



Senate Standing

Committee for the Scrutiny of Bills

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# Membership of the committee

## Current members

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Senator Nick McKim	AG, Tasmania
Senator Paul Scarr	LP, Queensland
Senator Tony Sheldon	ALP, New South Wales
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# Committee information

## Terms of reference

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

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

## Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a nonpartisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, standing order 24 enables senators to ask in the Senate Chamber, the responsible minister, for an explanation as to why the committee has not received a response.

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

## Publications

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

**General information**

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



## Report snapshot

### Chapter 1: Initial scrutiny

Bills introduced 4 September to 14 September 2023	31
Bills commented on in report	8
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### Chapter 3: Scrutiny of standing appropriations

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## Chapter 1

### Initial scrutiny

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

#### Water Amendment (Restoring Our Rivers) Bill 2023<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Water Act 2007</i> and Basin Plan 2012 to implement the Basin Plan in full, including recovering 450 gigalitres (GL) of additional environmental water, and to implement recommendations from the Water Market Reform: Final Roadmap, including introducing water markets reform measures aimed at improving the transparency and integrity of water markets.
<b>Portfolio</b>	Environment and Water
<b>Introduced</b>	House of Representatives on 6 September 2023
<b>Bill status</b>	Before the House of Representatives

#### Significant matters in delegated legislation

##### Privacy

##### Broad delegation of administrative powers or functions<sup>2</sup>

1.2 Schedule 3 to the bill seeks to amend the *Water Act 2007* to provide for a Water Markets Intermediaries Code (the Code) to regulate the conduct of eligible water market intermediaries towards participants and potential participants in the water market. Proposed section 100G provides that regulations may prescribe the Code and outlines what matters the Code may make provision for.<sup>3</sup> The Code may also make provision for pecuniary and civil penalties, not exceeding 600 penalty units.<sup>4</sup>

<sup>1</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Water Amendment (Restoring Our Rivers) Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 181.

<sup>2</sup> Schedule 3, proposed sections 100G and 100ZD. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i), (ii) and (iv).

<sup>3</sup> Proposed subsection 100G(2) outlines that these matters may include imposing an obligation upon eligible water markets intermediaries to act in the best interests of clients, the provision of information to clients, the retention of records for the purposes of the bill and trust accounting, holding clients' eligible tradeable water rights, holding professional indemnity insurance, and keeping client records.

<sup>4</sup> Proposed sections 100J and 100K.

1.3 While the bill sets out the kinds of matters that may be included in the Code, the detail of its content and operation is ultimately left to the Code itself, which is made through regulation.

1.4 The committee acknowledges that it is sometimes appropriate to include certain administrative and technical matters within delegated legislation. However, the explanatory memorandum has not provided an explanation as to why the bill and the Code are framed in this way. As no explanation has been given, and the matters left to be determined in the Code are all left to delegated legislation, it is difficult for the committee to assess the appropriateness of some of the provisions and whether adequate safeguards are in place. For example, of particular concern are provisions which prescribe broad delegations of administrative powers or functions, or those that have privacy implications, as identified below.

1.5 In relation to broad delegations of administrative powers or functions, proposed subsection 100G(3) provides that the Code may confer on a person or body functions and powers in relation to the Code, and provides a non-exhaustive list of matters that may be conferred. These include, for example: monitoring compliance; dealing with disputes; conducting investigations; providing exemptions; reviewing or reporting on the operation of the Code; and any other matter relating to the operation, application or administration of the Code.

1.6 Proposed subsection 100G(4) clarifies that, where it is a function or power providing *exemptions* from the Code, the persons or bodies on whom the Code may confer functions or powers are limited to the Australian Competition and Consumer Commission (ACCC) or the minister. However, where the function or power does not provide an exemption, any person or body, whether or not a participant in the water market, may have functions or powers conferred on them.

1.7 Further, proposed paragraph 100G(7)(b) provides that the Code may confer on a person or body (whether or not the Code relates to the person) a function of imposing, or a power to impose, a requirement that a person or body provide another person or body with information or documents relevant to the operation, application or administration of the Code.

1.8 The effect of these provisions is to allow for the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to the delegate's 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. Where broad delegations are provided for, the committee considers that an explanation as to why these are considered necessary should be included in the explanatory memorandum. In this case, the explanatory memorandum merely restates the provisions and offers no further explanation as to why the bill provides for such a broad scope for the Code to confer functions and powers on any person, even if they are not a participant in the water market.

1.9 The committee's concerns are heightened by the privacy implications of the power to confer on any person or body functions or powers relating to the sharing and reporting of information or documents relevant to the operation, application or administration of the Code, which may include personal information.

1.10 The bill further includes a number of provisions which may engage an individual's right to privacy, as they allow the Code to provide for the keeping and retention of information, and provide for powers to compel information or documents to be given. These are detailed below:

- proposed paragraph 100G(2)(c) provides that the Code may make provision for the keeping and retention of records for the purposes of the Code or for Division 5 trust accounting;
- proposed paragraph 100G(7)(a) provides that the Code may require a person or body to provide another person or body with information or documents relevant to the operation, application or administration of the Code (whether or not the Code relates to any of those persons);
- as noted above, proposed paragraph 100G(7)(b) provides that the Code may confer on a person or body (whether or not the Code relates to the person) a function of imposing, or a power to impose, a requirement of the kind mentioned in paragraph (a); and
- proposed section 100ZD provides that the ACCC may require eligible water market intermediaries to give information or produce documents, if required to keep, generate or publish information or a document under the Code.

1.11 The committee considers that where a bill provides for the collection, use or disclosure of personal information, the explanatory materials to the bill should address why it is appropriate to do so and what safeguards are in place to protect the personal information, and whether these are set out in law or policy. This includes whether the *Privacy Act 1988* (Privacy Act) applies to the information that is collected, stored and disclosed.

1.12 In this case, the explanatory memorandum provides no further information on the privacy implications of these provisions. It is unclear what information or documents may be required to be given or produced as this information will be set out in the Code.

1.13 While the Code will be made in regulations which will be separately scrutinised for privacy concerns, the bill does not appear to offer many privacy safeguards. It is also unclear to the committee whether the Privacy Act applies more broadly to the operation of the bill and the Code, and whether the potentially broad number of persons or bodies who may be conferred powers under the Code to compel information and documents are subject to the Privacy Act.

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

- why it is considered appropriate to leave the content of the Water Markets Intermediaries Code (the Code) to regulation;
- why it is considered necessary and appropriate to confer various functions and powers in the Code to any person or body, whether or not a participant in the water market (unless it is a function or power providing an exemption to the Code);
- whether persons upon whom functions or powers are conferred will be required to possess the appropriate training, qualifications, skills or experience, and what safeguards are in place to ensure functions and powers are only exercised by appropriate persons;
- whether the *Privacy Act 1988* applies to any information that is collected, stored and disclosed under the Code; and
- whether other safeguards exist to protect an individual's personal information.

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

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### Procedural fairness<sup>5</sup>

1.16 Proposed subsection 100ZA(1) provides that the ACCC may issue a public warning notice about the conduct of a person if: the ACCC has reasonable grounds to suspect the conduct may constitute a contravention of the Code; the ACCC is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and the ACCC is satisfied that it is in the public interest to issue the notice.

1.17 While there is likely a strong public interest in providing public warnings, the committee considers that public warning notices about the conduct of a person may engage procedural fairness and privacy concerns.

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

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<sup>5</sup> Proposed subsection 100ZA(1). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii).

- the nature and scope of the exclusion or limitation; and
- why it is considered necessary and appropriate to restrict a person's right to procedural fairness.

1.19 The explanatory memorandum explains:

This provision is modelled on the industry code framework set out under Division 3 of Part IVB of the CC Act [Competition and Consumer Act 2010]. The effect of this provision would be that the ACCC would be permitted to disseminate and circulate information about such persons and their conduct, to key stakeholders and the broader community. This is an appropriate regulatory tool to prevent or reduce harmful effects of prohibited conduct on the community by alerting the public to the alleged misconduct.<sup>6</sup>

1.20 While acknowledging this explanation and the importance of preventing or reducing the harmful effects of prohibited conduct, the committee considers that a decision to issue a public warning notice will have implications on the reputation of a person and notes that the explanatory memorandum has not explained how procedural fairness operates in relation to such a decision. For example, it is unclear to the committee what kind of information may be shared about a person in a public warning notice, whether that person will be notified before a notice is issued, whether they will have the opportunity to contest such a notice, or how long such a notice may be publicly available.

**1.21 In light of this, the committee requests the minister's advice as to whether procedural fairness exists in relation to the issuing of a public warning notice.**

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### Significant penalties<sup>7</sup>

1.22 Proposed subsection 239AJ(2) provides that the ACCC may give written notice to a person to require them to give information, produce documents or appear before the ACCC, or a member of staff of the ACCC, to give evidence. Proposed subsection 239AJ(5) provides that refusal or failure to comply with a notice, or in purported compliance with the notice knowingly giving information or evidence that is false or misleading, holds a penalty of imprisonment of 2 years or 100 penalty units, or both.

1.23 The committee considers that, where significant penalties are imposed, the rationale should be fully outlined in the explanatory memorandum and should be justified by reference to similar offences in Commonwealth legislation. This promotes consistency and guards against the risk that a person's liberty is unduly limited through

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<sup>6</sup> Explanatory memorandum, p. 50.

<sup>7</sup> Proposed subsection 239AJ(5). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

the application of disproportionate penalties. Where a bill seeks to impose significant penalties, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to impose significant penalties;
- whether the penalties are broadly equivalent to the penalties for similar offences in Commonwealth legislation and if not, why not; and
- whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

1.24 In this case, the explanatory memorandum explains:

This aligns with the penalty under subsection 155(6A) of the CC Act [*Competition and Consumer Act 2010*] and with the penalty for non-compliance with similar notice-based evidence-gathering powers of other regulators. Given the seriousness of this offence and that such conduct may undermine the integrity of the regulatory framework provided for by the Water Act, the size of the penalty is appropriate to act as a deterrent.<sup>8</sup>

1.25 While acknowledging the comparison with penalties in the *Competition and Consumer Act 2010*, it is not clear that a significant penalty of up to two years imprisonment or 100 penalty units for a failure to comply with a notice is a comparable penalty to other similar offences. The committee notes that the *Guide to Framing Commonwealth Offences* recommends that non-compliance with a notice to produce or attend (being a provision that allows an enforcement or regulatory agency to require a person to produce information or documents, or to appear at a hearing to answer questions) should generally be six months imprisonment and/or a fine of 30 penalty units.<sup>9</sup>

1.26 The committee also notes that in *Scrutiny Digest 6 of 2017*, the committee commented on subsection 155(6A) of the *Competition and Consumer Act 2010* when it was introduced in the Competition and Consumer Amendment (Competition Policy Review) Bill 2017.<sup>10</sup> At that time, the committee concluded that it 'does not consider that sufficient information has been provided to be able to conclude that the significant increase in penalties for non-compliance with section 155 is consistent with other comparable Commonwealth offences or is necessary in the circumstances'.<sup>11</sup>

1.27 The committee's concerns are heightened in this case given the penalties attach to an offence which reverses the evidential burden of proof in relation to

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<sup>8</sup> Explanatory memorandum, p. 101.

<sup>9</sup> Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 93.

<sup>10</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2017* (14 June 2017) pp. 94-98.

<sup>11</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2017* (14 June 2017) p. 98.

particular elements of the offence, which requires the defendant to raise evidence about the matter. Further, in one instance the offence reverses the legal burden of proof, which requires the defendant to positively prove the matter.

**1.28 In light of this, the committee requests the minister's detailed advice as to the appropriateness of the penalty in proposed subsection 239AJ(5) and whether it is broadly equivalent to the penalties for similar offences. The committee's consideration of the appropriateness of the provision would be assisted if the response explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.**



## Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023<sup>12</sup>

<b>Purpose</b>	The Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023 (the bill) amends the <i>Defence Act 1903</i> (the Defence Act), through the insertion of a new Part IXAA which regulates the work that certain former defence staff members - called foreign work restricted individuals - can perform without a foreign work authorisation. The bill also regulates the training that Australian citizens and permanent residents, other than foreign work restricted individuals, may provide without a foreign work authorisation.
<b>Portfolio</b>	Defence
<b>Introduced</b>	House of Representatives on 14 September 2023
<b>Bill status</b>	Before the House of Representatives

### Reversal of the evidential burden of proof

#### Broad scope of offence provisions<sup>13</sup>

1.29 Proposed section 115B inserts a new criminal offence into the *Defence Act 1903* (the Act). Proposed subsection 115B(1) prescribes that an individual commits an offence if they are an Australian citizen or permanent resident<sup>14</sup> and not a foreign work restricted individual<sup>15</sup>, and provide training to, or on behalf of<sup>16</sup>, a military organisation of a foreign country<sup>17</sup> or a foreign country government body<sup>18</sup>, and the training relates to goods, software or technology within the scope of Part 1 of the

<sup>12</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 182.

<sup>13</sup> Schedule 1, item 1, proposed section 115B. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

<sup>14</sup> Proposed paragraph 115B(1)(a).

<sup>15</sup> Proposed paragraph 115B(1)(b). A foreign work restricted individual is defined in proposed section 114 of the bill.

<sup>16</sup> Proposed paragraph 115(1)(c).

<sup>17</sup> Proposed subparagraph 115B(1)(c)(i).

<sup>18</sup> Proposed subparagraph 115B(1)(c)(ii).

Defence and Strategic Goods List<sup>19</sup> or to military tactics, military techniques or military procedures<sup>20</sup>, and the foreign country is a relevant foreign country.<sup>21</sup>

1.30 Proposed subsection 115B(1) prescribes a maximum criminal penalty of 20 years imprisonment.

1.31 There are five offence-specific defences prescribed in proposed section 115B and each defence carries a reversal of the evidential burden of proof. The defences are:

- if an individual has a foreign work authorisation permitting them to undertake the work (proposed subsection 115B(2));
- if the training provided by the individual is authorised by a written agreement to which the Commonwealth is a party (proposed subsection 115B(3));
- if the training is solely in the course of, and as part of, the individual's service in any capacity in or with any armed force and a declaration under subsection 119.8(1) of the *Criminal Code Act 1995* (Criminal Code) covers the individual and the circumstances of the individual's service in the armed forces (proposed subsection 115B(4));
- if the training provided by the individual is in the course of, and as part of, the individual's employment or engagement by the Commonwealth (proposed subsection 115B(5)); or
- if the training provided by the individual is solely or primarily for either or both of the purposes of providing aid of a humanitarian nature, or performing an official duty for the United Nations or an agency of the United Nations, or the International Committee of the Red Cross (proposed subsection 155B(6)).

