The Hon Clare O'Neil MP
Minister for Home Affairs
Minister for Cyber Security

Ref No: MC23-035144

Senator Dean Smith
Chair
Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Dean

Thank you for the Senate Scrutiny of Bills Committee's correspondence of 8 December 2023, concerning the Committee's assessment of the Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023. I appreciate the time the Committee has taken to consider the Bill.

My response to the matters raised by the Committee is enclosed at **Attachment A**. I have also copied this letter to the Minister for Immigration, Citizenship and Multicultural Affairs.

Thank you for raising these matters.

Yours sincerely

CLARE O'NEIL

6 / 2 / 2024

Attachment A

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Scrutiny Digest 16 of 2023

Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023

Procedural fairness
Undue trespass on rights and liberties
Significant penalties

....

1.13 In light of the above, the Senate Standing Committee for the Scrutiny of Bills (the Committee) requests the advice of the Minister for Home Affairs (the Minister) as to:

- The nature of the process associated with an application made under subsection 36D(1) and how that process will ensure procedural fairness;
- Whether the consideration of the Minister's application will necessitate a substantive hearing where and individual will be provided an opportunity to respond to any arguments progressed by the Minister that their citizenship will be revoked;
- Why the significant penalty of revocation of citizenship is considered necessary and appropriate, referring in particular to the matters relating to proportionality identified in para 1.11; and
- The impact of proposed subsection 36C(11) which provides Part IB of the *Crimes Act 1914* (Crimes Act) which deals with sentencing, imprisonment and release of federal offenders does not apply to an order made under section 36C.

Retrospective application

....

1.20 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of the retrospective application of measures in the bill.

Nature of the application to the court for a citizenship cessation order and procedural fairness

The *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (the Act) provides the legal framework that allows the Minister to make an application to a court, enlivening the court's discretionary power, to make a citizenship cessation order as part of the sentencing of a person who has been convicted of certain serious offences, in certain circumstances.

Prior to the commencement of the Act, the now-repealed section 36B of the *Australian Citizenship Act 2007* (Citizenship Act) reposed in the Minister the power to cease a dual national's citizenship where the person had engaged in certain conduct and that conduct demonstrated they had repudiated their allegiance to Australia. This determination was not based on a finding of guilt by a court.

Repealed section 36D of the Citizenship Act similarly empowered the Minister to cease a person's Australian citizenship where the person had been convicted of certain specified offences, and the Minister was satisfied the conduct to which the conviction related demonstrated a repudiation of their allegiance to Australia.

In *Alexander v Minister for Home Affairs & Anor* [2022] HCA 19 (*Alexander*) and *Benbrika v Minister for Home Affairs & Anor* [2023] HCA 33 (*Benbrika*), the High Court of Australia (the High Court) found sections 36B and 36D to be invalid as they conferred the function of punishing criminal guilt in the Executive, in breach of Chapter III of the Constitution; this function is only to be exercised by the judiciary.

The Act has amended the *Australian Citizenship Act 2007* to repeal the invalid provisions and ensure the power to cease citizenship is vested with the courts, as part of their role in sentencing for certain serious offences. The revised regime addresses the reasons for the High Court's decisions in *Alexander* and *Benbrika*.

Under the reforms, the decision about the making of a citizenship cessation order will be a discretionary matter for the judiciary and will form part of the sentence. The defendant will be afforded the procedural fairness that is available in all judicial proceedings and during sentencing. This includes the right to put relevant material before the court following a conviction and the right to appeal the sentence including where a citizenship cessation order forms part of the sentence.

The Minister, in making the application, must ensure that the application complies with all relevant court procedures. Ultimately the decision to make a citizenship cessation order is one for judicial discretion, using the direction provided in the Act and by applying relevant judicial precedents.

Citizenship cessation application hearings

Whether or not there will be a separate hearing will be a matter for the court to determine. Before or after conviction, but prior to sentencing, the Minister will make an application to the court for consideration of a citizenship cessation order as part of the sentence. Upon conviction, the defendant will be provided with the opportunity to put relevant material before the court consistent with the sentencing process that is applicable depending on whether the person has plead guilty or there has been a contested hearing.

