The Senate

# Standing Committee for the Scrutiny of Bills

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# Membership of the committee

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# Introduction

## Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

## Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister 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* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

## General information

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

# Chapter 1
# Comment bills

1.1 The committee comments on the following bills and, in some instances, seeks a response or further information from the relevant minister.

## Australian Immunisation Register Amendment (Reporting) Bill 2020

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *Australian Immunisation Register Act 2015* to create a requirement for recognised vaccination providers to report to the Australian Immunisation Register information relating to vaccinations administered by them, or vaccinations given outside of Australia that they are notified about. It also seeks to empower the Secretary of the Department of Health to compel the production of this information if a recognised vaccination provider does not comply with this reporting requirement |
| **Portfolio** | Health |
| **Introduced** | House of Representatives on 3 December 2020 |

### Privacy

### Significant matters in delegated legislation[1]

1.2 The *Australian Immunisation Register Act 2015* (the Act) establishes the Australian Immunisation Register (the Register), which records the vaccinations given to all people enrolled in Medicare in Australia. Currently, the Act does not require vaccination providers to report information relating to vaccinations (it is done on a voluntary basis).

1.3 This bill seeks to amend the Act to create a requirement for vaccination providers to report information relating to certain relevant vaccinations administered both in and outside Australia to the Register.[2] It would also create a power to require a provider to give specified information if they do not comply with this requirement. The bill does not specify the kind of vaccination this reporting obligation will apply to,

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1 Schedule 1, item 7, proposed Division 2A of Part 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

2 Schedule 1, item 7, proposed Division 2A of Part 2.

the information that must be reported or the manner or period in which information must be reported. The bill instead leaves these matters to be set out in delegated legislation. Failure to comply with these reporting obligations would be subject to a civil penalty of up to 30 penalty units for each failure to report.[3]

1.4 The committee's view is that significant matters, such as the scope of mandatory reporting obligations in relation to vaccinations, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

> This amendment requires recognised vaccination providers to report relevant information to the AIR vaccines that they administer and/or and vaccines they are given information about given outside Australia. Such disclosure of personal information is authorised by the AIR Act and therefore "authorised by law" for the purposes of the Privacy Act.
>
> The relevant information will be prescribed under the Australian Immunisation Register Rule 2015. The reliance on rules for the new reporting obligation in Division 2A is due to the staged approach for the reporting obligation. The Department is seeking to require mandatory reporting in relation to any COVID-19 vaccinations (should a safe and effective vaccine/s meet all necessary regulatory requirements for supply in the Australian market) and flu vaccinations from 1 March 2021, whereas mandatory reporting in relation to other National Immunisation Program vaccinations will not be required until 1 July 2021.
>
> This amendment also makes it a requirement for recognised vaccination providers to report within the period prescribed by the rules and in the manner prescribed by the rules, the information prescribed by the rules for that vaccination.
>
> Collection of information prescribed by the rules, rather than in the AIR Act is considered reasonable, necessary and proportionate. The rules will allow for flexibility in relation to a number of matters including, for example, what vaccines need to be reported.
>
> The relevant information set out in the rules will include information that is currently collected by the AIR, this process seeks to formalise through an instrument what information vaccination providers are required to report.[4]

1.5 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation, nor is it apparent to the committee why a staged approach to the mandatory reporting obligation could not be provided for on the face of the bill.

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3 Schedule 1, item 7, proposed subsections 10A(5) and 10B(3).

4 Explanatory memorandum, p. 6.

1.6 In this instance, the committee's scrutiny concerns are heightened noting the sensitive nature of the information that may be required to be reported for inclusion in the register.

**1.7 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 scope of mandatory reporting obligations in relation to vaccinations to delegated legislation; and**
- **whether the bill can be amended to instead specify the scope of these obligations (or at least high-level guidance in relation to these matters) on the face of the primary legislation.**

# Data Availability and Transparency Bill 2020

| | |
|---|---|
| **Purpose** | This bill seeks to authorise and regulate controlled access to Australian Government data to promote better availability and use of government data, empower the government to deliver effective policies and services, and support research and development |
| **Portfolio** | Government Services |
| **Introduced** | House of Representatives on 9 December 2020 |

## Privacy[5]

## Significant matters in delegated legislation[6]

1.8 The bill seeks to establish a new scheme authorising sharing of public sector data between accredited entities, for the purposes of delivering government services and supporting research and development. Subclause 10(2) defines 'public sector data', which includes data that is collected, created, or held by a Commonwealth body, or on its behalf, as well as 'personal information' and 'sensitive information', as defined by the *Privacy Act 1988*, and other types of data.[7] As a result, the committee considers that the scheme, in enabling the sharing of data including personal information has the potential to trespass on an individual's right to privacy.

*Data sharing principles*

1.9 Clause 16 establishes data sharing principles, which are intended to manage risks of sharing public sector data. The principles are structured to support data custodians to consider risks arising across five key elements of the data sharing process: the proposed project, the setting in which data is shared and accessed, and the persons, data and outputs involved.[8] Where the data being shared includes personal information, paragraph 16(2)(c) requires consent for sharing to be sought from the individuals concerned unless it is unreasonable or impracticable for the data scheme entities to do so.[9] The explanatory memorandum explains:

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5 Clauses 15, 16 and 88. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

6 Clauses 15, 126 and 133. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

7 Explanatory memorandum, p. 16.

8 Explanatory memorandum, p. 23.

9 Explanatory memorandum, p. 24.

> The standard of consent required is that set by the Privacy Act. The 'unreasonable or impracticable' language is drawn from section 16A of that Act, and should be interpreted using relevant guidance on consent made by the Australian Information Commissioner.
>
> The question of whether seeking consent is reasonable or impracticable may depend on the amount, nature and sensitivity of the data involved, and whether individuals gave informed consent for uses including the proposed sharing at the point the data was originally collected. Where it is unreasonable or impracticable to seek consent, parties must still consider implementing other controls to protect privacy, under this and other data sharing principles.[10]

1.10 The committee is concerned that there is a significant amount of flexibility in the meaning of 'unreasonable or impracticable' in this context, and that this may undermine the effectiveness of clause 16 as a safeguard against undue trespass on the privacy of individuals whose data may be shared under the scheme. The committee also notes that, while the data principles contemplate minimising the sharing of personal information as far as possible and sharing only the data reasonably necessary to achieve an applicable purpose,[11] there are no requirements for sharing only de-identified data in the principles or elsewhere in the bill.

1.11 Further, paragraph 16(2)(a) requires a judgement to be made about whether the sharing can reasonably be expected to serve the public interest. The committee notes that 'public interest' is also not defined in the bill, and the explanatory memorandum does not provide guidance about the factors that might be considered when evaluating public interest for the purposes of data sharing. In contexts where commercial and economic interests may be considered to factor into the 'public interest', the committee is concerned that privacy interests are not clearly central to the operation of the scheme.

1.12 The committee also notes that the application of the data sharing principles will be clarified in 'data codes', legislative instruments made by the Data Commissioner that serve as binding codes of practice for the data sharing scheme. The explanatory memorandum notes:

> a data code may set out how data scheme entities are to apply data definitions in clause 10, or comply with requirements for sharing in Chapters 2 and 3. This could include prescribing how to apply the data sharing principles in different situations, such as when sharing via an ADSP [Accredited data service provider], or assess requests against the data sharing purposes. Use of data codes in this manner will clarify core

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10 Explanatory memorandum, p. 24.

11 See subclause 16(8).

> requirements for sharing, and standardise their application by data scheme entities.[12]

1.13 The committee's view is that significant matters, such as privacy safeguards for data sharing, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, while the explanatory memorandum explains the approach of using legislative instruments rather than regulations to establish data codes, there is no explanation of why these matters cannot be included in primary legislation.

*Scope of scheme—data sharing purposes and receiving entities*

1.14 Clause 15 establishes permitted data sharing purposes, which are: delivery of government services, to inform government policy and programs, and research and development. These purposes are not clearly defined; rather, the explanatory memorandum emphasises that the purposes are to be construed broadly:

> Sharing to inform design and implementation of government policy and programs is permitted under subclause (1)(b). Both terms should be construed broadly, using their ordinary meaning. For instance, a 'government policy' is a rule or principle that guides government decisions, usually related to a specific topic such as education. Similarly, a 'government program' refers to an organised system of services, activities, or opportunities to achieve a goal or outcome. [13]

1.15 The committee notes that a broad construction of the permitted purposes for data sharing risks interpretations which may unduly trespass on privacy. The bill seeks to manage this risk in paragraph 15(2)(c) which enables the minister to make rules prescribing 'precluded purposes'. As noted above, the committee's view is that significant matters, such as privacy safeguards and the permissible scope for sharing personal information, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states that 'this approach is intended to manage unintended expansions or interpretations of clause 15, and to ensure the scheme continues to operate as intended and in line with community expectations.' [14]

1.16 The committee's scrutiny concerns in this regard are heightened by the breadth of the application of the bill, in particular that data may be shared with private sector entities with no requirements that the safeguards that apply to, for example, university research, apply to these entities.

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12 Explanatory memorandum, pp. 75-76.

13 Explanatory memorandum, p. 22.

14 Explanatory memorandum, p. 23.

**1.17 Given the potential impact on an individual's right to privacy as a result of the use and disclosure of personal information under the proposed data sharing scheme, the committee requests the minister's advice as to whether the bill can be amended to:**

- **include a public interest test which prioritises privacy interests in decision-making under the scheme;**
- **provide guidance on the face the bill about the circumstances in which it will be 'unreasonable or impracticable' to seek an individual's consent for sharing their personal information;**
- **require that, where possible, data that includes personal information is shared in a de-identified way;**
- **clarify the scope of the permitted data sharing purposes, and include guidance on the face of the bill about precluded purposes; and**
- **provide minimum standards for ethics approvals for private entities seeking to use data that includes personal information.**

*Review and complaint mechanisms*

1.18 The committee also notes that decisions about data sharing made by Commonwealth bodies that are data custodians under the bill will not be subject to internal or external merits review under the data sharing scheme. The explanatory memorandum states:

> Data sharing decisions by data custodians will not be reviewable on their merits under this scheme. Such decisions are best made by data custodians as they have a full understanding of the risks of and public interest in sharing their data.[15]

1.19 Noting that privacy interests may be affected by decisions made by data custodians under the scheme, it is not clear to the committee why individuals whose privacy interests may be affected should not have access to merits review. The committee notes that, as many decisions under the scheme will affect individual interests as a class, most individuals will be excluded from the initial decision making process. As discussed above, the lack of clarity around certain terms in the data sharing principles and purposes illustrates the broad scope for discretionary decision-making by the data custodians. The committee is concerned that there is a risk that individuals' interests in their personal information being kept private may not be given sufficient weight in an evaluation of public interest. Further, it does not appear that the Commonwealth entity making initial decisions with respect to sharing of data must consult experts or seek other external input.

15 Explanatory memorandum, p. 10.

1.20 The committee also notes that under the complaints mechanism established in Division 1 of Part 5.3, only data scheme entities may make a complaint. The explanatory memorandum states:

> While this mechanism is for data scheme entities, it does not prevent other entities contacting the Commissioner through administrative channels or complaining about data scheme entities' activities through existing legal mechanisms. For instance, a person may complain to the Australian Information Commissioner about mishandling of their personal information, under the Privacy Act.[16]

1.21 However, it is unclear to the committee why persons with privacy complaints must make complaints through a separate mechanism. The committee is concerned that establishing a narrowly focused complaints mechanism may result in the Data Commissioner rarely or never hearing privacy complaints, which may result in privacy concerns not being given adequate consideration in decision making under the scheme.

1.22 The committee also notes that, as similarly described above at [1.12], much of the detail about the complaints process under the data sharing scheme is left to data codes, legislative instruments made by the Data Commissioner.[17]

**1.23 The committee therefore requests the minister's advice as to why individuals whose privacy interests may be affected by the data sharing scheme should not have access to merits review and the dedicated complaints process established in Division 1 of Part 5.3.**

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## Significant penalties[18]

1.24 Clause 14 of the bill creates new criminal offences for sharing data in an unauthorised manner. The maximum penalty for both offences is imprisonment for 2 years. Subclause 104(3) also creates an offence for failing to comply with a notice to provide information or documents, which is subject to a maximum penalty of imprisonment for 12 months.

1.25 The committee's expectation is that the rationale for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited

16 Explanatory memorandum, p. 57.

17 Clause 126.

18 Clauses 14 and 104. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

through the application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a similar kind or of similar seriousness. This should include a consideration of… other comparable offences in Commonwealth legislation.'[19]

1.26 In this instance, the explanatory memorandum provides the following explanation of the penalties in both clause 14 and clause 104:

> The consequences for breach of a civil penalty or criminal offence provision in this Bill – up to 300 penalty units or up to two years imprisonment, respectively – align with similar laws and the *Guide to Framing Commonwealth Offences*. Consistent with the Guide, the Bill sets maximum penalties; a court will determine what is appropriate on a case-by-case basis. The maximums set by this clause balance the penalties in more established frameworks, such as the *Privacy Act*, with more contemporary offences for mishandling government and consumer data. This approach is in keeping with the intent for this scheme to align with other applicable frameworks, without duplicating them, as well as with community expectations.[20]

1.27 With respect to clause 104, the explanatory memorandum also states:

> Having penalties available for failure to comply with requests relating to investigations is appropriate given delays in identifying and rectifying non-compliance may have serious implications for people or things to which shared data relates. [21]

1.28 The committee acknowledges the importance of providing robust safeguards against the misuse of data under the new scheme, and notes that other Commonwealth legislation imposes comparable penalties for offences relating to the use and disclosure of sensitive data. However, given the significance of the penalties that may be imposed under proposed clauses 14 and 104 the committee would expect a comprehensive justification for the penalty in each of those provisions to be included in the explanatory memorandum.

**1.29 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the justification for the maximum penalties imposed by clauses 14 and 104.**

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19 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 39.

20 Explanatory memorandum, p. 21.

21 Explanatory memorandum, p. 63.

## Significant matters in delegated legislation[22]

1.30 The bill contains a number of clauses that provide for matters relating to the accreditation of entities under the data sharing scheme to be provided for in the rules (that is, in delegated legislation).[23] Clause 86 enables rules to be prescribed for the accreditation framework, providing for procedures, requirements and any other matters relating to the accreditation of entities for the purposes of the data sharing scheme.

1.31 The committee's view is that significant matters, such as the accreditation of entities for the purposes of sharing public sector data (which may include personal information), should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.32 The committee’s scrutiny concerns in this regard are heightened by the extent to which the bill relies on delegated legislation to determine the scope and operation of the data sharing scheme, especially in relation to privacy protections, as discussed above at [1.12] to [1.14] and [1.23].

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

- **why it is considered necessary and appropriate to leave procedures, requirements and other matters relating to the accreditation of entities for the purposes of the data sharing scheme to delegated legislation;**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

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## Broad delegation of investigatory powers[24]

1.34 Clauses 109 and 110 seek to trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014*. Subclauses 109(4) and 110(3) provide that an authorised person may be assisted by 'other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation. The explanatory memorandum does not explain the categories of 'other

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22 Clause 86. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

23 See clauses 77, 86, 137 and 139.

24 Clauses 109 and 110. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

1.35 The committee's consistent scrutiny position in relation to the exercise of coercive or investigatory powers is that persons authorised to use such powers should have the appropriate training and experience.