1.32 Proposed section 115A sets out a comparable offence which applies to 'foreign work restricted individuals', who are defined in proposed section 114 as an individual who was, but is not currently, a defence staff member. The committee notes that the offence in proposed section 115B applies to all Australian citizens and permanent residents regardless of any military or defence expertise. Proposed section 115B is therefore of more concern to the committee as it applies to Australian citizens and permanent residents regardless of any military or related expertise. It is unclear why the same penalty applies to contravention of proposed section 115B as proposed

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<sup>19</sup> Proposed subparagraph 115(1)(d)(i). See proposed section 113 of the bill for the definition of the Defence and Strategic Goods List.

<sup>20</sup> Proposed subparagraph 115(1)(d)(ii).

<sup>21</sup> Proposed paragraph 115(1)(e).

section 115A, given that an ex-Defence staff member is likely to have expert or sensitive military knowledge which a civilian would not.

1.33 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.<sup>22</sup> 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.

1.34 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.

1.35 In relation to the reversed evidential burdens in proposed subsection 115B(2), the explanatory memorandum states:

...It is appropriate for the defendant to bear the evidential burden because this fact would be within the defendant's knowledge.

The defendant will bear the burden of adducing or pointing to evidence that suggests a reasonable possibility that the foreign work authorisation was in force for this exception to be made out. If the defendant is able to meet this evidential burden, the prosecution will be required to refute the exception beyond a reasonable doubt.<sup>23</sup>

1.36 A similar explanation is provided for in relation to the reversed evidential burden in proposed subsection 115B(4).

1.37 In relation to the reversed evidential burdens in proposed subsection 115B(3), the explanatory memorandum states:

...the defendant would bear the evidential burden to prove that the individual had authorisation by written agreement and the Commonwealth was a party to that agreement. It is appropriate for the defendant to bear the evidential burden because this fact would be within the defendant's knowledge.

For example, the individual may have correspondence from the Commonwealth to the individual in relation to the agreement, a copy of the agreement, or other relevant official documentation in their possession.<sup>24</sup>

1.38 In relation to the reversed evidential burdens in proposed subsection 115B(5) the explanatory memorandum provides a similar justification and notes that the defendant may have 'correspondence of their employment or engagement from the

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<sup>22</sup> Subsection 13.3(3) of the Criminal Code 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.

<sup>23</sup> Explanatory memorandum, p. 15.

<sup>24</sup> Explanatory memorandum, p. 16

Commonwealth to the individual, a signed letter of offer from the Commonwealth, or payslips in their possession'.<sup>25</sup> In relation to proposed subsection 115B(6) the explanatory memorandum adds that the individual may have 'correspondence from the humanitarian agency in relation to the work performed, and relevant duty statements from the United Nations, an agency of the United Nations or the International Committee of the Red Cross'.<sup>26</sup>

1.39 The relevant test is that a matter should only be included in an offence-specific defence, as opposed to being specified as an element of the offence, where the matter is peculiarly within the knowledge of the defendant. In relation to the defences in proposed subsections 115B(2),(3), (4) and (5), it is not clear to the committee how the relevant matter is peculiarly within the knowledge of the defendant. Proposed subsection 115B(2) establishes a defence where the individual was given authorisation to undertake the relevant conduct by the Commonwealth which means that the Commonwealth would also have knowledge of the relevant fact. The same is applicable for the defence in proposed subsection 115B(3) where the relevant fact is that the individual was authorised to provide the training via a written agreement with the Commonwealth. Proposed subsection 115B(4) provides a defence in which the relevant conduct was undertaken as the course of an individual's service in the armed forces, which is knowledge that would be available to a number of parties including the Commonwealth. For proposed subsection 115B(5), the defence relates to the individual's employment with the Commonwealth which appears to be knowledge that the Commonwealth would be privy to.

1.40 Although the committee acknowledges that while the Commonwealth is required to disprove the above matters rather than the defendant adducing evidence to prove the existence of the relevant authorisation or agreement, it is not apparent that the matters are *peculiarly* within the defendant's knowledge. It is also not apparent that it would be significantly more difficult or costly for the prosecution to establish the matters than for the defendant to establish them.

1.41 The committee's concerns in this regard are heightened due to the broad scope of the offence provisions. The offence in proposed section 115B covers conduct including 'military tactics, military techniques or military procedures' which is considerably broad and open to interpretation.

**1.42 The committee draws its scrutiny concerns 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 matters that appear not to be peculiarly within the knowledge of the defendant.**

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<sup>25</sup> Explanatory memorandum, p. 17.

<sup>26</sup> Explanatory memorandum, p. 18.

**Procedural fairness**<sup>27</sup>

1.43 Proposed section 115E provides that the minister must cancel a foreign work authorisation granted to an individual if the minister reasonably believes, as a result of a change in circumstances, that the individual's performance of work or provision of training as specified in the authorisation would prejudice the security, defence or international relations of Australia (proposed paragraph 115E(1)(a)).<sup>28</sup> Proposed subsection 115E(2) provides that the minister is not required to observe any requirements of the natural justice hearing rule in relation to cancelling a foreign work authorisation.

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

1.45 In this regard, the explanatory memorandum states that '[t]he effect of this subsection is to clearly set out that there is a clear statutory intention to override the common law duty to provide procedural fairness'.<sup>29</sup>

1.46 In addition, the statement of compatibility with human rights explains:

The exclusion of the right to procedural fairness set out in section 115E also achieves the legitimate objective of ensuring the security, defence or international relations of Australia. Section 115E would only permit the Minister to cancel a foreign work authorisation where the Minister reasonably believes that the individual's performance of work or provision of training would prejudice the security, defence or international relations of Australia. Further, a review process, especially where there has been a change in circumstance, has the potential to create undue delay in cancelling an authorisation. The result of any delay could have the potential to cause immeasurable and irreparable damage to Australia's security, defence and international relations.<sup>30</sup>

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<sup>27</sup> Schedule 1, item 1, proposed subsection 115E(2) and proposed section 115M. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii).

<sup>28</sup> The minister must also cancel an authorisation if so requested by the individual, as per proposed paragraph 115E(1)(b).

<sup>29</sup> Explanatory memorandum, p. 25.

<sup>30</sup> Explanatory memorandum, p. 49.

1.47 While noting this advice, it is unclear to the committee why a complete abrogation of procedural fairness is necessary for national security. It appears that it would be possible for the reasons for the decision to be disclosed where the minister's reasonable belief as to the individual's change in circumstances relates to considerations which are personal or unique to the person, rather than national security or international relations.

1.48 In addition, proposed section 115K makes provision for internal review of relevant decisions. However, proposed subsection 115K(7) provides that the minister is taken to have affirmed the reviewable decision if the minister does not give the applicant written notice of a decision to affirm, vary or revoke the reviewable decision within 90 days. This is concerning from a procedural fairness perspective as it appears that no substantive consideration would be given to a review of decisions where the 90-day time limit is exceeded. There also appear to be no safeguards to require the minister to reasonably attempt to substantively review the decision within the specified 90-day period to avoid this occurrence. The committee notes that there is nothing in the explanatory memorandum to justify why proposed subsection 115K(7) is necessary, nor does it explain whether the impact on the affected individual has been considered.

1.49 Further, proposed subsection 115M(1) provides that if the minister makes a relevant decision which requires reasons to be given in a notice, the notice must not disclose reasons which the minister reasonably believes the disclosure of which would prejudice Australian security, defence or international relations. The relevant decisions are those covered by proposed subsection 115J(5), a reviewable decision, and a decision under proposed section 115K to affirm, vary or revoke a reviewable decision. This includes decisions such as the granting and cancelling of foreign work authorisations, and the suspension of authorisations.

1.50 **In light of the above, the committee request's the minister's advice as to:**

- **whether it would be possible for the reasons for the decision made under proposed section 115E to be disclosed where the minister's reasonable belief as to the individual change in circumstances relates to considerations which are personal or unique to the person, rather than national security or international relations;**
- **why it is necessary and appropriate for proposed subsection 115K(7) to provide that the minister is taken to have affirmed a reviewable decision if the minister does not give the applicant written notice of a decision to affirm, vary or revoke the reviewable decision within 90 days; and**
- **what consideration was given to the impact of proposed subsection 115K(7) on an individual's procedural fairness rights.**

## Disability Services and Inclusion Bill 2023<sup>31</sup>

<b>Purpose</b>	The bill will repeal and replace the <i>Disability Services Act 1986</i> and establish a modern legislative framework for the funding and regulation of programs targeted for the benefit of people with disability, their families and carers.
<b>Portfolio</b>	Social Services
<b>Introduced</b>	House of Representatives on 14 September 2023
<b>Bill status</b>	Before the House of Representatives

### Significant matters in delegated legislation

#### Privacy

#### Reversal of the evidential burden of proof<sup>32</sup>

1.51 Clause 29 of the bill seeks to provide for authorised uses and disclosures of relevant information. Clause 8 of the bill defines 'relevant information' to mean information obtained or generated by an entrusted person in performing, or assisting another person to perform, functions or duties, or exercising powers, under this Act. Clause 8 defines an 'entrusted person' to mean either the Secretary, an APS employee, or any other person employed or engaged by the Commonwealth to provide services to the Commonwealth.

1.52 The authorised purposes for which relevant information may be used and disclosed include: the administration of the bill;<sup>33</sup> Commonwealth purposes;<sup>34</sup> disclosure to a court or tribunal;<sup>35</sup> preventing threat to life, health or safety of a person with disability;<sup>36</sup> statistical purposes;<sup>37</sup> with the consent of the person to whom the information relates;<sup>38</sup> disclosure to a person to whom the information relates;<sup>39</sup> and information that is already public.<sup>40</sup>

1.53 Additionally, subclause 29(2) seeks to provide that an entrusted person may use or disclose relevant information if the use or disclosure is for a purpose specified

<sup>31</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Disability Services and Inclusion Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 183.

<sup>32</sup> Clause 28 and subclauses 29(3) and 29(7). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

<sup>33</sup> Subclause 29(1).

<sup>34</sup> Subclause 29(5).

<sup>35</sup> Subclauses 29(9) and (10).

<sup>36</sup> Subclause 29(11).

<sup>37</sup> Subclause 29(12).

<sup>38</sup> Subclause 29(13).

<sup>39</sup> Subclause 29(14).

<sup>40</sup> Subclause 29(15).

in a determination made by the secretary under subsection 29(3). Subclause 29(6) also provides that an entrusted person may disclose relevant information to the head of a department of state or territory, or of an authority of a state or territory, if the disclosure is for a purpose specified in a determination made under subsection 29(7) by the secretary.

1.54 Bills which enable the collection, use or disclosure of personal information may trespass on an individual's right to privacy. Where a bill contains provisions for the collection, use or disclosure of personal information, the committee expects the explanatory memorandum to the bill to address why it is appropriate and what safeguards are in place to protect the personal information, and whether these are set out in law or in policy.

1.55 In this case, the explanatory memorandum explains:

For example, a determination made under subclause 29(3) could allow for the use or disclosure of relevant information for purposes such as providing a brief to a Minister so that the Minister can consider complaints or issues raised with the Minister by or on behalf of a person, and respond to that person in relation to the complaints or issues. Requiring the Secretary to set out the purposes for which an entrusted person may use or disclose relevant information provides for transparency so that people are aware of how their information may be used or disclosed.

...

Under Part 4 of the Bill, personal information is considered to be protected information and will be handled in accordance with the limitations placed on the use and disclosure of protected information under this Bill, the *Privacy Act 1988*, and any other applicable Cth, State or Territory legislation.<sup>41</sup>

1.56 A similar justification is provided in relation to subclause 29(7).<sup>42</sup>

1.57 The committee acknowledges the transparency provided by including any further purposes for use or disclosure in a legislative instrument, and welcomes the clarification that the *Privacy Act 1988* applies to protect personal information. However, it is unclear to the committee why such a provision is required given the numerous purposes that information can already be used or disclosed by clause 29 of the bill. For example, it is not apparent to the committee why a legislative instrument would need to be made, rather than relying on another purpose listed in clause 29, to provide the legislative basis for a confidential brief to be provided to a minister.

1.58 Further, it is an offence under subclause 28(1) if a person is, or has been, an entrusted person, the person has obtained or generated relevant information in the person's capacity as an entrusted person, and the person uses or discloses protected

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<sup>41</sup> Explanatory memorandum, [162]; statement of compatibility, p. 46.

<sup>42</sup> Explanatory memorandum, [165].



information. This offence has a penalty of two years imprisonment or 120 penalty units, or both. Subclause 28(2) provides that subsection 28(1) does not apply if the use or disclosure is required or authorised by this Act or another law of the Commonwealth, or a law of a state or territory prescribed by the rules for the purposes of this paragraph. A note to subclause 28(2) states that the defendant bears the evidential burden in relation to the matter.

1.59 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.<sup>43</sup> 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, interfere with this common law right.

1.60 Generally, a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>44</sup>

1.61 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.

1.62 The explanatory memorandum explains:

It is appropriate that the defendant bears the evidential burden for these matters, as they should be within the defendant's knowledge.<sup>45</sup>

1.63 In this instance, that the defendant should know whether a use or disclosure is required or authorised by the Act or another law is insufficient to satisfy the test as outlined in the *Guide to Framing Commonwealth Offences*. It appears to the committee that whether the use or disclosure of relevant information is required or authorised by a law can be ascertained by the prosecution, and is not peculiarly within the defendant's knowledge. Further, given some of the purposes for authorised use or disclosure are to be specified in a determination under subclauses 29(3) and 29(7), it is difficult for the committee to determine whether the reversal of the evidential burden of proof is justified in these circumstances.

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

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<sup>43</sup> Subsection 13.3(3) of the *Criminal Code* provides that a defendant who wishes to rely on an exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

<sup>44</sup> Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) p. 50.

<sup>45</sup> Explanatory memorandum, [154].

- why it is necessary for the secretary to have the power to specify further purposes in determinations under subclauses 29(3) and 29(7), given the purposes that relevant information can already be used or disclosed for under clause 29 of the bill; and
- why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in subclause 28(2). 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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### Availability of independent merits review<sup>46</sup>

1.65 There are a range of clauses in the bill which provide for discretionary decisions that may affect individual rights and liberties and to which neither internal nor external merits review apply.