The Act sets out requirements for the Minister to notify the individual subject to a citizenship cessation application in writing of the existence of that application as soon as practicable after the application is made. Additionally, the Act provides that the application must be made prior to the court imposing a sentence on the individual for a conviction for the relevant offences. In effect, this process will ensure that there is enough time for the defendant to make submissions to the court, should they wish, against the making of a citizenship cessation order.

Appropriateness of citizenship cessation as a penalty

The measure only affects Australian citizens who are also a citizen or national or another country. However, the measure is reasonable and necessary to address the risks posed by individuals convicted of offences so serious and significant that they demonstrate that a person has repudiated their allegiance to Australia. The court must not make a citizenship cessation order unless they are satisfied the person would not become someone who is not a national or citizen of any country (i.e. stateless).

Removal of the benefit of Australian citizenship where the person has repudiated their allegiance to Australia by their voluntary conduct which led to a conviction, achieves the legitimate purpose of protecting the Australian community. Despite a citizenship cessation order being made for an individual's Australian citizenship, the person will retain the benefit of their other nationality or citizenship.

The Australian Government has determined that a three year aggregate term of imprisonment for serious offences is an appropriate threshold to justify citizenship cessation in circumstances where, by their offending conduct, the person has demonstrated a repudiation of allegiance to Australia. The appropriate sentence for the offence or the offences is a matter for the court who will take into consideration all relevant factors.

The Australian Government has determined that an application for citizenship cessation may be made for defendants 14 years or over, which is over and above the minimum age of criminal responsibility for Commonwealth offences, that being 10 years old. The court must therefore be satisfied that the defendant is at least 14 years of age before making a citizenship cessation order.

Importantly, the Act requires the court must have regard to the best interests of the child where the defendant to a citizenship cessation order is a child aged under 18 years. The court may consider any other matters which it considers relevant to the exercise of its discretion to make an order to cease a person's Australian citizenship.

Part 1B of the *Crimes Act 1914*

Part 1B of the Crimes Act provides the sentencing principles to be applied by the court when passing sentence. Section 16A gives clear guidance on the matters the court must have regard to when determining the sentence to be passed for Commonwealth offences. Factors in mitigation are included in the range of matters that must be considered by the court.

However, a citizenship cessation order made by the court must take into account factors that are specified in the Act about the defendant's conduct in relation to the offending. Significantly, this includes whether the conduct to which the conviction or convictions relate demonstrates a repudiation of the values, democratic beliefs, rights and liberties that underpin Australia society. Determining this requires consideration of factors that are well beyond the scope of matters for deliberation in sentencing under Part 1B.

Additionally, if the court determines a person has by their offending conduct repudiated their allegiance to Australia, the court must, in deciding whether to make an order, still have regard to:

- the best interests of the child where they are under 18; and
- the best interests of any dependent children of the defendant in Australia; and
- the person's connection to the other country and the availability of the rights of citizenship of that country to the person.

As these matters are not contained in Part 1B of the Crimes Act, it is to the person's advantage that these matters be taken into account when a citizenship cessation order is under consideration by the court. However, the factors listed in the Act do not limit the matters to which the court may have regard when deciding whether to make a citizenship cessation order.

The Hon Jason Clare MP
Minister for Education

Reference: MC24-000228

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
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By email: scrutiny.sen@aph.gov.au

Dear Chair

Thank you for your correspondence of 19 January 2024 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee), regarding Scrutiny Digest 1 of 2024 in relation to the Australian Research Council (ARC) Amendment (Review Response) Bill 2023 (the Bill).

The Committee has requested the following advice about certain provisions in the Bill, addressed in turn below.