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

- **why it is considered necessary and appropriate to allow any 'other person' to assist an authorised person in exercising monitoring and investigatory powers; and**
- **whether the bill can be amended to require that any person assisting an authorised person have the knowledge and expertise appropriate to the function or power being carried out.**

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## Reversal of evidential burden of proof [25]

1.37 Clause 136 establishes the geographic jurisdiction of civil penalty provisions and offences in the bill, by providing that the bill may apply extraterritorially where there is a sufficient link between Australia and the matter. Proposed subclauses 136(2) and (3) provide exceptions (offence-specific defences) for foreign entities if there is no Australian connection (territorial or nationality) and the conduct is lawful in the foreign jurisdiction in which it occurred.

1.38 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[26] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.39 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in clause 136 have not been addressed in the explanatory materials.

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25 Clause 136. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

26 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

**1.40 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. 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 *Guide to Framing Commonwealth Offences*.**[27]

27 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 50-52.

# Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020

| | |
|---|---|
| **Purpose** | Schedule 1 of this bill seeks to amend the *Corporations Act 2001* to require financial services providers that receive fees under an ongoing arrangement to provide annual fee updates to clients, and to obtain written consent before such fees can be deducted from a client's account<br>Schedule 2 of this bill seeks to amend the *Corporations Act 2001* to require a providing entity to give written disclosure of lack of independence when authorised to provide personal advice to a retail client<br>Schedule 3 of this bill seeks to amend the *Superannuation Industry (Supervision) Act 1993* to provide greater protection for superannuation members against paying fees for no service |
| **Portfolio** | Treasury |
| **Introduced** | House of Representatives on 9 December 2020 |

### Significant penalties

### Significant matters in delegated legislation[28]

1.41 Item 24 of Schedule 1 seeks to add proposed section 962X to the *Corporations Act 2001* (Corporations Act) in relation to records of compliance. Proposed subsection 962X(1) provides that fee recipients must keep appropriate records to show their compliance with Division 3 of Part 7.7A of the Corporations Act; and that these records must be kept for up to five years and a failure to do so is a criminal offence.

1.42 Item 35 provides that the maximum penalty for failing to comply with proposed subsection 962X(1) is five years imprisonment.

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

28 Schedule 1, item 24, proposed section 962X; and item 35. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

1.44 In this instance, the explanatory memorandum does not provide any justification as to why it is necessary and appropriate to impose a significant maximum penalty of five years imprisonment for failure to comply with the recordkeeping obligation in proposed subsection 962X(1). Nor does it include any reference to whether this level of penalty is comparable to similar offences in other Commonwealth legislation.

1.45 Further, proposed subsection 962X(2) provides that the regulations may specify other records that the fee recipient must keep as part of the obligation set out in subsection 962X(1).

1.46 It is the committee's view is that significant matters such as recordkeeping obligations which are subject to significant penalties, as in proposed section 962X, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.47 From a scrutiny perspective, the committee is concerned that the scope and types of records that must be kept in order to comply with the recordkeeping obligation is not clear on the face of the bill, with details in relation to the records that must be kept to instead be set out in delegated legislation.

1.48 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. It is unclear to the committee why at least high-level guidance in relation to the scope and type of records that must be kept cannot be provided on the face of the bill.

**1.49 In light of the above, the committee requests the Treasurer's detailed advice as to:**

- **the justification for the significant maximum penalty that may be imposed for failing to comply with proposed subsection 962X(1), including whether this level of penalty is comparable to similar offences in other Commonwealth legislation;**
- **why it is considered necessary and appropriate to leave the scope of recordkeeping obligations which are subject to significant penalties to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding the scope and type of records that must be kept on the face of the primary legislation.**

# Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *Migration Act 1958* to provide a framework to protect confidential information against unauthorised disclosure where that information has been provided by a law enforcement or intelligence agency to an authorised Commonwealth officer for consideration in a character test-based visa decision<br>This bill further seeks to amend the *Australian Citizenship Act 2007* to create a framework for the disclosure of confidential information provided by gazetted law enforcement and intelligence agencies for consideration in character related citizenship decisions |
| **Portfolio** | Home Affairs |
| **Introduced** | House of Representatives on 10 December 2020 |

## Adequacy of judicial review

## Significant matters in delegated legislation[29]

1.50 In *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 (*Graham*), the High Court held that the minister cannot be prevented from being required to divulge certain information to the High Court or to the Federal Court of Australia in order to review a purported exercise of power by the Minister to refuse or cancel a visa on character grounds, or revoke or set aside such a decision under sections 501, 501A, 501B and 501C of the *Migration Act 1958* (the Migration Act). The High Court held that the practical effect of the relevant secrecy provisions was to deny the Court the ability to fulfil its judicial review function under paragraph 75(v) of the Constitution of making a determination about whether or not legislatively imposed conditions of, and constraints on, a lawful exercise of power had been observed. The constitutional issue identified by the Court was that the provision imposed a 'blanket and inflexible limit' on the Court's capacity to even look at material which was, by definition, relevant to its review task — irrespective of the importance of the undisclosed material in a particular case. As the minister could base a decision in whole or in part on the protected information, the secrecy provision could operate 'to shield the purported exercise of power from judicial scrutiny'.[30] The fact that the Court could

29 The committee draws senators' attention to this matter pursuant to Senate Standing Order 24(1)(a)(iii) and (iv).

30 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 [53].

not require the 'undisclosed information' to be adduced in evidence left it in the dark as to whether the preconditions for the exercise of power were based on decisions which were reasonably reached on the material that was considered.

1.51 The amendments to the Migration Act and the *Australian Citizenship Act 2007* (the Citizenship Act) relating to the use of secret information seek to overcome this ruling by the High Court. The bill would allow the High Court, Federal Court of Australia or Federal Circuit Court to order that confidential information be produced to the court if the information was supplied by law enforcement or intelligence agencies and the information is for the purpose of the substantive proceedings.[31] If information is ordered to be produced a party can only make submissions or tender evidence with respect to the information if they are lawfully aware of the content of the information.[32] The bill would require the court to order that any party that does not qualify to make submissions relating to the information must be excluded from the hearing of those submissions, including the applicant and their legal representative.[33] After considering the information and any submissions, the court would be required to make a determination as to whether disclosing the information would create a real risk of damage to the public interest and, if so, the court must not disclose the information to any person, including the applicant and their legal representative.[34] In deciding whether such a risk exists, the court would be required to only have regard to the list of matters set out in the bill, which includes the protection and safety of informants; Australia's relations with other countries; Australia's national security; and any other matters specified in regulations.[35] The bill would permit the court to give such weight to the information as it considers appropriate in the circumstances, having regard to any submission made regarding the use of the information.[36]

1.52 As was emphasised by the High Court in *Graham*, a provision will be held inconsistent with section 75(v) of the Constitution to the extent it has the legal or practical operation of denying the court the ability to enforce the limits which Parliament has set on decision-making powers granted by the Parliament and this will be a question of substance and degree. The proposed scheme for allowing decisions to be based on secret information is more flexible than the one invalidated in *Graham*

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31 Schedule 1, item 3, proposed subsection 52C(1) and item 9, proposed subsection 503C(1).

32 Schedule 1, item 3, proposed subsection 52C(3) and item 9, proposed subsection 503C(3). A person must not become aware of the content of the information unlawfully or by way of an action for breach of confidence.

33 Schedule 1, item 3, proposed subsection 52C(4) and item 9, proposed subsection 503C(4).

34 Schedule 1, item 3, proposed subsections 52C(5)–(6) and item 9, proposed subsections 503C(5)–(6).

35 Schedule 1, item 3, proposed subsection 52C(5) and item 9, proposed subsection 503C(5).

36 Schedule 1, item 3, proposed subsection 52C(7) and item 9, proposed subsection 503C(7).

insofar as the Court is entitled to require the information be produced to it and to give that information such weight as it considers appropriate.

1.53 Nevertheless, the committee notes that the court has no flexibility to seek any feedback from the applicant to assist in performing its judicial review task. The exhaustive list of matters which are relevant to a judicial determination of whether or not there is a real risk to the public interest do not allow the court to balance that risk against the possibility that the applicant may be able to assist the court in the proper exercise of its judicial review function by responding to the secret information or aspects of that information. Nor does it appear that the court is able to disclose part of the secret information (such as the gist of the information or a discrete element of the information) even in circumstances where a partial disclosure could assist the court without creating a real risk of damage to the public interest. The committee is concerned that the provisions in the bill may continue to operate to undermine the practical efficacy of judicial review in many cases.

**1.54 In light of the committee's scrutiny concerns outlined above, the committee requests the minister's advice as to:**

- **whether the bill can be amended to allow the court to disclose part of the secret information in circumstances where partial disclosure could be achieved without creating a real risk of damage to the public interest;**
- **whether the gazetted intelligence and law enforcement agencies which may make use of the proposed scheme should be outlined in primary legislation or at least in delegated legislation subject to parliamentary disallowance, given the importance of balancing the constitutional right of an individual to meaningful judicial review with the interest of keeping certain information connected with law enforcement secret;**
- **whether proposed subsection 52C(5) of the *Australian Citizenship Act 2007* and proposed subsection 503C(5) of the *Migration Act 1958* could be amended to provide that the list of matters relevant to assessing the risk to the public interest is non-exhaustive;**
- **the appropriateness of allowing 'other matters' relevant to assessing the risk to the public interest to be specified in regulations; and**
- **whether, given the effect the secrecy provisions may have on the practical ability of the court to ensure power is exercised subject to jurisdictional limitations, proposed subsection 52B(8) of the *Australian Citizenship Act 2007* and proposed subsection 503B(8) of the *Migration Act 1958* can be amended to provide that the minister has an obligation to consider the exercise of the power to allow disclosure of information supplied by law enforcement or intelligence agencies, including to specified tribunals undertaking merits review of relevant decisions.**

## Parliamentary scrutiny[37]

1.55 Item 3 of Schedule 1 to the bill seeks to insert proposed section 52A into the *Australian Citizenship Act 2007*, to set out the information that is to be protected under the new protected information framework. Proposed subsection 52A(3) provides that an officer or minister who receives confidential gazetted agency information must not be required to produce or give the information to, or in evidence to, a parliament or parliamentary committee. Confidential gazetted agency information is information that is communicated to an authorised Commonwealth officer by a gazetted intelligence or law enforcement agency on condition that it be treated as confidential information.

1.56 Item 9 of Schedule 1 to the bill seeks to insert proposed section 503A into the *Migration Act 1958*, which mirrors proposed section 52A of the *Australian Citizenship Act 2007*.

1.57 The explanatory memorandum generally explains that it is important for the Department of Home Affairs to 'maintain robust information and intelligence-sharing relationships with gazetted agencies both domestically and internationally',[38] but does not at all address why it is necessary for the bill to prevent confidential gazetted agency information from being provided to a parliament or a parliamentary committee which would constitute a significant curtailment of the power of parliament.

1.58 The committee is concerned that proposed subsections 52A(3) and 503A(3) would have the effect of limiting parliamentary scrutiny and the Parliament's ability to review or oversee executive decision making. The committee notes that the Senate already has well-established processes in which the executive may make claims for public interest immunity where ministers or officials consider that they have grounds for withholding information from the Senate or a Senate committee.[39] Therefore, from a scrutiny perspective, the committee considers that it is inappropriate to prescribe a blanket prohibition on the disclosure of confidential gazetted agency information to a parliament or parliamentary committee, with such issues more appropriately being determined on a case-by-case basis by the Senate.

**1.59 In light of the above, the committee requests that proposed subsection 52A(3) of the *Australian Citizenship Act 2007* and proposed subsection 503A(3) of the *Migration Act 1958* be amended to omit the prohibition**

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37 Schedule 1, item 3, proposed subsection 52A(3) and item 9, proposed subsection 503A(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

38 Explanatory memorandum, p. 10, para 25.

39 Rosemary Laing (ed), *Odgers' Australian Senate Practice*, 14th ed, 2016, pp. 643-670.

**on the production or giving of confidential gazetted agency information to 'a parliament or parliamentary committee'.**

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## Evidentiary certificates
## Natural justice[40]

1.60 Item 3 of Schedule 1 seeks to insert proposed section 52A into the Citizenship Act. Proposed subsection 52A(4) provides that the hearsay rule does not apply to evidence that is given for the purposes of establishing that information is covered by proposed subsection 52A(1).[41] Item 9 of Schedule 1 seeks to insert mirroring proposed subsection 503A(4) into the Migration Act in relation to information covered under proposed subsection 503A(1).

1.61 Proposed subsection 52A(5) provides that a certificate signed by an authorised officer that states that information was communicated to that officer by an undisclosed gazetted agency is prima facie evidence of the matters stated in the certificate. Item 9 of schedule 1 seeks to insert mirroring proposed subsection 503A(5) into the Migration Act.

1.62 Item 3 of Schedule 1 seeks to insert proposed subsection 52B(9) into the Citizenship Act, to provide that the rules of natural justice do not apply to the consideration or exercise of the power under proposed subsection 52B(1) relating to a ministerial declaration to allow the disclosure of information. Item 9 of Schedule 1 seeks to insert a mirroring proposed subsection 503B(9) into the Migration Act.

1.63 Item 5 of Schedule 2 seeks to insert proposed section 52J into the Citizenship Act, to provide that proposed sections 52G and 52H are exhaustive statements of the natural justice hearing rule in relation to the information or documents to which those sections apply, for the purposes of the review of a decision by the Administrative Appeals Tribunal (AAT). Proposed section 52G provides that the Secretary must not give a document or information to the AAT in relation to the review of a decision if the minister certifies that such a disclosure would be contrary to the public interest. Proposed section 52H provides that the AAT may have regard to such a determination and any relevant written advice provided by the secretary but can make its own determination as to whether to disclose any matter contained in the document or information to the applicant or any other person who has given evidence to the AAT in relation to the decision.

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40 Schedule 1, item 3, proposed subsections 52A(4), (5) and (7), and proposed subsection 52B(9), item 9, proposed subsection 503A(4), (5) and (7), and proposed subsection 503B(9), and Schedule 2, item 5, proposed section 52J. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

41 Proposed subsection 54A(1) sets out the scope of information that is considered protected information under the new framework.

*Evidentiary certificates (proposed subsections 52A(5) and 503A(5))*

1.64 The *Guide to Framing Commonwealth Offences* states, in relation to conclusive evidentiary certificates, that requiring courts to exclude evidence to the contrary in this way can destroy any reasonable chance to place the complete facts before the court.[42] The *Guide to Framing Commonwealth Offences* further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'.[43]

1.65 The fact that information was not provided by a gazetted intelligence or law enforcement agency may be one of the few substantive bases for review under the new protected information framework. As a result, the committee has significant scrutiny concerns regarding the use of such certificates in this instance. The committee notes that the explanatory memorandum provides little additional information to explain and justify the inclusion of these proposed subsections in the bill.

*Natural justice (proposed subsections 52B(9) and 503B(9) and proposed section 52J)*

1.66 In addition, the committee notes that the natural justice hearing rule, which requires that a person be given an opportunity to present their case, is a fundamental common law principle and if it is to be abrogated or limited this should be thoroughly justified in a bill's explanatory memorandum. The committee also notes that the courts have consistently interpreted procedural fairness obligations flexibly based on specific circumstances and the statutory context. If it could, in the circumstances of a particular case, be demonstrated that specified information may be disclosed, then the rules of natural justice may require no more than a consideration of the extent to which it is possible to give notice to the affected person and how much (if any) detail of the reasons for the proposed decision should be disclosed.[44] The explanatory materials do not address why this level of flexibility would not adequately deal with situations where it would be impractical or inappropriate to grant a reasonable opportunity to be heard.

1.67 Specifically, the committee is concerned that proposed subsection 52B(9) and proposed subsection 503B(9) provide that the rules of natural justice do not apply to the consideration or exercise of the power for the minister to make a declaration to allow the disclosure of information. In this regard the committee notes that the explanatory memorandum does not justify why this is necessary or appropriate.

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42 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*,
September 2011, p. 55.

43 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 55.