1.66 Subclause 9(2) empowers the secretary to make a determination specifying a day by which a person must obtain a certificate of compliance for a regulated activity<sup>47</sup> if the person has given written notice to the secretary stating their intention to seek and obtain a certification on or before that day. Subclause 9(4) empowers the secretary to vary in writing the determination made under subclause 9(2) if the minister has made an arrangement for the making of payments or made a grant of financial assistance to the person under clause 13.

1.67 In relation to the review of decisions made under subclauses 9(2) and (4), the explanatory memorandum explains:

The Secretary's powers to make or vary a determination under subclauses 9(2) and 9(4) are not subject to merits review. Merits review of these decisions is not appropriate as the safety or wellbeing of people with disability in respect of regulated activities could be jeopardised, particularly where funding is provided for new activities or to persons that have not delivered supports and services in the past.

...

Persons affected would also have recourse to the Commonwealth Ombudsman where appropriate.<sup>48</sup>

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<sup>46</sup> Subclause 9(2) and (4); subclause 13(1); subclause 21(1),(5) and (8); subclause 26(1) and (4). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii).

<sup>47</sup> A regulated activity is an activity specified in a legislative instrument made by the secretary under clause 11 of the bill.

<sup>48</sup> Explanatory memorandum, [25]-[26].

1.68 While noting this explanation, the committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*<sup>49</sup> In this instance, the explanatory memorandum does not reference why the exclusion of merits review is appropriate in relation to the established grounds set out in the guide.

1.69 Subclause 13(1) provides that the minister may, on behalf of the Commonwealth, make, vary or administer an arrangement for the making of payments by the Commonwealth to a person, or make, vary or administer a grant of financial assistance to a person in relation to one of the eligible activities set out in paragraphs 13(1)(a)-(q). These include activities such as the provision of a range of supports or services for accessibility, accommodation, and education.

1.70 In relation to subclause 13(1), the explanatory memorandum notes:

Funding decisions and payments for arrangements and grants of financial assistance made under subclause 13(1) are not subject to merits review as they relate to the allocation of finite resources. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.16 to 4.19 of the *What decisions should be subject to merit review?* publication).

Decisions under clause 13(1) would be subject to the requirements of the Commonwealth resource management framework including, where relevant, the Public Governance, Performance and Accountability Act 2013 (PGPA Act), the Commonwealth Grants Rules and Guidelines 2017 and the Commonwealth Procurement Rules. These documents outline, among other things, requirements relating to the publication of applicant guidelines, development of eligibility and assessment criteria, and publication of details relating to the successful applicant and the arrangement and grant subsequently made.

In addition, the review and audit process undertaken by the Australian National Audit Office provides a mechanism to review Australian Government spending decisions and report any concerns to the Parliament. These requirements and mechanisms would help to ensure the proper use of Commonwealth resources and appropriate transparency around decisions relating to making, varying or administering arrangements and grants under subclause 13(1).<sup>50</sup>

1.71 The committee considers that there will be circumstances in which the allocation of finite resources justifies the exclusion of independent merits review. However, it is not clear that the exclusion is justified in this context. Subclause 13(1) applies broad discretion to grant funding arrangements for Commonwealth payments

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<sup>49</sup> Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999).

<sup>50</sup> Explanatory memorandum, [37]–[39].

to a large scope of disability supports and services. The committee is therefore concerned that subclause 13(1) provides a broad discretionary power that should be appropriately safeguarded by the availability of merits review.

1.72 Paragraph 14(6)(g) provides that the minister may publish information about a breach of a statutory funding provision on a Departmental website. In relation to this, the explanatory memorandum states:

While merits review is not available for decisions made under subclause 14(6), persons would have access to review under the ADJR Act. Further, these consequences only apply to statutory funding conditions, not to other terms and conditions set out in a funding agreement. Those terms and conditions would be subject to contractual dispute resolution mechanisms.<sup>51</sup>

1.73 However, the committee does not consider the availability of judicial review to be a sufficient reason in and of itself to exclude merits review. It is also unclear whether the grants and funding agreements made under this Act would enable a person to sue on the basis of the agreement, and whether a person who is affected but not party to an agreement would have grounds to sue. In this instance, the explanatory memorandum also does not reference why the exclusion of merits review is appropriate in relation to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*<sup>52</sup>

1.74 The committee's concerns are heightened as the consequences of the decision to publish information under paragraph 14(6)(g) where a breach has not occurred may trespass on personal rights, and the provision of merits review to provide checks and review of this decision would mitigate these concerns.

1.75 Clause 21 empowers an accredited certification body to grant a certificate of compliance (subclause 21(1)), revoke a certificate of compliance (subclause 21(5)), and vary a certificate of compliance (subclause 21(8)).

1.76 In relation to these decisions, the explanatory memorandum explains:

The decisions of an accredited certification body under clause 21 are not subject to merits review. These decisions relate to whether a particular entity is capable of performing a regulated activity based on their compliance with the compliance standards. There is a substantial public interest in ensuring adequate standards of quality assurance for funded services under the Bill. An entity's capacity to meet these standards will be determined by an independent and internationally recognised accreditation body approved on the basis of their skills and experience. A person who is aggrieved by a decision by an accredited certification body can engage with

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<sup>51</sup> Explanatory memorandum, [63].

<sup>52</sup> Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999).

the certification body itself. Alternatively, it will be open to the person to make a further application for certification or variation of certification as they consider appropriate.<sup>53</sup>

1.77 While noting this justification for the exclusion of merits review, the committee reiterates its view that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*<sup>54</sup> In this instance, the explanatory memorandum does not reference why the exclusion of merits review is appropriate in relation to the established grounds set out in the guide. The committee also notes that neither the bill nor the explanatory memorandum specifies whether an aggrieved party would be provided with reasons for a refusal, or internal merits review by the relevant certification body.

1.78 Clause 26 empowers an accrediting authority to accredit persons to become accredited certification bodies (subclause 26(1)) or withdraw accreditation from a person (subclause 26(4)).

1.79 In relation to clause 26 the explanatory memorandum states:

Decisions made by an accrediting authority under clause 26 are not subject to merits review. These decisions require expert, competent and impartial assessment as to whether an entity is equipped to undertake a specified function. The Administrative Review Council's publication on *What decisions should be subject to merit review?* states that decisions to appoint a person to undertake a specified function should not generally be subject to merits review. Appointment as an accredited certification body is dependent on the person's credentials and qualifications.<sup>55</sup>

1.80 It appears that decisions made under subclause 26(1) and 26(4) can be characterised as akin to licensing decisions to permit entities to perform roles within this statutory scheme. The committee notes that neither the bill nor the explanatory memorandum specifies whether an aggrieved party would be provided with reasons for a refusal or internal merits review by the relevant accrediting authority. It is also unclear whether, and on what basis, the decisions made under clause 26 would be subject to judicial review.

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

- **whether the exclusion of merits review from decisions made under clause 9 of the bill is in line with Administrative Review Council's guidance document, *What decisions should be subject to merits review?*; and**

**in relation to clause 13:**

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<sup>53</sup> Explanatory memorandum, para 110.

<sup>54</sup> Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999).

<sup>55</sup> Explanatory memorandum, [146].

- whether consideration could be given to methods of ensuring compliance with the Commonwealth Rules and Procurement Guidelines; and
- whether consideration has been given to providing redress for individuals who are denied grants due to an allocation process that has not been based on merit (similar to the process in relation to government procurement under the *Government Procurement (Judicial Review) Act 2018*); and

in relation to paragraph 14(6)(g):

- whether the grants and funding agreements made under this Act would enable a person to sue on the basis of the agreement, and whether a person who is affected but not party to an agreement would have grounds to sue; and
- why the exclusion of merits review is appropriate in relation to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*; and

in relation to clause 21:

- whether the exclusion of merits review from decisions made under clause 21 of the bill is in line with Administrative Review Council's guidance document, *What decisions should be subject to merits review?*; and
- whether an aggrieved party would be provided with reasons for a refusal or internal merits review by the relevant certification body; and

in relation to clause 26:

- whether an aggrieved party would be provided with reasons for a refusal or internal merits review by the relevant accrediting authority; and
- whether and on what basis the decisions made under clause 26 would be subject to judicial review.

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### **Incorporation of external materials as existing from time to time<sup>56</sup>**

1.82 Subclause 36(1) provides that the minister may make rules under the Act by legislative instrument. Subclause 36(3) provides that the rules can apply, adopt or incorporate matters contained in an instrument or other writing as in force or existing from time to time.

1.83 In relation to this, the explanatory memorandum states:

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<sup>56</sup> Subclause 36(3). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

Subclause 36(3) allows the rules to make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time. This will provide flexibility on the kinds of requirements that could be alternative compliance requirements. For example, the rules concerning alternative compliance requirements could allow for standards under another relevant scheme could be adopted.<sup>57</sup>

1.84 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

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

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

**1.86 In light of the above, the committee is of the view that any instruments made under subclause 36(1) which incorporate external materials should be accompanied by clear advice in any explanatory materials as to how the incorporated materials can be freely and readily accessed.**

**1.87 The committee draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation and makes no further comment on the matter.**

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<sup>57</sup> Explanatory memorandum, [204].

## Identity Verification Services (Consequential Amendments) Bill 2023<sup>58</sup>

<b>Purpose</b>	The bill seeks to amend the <i>Australian Passports Act 2005</i> to provide a legal basis for the minister to disclose personal information to share or match information relating to the identity of a person for the purpose of participating in one of the following information sharing and matching services: <ul style="list-style-type: none"> <li>• the document verification service or the face verification service; or</li> <li>• any other service specified, or of a kind specified, in a ministerial determination.</li> </ul>
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives on 13 September 2023
<b>Bill status</b>	Before the House of Representatives

### Significant matters in delegated legislation

#### Privacy<sup>59</sup>

1.88 Item 3 of the bill seeks to insert proposed subsection 46(da) into the *Australian Passports Act 2005* (the Act). Proposed paragraph 46(da) provides that, on request, the minister may disclose personal information of a kind and to a person specified in a determination, for the purposes of participating in: (i) the Document Verification Service (DVS);<sup>60</sup> (ii) the Face Verification Service (FVS);<sup>61</sup> or (iii) any other service specified, or of a kind specified in the minister's determination; to share or match information relating to the identity of a person.

1.89 The committee's consistent scrutiny view is that significant matters should be included within primary legislation unless a sound justification for the use of delegated

<sup>58</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Identity Verification Services (Consequential Amendments) Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 184.

<sup>59</sup> Schedule 1, item 3, proposed paragraph 46(da)(iii) and schedule 1, item 6, proposed section 46A. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

<sup>60</sup> The Document Verification Service provides 1:1 matching to verify biographic information (such as a name or date of birth), with consent, against government issued identity credentials.

<sup>61</sup> The Face Verification Service provides 1:1 matching to verify biometric information, with consent, against a Commonwealth, state or territory issued identity credential (for example, a passport).



legislation is provided. Specifying other services or kinds of services in a ministerial determination is one such matter. This is particularly so when, as in this case, the inclusion of such matters in delegated legislation has the potential to impact on a person's right to privacy as it relates to the sharing or matching of information relating to the identity of a person.

1.90 In this instance, the explanatory memorandum explains:

New paragraph 46(da)(iii) is intended to provide flexibility for the Minister to specify new services or kinds of services that may be used to share or match information relating the identity of a person in a determination. This ensures that a new type of identity verification service could be included should there be a need to do so. As technology advances, new services may be required to support the secure and efficient matching or verification of identity. Consistent with section 57 of the Australian Passports Act, such a determination will be a legislative instrument.<sup>62</sup>

1.91 In *Scrutiny Digest 2 of 2018* and *Scrutiny Digest 3 of 2018*, the committee commented on the insertion of section 46 into the Act.<sup>63</sup> At the time, the committee raised concerns that section 46 authorised the disclosure of personal information in broad terms in delegated rather than primary legislation.<sup>64</sup>

1.92 The committee notes that item 3 of the bill is expanding the scope of this delegation of legislative power to also include the specification of services, or kinds of services, for which personal information may be disclosed.

1.93 The committee remains concerned that the scope of personal information that may be disclosed, the person to whom the information is disclosed, and now the purpose for which it will be disclosed, will be set out in delegated legislation rather than on the face of the bill. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in seeking proposed changes in the form of an amending bill.

1.94 The committee is also concerned that there appears to be no constraints on the ability of the minister to determine any other services for the purposes of section 46 of the Act. It is unclear to the committee why at least high-level guidance in relation to these matters cannot be provided on the face of the bill.

1.95 Further, where a bill contains provisions for the use or disclosure of personal information, the committee expects the explanatory memorandum to the bill to address why it is appropriate and what safeguards are in place to protect the personal information. In this case, the statement of compatibility notes that some privacy safeguards exist in relation to the disclosure of personal information for the purposes

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<sup>62</sup> Explanatory memorandum, p. 61.

<sup>63</sup> Section 46 was inserted into the Act by the Australian Passports Amendment (Identity-matching Services) Bill 2018.

<sup>64</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018* (14 February 2018) pp. 14–15; *Scrutiny Digest 3 of 2018* (21 March 2018) pp. 65–68.

of the DVS and FVS, but it does not explain what protections exist for other services or kinds of services that may be specified under proposed paragraph 46(da)(iii).<sup>65</sup>

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

- **why it is both necessary and appropriate to expand, via ministerial determination, the purposes for which personal information may be disclosed under section 46 of the *Australian Passports Act 2005*;**
- **whether high-level guidance about what can be included in a ministerial determination under proposed paragraph 46(d)(iii) and any considerations the minister must make before making such a determination can be provided on the face of the bill; and**
- **what safeguards are in place to protect the disclosure of personal information under proposed paragraph 46(da)(iii), including whether the safeguards and limitations which apply to the disclosure of personal information under proposed paragraphs 46(da)(i) and (ii) will also apply.**

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## Privacy<sup>66</sup>

1.97 Item 5 of schedule 1 to the bill provides that the proposed amendments to section 46 of the Act made by schedule 1 apply in relation to any personal information disclosed after the commencement of this item, whether the information was obtained before or after that commencement. This relates to information disclosed for the purpose of participating in either the DVS, FVS or any other service specified, or of a kind specified, in the minister's determination.