1. **Why it is necessary and appropriate to provide the minister and the board with a broad power to vary funding approvals under proposed subsections 47(5) and 48(4)**

The approval of grants of financial assistance under subsection 47(1) (relating to research grants under the National Competitive Grants Program) and subsection 48(1) (relating to designated research programs) typically provide authority for multi-year projects with a number of key considerations, such as identification of a lead researcher and other named participants, along with allocation of budget to periods within the project, description of the project, and auditor details. Changes to these parameters require the agreement of the Board or the Minister.

Enabling these variations to be made in a simple and robust process is necessary to support the management of long-lived projects to deliver quality research outcomes from public investment. Variations are an essential part of grants administration, enabling compliance with the Commonwealth Grants Rules and Guidelines principle of Governance and Accountability, which among other things requires the ARC to 'ensure grant agreements are supported by ongoing communication, active grants management and performance monitoring requirements that are proportional to the risks involved.'

The ability to apply variations under these subsections will generally be given in circumstances requested by the organisation to avoid the organisation breaching a term or condition of the funding agreement, which could then lead to the Board or the Minister varying or terminating the approval under subsections 50(4) and 50(5).

2. **Why it is necessary and appropriate to provide the Chief Executive Officer (CEO) with a broad power to vary funding agreements under proposed subsection 50(2)**

The CEO (or their delegate) has a broad power to vary funding agreements under subsection 50(2) as it is the CEO who has responsibility to ensure the efficient day-to-day administration of the ARC's funding with respect to research projects, and to manage such agreements. As set out above, the ability to make variations is an essential part of grants administration as highlighted in the Commonwealth Grants Rules and Guidelines.

A variation of a funding agreement under subsection 50(2) will generally be made in circumstances as requested by the organisation, where it may be necessary to avoid the organisation breaching a term or condition of the funding agreement, which could lead to the CEO varying or terminating the agreement under subsection 50(1) (and also the Board or the Minister varying or terminating the approval under subsections 50(4) and 50(5)).

Subsection 50(2) is broad to ensure it can cover all circumstances in which a variation to an agreement may be given. For example, the CEO can vary milestone dates for certain deliverables set out in the funding agreement's terms and conditions if the organisation has a reasonable explanation as to why they are unable to meet them. Recent examples include the challenges experienced by the Australian research community to human resources, infrastructure and supply chains through the COVID-19 pandemic and major flooding events, which created unexpected and unavoidable obstacles in meeting planned milestone delivery. Under such circumstances, it is reasonable to support milestone date variations to funding agreements, approved by the CEO.

As an indication of the number of variations each year, in 2022–23 the ARC processed 10,946 variations to funding agreements. Most variations were minor – for example, a number of these related to a change of chief investigator.

3. **Whether guidance can be provided as to how the CEO must be satisfied that a breach of a condition of the funding agreement has occurred under proposed subsection 50(1)**

Whether there has been a breach of a term or condition of the funding agreement will be determined on a case-by-case basis by the CEO (or their delegate), considering all the circumstances in which the breach has occurred.

Subsection 49(1) of the Act will specify that organisations will be required to enter into funding agreements with the CEO to receive grants, subsection 49(2) identifies elements that must be included in the agreement, and subsection 49(4) sets out the process that the CEO must follow when they have formed the view that the a party to the funding agreement has breached a term or condition of the agreement.

Additionally, ARC funding agreements include termination and dispute resolution clauses that impose an obligation on the ARC to act reasonably or in good faith – and in many instances there is a requirement to give the research organisation an opportunity to remedy the breach.

The CEO may discover that an organisation has breached a term or condition of their funding agreement by various means, including the organisation self-reporting to the ARC, a third party giving information to the ARC, or through the ARC conducting an audit of the organisation's compliance with their agreement. The CEO will investigate and assess the breach by reference to the specified terms and conditions as set out in the agreement to determine if the power under subsection 50(1) should be exercised.

Subsection 50(6) of the Act will define the requirements for advising the organisation affected by a potential decision to terminate or vary.