44 For example, see *Leghaei v Director General of Security* [2005] FCA 1576; [2007] FCAFC 27.

1.68 In addition, the committee is concerned that proposed section 52J seeks to limit the rules of natural justice in relation to review of decisions by the AAT. In this regard the explanatory memorandum fails to explain the operation and effect of proposed subsection 52J and does not justify why it is considered necessary and appropriate.

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

- **why it is considered necessary and appropriate for evidentiary certificates to be prima facie evidence of the fact that information was communicated to an officer by a gazetted intelligence or law enforcement agency;**
- **why it is considered necessary and appropriate to provide that the rules of natural justice do not apply to the consideration or exercise of the power for the minister to make a declaration to allow the disclosure of information; and**
- **why it is considered necessary and appropriate for proposed section 52J to provide that proposed sections 52G and 52H are exhaustive statements of the natural justice hearing rule in relation to review of a decision by the Administrative Appeals Tribunal.**

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## Significant matters in delegated legislation[45]

1.70 Item 3 of Schedule 1 seeks to insert proposed paragraph 52C(5)(h) into the Citizenship Act. This would provide that regulations made under the bill may specify additional matters that the court may have regard to when determining whether disclosing information would create a real risk of damage to the public interest. Item 9 of Schedule 1 seeks to insert mirroring proposed paragraph 503C(5)(h) into the Migration Act.

1.71 The committee's view is that significant matters, such as the matters that may be considered by the court in relation to information and evidence disclosed on review, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is considered necessary to allow such significant matters to be set out in delegated legislation, for either provision.

1.72 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

45 Schedule 1, item 3, proposed paragraph 52C(5)(h) and item 9, proposed paragraph 503C(4)(h). The committee draws senators’ attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

**1.73 In light of the above, the committee requests the minister's detailed advice as to why it is considered necessary and appropriate to leave matters relevant to the court's determination of whether to disclose information for judicial review to delegated legislation.**

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## Broad delegation of administrative powers[46]

1.74 Item 7 of Schedule 2 seeks to insert proposed subsection 53(3) into existing section 53 of the Citizenship Act. This would provide that the secretary may delegate in writing all or any of their powers or functions under the Act or the regulations.

1.75 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.76 In this regard, the explanatory memorandum states:

> This item inserts new subsection 53(3) to establish a power for the Secretary of the Department to delegate (by writing) any of the Secretary’s functions or powers under the Citizenship Act or the Citizenship Regulation. This would apply to the Secretary’s powers and functions under the new non-disclosure certificate provisions being inserted by this Bill. The only other powers or functions in the Act provided to the Secretary are also conferred on relevant employees of the Department so the power to delegate would not be relevant to those powers and functions. The ability for the Secretary’s powers in relation to non-disclosure certificates to be delegated will align with similar provisions in the Migration Act regarding processes for non-disclosure certificates. The number of cases seeking merits review on the basis of a refusal of citizenship application is envisioned to be on a scale where delegation would be appropriate for the foreseeable future. The delegation of the Secretary’s obligations in new sections 52G and 52H is also appropriate given that the obligations include obligations of an administrative nature, for example, giving documents to the AAT which the Minister has relevantly certified and notifying the AAT of the application of section 52H. For this reason, it is not considered necessary to limit the delegation of the Secretary’s powers to SES staff within the Department.

46 Schedule 2 item 7 proposed subsections 53(3) and (4). The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

> Relevant training and guidance will also be provided to delegates to ensure the integrity of this process.
>
> This item also inserts new subsection 53(4). New subsection 53(4) expressly provides that section 53 of the Australian Border Force Act 2015 (the ABF Act) does not apply in relation to a function or power under the Citizenship Act. Although section 53 of the ABF Act establishes a power for the Secretary to delegate any of his or her functions or powers under a law of the Commonwealth, the purpose of this amendment is to give primacy to the delegation powers in amended section 53 of the Citizenship Act, for the purposes of that Act.[47]

**1.77 In light of the detailed information provided in the explanatory memorandum in relation to training and guidance for delegates, the committee makes no further comment on this matter.**

47 Explanatory memorandum, p. 41, paras 173-174.

# Regulatory Powers (Standardisation Reform) Bill 2020

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|---|---|
| **Purpose** | This bill seeks to amend various Acts in order to implement the *Regulatory Powers Act (Standard Provision) Act 2014*, in order to simplify and streamline regulatory powers across the Commonwealth statute book and represent best practice regulation |
| **Portfolio** | Attorney-General |
| **Introduced** | House of Representatives on 3 December 2020 |

## Privacy

## Coercive powers[48]

1.78 Item 5 of Schedule 1 seeks to extend the monitoring powers under the *Regulatory Powers (Standard Provisions) Act 2014* to allow them to be exercised in relation to 'a matter to which an Act or a legislative instrument relates'. The monitoring powers in that Act include coercive powers such as powers of entry and inspection which may unduly impact the privacy of individuals.

1.79 The explanatory memorandum explains:

> Currently, monitoring powers under the Regulatory Powers Act are confined to determining compliance with a provision or the correctness of information given in compliance with a provision. The changes allow Regulatory Powers Act monitoring powers to be exercised in relation to other matters (for example, whether or not a circumstance exists). The matters subject to monitoring would be specified in the Act triggering the Regulatory Powers Act in the same way as a provision or type of information is currently specified as being subject to monitoring. [49]

1.80 The statement of compatibility states that 'the power to monitor matters is necessary for the purposes of an effective monitoring scheme', and outlines a number of existing safeguards in the Act in relation to privacy.[50] However, the explanatory materials do not provide further explanation of how the ability to exercise monitoring in relation to 'a matter' will increase the effectiveness of the scheme, or examples of the types of 'matters' in relation to which the powers will be exercised.

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48 Schedule 1, item 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

49 Explanatory memorandum, p. 38.

50 Statement of compatibility, p. 8.

**1.81 The committee requests the minister's further advice as to the justification for expanding the application of the monitoring powers in the *Regulatory Powers (Standard Provisions) Act 2014* to allow them to be exercised in relation to 'a matter'.**

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## Strict liability offences[51]

1.82 Item 3 of Schedule 4 seeks to repeal subsections 93(2) and (3) of the *Fisheries Management Act 1991* to remove the defence of reasonable excuse from the offence contained in subsection 93(1) of that Act and to make the offence one of strict liability. Item 2 seeks to amend subsection 93(1) to provide that the offence carries a penalty of 30 penalty units. The explanatory memorandum provides no justification as to why the offence has been amended to make it subject to strict liability.

1.83 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[52]

**The committee requests the minister's advice as to the justification for the proposed amendment to section 93 of the *Fisheries Management Act 1991*, to provide that the offence will be a strict liability offence, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[53]**

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51 Schedule 4, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

52 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

53 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

## Use of force[54]

1.84 The bill seeks to amend a number of Acts to trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) in relation to the provisions of those Acts. These monitoring and investigation powers include coercive powers such as powers of entry and inspection.

1.85 Item 2 of Schedule 2 seeks to amend the *Defence Force Discipline Act 1982*. Proposed subsection 101ZAB(12) provides that in executing an investigation warrant under Part 3 of the Regulatory Powers Act, an authorised person and a person assisting the authorised person may use such force against things as is necessary and reasonable in the circumstances.

1.86 Item 12 of Schedule 3, and item 4 of schedule 7 seek to include similar provisions in the *Education Services for Overseas Students Act* (in relation to Parts 2 and 3 of the Regulatory Powers Act) and *Tobacco Plain Packaging Act 2011* (in relation to Part 2 of that Act).

1.87 The committee notes that the *Guide to Framing Commonwealth Offences* states that the inclusion in a bill of any use of force power for the execution of warrants should only be allowed where a need for such powers can be identified. It states that a use of force power should be accompanied by an explanation and justification in the explanatory memorandum and a discussion of proposed accompanying safeguards that the agency intends to implement.[55]

1.88 In relation to the *Defence Force Discipline Act 1982*, the explanatory memorandum states:

> It is necessary to modify the standard investigation provisions to allow authorised persons and persons assisting authorised persons to use of force against things, as an authorised person executing an investigation warrant may need to open locked doors, cabinets, drawers and other similar objects, as well as electronic equipment, that the authorised person reasonably suspects contain things or information that would provide evidence that provisions subject to investigation (service offences) have been contravened. This power is important in the military context where evidential material must be urgently secured. Evidential material related to

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54 Schedule 2, item 2, proposed subsection 101ZAB(12) of the *Defence Force Discipline Act 1982*; Schedule 3 item 12, proposed subsections 130(14) and 131(12) of the *Education Services for Overseas Students Act 2000*; Schedule 7, item 4, proposed subsection 51A(11) of the *Tobacco Plain Packaging Act 2011*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

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

service offences may include weapons or explosives, may be classified, or may otherwise adversely affect defence or national security.[56]

1.89 The explanatory memorandum provides similar explanations for the other provisions allowing for the use of force against things.[57]

1.90 While noting the explanations provided in the explanatory memorandum, the committee notes that no information has been provided as to the persons who will be authorised to use force against things, including whether they will be required to have appropriate training and experience.

1.91 Further the explanatory memorandum does not explain the categories of 'other persons' who may be assist an authorised officer and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

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

- **the training, qualifications or experience of the various 'authorised officers' who are authorised to used force against things under the bill;**
- **why it is necessary to confer powers to use force against things on any 'other person' to assist an authorised person; and**
- **whether the bill can be amended to require that all persons authorised to use force must have appropriate expertise and training.**

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## Broad delegation of investigatory powers[58]

1.93 As noted above, the bill seeks to trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) in relation to the provisions of amend a number of Acts.

1.94 Item 2 of Schedule 2 inserts new subsection 101ZAB(11) into the *Defence Force Discipline Act 1982* which provides that an authorised person may be assisted by 'other persons' in exercising powers or performing functions or duties in relation to investigation. Item 12 of Schedule 3, item 12 of Schedule 5, item 2 of Schedule 6, and item 4 of Schedule 7 seek to include identical provisions in the *Education Services for*

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56 Explanatory memorandum, p. 49-50.

57 Explanatory memorandum, pp. 68-69, 70-71 and 121-122.

58 Schedule 2, item 2, proposed subsection 101ZAB(11), *Defence Force Discipline Act 1982*; Schedule 3, item 12, proposed subsections 130(13) and 131(11), *Education Services for Overseas Students Act 2000*; Schedule 5, item 12, proposed subsections 115(12) and 116(11) *Tertiary Education Quality and Standards Agency Act 2011*; Schedule 6, item 2, proposed subsection 25C(11), *Tobacco Advertising Prohibition Act 1992*; Schedule 7, item 4, proposed subsection 51A(12) *Tobacco Plain Packaging Act 2011*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

*Overseas Students Act*, *Tertiary Education Quality and Standards Agency Act 2011*, *Tobacco Advertising Prohibition Act 1992*, and *Tobacco Plain Packaging Act 2011* in relation to either or both of the monitoring and investigation powers in the Regulatory Powers Act.

1.95 The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers in relation to any of the proposed amendments, and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

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

- **why it is considered necessary and appropriate to allow any 'other person' to assist an authorised person in exercising monitoring and investigatory powers; and**
- **whether the bill can be amended to require that any person assisting an authorised person have the expertise appropriate to the function or power being carried out.**

# Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020

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|---|---|
| **Purpose** | This bill seeks to amend the *Surveillance Devices Act 2004*, the *Crimes Act 1914* and associated legislation to introduce new law enforcement powers to enhance the ability of the Australian Federal Police and the Australian Criminal Intelligence Commission to combat online serious crime |
| **Portfolio** | Home Affairs |
| **Introduced** | House of Representatives on 3 December 2020 |

## Coercive powers

### Privacy[59]

1.97 The bill seeks to amend the *Surveillance Devices Act 2004* (SD Act), the *Crimes Act 1914* (Crimes Act) and associated legislation to introduce three new types of warrants available to the Australian Federal Police (AFP) and the Australian Criminal Intelligence Commission (ACIC) for investigating and disrupting online crime. These are:

- data disruption warrants, which enable the AFP and the ACIC to modify, add, copy or delete data for the purposes of frustrating the commission of serious offences online;
- network activity warrants, which permit access to devices and networks used by suspected criminal networks, and
- account takeover warrants, which provide the AFP and the ACIC with the ability to take control of a person's online account for the purposes of gathering evidence to further a criminal investigation.

1.98 In addition to authorising the doing of specified things in relation to a target computer, a data disruption warrant or network activity warrant may also authorise entering specified premises (or other premises to gain access to the specified premises), removing a computer, adding, copying or deleting certain data and intercepting certain communications. Network activity warrants may authorise the use of a surveillance device. The warrants must also authorise the use of force against persons and things necessary and reasonable to do the things specified in the

59 Schedules 1 to 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

warrants, and authorise anything reasonably necessary to be done to conceal the fact that any thing has been done under the warrants.

1.99 The committee considers that the authorisation of coercive search powers has the potential to unduly trespass on personal rights and liberties. Indeed, the need to properly scrutinise entry, search and seizure powers was the basis on which the Senate in 1978 moved towards establishing this committee.[60] As such, the committee considers it essential that legislation enabling coercive search powers be tightly controlled, with sufficient safeguards to protect individual rights and liberties.

***Authorisation of coercive powers***

*Issuing authority*

1.100 As noted above, Schedules 1 and 2 to the bill propose to allow the AFP and ACIC to apply for data disruption and network activity warrants under the SD Act. Proposed subsections 27KA(2) and 27KK(3)[61] provide that an application for such a warrant may be made to an eligible judge or to a nominated member of the Administrative Appeals Tribunal (AAT). Section 13 of the SD Act provides that a nominated AAT member can include any member of the AAT, including full time and part-time senior members and general members. Part-time senior members and general members can only be nominated if they have been enrolled as a legal practitioner for at least five years.

1.101 The committee has had a long-standing preference that the power to issue warrants authorising the use of coercive or intrusive powers should only be conferred on judicial officers. In light of the extensive personal information that could be covertly accessed, copied, modified or deleted from an individual's computer or device, the committee would expect a detailed justification to be given as to the appropriateness of conferring such powers on AAT members, particularly part-time senior members and general members. In this instance, the explanatory memorandum provides no such justification.

*Time period for warrants*

1.102 The committee's scrutiny concerns in this regard are heightened by the significant time period that an initial warrant has effect (90 days),[62] and the ability to

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60 Senate Standing Committee on the Scrutiny of Bills, *Twelfth Report of 2006: Entry, Search and Seizure Provisions in Commonwealth Legislation,* 4 December 2006, p. 317.

61 Schedule 1, item 13 and Schedule 2, item 9.

62 Proposed subsections 27KD(2) and 27KN(2) of the *Surveillance Devices Act 2004*, and section 3ZZUQ of the *Crimes Act 1914*.

continue to extent warrants beyond this period.[63] The explanatory memorandum notes, in relation to data disruption warrants, that a 90-day period:

> …is in line with the period of effect for surveillance device warrants and computer access warrants. This length of time is intended to allow long-term operations that could be complex, involve multiple linked targets, and involve a combination of warrants as part of the operation, such as the initial period of surveillance with the authority to disrupt data during that time where necessary. [64]

1.103 In relation to network access warrants, the explanatory memorandum merely states that the time period is consistent with the period in which a computer access warrant may be in effect,[65] and there is no explanation in the explanatory memorandum for specifying the same period for account takeover warrants.

