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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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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.

Administrative Review Tribunal Bill 2023[1]

Purpose	The Administrative Review Tribunal Bill 2023 seeks to establish a new, fit-for-purpose, federal administrative review body, to be named the Administrative Review Tribunal, which will replace the Administrative Appeals Tribunal.
Portfolio	Attorney-General
Introduced	House of Representatives on 7 December 2023
Bill status	Before the House of Representatives

Procedural fairness – public interest certificates

Limitation of appeal[2]

1.2 Division 7 of Part 4 of the bill sets out the Administrative Review Tribunal's (the Tribunal) public interest certificate and intervention provisions.

1.3 Clause 91 of the bill empowers the Attorney-General of either the Commonwealth or of a State or Territory (the Attorney-General) to prevent disclosure of information or documents for public interest reasons.

1.4 Subclauses 91(1) and (2) set out the following reasons for which the Attorney-General may certify that the disclosure of specified information or the content of a specified document in a proceeding in the Tribunal would be contrary to the public interest:

- the disclosure would prejudice the security, defence or international relations of the Commonwealth (paragraph 91(1)(a));
- the disclosure would involve the disclosure of deliberations or decisions of the Commonwealth Cabinet or of a Committee of the Cabinet (paragraph 91(1)(b)) or of a State or Territory Cabinet or of a Committee of the Cabinet (paragraph 91(2)(a)); and

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1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Administrative Review Tribunal Bill 2023, *Scrutiny Digest 2 of 2024*; [2023] AUSStaCSBSD 19.

2 Clauses 91, 92, 93, 94 and 189. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i) and (iii).

- any other reason that could form the basis for a claim by the Crown in right of the Commonwealth (paragraph 91(1)(c)) or of the State or Territory (paragraph 91(2)(b)) in a judicial proceeding that the information or the matter contained in the document should not be disclosed.

1.5 The effect of clause 91, as set out in subclause 91(3), would be that a public interest certificate applies to the specified information or document preventing the Tribunal from disclosing it beyond a member, the Principal Registrar or a staff member of the Tribunal in the performance of their duties.

1.6 Subclause 91(6) provides that the Tribunal may decide to disclose information or documents to any or all parties to the proceedings if the certificate was given on the basis of paragraphs 91(1)(c) or (2)(b) (any other reason that could form the basis for a claim in a judicial proceeding that the information should not be disclosed). Subclause 91(7) requires the Tribunal to take into account as a primary consideration the principle that it is desirable, in the interest of ensuring the effective performance of the Tribunal's functions, for the parties to the proceedings to be made aware of all relevant matters, and to have regard to any reason specified in the certificate.

1.7 Clause 92 empowers the Attorney-General to prevent a person from answering a question for public interest reasons. Subclause 92(1) provides that, if a person is asked a question while giving evidence at the hearing of a proceeding in the Tribunal, the Attorney-General may inform the Tribunal that, in their opinion, the answering of the question would be contrary to the public interest for a reason mention in subclauses 91(1) and (2). If the Attorney-General so informs the Tribunal, the person is excused from answering the question as per subclause 92(2).

1.8 Subclause 92(3) sets out exceptions to subclause 92(1) which provide the Tribunal with discretion to determine whether a person must answer a question. Paragraph 92(3)(a) provides that, where a public interest exemption was claimed by the Attorney-General on the basis of paragraphs 91(1)(c) or (2)(b) (any other reason that could form the basis for a claim in a judicial proceeding that the information should not be disclosed), the Tribunal may decide that the answering of the question would not be contrary to the public interest.

1.9 Clause 94 applies in proceedings in which the Attorney-General has sought to have information, documents, or an answer from a person prevented from being supplied on public interest grounds, and the Tribunal has decided that the information, document or answer should be provided. Under subclause 94(3) the Tribunal is required to give each party to the primary proceeding a statement of reasons for the decision. The Attorney-General would also be a party to the proceedings under clause 93.

1.10 Clause 189 relates to documents sent to the Federal Court under Division 6 of Part 7 of the bill[3] which are subject to a public interest certificate.[4] Subclause 189(2) provides that in these circumstances the Federal Court must do all things necessary to ensure that the matter is not disclosed to any person other than a member of the court as constituted for the appeal or reference. Subclause 189(3) provides that the court may decide that a matter should be disclosed to some or all of the parties to the proceedings and therefore must permit the parties to inspect the relevant part of the document if it is covered by a certificate granted only on the basis of any other reason that could form the basis for a claim in a judicial proceeding that the information should not be disclosed, and not for any other reasons as set out in the relevant clauses.[5]

1.11 The committee has several scrutiny concerns in relation to the above clauses, which are modelled on existing provisions in the *Administrative Appeals Tribunal Act 1975* (the AAT Act). While the explanatory memorandum addresses the operation of these clauses, the committee does not consider that it provides sufficient justification for the scope of their operation given the significant impact they may have on an individual's procedural fairness right to have access to all information relevant to the proceedings.

1.12 First, in the committee's view, the public interest certificate regime may effectively prevent an individual from being able to meet a case that is put against them as they would not be privy to all the relevant evidence or information. While it is generally accepted that unambiguously clear legislation can abrogate common law principles of procedural fairness, such an abrogation should be well justified in any accompanying explanatory memoranda.[6] The committee is of the view that the explanatory memorandum does not adequately justify the extent of the abrogation of procedural fairness in this context. In addition, the committee notes that clause 9 sets out the objectives of the bill to include providing independent merits review that is 'fair and just', and queries how the clear abrogation of procedural fairness in this context supports these objectives. Again, this issue is not substantively addressed in the explanatory memorandum.

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3 Relating to appeals and references of questions of law to the Federal Court.

4 This clause applies to certificates granted under subclauses 91(1) or (2), 161(2), 272(1), or under a provision listed in column 2 of the table in subclause 162(1).

5 For example, the court could not decide that a matter should be disclosed if the certificate was granted because the disclosure would prejudice the security, defence or international relations of the Commonwealth.

6 See, for eg, *SDCV v Director-General of Security* [2022] HCA 32 per Edelman J.

1.13 Secondly, the committee acknowledges that fairness may be legitimately adjusted in the context of countervailing public interests. However, this approach may be preserved whilst adopting a less rigid and more flexible drafting approach. Such an approach would afford the Tribunal more discretion to consider the evidence, document, or answer to a question, and assess on a case-by-case basis whether the public interest in preventing the information from being disclosed outweighs an applicant's procedural fairness rights.

1.14 As currently drafted, the Tribunal is extremely limited in its ability to exercise this discretion, given that it is only authorised to do so in relation to information that was certified as against the public interest on the grounds of 'any other reason that could form the basis for a claim in a judicial proceeding that the information should not be disclosed'. This approach does not allow the Tribunal to consider the particular sensitivities of each case and determine whether disclosure (or at least partial disclosure) may be warranted, regardless of why the certificate was issued. In this regard, the explanatory memorandum has not sufficiently justified why the approach taken is appropriate.

1.15 Thirdly, the committee notes that the statement of compatibility to the bill states that 'The Bill also provides for parties to seek review of decisions on public interest certificates in the FCA'.[7] However, it appears to the committee that it would be nearly impossible for public interest certificates to be successfully challenged by way of judicial review, and that it would be difficult for an applicant merely to make a submission to that effect.[8] This is because the question for the court would not be the merits of the public interest in non-disclosure but the much narrower question of whether the certificate was invalid on account of a jurisdictional error.

1.16 Fourthly, in relation to clause 189, the committee notes the case of *SDCV v Director-General of Security*, in which the constitutional validity of the equivalent provision in the AAT Act was upheld by a narrow majority.[9] It was emphasised in the dissenting judgments of Justices Gageler, Gordon and Edelman in that case that, as a result of the equivalent AAT Act provision, it was possible for a court to decide that a person was lawfully stripped of a statutory right (in that case to be lawfully stripped of a permanent right to remain in Australia) for reasons which have never been given to the applicant or their counsel.