4. **Whether independent merits review will be available in relation to a decision made under proposed subsection 50(1), 50(4) or 50(5) of the Bill or if not, why not**

   and

5. **Why it is necessary and appropriate to exclude independent merits review of a decision made under proposed subsection 50(1), 50(4) or 50(5) of the Bill, with reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?***

Independent merits review through the Administrative Appeals Tribunal (or the newly established Administrative Review Tribunal if that tribunal is operational at the commencement of these provisions) is not available in relation to a decision made under subsections 50(1), 50(4) or 50(5).

The exclusion of independent merits review of a decision under subsection 50(1), 50(4) or 50(5) reflects the balance of the likely impact of these decisions and the costs of managing such a review process, in line with the considerations set out in paragraphs [4.56][4.57] in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*

The ARC manages thousands of grants each year. It is expected that the majority of decisions made under section 50 will involve variations to funding agreements. For example, the ARC approved 10,946 variations to agreements in 2022–23 (by way of comparison, the ARC approved 1,254 new agreements in the same year). To include a merits review for each of these decisions would increase the cost to Government without much broader benefit to the overall quality of Government decision-making.

As a matter of grants administration, many Government agencies including the ARC have standard processes and procedures to ensure that grant recipients are accountable for their results and are achieving outcomes underpinning the purposes of the grant. Based on this routine model which ensures efficient oversight that grants are being spent as specified, an independent merits review process may lead to significant delays and resourcing implications which impact on the ability of the ARC to continue with administering research grants and its primary functions to support the conduct of research, and research activities, for the benefit of Australian communities.

In line with the greater potential impact of a decision to terminate an agreement or approval under subsections 50(1), 50(4) or 50(5), subsection 50(6) provides greater detail of the requirements on the CEO, Board or Minister (as the case may be) to give the organisation procedural fairness before making these decisions. This preliminary step provides a clear opportunity for the organisation to make submissions as to why a funding agreement or funding approval should not be varied (for approvals only) or terminated for the breach of a term or condition.

I note that subsection 50(6) does not apply to the CEO's decision to vary a funding agreement under paragraph 50(1)(b) where the CEO is satisfied that the organisation has breached a term or condition of the funding agreement. A variation in these circumstances will generally be beneficial to the organisation so that the agreement and approval is not terminated and the funding for the research project can continue. If the variation may cause some detriment to the organisation, for example, it may vary the periods or amounts in which funding is given, the ARC will notify and discuss this with the organisation at an early stage so as to minimise any disruptions to the continuation of the research project.

An affected organisation is also able to apply for judicial review of these decisions under the *Administrative Decisions (Judicial Review) Act 1977* if there has been an error of law in the decision.

I trust this information is of assistance.

Yours sincerely

JASON CLARE

5 / 12 / 2024

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MC24-000449

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
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Dear Senator Smith

I refer to the email correspondence of 7 February 2024 from the Senate Scrutiny of Bill Committee (the Committee), requesting information about the issues identified in relation to the Digital ID Bill 2023.

I appreciate the time the Committee has taken to review the Digital ID Bill and thank you for allowing me the opportunity to address the Committee's concerns.

My response to the questions outlined in the Committee's *Scrutiny Digest 2 of 2024* are set out in **Attachment A** to this letter.

I trust that the information provided will address the Committee's concerns.

Yours sincerely

Katy Gallagher

16 February 2024

ATTACHMENT A – RESPONSES TO ISSUES RAISED BY THE SENATE SCRUTINY OF BILLS COMMITTEE IN RELATION TO THE DIGITAL ID BILL 2023

Immunity from civil and criminal liability

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

Answer: The Digital ID Bill 2023 seeks to create a liability regime that provides appropriate incentives for Digital ID service providers, once they are accredited, to participate in the Australian Government Digital ID System (AGDIS). Participation in the AGDIS brings with it a range of additional privacy, consumer and other safeguards for individuals and businesses using digital ID services that do not apply to accredited (or non-accredited) Digital ID services that operate in other digital ID systems within the private sector.

