Senate Standing

Committee for the Scrutiny of Bills

Scrutiny Digest 13 of 2024

9 October 2024

ISSN 2207-2004 (print)
ISSN 2207-2012 (online)

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3050

Email: scrutiny.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_scrutiny

This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024*; [2024] AUSStaCSBSD 200.

This document was prepared by the Senate Standing Committee for the Scrutiny of Bills and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Current members

Senator Dean Smith (Chair)	LP, Western Australia
Senator Raff Ciccone (Deputy Chair)	ALP, Victoria
Senator Nick McKim	AG, Tasmania
Senator Paul Scarr	LP, Queensland
Senator Tony Sheldon	ALP, New South Wales
Senator Jess Walsh	ALP, Victoria

Secretariat

Anita Coles, Secretary
Hannah Wilkins, Principal Research Officer
Nidhi Venkatesan, Senior Research Officer
Kieran Knox, Legislative Research Officer

Committee legal adviser

Professor Leighton McDonald

Contents

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[1]

Chapter 1: Initial scrutiny	
Bills introduced 16 September to 19 September 2024	1
Bills commented on in report[2]	3
Private members or senators' bills that may raise scrutiny concerns	0
Commentary on amendments or explanatory materials	0
Chapter 2: Commentary on ministerial responses	
Bills which the committee has sought further information on or concluded its examination of following receipt of ministerial response	3
Chapter 3: Scrutiny of standing appropriations	
Bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts	1

1 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report Snapshot, *Scrutiny Digest 13 of 2024*; [2024] AUSStaCSBSD 201.

2 This includes three bills previously deferred in *Scrutiny Digest 12 of 2024*: Aged Care Bill 2024; Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024; and Privacy and Other Legislation Amendment Bill 2024.

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.

Aged Care Bill 2024[3]

Purpose	This bill seeks to amend the legislative framework for the Commonwealth aged care system, including by: • providing legislative authority for the delivery of funded aged care services to individuals; • setting out the eligibility requirements for individuals seeking to access funded aged acre services; • setting out conditions of registration for providers and key obligations of registered providers and aged care workers; • providing for funding arrangements for funded aged care services; • establishing the governance and regulatory framework for the Commonwealth aged care system; • authorising the use and disclosure of protected information in certain circumstances and providing for whistleblower protections; and • providing pathways for review of decisions made under the bill.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 12 September 2024
Bill status	Before the House of Representatives

[3] This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Aged Care Bill 2024, *Scrutiny Digest 13 of 2024*; [2024] AUSStaCSBSD 202.

Significant matters in delegated legislation
Broad discretionary powers[4]

1.2 The bill seeks to provide a new framework for the administration of funded aged care services. Many matters of significance to this regime are being left to delegated legislation including, for example:

- the Aged Care Code of Conduct which will apply to registered providers, aged care workers and responsible persons;[5]
- the Aged Care Quality Standards which providers will be required to adhere to;[6]
- the specification of reportable incidents, including matters such as reports regarding the use of force and emotional abuse and neglect;[7]
- the privacy safeguards and requirements applicable to the retention of personal information and documents by registered providers;[8]
- the expansion of the purpose of the aged care worker screening database;[9] and
- matters in relation to payment of subsidies for funded aged care.[10]

1.3 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. The explanatory memorandum provides minimal justifications for leaving significant aspects of the scheme to delegated legislation.

1.4 The committee appreciates that this bill is seeking to set out a significant regulatory scheme and it is not possible for all matters to be contained in primary legislation, noting the importance of expert-led, responsive approaches to ensure the safety and quality of aged care services. However, the committee expects that the explanatory memorandum should have explained how the extensive use of delegated legislation in this scheme does not undermine the parliament's capacity to scrutinise the envisaged policy directions of the regulatory scheme. The explanatory memorandum should have explained what the overall balance is and why that balance has been struck, and then also explain whether any particular details which are of

---

4 The committee draws senators' attention to the bill relating to this matter pursuant to Senate standing order 24(1)(a)(ii) and (iv).

5 Clause 14.

6 Clause 15.

7 Clause 16.

8 Clause 154.

9 Clause 379.

10 Chapter 4.

presumptive significance (such as protections in relation to undue trespass on rights and liberties and review rights) have been left to delegated legislation. While some matters may be appropriate to be left to delegated legislation, others may not be, but this has not been explored in the explanatory memorandum. Instead, the explanatory memorandum provides only minimal justification regarding the need for flexibility in relation to some of these matters.[11]

1.5 In addition, the committee is concerned that as a result of leaving some of these significant matters to delegated legislation, broad discretionary powers and functions may be conferred on officials and bodies without parliamentary oversight or approval of those delegations.