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7 Explanatory memorandum, p. 10.

8 *SDCV v Director-General of Security* [2022] HCA 32 [250].

9 *SDCV v Director-General of Security* [2022] HCA 32.

1.17 Noting this, in relation to clause 189, the committee is concerned, from a scrutiny perspective, with the fairness of the provision, given the inherent procedural unfairness that arises when courts rely on secret evidence. Further, the committee considers, again, that the explanatory memorandum does not provide sufficient information upon which to assess whether these measures are appropriate. The committee queries how clause 189 meets the objectives of the bill in providing fairness for applicants given that evidence against their case will not be put to them, particularly noting the absence of judicial discretion to consider the strength of the relevant public interest claim and the lack of any other safeguards (such as a special advocate regime) to ameliorate the inherent unfairness of such a provision.

1.18 Finally, the committee notes that it has not generally considered that consistency with existing provisions in legislation is, of itself, sufficient justification for provisions that limit the availability or adequacy of review of decisions that will affect a person's rights and liberties, such as provisions that may impact whether a person would receive a fair hearing. The committee considers the introduction of legislation that entirely remakes a federal administrative review body to provide a suitable opportunity for policy-makers to reconsider the procedural fairness implications of existing measures.

1.19 **In light of the above, the committee requests that the Attorney-General provide a comprehensive justification for the rigid approach adopted for public interest certificates, including:**

- **a consideration of whether fairness could appropriately be promoted by an approach which includes granting the Administrative Review Tribunal a more general discretion to consider the cogency of any public interest immunity claims (analogous to the flexibility given to a court when considering a public interest immunity claim and noting that the Administrative Review Tribunal could be required to exercise this discretion through a judicial member);**
- **whether the bill could be amended to require the minister to balance the extent of prejudice to the public interest with the unfairness to the individual prior to issuing a certificate under clause 91 or 92;**
- **whether the bill can be amended to include additional mechanisms to provide for procedural fairness or, at a minimum, ameliorate the denial of procedural fairness;**
- **whether a more detailed explanation can be provided as to what other mechanisms have been considered to address the denial of procedural fairness and, if they are considered not appropriate to include in the bill, why this is the case; and**
- **a consideration of the appropriateness of a special advocate scheme in this context.**

Procedural fairness – intelligence and security jurisdiction[10]

1.20 Part 6 of the bill sets out requirements for proceedings that take place in the intelligence and security jurisdictional area of the Tribunal.[11]

1.21 Subclause 136(2) provides that Division 3 of Part 10 of the bill, relating to decision-makers providing reasons for decisions, does not apply to intelligence and security decisions.[12] This has the effect that applicants for these decisions cannot be provided with a statement of reasons for the decision.

1.22 Clause 158 sets out procedures for security certificates to be issued in the intelligence and security jurisdiction.[13] Subclause 158(2) provides that clause 158 applies in relation to evidence to be adduced or a submission to be made by or on behalf of any of the following:

- the agency head (paragraph 158(2)(a));
- a relevant body (paragraph 158(2)(b));
- an officer or employee of the agency's head's agency (paragraph 158(2)(c));
- an officer or employee of a relevant body (paragraph 158(2)(d)); or
- a person connected with the agency or relevant body (paragraph 158(2)(e)).

1.23 As per subclause 158(3), the responsible minister may certify in writing that disclosing the evidence or making the submission would be contrary to the public interest because it would prejudice: in any case, the security, defence or international relations of the Commonwealth (paragraph 158(3)(a)); or, in the case of a criminal intelligence assessment decision—law enforcement interests (paragraph 158(3)(b)).

1.24 Subclause 158(4) provides that if the responsible minister so certifies, when the evidence is adduced or the submission is made, the applicant must not be present (paragraph 158(4)(a)), and the applicant's representative must not be present except

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10 Clauses 136, 158, 159 and 161. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

11 The committee considered these issues in relation to substantively similar clauses of the Australian Security Amendment Bill 2023 in *Scrutiny Digest 5 of 2023* and *Scrutiny Digest 6 of 2023*. The Australian Security Amendment Bill 2023 inserted clauses into the *Administrative Appeals Tribunal Act 1975* which are currently being replicated in this bill. The concerns set out in this entry largely mirror those in the committee's previous commentary on the Australian Security Amendment Bill 2023 in which the committee ultimately drew its scrutiny concerns to the Senate for consideration.

12 An intelligence and security decision is defined in clause 9 of the bill to include a criminal intelligence assessment, an exempt security record decision, a foreign acquisitions and takeovers decision, a preventative detention decision, a security assessment, a security clearance decision, or a security clearance suitability assessment.

13 Subclause 158(1) provides that the clause does not apply to exempt security record decisions.

with the consent of the responsible minister (paragraph 158(4)(b)). In relation to this, the explanatory memorandum explains:

> In proceedings for review of intelligence and security decisions in the Intelligence and Security jurisdictional area, there will be significant amounts of sensitive information involved. While it is critical that the Tribunal is provided with all information so it can undertake the review process, proceedings in the Intelligence and Security jurisdictional area will necessarily involve sensitive information that should not be disclosed to others—including the applicant. These certificates are intended to ensure the Tribunal is provided with all information, but that sensitive information is adequately protected.[14]

1.25 There is no opportunity provided in clause 158 for the Tribunal to determine whether sensitive information may be disclosed to the applicant.

1.26 Clause 159 sets out procedures for issuing sensitive information certificates in relation to reviews of a security clearance decision or a security clearance suitability assessment.

1.27 Subclause 159(2) provides that the Director-General of Security may certify in writing that, in their opinion, disclosure of information contained in a document given to the Tribunal by the Director-General in relation to a proceeding:

- would be contrary to the public interest for one or more of the following reasons (paragraph 159(2)(a)):
    - the disclosure would prejudice the security, defence or international relations of the Commonwealth (subparagraph 159(2)(a)(i));
    - the disclosure would reveal information that has been disclosed to the Australian Security Intelligence Organisation in confidence (subparagraph 159(2)(a)(ii));
    - any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the sensitive information or the matter contained in the document should not be disclosed (subparagraph 159(2)(iii)); or
- could reveal the methodology underlying a psychological assessment of the person who applied for the decision or assessment (paragraph 159(2)(b)).

[14] Explanatory memorandum, p. 132.

1.28 Subclause 159(4) provides that if such a certificate is issued the Tribunal must do all things necessary to ensure that the sensitive information is not disclosed to the applicant or any person other than the Director-General of Security or their representative, or a member, Principal Registrar, or a staff member of the Tribunal in the course of the performance of their duties.[15]

1.29 Clause 161 makes provision for the responsible minister to issue public interest certificates. These apply to proceedings for review of an intelligence and security decision,[16] and instead of the following provisions:

- clause 91 (disclosure of information – public interest certificate);[17]
- clause 92 (Attorney-General may intervene for public interest reasons);[18]
- clause 112 (notice of decision and statement of reasons – other proceedings) to the extent to it would apply in relation to anything done under this section.[19]

1.30 As per subclause 161(2) the responsible minister may certify in writing that the disclosure of specified information or the content of a specified document in the proceeding would be contrary to the public interest, on the basis of the same reasons as described in paragraph [1.27] above.

1.31 Subclause 161(5) provides that if such a certificate is issued the Tribunal must do all things necessary to ensure that the sensitive information is not disclosed to the applicant or any person other than the Director-General of Security or their representative, or a member, Principal Registrar, or a staff member of the Tribunal in the course of the performance of their duties.

1.32 Subclause 161(6) permits the Tribunal to make the information or document available to any or all of the parties to the proceedings if the certificate does not specify the reasons set out in paragraph 161(2)(a),(b) or (c). This means, in effect, that the Tribunal only has the discretion to disclose information or documents covered by certificates issued on the basis of 'any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the matter contained in the document should not be disclosed'. Subclause 161(7) requires the Tribunal to take into account as a primary consideration the principle that it is desirable, in the interest of ensuring the effective performance

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15 Subclause 159(5) provides that this requirement does not apply in relation to disclosure to the applicant or their representative to the extent that the information has already been lawfully disclosed to the applicant or is disclosed to the applicant with consent of the Director-General of Security.

