information' provided by proposed subsection 5(1), the committee reiterates its concerns as to 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 considers the minister's response does not address the necessity of disclosing spent conviction information and it is still 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.

2.73 The committee also continues to query 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.

2.74 The committee's concerns remain heightened in this instance by the retrospective validation of any disclosure of personal information in relation to

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[173] Under proposed sections 501M or 198AAA.

affected individuals, including criminal history information, that may have occurred prior to the commencement of item 4 of Schedule 3. The committee reiterates 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 presumptively 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. The committee considers that the minister has failed to address this part of the committee's concerns and that the need for certainty as to the lawfulness of the collection, use or disclosure of criminal history information in this context is not a justification for the retrospective validation of the collection, use and disclosure of criminal history information that was unlawful at the time of collection, use or disclosure. Further, the committee is alarmed that the basis for this retrospective validation is to avoid the risk of being challenged in a court in the absence of a proper analysis as to the nature of that risk (including reference to any current or impending litigation) and thus the justifiability of retrospective validation in particular circumstances.

2.75 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 remains unaddressed.

2.76 Finally, the committee notes that its queries in relation to the detrimental impact such retrospective validation would have on non-citizens and the impact these amendments would have on criminal or civil proceedings that have been concluded or are before the courts have not been addressed. The committee does not consider the Commonwealth's policy of not commenting on matters currently before the courts as justification to not address this concern. Understanding the intended effect of legislation is necessary for proper parliamentary scrutiny of any bill.

2.77 The committee considers the disclosure of criminal history information and personal information relating to an individual is likely to unduly trespass on the right to privacy. The committee is also concerned that the bill, by retrospectively validating the disclosure of criminal history information, unduly trespasses on rights and liberties and a core aspect of the rule of law.

2.78 The committee draws its significant scrutiny concerns to the attention of senators and leaves the to the Senate as a whole the appropriateness of these measures.

Undue trespass on rights and liberties
Procedural fairness
Significant matters in delegated legislation
Retrospective application[174]

Overview

2.79 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.[175] 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 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.

2.80 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*[176] (*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.

2.81 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).[177] 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.[178] 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

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174 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).

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

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

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

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

conditions automatically attached to their visa.[179] 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).[180] 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.[181]

2.82 The committee noted its scrutiny concerns in relation to these powers in *Scrutiny Digest 15 of 2023*.[182] 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.[183]

2.83 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.[184]

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

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

181 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.

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

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

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

2.84 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.[185]

2.85 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 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.[186]

2.86 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.[187] This is the same test as in the 2024 Regulations (although posed in the negative).

2.87 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.

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

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

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

2.88 In *Scrutiny Digest 14 of 2024*,[188] the committee requested the minister's advice as to the following:

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

Minister for Home Affairs' response[189]

2.89 The minister advised that BVR holders are not afforded procedural fairness to make submissions prior to conditions being imposed as it is appropriate that the imposition of visa conditions is not delayed and that the available tools to manage community safety risk are applied immediately.

2.90 The minister advised that the effect of a negative test being imposed is that if the minister is not satisfied of the relevant matters the minister must grant a new visa not subject to the conditions, which mirrors the test for imposition of conditions on a BVR as introduced by the 2024 Regulations.

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188 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 25–34.

189 The minister responded to the committee's comments in a letter dated 25 November 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 15 of 2024*).

2.91 Regarding why the proposed test assesses a 'substantial' risk rather than 'unacceptable' risk, the minister only advised that the test mirrors the 2024 Regulations described.

2.92 In response to timeframes for the minister's decision under subsection 76E(4), the minister advised that this is not unusual and allows for flexibility in administrative decision-making. In the absence of a specific time frame, the minister advised that a reasonable timeframe would apply.

2.93 In addition, the minister advised that the term 'serious offence', and the order in which conditions may be imposed, is better set out in delegated legislation as this allows them to remain consistent at the time of the BVR being granted.

2.94 In regard to whether the retrospective application of Schedule 6 of the bill would have a detrimental impact on BVR holders, the minister advised that the application provisions will have a beneficial effect for BVR holders whose section 76E review rights remain available. Namely, review processes will be conducted with reference to the post-*YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 higher threshold for the imposition of conditions, where a visa was granted under the 2024 Regulations but ahead of amendments to section 76E by this bill.

Committee comment

Undue trespass on rights and liberties

2.95 The committee considers that its substantial concerns with this scheme have not been addressed by the minister's response. The committee's concerns with this bill overlap to a significant extent with the concerns it raised one year ago in *Scrutiny Digest 15 of 2023.*[190] The committee expresses its disappointment once more that the minister failed, in this response, to respond to the queries raised one year ago, about the overall effect of this scheme on personal rights and liberties.

2.96 The committee welcomes the minister's undertaking to prepare an addendum to the bill's explanatory memorandum addressing how the amendments to proposed section 76E align with the High Court's judgement in the *YBFZ* decision.

2.97 However, 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.

2.98 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

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

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.

