

The Senate

Standing
Committee for the
Scrutiny of Bills

Scrutiny Digest 7 of 2023

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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, standing order 24 enables Senators to ask the responsible minister why in the Senate chamber, for an explanation the committee has not received a response.

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

Publications

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

General information

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

Chapter 1

Initial scrutiny

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

Greenhouse and Energy Minimum Standards Amendment (Administrative Changes) Bill 2023¹

Purpose	This bill seeks to amend the <i>Greenhouse and Energy Minimum Standards Act 2012</i> to improve the Greenhouse and Energy Minimum Standards Regulator performance and reduce administrative burden.
Portfolio	Climate Change and Energy
Introduced	Senate on 15 June 2023

Significant matters in delegated legislation²

1.2 Item 5 of Schedule 1 to the bill seeks to insert proposed subsection 27A(1) into the *Greenhouse and Energy Minimum Standards Act 2012* (the Act) to allow the Greenhouse and Energy Minimum Standards Regulator (the GEMS Regulator) to, by legislative instrument, declare that specified classes of products or specified models of GEMS products are taken to comply with one or more requirements, or one or more aspects of requirements, of a specified GEMS determination in specified circumstances or if specified conditions are complied with.

1.3 The committee's consistent scrutiny view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee notes that a determination made by the GEMS Regulator would mean that a specified class or model of products are deemed to comply with requirements specified in a determination made by the Minister under section 23 of the Act.

1.4 In this instance, the explanatory memorandum states:

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Greenhouse and Energy Minimum Standards Amendment (Administrative Changes) Bill 2023, *Scrutiny Digest 7 of 2023*; [2023] AUSStaCSBSD 107.

2 Schedule 1, Part 2, item 5, proposed subsection 27A(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

The ability for the GEMS Regulator to prescribe such matters in a legislative instrument made under the Act is consistent with good regulatory practice. Over time, technological advances and consumer behaviours are likely to necessitate changes to how products are regulated under the Act. Furthermore, different products will have different requirements. Those requirements are in turn subject to change due to technological advances, consumer behaviours and changes in relevant international and domestic markets for specific products and applicable regulatory frameworks. Allowing a legislative instrument to prescribe such matters provide the necessary flexibility to quickly respond to changes in the regulatory regimes.³

1.5 While acknowledging the information provided in the explanatory memorandum, the committee generally expects there to be appropriate safeguards within the primary legislation that limit the matters that are being left to delegated legislation. In this regard, the committee welcomes the inclusion in the bill of proposed subsection 27A(3) to constrain the Regulator's declaration making power. This proposed subsection provides that the GEMS Regulator must not make a declaration unless satisfied that making the declaration is likely to promote the objects of the Act and the requirements (if any) prescribed by the regulations are complied with.

1.6 The committee considers, however, that it may be appropriate to amend the bill to provide for the conduct of a review of the operation of declarations made under proposed subsection 27A(1) within a specified time, for example, within three years of commencement of the declaration. This would ensure it remains fit for purpose and would allow for the consideration of whether it would be more appropriate to amend the Minister's GEMS determination to reflect the content of the Regulator's declaration.

1.7 In light of the above, the committee requests the minister's detailed advice as to whether the bill can be amended to provide for a review of the operation of declarations made under proposed subsection 27A(1) within a specified time, for example within three years of commencement of the declaration.

3 Explanatory memorandum, p. 7.

Public Service Amendment Bill 2023⁴

Purpose	This bill seeks to amend the <i>Public Service Act 1999</i> to deliver enduring transformational change, and ensure the Australian Public Service is well placed to serve the Australian Government, the Parliament and the Australian public into the future.
Portfolio	Prime Minister and Cabinet
Introduced	House of Representatives on 14 June 2023

Tabling of documents in Parliament⁵

1.8 Item 8 of Schedule 1 seeks to introduce section 44A into the *Public Service Act 1999* (the Act). This provision provides that the Australian Public Service Commissioner (the Commissioner) can cause a capability review of an Agency to be undertaken, at least once every 5 years or if the Commissioner determines in writing, another number of years in relation to the Agency.⁶ A similar power is introduced for the Secretary of the Prime Minister's Department to cause a capability review of the Australian Public Service Commission to be undertaken. Proposed paragraph 44A(4)(d) requires that a capability review report is published on an Agency website.⁷ There appears to be no requirement for capability review reports of the Australian Public Service Commission to be published.