*Mandatory considerations*

1.104 The bill provides that in considering whether to grant a warrant, the judge, AAT member or magistrate must have regard to specific considerations, including the nature and gravity of the alleged offences; the likely value of the intelligence or evidence to be obtained; the likelihood that the doing of the thing specified in the warrant would be effective in preventing, detecting or frustrating the alleged offence; and the existence of any alternative means of realising the intention of the warrant.[66] With respect to a network activity warrant, the issuing authority must also consider whether the things authorised by the warrant are proportionate to the likely intelligence value of any information obtained, and the extent to which the warrant will result in access to data of persons who are lawfully using the computer.[67] With respect to an account takeover warrant, the issuing authority must also have regard to the extent to which the privacy of any person is likely to be affected.

1.105 The committee notes that these mandatory considerations are important safeguards to mitigate the risk of undue trespass on an individual's privacy. However, noting the significant impact on the privacy of individuals whose information is collected or accessed under these warrants, it is unclear why privacy is a mandatory consideration in relation to account takeover warrants only and should not also apply to data disruption and network activity warrants. Similarly, it is unclear why issuing authorities must not consider whether the warrant is proportionate having regard to

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63 Proposed sections 27KF and 27KQ of the *Surveillance Devices Act 2004*, and section 3ZZUS of the *Crimes Act 1914*.

64 Explanatory memorandum, p. 31.

65 Explanatory memorandum, p. 76.

66 Schedule 1, item 13, proposed subsection 27KC(2); Schedule 2, item 9, proposed subsection 27KM(2) of the *Surveillance Devices Act 2004*; Schedule 3, item 4, proposed subsection 3ZZUP(2) of the *Crimes Act 1914*.

67 Schedule 2, item 9, proposed paragraph 27KM(2)(f).

the nature and gravity of the offence and the likely value of information sought to be obtained in relation to all warrants rather than being limited to network activity warrants, as well as the extent of possible interference with the privacy of third parties (discussed further below at 1.120 to 1.136).

*Broad scope of offences*

1.106 The committee's scrutiny concerns are heightened by the broad scope of offences that may be considered 'relevant offences' for the purposes of these warrants.[68] The statement of compatibility states that the warrant schemes 'target activity of the most serious nature, including terrorism, child exploitation, drug trafficking and firearms trafficking'.[69] However, the definition of 'relevant offence' in section 6 of the SD Act includes a broad list of offences including an offence against the law of the Commonwealth or a law of a State that has a federal aspect that is punishable by a maximum term of imprisonment of 3 years or more or for life, and offences under *Financial Transaction Reports Act 1988*; *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*; *Fisheries Management Act 1991*; and *Torres Strait Fisheries Act 1984*. In addition, the regulations may prescribe additional relevant offences.[70] Similarly, the definition of 'serious Commonwealth offence' in section 15GE of the Crimes Act includes offences punishable by a maximum term of imprisonment of 3 years or more relating to, amongst other matters, tax evasion, currency violations, illegal gambling, bankruptcy and currency violations, forgery, misuse of a computer or electronic communications, or other matters prescribed by the regulations. Noting this broad range of offences, the committee considers that an explicit requirement to consider proportionality in relation to issuing each of the warrants is important to ensure that the significant coercive powers authorised under these warrants are only exercised where necessary and appropriate.

*Defects or irregularities in warrants*

1.107 The committee also notes amendments made by the bill to correct the effect of a defect or irregularity in relation to a warrant or emergency authorisation. These provisions provide that use of a surveillance device or computer access in obtaining information or a record,[71] disruption of data,[72] or information purportedly obtained under an account takeover warrant[73] is taken to be valid if but, for that defect or

68 See section 6 of the *Surveillance Devices Act 2004*, and Schedule 3, item 4, proposed section 3ZZUK of the *Crimes Act 1914*.

69 Explanatory memorandum, p. 26.

70 *Surveillance Devices Act 2004*, section 6, paragraph (e) of the definition of ***relevant offence*.**

71 See Schedule 1, item 48, and Schedule 2, item 32.

72 Schedule 1, item 49.

73 Schedule 3, item 4, proposed section 3ZZVY.

irregularity, the warrant or authorisation would be sufficient authority for the actions taken.

1.108 While the committee notes that references to defects or irregularities in these provisions broadly refer to irregularities or defects in relation to documents purporting to be warrants, or in connection with the issue or execution of warrants,[74] neither the bill nor the explanatory memorandum provide guidance on the types of defects or irregularities these provisions are intended to relate to, other than noting that they must not be 'substantial'.[75]

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

- **why the categories of persons eligible to issue data disruption and network activity warrants should not be limited to persons who hold judicial office;**[76]
- **why it is considered necessary and appropriate to issue each type of warrant for an initial 90-day period as opposed to a shorter period;** [77]
- **why the bill does not require, in relation to all warrants, that the issuing authority must consider whether the warrant is proportionate having regard to the nature and gravity of the offence and the likely value of the information or evidence sought to be obtained, as well as the extent of possible interference with the privacy of third parties;**[78] **and**
- **the nature of the defects or irregularities that will not lead to the invalidity of actions done under a purported warrant or emergency authorisation.**[79]

***Use of coercive powers without a warrant***

*Emergency authorisations*

1.110 Schedules 1, 2 and 3 to the bill set out a range of circumstances in which coercive action can be taken without a warrant, namely in emergency circumstances and in order to conceal things done to execute the warrant.

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74 See, for example, schedule 3, item 4, proposed subsection 3ZZVY(2).

75 Schedule 1, items 48 and 49, Schedule 2, item 32 and section 65, *Surveillance Devices Act 2004*, schedule 3, item 4, proposed subsection 3ZZVY(2).

76 Schedule 1, item 13, proposed subsection 27KA(2) and Schedule 2, item 9, proposed subsection 27KK(2) *Surveillance Devices Act 2004*.

77 Schedule 1, item 13, proposed subsection 27KD(2) and Schedule 2, item 9, proposed subsection 27KN(2) *Surveillance Devices Act 2004*, and Schedule 3, item 4, proposed subsection 3ZZUQ(3) *Crimes Act 1914*.

78 Schedule 1, item 13, proposed subsection 27KC(2); Schedule 2, item 9, proposed subsection 27KM(2) *Surveillance Devices Act 2004*; Schedule 3, item 4, proposed subsection 3ZZUP(2) *Crimes Act 1914*.

79 Schedule 1, items 48 and 49, Schedule 2, item 3, Schedule 3, item 4, proposed subsection 3ZZVY(2).

1.111 Proposed subsection 28(1C) of the SD Act and section 3ZZUX of the Crimes Act seek to allow law enforcement officers to apply to an appropriate authorising officer for an emergency authorisation for disruption of data or taking control of an online account if the officer reasonably suspects that there is an imminent risk of serious violence to a person or substantial damage to property, disruption to data or taking control of the account is immediately necessary to deal with the risk, the circumstances are serious and urgent, and it is not practicable to apply for a data disruption or account takeover warrant.[80] 'Appropriate authorising officer' is defined in section 6A of the SD Act and proposed section 3ZZUM of the Crimes Act and includes the head or deputy head of the agency, but also certain executive level officers.

1.112 Within 48 hours after an emergency authorisation is given, the appropriate authorising officer must apply to a judge or nominated AAT member, or magistrate (in relation to account takeover warrants) for approval of the giving of the emergency authorisation.[81] However, if the judge, AAT member or magistrate refuses to approve the emergency authorisation, in making an order as to how information obtained under an invalid authorisation is to be dealt with, proposed subsections 35B(4) SD Act and 3ZZVC(4) *Crimes Act* provide that the manner of dealing with the information must not involve the destruction of that information.[82]

1.113 As data disruption and account takeover warrants can involve significant coercive and intrusive powers (for example, the ability to covertly access, modify, copy, delete or disrupt data held on particular computers, enter premises and use force), the committee is particularly concerned that such powers only be authorised under a warrant issued by a judicial officer. Allowing a law enforcement agency to authorise its own actions under an emergency authorisation has the potential to unduly trespass on the right to privacy, and as such the committee would expect the explanatory materials to provide a detailed justification for such provisions. In this instance, the statement of compatibility provides no such justification, and the explanatory memorandum merely states, in relation to account takeover warrants:

> This provision establishes a high threshold, characterised by urgency, immediacy and seriousness, for an emergency authorisation to be issued. However, in the emergency situations in which these circumstances exist, emergency authorisations will allow law enforcement officer to respond quickly and effectively to criminal activity. [83]

1.114 Further, no information is provided as to when it may be impractical to apply to a judge or nominated AAT member (noting that proposed sections 27KB of the SD

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80 Schedule 1, item 15 and Schedule 3, item 4, proposed section 3ZZUX.

81 See section 33 of the *Surveillance Devices Act 2004* and Schedule 3, item 4, proposed section 3ZZVA of the *Crimes Act 1914*.

82 Schedule 1, item 23 and Schedule 3, item 4, proposed subsection 3ZZVC(4).

83 Explanatory memorandum, p. 162.

Act and 3ZZUN of the *Crimes Act* would allow an application for a warrant to be made by telephone, fax, email or any other means of communication).[84]

1.115 In relation to the use of information obtained under an emergency authorisation, the explanatory memorandum states that the judge, AAT member or magistrate 'may not order that such information be destroyed because such information, while improperly obtained, may still be required for a permitted purpose, such as an investigation'.[85]

1.116 The committee notes that retaining evidence obtained improperly for investigative purposes has serious implications for personal rights and liberties. It is possible that authorisations might be improperly made with the knowledge that the information could still be retained for an investigation. It is not clear to the committee that the explanatory memorandum provides sufficient justification for retaining information coercively and covertly obtained by a law enforcement officer in circumstances that have not been approved by a judge, AAT member or magistrate.

*Actions to conceal things done under warrants*

1.117 Schedules 1, 2 and 3 of the bill also propose to give law enforcement agencies the power to act to conceal their activities after a warrant has ceased to be in force.[86] These provisions authorise the agencies to do anything reasonably necessary to conceal the fact that anything has been done under a warrant, enter premises, remove anything to conceal things, add, copy, delete or alter data and intercept communications, at any time while the warrant is in force or within 28 days after it ceases to be in force. In addition, the bill provides that if concealment activities have not been done within 28 days after the warrant ceases to be in force, those things can be done at the earliest time after that 28 day period in which it is reasonably practicable.[87] In effect, it appears that these provisions allow coercive or intrusive actions to be taken which have not been authorised under an existing warrant. The explanatory memorandum states:

> The period of time provided to perform these concealment activities recognises that, operationally, it is sometimes impossible to complete this process within 28 days of a warrant expiring. The requirement that the concealment activities be performed 'at the earliest time after the 28-day period at which it is reasonably practicable to do so' acknowledges that this

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84 Schedule 1, item 13, and Schedule 3, item 4.

85 Explanatory memorandum, p. 46.

86 See Schedule 1, item 13, proposed paragraph 27KE(9)(j) *Surveillance Devices Act 2004*; Schedule 2, item 9, proposed paragraph 27KP(8)(k) *Surveillance Devices Act 2004*; Schedule 3, item 4, proposed paragraph 3ZZUR(6)(f) *Crimes Act 1914*.

87 Schedule 1, item 13, proposed paragraph 27KE(9)(k) *Surveillance Devices Act 2004*; Schedule 2, item 9, proposed paragraph 27KP(8)(l) *Surveillance Devices Act 2004*; Schedule 3, item 4, proposed paragraph 3ZZUR(6)(g) *Crimes Act 1914*.

authority should not extend indefinitely, circumscribing it to operational need.[88]

1.118 However, while the committee acknowledges there may be difficulties in knowing when the process of concealment may be complete, there are scrutiny concerns in allowing agencies to exercise coercive or intrusive powers after a warrant has ceased to be in force. The committee notes that it would be possible to have a separate statutory process for applying for a new warrant to allow the agency to carry out concealment activities, which would remove concerns about not being able to meet the statutory threshold for obtaining a new data disruption, network activity or account takeover warrant, but would ensure coercive powers are undertaken under an existing warrant.

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

- **why it is considered necessary and appropriate to enable law enforcement officers to disrupt or access data or takeover an online account without a warrant in certain emergency situations (noting the coercive and intrusive nature of these powers and the ability to seek a warrant via the telephone, fax or email);**[89]
- **the appropriateness of retaining information obtained under an emergency authorisation that is subsequently not approved by a judge or AAT member; and**[90]
- **the appropriateness of enabling law enforcement agencies to act to conceal any thing done under a warrant after the warrant has ceased to be in force, and whether the bill could be amended to provide a process for obtaining a separate concealment of access warrant if the original warrant has ceased to be in force.**[91]

***Innocent third parties***

1.120 The committee also has scrutiny concerns that the coercive powers in the bill may adversely affect third parties who are not suspected of wrongdoing.

*Entry onto third party premises*

1.121 In particular, proposed paragraphs 27KE(2)(b) and 27KP(2)(b) of the SD Act provide that a data disruption warrant or network access warrant may authorise entering 'any premises' for the purposes of gaining entry to, or exiting, the specified

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88 Explanatory memorandum, p. 39.

89 Schedule 1, item 15 and Schedule 3, item 4, proposed section 3ZZUX.

90 Schedule 1, item 23 and Schedule 3, item 4, proposed subsection 3ZZVC(4).

91 See Schedule 1, item 13, proposed paragraph 27KE(9)(j) *Surveillance Devices Act 2004*; Schedule 2, item 9, proposed paragraph 27KP(8)(k) *Surveillance Devices Act 2004*; Schedule 3, item 4, proposed paragraph 3ZZUR(6)(f) *Crimes Act 1914*.

premises. The explanatory memorandum explains that this may allow for entry into third party premises where there is no other way to gain access to the subject premises or where, for operational reasons, adjacent premises may be the best means of entry, or in emergency or unforeseen circumstances.[92] The committee notes there is nothing in the legislation that would require persons entering third party premises under these provisions to first seek the consent of the occupiers, or even announce their entry. In relation to network activity warrants, the explanatory memorandum explains:

> In line with the covert nature of surveillance, it would in many circumstances not be appropriate to notify a third party before the execution of a network activity warrant could take place as there may be significant risks to capabilities and methodology, and risks to operations if third parties were required to be notified. [93]

*Access to third party computers, communications in transit and account-based data*

1.122 In addition, proposed paragraphs 27KE(2)(e) and 27KP(2)(e) of the SD Act provide that a data disruption warrant or network access warrant may authorise using any other computer or a communication in transit to access and disrupt relevant data and, if necessary to achieve that purpose, to add, copy, delete or alter data in the other computers or communications in transit. Proposed paragraph 3ZZUR(2)(d) of the Crimes Act similarly provides that an account takeover warrant may use a communication in transit for the purpose of taking control of the target account. These things can be done if, having regard to other methods to effectively obtain access, it is considered reasonable to do so. The explanatory memorandum states that this 'ensures that the AFP and ACIC can effectively use a third party computer or a communication in transit'.[94] In relation to network activity warrants, the explanatory memorandum states:

> In recognition of the potential privacy implications for third parties, the eligible Judge or nominated AAT member must have regard to any other method of obtaining access to the relevant data which is likely to be as effective. The eligible Judge or nominated AAT member must consider this before authorising the use of a third party's computer under a network activity warrant. This consideration… ensures that the issuing authority must take into account the circumstances before him or her and balance the impact on privacy against the benefit to the intelligence operation.[95]

1.123 However, the committee notes that proposed paragraph 27KE(2)(e) and paragraph 27KP(2)(e) do not specifically require the judge or nominated AAT member to consider the privacy implications for third parties of accessing third party computers

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92 Explanatory memorandum, p. 34.

93 Explanatory memorandum, p. 77.

94 Explanatory memorandum, p. 35.

95 Explanatory memorandum, p. 78.

or communications in transit. As described above at 1.105, it is unclear why privacy is a mandatory consideration only in relation to account takeover warrants only and should not also apply to data disruption and network activity warrants.