2.99 The committee also remains concerned that these conditions will continue to be imposed on the basis of the risk of future offending. The committee reiterates 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. Regardless of whether or not these amendments would avoid any further constitutional challenge, 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. It is still unclear to the committee why the provision requires that there be a 'substantial risk' of harm to the community, rather than an 'unacceptable risk' of serious harm as the courts are required to consider in imposing community safety supervision orders.[191] The committee considers 'unacceptable'[192] to be a higher threshold than 'substantial'.[193] Contrary to the minister's suggestion, it is difficult to understand how alignment of the higher 'substantial' threshold with the 2024 regulations in any way justifies its adoption.

2.100 The committee also notes that amendments were passed by the House on 20 November 2024 containing a new Schedule 7 to the bill. This Schedule would have the effect of expanding the existing offence provisions for breaching the monitoring and curfew conditions, and the applicability of section 76E, to a broader range of visa holders. The intention behind this is to support potential amendments to the Migration Regulations, to provide that a BVR granted by the minister using their personal powers will be subject to the same curfew and monitoring conditions. This has the effect of expanding the range of people to whom these powers could apply, and, as such, the committee's concerns relating to this scheme apply also to the amendments made by Schedule 7.

Procedural fairness

2.101 As noted above, the committee is concerned that the conditions regarding curfew and monitoring can be imposed on an affected individual without providing

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

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

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

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.

2.102 It is still not apparent to the committee 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 posed by that individual and how any conditions that are imposed are reasonably appropriate and adapted for the purpose of protecting the community. Although the committee has noted that the minister is assisted by a Community Protection Board when deciding whether to impose conditions,[194] it remains unclear as to how this is sufficient in assessing individual future risks to the community. The committee reiterates that affected persons should be able to make submissions as to their risk levels prior to the imposition of any conditions, and that this evidence should be taken into consideration prior to the imposition of any conditions. The committee considers the minister's response to have merely restated the effect of these provisions. Where conditions are apt to be characterised as punitive, in the absence of exceptional circumstances and an extensive justification as to necessity, the committee expects procedural fairness should be afforded to an affected person prior to the imposition of those conditions. The committee does not consider affording procedural fairness after the imposition of these conditions to be a sufficient justification for not affording natural justice at the outset.

2.103 The committee also remains concerned 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. The committee reiterates its concerns, based on the High Court's view, that this test requires the decision-maker to form '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.'[195] The committee does not consider that the minister's response addresses this concern and merely restates the effect of the provision.

2.104 Finally, the committee notes again 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

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

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

decision be made in a specified timeframe. The committee does not consider the need for flexibility to justify the absence of a specified timeframe or the reliance on a 'reasonable' timeframe, noting the effect on personal rights and liberties in this context.

Significant matters in delegated legislation

2.105 The committee notes again 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 reiterates that it 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.

2.106 The committee continues to be concerned that the bill incorporates purported safeguards, such as the definition of serious offence and the order in which monitoring and curfew conditions should be imposed, only by reference to delegated legislation, rather than setting these safeguards out on the face of the bill. The committee reiterates that 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. Although the committee acknowledges that defining 'serious offence' and prescribing an order for the imposition of conditions ameliorates some of the committee's concerns with the scheme as a whole, the committee considers that the minister's response fails to engage with its substantive concern and notes that the justification of consistency is not relevant in this instance as it is possible to change the definition of serious offence or the order in which conditions are imposed at any time due to their inclusion in the Migration Regulations.

Retrospective application

2.107 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.

2.108 The committee reiterates 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 (and those made by the 2024 Regulations) the High Court's ruling that these conditions were invalid would otherwise have applied to ensure the monitoring and curfew conditions were not applicable.

2.109 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.

2.110 The committee reiterates that it raised these concerns when the bill providing for these powers was introduced a year ago and requested detailed information from the minister in relation to these scrutiny concerns. The committee expresses its disappointment that the minister has again failed to provide a response to these initial concerns (which has now been overdue for 10 months).[196] The committee notes that its scrutiny function can only be performed effectively with cooperation from the executive government.

2.111 The committee draws these significant scrutiny concerns to the attention of senators and leaves the to the Senate as a whole the appropriateness of these provisions.

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

Parliamentary scrutiny[197]

2.113 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. In *Scrutiny Digest 14 of 2024*,[198] the committee noted its scrutiny concerns surrounding the swift passage of the bill and others like it and drew the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation to regulations made which may be inconsistent with primary legislation.

Minister for Home Affairs' further correspondence[199]

2.114 The minister provided further correspondence to the committee's concerns, noting that the Senate Legal and Constitutional Affairs Legislation Committee were also conducting an inquiry into the provisions of the bill, and that the government would consider and respond to any recommendations made by in the report.

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

197 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).

198 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024), pp. 34–35.

199 The minister responded to the committee's comments in a letter dated 25 November 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 15 of 2024*).

2.115 Additionally, the minister advised that the Department and government do not consider there to be inconsistencies between the regulations and primary legislation.