Clause 84 of the legislation grants accredited entities a protection from liability to action or other proceedings but it is limited in a number of ways.

First, the protection only applies in relation to the provision or non-provision of accredited services to other accredited entities and relying parties participating in the AGDIS. This does not include, for example, individuals using their Digital ID to access services within the AGDIS and therefore does not limit those individuals' rights. Related to this, clause 85 creates a statutory contract between accredited entities participating in the AGDIS and other accredited entities in the AGDIS and participating relying parties. It is therefore appropriate for clause 84 to shield accredited service providers from liability in relation to the services provided within the AGDIS when they have complied with the relevant requirements in the Act and rules (excluding the service levels). Clause 84 appropriately balances liability and incentivises participation, reflecting that limits on liability are common in commercial contractual relationships.

Second, the protection only relates to provision or non-provision of accredited services (for example, authentication and verification services).

Thirdly, the accredited entity can only claim the protection if it has both complied with the Act and rules and acted in good faith.

A submission from the Office of the Information Commissioner to the Senate Economics Legislative inquiry on the Digital ID Bill sought clarity as to whether clause 84 unintentionally applied beyond the parties to the statutory contract. The Department of Finance will work with the Office of Parliamentary Counsel to ensure the provision applies only to parties to the statutory contract as intended.

Tabling of documents in Parliament

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

Answer: It was considered unnecessary to table this report in Parliament since it would be accessible publicly via the website. However, should the committee express a preference for its tabling in Parliament, I have no reservations about doing so.

Significant matters in delegated legislation - Instruments not subject to an appropriate level of parliamentary oversight

Question: In light of the above, the committee requests the minister's detailed advice

as to:

- **why it is considered necessary and appropriate to leave the matter of establishing an advisory committee under subclause 150(1), and determining matters relating to the operation and members of such committees under subclause 150(3), to written instruments, rather than these matters being included in the primary legislation; and**
- **whether the bill could, at a minimum, be amended to provide that these instruments are legislative instruments, to ensure that they are subject to appropriate parliamentary oversight.**

Answer: The composition, purpose and terms of Advisory Committees are appropriately left to executive control to ensure that committees are able to be established as required with appropriate subject-matter experts and terms of reference targeted to the role of the Committee. The Minister may require different Advisory Committees to deal with specific subjects, especially in the fast-evolving digital environment. As separate committees may deal with different subject-matters, each committee's terms of reference, terms and composition are expected to be different. A committee may be short-term, set up to advise on a particular issue such as an emerging threat or measures to implement a new digital ID technology. In some cases, there may be no payment to a committee member (for example, where a committee member is a government employee).

It is considered appropriate that these matters remain in executive control.

- **why it is considered necessary and appropriate to specify that instruments made under subclauses 150(1) and 150(3) are not legislative instruments (including why it is considered that the instruments are not legislative in character)**

Answer: The instruments establishing committees, their composition, purpose and term, are considered administrative in character as, I am advised, these instruments do not determine the law or alter the content of the law. It is therefore appropriate to make it clear in the Bill that they are not legislative instruments. These instruments deal with the administrative matters relevant to the setting up of a committee which, as stated, may be for short-term, for a specific purpose. It is considered appropriate (and not unusual) that those matters remain within executive control.

Reversal of the evidential burden of proof – clause 151

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

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

Answer: Subclause 151(1) creates a criminal offence for the use or disclosure by an 'entrusted person' of information that was disclosed to or obtained by the person under or for the purposes of the Act or rules (called 'protected information'). The offence applies to uses and disclosures of personal information or to commercially sensitive information where there is a risk that the use or disclosure might substantially prejudice the commercial interests of a person.

The offence is designed to deter what would be a serious harm if this kind of information was used or disclosed by entrusted officers other than for authorised purposes. The authorised purposes are specified in clause 152. Subclause 151(3) makes it clear that the offence provision does not apply if the entrusted person has used or disclosed the protected information for one of the authorised purposes.