1.98 Further, proposed section 46A empowers the minister to arrange for the use of computer programs to disclose personal information about a person participating in either the DVS or FVS. Item 7 of schedule 1 to the bill provides that proposed section 46A applies in relation to any personal information disclosed after the commencement of this item, whether the information was obtained before or after that commencement.

1.99 While in this instance the amendments in items 5 and 7 apply in relation to any personal information disclosed *after* commencement, the committee considers that as these provisions relate to personal information obtained *before* commencement, it likely raises privacy concerns.

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<sup>65</sup> Statement of compatibility, pp. 16-17.

<sup>66</sup> Schedule 1, item 5; schedule 1, item 6, proposed section 46A; schedule 1, item 7. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

1.100 The Australian Privacy Principles (APP) outline how particular entities can collect and manage personal information. One of the key principles is that, generally, an APP entity may use or disclose personal information for a purpose for which it was collected. It appears to the committee that the operation of the amendments in items 5 and 7 mean that the personal information of Australian citizens will be disclosed for purposes for which the relevant person did not initially consent.<sup>67</sup>

1.101 In this case, the explanatory memorandum does not address the potential privacy implications of the application of amendments provisions in items 5 and 7 of the bill.

1.102 The committee's privacy concerns are further heightened in this instance as proposed section 46A provides for the use of computer programs to disclose personal information. While the committee acknowledges the operational needs for the department to use computer programs, the committee considers it important that there are adequate transparency and accountability mechanisms over the operation of the identity verification facilities in order to protect an individual's privacy.

**1.103 In light of the above, the committee requests the Attorney-General's advice as to whether it is appropriate for the bill to provide for the disclosure of personal information that was collected before the commencement of the bill, noting that information may be disclosed for purposes for which it was not initially collected for.**

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<sup>67</sup> See, for example, Office of the Australian Information Commissioner - [Australian Privacy Principle 3: Collection of solicited personal information](#).

## Identity Verification Services Bill 2023<sup>68</sup>

<b>Purpose</b>	The bill seeks to establish a legislative framework to support the operation of technical systems that will facilitate identity-matching services.
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives on 13 September 2023
<b>Bill status</b>	Before House of Representatives

### Privacy<sup>69</sup>

1.104 The bill seeks to facilitate the exchange of identification information between the Commonwealth and state and territory governments, and certain other public and private sector entities. It seeks to do this by establishing the legislative authority for the Attorney-General's department to develop, operate and maintain three identity verification facilities:

- the Document Verification Service (DVS), which provides 1:1 matching to verify biographic information (such as a name or date of birth), with consent, against government issued identity credentials;
- the Face Verification Service (FVS), which provides 1:1 matching to verify biometric information (in this case a photograph of an individual), with consent, against a Commonwealth, state or territory issued identity credential (for example, passports and driver licences); and
- the National Driver Licence Facial Recognition Solution (NDLFRS), which enables the FVS to conduct matching against state and territory credentials such as driver licences.<sup>70</sup>

1.105 The types of identification information that may be shared are face-matching service information and DVS information. This includes: a person's name (current and former); address (current and former); place and date of birth; age; current or former sex, gender identity or intersex status; information about whether the individual is alive or dead; any information contained in a driver's licence, passport or visa, or other state or territory issued identity document; an individual's current or former

<sup>68</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Identity Verification Services Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 185.

<sup>69</sup> The committee draws senators' attention to this bill pursuant to Senate standing order 24(1)(a)(i).

<sup>70</sup> Part 2 of the bill; statement of compatibility, p. 6.

citizenship; a facial image of the person; and information about the outcome of a comparison involved in a FVS requested in relation to an individual.<sup>71</sup>

1.106 Identification information may be collected or disclosed for the following purposes:

- providing a DVS and FVS for the purpose of verifying the identity of a person;
- providing an FVS or FIS (face identification service) for the purpose of protecting a 'shielded person' or someone else associated with such a person;<sup>72</sup>
- developing identity verification services, or facilities for providing those services, for the purpose mentioned above; or
- developing, operating or maintaining the NDLFRS.<sup>73</sup>

1.107 The process for entities to request and provide identity verification services is governed by participation agreements, which are agreements between the Attorney-General's department and other authorities, persons or bodies using the approved identity verification facilities, and NDLFRS hosting agreements, which are agreements between the Attorney-General's department and authorities of a state or territory that supply identification information stored and used in the NDLFRS.<sup>74</sup>

1.108 These provisions would give a broad power for the Attorney-General's department to collect, use and disclose personal information for a wide range of purposes to a wide range of government agencies (and some local government authorities and private entities). This has clear implications for the privacy of the millions of individuals whose facial images and other biographical information will be available for collection, use and disclosure.

1.109 Where a bill contains provisions for the collection, use or disclosure of personal information, the committee expects the explanatory materials accompanying the bill to contain a clear explanation justifying why this is appropriate and what safeguards are in place to protect personal information. In this instance, the statement of compatibility has provided a detailed analysis of the privacy implications of the bill.<sup>75</sup>

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<sup>71</sup> Subclause 6(1)-(3).

<sup>72</sup> Clause 5, a 'shielded person' is a person who has been authorised to acquire or use an assumed identity (for example, an undercover police officer or a participant in a witness protection program) under law, including the *Crimes Act 1914* (Cth) and *Witness Protection Act 1994* (Cth).

<sup>73</sup> Subclause 27(2) of the bill.

<sup>74</sup> Subdivision B of the bill.

<sup>75</sup> Statement of compatibility, pp. 7-13.

1.110 The committee notes that it commented on privacy concerns in relation to a similar bill previously introduced, the Identity-matching Services Bill 2018, in *Scrutiny Digest 2 of 2018* and *Scrutiny Digest 5 of 2018*.<sup>76</sup> The committee welcomes that many of its concerns raised at the time have been addressed in the current bill. For example, numerous safeguards are now included in the bill itself which specifies requirements that must be included in participation and hosting agreements rather than as previously set out in the 2017 intergovernmental agreement on identity matching services.<sup>77</sup> The bill also now limits 1:many matching services to a narrower class of persons rather than more broadly.<sup>78</sup>

1.111 While the committee considers there are a number of safeguards in the bill to help protect privacy, the committee is nevertheless concerned that the framework set up by the bill may unduly trespass on personal rights and liberties in that it seeks to enable the sharing of an extensive amount of personal information for a broad range of purposes to a broad range of agencies, including private sector agencies.

1.112 The committee considers that determining whether an appropriate balance has been struck between the scheme's public interest objectives and the protection of privacy, necessitates a consideration of the adequacy of transparency and accountability mechanisms over the operation of the identity verification facilities.

1.113 To this end, the committee notes that the Information Commissioner has responsibilities under the bill to annually assess the operation and management of the approved identity verification facilities by the Attorney-General's department, and to provide the Secretary of the Attorney-General's department a written report of the assessment.<sup>79</sup> The bill also requires that a review of the operation of the Act must begin within two years of the commencement of the Act.<sup>80</sup> The committee considers it is vital that these oversight institutions be adequately resourced to ensure privacy standards are upheld.

**1.114 Noting the ongoing oversight mechanisms provided in the bill, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of enabling the extensive sharing of personal information for a broad range of purposes, and to a broad range of agencies.**

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<sup>76</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018* (14 February 2018) pp. 20–24 and *Scrutiny Digest 5 of 2018* (9 May 2018) pp. 103–110.

<sup>77</sup> Subdivision B of the bill.

<sup>78</sup> Clauses 16 and 17 of the bill.

<sup>79</sup> Clause 40 of the bill.

<sup>80</sup> Clause 43 of the bill.

**Reversal of evidential burden of proof<sup>81</sup>**

1.115 Subclause 30(1) seeks to make it an offence for an entrusted person who has obtained protected information in their capacity as an entrusted person to make a record of the information or to disclose the information to another person. Subclause 30(2) seeks to make it an offence for an entrusted person to access protected information. Subclause 30(3) provides an exception (offence-specific defence) to these offences, stating that the offence does not apply if the conduct is authorised by, or is in compliance with, a requirement under a Commonwealth, state or territory law. Each offence carries a maximum penalty of two years imprisonment.

1.116 A note to subclause 30(3) clarifies that subsection 13.3(3) of the *Criminal Code Act 1995* applies and 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.

1.117 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.

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

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>82</sup>

1.118 The explanatory memorandum states:

Placing the evidential burden on the defendant in relation to the exceptions in subclause 30(3) is appropriate because the facts in relation to the offence-specific exception would be peculiarly within the knowledge of the defendant. In particular, it would be impracticable to require the prosecution to prove that the defendant had no authorisation for the disclosure under any law. For the prosecution to prove this, it would likely need to examine a very large array of Commonwealth, state or territory laws in order to establish that there was no authorising law in the particular circumstances to the requisite burden of proof. In contrast, the defendant

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<sup>81</sup> Subclause 30(3). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

<sup>82</sup> Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) p. 50.

could readily and cheaply adduce evidence that suggests a reasonable possibility that an exception is applicable, by identifying the specific law that they claim the alleged unlawful conduct was in fact permitted under, or authorised by.<sup>83</sup>

1.119 In this case, it is not apparent to the committee that whether the conduct is authorised by, or is in compliance with, a requirement under a Commonwealth, state or territory law are matters *peculiarly* within the defendant's knowledge. Additionally, that it would be impracticable for the prosecution to prove their case is not a reason in itself to create an exception to the offence which reverses the evidential burden of proof. The committee considers that these matters appear to be more appropriate to be included as an element of the offence. For example, subclause 30(1) could be amended to provide that a person commits the offence if the conduct is not authorised by, or in compliance with a requirement under, a law of the Commonwealth or of a state or territory.

1.120 The committee notes that it raised this same concern in relation to an almost identical provision in the Identity-matching Services Bill 2018 in *Scrutiny Digest 2 of 2018* and *Scrutiny Digest 5 of 2018*,<sup>84</sup> and in that case the committee similarly concluded that the matter did not appear to be peculiarly within the knowledge of the defendant.

**1.121 The committee therefore requests the Attorney-General's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) under subclause 30(3).**

1.122 The committee suggests that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence.

1.123 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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<sup>83</sup> Explanatory memorandum, p. 50.

<sup>84</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018* (14 February 2018) pp. 26–27 and *Scrutiny Digest 5 of 2018* (9 May 2018) pp. 113–117.



## Interactive Gambling Amendment (Credit and Other Measures) Bill 2023<sup>85</sup>

<b>Purpose</b>	The Interactive Gambling Amendment (Credit and Other Measures) Bill 2023 seeks to amend the <i>Interactive Gambling Act 2001</i> to prohibit the use of credit cards, credit related products and digital currency as payment methods for interactive wagering services. It also seeks to create a new criminal offence and civil penalty provision related to this ban and provide the Australian Communications and Media Authority with enhanced powers to enforce the ban.
<b>Portfolio</b>	Infrastructure, Transport, Regional Development, Communications and the Arts
<b>Introduced</b>	House of Representatives on 13 September 2023
<b>Bill status</b>	Before the House of Representatives.

### Reversal of the evidential burden of proof<sup>86</sup>

1.124 Item 9 of schedule 1 to the bill seeks to introduce proposed subsection 15C(1A) to the *Interactive Gambling Act 2001* (the Act), which creates the offence of: intentionally providing a regulated interactive gambling service that is a wagering service; and accepting, or offering to accept, a prohibited payment method from a customer or prospective customer who is physically present in Australia. The offence carries a penalty of 500 penalty units.

1.125 Item 17 of schedule 1 seeks to amend existing subsection 15C(5) of the Act to extend the application of the defence under this subsection to the offence under proposed subsection 15C(1A). This defence applies where a person did not know and could not with reasonable diligence have ascertained that the customer or prospective customer was physically present in Australia.<sup>87</sup>

1.126 Further, item 18 of schedule 1 seeks to insert proposed subsection 15C(5A), which creates a new defence that applies to the offence under proposed subsection 15C(1A). The defence is applicable to persons where they did not know and could not, with reasonable diligence, have ascertained that they were accepting, or offering to accept, payment using a prohibited method.

<sup>85</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, *Interactive Gambling Amendment (Credit and Other Measures) Bill 2023*, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 186.

<sup>86</sup> Schedule 1, items 17 and 18, existing subsection 15C(5) and proposed subsection 15C(5A). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

<sup>87</sup> *Interactive Gambling Act 2001*, subsection 15C(5).

1.127 A note to each of these defences clarifies that the evidential burden of proof is reversed.

1.128 Item 13 of schedule 1 also seeks to insert proposed subsection 15C(3A), which imposes a civil penalty of 750 penalty units if a person provides a regulated interactive gambling service that is a wagering service and accepts, or offers to accept, a prohibited payment method from a customer or prospective customer who is physically present in Australia. The committee notes these civil penalties, but is primarily concerned with criminal penalties where the criminal process is being subverted through reversed burdens.

1.129 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.

1.130 The committee expects any such reversal of the evidential burden of proof to be justified and for the explanatory memorandum to address whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*, which states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>88</sup>

1.131 In relation to existing subsection 15C(5), the explanatory memorandum states:

The effect of this would be to ensure that the due diligence defence is available in respect of the prohibited conduct at subsections 15C(1A) and (3A) in cases where the person did not know, and could not, with reasonable diligence, have ascertained that the customer, or prospective customer, was physically present in Australia.<sup>89</sup>

1.132 While the committee notes that this is a consequential change, extending the application of this defence to the offence under proposed subsection 15C(1A) is effectively creating a new defence in respect of that offence. The committee considers that this should be accompanied by a justification of why it is appropriate to reverse the evidential burden of proof with reference to the *Guide to Framing Commonwealth Offences*.

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<sup>88</sup> Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011) p. 50.

<sup>89</sup> Explanatory memorandum, p. 17.

1.133 In relation to proposed subsection 15C(5A), the explanatory memorandum states:

Placing the evidential burden on the defendant in this case is appropriate as the evidentiary matter required to be established—whether the defendant did not know or could not have ascertained with reasonable diligence that the customers, or prospective customer, was making a payment with prohibited form of credit—is a matter exclusively within the knowledge of the defendant. In other words, the defendant is in the best position to provide evidence as to what reasonable diligence checked that undertook and how they did not know or could not have known that the form of payment used was a prohibited form. It would be extremely time consuming and burdensome for the prosecution to disprove this ‘knowledge’ matter than it is for the defendant to establish this matter.