16 Subclause 161(1) provides that the clause does not apply to exempt security record decisions.

17 Subparagraph 161(1)(b)(i).

18 Subparagraph 161(1)(b)(ii).

19 Subparagraph 161(1)(b)(iii).

of the Tribunal's functions, for the parties to the proceeding to be made aware of all relevant matters, and to have regard to any reason specified in the certificate.

1.33 The committee has several scrutiny concerns in relation to the above clauses, which are modelled on existing provisions in the AAT Act. While the explanatory memorandum addresses the operation of these clauses, the committee does not consider that it provides sufficient justification for their inclusion, given the significant impact they may have on an individual's procedural fairness right to have access to all information relevant to the proceedings.

1.34 First, in relation to clause 136, the committee notes that the default position is that no reasons for a decision are provided in relation to an intelligence and security decision. The committee considers that procedural fairness would be better served if the provision was redrafted so that the default position required reasons for a decision to be provided, noting that it is possible for Acts conferring jurisdiction on the Tribunal to modify this rule in relation to the review of particular decisions within the intelligence and security division and that public interest certificates may also be used to ensure sensitive information is withheld. This would be a preferable arrangement, from a scrutiny perspective, as it would place the onus on the Attorney-General to justify why an applicant's right to hear the case against them should be limited. In this regard the committee also notes that the explanatory memorandum does not explain why this blanket approach is necessary beyond citing the 'sensitive nature of information that *may* form the basis of such decisions' (italics added).[20]

1.35 Secondly, the committee queries why the sensitive information certificate regime set out in clause 159 and the public interest certificate regime for the intelligence and security division set out in clause 161 are necessary in light of clauses 91 to 94. These clauses empower the Attorney-General to withhold information from parties to proceedings on the basis of public interest certificates. As outlined above at paragraphs [1.4 and 1.7] these certificates are granted to prevent the disclosure of information or documents for the same public interest reasons prescribed in subclauses 159(2) and 161(2). It is therefore unclear why the regime in clauses 91 to 94 could not be applied to the security and intelligence division, and there appears to be no consideration of this issue in the explanatory memorandum.

1.36 Thirdly, the committee notes that there is no discretion for the Tribunal to consider, even on limited grounds, whether information or documents (or parts of the information or documents) for which security certificates are issued under clause 158 should be disclosed to the applicant. Such information would be adduced to the Tribunal by one of the government bodies or employees as defined in subclause 158(2) with the applicant having no knowledge of the evidence being put against them and no opportunity to make arguments or submissions in response. This significantly impacts an applicant's procedural fairness rights and their ability to meet the case

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20 Explanatory memorandum, p. 119.

against them. In this regard, the committee considers that it would be more appropriate for the Tribunal to be provided with discretion to determine whether information or documents may be appropriate for disclosure.

1.37 Further, in relation to clauses 159 and 161, the Tribunal is extremely limited in its ability to exercise this discretion given that they are only authorised to do so in relation to information that was certified as against the public interest on the grounds of 'any other reason that could form the basis for a claim in a judicial proceeding that the information should not be disclosed'. This approach does not enable the Tribunal to consider the particular sensitivities of each case and determine whether disclosure (or at least partial disclosure) may be warranted, regardless of why the certificate was issued. In this regard, the explanatory memorandum has not sufficiently justified why the approach taken is the appropriate one. A more flexible an approach which afforded more discretion to the Tribunal would enable it to consider the evidence, document, or answer to a question on a case-by-case basis and make a judgement about whether the public interest in preventing the information from being disclosed outweighs the applicant's procedural fairness rights. The Tribunal might also consider whether an established public interest against disclosure can be adequately protected through partial disclosure of the information covered by a security certificate.

1.38 Again, it is unclear to the committee how these provisions further the objectives of the bill in providing fairness for applicants, particularly noting the absence of any safeguards, such as a special advocate regime.

1.39 Finally, the committee notes that it has not generally considered that consistency with existing provisions in legislation is, of itself, sufficient justification for provisions that limit the availability or adequacy of review of decisions that will affect a person's rights and liberties, such as provisions that may impact whether a person would receive a fair hearing. In this case, the committee considers the remaking of a federal administrative review body to provide an adequate opportunity for policy makers to reconsider the procedural fairness implications of existing measures.

1.40 **In light of the above, the committee requests the Attorney-General provide a comprehensive justification for the rigid approach adopted for decisions made in the intelligence and security jurisdiction of the Tribunal, including:**

- **why it is necessary and appropriate for subclause 136(2) to provide a blanket ban on reasons for intelligence and security decisions from being provided to applicants, and whether consideration has been given to drafting the provision so that the default position required reasons for a decision to be provided with grounds for exceptions for non-disclosure;**
- **a consideration of whether fairness could appropriately be promoted by an approach which includes granting the Administrative Review Tribunal a more general discretion to consider the cogency of the public interest immunity claims for intelligence and security decisions (analogous to the flexibility given to a court when considering a public interest immunity claim**

and noting that the Administrative Review Tribunal could be required to exercise this discretion through a judicial member);

- **whether the bill can be amended to require the minister to balance the extent of prejudice to the public interest with the unfairness to the individual prior to issuing a certificate under clause 159, 160 or 161;**
- **whether the bill can be amended to include additional mechanisms to provide for procedural fairness or, at a minimum, ameliorate the denial of procedural fairness;**
- **whether a more detailed explanation can be provided as to what other mechanisms have been considered to address the denial of procedural fairness and, if they are considered not appropriate to include in the bill, why this is the case; and**
- **a consideration of the appropriateness of a special advocate scheme in this context.**

Broad discretionary power[21]

1.41 Clause 294 provides that certain people can apply for legal or financial assistance in relation to Tribunal proceedings, specifically:

- someone who applies, or proposes to apply, to the Tribunal for review of a reviewable decision;
- someone who applies, or proposes to apply, to have a Tribunal decision referred to the guidance and appeals panel;
- a party to a Tribunal proceeding, or a person who proposes to become a party to that proceeding;
- someone who commences, or intends to commence, a court proceeding relating to a Tribunal proceeding; and
- someone who is a party, or proposes to become a party, in a court proceeding relating to a Tribunal proceeding.

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[21] Clause 294. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

1.42 Subclause 294(7) provides that if the Attorney-General of the Commonwealth considers that it would involve hardship to the person to refuse the person's application, and in all the circumstances, it is reasonable that the person's application should be granted, the Attorney-General may authorise the provision by the Commonwealth to the person of legal or financial assistance determined by the Attorney-General in respect of the proceeding. Subclause 294(8) further provides that the legal or financial assistance is subject to any conditions determined by the Attorney-General.

1.43 Where a bill contains a discretionary power, the committee expects the explanatory memorandum to the bill to address whether there are appropriate criteria or considerations that limit or constrain the exercise of any power, including whether they are contained in law or policy. In this case, the explanatory memorandum merely notes that '[t]he decision to grant financial or legal assistance (including the amount granted) is at the discretion of the Attorney-General'.[22]

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

- **the criteria against which the Attorney-General will consider a decision to grant financial or legal assistance; and**
- **whether consideration has been given to including appropriate criteria or considerations in the bill that can guide the exercise of the Attorney-General's broad discretionary power to authorise the provision of legal or financial assistance.**

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[22] Explanatory memorandum, p. 253.

Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023[23]

Purpose	The Consequential Bill supports the Administrative Review Tribunal Bill 2024 by repealing the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), making consequential amendments across 138 Commonwealth Acts and providing transitional rules which facilitate the smooth transition from the Administrative Appeals Tribunal to the Administrative Review Tribunal.
Portfolio	Attorney-General
Introduced	House of Representatives on 7 December 2023
Bill status	Before the House of Representatives

Modification of the operation of primary legislation by delegated legislation (akin to Henry VIII clause)[24]

1.45 Item 16 of Schedule 1 to the bill seeks to insert proposed subsection 798G(2) into the *Corporations Act 2001* (the Corporations Act). The effect of proposed subsection 798G(2) is that market integrity rules made under existing section 798G of the Corporations Act may modify the operation of the Administrative Review Tribunal Act[25] when making provision for applications to be made to the Administrative Review Tribunal (the Tribunal).

1.46 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation. 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. Consequently, the committee expects sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

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23 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, *Scrutiny Digest 2 of 2024*; [2024] AUSStaCSBSD 20.

24 Schedule 1, item 16, proposed subsection 798G(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

25 The bill for this Act, the Administrative Review Tribunal Bill 2023, is before the Parliament at the time of writing.

1.47 In this case, the explanatory memorandum explains that ASIC (Australian Securities and Investments Commission) instruments made under existing section 798G apply contrary to provisions in the *Administrative Appeals Tribunal Act 1975* (the AAT Act), and that item 16 is necessary to ensure that 'ASIC has the ability to include similar rules when remaking or amending such legislative instruments'.[26]

1.48 However, noting the significant impact that Henry-VIII-type clauses have on parliamentary scrutiny, the committee considers that this explanation falls short of providing a full justification as to why there is a specific need for market integrity rules to be able to modify the operation of the Administrative Review Tribunal Act.

1.49 **The committee requests the Attorney-General's advice as to why it is necessary and appropriate for proposed subsection 798G(2) of the *Corporations Act 2001* to allow delegated legislation made under that Act to amend the operation of the Administrative Review Tribunal Act.**

Procedural fairness[27]

1.50 Item 120 of Schedule 2 to the bill would insert proposed section 336P into the *Migration Act 1958* (the Migration Act), dealing with the interaction between the Migration Act and the Administrative Review Tribunal Act. Paragraph 336P(2)(l) disapplies section 294 of the Administrative Review Tribunal Act, with the effect that a person who applies to the Tribunal for review of a reviewable migration and protection decision cannot make an application to the Attorney-General for legal or financial assistance.

1.51 Where legal or financial assistance is not available this may, in some circumstances, limit the ability of a person adversely affected by a decision to have a fair hearing. This is likely particularly so in the case of individuals seeking a migration or protection decision, who may have limited or no English-speaking ability.

1.52 Procedural fairness is a fundamental common law right that ensures fair decision-making. Amongst other matters, it includes requiring that people who are adversely affected by a decision are given an adequate opportunity to put their case before a decision is made (known as the 'fair hearing rule'). The fair hearing rule includes not only the right of a person to contest any charges against them but also to test any evidence upon which any allegations are based. Where a bill limits or excludes the right to procedural fairness the committee expects the explanatory memorandum to the bill to address why it is considered necessary and appropriate.

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[26] Explanatory memorandum, p. 36.

[27] Schedule 2, item 120, proposed section 336P. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

1.53 In this case, the explanatory memorandum merely notes the effect of the provision and states that it 'retains the effect of subsection 69(3) of the AAT Act in which an application for legal assistance to the Attorney-General is not currently available in the Migration and Refugee Division of the AAT'.[28]

1.54 The committee notes that it has not generally considered that consistency with existing provisions in legislation is, of itself, sufficient justification for provisions that limit the adequacy of review of decisions that will affect a person's rights or liberties. This includes provisions that might impact whether a person would receive a fair hearing, for instance by removing access to financial or legal assistance for the review of a migration or protection decision.

1.55 In light of the above, the committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to restrict a person's right to apply for legal or financial assistance in relation to the review of a migration or protection decision.

Procedural fairness – the natural justice hearing rule[29]

1.56 Item 151 of Schedule 2 to the bill would insert new subsection 357A(2C) into the Migration Act. Proposed subsection 357A(2C) provides that, as an exhaustive statement of the requirements of the natural justice hearing rule, Division 4 of Part 5 of the Migration Act does not require the Tribunal to observe any principle or rule of common law relating to the matters dealt with by the Division.

1.57 In relation to this the explanatory memorandum explains:

> …The Migration Act will continue to contain an exhaustive statement of the natural justice hearing rule ('exhaustive statement'). However, its scope will be adjusted. The reform as a whole is intended to enhance the Tribunal's ability to efficiently and effectively manage the high volume of reviewable migration and protection decisions while providing fairness to genuine applicants.
>
> …
>
> The exhaustive statement of the natural justice hearing rule does not apply to all aspects of a Tribunal review. This is to enable the Tribunal to exercise a broader range of powers and procedures to resolve matters efficiently and effectively. Powers in the ART Bill such as those relating to issuing directions, holding directions hearings, case conferencing, withdrawal and dismissal of matters will be available in these reviews.[30]

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28 Explanatory memorandum, p. 76.

29 Schedule 2, item 151, proposed subsection 357A(2C). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

30 Explanatory memorandum, pp. 83–84.

1.58 Further details of the features of the exhaustive statement of the natural justice hearing rule are set out on pages 83 and 84 of the explanatory memorandum.

1.59 The committee notes that the Migration Act sets out a procedural code for the making of migration and protection decisions which apply to the various stages of decision-making, including at the current Administrative Appeals Tribunal. The committee considers, from a scrutiny perspective, that reliance on such a procedural code will necessarily result in unfairness in some cases as this removes the requirement for the Tribunal to consider what fairness requires in the circumstances of each case.

1.60 Further, the committee notes that the codification of the natural justice hearing rule was intended to provide clarity to applicants. However, as the meaning of the procedural code has been the subject of extensive litigation[31], it is unclear to the committee whether the gains in clarity and certainty thought to be associated with codification have been realised in practice, and therefore whether there is sufficient justification for their use in this context given the risk that the code may result in procedural unfairness in certain cases.

1.61 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the continuing implementation of codes of procedure for the making of migration and protection decisions.

Procedural fairness[32]

1.62 Item 161 of Schedule 2 would insert proposed subsection 359A(4A) into the Migration Act. This subsection would provide that the Tribunal is not required to give particulars of information mentioned in existing subsection 359A(4) to the applicant before making a decision on the application under section 105 of the Administrative Review Tribunal Act or section 349 of the Migration Act. The effect of proposed subsection 359A(4A) is that the Tribunal would not have to furnish an applicant with particulars of information that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member, or that the applicant provided as part of their application, or that is non-disclosable information.

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31 See, for e.g., *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627; and *Minister for Immigration and Border Protection v SZMTA*, *CQZ15 v Minister for Immigration and Border Protection*, *BEG15 v Minister for Immigration and Border Protection* (2019) CLR 421.

32 Schedule 2, item 160, proposed paragraphs 359A(4)((d) and (e); and item 161, proposed subsection 359A(4A). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

1.63 Item 160 would add two new paragraphs to existing subsection 359A(4), to cover information that was included or referred to in the written statement of the decision that is under review (paragraph 359A(4)(d)), or that is prescribed by the regulations (paragraph 359A(4)(e)). Such information would also not have to be provided to an applicant.

1.64 In relation to proposed subsection 359A(4A) the explanatory memorandum states:

> This is intended to put it beyond doubt that the Tribunal is not required to put information covered in subsection 359A(4) to the applicant, at all before making its decision. This provision is intended to exhaustively displace the common law rules of the natural justice hearing rule in relation to this matter.[33]

1.65 These items appear to limit procedural fairness for applicants to the Tribunal in a number of ways.

1.66 In relation to proposed subsection 359A(4A), the committee is concerned that information that is not specifically about the applicant but, rather, is about a relevant class of persons, could form part of a decision made against an applicant without having been put to the applicant. In the committee's view, information about a class of persons to which the applicant is a member could have relative significance to a protection visa application. For example, this could include relevant country of origin information about the treatment of members of an applicant's ethnic or religious group which could have bearing on the applicant's claim for refugee status.