1.9 Proposed section 44B provides that where a capability review of an Agency is undertaken and a written report of the review given to the Agency Head,⁸ within 90 days after the report is given to the Agency Head, the Agency Head must prepare a written action plan that includes a response to the findings and publish the action plan on an Agency website.

4 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Public Service Amendment Bill 2023, *Scrutiny Digest 7 of 2023*; [2023] AUSStaCSBSD 108.

5 Schedule 1, items 8, 10 and 12, proposed sections 44A, 44B 64A and 78B. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

6 *Public Service Act 1999*, section 7 defines an 'Agency' to mean a Department, an Executive Agency or a Statutory Agency.

7 Item 1, proposed section 7 seeks to introduce a definition of 'Agency website' to mean a website maintained by the Agency.

8 *Public Service Act 1999*, section 7 defines an 'Agency Head' to mean the Secretary of a Department, the Head of an Executive Agency or the Head of a Statutory Agency.

1.10 Item 10 of Schedule 1 seeks to introduce section 64A which requires the Secretaries Board⁹ to cause long-term insights reports to be prepared in relation to one or more matters of public policy. Proposed subsection 64A(2) explains that the purpose of a long-term insight report is to make available information about:

- medium-term and long-term trends, risks, and opportunities that affect or may affect Australia or Australian society; and
- information and impartial analysis relating to those trends, risks and opportunities.

1.11 Proposed subsection 64A(4) provides that this be published on an Agency website and, if the Secretaries Board considers appropriate, elsewhere.

1.12 Item 12 of Schedule 1 seeks to insert section 78B, which requires the Agency Head of an Agency to prepare an action plan that sets out the Agency Head's response to the census results as they relate to the Agency. Proposed subsection 78B(3) provides that the census results and action plan must be published as soon as practicable after the first day on which a copy of the State of the Service report for the financial year is laid before a House of the Parliament, unless an exemption from the Commissioner has been given in writing.

1.13 The bill does not require any of the documents created under proposed sections 44A, 44B, 64A or 78B to be tabled in the Parliament. The committee's consistent scrutiny view is that tabling documents in the Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not made available through other means, for example, by being published online.

1.14 In this case, the documents proposed to be created include capability reviews of government agencies, action plans responding to capability reviews, long-term insight reports, and action plans responding to Agency census results. All of these appear to be directed at improving transparency and external scrutiny of performance of government agencies, which would be further aided by requiring them to be tabled in the Parliament.

1.15 The explanatory memorandum does not include any justification as to why these documents are not intended to be tabled in the Parliament and why it is considered appropriate to only publish them online.

9 *Public Service Act 1999*, section 64 provides that the 'Secretaries Board' consists of the Secretary of the Prime Minister's Department, the Secretary of each other Department, the Commissioner, and such other persons as are nominated in writing by the Secretary of the Prime Minister's Department.

1.16 The committee requests the minister's advice as to:

- **whether the bill can be amended to provide that the documents created under proposed sections 44A, 44B, 64A or 78B of the bill must be tabled in the Parliament; or**
 - **if the minister considers these documents are not appropriate for tabling in the Parliament, whether a justification can be provided as to why it is appropriate that the documents are not tabled.**
-

Privacy¹⁰

1.17 As noted above, item 8 of Schedule 1 of the bill seeks to introduce section 44A to provide that the Commissioner can cause capability reviews of Agencies to be undertaken. Proposed subsection 44A(11) provides an exception to the requirement to publish the report. A person who causes a capability review into an Agency to be undertaken and receives a written report of the review may remove material from the copy that is published or decide not to publish the report if publishing the material or the report would, or could, reasonably be expected to, damage the security, defence or the international relations of the Commonwealth.

1.18 The committee considers that as undertaking a capability review may involve the collection of information about individuals, the provision engages the right to privacy. Where a bill provides for the collection, use or disclosure of personal information, the committee expects that the explanatory materials to the bill should address why it is appropriate to do so, what safeguards are in place to protect the personal information, and whether these are set out in law or policy.

1.19 The statement of compatibility explains:

Undertaking a capability review of an Agency may necessitate gathering of information about the capabilities and opinions of individuals during the initial analysis stage. The capturing of this information would be subject to any requirements under the *Privacy Act 1988* (Cth). Further, it is expected that the published report would focus on the strengths and development areas of the Agency in the context of its future operating environment and not on individual capabilities and would not identify or enable the identification of individuals. For these reasons, the protection of an individual's right to privacy has been considered and it is deemed there are sufficient protections in place without further requirement under the Bill.¹¹

10 Schedule 1, item 8, proposed section 44A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

11 Statement of compatibility, p. 6.

1.20 While acknowledging the operation of the *Privacy Act 1988* and that the intention of a capability review is to report on broader work practices of an Agency rather than individual capabilities, the committee nevertheless considers it may be appropriate to include specific safeguards in the bill to reflect this intention. For example, the bill could be amended to specifically provide that a capability report cannot include information pertaining, or which may identify, individuals who are non-Senior Executive Service employees.