1.124 Account takeover warrants may also authorise access to account-based data, and adding, copying deleting or altering account credentials or data in a computer, if this is necessary for the purpose of taking control of the target account.[96]

1.125 The explanatory memorandum explains:

> The mobile nature of communications requires law enforcement to access data associated with the use of an account for the purposes of taking control of the account under an account takeover warrant. For example, it is feasible that a broad range of people may be using an account to conduct illegal activity, or a person of interest is using the accounts of others to conduct illegal activity. It will often be necessary to access account-based data when seeking to take control of an account to, for example, determine when an account is being used and by whom. The ability to access account-based data is important in facilitating the effective execution of an account takeover warrant. [97]

1.126 From a scrutiny perspective, the committee is concerned that these coercive search powers authorise the collection of potentially substantial amounts of personal data of persons who are not the subject of the warrant.

*Compelling third parties to provide information*

1.127 Schedules 1 to 3[98] also introduce or amend existing provisions that make it an offence for a person not to comply with an assistance order. An assistance order can be made by a judge or AAT member (or, in the case of account takeover warrants, a magistrate), and it can provide, dependent on the relevant warrant, that any specified person is required to provide any information or assistance that is reasonable or necessary to allow the relevant officer to disrupt, access, copy or convert data held in any target computer or relevant device or take control of an online account.

1.128 Assistance orders can be made in relation to the person who is suspected of the relevant activity, but can also be made against the following persons, so long as they have relevant knowledge of the target computer or device or related computer network or measures used to protect data in that computer or device:

- the owner or lessee of the computer or device;
- an employee or contractor of the owner or lessee of the computer or device;

96 Schedule 3, item 4, proposed section 3ZZUR, *Crimes Act 1914*.

97 Explanatory memorandum, p. 156.

98 Schedule 1, item 47; Schedule 2 items 30 and 31; Schedule 3, item 4 (proposed section 3ZZVG of the *Crimes Act 1914*).

- any person who uses or has used the computer or device; or
- a person who is or was a system administrator for the system including the computer or device.

1.129 A person who is capable of complying with the order but fails to do so would be subject to significant penalties of up to ten years imprisonment, or 600 penalty units, or both. These provisions could result in a person not suspected of any wrongdoing being compelled to provide information which could lead to access to their own personal information held on a computer or device, or in relation to an online account. The committee reiterates that it expects explanatory materials to provide a strong justification when introducing or expanding coercive or intrusive powers that could have a substantial impact on innocent third parties. However, in this instance, the explanatory materials provide limited justification for impacting on the privacy of third parties in this way.

1.130 The criteria for granting assistance orders include:

- the disruption of data is likely to substantially assist in frustrating the commission of the offences that are covered by the warrant, and is justifiable and proportionate, having regard to the offences (data disruption warrants);[99]
- there are reasonable grounds for suspecting that access to data will substantially assist in the collection of intelligence that relates to a criminal network of individuals and is relevant to the prevention, detection or frustration of a relevant offence (network activity warrants);[100] or
- there are reasonable grounds for suspecting that taking control of the account is necessary for the purpose of enabling evidence to be obtained of the commission of the alleged relevant offence (account takeover warrants).[101]

1.131 The committee notes that, in relation to a data disruption warrant, the criterion that disruption of data held in the computer is justifiable and proportionate, having regard to the offences, may operate as a form of a safeguard against undue trespass on the privacy of third parties subject to an assistance order. However, it is unclear why the issuing authority is not required to be satisfied of this criterion with respect to assistance orders relating to all warrants.

1.132 The committee's scrutiny concerns in this regard are heightened by the ability for assistance orders to be made in relation to emergency authorisations for disruption of data or an account takeover, which allow the use of significant coercive or intrusive

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99 Schedule 1, item 47, proposed subsection 64B(2).

100 Schedule 2, item 31, proposed paragraph 64A(6A)(a) of the *Surveillance Devices Act 2004*.

101 Schedule 3, item 4, proposed paragraph 3ZZVG(2)(a) of the *Crimes Act 1914*.

powers without judicial authorisation.[102] The committee's scrutiny concerns in relation to emergency authorisations are discussed above at 1.07 to 1.16.

*Broad definition of 'criminal network of individuals'*

1.133 From a scrutiny perspective, the committee is further concerned about the wide scope of innocent third parties who may be impacted by network activity warrants. These warrants may be sought in relation to a 'criminal network of individuals', defined in proposed section 7A[103] of the SD Act as a group of individuals who are linked electronically, and

> One or more individuals in the group must have engaged, are engaging, or are likely to engage in conduct that constitutes a relevant offence, or have facilitated, are facilitating, or are likely to facilitate, another person's engagement in conduct that constitutes a relevant offence. The person whose engagement in criminal activity was facilitated by an individual in the group, may or may not be an individual in the group themselves. [104]

1.134 An 'electronically linked group of individuals' is broadly defined as a group of 2 or more individuals, where each individual in the group uses, or is likely to use the same electronic service as at least one other individual in the group; or communicates, or is likely to communicate with at least one other individual in the group by electronic communication.[105] The explanatory memorandum notes:

> There is no requirement that every individual who is part of the criminal network is himself or herself committing, or intending to commit, a relevant offence. The word 'facilitating' is used to capture those individuals who are, knowingly or unknowingly, facilitating engagement by another person in conduct constituting a relevant offence...[106]

1.135 The committee is concerned that, as a result of these broad definitions, there is a potentially unlimited class of persons who may be subject to, or affected as a third party connected to a person who is the subject of, a network activity warrant.

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

- **the effect of Schedules 1-3 on the privacy rights of third parties and a detailed justification for the intrusion on those rights, in particular:**
  - **why proposed sections 27KE and 27KP do not specifically require the judge or nominated AAT member to consider the privacy implications**

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102 See Schedule 1, item 47, proposed subparagraph 64B(1)(a)(ii) of the *Surveillance Devices Act 2004* and Schedule 3, item 4, proposed subsection 3ZZVG(1) of the *Crimes Act 1914*.

103 Schedule 2, item 8.

104 Explanatory memorandum, p. 67.

105 Schedule 2, item 3.

106 Explanatory memorandum, p. 67.

**for third parties of authorising access to a third party computer or communication in transit;**[107]

- **why the requirement that an issuing authority be satisfied that an assistance order is justifiable and proportionate, having regard to the offences to which it would relate, only applies to an assistance order with respect to data disruption warrants, and not to all warrants;**[108] **and**
- **whether the breadth of the definitions of 'electronically linked group of individuals' and 'criminal network of individuals' can be narrowed to reduce the potential for intrusion on the privacy rights of innocent third parties.**[109]

***Use of information obtained through warrant processes***

*Prohibitions on use*

1.137 The bill provides that information obtained under data disruption and account takeover warrants will be protected information that may only be used, recorded, communicated or published in limited circumstances.[110] Information (other than network activity warrant intercept information) obtained from access to data under a network activity warrant is deemed to be 'protected network activity warrant information' and, subject to limited exceptions, may not be used in evidence in a criminal proceeding.[111]

1.138 In respect of each of the warrant schemes, it will be an offence to use, disclose, record, communicate or publish protected information except in limited circumstances, such as where necessary for the investigation of a relevant offence, a relevant proceeding or the making of a decision as to whether or not to prosecute a person for a relevant offence, or where necessary to help prevent or reduce the risk of serious violence to a person or substantial damage to property.[112] The statement of

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107 Schedule 1, item 13, proposed paragraph 27KE(5)(e), Schedule 2, item 9, proposed paragraph 27KP(5)(e) of the *Surveillance Devices Act 2004*.

108 Schedule 1, item 47, proposed subsection 45B(2); Schedule 2, item 31, proposed subsection 64A(6A), *Surveillance Devices Act 2004*; Schedule 3, item 4, proposed section 3ZZVG of the *Crimes Act 1914*.

109 Schedule 2, items 3 and 8.

110 Schedule 1, item 28; Schedule 3, item 4, proposed section 3ZZVH. See also *Surveillance Devices Act 2004,* part 6, division 1.

111 Schedule 2, items 18 and 19, proposed sections 44A and 45B of the *Surveillance Devices Act 2004*.

112 Statement of compatibility, p. 14.

compatibility identifies the restrictions on the use of information collected under warrants as a safeguard against arbitrary and unlawful interference with privacy.[113]

1.139 However, the committee notes that these prohibitions are subject to a broad range of exceptions, which may undermine their effectiveness as a safeguard against undue trespass on a person's privacy. For example, Schedule 2 sets out numerous circumstances in which protected information obtained under a network activity warrant can be lawfully used and admitted into evidence, such as disclosure in proceedings in open court, for the purposes of the AFP collecting, correlating, analysing or disseminating criminal intelligence, or the doing of a thing authorised by the warrant.[114]

1.140 The bill would also allow protected network activity warrant information to be shared with ASIO or any agency within the meaning of the *Intelligence Services Act 2001* if it relates or appears to relate to any matter within the functions of those organisations or agencies.[115] As drafted, these exceptions would appear to allow protected information obtained under a warrant for a specified purpose to be shared for other broader purposes and potentially purposes that are unrelated to the objectives of the bill. It is not clear to the committee whether some of the exceptions are drafted in broader terms than is strictly necessary.

*Storage and destruction of records*

1.141 The bill provides that information obtained under one of the three warrant schemes proposed by the bill must be kept in a secure place that is not accessible to people who are not entitled to deal with it, and is destroyed as soon as practicable if no civil or criminal proceedings have been or are likely to be commenced and the material is unlikely to be required, or within five years after the making of the report or record (which must be reviewed every five years).[116] The statement of compatibility explains:

> Requiring the security and destruction of records ensures that private data of individuals subject to a data disruption warrant is not handled by those without a legitimate need for access, and are not kept in perpetuity where there is not a legitimate reason for doing so. [117]

1.142 The committee notes the importance of provisions for secure storage and destruction of information to protecting against undue trespass on the privacy of individuals whose information is collected through these warrant schemes. However,

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113 Statement of compatibility, p. 14.

114 Schedule 2, item 19, proposed subsections 45B(3)–(9) of the *Surveillance Devices Act 2004*.

115 Schedule 2, item 19, proposed subsection 45B(4) of the *Surveillance Devices Act*.

116 Schedule 1, item 38 and *Surveillance Devices Act 2004*, section 46; Schedule 2, item 20, proposed section 46AA; Schedule 3, item 4, proposed section 3ZZVJ.

117 Statement of compatibility, p. 16.

it is unclear to the committee whether the specified time period of five years is an appropriate period of time for the purposes of operating as an effective safeguard, and the explanatory memorandum does not provide any explanation in this regard. In particular, it is not clear why the bill does not require a review of the continued need for the retention of such records or reports on a more regular basis.

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

- **whether all of the exceptions to the restrictions on the use, recording or disclosure of protected information obtained under the warrants are appropriate and whether any exceptions are drafted in broader terms than is strictly necessary; and**
- **why the bill does not require review of the continued need for the retention of records or reports comprising protected information on a more regular basis than a period of five years.**

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## Presumption of innocence—certificate constitutes prima facie evidence[118]

1.144 Currently, subsection 62(1) of the SD Act provides that an appropriate authorising officer for a law enforcement officer may issue a written certificate setting out any facts he or she considers relevant with respect to things done by the law enforcement officer in connection with particular matters. Subsection 62(2) provides that a certificate issued under subsection 62(1) is admissible in evidence in any proceedings as prima facie evidence of the matters it certifies. Item 44 of Schedule 1 and item 29 of Schedule 2 to the bill seek to amend this provision to add new paragraphs 62(1)(d) and (e), the effect of which would be to enable an evidentiary certificate to be issued in connection with information obtained from access to, or disruption of data under a data disruption warrant or emergency access authorisation, or information obtained from access to data under a network access warrant.

1.145 Similarly, in Schedule 3 to the bill, proposed section 3ZZVZ of the Crimes Act provides for evidentiary certificates to be issued in connection with information obtained under account takeover warrants.

1.146 The committee notes that where an evidentiary certificate is issued, this allows evidence to be admitted into court which would need to be rebutted by the other party to the proceeding. While a person still retains a right to rebut or dispute those facts, that person assumes the burden of adducing evidence to do so. The issue of evidentiary certificates therefore effectively reverses the evidential burden of proof, and may, if used in criminal proceedings, interfere with the common law right

118 Schedule 1, item 44; Schedule 2, item 29; Schedule 3, item 4 (proposed section 3ZZVZ of the *Crimes Act 1914*). The committee draws senators’ attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

to be presumed innocent until proven guilty. In this instance, from a scrutiny perspective, the committee is concerned that the provisions outlined above could place a significant and potentially insurmountable burden on persons seeking to challenge the validity of actions taken by law enforcement agencies under warrants, as well as things done to conceal those actions.

1.147 The committee also notes that evidentiary certificates issued under subsection 62(1) of the SD Act and section 3ZZVZ of the *Crimes Act* would be taken as prima facie evidence in any proceeding. However, the explanatory memorandum provides no information about the nature of the proceedings in which such certificates are intended to be used. The committee has scrutiny concerns that the use of such certificates could trespass on individuals' rights, particularly if it related to circumstances where a certificate is taken as evidence of matters relevant to a person's culpability for an offence.

1.148 Noting the burden that the issue of an evidentiary certificate may place on a person wishing to challenge the validity of actions taken by law enforcement agencies and officials, and the potential to trespass on individuals' rights, the committee would expect a detailed justification for the powers to issue evidentiary certificates identified above (including the expansion of those powers) to be included in the explanatory materials.

1.149 In relation to item 44 of Schedule 1, the explanatory memorandum states:

> Evidentiary certificates are intended to streamline the court process by reducing the need to contact numerous officers and experts to give evidence on routine matters. Evidentiary certificates also assist agencies to protect sensitive capabilities. [119]

1.150 However, the committee does not generally consider streamlining court processes to be sufficient justification for conferring powers to issue evidentiary certificates in relation to things done in connection with information obtained under a warrant. Moreover, the explanatory memorandum does not explain how evidentiary certificates protect 'sensitive capabilities' or what these are.

1.151 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states, in relation to criminal proceedings, that evidentiary certificates:

> are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute or would be difficult to prove under the normal evidential rules. [120]

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119 Explanatory memorandum, p. 54. Substantially similar explanations are provided in relation to Schedule 2, item 29, at p. 97, and Schedule 3, item 4 (proposed section 3ZZVZ of the *Crimes Act 1914*) at p. 180.

120 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 54.

1.152 The Guide further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'. [121]

1.153 In this instance, it is not clear that the matters in evidentiary certificates issued under the provisions identified above would be sufficiently removed from the main facts at issue in relevant proceedings.

**1.154 As the explanatory materials do not adequately address these issues, the committee requests the minister's detailed advice as to:**

- **why it is considered necessary and appropriate to provide for evidentiary certificates to be issued in connection a data disruption warrant or emergency authorisation, a network access warrant, or an account takeover warrant;**
- **the circumstances in which it is intended that evidentiary certificates would be issued, including the nature of any relevant proceedings; and**
- **the impact that issuing evidentiary certificates may have on individuals' rights and liberties, including on the ability of individuals to challenge the lawfulness of actions taken by law enforcement agencies.**

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## Reversal of evidential burden of proof[122]

1.155 Proposed subsection 3ZZVH(1) of the Crimes Act creates an offence for use or disclosure of protected information, with a maximum penalty of imprisonment for 2 years. Proposed subsection 3ZZVH(2) creates an aggravated offence where use or disclosure of the information endangers the health or safety of any person or prejudices the effective conduct of an investigation into a relevant offence, with a maximum penalty of imprisonment for 10 years. Proposed subsection 3ZZVH(3) provides several exceptions (offence-specific defences) to this offence, including that the information was used or disclosed in connection with the administration of Part IAAC of the Crimes Act,[123] or in connection with functions of the Australian

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121 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 55.