It is considered appropriate that this exception to the offence (that is, the offence-specific defence) requires the entrusted person to raise evidence about the matter that brings the use or disclosure within one of the authorised uses in clause 152. This is because the entrusted person, before using or disclosing the protected information involved, would need to ensure that the use/disclosure comes within one of the authorised purposes. The facts about that particular authorised purpose would be peculiarly within the knowledge of the entrusted person and could be readily and cheaply provided by the entrusted person.

In relation to use or disclosure of protected information for each of the authorised purposes in clause 152, the person would have the knowledge relevant to the offence-specific defence. More specifically, where the person used or disclosed the information:

- in accordance with a duty, function or power under the Act or legislative rules, the person would have the knowledge as to what specific duty, function or power was involved in the circumstances;
- to enable another person to perform duties/functions/powers under or in relation to this Act, the entrusted person would have the knowledge about who the other person was and what specific duty, function or power was involved in the circumstances;
- to assist in the administration or enforcement of another law, the entrusted person would have the knowledge about who it was they were assisting, or how they were assisting in the circumstances, the specific law involved and whether the circumstances of the use or disclosure related to administration or enforcement of the specific law involved;
- as required or authorised by or under a law, the entrusted person would have the knowledge of what law required or authorised the particular use or disclosure in the particular circumstances;
- with consent, the entrusted person would have the knowledge of what consent was provided;

- as it was already lawfully publicly available, the entrusted person would have the knowledge as to whether the information was available;
- in accordance with a public interest certificate issued by the Minister, the entrusted person would have the knowledge about the instrument made and how the specific use or disclosure complied with the certificate; and
- in accordance with any requirements in legislative rules, the entrusted person would have the knowledge as to how the requirements were met in the circumstances of the particular use or disclosure.

It is considered appropriate that the evidential burden be on the entrusted person, given the detail required to establish the relevant facts in each of the matters above. For example, what particular law (at the Commonwealth or State/Territory level) was involved would be peculiarly in the knowledge of the entrusted person, while proof by the prosecution of what particular Commonwealth, State or Territory law matter required or authorised the specific use or disclosure involved would in many cases difficult. The same applies for establishing the fact that the specific use or disclosure in the circumstances could be for the purpose of assisting others in the administration of a law across the range of Commonwealth, State and Territory laws.

Requiring the prosecution to prove such facts would be difficult, and expensive, whereas the facts about the authorised purpose could be readily and cheaply provided by the entrusted person.

Incorporation of external materials as existing from time to time

Question: Noting the above comments and in the absence of a sufficient explanation in the explanatory memorandum, the committee requests the minister's advice as to whether documents applied, adopted or incorporated by reference under clause 167 will be made freely available to all persons interested in the law and why

Why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.

Answer: The Digital ID Bill and legislative rules seek to adopt existing frameworks, standards or policies that are appropriate for digital ID. These include standards or policies dealing with security of systems and international or national standards relating to accessibility and inclusiveness for individuals and the security of accredited entities' IT systems. This avoids regulatory duplication and burden and many entities are already implementing these standards and frameworks. Incorporated standards and policies change over time as circumstances, risks and threats change. The draft Accreditation Rules include a provision stating that accredited entities will have 12 months to comply with changes in any incorporated standard or policy, unless the incorporated document itself sets out a longer timeframe, as is the case with some international standards dealing with cyber security controls.

There will be two kinds of incorporated instruments in the legislative rules:

- those that are publicly available. The legislative rules will include, in accordance with good drafting practice, details of where those documents are available; and
- standards relating to security, biometric technology operation and biometric technology testing, published by the International Organization for Standardization (ISO) that are not publicly available in full for free, but must be purchased. The Commonwealth is unable to make these publicly available due to copyright laws. However, ISO provides a publicly available summary and preview of each standard, including information about the standard and its subject matter and intended purpose, as well as the foreword, introduction, scope, terms and definitions and table of contents. The legislative rules will include the location for this ISO information which can be publicly accessed.