1.21 In light of the above, the committee requests the minister's detailed advice as to whether the bill can be amended to include safeguards to protect non-Senior Executive Service employees' personal information.

Broad delegation of administrative powers or functions¹²

1.22 Under subsection 78(7) of the Act, an Agency Head may, in writing, delegate to another person any of the Agency Head's powers or functions under the Act (but cannot delegate the power to delegate). Subsection 78(8) further provides that an Agency Head cannot delegate powers or functions to an 'outsider' without the prior written consent of the Commissioner. An outsider means a person other than (a) an APS employee, or (b) a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth.

1.23 Item 11 of Schedule 1 of the bill seeks to introduce paragraph 78(8)(c) to include a member of the Australian Defence Force (ADF). This has the effect that a member of the ADF is not considered an 'outsider' for the purposes of an Agency Head's delegation power under subsection 78(7), and therefore an Agency Head may delegate any of their powers or functions to a member of the ADF without the written consent of the Commissioner.

1.24 The powers and functions an Agency Head has under the Act, and therefore that can be delegated, include the ability to, amongst other things:

- determine procedures for determining whether an APS employee (current or former) has breached the Code of Conduct and to impose sanctions for its breach;¹³ and
- determine employment conditions relating to staff, including the power to reduce classification levels and terminate employment.¹⁴

12 Schedule 1, item 8, proposed section 44A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

13 *Public Service Act 1999*, subsections 15(1) and (3).

14 See, for example, *Public Service Act 1999*, sections 22, 23, 24 and 29.

1.25 The committee has consistently drawn attention to legislation that allows the delegation of a broad range of administrative powers or functions 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 (SES).

1.26 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, and an explanation of who will be exercising the powers and functions, including whether they possess the appropriate training, qualifications, skills or experience.

1.27 The explanatory memorandum explains that the amendment seeks to eliminate unnecessary administration to delegate powers and functions to ADF members, and will bring the Act in line with updates made to the Public Service Regulations 2023.¹⁵

1.28 While noting this explanation, the committee considers that a desire for administrative efficiency is not, of itself, sufficient justification for allowing a broad delegation of administrative powers. The committee notes that it is sometimes appropriate to delegate powers to a wide range of people in order to allow for administrative efficiency. However, the committee considers that it would be possible to achieve this without allowing delegation to anyone who is not an 'outsider'. It is not clear to the committee why it would not be possible to provide at least high-level restrictions on either the powers and functions that may be delegated or the persons who may receive delegations. For example, the bill could be amended to include a requirement that the Agency Head can only delegate their functions or powers to members of the SES and must be satisfied that the person has the appropriate training, qualifications or experience to appropriately exercise the delegated power or function.

1.29 Further, there appear to be few safeguards within the bill. The committee does not consider the limitation in subsection 78(11) of the Act, that a person exercising powers or functions under a delegation under section 78 must comply with any directions of the person who delegated the power or function, to be sufficient.

1.30 The committee notes that the Public Service Regulations 2023 introduce similar powers and was similarly the subject of comment regarding the broad delegation of administrative powers or functions by the Senate Standing Committee

15 Explanatory memorandum, p. 15.

on the Scrutiny of Delegated Legislation in its *Delegated Legislation Monitor 5 of 2023*.¹⁶

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

- why it is necessary and appropriate to allow an Agency Head to make a delegation under subsection 78(7) of the *Public Service Act 1999* to any person who is not an 'outsider'; and
- whether the bill can be amended to provide legislative guidance as to the scope of powers that might be delegated, or to further limit the categories of people to whom those powers might be delegated.

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

16 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 5 of 2023* (10 May 2023) pp. 4–5.

Private senators' and members' bills that may raise scrutiny concerns¹⁷

1.33 The committee notes that the following private senator's bill may raise scrutiny concerns under Senate standing order 24. Should this bill proceed to further stages of debate, the committee may request further information from the bill proponent.