While it is a matter for a court to decide, it is anticipated that there will be a range of factors relevant to establishing if the defence is made out. For example, what the wagering provider conveyed to the customer on its website or elsewhere about what forms of payment were allowed or not allowed, and the wagering provider’s procedures and systems, including any technical solutions, steps or other arrangements that they put in place directly or through their merchant/ecommerce provider, to prevent the acceptance of a prohibited form of payment as listed at proposed new subsection 15C(4).<sup>90</sup>

1.134 It is not clear to the committee that the matters to be made out in the defence are peculiar to the defendant’s knowledge as the range of factors relevant to establishing this include: information conveyed on a website or systems; and procedures in place to prevent the acceptance of a prohibited form of payment. These can be ascertained readily by the prosecution as evidence that would be attributed to ‘reasonable diligence’. However, it is unclear to the committee how a defendant would be able to provide evidence that they did not know the payment method used by a customer was a prohibited method without relying on matters that are not peculiarly within the defendant’s knowledge. The committee considers that further guidance as to the operation of this defence would be useful.

**1.135 As the explanatory materials do not adequately address this issue, the committee requests the minister’s detailed justification as to why it is proposed to use offence-specific defences (which reverses the evidential burden of proof) in relation to the offence under proposed subsection 15C(1A), and requests further guidance as to the operation of the defence.**

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<sup>90</sup> Explanatory memorandum, p. 17.

## Public Health (Tobacco and Other Products) Bill 2023<sup>91</sup>

<b>Purpose</b>	This bill seeks to consolidate Commonwealth tobacco regulation into one legislation package to streamline the operation of the legal framework. The bill will be supported by the Public Health (Tobacco and Other Products) (Consequential Amendments and Transitional Provisions) Bill 2023.
<b>Portfolio</b>	Health and Aged Care
<b>Introduced</b>	House of Representatives on 13 September 2023
<b>Bill status</b>	Before the House of Representatives

### Immunity from civil liability<sup>92</sup>

1.136 Clause 183 of the bill provides that a protected person, which includes the minister, the secretary, an authorised officer or a person acting under an authorised officer's direction or authority<sup>93</sup>, is not liable to civil proceedings for loss, damage or injury of any kind suffered by another person as a result of anything done by the protected person in good faith in performance of the bill.

1.137 An authorised officer is granted monitoring and investigation powers<sup>94</sup>, as well as the power to require information or documents.<sup>95</sup> These powers can include using force against things in executing a warrant.<sup>96</sup>

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

<sup>91</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Public Health (Tobacco and Other Products) Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 187.

<sup>92</sup> Subclause 183(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

<sup>93</sup> Subclause 183(1).

<sup>94</sup> Clauses 154 and 156.

<sup>95</sup> Clause 151.

<sup>96</sup> Subclauses 154(10) and 156(9).

1.139 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum explains:

This is necessary because there are specific risks under this Bill that actions done in compliance with the Bill could be perceived as, for example, defamatory. For example, the publication of information about failure to comply with Chapter 5 (clause 152). Clause 183 makes it clear that those who act in good faith in administering this Bill are protected from these kinds of legal proceedings.

The approach concentrates attention on the effective pursuit of the regime. At times such protected persons will need to act quickly and efficiently. Where a protected person is acting in good faith to further the objectives of the scheme they should not be at risk of action for civil liability.<sup>97</sup>

1.140 While there may be a need to act quickly and efficiently, the committee notes that certain actions that may be taken can have serious consequences for affected parties, such as the publication of non-compliance information. These parties will be left without an avenue for recourse until they are able to prove the minister, secretary, authorised officer, or person acting under an authorised officer was acting in bad faith.

1.141 The committee has previously commented on the matter of immunity from civil liability, and reiterates its view that the need for administrative efficiency and being able to perform functions without a risk of action for civil liability is not, of itself, sufficient justification for conferring immunity from liability.<sup>98</sup>

**1.142 The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to confer immunity from liability on the minister, secretary, authorised officers and persons acting under authorised officers in clause 183 of the bill.**

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### Reversal of the evidential burden of proof<sup>99</sup>

1.143 A number of provisions in the bill create offences which have offence-specific defences which reverse the evidential burden of proof. These defences are provided by the following subclauses: 19(3), 42(3), 93(2), 94(2), 95(4), 96(4), 99(4), 100(2), 103(3), 104(3), 107(2), 108(2), 109(4), 110(4), 113(4), 114(2), 117(3), 118(3), 120(2), 127(3) and 128(3).

1.144 Broadly, these offences are contained in Chapter 3 of the bill and relate to the sale, supplying, possession, purchasing, packaging or manufacturing of tobacco

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<sup>97</sup> Explanatory memorandum, p. 100.

<sup>98</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2022*, pp. 8-9.

<sup>99</sup> Subclauses 19(3), 42(3), 93(2), 94(2), 95(4), 96(4), 99(4), 100(2), 103(3), 104(3), 107(2), 108(2), 109(4), 110(4), 113(4), 114(2), 117(3), 118(3), 120(2), 127(3) and 128(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

products that are not compliant with retail packaging requirements, or that are prohibited or are otherwise non-compliant. The defences provided by the subclauses above broadly relate to personal use or conduct that is in the course of compliance and enforcement activities.

1.145 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.

1.146 The committee expects any such reversal of the evidential burden of proof to be justified and for the explanatory memorandum to address whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*<sup>100</sup>, which states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.<sup>101</sup>

1.147 In this instance, the explanatory memorandum provides a general explanation in relation to all the offence-specific defences:

In each of these cases, the exception is dependent on particular knowledge or intent of the defendant. It would be significantly more difficult for the prosecution to prove the intention of an individual to, for example, purchase a tobacco product for personal use, than for the defendant to show their history of tobacco use and purchases, and their particular intentions in each instance. Similarly, a manufacturer will have particular knowledge and proof of any steps undertaken to ensure retail packaging complied with plain packaging requirements and would also have documentation relevant to the intended market for the product in instances where the product is intended for export.<sup>102</sup>

1.148 While the committee notes that there are a large number of offences, the committee still considers that each offence-specific defence should be justified separately and on the basis of whether each defence is consistent with the *Guide to Framing Commonwealth Offences*. In this instance, the committee considers an explanation for each category of defences would be appropriate to justify how best the information required to meet the evidential burden is peculiar to the defendant's

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<sup>100</sup> Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011).

<sup>101</sup> Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011) p. 50.

<sup>102</sup> Explanatory memorandum p. 71.

knowledge and more difficulty or costly for prosecution to disprove. This would include justifications for defences relating to individual resale, personal use, conduct that is in the course of compliance and enforcement activities, conduct in the course of repackaging, and the export exception.

1.149 Further, it is unclear to the committee how some of these defences may be peculiar to the defendant's knowledge and significantly more difficult or costly for prosecution to disprove the matter relating to the defence. For instance, the defences contained in subclauses 95(4), 103(4), 109(3) and 117(3) relate to conduct that is in the course of compliance and enforcement activities. It is not apparent to the committee how purchase or possession by an authorised officer, a member of the Australian Federal Police or a member of State or Territory police in the course of complying with or enforcing provisions of the bill could be peculiarly within their knowledge. The committee considers that in this instance, a direction or similar authority would have been provided to the defendant that could be available to prosecution.

1.150 In addition, subclauses 19(1) and 42(1) prohibit the publication of tobacco and e-cigarette advertisements respectively. Subclauses 19(3) and 42(3) provide defences to these offences which permit certain publications of tobacco and e-cigarette advertisements which are set out in Division 5 of Parts 2.2 and 2.4 of Chapter 2 of the bill. The defences in subclauses 19(3) and 42(3) require the defendant to provide evidence suggesting a reasonable possibility that the publication is a permitted publication as set out in Division 5.

1.151 It is unclear to the committee how the information required to prove the publication is a permitted publication in order to meet the evidential burden under subclauses 19(3) and 42(3) could be peculiar to the defendant's knowledge as it appears to be information that would be available to the prosecution. These permitted publications include:

- publications that comply with Commonwealth, State and Territory law, such as under clauses 31 and 57;
- publications that are made to comply with a request or requirement of an authorised officer under clauses 36 and 62; and
- publications that are made during aircraft flights under clauses 37 and 63.

**1.152 As the explanatory materials do not adequately address this issue, the committee requests the minister's further detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) for the defences listed in subclauses 19(3) and 42(3) under Chapter 2 of the bill.**

**1.153 The committee also requests the minister's justification as to the requirement to reverse the evidential burden of proof in relation to the other categories of defences under Chapter 3 of the bill.**

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## Reversal of the legal burden of proof

### Broad scope of offence provisions<sup>103</sup>

1.154 The bill imposes three rebuttable presumptions. These are provided by clause 17, relating to a rebuttable presumption of offer for retail sale; subclause 20(4), relating to a rebuttable presumption for when material is presumed to be a tobacco advertisement; and subclause 43(4), relating to when material is presumed to be an e-cigarette advertisement.

1.155 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 one or more elements of an offence, interfere with this common law right. A rebuttable presumption is a type of provision that may reverse the burden of proof where the presumption is adverse to the defendant. In these cases, the effect of the rebuttable presumption is that the defendant would have to provide evidence to suggest a reasonable possibility contrary to the presumption to rebut it or may have to positively prove a matter contrary to the presumption on the balance of probabilities to rebut it.

1.156 As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification each time the burden is reversed, with the rights of people affected being the paramount consideration. In this instance, the explanatory memorandum states:

The onus of proof appropriately rests on the defendant for proving the contrary. The presumption relates to only one element of the offence and the corresponding exception is dependent on the particular knowledge or intent of the defendant (i.e., the defendant will know why the product is in the shop and should be readily able to produce evidence of an alternative purpose if there is one). This information is unlikely to be readily available to the prosecution and would be significantly more difficult and costly for the prosecution to prove that the intention of the retailer was to sell the product than it would be for the retailer to rebut this presumption.

[...]

The inclusion of a rebuttable presumption is justified on the basis that the information is likely particular to the knowledge of, and readily available to, the defendant whereas it would be more costly and onerous for the prosecution to prove. For example, if the use of a trade mark is genuinely in respect of goods that are not tobacco products, a prosecution is unlikely to

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<sup>103</sup> Clause 17, subclauses 19(9), 20(4), 42(9), 43(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).



be brought and if it is the presumption is readily rebutted by evidence easily available to the defendant.<sup>104</sup>

1.157 The committee considers that the explanatory memorandum has provided a justification as to why the evidential burden of proof needs to be reversed but has not established why it is necessary to reverse the legal burden of proof. It would appear that if the facts relating to why the defendant intended to sell a product or why a publication is not a tobacco or e-cigarette advertisement are peculiarly within the knowledge of the defendant, it would be sufficient to require the defendant to raise evidence that suggests a reasonable possibility that the presumption is not applicable, and the prosecution could then be required to disprove the matters that had been raised beyond reasonable doubt.

1.158 The committee also notes that under subclauses 20(4)(c) and 43(4)(c), the prosecution are able to presume that material containing a trade mark, design, colour, logo, get-up or work that is 'evocative of, or closely associated with, a registered trade mark or design that is used, or has been used by any person at any time'<sup>105</sup> in relation to tobacco or e-cigarette products is a tobacco or e-cigarette advertisement. The committee considers that this term can conceivably cover a broad range of material and is not sufficiently specific as to what is evocative of or closely associated with a registered trade mark or design. The committee also considers that this may capture materials that accidentally bear resemblance to a trade mark or design that is associated with a tobacco or e-cigarette product as even colour that is evocative of a design or trade mark used by any person at any time is sufficient to give rise to this presumption.

1.159 Further, it is not apparent to the committee that a defendant would have information that is peculiar to their knowledge or would be better placed to prove this provision to the contrary. This requires the defendant to prove on the balance of probabilities that their material is not evocative of, or closely associated with, a registered trade mark or design that is used or has been used by any person at any time in relation to tobacco or e-cigarette products. The committee also notes that the defendant would be required to prove what their publication or material may evoke for other people (due to the inclusion of 'has been used by any person at any time'), rather than prove what it is intended to evoke. The committee does not consider this information to be peculiar to the defendant's knowledge and considers that the prosecution would be equally able to prove whether material is evocative of or closely associated with a trade mark or design used for a tobacco or e-cigarette product, rather than needing to presume this matter.

1.160 The committee considers that some clarity as to what materials 'evocative of, or closely associated with, a registered trade mark or design that is used, or has been used by any person at any time' is intended to capture would be helpful. In addition,

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<sup>104</sup> Explanatory memorandum, pp. 40 and 43.

<sup>105</sup> Subclauses 20(4), 43(4).

clarity regarding how a defendant would be able to rebut a presumption as to when material is a tobacco or e-cigarette advertisement when the presumption is based on subclauses 20(4)(c) or 43(4)(c) would be useful.

1.161 Subclauses 19(1) and 42(1) create offences which relate to the prohibition on publishing tobacco and e-cigarette advertisements. Subclauses 19(9) and 42(9) create exceptions to these offences where:

- the defendant is an individual;
- the publication was not in the course of or associated with the manufacture, importation, distribution or sale of tobacco or e-cigarette products; and
- the defendant did not receive any direct or indirect benefit (whether financial or not) from any person for publishing the material.

1.162 In this instance, the explanatory memorandum explains:

The defendant will bear a legal burden (which is made clear on the face of the legislation) in relation to providing the matters in the defence. This is appropriate due to the difficulty of the prosecution countering the elements of the defence once raised because they relate to matters particularly within the knowledge of the defendant, who is best placed to prove them. The defendant will, if applicable, be readily able to produce evidence that they were acting by themselves and that they did not receive any benefit for the publication.

[...]

The reversal of the legal burden is appropriate as while the act of having published the e-cigarette advertisement will be evident the conduct involved in doing so will be particular to the knowledge of the defendant. The evidence will be readily available to the defendant if they were acting as an individual and they did not receive a benefit for publishing the advertisement, and of minimal or no cost for them to produce.<sup>106</sup>

1.163 Again, the committee considers that the explanatory memorandum has provided a justification as to why the evidential burden of proof needs to be reversed but has not established why it is necessary to reverse the legal burden of proof. It would appear that if the facts relating to whether a publication is an individual publication are peculiarly within the defendant's knowledge, it would be sufficient to require the defendant to raise evidence that suggests a reasonable possibility that this is the case, and the prosecution could then be required to disprove the matters that had been raised beyond reasonable doubt.