1.67 While the committee recognises that this measure already operated within the Migration Act, the remaking of this provision provides an opportunity to consider the procedural fairness implications for applicants. It cannot, in the committee's view, be reasonably assumed in all cases that such information would be known to the applicant, and there may therefore be circumstances in which these measures create unfairness.

1.68 In relation to proposed paragraph 359A(4)(d), which applies to information that was included in the original written decision, this appears to assume that the applicant would already be aware of this information and therefore it does not need to be disclosed to them as part of a review decision. However, the committee considers that circumstances may arise where information included in the original statement of decision may not clearly be information that the applicant would consider adverse but is nevertheless relied on by the Tribunal as part of its reasons to affirm the original decision. These concerns are compounded by fact that applicants for protection visa decisions may have limited access to legal assistance and limited English-language skills.

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33 Explanatory memorandum, p. 86.

1.69 The committee is also concerned that proposed paragraph 359(4)(e) seeks to allow the regulations to prescribe additional matters that the Tribunal can rely on but does not need to disclose to an applicant. The committee notes that, in the absence of any guidance on the face of the legislation that would limit the matters that could be so prescribed, the fair hearing rights of applicants could be severely impacted. In such a situation, the committee expects the explanatory memorandum to clearly outline why a limitation of fair hearing rights is considered necessary and appropriate. In this case, the committee notes that no such justification has been included in the explanatory memorandum.

1.70 At a minimum the committee expects that some consideration of the balance between what appears to be an efficiency measure and an individual's procedural fairness rights should have been addressed in the explanatory memorandum.

1.71 **The committee therefore requests the Attorney-General's advice as to:**

- **for proposed subsection 359A(4A), whether consideration was given to how non-disclosure of information about a class of persons to which the applicant is a member could have a significant impact on an applicant's claim for protection and how their procedural fairness rights are balanced;**
- **for paragraph 359A(4)(d), whether consideration was given to whether applicants may not be aware of information provided in the original written decision being considered adverse to their case, and whether further justification as to the necessity of this paragraph can be provided; and**
- **for paragraph 359A(4)(e), why it is considered to be necessary and appropriate for the regulations to be empowered to prescribe further types of information upon which the Tribunal may base their decision without disclosing that information to the applicant.**

Parliamentary scrutiny[34]

1.72 Item 188 of Schedule 2 to the bill would substitute existing section 378 of the Migration Act. Proposed subsection 378(1) would provide that an entrusted person[35] must not be required to produce or disclose a protected document or protected information to a parliament if:

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[34] Schedule 2, item 188, proposed section 378. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

[35] Proposed subsection 378(3) defines an entrusted person to have the same meaning as the Administrative Review Tribunal Act. Clause 4 of the Administrative Review Tribunal Bill defines an entrusted person as a person who is or has been a member, or the Principal Registrar, or a staff member, or a person engaged to provide services to the Tribunal.

- the document or information relates to a reviewable protection decision;[36] and
- the production or disclosure is not necessary for the purposes of carrying into effect the provisions of the Administrative Review Tribunal Act[37] or another enactment conferring powers on the Administrative Review Tribunal.[38]

1.73 Proposed subsection 378(3) defines parliament to include a House of the Commonwealth Parliament or of a state or a territory parliament, or a parliamentary committee of a House of the Commonwealth Parliament or of a state or territory parliament.

1.74 Proposed subsection 378(2) provides that proposed subsection 378(1) applies despite subsection 274(1) of the Administrative Review Tribunal Act[39], which sets out requirements around confidentiality of protected information and documents. Subsection 274(1) of that Act provides that entrusted persons must not be required to disclose information or documents to a court, tribunal, authority or person (*other than a parliament*).[40]

1.75 The committee notes that by virtue of section 49 of the Constitution each House of the Commonwealth Parliament has the power to require the production of information or documents. This power supports one of the major functions of the Houses, inquiring into matters of concern, which also assists debate and consideration of legislation relating to the matters.[41]

1.76 The power to require the production of information or documents can only be abrogated by express statutory declaration. In considering such statutory declarations, the Senate Standing Committee of Privileges (Privileges Committee), in its 144th report, stated that:

> It would only be in the rarest and most extraordinary of cases that the Parliament would decide to set some limit on its own operations, and legislate so as to limit itself in some way.[42]

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36 Proposed paragraph 378(1)(a).

37 The bill for this Act, the Administrative Review Tribunal Bill 2023, is before the Parliament at the time of writing.

38 Proposed paragraph 378(1)(b).

39 The bill for this Act, the Administrative Review Tribunal Bill 2023, is before the Parliament at the time of writing.

40 Administrative Review Tribunal Bill 2023, subclause 274(1).

41 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As revised by Harry Evans* (Department of the Senate, 14th ed, 2016) p. 78.

42 Senate Standing Committee of Privileges, 144th report, *Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* (June 2010) p. 5.

1.77 The Privileges Committee noted that only 'a small number of provisions in Commonwealth law expressly limit the powers, privileges and immunities of the Parliament in certain circumstances'[43] and that such provisions are 'obnoxious in principle'.[44]

1.78 The committee will therefore closely scrutinise any legislative provision that represents an intrusion on the powers, privileges and immunities of the Parliament, such as proposed subsection 378(1) of the Migration Act. The necessity and rationale for such a provision should be clearly addressed in the explanatory materials.

1.79 Where a provision would inhibit the power of the Parliament to require the production of information and documents, matters that should be considered and addressed in the explanatory materials include the potential risks associated with disclosure weighed against the importance of safeguarding the Parliament's powers, the demonstrated need for the provision and the mechanisms in place that would safeguard against the risk that public disclosure of the information may present.

1.80 In relation to proposed subsection 378(1) the explanatory memorandum to the bill explains:

> This item repeals and replaces section 378. It applies despite clause 274 of the ART Bill (Protected information and documents), to extend the restrictions on the production or disclosure of documents or information, to include production or disclosure to a parliament. The section relies on the definitions of entrusted person, protected document and protected information in the ART Bill. The intent is to provide additional protection to the privacy and safety of persons involved in reviewable protection decisions.[45]

1.81 The committee appreciates the policy rationale of ensuring that private information about protection visa applicants remains confidential. However, the explanatory memorandum fails to justify why Parliament should be excluded from receiving such information by way of a blanket legislative prohibition, rather than leaving in place the existing structures and practices available on a case by case basis, to allow for the handling of sensitive information by the Parliament and its committees.

1.82 The committee notes that even if the proposal to limit the ability of entrusted persons to disclose reviewable protection decision information to a parliament is based on a concern for the privacy and safety of applicants, it is not clear that the

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43 Senate Standing Committee of Privileges, 144th report, *Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* (June 2010) p. 7.

44 Senate Standing Committee of Privileges, 144th report, *Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* (June 2010) p. 29.

45 Explanatory memorandum, p. 95.

Parliament should take the significant step of legislating to limit its own powers to require the production of information. The committee notes that there are existing processes in place that provide a basis for parliamentary committees to handle genuinely sensitive information, such as protection visa information.

1.83 For example, the Privileges Committee has noted that the standing orders, privilege resolutions and a resolution of the Senate relating to public interest immunity claims all provide a sound structure for committees to either handle sensitive information and retain it on an in-camera basis or, in cases where a claim of public interest immunity has been made out, to decide to not receive the information at all.[46] Similar practices are in place in other parliaments for dealing with sensitive information.[47]

1.84 The committee also notes that, at a practical level, it is unlikely that a House of the Parliament or one of its committees would require the provision of sensitive information or documents relating to a specific individual. Inquiries undertaken by committees tend to be into systemic issues rather than individual cases. Broad requests for documents or information that appear to require sensitive information relating to individuals could be addressed by an appropriately raised public interest immunity claim, or an offer to provide more general information, including on an in-camera basis.

