



9 February 2024

## Introduction

This newsletter highlights key aspects of the work of the Senate Scrutiny of Bills Committee and the Senate Scrutiny of Delegated Legislation Committee. It has a particular focus on information that may be useful while bills are under consideration and legislative instruments are subject to disallowance and seeks to raise awareness about the committees' scrutiny principles set out in Senate standing orders 23 and 24.

For more detail and discussion of these matters see the committees' [Scrutiny Digests](#) and [Delegated Legislation Monitors](#).

## Scrutiny of Bills Committee

*Scrutiny Digest 2 of 2024* reports on the committee's consideration of **3** bills which were introduced into the Parliament during recent sitting weeks.

### Key scrutiny issues: Bills (*Scrutiny Digest 2 of 2024*)

#### Administrative Review Tribunal Bill 2024

- Procedural fairness – public interest certificates; limitation of appeal: the committee is seeking a justification for the rigid approach adopted for public interest certificates.
- Procedural fairness – intelligence and security jurisdiction: the committee is seeking a justification for the rigid approach adopted for decisions made in the intelligence and security jurisdiction of the Administrative Review Tribunal.
- Broad discretionary power: the committee is seeking 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 this in the bill.

#### Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024

- Parliamentary scrutiny: the committee is seeking advice as to why it is considered necessary and appropriate to specifically exclude entrusted persons from providing protected documents and information relating to protection visa decisions to the Parliament.

- Modification of the operation of primary legislation by delegated legislation (akin to Henry VIII clause): the committee is seeking advice as to why it is necessary and appropriate to allow delegated legislation made under various Acts to amend the operation of the Administrative Review Tribunal Act.
- Procedural fairness: the committee is seeking 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 a review of a migration or protection decision.
- Procedural fairness – the natural justice hearing rule: the committee leaves to the Senate the appropriateness of the continuing implementation of codes of procedure for the making of migration and protection decisions.
- Procedural fairness: the committee is seeking advice on the non-disclosure of information in relation to an applicant's claim for protection and on regulations which are empowered to prescribe further types of information upon which the Tribunal may base their decision without disclosing the information to the applicant.
- Availability of appeal: the committee is seeking 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: the committee is seeking advice on restrictions for access to security clearance standards, and what consideration has been given to allowing access as the default position.
- Retrospectivity; Henry VIII clause – modification of primary legislation by delegated legislation: the committee is seeking advice on the restriction of the operation of subsection 12(2) of the *Legislation Act 2003*, on the inclusion of the power to make rules that may modify, or provide for the application of, provisions of the Act or Administrative Review Tribunal Act; and whether the power to make transitional rules in these circumstances can be restricted to a period of time.

#### **Other bills commented on (Scrutiny Digest 2 of 2024)**

- **Digital ID Bill 2024**: the committee is seeking advice on the provision of immunity from civil and criminal liability for accredited entities, whether reports on reviews of the Digital ID Rules can be tabled in Parliament, the inclusion of significant matters in delegated legislation, reversal of the evidential burden of proof, and the incorporation of external materials as existing from time to time.

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For any comments or questions, please contact:

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## Scrutiny of Delegated Legislation Committee

*Delegated Legislation Monitor 1 of 2024* reports on the committee's scrutiny concerns of 3 instruments registered between 17 November and 19 December 2023, and 1 ongoing matter.

### Key scrutiny issues: Legislative instruments (*Delegated Legislation Monitor 1 of 2024*)

#### Migration Amendment (Bridging Visa Conditions) Regulations 2023

- Significant matters in delegated legislation: the committee is requesting the minister's advice as to why it is considered necessary and appropriate to further amend the Bridging Visa (Removal Pending) framework by delegated legislation, rather than primary legislation.
- Conferral of discretionary powers; availability of independent merits review: the committee is seeking the minister's advice as to whether further detail can be provided regarding how the minister may determine whether a condition is 'not reasonably necessary' for the protection of the Australian community, and whether any safeguards or limitations apply to the exercise of this power, including the availability of independent merits review.
- Consultation with persons affected: the committee is requesting the minister's advice as to which other Commonwealth agencies were consulted and whether any persons likely to be affected by the instruments, any experts or any stakeholders representing the NZYQ-affected cohort were consulted.

#### Biosecurity (Electronic Decisions) Determination 2023

- Automated decision-making; conferral of discretionary powers: the committee is requesting the minister's advice as to whether further detail can be provided regarding:
  - The factors the Director of Biosecurity considers in exercising certain safeguards in the *Biosecurity Act 2015*, and the meaning of 'reasonable steps' in relation to decisions that may be made by a computer program;
  - The factors that a biosecurity officer considers in determining whether an electronic decision is consistent with the Act's objectives or that another decision is 'more appropriate in the circumstances';
  - The factors and weighting of criteria in the business rules that assist with decision-making;
  - The mechanisms used to identify errors in automated decision-making and, where errors arise, the mechanisms to correct those errors; and
  - Specific safeguards in relation to users of the computer program (which includes a wide range of people enabled to do so by the instrument).

The committee is also seeking the minister's advice as to whether consideration has been given to the Commonwealth Ombudsman's *Automated Decision-making Better Practice Guide* in relation to providing for automated decision-making and recommendations 17.1 and 17.2 of the Royal Commission into the Robodebt Scheme.

- *Availability of independent merits review*: the committee is requesting the minister's advice as to whether legislative amendments can be made to provide that certain decisions in the instrument are specified as 'reviewable decisions' under the *Biosecurity Act 2015*, or to clarify whether independent review of these discretionary decisions could otherwise be provided for.
- *Consultation with persons affected*: the committee is requesting the minister's advice as to whether consultation was undertaken in relation to the instrument with persons affected or experts, and if not, why not.
- *Clarity of drafting*: the committee is requesting the minister's advice as to whether the explanatory statement can be amended to correct a possible drafting error.

### Notices of motion to disallow

The Scrutiny of Delegated Legislation Committee **did not give** notice of motion to disallow any instruments or **withdraw** or give notice of its intention to withdraw any instruments between 6 and 8 February 2024.

All legislative instruments subject to a notice of motion for disallowance in either House of the Parliament are listed in the [Disallowance Alert](#).

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For any comments or questions, please contact:  
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