Bill	Relevant provisions	Potential scrutiny concerns
Murdoch Media Inquiry Bill 2023	Clauses 12 and 13	The provisions may raise scrutiny concerns under principle (i) in relation to coercive powers.
	Clauses 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26	The provisions may raise scrutiny concerns under principle (i) in relation to significant penalties which have not been justified within the explanatory memorandum.

¹⁷ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 7 of 2023*; [2023] AUSStaCSBSD 109.

Bills with no committee comment¹⁸

1.34 The committee has no comment in relation to the following bills which were introduced into the Parliament between 13 – 16 June 2023:

- Broadcasting Services Amendment (Ban on Gambling Advertisements During Live Sport) Bill 2023
- Home Affairs Bill 2023¹⁹

18 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 7 of 2023*; [2023] AUSStaCSBSD 110.

19 This bill was introduced in the House of Representatives on 15 June 2023 and passed the same day after 73 minutes of debate in both Houses. The committee seeks to consider and report on all bills while still before the Parliament in order to inform debate. The committee considers that this quick process inappropriately limited parliamentary scrutiny and debate.

Bills deferred²⁰

1.35 Consideration of the following bills which were introduced into the Parliament between 13 – 16 June 2023 has been deferred:

- Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023
- Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023
- Treasury Laws Amendment (2023 Measures No. 3) Bill 2023

²⁰ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills deferred, *Scrutiny Digest 7 of 2023*; [2023] AUSStaCSBSD 111.

Commentary on amendments and explanatory materials²¹

Aboriginal Land Grant (Jervis Bay Territory) Amendment (Strengthening Land and Governance Provisions) Bill 2022

1.36 On 14 June 2023, the Minister for Indigenous Australians (the Hon Linda Burney MP) circulated a supplementary explanatory memorandum to the bill.

1.37 The committee thanks the minister for providing a supplementary explanatory memorandum, which includes key information requested by the committee in relation to the broad delegation of administrative powers.²²

Creative Australia Bill 2023

1.38 On 16 June 2023, the Minister for the Arts (the Hon Tony Burke MP) circulated a correction to the explanatory memorandum.

1.39 The committee thanks the minister for providing a correction to the explanatory memorandum, which aligns with scrutiny concerns raised by the committee in relation to inconsistency with the primary legislation.²³

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

- Australian Security Intelligence Organisation Amendment Bill 2023;²⁴
- Jobs and Skills Australia Amendment Bill 2023;²⁵

21 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 7 of 2023*; [2023] AUSStaCSBSD 112.

22 Senate Standing Committee for the Scrutiny of Bills, [Digest 7 of 2022](#) (23 November 2022) pp. 2–3; Senate Standing Committee for the Scrutiny of Bills, [Digest 1 of 2023](#) (8 February 2023) p. 77.

23 Senate Standing Committee for the Scrutiny of Bills, [Digest 7 of 2022](#) (23 November 2022) pp. 2–3; Senate Standing Committee for the Scrutiny of Bills, [Digest 1 of 2023](#) (8 February 2023) p. 77.

24 On 15 June 2023, the Minister for Home Affairs (the Hon Clare O’Neil MP) presented a replacement explanatory memorandum to the bill.

25 On 13 June 2023, Senator the Hon Malarndirri McCarthy tabled a revised explanatory memorandum to the bill.

- Public Interest Disclosure Amendment (Review) Bill 2022;²⁶ and
- Treasury Laws Amendment (2023 Measures No. 2) Bill 2023.²⁷

26 On 15 June 2023, the Senate agreed to 3 Government amendments to the bill.

27 On 16 June 2023, the Senate agreed to 2 Opposition amendments to the bill.

Chapter 2

Commentary on ministerial responses

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

National Security Legislation Amendment (Comprehensive Review and other Measures No. 2) Bill 2023¹

Purpose	<p>This bill seeks to amend the:</p> <ul style="list-style-type: none"> • <i>Acts Interpretation Act 1901</i> • <i>Administrative Appeals Tribunal Act 1975</i> • <i>Archives Act 1983</i> • <i>Australian Security Intelligence Organisation Act 1979</i> • <i>Crimes Act 1914</i> • <i>Criminal Code Act 1995</i> • <i>Freedom of Information Act 1982</i> • <i>Inspector-General of Intelligence and Security Act 1986</i> • <i>Intelligence Services Act 2001</i> • <i>Law Officers Act 1964</i> • <i>Ombudsman Act 1976</i> • <i>Public Interest Disclosure Act 2013</i> • <i>Telecommunications (Interception and Access) Act 1979</i> <p>to implement ten recommendations of the Comprehensive Review of the Legal Framework of the National Intelligence Community.</p>
Portfolio	Attorney-General
Introduced	House of Representatives on 29 March 2023

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Security Legislation Amendment (Comprehensive Review and other Measures No. 2) Bill 2023, *Scrutiny Digest 7 of 2023*; [2023] AUSStaCSBSD 113.