The Hon Clare O'Neil MP
Minister for Home Affairs
Minister for Cyber Security

Ref No: MC24-001840

Senator Dean Smith
Chair
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Dear Senator Dean

Thank you for your correspondence of 19 January 2024 concerning the Senate Standing Committee for the Scrutiny of Bills' consideration of the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023.

I appreciate the time the Committee has taken to consider the Bill. My response to the matters raised by the Committee is provided at Attachment A.

I trust this information is of assistance to the Committee.

Yours sincerely

CLARE O'NEIL

5 / 2 / 2024

Attachment A

National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023

Response to the Senate Standing Committee for the Scrutiny of Bills
Scrutiny Digest 1 of 2024

The Senate Standing Committee for the Scrutiny of Bills (the Committee) has requested the Minister for Home Affairs' further advice in relation to the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023 (the Bill). The Committee's observations are set out in *Scrutiny Digest 1 of 2024*.

The following information is provided in response to the Committee's request. The Bill is currently being considered by the Parliamentary Joint Committee on Intelligence and Security (PJCIS).

Committee Comments – Reversal of the evidential burden of proof

1.72 As the explanatory materials do not adequately address this issue, the committee requests the minister's explanation as to:

- **why it is proposed to use an offence-specific defence in proposed subsection 92(2) (which reverses the evidential burden of proof) in relation to the offence under proposed subsection 92(1);**
- **why the matters in proposed subsection 92(2) cannot remain as an element of the offence under proposed subsection 92(1); and**
- **whether further guidance can be provided as to the operation of the defence.**

The Bill includes an offence-specific defence at subsection 92(2) of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) in relation to the offence at subsection 92(1). The offence modernises the existing offence under section 92 and prohibits making information public, or causing information to be public, that identifies a person as being current or former Australian Security Intelligence Organisation (ASIO) employee, or affiliate, with a penalty of imprisonment for 10 years.

The offence-specific defence at subsection 92(2) ensures that a person who has the consent of the Minister or Director-General in writing to make the identity of an ASIO employee or affiliate public will not be subject to criminal liability for their conduct.

The Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide), provides guidance on when offence-specific defences are appropriate. Paragraph 4.3 of the Guide 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.

In the context of proposed subsection 92(2), both conditions are satisfied. If an individual has received written consent from the responsible Minister or Director-General to make public the identity of a current or former ASIO employee or affiliate, the written approval should be in their

knowledge and possession. They should be able to produce such evidence without incurring significant cost or delay.

Were the burden of proof to sit with the prosecution, the prosecution would be required to prove the absence of written consent from the responsible Minister or Director-General. The prosecution would also need to prove the applicable fault element, which in this case would be recklessness, beyond reasonable doubt. Establishing the state of mind of the defendant would be very challenging. In this context proving the absence of a circumstance would be significantly difficult than for the defendant to establish the evidential burden for this defence. As such, reversing the burden of proof in this instance supports the efficient administration of justice through reducing the complexity of any prosecution.

Paragraph 4.3.1 of the Guide states that it may be justified to create a defence if the conduct proscribed by the offence poses a grave danger to public health or safety. In the context of the offence at section 92 as amended by the Bill, the Director-General noted in ASIO's 2023 threat assessment that those who chose to identify themselves as security clearance holders or revealed they worked in the intelligence community were 'high value targets' to malicious actors.

Publication of the identity of current or former ASIO employees and affiliates therefore has the potential to cause grave harm to security due to the high likelihood that these disclosures could expose ASIO's operations, increase the risk of being targeted by hostile third parties to undermine Australia's security, and endanger the lives of ASIO employees, affiliates, and their families. The 10 year imprisonment penalty also reflects the seriousness of the offence and its possible consequences.