122 Schedule 3, item 4, proposed section 3ZZVH of the *Crimes Act 1914*. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

123 See Schedule 3, item 4, proposed paragraph 3ZZVH(3)(a).

Federal Police,[124] or ACIC,[125] or with preventing, investigating or prosecuting an offence.[126]

1.156 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.157 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in proposed section 3ZZVH have not been addressed in the explanatory materials.

**1.158 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. 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 *Guide to Framing Commonwealth Offences*.**

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## Broad delegation of administrative powers[127]

*Appropriate authorising officers of the ACIC*

1.159 Item 4 of Schedule 3 seeks to insert proposed subsection 3ZZUM(4) into the Crimes Act which provides that the chief officer of the ACIC may authorise a person who is an executive level member of the staff of the ACIC to be an 'appropriate authorising officer'. The committee notes that appropriate authorising officers have significant authorities under proposed Part IAAC of the Crimes Act, including the

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124 See Schedule 3, item 4, proposed paragraph 3ZZVH(3)(b).

125 See Schedule 3, item 4, proposed paragraph 3ZZVH(3)(c).

126 See Schedule 3, item 4, proposed paragraph 3ZZVH(3)(d). Additional exceptions include that the disclosure was: by a person who believes on reasonable grounds that the use or disclosure is necessary to help prevent or reduce the risk of serious violence to a person or substantial damage to property; for the purposes of legal proceedings, or obtaining legal advice; in connection with the performance of functions or duties, or the exercise of powers under Part IAAC, or by a law enforcement officer; or for the purposes of the admission of evidence in a proceeding that is not a criminal proceeding.

127 Schedule 3, item 4, proposed subsection 3ZZUM(4) of the *Crimes Act 1914*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

authority to give an emergency authorisation under proposed section 3ZZUX (discussed above at 1.107 to 1.114).

1.160 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.161 The explanatory materials provide no information about why the class of persons who may be authorised as an ‘appropriate authorising officer’ is not confined to the holders of nominated offices or to members of the Senior Executive Service of the ACIC.

**1.162 The committee requests the minister's advice as to why it is considered necessary to allow for executive level members of staff of the ACIC to be ‘appropriate authorising officers’, in particular with reference to the committee’s scrutiny concerns in relation to the use of coercive powers without judicial authorisation under an emergency authorisation.**

*Ombudsman functions or powers*

1.163 The committee also notes that proposed section 3ZZVV of the Crimes Act provides that the Ombudsman may delegate to an APS employee responsible to the Ombudsman all or any of the Ombudsman’s functions or powers under Division 7 of proposed Part IAAC, other than section 3ZZVX (reports on inspections).

1.164 The explanatory memorandum explains:

> This delegation power is purposefully broad. This is consistent with other delegations that relate to the Ombudsman’s inspection functions, for example in section 91 of the TIA Act. The reason for such a broad delegation is that it allows the Ombudsman to determine the most efficient, effective and appropriate means of operationalising the Ombudsman’s functions as between the Ombudsman and staff members, whilst taking into account the powers involved and the expertise required to exercise them.

**1.165 Noting this explanation, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Ombudsman to delegate all or any of her or his functions to any APS employee responsible to the Ombudsman.**

# Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

| | |
|---|---|
| **Purpose** | This bill seeks to establish a mandatory code of conduct to support the sustainability of the Australian news media sector by addressing bargaining power imbalances between digital platforms and Australian news businesses |
| **Portfolio** | Treasury |
| **Introduced** | House of Representatives on 9 December 2020 |

## Significant matters in delegated legislation—digital platforms[128]

1.166 A digital platform must participate in the News Media and Digital Platforms Mandatory Bargaining Code (the Code) if one or more of the services it operates or controls has been designated by the Minister as a designated digital platform service. Proposed section 52E provides that the Minister may, by legislative instrument, make a determination that specifies services as 'designated digital platform services' and specifies a corporation as a 'designated digital platform corporation'.

1.167 The explanatory memorandum notes that in making a determination, the Minister must consider whether there is a significant bargaining power imbalance between Australian news businesses and the group comprised of the corporation and all of its related bodies corporate. The explanatory memorandum also notes that the Minister may consider any reports or advice of the Australian Competition and Consumer Commission (Commission).[129] However, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.168 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.169 In this instance, the committee's scrutiny concerns are heightened due to the use of certain terms which are not defined in the bill. Specifically, the term 'digital platform' is not defined in the bill. The explanatory memorandum states that the term 'digital platform' is intended to take its ordinary meaning; and explains that it is

128 Item 1, Schedule 1, proposed section 52E. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

129 Explanatory memorandum, pp. 16–17.

intended that the term will capture platforms that deliver a wide variety of services such as social media services, search engines and other digital content aggregators.[130]

1.170 The committee's view is that significant matters, such as which digital platforms must participate in the Code, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. If such matters are to remain in delegated legislation, the committee considers parliamentary scrutiny over such significant matters could be increased by requiring the positive approval of each House of the Parliament before the instrument could come into effect.

**1.171 In light of the above, the committee requests the Treasurer's advice as to why it is considered necessary and appropriate to leave the determination of which digital platforms must participate in the News Media and Digital Platforms Mandatory Bargaining Code to delegated legislation.**

**1.172 If it is considered appropriate to leave this matter to delegated legislation, the committee requests the Treasurer's advice as to whether the bill can be amended to require the positive approval of each House of the Parliament before determinations made under proposed section 52E come into effect.[131]**

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## Significant matters in delegated legislation[132]

1.173 The bill seeks to insert a range of powers to prescribe matters in delegated legislation into the *Competition and Consumer Act 2010*.

1.174 Schedule 1 to the bill seeks to insert:

- proposed paragraph 52F(2)(d) in relation to applications for registration of news businesses and news business corporations;
- proposed subparagraphs 52P(1)(a)(v) and (vi) in relation to the professional standards test;
- proposed paragraphs 52Y(b) and (e) and 52Z(b) and (d) in relation to setting up points of contact set up by responsible digital platform corporations or registered news business corporations;
- proposed subsection 52ZK(3) in relation to the register of bargaining code arbitrators;

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130 Explanatory memorandum, p. 17.

131 For an example of this approach, see section 10B of the *Health Insurance Act 1973*.

132 A range of proposed sections in Schedule 1. The committee draws senators’ attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

- proposed paragraph 52ZM(7)(b) in relation to the formation of an arbitral panel;
- proposed subsection 52ZO(3) in relation to the costs of an arbitral panel;
- proposed subsection 52ZP(1) in relation to the requirement that the Chair notify the start of an arbitration;
- proposed subsections 52ZV(4) and (5) which would allow the regulations to alter the timeframes set out in the primary legislation in relation to information requests made by bargaining parties;
- proposed subparagraph 52ZX(4)(a)(iv) in relation to timeframes for final offer arbitration;
- proposed subsection 52ZZA(1) which would allow the regulations to alter the timeframe for an arbitration determination set out in the primary legislation;
- proposed subsection 52ZZA(4) in relation to written reasons relating to an arbitration determination;
- proposed subsection 52ZZC(1) which would allow the regulations to alter the timeframe set out in the primary legislation in which the Australian Competition and Consumer Commission may give the arbitral panel a submission about final offers;
- proposed subsections 52ZZF(1) and (2) in relation to record generation and keeping obligations;
- proposed subsections 52ZZJ(2) and (5) in relation to the making of and content of standard offers relating to remuneration for registered news business corporations; and
- proposed subparagraph 52ZZJ(8)(a)(ii) which would allow the regulations to alter the offer period for a standard offer.

1.175 The committee's view is that matters which may be significant to the operation of a legislative scheme should be included in primary legislation unless sound justification for the use of delegated legislation is provided.

1.176 In addition, the committee notes that some of the above provisions enable delegated legislation to modify the operation of primary legislation and are therefore akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation.[133] 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.

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133 Schedule 1, item 1, proposed subsections 52ZV(4) and (5), proposed subsection 52ZZA(1), proposed subsection 52ZZC(1), and proposed subparagraph 52ZZJ(8)(a)(ii).

1.177 The committee considers that these matters have not been sufficiently addressed in the explanatory memorandum and that the prescription of so many delegated legislation making powers in the bill has not been adequately justified.

**1.178 The committee therefore requests the Treasurer's detailed advice as to why it is considered necessary and appropriate to leave each of the above matters to delegated legislation.**

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## Parliamentary scrutiny—tabling[134]

1.179 Proposed section 52ZZS provides for a review of the operation of the Part introduced by the bill (relating to the news media and digital platforms mandatory bargaining code). The proposed section specifies that the Minister must ensure that copies of the report of the review are available for public inspection as soon as practicable after the period of 28 days beginning on the day the report is given to the minister, however, there is no requirement for the report to be tabled in Parliament.

1.180 The committee notes that not providing for the review report to be tabled in Parliament reduces the scope for parliamentary scrutiny. The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only available for public inspection. As such, the committee expects there to be appropriate justification for not including a requirement for review reports to be tabled in Parliament.

**1.181 Noting the impact on parliamentary scrutiny of not providing for the review report to be tabled in Parliament, the committee requests the Treasurer's advice as to whether proposed section 52ZZS of the bill can be amended to provide that the minister must arrange for a copy of the review report to be tabled in each House of the Parliament within 15 sitting days of the House after the report is given to the minister.**

134 Item 1, Schedule 1, proposed section 52ZZS. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

# Bills with no committee comment

1.182 The committee has no comment in relation to the following bills which were introduced into the Parliament between 30 November – 10 December 2020:

- COAG Reform Fund Amendment (No Electric Vehicle Taxes) Bill 2020
- Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2020
- Data Availability and Transparency (Consequential Amendments) Bill 2020
- Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020
- Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020
- Fair Work Amendment (Ten Days Paid Domestic and Family Violence Leave) Bill 2020
- Fair Work Amendment (Ten Days Paid Domestic and Family Violence Leave) Bill 2020 [No. 2]
- Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Bill 2020
- Live Animal Export Prohibition (Ending Cruelty) Bill 2020
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Benefit to Australia) Bill 2020
- Therapeutic Goods Amendment (2020 Measures No. 2) Bill 2020

# Commentary on amendments and explanatory materials

## Aged Care Amendment (Aged Care Recipient Classification) Bill 2020

1.183 On 8 December 2020, the House of Representatives agreed to two Government amendments, the Assistant Minister to the Prime Minister and Cabinet (Mr Morton) tabled a supplementary explanatory memorandum, and the bill was read a third time. On 9 December 2020, Senator Colbeck tabled a revised explanatory memorandum, and the debate was adjourned till the next day of sitting.

**1.184 The committee thanks the minister for moving amendments to the bill which appear to address the committee's scrutiny concerns regarding the use and disclosure of personal information.**[135]

## Australian Security Intelligence Organisation Amendment Bill 2020

1.185 On 10 December 2020, the House of Representatives agree to 14 Government amendments, the Minister for Home Affairs (Mr Dutton) presented a supplementary explanatory memorandum and an addendum to the explanatory memorandum, and the bill was read a third time. On 10 December 2020 in the Senate, the Minister for Aged Care and Senior Australians (Senator Colbeck) tabled a revised explanatory memorandum, and the bill was read a third time.

**1.186 The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.**[136]

## Crimes Legislation Amendment (Economic Disruption) Bill 2020

1.187 On 12 December 2020, the Minister for Government Services (Mr Robert) presented an addendum to the explanatory memorandum, and the bill was read a third time.

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135 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 17 of 2020*, 2 December 2020, pp. 33–34.

136 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2020*, 6 August 2020, pp. 7–38.

**1.188 The committee thanks the minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.**[137]

### Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020

1.189 On 8 December 2020, the Minister for Aged Care and Senior Australians (Senator Colbeck) tabled a replacement explanatory memorandum, and the bill was read a third time.

**1.190 The committee thanks the minister for including additional key information in the replacement explanatory memorandum as previously requested by the committee.**[138]

### Export Market Development Grants Legislation Amendment Bill 2020

1.191 On 8 December 2020, Mr Tehan presented an addendum to the explanatory memorandum, and the bill was read a third time.

**1.192 The committee thanks the minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.**[139]

### Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020

1.193 On 8 December 2020, Senator Hume tabled an addendum to the explanatory memorandum, and the second reading was moved. On 9 December 2020, the Senate agreed to 10 Government and four Independent amendments, the Minister for Families and Social Services (Senator Ruston) tabled a supplementary explanatory memorandum, and the third reading was agreed to. On 10 December 2020, the House of Representatives agreed to the Senate amendments, and the bill finally passed both Houses.

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137 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2020*, 20 November 2020, pp. 41–49.

138 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2020*, 11 November 2020, pp. 51–56.

139 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 17 of 2020*, 2 December 2020, pp 44–51.

**1.194 The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.**[140]

### Territories Legislation Amendment Bill 2020

1.195 On 8 December 2020, Mrs Marino presented an addendum to the explanatory memorandum, and the bill was read a third time.

**1.196 The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.**[141]

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

- Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Bill 2020;[142]
- Foreign Investment Reform (Protecting Australia's National Security) Bill 2020;[143]
- National Emergency Declaration Bill 2020;[144]

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140 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 17 of 2020*, 2 December 2020, pp 58–67.

141 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 17 of 2020*, 2 December 2020, pp 68–80.

142 On 9 December 2020, the House of Representatives agreed to six Government amendments, the Assistant Minister for Customs, Community Safety and Multicultural Affairs (Mr Wood) presented a supplementary explanatory memorandum, and the bill was read a third time.

143 On 8 December 2020, the Senate agreed to two Opposition amendments, and the bill was read a third time. On 9 December 2020, the House of Representatives agreed to the Senate amendments, and the bill finally passed both Houses.

144 On 9 December 2020, the House of Representatives agreed to six Government amendments, the Assistant Minister for Waste Reduction and Environmental Management (Mr Evans) presented a supplementary explanatory memorandum, and the bill was read a third time. On 10 December 2020, the Minister for Employment, Skills, Small and Family Business (Senator Cash) tabled a revised explanatory memorandum, and the bill was read a third time.

- Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020;[145]
- Social Services and Other Legislation Amendment (Extension of Coronavirus Support) Bill 2020;[146]
- Sport Integrity Australia Amendment (World Anti-Doping Code Review) Bill 2020;[147]
- Transport Security Amendment (Testing and Training) Bill 2020.[148]

145 On 8 December 2020, the Minister for Employment, Skills, Small and Family Business (Senator Cash) tabled an addendum to the explanatory memorandum, and the bill was read a third time.

146 On 10 December 2020, the Senate agreed to one Opposition amendment, and the bill was read a third time. On 10 December 2020, the House of Representatives disagreed to the Senate amendment, the Senate did not insist on its amendment, and the bill finally passed both Houses.

147 On 10 December 2020, the Assistant Minister for Waste Reduction and Environment Management (Mr Evans) presented a replacement explanatory memorandum, and the bill was read a third time.

148 On 8 December 2020, the Assistant Minister to the Prime Minister and Cabinet (Mr Morton) presented a revised explanatory memorandum, and the second reading was moved. On 10 December 2020, the bill was read a third time.

# Chapter 2

# Commentary on ministerial responses

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

## Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Bill 2020

| | |
|---|---|
| **Purpose** | This bill seeks to introduce a Serious Incident Response Scheme for residential aged care and flexible care delivered in a residential aged care setting |
| **Portfolio** | Health |
| **Introduced** | House of Representatives on 2 December 2020 |
| **Bill status** | Before the House of Representatives |

### Significant matters in delegated legislation[1]

2.2 In *Scrutiny Digest 18 of 2020* the committee requested the minister's advice as to why it is considered necessary and appropriate to leave significant matters, such as how reportable aged care incidents are managed, to delegated legislation.[2]

#### *Minister's response*[3]

2.3 The minister advised:

> Item 2 of Schedule 1 to the Bill inserts proposed new section 54-3 to the Aged Care Act. Proposed section 54-3 sets out what reportable incidents are for the purposes of SIRS and how these reportable incidents must be dealt with as part of an approved provider's responsibility to implement and maintain an incident management system under proposed new subparagraph 54-1(1)(d)(i).