Committee comment

2.116 The committee notes that the High Court handed down its judgment in *YBFZ*,[200] 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 and passed the House three sitting days later on 20 November. The committee notes that a new amendment containing a new Schedule was also passed on 20 November 2024 (after the committee's initial consideration of this bill). While the committee welcomes that senators had the opportunity to hold a short hearing of the Senate Standing Committee on Legal and Constitutional Affairs on 21 November (with that committee reporting on the bill on 26 November), the committee notes that the truncated time between introduction of the bill and the hearing may have impacted the ability of senators to meaningfully engage with the bill, in order to scrutinise the bill to the fullest extent.

2.117 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.[201] This is of concern to the committee, particularly in the context of legislation which may unduly impact on individuals' rights and liberties.

2.118 The committee also notes that regulations were made in response to the High Court's decision on 7 November 2024. This is before the bill passed. The committee notes the minister's second reading speech stated that the primary legislation is 'not consistent with the new regulations.'[202] However, the committee notes the advice that there is no inconsistency as the application provisions in the bill are intended to deal with the 'period of mismatch' between the primary legislation and delegated legislation. The committee reiterates that subsection 504(1) of the Migration Act provides that the Governor-General may only make regulations not inconsistent with

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

201 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).

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

the Migration Act.[203] 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 (at least until passage of this bill, which applies retrospectively).

2.119 The committee reiterates its concern that this bill has not been 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.

2.120 The committee again draws to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation the making of regulations that may be inconsistent with existing primary legislation.

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

Security of Critical Infrastructure and Other Legislation Amendment (Enhanced Response and Prevention) Bill 2024[204]

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	Passed both Houses on 25 November 2024

Immunity from civil liability[205]

2.121 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.[206] 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.[207]

2.122 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.[208] 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.[209]

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204 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 15 of 2024*; [2024] AUSStaCSBSD 244.

205 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).

206 Proposed subsection 30EB(2).

207 Proposed subsection 30EB(4).

208 Proposed subsection 30EF(2).

209 Proposed subsection 30EF(6).

2.123 In *Scrutiny Digest 14 of 2024*[210] the committee requested the minister's advice as to the following:

- why an immunity from civil liability for entities responsible for a critical telecommunications asset is included in proposed subsections 30EB(4) and 30EF(6);
- recourse available to individuals besides a demonstrated lack of good faith by the entity; and
- affected individuals' ability to seek recourse from the Commonwealth or whether it is intended that the immunity from civil liability extend to the Commonwealth as a whole.

Minister for Home Affairs' response[211]

2.124 In relation to immunity from civil liability for entities responsible for a critical telecommunications asset, the minister advised that this is to provide broad protection in case of damages caused by negligence or breach of contract arising from an entity performing its duties under the obligation to protect the asset.

2.125 The minister advised that this protection is an important incentive for entities to comply with their legal obligations under the amended Act, or while complying with legal directions from the minister. In cases of direction from the minister, prompt action may require the entity to breach a contract. The immunity from civil liability is designed to ensure that entities comply quickly and efficiently, without hesitation.

2.126 In response to the committee's query on what recourse would be available to affected individuals, the minister advised that that this recourse is limited to where an entity acts in bad faith. This is considered proportionate given that actions taken by entities under proposed subsection 30EF are intended for use only in the most extreme circumstances, such as protection of the Commonwealth, States, and Territories from espionage, sabotage, or politically motivated violence.

2.127 The minister further advised that the threshold for exercising the power, which may affect individuals, is that the risk is prejudicial to security and requires an adverse security assessment. Additionally, the minister advised of two further safeguards. Those being that the direction under proposed section 30EF can only relate to carriage services generally, but cannot describe or prohibit provision of carriage services to persons or classes of persons, and that prior to issuing a direction, the minister must consult with the affected entity. In this instance, the entity may raise

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210 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 51–52.

211 The minister responded to the committee's comments in a letter dated 25 November 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 15 of 2024*).

the impacts of a potential direction on individuals, which the minister must consider before issuing a direction.

2.128 Finally, the minister advised the committee that the relevant immunity is only applicable to the telecommunications entity, not the Commonwealth.

Committee comment

2.129 The committee thanks the minister for this response. The committee acknowledges that these powers are likely to be exercised in the most extreme circumstances where the cessation of the service would be necessary for the protection from espionage, sabotage, politically motivated violence or attacks on Australia's defence system. In light of this, the committee also acknowledges the need for this immunity to be conferred on responsible entities.

2.130 However, the committee notes that an affected individual may have limited recourse available unless they are able to demonstrate bad faith by the entity.

2.131 The committee acknowledges the importance of conferring immunity in this context in order to allow responsible entities to act in a manner that protects critical telecommunications infrastructure. However, the committee notes that an individual affected by these actions may have limited recourse available. However, noting the bill has now passed both Houses of Parliament, the committee makes no further comment on this matter.

Chapter 3
Scrutiny of standing appropriations[212]

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.[213] 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.[214]

3.4 The committee notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator Dean Smith
Chair

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212 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 15 of 2024*; [2024] AUSStaCSBSD 245.

213 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*.

214 For further detail, see Senate Standing Committee for the Scrutiny of Bills *Fourteenth Report of 2005*.