**1.164 As the explanatory materials do not sufficiently justify this matter, the committee requests the minister's advice as to why it is proposed to reverse the**

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<sup>106</sup> Explanatory memorandum, pp. 41 and 52.

legal, rather than evidential, burden of proof in relation to clause 17 and subclauses 19(9), 20(4), 42(9) and 43(4).

1.165 The committee requests the minister's detailed advice as to the types of material expected to be captured by subclauses 20(4)(c) and 43(4)(c).

1.166 The committee also requests the minister's advice as to how it is anticipated a defendant would be able to rebut a presumption as to whether material is a tobacco or e-cigarette advertisement where the presumption has arisen due to the operation of subclauses 20(4)(c) or 43(4)(c).

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### Broad delegation of administrative power<sup>107</sup>

1.167 Subclauses 154(11) and 156(10) of the bill provide that an authorised officer may be assisted by other persons in exercising powers or performing functions or duties under Parts 2 and 3 of the *Regulatory Powers Act 2014*.<sup>108</sup> Persons assisting are able to exercise these powers and functions in relation to evidential material that relates to an offence against the bill, a civil penalty provision of the bill or an offence against the *Crimes Act 1914* or the *Criminal Code 1995*. In addition, they will be able to exercise all monitoring and investigation powers that authorised officers are empowered to.

1.168 Subclause 150(2) provides that an authorised officer may only be appointed if the secretary is satisfied that the person has suitable qualifications, training or experience to properly perform the functions or exercise the powers of an authorised officer.<sup>109</sup>

1.169 In relation to authorised officers, the explanatory memorandum states:

Consistent with Chapter 7 of the Guide to Framing Commonwealth Offences, authorised officers must be appointed individually by the Secretary, and the Secretary must be satisfied that any person appointed has suitable qualifications, training or experience. The method of appointment provides a safeguard that any authorised officers appointed will meet certain requirements as to qualifications, training or experience as identified by the Secretary. Typically, the Secretary is satisfied that authorised officers either have formal qualifications relating to government compliance or investigation, or relevant experience in the field. In practice, all authorised officers receive tobacco plain packaging compliance training.<sup>110</sup>

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<sup>107</sup> Subclauses 154(11) and 156(10). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

<sup>108</sup> *Regulatory Powers Act 2014*.

<sup>109</sup> Subclause 150(2).

<sup>110</sup> Explanatory memorandum, pp. 86 – 87.

1.170 However, the explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers to assist an authorised officer, and the bill does not restrict who may exercise the powers by reference to any particular expertise or training. The committee's concerns are heightened in this instance as persons acting under an authorised officer, as noted above, are conferred an immunity from civil liability.

1.171 In this instance, it is not clear to the committee whether persons assisting an authorised officer will be subject to the same requirements when being appointed as an authorised officer, such as the requirement to hold certain qualifications, experience or training. It is also not clear to the committee whether persons assisting an authorised officer will receive tobacco plain packaging compliance training as well.

**1.172 The committee therefore requests the minister's advice as to why it is necessary to confer monitoring and investigation powers on any person to assist an authorised officer and what qualifications, training or experience a person assisting will be required to have in order to be appointed.**



## Significant matters in delegated legislation

### Reversal of the evidential burden of proof<sup>112</sup>

1.173 Existing subsection 426-120(1) of the *Taxation Administration Act 1953* (the Act) prescribes liability for an administrative penalty where trustees of an ancillary fund hold the fund out as being endorsed, entitled to be endorsed, or entitled to remain endorsed, as a deductible gift recipient, and the fund is not so endorsed or entitled. Item 12 of schedule 3 to the bill seeks to amend existing section 426-120 to extend the operation of this provision to both ancillary and community charity trust funds.

1.174 Item 11 of schedule 3 to the bill seeks to insert proposed section 426-118 into the Act. Proposed paragraph 426-118(a) provides that the minister must formulate community charity trust guidelines by legislative instrument setting out rules that community charity trusts and their trustees must comply with if the trusts are to be, or are to remain, endorsed as deductible gift recipients. Proposed paragraph 426-118(b) provides that the charity trust guidelines must also set out the amount of the administrative penalty, or how to work out the amount of the administrative penalty, for the purposes of subsection 426-120(1) in relation to community charity trusts.

1.175 Existing subsection 426-120(3) of the Act prescribes that the penalty amount incurred under subsection 426-120(1) is specified in guidelines. Item 15 of schedule 3 to the bill seeks to amend existing subsection 426-120(3) of the Act to include community charity trust funds. As per proposed amended section 426-120(3), the penalty for the offence in subsection 426-120(1) would be:

- the amount specified in the applicable trust fund guidelines (proposed paragraph 426-120(3)(a)); or
- the amount worked out in accordance with the method specified in the applicable trust fund guidelines (proposed paragraph 426-120(3)(b)); and
- the guidelines may specify different penalties or methods for different circumstances. (426-120(3)).

1.176 Item 34 seeks to insert proposed section 426-195 into the Act. Proposed subsection 426-195(1) prescribes liability for an administrative penalty where a community charity corporation, or a direct holds out that:

- the corporation is endorsed as a deductible gift recipient and the corporation is not so endorsed (proposed paragraph 426-195(1)(a)); or
- the corporation is entitled to remain endorsed as a deductible gift recipient but is not so entitled (proposed paragraph 426-195(1)(b)); or

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<sup>112</sup> Schedule 3, item 11, proposed section 426-118; item 15, proposed subsection 426-120(3); item 34, proposed section 426-185 and 426-195. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

- the corporation will be endorsed as a deductible gift recipient at a particular time and is not so endorsed (proposed paragraph 426-195(1)(c)).

1.177 Proposed subsection 426-195(2) provides that the penalty is the amount specified in the community charity corporation guidelines, or the amount worked out in accordance with the method specified in the community charity corporation guidelines. Proposed subsection 426-195(2) also provides that the guidelines may specify different penalties or methods for different circumstances. Proposed subsection 426-195(3) provides that a director who is liable to the penalty must not be reimbursed the penalty from the corporation.

1.178 In addition, proposed subsection 426-195(4) prescribes an offence-specific defence for the offence set out in proposed subsection 426-195(1). Proposed subsection 426-195(6) provides that the evidential burden of proof is reversed for persons relying on this defence.

1.179 Item 34 of schedule 3 to the bill also seeks to insert proposed section 426-185 into the Act. Proposed paragraph 426-185(a) provides that the minister must formulate community charity corporation guidelines by legislative instrument setting out rules that community charity corporations and their directors must comply with if the corporations are to be, or are to remain, endorsed as deductible gift recipients (DGR). Proposed paragraph 426-118(b) provides that the charity trust guidelines must also set out the amount of the administrative penalty, or how to work out the amount of the administrative penalty, under subsection 426-195(1) in relation to community charity corporations.

1.180 These items represent a significant delegation of legislative power in that they allow regulations (which are not subject to the same level of parliamentary scrutiny as primary legislation) to impose penalties. The committee's view is that significant matters, such as the imposition of penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance the bill provides for the imposition of civil penalties in delegated legislation, without the provision of guidance or factors to be considered when determining these amounts. The committee's preference is that guidance, factors to be considered, or a cap on the penalty amounts be included on the face of the bill, to constrain the scope of legislative power that is being delegated.

1.181 In relation to proposed sections 426-118 and 426-185, the explanatory memorandum explains:

The guidelines may specify different penalties or methods for different infringing behaviours. It is appropriate for the guidelines to set out penalty amounts, as this allows for them to be customised to the nature and size of the breach, as well as taking account of the trustee or director's level of culpability. This level of specificity is not present in, or appropriate for, the primary legislation, which sets out an overarching narrative in the context of which detailed obligations would be out of place and difficult to comprehend. An additional reason for including penalty amounts in the

guidelines rather than the primary legislation is that the former may be more readily updated to respond to new factual scenarios and ensure recipients of DGR status are being satisfactorily regulated.<sup>113</sup>

1.182 In relation to the reversal of the evidential burden of proof in proposed section 426-195, the explanatory memorandum states:

It is appropriate to place the burden of proof on a director to make out this defence, because knowledge of whether or not they were aware of the breach is peculiarly within their possession and would be relatively easy to establish. Also, as noted, these provisions are not novel; they have been extended or used as a model in respect of community charities.<sup>114</sup>

1.183 The imposition of an offence-specific defence which reverses the evidential burden of proof ordinarily heightens the committee's concerns in relation to the imposition of indeterminate penalty amounts to be prescribed in delegated legislation. However the committee notes that in this instance, the relevant offence is a civil rather than criminal offence which mitigates the committee's concerns, to an extent.

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

- **the penalty amount(s) that it is anticipated will be set out in delegated legislation in relation to the specified provisions; and**
- **any further guidance as to how these penalties will be formulated, including whether the bill can be amended to include guidance, factors to be considered, or a cap on the amounts that can be set out in delegated legislation.**

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<sup>113</sup> Explanatory memorandum, pp. 39 – 40.

<sup>114</sup> Explanatory memorandum, p. 41.



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## **Private senators' and members' bills that may raise scrutiny concerns<sup>115</sup>**

The committee notes that for this Digest, there are no private senators' or members' bills that may raise scrutiny concerns under Senate standing order 24.

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<sup>115</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 189.

## **Bills with no committee comment<sup>116</sup>**

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

- Australian Capital Territory Dangerous Drugs Bill 2023
- Australian Education Amendment (Save Our Public Schools) Bill 2023
- Competition and Consumer Amendment (Continuing ACCC Monitoring of Domestic Airline Competition) Bill 2023
- Disability Services and Inclusion (Consequential Amendments and Transitional Provisions) Bill 2023
- Ending Native Forest Logging Bill 2023
- National Housing Finance and Investment Corporation Amendment (Unlocking Regional Housing) Bill 2023
- Public Health (Tobacco and Other Products) (Consequential Amendments and Transitional Provisions) Bill 2023

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<sup>116</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 190.

## Commentary on amendments and explanatory materials<sup>117</sup>

### Housing Australia Future Fund Bill 2023

1.185 On 13 September 2023, one government amendment to the bill was agreed to in the Senate, and on 14 September 2023, 20 amendments were agreed to by the House of Representatives. Senator Gallagher tabled two supplementary explanatory memoranda related to the amendments.

1.186 Item 9 inserts clause 33A into the *Housing Australia Future Fund Act 2023*.<sup>118</sup> Subsection 33A(2) provides that the minister must direct in writing that a specified amount is to be debited from the Housing Australia Future Fund Special Account and credited to the Housing Australia Special Account. Subsection 33A(3) provides that a direction made under subsection 33A(2) is not a legislative instrument.

1.187 From a scrutiny perspective, the committee is concerned that such a direction will not be a legislative instrument and is therefore not subject to parliamentary scrutiny through the processes of registration, tabling, and being subject to the disallowance procedure.

1.188 The committee notes that in relation to directions made under subsection 33A(2), the supplementary explanatory memorandum states:

Subclause 33A(3) would provide that a direction under subclause 33A(2) is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act 2003. Directions of this type are administrative in character because they are merely the application of a legal power in a particular case (i.e. they do not determine or alter the content of the law itself).

1.189 Nevertheless, the committee remains concerned that the re-allocation of Commonwealth money between housing funds will not be subject to the full range of parliamentary scrutiny that is afforded to a legislative instrument.

**1.190 In light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.**

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<sup>117</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, Scrutiny Digest 12 of 2023; [2023] AUSStaCSBSD 191.

<sup>118</sup> The committee draws the Senate's attention to amendments on sheet UC149.

## National Occupational Respiratory Disease Registry Bill 2023

### National Occupational Respiratory Disease Registry (Consequential Amendments) Bill 2023

1.191 On 14 September 2023, the Assistant Minister for Education (Senator Chisholm) tabled an addendum to the explanatory memorandum relating to the bills.

1.192 **The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information requested by the committee in relation to broad discretionary powers.**<sup>119</sup>

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

- National Housing Supply and Affordability Council Bill 2023
- On 14 September 2023 the House of Representatives agreed to one Government and one Independent (Senator Pocock) amendment to the bill, and the Assistant Minister for Trade (Senator Ayres) tabled a supplementary explanatory memorandum to the bill.
- Parliamentary Workplace Support Service (Consequential Amendments and Transitional Provisions) Bill 2023
- On 14 September 2023 the Senate agreed to two Government amendments to the bill and the Minister for Finance (Senator Gallagher) tabled a supplementary explanatory memorandum to the bill.
- Parliamentary Workplace Support Service Bill 2023
- On 14 September 2023, the Senate agreed to five Government amendments to the bill and the Minister for Finance (Senator Gallagher) tabled a supplementary explanatory memorandum to the bill.

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<sup>119</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2023* (2 August 2023) p. 29; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2023* (6 September 2023) pp. 40-43.

## Chapter 2

### Commentary on ministerial responses

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

#### Parliamentary Workplace Support Service Bill 2023<sup>120</sup>

<b>Purpose</b>	This bill seeks to establish the Parliamentary Workplace Support Service (the PWSS) as an independent statutory agency to provide human resources and certain other services for parliamentarians and persons employed under the <i>Members of Parliament (Staff) Act 1984</i> . This bill also gives effect to the recommendations of the Australian Human Rights Commission.
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives on 10 August 2023
<b>Bill status</b>	Received Royal Assent on 20 September 2023

#### Privacy<sup>121</sup>

2.2 Clause 61 of the bill introduces information sharing between the Parliamentary Workplace Support Service (the PWSS) and other Commonwealth entities or an individual who holds any office or appointment under a law of the Commonwealth.<sup>122</sup> Information may also be disclosed by a Commonwealth entity to the PWSS if the disclosure is reasonably necessary to assist the PWSS or the CEO of the PWSS to perform any of their functions or exercise any of their powers.<sup>123</sup>

2.3 Before disclosing any of the information obtained in the course of its review function under clause 19, the PWSS must have regard to whether the disclosure would be likely to result in harm to an individual to whom the information relates, other than mere damage to the individual's reputation.<sup>124</sup>

<sup>120</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Parliamentary Workplace Support Service Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 192.

<sup>121</sup> Clause 61. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

<sup>122</sup> Subclause 61(1).

<sup>123</sup> Proposed paragraphs 61(1)(c) and 61(1)(d), and subclause 61(2).

<sup>124</sup> Subclause 61(6).