1.6 The committee has previously raised similar concerns in relation to recent aged care legislation[12] and is concerned that this systemic scrutiny issue is being repeated in the current version of these provisions.

1.7 The committee acknowledges this is a significant regulatory scheme and there is likely a need for certain matters to be left to delegated legislation. However, the committee is concerned that large elements of this scheme, including those that affect personal rights and liberties, are being left to delegated legislation without sufficient explanation, including an assessment of the balance between the need for administrative flexibility and the importance of parliamentary oversight.

1.8 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving significant aspects of the aged care scheme to delegated legislation.

1.9 The committee also draws these matters to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

---

11 See, for example, clause 17 of the bill and page 70 of the explanatory memorandum.

12 See in relation to the Aged Care Bill 2021, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2021*, 21 October 2021, pp. 4–5; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 17 of 2021*, 24 November 2021, pp. 51–53; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2022*, 4 February 2022, pp. 27–29. See the committee's comments on item 9 of Schedule 3 to the bill. See in relation to the Aged Care and Other Legislation Amendment (Royal Commission Response) Bill 2022, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2022* (7 September 2022), pp. 4-9.

Undue trespass on rights and liberties
Significant matters in delegated legislation
Broad discretionary powers
Immunity from civil and criminal liability[13]

1.10 The bill provides that a restrictive practice in relation to an individual is any practice or intervention that has the effect of restricting the rights or freedom of movement of that individual.[14] The practices or interventions that are to be classified as restrictive practices will be set out in the rules made under the bill.[15] The bill further provides that when specifying restrictive practices the rules must require that the practice is only used as a last resort to prevent harm to the individual or other persons, and after consideration of the likely impact of the use of the practice on the individual.[16] Further safeguards that must be set out in the rules on the use of restrictive practices are provided on the face of the bill.[17] The bill also provides that the rules may set out the persons or bodies who may give informed consent to the use of a restrictive practice for individuals who lack capacity to consent,[18] and may also provide that requirements in the rules do not apply if the use of a restrictive practice is necessary in an emergency.[19] Further, the bill provides that it would be a condition of registration for aged care providers to comply with any requirements prescribed by the rules in relation to the use of restrictive practices.[20]

1.11 The committee's consistent scrutiny view is that significant matters, such as when restrictive practices can be used in aged care settings, should be contained on the face of the primary legislation unless a sound justification for the use of delegated legislation is provided. In relation to this, the explanatory memorandum states:

> To promote person-centred approaches, it is essential that legislative obligations are flexible and adaptable to changing contexts. Including matters in delegated legislation, such as definitions for the practices or interventions deemed to be restrictive practices, will allow for responsiveness in relation to the regulation of restrictive practices in aged care. As it is intended that all forms of restrictive practices are accurately captured, it is appropriate that the legislation relating to restrictive practices can be adapted and modified in a timely manner in response to emerging concerns about practices or interventions that are considered restrictive and may be inappropriate and/or harmful to an individual receiving funded

---

13 Clause 17. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i),(ii) and (iv).

14 Subclause 17(1).

15 Subclause 17(2)

16 Paragraph 18(1)(a).

17 Paragraphs 18(1)(b)-(g).

18 Subclause 18(2).

19 Subclause 18(3).

20 Clause 162.

> aged care services. Allowing some flexibility to promptly respond to these unforeseen risks, concerns and omissions aligns with community expectations and the key aim of regulating restrictive practices, which is to protect individuals accessing funded aged care services from the use of such practices other than in accordance with the limited circumstances to be set out in the rules.[21]

1.12 The committee has generally not accepted a desire for administrative flexibility to be a sufficient justification for leaving significant elements of a legislative scheme to delegated legislation. The committee's concerns in this instance are heightened noting the potentially significant impact of the inappropriate use of restrictive practices and the vulnerability of the persons to whom they may be applied. A legislative instrument is not subject to the same level of parliamentary scrutiny as amendments to primary legislation.

1.13 Additionally, the bill provides that the rules may provide that a requirement of the rules does not apply if the use of a restrictive practice is necessary in an emergency. The committee considers that this provides the minister with a broad discretionary power to determine, in delegated legislation, when the requirements for the use of a restrictive practice no longer apply. The committee notes that there is no guidance on the face of the bill as to what would constitute an emergency or who would determine that an emergency is occurring. The committee has significant scrutiny concerns in relation to this ability to override any of the statutory requirements in circumstances when there is no guidance on the face of the primary legislation as to what may be considered an emergency. The committee notes that certain considerations set out in the bill, such as that a restrictive practice must be used in the least restrictive form and for the shortest time,[22] would remain relevant during an emergency situation.