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1 Schedule 1, item 2, proposed section 54-3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 1-2.

3 The minister responded to the committee's comments in a letter dated 12 January 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

The Committee has raised concerns that significant matters, such as how reportable incidents are managed, are proposed to be included in delegated legislation. The Committee raised its concerns in relation to the powers under proposed subsections 54-3(1), (4), (5) and (6) of the Aged Care Act. These subsections provide that the *Quality of Care Principles 2014* (Quality of Care Principles) must make provisions for dealing with reportable incidents, and may define or clarify the expression reportable incident. The Quality of Care Principles may also specify that an incident is or is not a reportable incident and deal with matters including the manner and period of reporting to the Commissioner, the actions that must be taken, and the provision of information to other persons.

As noted in the Bill's explanatory memorandum, the legislative design of the SIRS is similar to the incident management and disclosure protection scheme under the National Disability Insurance Scheme (NDIS) (see subsection 732(2) of the *National Disability Insurance Scheme Act 2013).* Consistent with the NDIS, the Quality of Care Principles will include arrangements similar to those included in the Part 3 of the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* (NDIS Incident Rules). The Quality of Care Principles will specify matters such as the timeframes and actions required when notifying the Commission of reportable incidents and the details of notices on reportable incidents.

These matters will go into the minutiae of notification arrangements such as the specific details to be provided in the notice, including the name, position and contact details of the person giving the notice. It is considered appropriate that these matters be dealt with in delegated legislation as they relate to operational matters such as process and procedures.

The Quality of Care Principles will also further define and provide clarification on the terms in proposed subsection 54-3(2) of the Aged Care Act and specify where an incident is, or is not, a reportable incident despite that proposed subsection. The Quality of Care Principles are proposed to provide clarity of the terms by using concepts to identify what the terms include, and by providing scenarios of what these would not entail. The Quality of Care Principles are also proposed to specify where an incident covered by proposed subsection 54-3(2) is not a reportable incident. This is also proposed to be achieved using concepts or classes, for example where a residential care recipient refuses to receive care or services from an approved provider and has sufficient cognitive function the make that decision. If these matters were dealt with in primary legislation it is likely that, in an attempt to capture all scenarios, the definitions would become highly complex and therefore difficult to interpret and implement.

Including matters provided for by proposed section 54-3 in delegated legislation will allow for responsiveness in relation to incidents in residential aged care services. As these arrangements are intended to ensure the reporting of abuse and neglect in residential aged care, it is appropriate that

> these aspects of the SIRS can be adapted and modified in a timely manner. Allowing some flexibility to promptly respond to unforeseen risks, concerns and omissions aligns with community expectations and the key aim of the SIRS which is to protect older Australians from abuse and neglect.

***Committee comment***

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the matters to be specified in delegated legislation will go into the minutiae of notification arrangements such as the specific details to be provided in the notice, including the name, position and contact details of the person giving the notice.

2.5 The committee also notes the minister's advice that if these matters were dealt with in primary legislation it is likely that, in an attempt to capture all scenarios, the definitions would become highly complex and therefore difficult to interpret and implement.

2.6 The committee further notes the minister's advice that delegated legislation will allow for responsiveness in relation to incidents in residential aged care services; and that as these arrangements are intended to ensure the reporting of abuse and neglect in residential aged care, it is appropriate that these aspects of the Serious Incident Response Scheme (the SIRS) can be adapted and modified in a timely manner.

2.7 While acknowledging this explanation, the committee considers that not all of the matters to be set out in delegated legislation relate to the minutiae of the SIRS. From a scrutiny perspective, in light of the serious nature of a reportable incident, the committee remains of the view that these matters should be set out on the face of primary legislation and should be subjected to the full range of parliamentary oversight.

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

**2.9 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving significant matters relating to the management of reportable aged care incidents to delegated legislation.**

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

**Significant matters in delegated legislation**[4]

2.11 In *Scrutiny Digest 18 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the way in which the Commissioner deals with reportable aged care incidents to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[5]

***Minister's response***

2.12 The minister advised:

> Item 3 to Schedule 1 of the Bill inserts proposed subsection 21(7) into the Quality and Safety Commission Act. Proposed subsection 21(7) provides that delegated legislation may prescribe matters in relation to how the Commissioner deals with reportable incidents. The Committee has raised concerns that significant matters, such as how the Commissioner deals with reportable incidents ls proposed to be included in delegated legislation.
>
> As noted in the Bill's explanatory memorandum and above, the legislative approach for the SIRS is based on the existing legislative framework under the NDIS incident management and disclosure protection scheme. Similar to Parts 3 and 4 of the NDIS Incident Rules, the proposed delegated legislation will specify how the Commissioner deals with matters in relation to reportable incidents. This may include requests for further information or a final report, undertaking inquiries or investigations, approving forms and other actions by the Commissioner, for example referral to police or requesting a provider to take remedial action to ensure the health, safety and well-being of residential care recipients.
>
> It is considered reasonable that these matters be dealt with in delegated legislation as they relate to operational matters such as process and procedures. Including these arrangements in delegated legislation will allow flexibility to respond to unforeseen issues and respond to community and sector concerns in a timely manner. As these matters relate to actions taken in response to reportable incidents it is appropriate (including from a community expectations perspective) that there is flexibility for the Commissioner to take appropriate and prompt action in response to any unforeseen matters. It is intended that the Australian Government's ability to undertake such actions will prevent abuse and neglect of older Australians.

4 Schedule 1, item 3, proposed subsection 21(7). The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 2-3.

> The Government has undertaken significant consultation on the arrangements under the SIRS. This includes engagement with key stakeholders from the aged care sector on the details of the Bill and what is proposed for delegated legislation. Further, communications and guidance are being prepared and are proposed to be issued across the sector prior to commencement of the SIRS, and will include details on these matters. As such, the Government does not consider it necessary to amend the Bill to include high-level guidance on these matters. As noted in the explanatory memorandum, these arrangements are intended to be broad to enable appropriate flexibility for the Commissioner to ensure the safety needs of older Australians.

***Committee comment***

2.13 The committee thanks the minister for this response. The committee notes the minister's advice that the proposed delegated legislation will specify that the Commissioner deal with matters in relation to reportable incidents in a similar manner to that set out in Parts 3 and 4 of the NDIS Incident Rules.

2.14 The committee also notes the minister's advice that it is considered reasonable that these matters be dealt with in delegated legislation as they relate to operational matters such as process and procedures. Including these arrangements in delegated legislation will allow flexibility to respond to unforeseen issues and respond to community and sector concerns in a timely manner.

2.15 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. The committee remains of the view that at least high-level guidance in relation to these matters should be provided on the face of the bill.

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

**2.17 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving significant matters relating to how the Commissioner will manage reportable aged care incidents to delegated legislation.**

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

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### Broad delegation of administrative powers[6]

2.19 In *Scrutiny Digest 18 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow for the delegation of any or all of the Commissioner's functions or powers under the Regulatory Powers Act and proposed sections 74EE and 74GA to any member of staff of the commission; and
- whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.[7]

#### *Minister's response*

2.20 The minister advised:

> Items 1 and 2 to Schedule 2 of the Bill insert proposed sections 74EA, 74EB, 74EC, 74ED, 74EE and 74GA to the Quality and Safety Commission Act. Proposed sections 74EA to 74ED introduce new enforcement powers and functions for the Commissioner by making certain provisions in the Aged Care Act and the Quality and Safety Commission Act subject to enforcement under the *Regulatory Powers (Standard Provisions) Act 2014*. Proposed section 74EE provides for the Commissioner to issue compliance notices in relation to the SIRS and proposed section 74GA provides the Commissioner a new power to require, by notice in writing, a person to provide information or documents for the purposes of administering the Commission's regulatory framework.
>
> The purpose of these amendments is to enhance and expand the Commission's powers of enforcement and compliance. These powers and functions aim to address some deficiencies in the Commission's existing regulatory framework that were identified by the Aged Care Quality and Safety Advisory Council and the hearings of the Royal Commission into Aged Care Quality and Safety, as well as through the Commission's own experience during the recent COVID-19 outbreak. These new powers and functions will provide for more graduated and proportionate responses allowing the Commissioner to respond appropriately to any instance of non-compliance with the requirements of the legislation.
>
> The Committee noted its concerns that the Commissioner's powers and functions under proposed sections 74EA, 74EB, 74EC, 74ED, 74EE and 74GA could be delegated to any member of staff of the Commission. The Committee also noted its concern that there is no requirement for the

6 Schedule 2, item 1, proposed section 74ED. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 3-5.

Commissioner to be satisfied that the staff member possesses appropriate qualifications or training in the use of the relevant functions and powers.

As noted in the explanatory memorandum, it is intended that existing delegation arrangements under subsection 76(1) of the Quality and Safety Commission Act would apply to these new powers and functions. Under subsection 76(1) the Commissioner may delegate to a member of staff of the Commission all or any of the Commissioner's functions or powers under the Quality and Safety Commission Act (except for the powers and functions under Part 78). The phrase 'staff of the Commission' is defined by section 33 of the Quality and Safety Commission Act to be persons engaged under the *Public Service Act 1999.*

Subsection 76(18) of the Quality and Safety Commission Act, provides that the Commissioner must not delegate a function or power under subsection 76(1), unless the Commissioner is satisfied that the person has suitable training or experience to properly perform the function or exercise the power. As such, when the Commissioner delegates the new powers and functions under proposed sections 74EA, 74EB, 74EC, 74ED, 74EE and 74GA, they are expressly required to be satisfied that the delegate has suitable training or experience to exercise the relevant powers and functions. In addition to the requirement under subsection 76(1B), in accordance with internal policy arrangements, the Commissioner will also determine which persons are best qualified to make particular decisions or to exercise the particular powers prior to making a delegation.

Further, being able to delegate powers is necessary to effectively and efficiently manage the volume of work of the commission and ensure the quality of Commonwealth funded aged care services and the safety of individuals in care. Time is a factor that could make a significant difference to the health, safety, well-being and quality of life of a recipient of aged care services, especially if the non-compliance relates to the quality of care provided.

It is planned for new powers and functions to be delegated in accordance with existing arrangements under the Quality and Safety Commission Act, therefore, the Government does not consider that it is necessary to include any guidance in the Bill as to how these powers and functions will be delegated.

### *Committee comment*

2.21 The committee thanks the minister for this response. The committee notes the minister's advice that the Commissioner must not delegate a function or power under subsection 76(1) of the Quality and Safety Commission Act, unless the Commissioner is satisfied that the person has suitable training or experience to properly perform the function or exercise the power.

2.22 The committee also notes the minister's advice that when the Commissioner delegates the new powers and functions under proposed sections 74EA, 74EB, 74EC,

74ED, 74EE and 74GA, they are expressly required to be satisfied that the delegate has suitable training or experience to exercise the relevant powers and functions.

2.23 Finally, the committee notes the minister's advice that it is planned for new powers and functions to be delegated in accordance with existing arrangements under the Quality and Safety Commission Act, therefore, the government does not consider that it is necessary to include any guidance in the bill as to how these powers and functions will be delegated.

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

**2.25 In light of the detailed information provided, the committee makes no further comment on this matter.**

# Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *Criminal Code Act 1995* to establish an extended supervision order scheme for high-risk terrorist offenders. It will enable Supreme Courts to make such an order to prevent the risk that a high-risk terrorist offender poses to the community at the end of their custodial sentence |
| **Portfolio** | Attorney-General |
| **Introduced** | House of Representatives on 3 September 2020 |
| **Bill status** | Before the House of Representatives |

### Procedural fairness—right to a fair hearing[8]

2.26 The committee initially scrutinised this bill in *Scrutiny Digest 14 of 2020* and requested the Attorney-General's advice.[9] The committee considered the Attorney-General's response in *Scrutiny Digest 16 of 2020* and requested the Attorney-General's further advice as to whether the bill can be amended to provide high level guidance that the court-only evidence provisions in items 189–210 of Schedule 1 may only be used in exceptional circumstances, where it is absolutely necessary to present highly sensitive information to a court to support an application.[10]

#### *Attorney-General's response*[11]

2.27 The Attorney-General advised:

> I am of the view that it is not necessary to amend the Bill to provide guidance of that kind. Doing so would not result in any change to the effect and operation of the provisions under the *National Security Information (Criminal and Civil Proceedings) Act 2004,* which already stipulate the circumstances in which orders may be sought.

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8 Schedule 1, item 120, proposed sections 105A.14B-105A.14D and items 189-210. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 15-18.

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 34-38.

11 The Attorney-General responded to the committee's comments in a letter dated 3 December 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> Wherever possible, proceedings for extended supervision orders will be held in open court. The court-only evidence provisions would only be used in circumstances where it is necessary to protect highly sensitive information where disclosure may be likely to prejudice national security. It would ultimately be a matter for the court to determine if, and how, information is to be protected in proceedings, balancing the need to protect highly sensitive national security information with the offender's right to a fair hearing. The court may also appoint a special advocate to represent the interests of the offender if the court makes an order that the offender and/or their legal representatives are not entitled to be present at any part of a hearing in the proceeding.

### *Committee comment*

2.28 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that it is not necessary to amend the bill to provide that the court-only evidence provisions in items 189–210 of Schedule 1 may only be used in exceptional circumstances. The Attorney-General's view is that such an amendment would not affect the operation of the provisions under the *National Security Information (Criminal and Civil Proceedings) Act 2004*. The Attorney-General also advised that court-only evidence provisions would only be used where necessary to protect highly sensitive information and that it would ultimately be a matter for the court to determine if, and how, information is to be protected in proceedings, balancing the need to protect highly sensitive national security information with the offender's right to a fair hearing.

**2.29 While noting this advice, from a scrutiny perspective, the committee remains of the view that it would be appropriate to amend the bill to provide high-level guidance that the court-only evidence provisions in items 189–210 of Schedule 1 may only be used in exceptional circumstances, where it is absolutely necessary to present highly sensitive information to a court to support an application.**

**2.30 In the absence of such an amendment to the text of the bill, the committee requests that an addendum to the explanatory memorandum containing the key information provided by the Attorney-General in relation to this matter be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.31 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the court-only evidence provisions of the bill.**

# Designs Amendment (Advisory Council on Intellectual Property Response) Bill 2020

| | |
|---|---|
| **Purpose** | This bill seeks to make several technical amendments to simplify and clarify aspects of the design system, and to provide more flexibility for designers during the early stages of registering design protection |
| **Portfolio** | Industry, Science and Technology |
| **Introduced** | Senate on 2 December 2020 |
| **Bill status** | Before the Senate |

### Instruments not subject to parliamentary disallowance [12]

2.32 In *Scrutiny Digest 18 of 2020* the committee requested the minister's advice as to:

- why it is appropriate to specify that determinations made under proposed section 149A are not legislative instruments; and
- whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.[13]

### *Minister's response*[14]

2.33 The minister advised:

> I trust the following will address the Committee's request for advice. If the Committee accepts these submissions and considers it appropriate, I will arrange for an addendum to the Explanatory Memorandum incorporating the reasoning set out in this letter.
>
> *Why it is appropriate to specify that determinations made under proposed section 149A are not legislative instruments?*
>
> Proposed subsection 149A(3) of the Bill provides that a formal requirements determination under subsection 149A(1) is not a legislative instrument. The

12 Schedule 6, item 4, proposed subsection 149A(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 6-7.

14 The minister responded to the committee's comments in a letter dated 22 January 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

determination would not be a legislative instrument under the definition in section 8 of the *Legislation Act 2003* (Legislation Act). Subsection 149(3) confirms – for the benefit of readers, and the avoidance of doubt – what would be the case in any event. It does not have the effect of declaring the instrument is not legislative when it otherwise would be.