2.4 In *Scrutiny Digest 10 of 2023*, the committee requested the minister's advice as to:

- the nature of information that may be disclosed by the PWSS and Commonwealth entities;
- whether guidance can be provided regarding what circumstances are expected to necessitate disclosing information because the disclosure is reasonably necessary to assist the PWSS or the Commonwealth entity to perform its functions or exercise its powers;
- what level or nature of harm is sufficient to prevent disclosure of information; and
- what other considerations must be made by the PWSS prior to disclosing information.<sup>125</sup>

**Minister for Finance's response<sup>126</sup>**

2.5 The Minister for Finance (the minister) advised of various situations that may require the PWSS to disclose personal information.

2.6 The minister advised that as the PWSS has a responsibility to support the Commonwealth in discharging its obligations under the *Work Health and Safety Act 2011*, the PWSS is obligated under that Act to notify Comcare once it becomes aware of a notifiable incident. This requires the PWSS to disclose personal information about the person who suffered serious injury or illness, and information about other involved workers. Similarly, the minister advised that another Commonwealth entity may require information as part of its work health and safety obligations. The PWSS may disclose information gathered in order for that department to address a work health and safety risk, but the minister advised that this information would include a broad description of the risk, and the information would be de-identified to the maximum extent possible.<sup>127</sup>

2.7 Other situations that may necessitate disclosure include to assist law enforcement, or as part of the PWSS' human resources function to enable the Department of Finance to pay *Members of Parliament (Staff) Act 1984* employees. The minister advised the latter would require the PWSS to share information on individual leave entitlements and allowances. However, the minister advised that subclauses 61(1) and 61(2) do not undermine the general principle that disclosure will only be

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<sup>125</sup> Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 10 of 2023](#) (6 September 2023) pp. 11–12.

<sup>126</sup> The minister responded to the committee's comments in a letter dated 11 September 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 12 of 2023* available at: [http://www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest).

<sup>127</sup> See minister's response.

between the PWSS and Commonwealth entities where there is a reasonably necessary and legitimate purpose to disclose the information.<sup>128</sup>

2.8 As part of the consideration of harm under subclause 61(6), the minister advised that the PWSS must have regard to any likely harm to an individual prior to the disclosure of information. The minister advised that 'harm' may include physical, psychological or emotional harm. The minister also advised that any consideration of harm occurs alongside the consideration of other circumstances relevant to the potential disclosure. For example, even where harm may be caused to an individual, the PWSS may make a disclosure where 'there is an overriding public policy interest, such as to protect the safety of others'.<sup>129</sup>

### ***Committee comment***

2.9 The committee thanks the minister for this response.

2.10 The committee welcomes the minister's advice that disclosure of personal information between the PWSS and Commonwealth entities will only occur where it is reasonably necessary and for a legitimate purpose. The committee also notes the minister's advice that information may be disclosed even where harm is caused to an individual, where there is an overriding public policy interest.

**2.11 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*).**

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<sup>128</sup> See minister's response.

<sup>129</sup> See minister's response.

## Social Security Amendment (Australian Government Disaster Recovery Payment) Bill 2023<sup>130</sup>

<b>Purpose</b>	The Social Security Amendment (Australian Government Disaster Recovery Payment) Bill 2023 amends the <i>Social Security Act 1991</i> to provide greater certainty in supporting automation processes and ensure the timely payment of claims for the Australian Government Disaster Recovery Payment in the 2023/24 High Risk Weather Season and beyond.
<b>Portfolio</b>	Home Affairs
<b>Introduced</b>	House of Representatives on 6 September 2023
<b>Bill status</b>	Received Royal Assent on 28 September 2023

### Instruments not subject to an appropriate level of parliamentary oversight<sup>131</sup>

2.12 Item 2 of schedule 1 to the bill inserts subparagraph 1061K(1)(b)(v) into the *Social Security Act 1991* (the Act), which has the effect of requiring anyone who is eligible for an Australian Government Disaster Recovery Payment ('AGDRP') to be covered by a determination made under subsection 1061K(3A). Item 3 of schedule 1 inserts subsection 1061K(3A), which allows the minister to determine, by notifiable instrument, that a person is eligible for an AGDRP if they:

- have been in Australia for a specified period, ending on the day a major disaster is determined under the Act; and
- are an Australian citizen, permanent visa holder or a protected special category visa holder.

2.13 As instruments made under subsection 1061K(3A) are notifiable instruments, they are not subject to the tabling, disallowance or sunseting requirements that apply to legislative instruments.

2.14 In *Scrutiny Digest 11 of 2023*, the committee requested the minister's advice as to why it is considered appropriate that instruments made under subsection 1061K(3A) are notifiable instruments and whether the bill could be amended to provide that these instruments are legislative instruments.<sup>132</sup>

<sup>130</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Social Security Amendment (Australian Government Disaster Recovery Payment) Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 193.

<sup>131</sup> Schedule 1, item 3, proposed subsection 1061K(3A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

<sup>132</sup> Senate Scrutiny of Bills Committee, *Scrutiny Digest 11 of 2023* (13 September 2023) pp. 3–5.



**Minister for Home Affairs response<sup>133</sup>**

2.15 The Minister for Home Affairs (the minister) advised that subsection 1061K(3A) allows the minister to determine, with respect to a person's citizenship or visa status, a specified period of time they have been in Australia to qualify for the AGDRP by notifiable instrument. The minister advised this instrument will be administrative in nature as it gives content to the law, rather than prescribing a substantive exemption from the requirements of the *Legislation Act 2003*.

2.16 The minister further advised that such an instrument limits the minister's discretion to the determination of objective factors for how the law should operate. The minister explained that this will support increased automatic decision-making, and will benefit eligible individuals by ensuring they receive their payments quickly when they have been impacted by disaster. The minister also advised this mirrors the mechanism by which the minister may determine that an event is a major disaster under section 36 of the Act.

**Committee comment**

2.17 The committee thanks the minister for this response.

2.18 The committee reiterates its longstanding view that, where feasible, legislative rather than notifiable instruments are preferred, as they are subject to tabling, sunset and disallowance requirements that promote better parliamentary oversight.

2.19 Further, it is not apparent to the committee that instruments made under subsection 1061K(CA) are administrative in nature as they will determine the circumstances in which a person will have an entitlement to an AGDRP following the occurrence of a major disaster. The committee considers that these instruments have the potential to directly or indirectly affect privileges or interests, or create a right.<sup>134</sup> Further, the committee does not accept that receiving payments quickly is sufficient justification for the use of a notifiable instrument as legislative instruments are effective from the date registered and can continue to operate and have action taken under them during the disallowance period, by being subject to the disallowance process.

2.20 The committee considers that section 8 of the *Legislation Act 2003* enables primary law to provide for something to be done by legislative instrument if so desired.

2.21 However, the committee notes that this bill was passed on 14 September 2023 and is no longer before Parliament.

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<sup>133</sup> The minister responded to the committee's comments in a letter dated 28 September 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 12 of 2023*).

<sup>134</sup> *Legislation Act 2003*, paragraph 8(4)(b).

**2.22** The committee retains its scrutiny concerns and considers that subsection **1061K(3A)** should require the matters set out to be contained in legislative instrument as opposed to notifiable instrument.

**2.23** In light of the fact that the bill has received Royal Assent, the committee makes no further comment on this issue.

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## Members of Parliament (Staff) Amendment Bill 2023<sup>135</sup>

<b>Purpose</b>	The bill seeks to amend the <i>Members of Parliament (Staff) Act 1984</i> to implement certain recommendations of the review by the Department of Prime Minister and Cabinet in relation to the Act's employment framework. It also seeks to make consequential amendments to the establishment of the Parliamentary Workplace Support Service and seeks to make consequential amendments to 18 Acts.
<b>Portfolio</b>	Special Minister of State
<b>Introduced</b>	House of Representatives on 10 August 2023
<b>Bill status</b>	Royal Assent on 20 September 2023

### Broad delegation of administrative powers<sup>136</sup>

2.24 The bill amends the *Members of Parliament (Staff) Act 1984* (MOPS Act) to implement 11 of the 15 recommendations of the 7 October 2022 Review of the MOPS Act undertaken by the Department of Prime Minister and Cabinet.

2.25 Item 14 of schedule 1 to the bill inserts section 31 into the MOPS Act. Subsection 31(1) empowers a parliamentarian or office-holder to authorise another person to exercise all or any of their functions or powers under the MOPS Act, provided that they are satisfied that it is appropriate. Subsection 31(2) requires an authorised person to comply with any directions of the authoriser.

2.26 In *Scrutiny Digest 10 of 2023* the committee requested the minister's advice as to:

- why it is necessary and appropriate to allow for any authorised person to carry out a parliamentarian or office-holders' functions or powers under the *Members of Parliament (Staff) Act 1984*;
- who it is anticipated that a parliamentarian or office holder may authorise to exercise their powers or functions under the *Members of Parliament (Staff) Act 1984*; and
- whether authorised persons will be expected to hold specific or relevant experience, training or qualifications.

<sup>135</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Members of Parliament (Staff) Amendment Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 194.

<sup>136</sup> Schedule 1, item 14, proposed subsection 31(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

**Minister for Trade and Tourism's response<sup>137</sup>**

2.27 The Minister for Trade and Tourism (the minister) advised that the MOPS Act authorises parliamentarians and office-holders (authorisers) to delegate all their powers and functions under the Act in reflection of the variable roles and responsibilities of parliamentarians. The minister noted, for example, that parliamentarians are responsible for different numbers of staff and offices, and have personal preferences for staff management. Delegation of their MOPS Act powers affords parliamentarians flexibility and allows for resource management. The minister noted that while this flexibility already exists in the MOPS Act the bill provides that authorised persons must comply with directions of the parliamentarian or office holder, and authorisers must be satisfied that the authorisation is appropriate.

2.28 Further, the minister advised that it is anticipated that authorisers will continue the common practice of authorising at least one MOPS Act employee with at least some of their functions and powers. For example, the minister advised that the bill permits 'prime ministers to authorise public servants occupying specific roles to engage and manage staff working in official establishments (Kirribilli and the Lodge)'.

2.29 In relation to training, qualifications and experience, the minister advised that there are no specific requirements for authorisation under the MOPS Act. However, the minister noted that the experience, training and qualifications of an individual would be relevant to whether or not the authoriser considers the authorisation appropriate. For example, the minister advised that it is anticipated that an authoriser would consider previous staff management experience, leadership training, and skills when assessing appropriateness. The minister also noted that relevant factors would include the scope of the relevant authorisation, as well as the size and nature of the office.

2.30 In addition, the minister noted that the bill introduces a requirement that authorisers assess the capability of a person to perform a role prior to employment, and those hired to perform staff management roles would need to demonstrate capacity to fulfil those types of responsibilities.

2.31 Finally, the minister noted that the Parliamentary Workplace Support Service will be involved in the provision of training which may include training in relation to human resources.

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<sup>137</sup> The minister responded to the committee's comments in a letter dated 12 September 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 12 of 2023*).

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**Committee comment**

2.32 The committee thanks the minister for this advice.

2.33 The committee welcomes the examples provided by the minister as to the factors that may be considered when an authoriser is assessing the appropriateness of an authorisation of MOPS Act powers and functions.

2.34 The committee reiterates its preference that delegations of administrative power be limited by the scope and type of powers that may be delegated. These concerns are heightened in this instance as the bill provides that functions in relation to hiring, suspending and terminating employment may be authorised to any person, with minimal safeguards.

2.35 **As the bill has already passed both Houses of Parliament and received Royal Assent, the committee makes no further comment on this matter.**

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## Counter-Terrorism and Other Legislation Amendment Bill 2023<sup>138</sup>

<b>Purpose</b>	<p>This bill seeks to extend, for three years, the following Australian Federal Police counter-terrorism powers that are scheduled to sunset on 7 December 2023:</p> <ul style="list-style-type: none"> <li>• the stop, search and seizure powers in Division 3A of Part IAA of the <i>Crimes Act 1914</i>;</li> <li>• the control order regime in Division 104 of the <i>Criminal Code Act 1995</i>; and</li> <li>• the preventative detention order regime in Division 105 of the <i>Criminal Code Act 1995</i>.</li> </ul> <p>The bill also seeks to extend by 12 months the operation of section 122.4 of the <i>Criminal Code Act 1995</i>, which makes it an offence for a current or former Commonwealth officer to disclose information without authorisation.</p>
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives on 10 August 2023
<b>Bill status</b>	Before the House of Representatives

### Coercive powers

### Broad discretionary powers

### Deferral of sunseting<sup>139</sup>

2.36 Schedules 1 and 2 to the bill seek to extend, by three years, the operation of significant counter-terrorism measures that are due to sunset on 7 December 2023.

2.37 Specifically, the bill is seeking to extend the operation of the following measures:

- the **stop, search and seizure powers**, which allow a police officer to stop, question and search persons and seize items in a Commonwealth place or

<sup>138</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Counter-Terrorism and Other Legislation Amendment Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 195.

<sup>139</sup> Schedules 1 and 2. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i), (ii) and (v).

prescribed security zone without a warrant (and, in relation to prescribed security zones, without the need for reasonable suspicion);<sup>140</sup>

- the **control order regime**, which allows courts to impose conditions on a person without charge, restricting their ability to do certain things;<sup>141</sup> and
- the **preventative detention order regime**, which allows a person to be taken into custody and detained for up to 48 hours if it is suspected, on reasonable grounds, that they are preparing to engage in a terrorist act.<sup>142</sup>

2.38 These measures were first introduced in 2005, pursuant to the Anti-Terrorism Bill (No. 2) 2005, and their operation has been extended several times. The committee has previously raised scrutiny concerns regarding these broad coercive powers and the continued extension of these measures.<sup>143</sup>

2.39 In *Scrutiny Digest 10 of 2023*, the committee requested the Attorney-General's detailed advice as to why it is considered necessary and appropriate to extend, by a further three years, the operation of broad coercive powers within the *Crimes Act 1914* (the Crimes Act) and the *Criminal Code Act 1995*.<sup>144</sup>

### **Attorney-General's response<sup>145</sup>**

1.2 The Attorney-General advised that while the National Terrorism Threat Level has lowered from 'probable' to 'possible', the current counter-terrorism laws and frameworks are a key factor in managing the terrorism risk and threat level in Australia and the potentially catastrophic consequences of a terrorist attack do not change despite the recent downgrade.

1.3 The Attorney-General noted that:

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<sup>140</sup> In Part 1AA, Division 3A of the *Crimes Act 1914*. Item 9 of Schedule 1 to the bill seeks to extend the operation of this measure.