Finally, approval to publish an ASIO officer identity is a rare occurrence. Aside from recent Deputy Directors-General, the Minister or Directors-General has only given consent to publish the identities of current and former ASIO employees in exceptional circumstances. Noting the public interest in avoiding publication of the identity of ASIO employees and affiliates, any such decision by the Minister or the Director-General would not be made lightly, such that if a defendant has obtained written consent, it would be readily apparent and accordingly can easily be produced.

The Hon Michelle Rowland MP

Minister for Communications
Federal Member for Greenway

MS24-000110

Senator Dean Smith
Senator for Western Australia
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CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 19 January 2024 regarding the Scrutiny of Bills Committee's queries about clauses in the Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Bill 2023 (the Bill). In particular, the Committee requested my advice as to why it is necessary and appropriate to allow delegated legislation made under proposed subsections 360HB(4), 360HB(5), 360J(3), 360J(4), 360KB(2) and 360KB(4) to modify the operation of the *Telecommunications Act 1997* (the Act).

Proposed section 360HB provides that a carriage service provider (CSP) that meets specific criteria set out in the section must declare a provisional nominated service area in relation to the project area of a real estate development project. Proposed subsections 360HB(4) and 360HB(5) then provide that the Minister may, by legislative instrument, exempt a specific real estate development project (subsection (4)) or specify circumstances in which the requirement to declare a provisional nominated service area does not apply (subsection (5)).

Proposed section 360HB is modelled on existing section 360H, as noted in the explanatory memorandum to the Bill. Similar powers exist there. The powers are proposed because of the possibility of changes in the market that could lead to circumstances where it may not be appropriate for certain types of development to be subject to statutory infrastructure provider (SIP) obligations. Such circumstances are by definition difficult to predict, which is why the proposed powers are framed broadly. However, the matching power under section 360H was used when it became apparent that contracts to supply mobile coverage, and not broadband, to new developments could be subject to SIP requirements, and should be exempted. If in the future there were similar contracts for services that may deliver a public benefit, and which do not need to be subject to SIP requirements, then if there is no power to exempt such contracts there could be barriers to commercial activity which could reduce consumer welfare.

As the powers would be activated by legislative instrument, they are subject to the consultation, sunsetting and disallowance processes in the *Legislation Act 2003*, meaning any instruments, if made, would be subject to public and Parliamentary scrutiny.

Section 360J of the Act deems 33 'development areas' specified in conditions of carrier licence to be nominated service areas for the purposes of Part 19 of the Act. However, the Act currently provides no mechanism for the nominated service areas to be varied or revoked. As noted in the explanatory memorandum to the Bill, in some cases network boundaries no longer match the areas deemed by the Act. This can mean that in some areas the carrier that owns the network infrastructure is not specified as the SIP for the area. This could lead to an inefficient outcome, where NBN Co Limited, as the default SIP, would need to honour SIP requests, even if it has no infrastructure in the area. Accordingly, proposed subsections 360J(3) and (4) of the Bill would create powers for the areas to be varied or revoked, by legislative instrument. Again, any legislative instruments would be subject to an appropriate level of public and Parliamentary scrutiny.

Proposed section 360KB deals with the new concept of an 'anticipated service area', which is being created through the Bill. Proposed subsections 360KB(2) and 360KB(4) would allow the Minister to determine that an alternative carrier or CSP is the SIP for the anticipated service area. In this case, the powers are proposed for the same reason as noted by the Committee in relation to proposed subsection 360K(1B). That is, if a SIP were to exit the market or sell its network infrastructure to another entity, then it would no longer be appropriate for it to continue to be the SIP where this occurs. There needs to be a mechanism for changing the SIP (where the areas are taken over by an entity other than the default SIP, NBN Co Limited).

The proposed powers are important to enable to SIP regime to function effectively. If the regime is unable to take account of changes in the market, then it could become difficult to ensure that SIP obligations are appropriately applied to the entities that are able to fulfil them. There could also be confusion and a lack of clarity for industry and this may create poor outcomes for consumers.

Thank you for taking the time to write to me on this matter.

Yours sincerely

Michelle Rowland MP

8 / 2 / 2024