1.85 Similarly, on practical grounds, it is unclear to the committee why proposed subsection 378(1) includes a limitation on the powers of state and territory parliaments, or committees of such parliaments. This is because, under the rules of comity, state and territory parliaments are not able to compel Commonwealth officials to appear before committees or to provide information or documents.

1.86 Finally, the committee notes that there are three provisions in the Migration Act and the AAT Act that raise similar scrutiny concerns to proposed section 378, and that the bill proposes to repeal two of these provisions.[48] The committee reiterates its consistent position that the existence of similarly enacted provisions does not, in itself,

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46 Senate Standing Committee of Privileges, 144th report, *Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* (June 2010) p. 30.

47 See, for example, David Elder (ed), *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) p. 625, pp. 710–714; Susan Want and Janelle Moore, *Annotated Standing Orders of the New South Wales Legislative Council* (Federation Press, 2018) pp. 163–164.

48 Section 473GC in Part 7AA of the Migration Act and subsection 66(2) of the AAT Act are proposed to be repealed by Schedule 2, item 228, which seeks to repeal Part 7AA, and Schedule 17, item 1, which seeks to repeal the whole of the AAT Act, respectively. Existing section 503A of the Migration Act, relating to the protection of information supplied to authorised migration officers by law enforcement or intelligence agencies, prevents the provision of confidential information to a parliament.

provide sufficient justification relating to any scrutiny concerns raised by newly proposed provisions.

1.87 **The committee requests the Attorney-General's advice as to:**

- **why it is considered necessary and appropriate to specifically exclude, through legislative provision, entrusted persons from providing protected documents and information to the Parliament, particularly noting the existing structures in place for the protection of sensitive information such as the ability for ministers to raise public interest immunity claims and for committees to receive evidence on an in-camera basis; and**
- **whether the bill could be amended to remove proposed section 378 of the Migration Act, noting that such a provision should not be enacted except in the rarest and most extraordinary of cases.**

Availability of appeal[49]

1.88 Item 237 of Schedule 2 inserts Division 1A into the Migration Act, which relates to the interaction between the Migration Act and the Administrative Review Tribunal Act. Proposed subsection 474AA(1) provides that Part 7 of the Administrative Review Tribunal Act (appeals and references of questions of law to the Federal Court) does not apply to an application in relation to, or a proceeding for the review of, a privative clause decision[50], a purported privative clause decision[51], and an Administrative Review Tribunal Act migration decision.[52] This prevents parties in Tribunal proceedings from appealing to the Federal Court on questions of law and appears to cover all migration and protection decisions. The Tribunal has the power, on its own initiative, to refer questions of law in relation to a reviewable migration or protection decision to the Federal Court as a result of subsections 474AA(2) and (4).

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49 Schedule 2, item 237, new Division 1A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

50 Subsection 474(2) of the *Migration Act 1958* defines a privative clause decision to mean a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under the Migration Act or instrument other than a decision as outlined in subsections 474(4) or (5).

51 Section 5E of the *Migration Act 1958* defines a purported privative clause decision to be a decision purportedly made, proposed to be made, or required to be made under the Migration Act or instrument that would be a privative clause decision if there were not a failure to exercise jurisdiction, or an excess or jurisdiction, in the making of the decision.

52 Item 238, proposed substituted section 474A(2) lists the decisions under the Administrative Appeals Tribunal Act which are considered to be Administrative Appeals Tribunal Act migration decisions.

1.89 The committee notes that parties to proceedings would be able to apply for judicial review of migration and protection decisions to the High Court in its jurisdiction under its constitutional sources of jurisdiction and that the Migration Act also contains provisions empowering other federal courts to undertake judicial review.[53]

1.90 While the committee notes that the provisions inserted by item 237 replicate the current position with respect to privative clause decisions in the AAT Act, the committee reiterates that consistency with existing provisions in legislation is not, of itself, sufficient justification for provisions that seek to limit review or appeal rights. Noting that there may be procedural advantages in a particular case of an appeal as opposed to an application for judicial review, the committee expects that any limitation of review or appeal rights within a legislative provision requires clear and substantial justification in the related explanatory materials. In this case, the explanatory memorandum merely restates the operation of the provisions.

1.91 In addition, the definition of an Administrative Review Tribunal Act migration decision is integral to an understanding of the operation and scope of the limitation on the ability of applicants to refer questions of law to the Federal Court. Given that such a decision is defined by reference to a list of provisions in the Administrative Review Tribunal Act as set out in proposed subsection 474A(2), comprehension of these measures would be assisted if the explanatory memorandum detailed which decisions are included within these provisions.

1.92 **The committee therefore requests the Attorney-General's advice as to why it is necessary and appropriate to limit the right to appeal to the Federal Court on a question of law in the context of migration and protection decisions.**

Procedural fairness[54]

1.93 Item 43 of Schedule 4 to the bill inserts proposed section 83CA into the *Australian Security Intelligence Organisation Act 1979*. This provision provides that when an application has been made to the Tribunal for review of a security clearance decision or a security clearance suitability assessment, and the Director-General of Security gives a copy of a security clearance standard (or a part of a standard) to the Tribunal that is certified in writing as relating to the Commonwealth's highest level of security clearance, then:

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53 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial review of government action and government liability*, 7th ed, Lawbook Co., 2022, pp. 58–59.

54 Schedule 4, item 43, proposed section 83CA. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

- the applicant or any person representing them cannot be present while the Tribunal is hearing submissions made or evidence adduced in relation to the copy of the standard unless it has already been disclosed to the applicant, or
- the Director-General of Security consents to the applicant being present.

1.94 This provision appears to limit procedural fairness, as an applicant may be restricted in access to security clearance standards which form part of the review. Therefore an applicant adversely affected by a decision may not have an adequate opportunity to put their case before the decision is made (known as the 'fair hearing rule'). The fair hearing rule includes not only the right of a person to contest any charges against them but also to test any evidence upon which any allegations are based. Where a bill limits or excludes a person's right to procedural fairness the committee expects the explanatory memorandum to the bill to address why it is considered necessary and appropriate to do so.

1.95 In relation to this provision, the explanatory memorandum notes that this replicates an existing provision in the AAT Act, but does not justify why this exclusion of procedural fairness is necessary or appropriate.[55]

1.96 The committee reiterates that it does not consider that consistency with existing practices in the AAT Act is a sufficient justification, in itself, for reintroducing provisions that may restrict an individual's procedural fairness rights. The committee considers it may be appropriate, as the default position, to allow access to the copy of a standard (or relevant part of) and provide the Director-General of Security the power to restrict its disclosure under limited circumstances.

1.97 The committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to restrict a person's access to security clearance standards, and what consideration has been given to allowing access as the default position.

Modification of the operation of primary legislation by delegated legislation (akin to Henry VIII clause)[56]

1.98 Items 23 and 39 of Schedule 15 to the bill would insert subsections 115B(12) and 216(2) into the *Veterans' Entitlements Act 1986*.

1.99 Proposed subsection 115B(12) would empower the Veterans' Vocational Rehabilitation Scheme (VVRS) to modify the operation of sections 18 and 19 of the Administrative Review Tribunal Act as it applies in relation to a decision made under the VVRS. Proposed subsection 216(2) would empower regulations made under the

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55 Explanatory memorandum, p. 164.

56 Schedule 15, item 23, proposed subsection 115B(12) and item 39, proposed subsection 216(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

Veterans' Entitlements Act 1986 to modify the operation of section 18 of the Administrative Review Tribunal Act as it applies in relation to a decision made under the regulations.

1.100 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive 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. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

1.101 In this case, the explanatory memorandum explains the operation of the provisions without justification as to why these modifications are necessary and appropriate. Noting the significant impact that Henry VIII-type clauses have on parliamentary scrutiny, the committee considers that this explanation falls short of providing a full justification as to why there is a specific need for delegated legislation to be able to modify the operation of the Administrative Review Tribunal Act in this context.