Subsection 8(4) of the Legislation Act provides that an instrument is legislative if it has the effect of determining the law or altering its content, rather than determining particular circumstances in which the law is to apply (i.e. is administrative in character). Instruments that do not fulfil the definition set out in subsection 8(4) of the Legislation Act are likely to be administrative in nature.

The power to make a determination of formal requirements is similar to the power to prescribe or approve a form, which is expressly non-legislative under item 6 of regulation 6 of the *Legislation (Exemptions and Other Matters) Regulations 2015*. This strongly suggests that the determination of formal requirements is also non-legislative.

Essentially, formal requirements ensure that applications are made in a suitable form to be registered. They do not materially determine the law regarding registration of a design. The substantive requirements for a design to be registrable are determined by the *Designs Act 2003* (Designs Act) and *Designs Regulations 2004* (Designs Regulations). Of course, any changes to the Designs Act or Designs Regulations would be subject to parliamentary scrutiny.

While a failure to comply with the formal requirements determination could result in an application not being registered under sections 39 and 40 of the Designs Act, a design applicant would have an opportunity to amend their application under section 28 to resolve the issue before this occurred.

I would also like to advise the Committee that the Administrative Law Section of the Attorney-General's Department was consulted during drafting of the Bill, and was of the view that an instrument made by the Registrar determining the formal requirements of design applications under proposed section 149A would be administrative in character.

Under the Designs Act, the Registrar of Designs has existing powers to make non-legislative determinations of formal and procedural matters, including under sections 144A, 144B and 144C. These powers are closely analogous to the proposed power to make a determination of formal requirements in the Bill.

Further, the Commissioner of Patents was recently granted the power to determine formalities requirements for patent applications by the Parliament: section 229 of the *Patents Act 1990,* inserted by the *Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Act 2018.* The new power in section 149A is analogous to this power to make a non-legislative determination.

> Viewed in the context of existing powers in Intellectual Property legislation and the provisions of the Legislation Act, the determination under the proposed section 149A is non-legislative. Therefore, the specification that it is non-legislative in proposed subsection 149A(3) is intended to be a clarification and should be considered appropriate.
>
> *Whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary scrutiny?*
>
> It would not be appropriate to provide that the formal requirements determination made by the Registrar of Designs is a legislative instrument, as it is administrative in character.
>
> Use of a non-legislative instrument to set formal requirements will enable these requirements to be more readily updated and kept up to date as technology advances, and will give greater flexibility to the Registrar to manage design filings in a manner that meets the needs and expectations of design applicants.
>
> IP Australia conducted a public consultation on an exposure draft of the Bill, and stakeholders who commented on the measure were supportive of proposed section 149A's power to make a formalities determination, and did not express any reservations about the potential lack of parliamentary scrutiny of such a determination.

### *Committee comment*

2.34 The committee thanks the minister for this response. The committee notes the minister's advice that the power to make a determination of formal requirements is similar to the power to prescribe or approve a form and is therefore non-legislative in character. The committee also notes the minister's advice that formal requirements ensure that applications are made in a suitable form to be registered. These formal requirements do not materially determine the law regarding registration of a design with the substantive requirements for a design to be registrable being determined by the *Designs Act 2003* and Designs Regulations 2004.

**2.35 The committee thanks the minister for indicating that she will arrange for an addendum to the explanatory memorandum incorporating the reasoning set out in her letter to be tabled in the Parliament. The committee would welcome the tabling of an addendum as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).**

**2.36 In light of the detailed information provided, the committee makes no further comment on this matter.**

# Export Control Amendment (Miscellaneous Measures) Bill 2020

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *Export Control Act 2020* to support the implementation of the new export control framework and Australia's agricultural export industry and stakeholders |
| **Portfolio** | Agriculture |
| **Introduced** | House of Representatives on 11 November 2020 |
| **Bill status** | Before the House of Representatives |

**Power for delegated legislation to modify primary legislation (akin to Henry VIII clause)**[15]

2.37 In *Scrutiny Digest 17 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow delegated legislation to modify the operation of *Export Control Act 2020* (the Act) and the *Administrative Appeals Tribunal Act 1975* (the AAT Act), and the circumstances in which it is envisaged that these powers are likely to be used; and
- whether the modification of the operation of the Act or the AAT Act may trespass on an individual's right to a fair hearing.[16]

***Minister's response***[17]

2.38 The minister advised:

> The Australian Government supports Australian agricultural exports by facilitating trade. We negotiate bilateral and multilateral agreements with trading partners. These agreements can include reduced tariff rate arrangements for certain products. These are administered via tariff rate quotas. Exporters can get reduced import taxes on entry of a certain volume of goods into a particular country. This can save money for Australian businesses.

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15 Schedule 1, items 10, 12 and 13. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2020*, pp. 10-11.

17 The minister responded to the committee's comments in a letter dated 20 December 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Tariff rate quota certificates enable specific amounts of goods to enter an importing country at a reduced, or zero, tariff rate.

The Export Control Amendment (Miscellaneous Measures) Bill 2020 (Bill) will amend existing section 386 of the *Export Control Act 2020* (Act) so that rules modifying subsection 383(4) of the Act and subsection 43(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act) in relation to decisions on review will apply to reviewable decisions about tariff rate quota certificates, in addition to tariff rate quota entitlements as already provided for. Tariff rate quota certificates are a component of the tariff rate quota system, or systems, that may be established by rules under section 264 of the Act and which also includes tariff rate quota entitlements. Such certificates will be able to be issued to facilitate an export consignment's entry to a country at the concessional tariff rate relevant to the tariff rate quota.

Tariff rate quota certificates depend on the product and its destination:

- For an allocated quota, my department issues a certificate to exporters who have an allocation. The certificate covers the volume of the quota request (either in kilograms, tonnes, litres or pieces).
- Some quotas are not allocated. My department issue certificates on a first-come, first-served basis.

Rules as described above can only be made where for the purpose of ensuring that tariff rate quota amounts are not exceeded. The provisions of the Act and the AAT Act that may be modified relate to the range of decisions open to the Secretary (in respect of internal merits review) and the Administrative Appeals Tribunal (in respect of external merits review) upon review of a reviewable decision. The ability to amend the application of these provisions in relation to the tariff rate quota system recognises that, due to agreements in place with trading partners, certificates issued for any quota type cannot exceed the stated access amount (that is, must not be more than 100 per cent).

Eligibility for, and allocation of, the tariff rate quota entitlements for Australian exporters is determined by the specific methods prescribed in the various Export Control (Tariff Rate Quotas) Orders. These methods must factor in access amounts agreed with Australia's trading partners.

It is proposed that rules under section 386 of the Act, as amended by the Bill, will be made in equivalent terms to the current *Export Control (Tariff Rate Quotas) Order 2019*, which prevents a person making a decision to overturn an initial decision if there is an insufficient amount of quota available at that time. This means there will be no change to the current administration of tariff rate quota certificates or impact on related trade agreements. Overturning a decision where this would result in a quota being overfilled, or in the quota allocation issued to an individual being overused,

> would result in subsequent consignments being refused their preferential tariff rates at import. Refusal of such tariff rate concessions would negatively impact— by way of the imposition or increase of import tariffs— other parties who had correctly been issued tariff rate quota (TRQ) certificates. Most importantly, the issuance of TRQ certificates that exceed the total access amounts available may also undermine confidence in Australia's regulatory system.

### *Committee comment*

2.39 The committee thanks the minister for this response. The committee notes the minister's advice that due to agreements in place with trading partners, certificates issued for any quota type cannot exceed the stated access amount, and that rules modifying subsection 383(4) of the *Export Control Act 2020* and subsection 43(1) of the *Administrative Appeals Tribunal Act 1975* can only be made for the purpose of ensuring that tariff rate quota amounts are not exceeded. The committee further notes the minister's advice that overturning a decision that would result in a quota being overfilled would lead to subsequent consignments being refused their preferential tariff rates at import, and that this would negatively impact parties who had correctly been issued tariff rate quota certificates.

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

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

**2.42 In light of the detailed information provided, the committee makes no further comment on this matter.**

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## Incorporation of external materials as in force from time to time
## Significant matters in non-legislative documents[18]

2.43 In *Scrutiny Digest 17 of 2020* the committee requested the minister's advice as to:

18 Schedule 1, item 14, proposed paragraphs 432(3)(g) and (h). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

- whether documents incorporated by reference into the rules will be made freely available to all persons interested in the law; and
- why it is considered necessary and appropriate for matters relating to the calculation of tariff rate quotas to be set out in non-legislative documents which may be subject to limited (if any) parliamentary scrutiny.[19]

### *Minister's response*

2.44 The minister advised:

> My department provided a previous response to the Senate Scrutiny of Bills Committee's comments in Scrutiny Digest 3/18, as to the incorporation of external material in the Export Control Bill 2017, which preceded the Export Control Bill 2019.
>
> It remains the intention that whenever documents described in subsection 432(3), and specifically paragraphs 432(3)(g) and (h) are applied, adopted or incorporated by the rules, these documents will be publicly available. The documents will be accessible either on my department's website or through a link to where the documents may be found on the website of the relevant authority or body.
>
> The purpose of the provisions in paragraphs 432(3)(g) and (h) is to ensure rules can be made to enable accurate calculation of tariff rate quotas for the exportation of Australian goods into a particular country.
>
> Our key trading partners place a great deal of importance on the accurate calculation of tariff rate quotas for the importation of goods. Considerable work may be undertaken by Australia and our trading partners to enter into agreements that cover the trade between our respective countries. These agreements may contain the amount of tariff rate quota available for a good to a particular country or the method for calculating the tariff rate quota. This amendment will ensure that if a responsible authority or body were to make changes to the documents listed under subclause 432(3) after the Bill or rules are first made, the Bill, rules and standards to be applied will not be out of date.
>
> Paragraph 432(3)(h) operates in addition to paragraph 432(3)(g) in the circumstance an agreement is entered into between Australia and another country (for example, a free trade agreement with the European Union), which may be made by an authority or body that is not responsible for regulating the importation of goods into that county.
>
> To ensure Australian exports may have access to tariff rate quotas, it is necessary to provide for incorporation of agreements between Australia

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2020*, pp. 11-12.

> and other countries that may contain the amount of tariff rate quota and calculation of that tariff rate quota.
>
> If these agreements were not incorporated, Australian exports may be unable to access the available rates of tariff rate quotas and subsequently be exposed to higher importation taxes upon entry into the importing country.

***Committee comment***

2.45 The committee thanks the minister for this response. The committee notes the minister's advice that it remains the intention that whenever documents described in paragraphs 432(3)(g) and (h) are applied, adopted or incorporated by the rules, these documents will be publicly available, and that the documents will be accessible either on the department's website or through a link to where the documents may be found on the website of the relevant authority or body.

2.46 The committee further notes the minister's advice that the purpose of the provisions in paragraphs 432(3)(g) and (h) is to ensure rules can be made to enable accurate calculation of tariff rate quotas for the exportation of Australian goods into a particular country. The minister advises that it is necessary to provide for incorporation into these rules of agreements between Australia and other countries that may contain the amount of tariff rate quota and calculation of that tariff rate quota to ensure Australian exports may have access to tariff rate quotas, and to ensure that the rules will not be out of date if changes are made.

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

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

**2.49 In light of the detailed information provided, the committee makes no further comment on this matter.**

# Treasury Laws Amendment (2020 Measures No. 4) Bill 2020

| | |
|---|---|
| **Purpose** | Schedule 1 to this bill seeks to amend the income tax law to ensure that no tax is payable on refunds of large-scale generation certificate shortfall charges<br>Schedule 2 to this bill seeks to facilitate the closure of the Superannuation Complaints Tribunal and any associated transitional arrangements<br>Schedule 3 to this bill seeks to enable the government to establish a more effective enforcement regime to encourage greater compliance with the franchising code by increasing the maximum civil pecuniary penalty available for a breach of an industry code, and increasing the civil pecuniary penalties for breaches of the franchising code accordingly<br>Schedule 4 to this bill seeks to extend the operation of a temporary mechanism put in place during the coronavirus pandemic, to respond to the ongoing challenges posed by social distancing measures and restrictions on movement and gathering in Australia and overseas |
| **Portfolio** | Treasury |
| **Introduced** | House of Representatives on 28 October 2020 |
| **Bill status** | Before the House of Representatives |

### Power for delegated legislation to modify the operation of primary legislation (akin to Henry VIII clause)[20]

2.50 In *Scrutiny Digest 16 of 2020* the committee requested the Assistant Treasurer's advice as to whether the bill could be amended to remove the ability of the Assistant Treasurer to, by legislative instrument, extend the operation of the modification power in Schedule 5 of the Act beyond 31 March 2021.[21]

20 Schedule 4, item 1, proposed subitems (7) and (8) of section 1 of Schedule 5, and item 2, proposed subsections 1, 2 and 3 of Schedule 5, section 1. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 26-28.

### *Assistant Treasurer's response*[22]

2.51 The Assistant Treasurer advised:

> The unpredictable nature of the COVID 19 pandemic poses particular risks to ensuring timely Government responses to the pandemic without flexible mechanisms in place. The types of determinations that are, or would be, made under this Schedule are in the nature of providing greater flexibility for individuals and businesses to comply with requirements under Commonwealth legislation via allowing additional acceptable mechanisms for compliance, with no disadvantage or detrimental effects on individuals or entities. Instead, enabling Australians to fulfil document requirements through alternative means, including electronically, is necessary to ensure that individuals, particularly vulnerable Australians, can continue to access government services without unnecessary difficulty in the face of social distancing restrictions.
>
> Due to the COVID 19 pandemic, it is not unforeseeable that there could be further disruptions or changes to the Parliamentary sitting schedule in 2021, which would heighten the risks around progressing amendments to primary legislation swiftly in such circumstances.
>
> I note that under Schedule 4 to the Bill the designated Minister will only be able to extend the modification power, if they are satisfied it is in response to the circumstances relating to the COVID 19 pandemic. As such, the power is for a specific purpose and is restrictive rather than perpetual in nature. Additionally, the designated Minister may only extend the modification power by a legislative instrument which would be subject to the scrutiny of the Parliament and disallowable. As such, Parliament will continue to have oversight of any further extensions of the modification power beyond 31 March 2021 and will have the ability to disallow the extension.
>
> In summary, the Attorney-General's Department have advised that it is critical to retain the ability for the Attorney-General to extend the operation of the mechanism by ministerial determination.

### *Committee comment*

2.52 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that the types of determinations that are, or would be, made under this Schedule are in the nature of providing greater flexibility for individuals and businesses to comply with requirements under Commonwealth legislation and that under Schedule 4 to the bill the designated

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22 The Assistant Treasurer responded to the committee's comments in a letter dated 7 December 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 18 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest.

minister will only be able to extend the modification power if they are satisfied it is in response to the circumstances relating to the COVID-19 pandemic.

2.53 The committee also notes the Assistant Treasurer's advice that the designated minister may only extend the modification power by a disallowable legislative instrument, which would therefore be subject to the scrutiny of the Parliament, and that this power is for a specific purpose and is restrictive rather than perpetual in nature.

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

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

**2.56 In light of the information provided, the committee makes no further comment on this matter.**

# Chapter 3

# Scrutiny of standing appropriations

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

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

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.[1] 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.[2]

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

**Senator Helen Polley**
**Chair**

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1 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*.

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