1.14 In addition, the committee is concerned that the bill provides that the persons and bodies who may consent to the use of restrictive practices for individuals deemed to lack capacity will be left to delegated legislation. This is an extremely significant matter and, while noting the advice in the explanatory memorandum that this is intended to address issues regarding the interaction with current State and Territory consent laws, the committee considers that these details should have been set out on the face of the bill for parliamentary consideration. At a minimum, guidance should have been included on the face of the bill as to the considerations and safeguards that apply when identifying persons and bodies who may consent to restrictive practices in recognition of the significant trespass on rights and liberties that these practices represent.

---

21 Explanatory memorandum, p. 70.

22 Paragraph 18(1)(e).

1.15 The committee raised similar concerns in relation to the use of restrictive practices in emergencies when they were amended in 2021,[23] and it is concerning that the current iteration of these provisions replicates the same scrutiny concerns that were present.

1.16 Further, the bill provides civil and criminal immunity for entities who use restrictive practices if informed consent was given by a person or body as prescribed by the rules (where individuals are deemed to lack capacity to consent) and the practice was used in accordance with these requirements.[24] The explanatory memorandum explains:

> This clause replicates the immunity provision which was introduced by the *Aged Care and Other Legislation (Royal Commission Response) Act 2022* to ensure that registered providers and relevant individuals are not liable to any civil or criminal action in circumstances where they have adhered to the requirements for the use of restrictive practices set out in clause 18. This is because the proposed consent arrangements may result in a registered provider, or relevant individual, relying on consent by a person who is authorised to give that consent under the Commonwealth's aged care laws, but who may not have the requisite authority under the relevant State or Territory laws.
>
> …
>
> This immunity will only apply where restrictive practices have been used in a way that is consistent with the requirements under the rules. This includes, for example, that restrictive practices were used as a last resort, only to the extent that was necessary, for the shortest time and in the least restrictive form, and to prevent harm to the individual accessing funded aged care services or another person. The immunity afforded by this clause will not apply where the use of the restrictive practice is not compliant with the requirements set out in the rules, or where the restrictive practice is used in a manner that is not in accordance with the consent that has been provided (e.g., the type of restrictive practice, the way in which it is applied, or the time specified for use of the restrictive practice was not in accordance with the consent given). This will provide additional protection to individuals receiving funded aged care services and ensure that the scope of this immunity is strictly limited to use that aligns with the consent that has been provided. This provision is not intended to provide a broad immunity to negligence in respect of the use of a restrictive practice. It is only intended to permit registered providers and those involved in the use of restrictive practices to rely on consent from a restrictive practices substitute decision maker as prescribed by the rules.[25]

---

23 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021* (16 June 2021), pp. 1-4.

24 Clause 163.

25 Explanatory memorandum, p. 179-180.

1.17 The committee raised concerns in relation to amendments that first introduced this immunity from liability and has consistently raised scrutiny concerns regarding provisions that provide persons with immunity from civil or criminal liability.[26] The committee acknowledges the explanation provided for the application of this immunity. However, the committee notes that this immunity means that where a restrictive practice is used on a person who is deemed to lack capacity, they would have no remedy for the use of that practice if done with the consent of another, whereas those who have capacity would have access to a remedy. The appropriateness of this immunity also relies on the breadth of who is able to give consent to the use of the restrictive practice – which is a matter which will be provided for in the rules. The committee's concerns are heightened as immunity is provided for in relation to criminal as well as civil proceedings.

1.18 Noting the potential for the use of restrictive practices to impact on personal rights and liberties, the committee requests the minister's advice as to:

- **why it is considered necessary and appropriate to leave the details of when restrictive practices can be used in an aged care setting to delegated legislation;**
- **whether the bill could be amended to include additional high-level guidance about when restrictive practices can be used on the face of the primary legislation; and**
- **whether the bill could be amended to include:**
    - **at least a broad definition of 'emergency'; and**
    - **limits around which considerations set out in clause 18 can be overridden in an emergency.**

1.19 The committee draws the attention of senators and leaves to the Senate as a whole the appropriateness of the immunity from civil and criminal liability in clause 168 of the bill.

Undue trespass on rights and liberties
No invalidity clause[27]

1.20 The bill sets out a Statement of Rights of persons seeking and receiving aged care.[28] The Statement includes rights such as independence, equitable access, and quality and safe funded aged care services. However, the bill also provides that while

---

[26] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 17 of 2021* (24 November 2021) pp. 43-45.