1.102 **The committee requests the Attorney-General's advice as to why it is necessary and appropriate for proposed subsections 115B(12) and 216(2) of the bill to empower legislative instruments to amend the operation of the Administrative Review Tribunal Act.**

Retrospectivity

Henry VIII clause – modification of primary legislation by delegated legislation[57]

1.103 Subitem 51(1) of Schedule 16 to the bill provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted by this Act to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Subitems 51(2) and (3) provide that the rules may prescribe matters of a transitional nature, and may modify provisions, or provide for the application of provisions, of this Act or the Administrative Review Tribunal Act to matters to which they would otherwise not apply, and can modify the operation of the Act.

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[57] Schedule 16, item 51. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i) and (iv).

1.104 Provisions authorising delegated legislation to modify the operation of primary legislation, as in this case, may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the Executive.

1.105 Further, subitem 51(4) provides that, despite subsection 12(2) of the *Legislation Act 2003*, the rules may be expressed to take effect from a date before the rules are registered under that Act. This means that the rules can commence retrospectively. Subitem 51(5) clarifies that, if the rules are expressed to take effect from a date before they are registered under the *Legislation Act 2003* and a person engaged in conduct before the registration date and, but for the retrospective effect of the rules, the conduct would not have contravened a provision of an Act, then a court must not convict the person of an offence, or order the person to pay a pecuniary penalty, in relation to the conduct on the grounds that it contravened a provision of that Act.

1.106 Retrospective commencement or application challenges a basic principle of the rule of law that laws should only operate prospectively. Underlying this principle is the importance of enabling people to rely on the law at the time of a relevant action or decision and protecting those affected by government decisions from arbitrary decision-making. The committee therefore has long-standing scrutiny concerns in relation to provisions which have the effect of applying retrospectively. These concerns are particularly heightened if the legislation will, or might, have a detrimental effect on individuals. Generally, where proposed legislation will have a retrospective effect, the committee expects that the explanatory materials will set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.107 In this case, the explanatory memorandum explains:

> This rule-making power, including the ability to make retrospective rules, is necessary to provide the Minister with the discretion and flexibility to deal with matters or circumstances that are not covered in the Consequential Bill. The transitional provisions in this Schedule will apply in relation to a very large number of applications and proceedings, and it may not be possible to anticipate the full range of circumstances which the transitional provisions will need to accommodate. The rule-making power enables the Minister to deal with unintended outcomes, or unforeseen issues, in relation to the transition from the AAT to the Tribunal which could require immediate or prompt changes. This is particularly important to ensure that applications made to the Tribunal relating to decisions made before the transition time, and AAT proceedings that are transferred to the Tribunal, can be dealt with smoothly and with as little disruption to the parties as possible.

> While the rules may be made to have retrospective application, subitem 51(5) makes it clear that a person could not be convicted of an offence or ordered to pay a pecuniary penalty in relation to conduct before the registration date if the conduct would not have contravened an existing Act. This means that the rules would not be able to retrospectively criminalise conduct or retrospectively apply a penalty.[58]

1.108 While the committee welcomes the legislative assurance that a person could not be convicted of an offence or ordered to pay a pecuniary penalty in relation to conduct before the registration date, the committee considers that the retrospective operation of the rules may nevertheless have a detrimental impact and in particular there may be procedural fairness implications for individuals.

1.109 The committee notes that subsection 12(2) of the *Legislation Act 2003* provides that the retrospective commencement of an instrument is of no effect to the extent that, as a result of that commencement, the person's rights as at the time the instrument is registered would be affected so as to disadvantage the person, or liabilities would be imposed on the person in respect of anything done or omitted to be done before the instrument is registered. The committee is concerned that subitem 51(4) operates to limit subsection 12(2) of the *Legislation Act 2003* and that the explanatory memorandum has provided no justification as to why this is considered necessary or appropriate.

1.110 Further, the committee is concerned that there is no time-limit attached to the transitional rules that may be made. Providing for transitional rules that may apply retrospectively and which can modify the operation of primary legislation for an unspecified period of time introduces significant uncertainty and operates to undermine the rule of law.

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

- **why it is considered necessary and appropriate to restrict the operation of subsection 12(2) of the *Legislation Act 2003* and what steps, if any, will be taken to avoid any disadvantage to an individual and ensure procedural fairness for affected persons;**
- **why it is necessary and appropriate for rules to be made under subitems 51(2) and (3) that may modify provisions, or provide for the application of provisions, of the Act or the Administrative Review Tribunal Act; and**
- **whether the power to make transitional rules which may modify provisions of Acts or the operation of Acts can be restricted to a period of time after the Act has come into force.**

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58 Explanatory memorandum, p. 233.

Digital ID Bill 2023[59]

Purpose	The Digital ID Bill 2023 seeks to establish an accreditation scheme for entities providing digital ID services; provide additional privacy safeguards for the provision of accredited digital ID services; establish an Australian Government Digital ID System (the AGDIS); and strengthen the oversight and regulation of accredited digital ID providers and entities participating in the AGDIS, and the integrity and performance of the AGDIS.
Portfolio	Finance
Introduced	Senate on 30 November 2023
Bill status	Before the Senate

Immunity from civil and criminal liability[60]

1.112 Clause 84 of the Digital ID Bill 2023 (the bill) seeks to provide that accredited entities participating in the Australian Government Digital ID System (AGDIS) are protected from civil and criminal liability in certain circumstances. Subclause 84(1) provides that an accredited entity[61] is not liable to an action or other proceeding in relation to the provision or non-provision of an accredited service[62] to another accredited entity participating in the AGDIS, or to a participating relying party.[63] The immunity from civil and criminal liability is applicable where:

- the accredited entity provides or does not provide the accredited service in good faith in compliance with the bill;[64] or

59 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Digital ID Bill 2023, *Scrutiny Digest 2 of 2024*; [2023] AUSStaCSBSD 21.

60 Clause 84. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

61 Clause 9, an accredited entity includes an accredited attribute, identity exchange or identity service provider or an entity that is accredited to provide services of a kind prescribed by the Accreditation Rules.

62 Clause 9, an accredited service is the service provided or proposed to be provided by an accredited entity in the entity's capacity as a particular kind of accredited entity.

63 Subclause 84(1).

64 Paragraph 84(1)(a).

- the accredited entity does not comply with the bill in relation to the accredited service and the non-compliance is not the ground or the cause for the action or the other proceeding.[65]

1.113 This therefore removes any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.114 The committee expects that if a bill seeks to provide immunity from civil and criminal liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.[66]

1.115 In this instance, the committee notes that accredited entities provide services, that if not rendered to a party, can have significant consequences for that party. This may be the case even where the accredited entity has acted in good faith. The committee notes the example provided in the definition of 'accredited service' in clause 9 in relation to Acme Co, who provide the accredited service of managing, maintaining and verifying information relating to an individual's identity. A failure to maintain identifying information, even if done in good faith, would have consequences for the individual whose identifying information has not been maintained, managed or verified. These parties will be left without an avenue for recourse until they are able to prove the accredited entity was acting in bad faith.

1.116 The committee requests the minister's advice as to why it is considered necessary and appropriate to provide an accredited entity immunity from civil and criminal liability so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

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65 Paragraph 84(1)(b).

66 Explanatory memorandum, p. 83.

Tabling of documents in Parliament[67]

1.117 Subclause 145(1) provides that the Minister for Finance (the minister) must cause periodic reviews of provisions in the Digital ID Rules that relate to the charging of fees by the Digital ID Regulator[68] to be undertaken.[69] Subclause 145(4) provides that the minister must cause a written report about each review to be prepared and published on the Digital ID Regulator's website.[70] The provision does not require any such report to be tabled in both Houses of the Parliament.

1.118 The explanatory memorandum does not provide any further information in relation to the absence of the requirement to table any report prepared and published under subclause 145(4) to be tabled in Parliament.