Reversal of the evidential burden of proof²

2.2 Items 6, 8 and 9 of Schedule 1 to the bill seeks to amend the *Criminal Code Act 1995* to introduce defences for various telecommunication-related offences.³ Proposed subsection 474.6(4A) provides that a person is not criminally responsible for an offence against subsections (1) and (3) if:

- (a) the person is, at the time of the offence, an ASIO (Australian Security Intelligence Organisation) officer acting in good faith in the course of the person's duties; and
- (b) the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

2.3 Proposed subsections 477.2(2) and 477.3(2) insert similar defences. A defendant bears an evidential burden of proof in relation to all of these defences.

2.4 In *Scrutiny Digest 5 of 2023*, the committee requested the Attorney-General's advice as to why determining whether conduct of an ASIO officer is reasonable is considered *peculiarly* within the knowledge of the defendant. The committee suggested that it may be appropriate for the bill to be amended to provide that reasonable conduct by an ASIO officer is specified as not an element of the offence under subsections 474.6(1), 474.6(3), 477.2(1) and 477.3(1) in the *Criminal Code Act 1995*, rather than as exceptions to the offence.⁴

Attorney-General's response⁵

2.5 The Attorney-General advised that the inclusion of these offences implements recommendation 66 of the Comprehensive Review of the Legal Framework of the National Intelligence Community (the Comprehensive Review). The Attorney-General advised that why a person engaged in conduct is information that will be peculiarly

2 Schedule 1, part 2, items 6, 8 and 9, proposed subsections 474.6(4A), 477.2(2) and 477.3(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

3 Subsections 474.6(1) and (3) of the *Criminal Code Act 1995* provide for offences for tampering with, or interfering with, a facility owned or operated by a carrier, a carriage service provider or a nominated carrier. Subsection 477.2(1) provides an offence for unauthorised modification of data to cause impairment. Subsection 477.3(1) provides an offence for unauthorised impairment of electronic communication.

4 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 5 of 2023](#) (10 May 2023) pp. 30–31.

5 The minister responded to the committee's comments in a letter dated 9 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

within their knowledge. The Attorney-General advised that reversing the burden of proof will better enable the reason for the relevant conduct to come to light as the defendant is best placed to point to evidence as to why they engaged in the relevant conduct, including to demonstrate why, in their view, the conduct was reasonable in the circumstances. The Attorney-General further advised that the matters concern the actions of a person in the course of their duties for ASIO which will be highly classified to protect operational security. While the question of whether conduct of the ASIO officer is 'reasonable' is an objective test, the Attorney-General advised that the assessment of whether such action was reasonable will depend on facts and circumstances known to the defendant at the time they took the action, including the operational context and professional judgement of deciding to engage in the conduct.

2.6 In relation to whether the bill could be amended to provide that reasonable conduct by an ASIO officer is specified as an element of the offence, the Attorney-General advised that this would result in an unjustifiably difficult onus for the prosecution to discharge. This is because there is a risk of a significant burden (including impact to resourcing and timing) being placed on prosecutors to establish a matter that is peculiarly within the knowledge of, and could be easily pointed to by, the defendant. The Attorney-General further advised that this approach reflects similar defences in place for intelligence and law enforcement officers in regards to certain telecommunications offences in the Criminal Code and is consistent with the Guide to Framing Commonwealth offences.

Committee comment

2.7 The committee thanks the Attorney-General for this response.

2.8 The committee acknowledges the Attorney-General's advice that it is considered that the defendant is best placed to demonstrate why they think the conduct was reasonable in the circumstances, and that while the assessment of whether an action was reasonable is an objective test, it will depend on facts and circumstances that could be peculiarly known to the defendant. However, the committee notes that given the vagueness of the defence it is equally possible to conceive of a list of relevant matters which would not be peculiarly within the knowledge of a potential defendant.

2.9 Given the generality of the defence set out at proposed subsection 474.6(4A), the committee does not consider that it is appropriate to reverse the evidential burden of proof in this instance. The committee considers that it would have been more appropriate to provide a more specific defence or to have relied on the general defences set out in the Criminal Code. The committee's concerns are heightened given that the 'reasonableness' element of the defence would require a defendant to raise evidence to prove an objective legal test on the balance of probabilities.