<sup>141</sup> In Part 3, Division 104 of Schedule 1 to the *Criminal Code Act 1995* (the Criminal Code). Item 42 of Schedule 2 to the bill seeks to extend the operation of this measure.

<sup>142</sup> In Division 105 of the Criminal Code. Item 51 of Schedule 2 to the bill seeks to extend the operation of this measure.

<sup>143</sup> See, most recently, the committee's comments on the Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022 which extended these measures for 12 months in Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 5 of 2022* (28 September 2022) pp. 4–6; and the Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021 which extended these measures for three years in Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 12 of 2021* (11 August 2021) pp. 1–4.

<sup>144</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2023* (6 September 2023) pp. 1–6.

<sup>145</sup> The minister responded to the committee's comments in a letter dated 18 September 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 12 of 2023*).

the Australian Federal Police (AFP) have advised that in the current threat environment:

- control orders are a 'necessary legislative mechanism of managing individuals who present a significant terrorism risk to the Australian community',
- preventative detention orders provide critical preventive powers to the AFP in response to terrorism, that traditional policing powers cannot sufficiently address, and
- the stop, search and seizure powers in Division 3A of Part 1AA are a necessary part of the suite of emergency police powers in state, territory and Commonwealth law, ensuring police can respond consistently and effectively to incidents in a Commonwealth place.<sup>146</sup>

1.4 The Attorney-General also advised that the Parliamentary Joint Committee on Intelligence and Security (PJCIS)'s 2021 *Review of police powers in relation to terrorism, the control order regime, the preventive detention order regime and the continuing detention order regime* recommended that these powers be extended to 7 December 2025. As those recommendations were made almost two years ago, the Attorney-General advised that the extension of the sunset dates to 7 December 2026 is consistent with the intent of those recommendations which was to extend the sunset dates for three years. The new sunset date appropriately reflects the extraordinary nature of these powers and guarantees an opportunity for the Parliament to review them again after a reasonable period to ensure they continue to be fit for purpose.

#### **Committee comment**

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

2.41 However, the committee reiterates its concerns about the extraordinary nature of the regimes and questions whether an appropriate balance has been struck between the rights of accused and the public interest. The committee also notes that when the PJCIS reviewed the powers in 2021, it was before the National Terrorism Threat Level had been downgraded, and it is unclear to the committee what demonstrates the need to continue these powers despite the reduction in the terrorism threat level. The committee further notes that the PJCIS is currently undertaking a review of the operation and effectiveness of post-sentence terrorism orders in Division 105A of the Criminal Code.

2.42 The committee reiterates its concerns regarding the regular extension of the sunset dates and considers that these measures are likely no longer adequately

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<sup>146</sup> See minister's response.



justified as extraordinary and temporary given their continued renewal and the acknowledged reduction in the level of threat of terrorist offences.

**2.43 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of extending, by a further three years, the operation of broad coercive powers within the *Crimes Act 1914* and the *Criminal Code Act 1995*.**

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### **Undue trespass on personal rights and liberties<sup>147</sup>**

2.44 Item 2 of schedule 1 to the bill seeks to insert proposed subsections 3UD(1A) and (1B) into the Crimes Act. Proposed subsection 3UD(1A) provides that a police officer who stops and detains a person under section 3UD of the Crimes Act (relating to powers to stop and search a person for a terrorism related item) must inform the person of any right they have to make a complaint to the Commonwealth Ombudsman or a State or Territory police oversight body about the conduct of the police officer in exercising the powers conferred by this section. Proposed subsection 3UD(1B) provides that the obligation to inform a person of a right to make a complaint under proposed subsection 3UD(1A) does not require a police officer to inform a person of a right if it is not reasonably practicable to do so due to urgency.

2.45 In *Scrutiny Digest 10 of 2023*, the committee requested the Attorney-General's detailed advice as to whether the bill could be amended to the effect that it requires a person be told of their right to make a complaint as soon as it is practicable in circumstances of urgency under proposed subsection 3UD(1B) of Crimes Act.<sup>148</sup>

### **Attorney-General's response<sup>149</sup>**

2.46 The Attorney-General advised that the phrase 'circumstances of urgency' is intended to take the same meaning in new subsection 3UD(1B) as it carried in section 19AU – that is, there is a need for immediate action. The use of the powers may be exercised in time-sensitive situations where, for instance, a terrorist act may be imminent and police should not be delayed in efforts to prevent an imminent terrorist offence by an obligation to provide this information. The Attorney-General advised that a person would still have a right to complain to the Commonwealth Ombudsman or applicable State or Territory police oversight body about the conduct of a police officer exercising Division 3A powers even if the police officer did not advise them of this right due to circumstances of urgency.

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<sup>147</sup> Schedule 1, item 2, proposed subsections 3UD(1A) and (1B). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

<sup>148</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2023* (6 September 2023) pp. 6 – 7.

<sup>149</sup> The minister responded to the committee's comments in a letter dated 18 September 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 12 of 2023*).

2.47 The Attorney-General further advised that the government will give further consideration to the committee's suggestion that the bill be amended to require a police officer to give notice to an individual after circumstances of urgency have passed, following the completion of the PJCIS review of the bill.

***Committee comment***

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

2.49 The committee acknowledges that proposed subsection 3UD(1B) does not prevent an individual from having a right to complain to the relevant body, however considers that informing a person of their right to complain as soon as is practicable after the event may be a welcome safeguard to ensure individuals are aware of their rights.

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

## Environment Protection (Sea Dumping) Amendment (Using New Technologies to Fight Climate Change) Bill 2023<sup>150</sup>

<b>Purpose</b>	This bill seeks to give effect to Australia's obligations arising out of the 2009 and 2013 amendments to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972. This bill amends the <i>Environment Protection (Sea Dumping) Act 1981</i> to: enable a permit to be granted for the export of carbon dioxide streams from carbon dioxide capture processes for the purpose of sequestration into a sub-seabed geological formation; enable a permit to be granted for the placement of wastes or other matter for a marine geoengineering activity for the purpose of scientific research; and make minor consequential and technical amendments.
<b>Portfolio</b>	Climate Change, Energy, the Environment and Water
<b>Introduced</b>	House of Representatives on 22 June 2023
<b>Bill status</b>	Before the Senate

### Reversal of the evidential burden of proof<sup>151</sup>

2.51 Section 10C of the *Environment Protection (Sea Dumping) Act 1981* (the Act) provides that it is an offence if, otherwise than in accordance with a permit, a person loads controlled material on a vessel, aircraft or platform in Australia or Australian waters for the purpose of dumping or incineration. Item 2 of schedule 1 to the bill seeks to insert proposed subsection 15(2A) into the Act to create a new defence to the section 10C offence. The bill also introduces two new offences by inserting proposed sections 10CA<sup>152</sup> and 10DA<sup>153</sup>, which relate to loading or exporting wastes or other matters and placing these in Australian waters.

2.52 Item 25 of schedule 1 seeks to insert proposed subsection 15(2B) into the Act to create a new defence to the offence under proposed section 10CA. Proposed subsection 15(2B) provides that proposed section 10CA does not apply in relation to loading for the purpose of the placement of wastes or other matter into waters that are not Australian waters, if that placement will be in accordance with a permit

<sup>150</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Environment Protection (Sea Dumping) Amendment (Using New Technologies to Fight Climate Change) Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 196.

<sup>151</sup> Schedule 1, proposed subsections 15(2A), 15(2B) and 15(2C). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

<sup>152</sup> Schedule 1, item 17, proposed section 10CA.

<sup>153</sup> Schedule 1, item 18, proposed section 10DA.

granted (by a party other than Australia) in accordance with the London Protocol (the Protocol).

2.53 Item 25 of schedule 1 also inserts proposed subsection 15(2C) into the Act, which creates a new defence to the offence under proposed section 10DA. Proposed subsection 15(2B) provides that proposed section 10DA does not apply in relation to exporting for the purpose of the placement of wastes or other matter into waters that are not Australian waters, if that placement will be in accordance with a permit granted (by a party other than Australia) in accordance with the Protocol.

2.54 In *Scrutiny Digest 8 of 2023*, the committee requested the minister's advice as to why it is proposed to introduce proposed subsections 15(2A), 15(2B) and 15(2C) with the consequence that the defendant bears the evidential burden of proving exceptions to the offences under existing section 10C and proposed subsections 10CA and 10DA respectively.<sup>154</sup>

***Minister Climate Change, Energy, the Environment and Water's response***<sup>155</sup>

2.55 The Minister for Climate Change, Energy, the Environment and Water (the minister) advised that, generally, the offences under existing section 10C and proposed section 10CA and 10DA are intended to address situations where an activity is allowed by a permit that was granted in accordance with the London Protocol by Australia or another Contracting Party to the Protocol.

2.56 The minister further advised that existing subsection 15(4) of the Act has the effect that a person who seeks to rely on any exception in section 15, (under which this bill seeks to insert proposed subsections 15(2A), 15(2B) and 15(2C)), bears an evidential burden in relation to the matters in that exception.<sup>156</sup>

2.57 The minister also advised that in relation to proposed subsections 15(2B) and 15(2C), there is a possibility that the person covered within the scope of the Act could be granted a permit by a Contract Party that is not Australia for activities conduct outside of Australian waters. Therefore, whether a permit for that specific activity exists would be peculiarly in the knowledge of the defendant and it would be extremely burdensome and costly for the prosecution to disprove the possibility of any of the Contract Parties to the London Protocol having granted a permit for the relevant activity.

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<sup>154</sup> Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2023* (2 August 2023) pp. 10–13.

<sup>155</sup> The minister responded to the committee's comments in a letter dated 12 September 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 12 of 2023*).

<sup>156</sup> See minister's response.

**Committee comment**

2.58 The committee thanks the minister for this advice.

2.59 The committee notes that while existing subsection 15(4) has the effect of requiring a person seeking to rely on any exception set out in section 15 of the Act to bear an evidential burden in relation to the matters in that exception, the committee does not consider this to be a sufficient justification for creating an offence-specific defence. The committee considers that each offence-specific defence should be justified on its own merits with reference to the *Guide to Framing Commonwealth Offences*.<sup>157</sup>

2.60 In relation to proposed subsection 15(2A), the committee notes that the permit is issued by Australia in relation to activities in Australian waters. In this instance, it is not clear to the committee that knowledge of the existence of a permit is peculiar to the defendant. Further, it is also unclear to the committee how it would be significantly more costly or difficult for the prosecution to disprove the existence of a permit granted by the Australian government than it is for the defendant to prove the existence of this permit.

2.61 In relation to proposed subsections 15(2B) and 15(2C), the committee notes the minister's advice that a permit may have been granted by another contracting party to the London Protocol, and that this would be significantly easier for the defendant to prove than for the prosecution to disprove. The committee considers that this information is the type of information that would have been useful to include in the explanatory memorandum to the bill.

**2.62 In light of the above, 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 offences under proposed subsection 15(2A) of the bill.**

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<sup>157</sup> Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011) p. 50.

## National Occupational Respiratory Disease Registry Bill 2023<sup>158</sup>

<b>Purpose</b>	This bill seeks to create a legislative framework for the establishment and ongoing management of the National Occupational Respiratory Disease Registry (the National Registry). The National Registry will provide access to information about occupational respiratory diseases and support the identification of industries, occupations, job tasks and workplaces where there is a risk of exposure to respiratory disease-causing agents.
<b>Portfolio</b>	Health and Aged Care
<b>Introduced</b>	House of Representatives on 21 June 2023
<b>Bill status</b>	Before the Senate

### Significant matters in delegated legislation

#### Privacy

#### Broad discretionary powers<sup>159</sup>

2.63 The bill seeks to create a legislative framework for the establishment and ongoing management of the National Occupational Respiratory Disease Registry (the National Registry).

2.64 The committee raised scrutiny concerns in relation to the bill in *Scrutiny Digest 8 and 10 of 2023*.<sup>160</sup> The committee was concerned that much of the information related to the scope and operation of the National Registry is being left to delegated legislation. In *Scrutiny Digest 10 of 2023*, the committee considered the assistant minister's substantive response to these scrutiny concerns.

2.65 In *Scrutiny Digest 10 of 2023* the committee:

- requested the assistant minister table an addendum to the explanatory memorandum containing the key information provided by the minister in correspondence to the committee dated 15 August 2023, be tabled in the Parliament as soon as practicable, noting the importance of these

<sup>158</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Occupational Respiratory Disease Registry Bill 2023, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 197.

<sup>159</sup> The committee draws senators' attention to the framework nature of the bill pursuant to Senate standing orders 24(1)(a)(i), (ii), and (iv).

<sup>160</sup> For a full accounting of the committee's scrutiny concerns and the responses of the assistant minister, see *Scrutiny Digest 9 of 2023* and *Scrutiny Digest 10 of 2023*.

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); and

- the committee drew its scrutiny concerns to the attention of senators and left to the Senate as a whole the appropriateness of leaving much of the information related to the scope and operation of the National Registry to delegated legislation.

***Assistant Minister for Health and Aged Care response<sup>161</sup>***

2.66 The assistant minister advised that an addendum to the explanatory memorandum to the bill is being prepared. The assistant minister advised that the addendum will outline the appropriateness, scope, and operation of the National Registry, which is to be set out in in delegated legislation. The minister also advised that the addendum would explain why specified terms will be defined in delegated legislation rather than in the primary bill.

2.67 The assistant minister further advised that the addendum will address the criteria and considerations which will limit the exercise of the Chief Medical Officer's power to determine key terms in delegated legislation.

***Committee comment***

**2.68 The committee thanks the assistant minister for his advice that an addendum to the explanatory memorandum to the bill will be tabled in the Senate during debate on the bill.**

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<sup>161</sup> The minister responded to the committee's comments in a letter dated 14 September 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 12 of 2023*).

## **Ministerial responses with no committee comment<sup>162</sup>**

The committee has no comment in relation to the following ministerial responses:

- Biosecurity Amendment (Advanced Compliance Measures) Bill 2023
- Treasury Laws Amendment (2023 Measures No. 3) Bill 2023

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<sup>162</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Ministerial response with no committee comment, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 198.



## Chapter 3

### Scrutiny of standing appropriations<sup>163</sup>

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.<sup>164</sup> 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:

inappropriately delegate legislative powers; or

insufficiently subject the exercise of legislative power to parliamentary scrutiny.<sup>165</sup>

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

**Senator Dean Smith**

**Chair**

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<sup>163</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 12 of 2023*; [2023] AUSStaCSBSD 199.

<sup>164</sup> 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*.

<sup>165</sup> For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).