1.119 The committee's consistent scrutiny view is that the tabling of documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability. The committee's concerns are heightened in this instance as the report would relate to a review of fees that may be charged by the Digital ID Regulator and transparency and accountability in this context are necessary.

1.120 Noting that there may be impacts on parliamentary scrutiny where reports associated with the operation of regulatory schemes are not tabled in the Parliament, the committee requests the minister's advice as to whether the bill can be amended to provide that reports prepared under subclause 145(4) be tabled in Parliament in order to improve parliamentary scrutiny.

Significant matters in delegated legislation

Instruments not subject to an appropriate level of parliamentary oversight[71]

1.121 Subclause 150(1) of the bill seeks to provide that the minister may establish, in writing, advisory committees to provide advice to the minister, the Secretary, the System Administrator and the Digital ID Data Standards Chair.[72] This advice may relate to any matters within the bill, including but not limited to the performance of the

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67 Subclause 145(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

68 Subclause 144(1).

69 Subclause 145(1).

70 Subclause 145(4).

71 Subclauses 151(1) and 151(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

72 Subclause 150(1).

Digital ID Regulator's powers and functions under the bill.[73] The minister may determine the persons appointed to the advisory committee and must also determine various matters in relation to the operation and members of the committee, which are provided by subclause 150(3).[74]

1.122 The establishment of committees to provide advice about matters arising under the Act, including in relation to the Digital ID Regulator's powers and functions, is a significant part of the overall legislative scheme.

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

1.124 The committee queries why such committees are to be established by instrument, rather than in the primary legislation, which would afford the best opportunity for parliamentary scrutiny in relation to the establishment of any advisory committee. The committee further queries why advisory committees could not, at a minimum, be established by legislative instrument. Subclause 150(4) seeks to provide that instruments made under subclauses 150(1) and 150(3) are not legislative instruments.[75] A determination that is not a legislative instrument is not subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments. Noting the importance of parliamentary scrutiny, the committee expects the explanatory materials to include a justification as to why the establishment of the advisory committees has been left to written instruments, rather than being included in the primary legislation, and why the instruments are not legislative in character. In this instance, the explanatory memorandum does not provide such a justification and merely restates the provisions.[76]

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

- **why it is considered necessary and appropriate to leave the matter of establishing an advisory committee under subclause 150(1), and determining matters relating to the operation and members of such committees under subclause 150(3), to written instruments, rather than these matters being included in the primary legislation; and**

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73 Subclause 150(1).

74 Subclause 150(3).

75 Subclause 150(4).

76 Explanatory memorandum, pp. 113–114.

- **why it is considered necessary and appropriate to specify that instruments made under subclauses 150(1) and 150(3) are not legislative instruments (including why it is considered that the instruments are not legislative in character); and**
- **whether the bill could, at a minimum, be amended to provide that these instruments are legislative instruments, to ensure that they are subject to appropriate parliamentary oversight.**

Reversal of the evidential burden of proof[77]

1.126 Subclause 151(1) of the bill seeks to provide that a person commits an offence if the person is or has been an entrusted person,[78] obtains protected information in the course of or for the purposes of performing functions or exercising powers under the bill, and discloses the protected information.[79] Paragraph 151(1)(d) provides a further stipulation that the protected information that is disclosed must be personal information about an individual or that there must be a risk that the use or disclosure might substantially prejudice the commercial interests of another person. The offence carries a penalty of imprisonment for up to two years or 120 penalty units, or both.

1.127 Subclause 151(3) provides that the offence does not apply if the use or disclosure is authorised by clause 152. Clause 152 provides a list of circumstances in which an entrusted person may use or disclose protected information. A note to subclause 151(3) clarifies that a defendant bears an evidential burden of proof in relation to the offence-specific defence in subclause 151(3).

1.128 The committee expects any such reversal of the evidential burden of proof to be justified and for the explanatory memorandum to address whether the approach taken is consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (*Guide to Framing Commonwealth Offences*), which states that a matter should only be included in an offence-specific defence (rather than being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and

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77 Subclause 151(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

78 Under subclause 151(2) of the bill, an 'entrusted person' includes: the Digital ID Regulator, the System Administrator, a member, associated member or member of staff of, or consultant for, the Australian Competition and Consumer Commission, and departmental employees assisting the Chief Executive Centrelink.

79 Subclause 151(1).

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[80]

1.129 In relation to subclause 151(3), the explanatory memorandum merely restates the provision and does not provide a justification for the reversal of the evidential burden of proof in relation to the offence in subclause 151(1).[81] It is not apparent to the committee that the circumstances listed under clause 152 are matters that are peculiarly within the defendant's knowledge.

1.130 For instance, some examples of authorised disclosures of protected information include assisting in the administration or enforcement of a Commonwealth or Territory or a law of a state that is prescribed by the Digital ID Rules.[82] It is unclear to the committee how complying with the requirement of a written law is peculiarly within any person's knowledge. Another example of an authorised disclosure is where the disclosure is required or authorised by law.[83] It is not clear to the committee how a disclosure that is required or authorised by law can be peculiarly within a person's knowledge. Further, it is not clear to the committee that obtaining or disproving a matter relating to the administration or enforcement of a law or compliance with a law would be significantly more costly or difficult for the prosecution.

1.131 As the explanatory materials do not adequately address this issue, the committee requests the minister's explanation as to why it is proposed to use an offence-specific defence in subclause 151(3) (which reverses the evidential burden of proof) in relation to the offence under subclause 151(1).

1.132 The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[84]

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

81 Explanatory memorandum, p. 114.

82 Subparagraphs 152(1)(a)(iii) and 152(1)(a)(iv).

83 Paragraph 152(1)(b).

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

Incorporation of external materials as existing from time to time[85]

1.133 Subclause 167(2) of the bill provides that the Accreditation Rules, the Digital ID Data Standards and the Digital ID Rules, which are core instruments that will be made pursuant to the bill, may apply, adopt or incorporate any matter contained in other material as in force or existing from time to time. The explanatory memorandum provides examples of material that may be incorporated, which includes Commonwealth documents relating to protective security and cyber security, international standards and digital identity standards set by internationally recognised organisations.[86]

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

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

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

1.136 Noting the above comments and in the absence of a sufficient explanation in the explanatory memorandum, the committee requests the minister's advice as to whether documents applied, adopted or incorporated by reference under clause 167 will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.

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85 Clause 167. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

86 Explanatory memorandum, pp. 120–121.

Private senators' and members' bills that may raise scrutiny concerns[87]

The committee has not finalised its consideration of any private senators' or members' bills that have been introduced into the Parliament since the presentation of the committee's *Scrutiny Digest 1 of 2024* out of sitting on 18 January 2024.

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[87] This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 2 of 2024*; [2023] AUSStaCSBSD 22.

Commentary on amendments and explanatory materials[88]

1.137 The committee has not finalised its consideration of any amendments agreed to by, or explanatory materials tabled in, either house of the Parliament since the presentation of the committee's *Scrutiny Digest 1 of 2024* out of sitting on 18 January 2024.

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[88] This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 2 of 2024*; [2023] AUSStaCSBSD 23.

Chapter 2
Commentary on ministerial responses

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

2.2 The committee has not finalised its consideration of any ministerial responses since the presentation of the committee's *Scrutiny Digest 1 of 2024* out of sitting on 18 January 2024.

Chapter 3
Scrutiny of standing appropriations[89]

3.1 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Their significance from an accountability perspective is that, once they have been enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. They are not subject to approval through the standard annual appropriations process.

3.2 By allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe on the committee's terms of reference relating to the delegation and exercise of legislative power.

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.[90] It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

> (iv) inappropriately delegate legislative powers; or
>
> (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.[91]

3.4 The committee notes there were no bills introduced, since the presentation of the committee's *Scrutiny Digest 1 of 2024* out of sitting on 18 January 2024, that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator Dean Smith

Chair

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89 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 2 of 2024*; [2023] AUSStaCSBSD 24.

90 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.

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