2.10 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of

proof in relation to an offence under subsections 474.6(1), 474.6(3), 477.2(1) and 477.3(1) in the *Criminal Code Act 1995*.

Privacy⁶

2.11 Item 14 of Schedule 1 to the bill seeks to add proposed section 85ZZJA into the *Crimes Act 1914* to expand the exclusions in the spent convictions scheme. The provision allows ASIO, or an ASIO officer, to disclose, file or record, or use information relating to spent convictions for the purpose of performing its functions or exercising its powers.

2.12 Under proposed subsection 85ZZJA(2), an ASIO officer is defined to mean the Director-General of Security, an ASIO employee or an ASIO affiliate (which includes consultants, contractors and persons seconded to ASIO).⁷

2.13 In *Scrutiny Digest 5 of 2023* the committee requested the Attorney-General's more detailed advice as to why it is appropriate for ASIO or an ASIO officer to have the power to disclose, file or record, or use information relating to spent convictions. The committee noted that its consideration of this issue will be assisted if the Attorney-General's response details what safeguards exist for individuals who may be affected by proposed section 85ZZJA of the *Crimes Act 1914*, whether these safeguards are contained in law or policy, and to whom ASIO officers may disclose information about an individual's spent conviction.⁸

Attorney-General's response⁹

2.14 The Attorney-General advised that this implements recommendation 136 of the Comprehensive Review. The Attorney-General advised that excluding ASIO from the spent convictions scheme will allow ASIO to better perform its functions and exercise its powers, including cooperating with law enforcement, and further noted that:

As stated in the Comprehensive Review, there are certain communal interests which override an individual's interest in having their conviction spent. The public interest in ASIO having access to information to use in protecting Australia, its people and its interests from threats to security

6 Schedule 1, part 4, item 14, proposed section 85ZZJA. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

7 *Australian Security Intelligence Organisation Act 1979*, section 4.

8 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 5 of 2023](#) (10 May 2023) pp. 32–33.

9 The minister responded to the committee's comments in a letter dated 9 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

outweighs an individual's interest in not having their convictions taken into account by ASIO when performing its functions. It will also rectify an existing discrepancy whereby law enforcement agencies are able to use, record and disclose spent convictions information for investigations or the prevention of a crime, while ASIO is prohibited from doing the same in the performance of its functions.

2.15 The Attorney-General further advised that the exclusion extends only to the use of information by ASIO and that spent conviction information obtained by other agencies from ASIO would remain subject to the protection of the spent conviction scheme. The Attorney-General also advised that there are some additional safeguards for the protection of spent conviction information, including:

- ASIO's use of spent conviction information must be conducted in line with the Minister for Home Affairs' guidelines which require:
 - ASIO to consider the proportionality of its activities and conduct those activities with as little intrusion into the privacy of affected individuals as is reasonably required;
 - the least intrusive techniques for collecting information should be used before more intrusive techniques; and
 - the Director-General of Security to take all reasonable steps to ensure that ASIO's collection, retention, use, handing and disclosure of personal information is limited to what is reasonably necessary to perform its functions;
- ASIO will draft internal policy guidance for how the exclusion will be applied in practice; and
- the actions of ASIO and the National Intelligence Community are subject to the oversight of the Inspector-General of Intelligence and Security.

Committee comment

2.16 The committee thanks the Attorney-General for this response.

2.17 While the committee acknowledges the importance of balancing national and individual considerations in relation to national security, the committee nevertheless considers it important to ensure safeguards exist for affected individuals. Further, noting the advice that the exclusion only extends to ASIO's use of spent conviction information, it is still unclear from this response to whom ASIO may disclose an individual's spent conviction information.

2.18 Nevertheless, the committee welcomes the advice that there are a number of non-legislative safeguards to protect an individual's privacy and considers it would be appropriate for the explanatory materials to provide greater detail as to what safeguards exist.

2.19 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Attorney-General 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*).

2.20 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding the exclusions in the spent convictions scheme in the *Crimes Act 1914*, noting its implications for the privacy of individuals.

Chapter 3

Scrutiny of standing appropriations¹

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.² 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.³

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

Senator Dean Smith
Chair

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Scrutiny of standing appropriations, *Scrutiny Digest 7 of 2023*; [2023] AUSStaCSBSD AUSStaCSBSD 114.

2 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*.

3 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).