[27] Clauses 24 and 26. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

[28] Clause 23.

an individual is entitled to these rights and that Parliament's intention is for providers to take all reasonable and proportionate steps to act compatibly with these rights, the rights and duties are not enforceable by proceedings in a court or tribunal.[29]

1.21 The bill also sets out a Statement of Principles of the core values that underpin the aged care system, including, for example, a person-centred approach, valuing workers and carers, transparency and financial sustainability.[30] As with the Statement of Rights, the bill provides that while Parliament's intention is for stakeholders to have regard to the Principles, the rights and duties are not enforceable by proceedings in a court or tribunal.[31] Further, the bill provides that a failure to comply does not affect the validity of any decision and is not a ground for the review or challenge of any decision.[32]

1.22 In relation to the Statement of Rights the explanatory memorandum states:

> In line with the approach of the Royal Commission, which recommended that these rights should not be separately and directly enforceable in the courts, subclause 24(3) clarifies that nothing in clause 23 or clause 24 create rights or duties that are enforceable by proceedings in a court or tribunal. This is because the Statement of Rights is broad, and a one-size-fits-all response to a possible breach would not be appropriate. However, this does not limit individuals from raising a complaint with the Complaints Commissioner if they feel that their rights have not been upheld while accessing, or seeking to access, funded aged care services.
>
> Where a registered provider has failed to take reasonable and proportionate steps to ensure services are delivered in a manner compatible with the Statement of Rights, it is also likely they have failed to comply with other obligations under the Bill and may be subject to a civil penalty for breaching a condition of their registration. For example, conduct which is inconsistent with the Statement of Rights may also be inconsistent with obligations of workers and providers under the Code and aspects of the Quality Standards. This is outlined further in Chapter 3.[33]

1.23 In relation to the Statement of Principles the explanatory memorandum states:

> Subclause 26(2) makes it clear that nothing in this Division of the Bill creates a right or duty that is enforceable by proceedings in a court or tribunal. This is because the Statement of Principles is intended to provide high level guidance of the core values that underpin every part of the aged care system.

---

29 Clause 24.

30 Clause 25.

31 Subclauses 26(1) and (2).

32 Subclause 26(3).

33 Explanatory memorandum, p. 82.

> Subclause 26(3) also makes it clear that a failure to comply with this Division of the Bill does not affect the validity of any decision, and is not a ground for the review or challenge of any decision. This clause does not negate those bodies bound by the Statement of Principles in subclause 26(1) from having to have regard to the principles when performing functions and exercising powers, but rather reflects the guiding nature of the statement. However, including a 'no invalidity' clause in the Bill will not exclude judicial review under section 75(v) of the Constitution and section 39B of the Judiciary Act 1903 where a failure to meet procedural requirements would amount to a jurisdictional error. It is unlikely to inoculate a decision against broader failures such as fraud, bribery, dishonesty or other forms of conscious maladministration.[34]

1.24 While the committee welcomes the inclusion of the Statements of Rights and Principles and notes the advice of the Royal Commission Report that most of these not be separately and directly enforceable in the courts, the committee is concerned that these important matters are not enforceable and therefore have no little to no impact. As a result, there are limited remedies for individuals who have suffered a breach of either the Statement of Rights or Statement of Principles.

1.25 In relation to the Statement of Principles, the committee notes that the Final Report of the Aged Care Royal Commission considered that two principles are paramount to the administration of the bill: ensuring safety, health and wellbeing of aged care recipients, and putting older people first.[35] While these principles are reflected in the Statement of Principles, the committee is concerned that they are not mandatory requirements in line with the views put forth by the Aged Care Royal Commission.

1.26 Further, the committee notes that the bill provides a no-invalidity clause for a failure to comply with the Statement of Principles.[36] A legislative provision that indicates that an act done or a decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory

---

34 Explanatory memorandum, p. 87.

35 Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect: Volume 3A*, p. 20

36 Subclause 26(3).

memorandum. However, in this instance there is no explanation or justification provided as to why the no-invalidity clause is necessary and appropriate.

1.27 In this context, the committee is concerned that subclause 26(3) would mean that a decision-maker may have no regard to the Principles and yet a decision would still be valid. It is unclear why making the Principles relevant factors which must be considered as a condition of validity would be unworkable. The committee notes if the intention of Parliament is, as stated in subclause 26(1) to ensure that regard must be had to the Principles, it is inconsistent with that intention to provide no ground for judicial review as to whether consideration was given to the Principles when making a decision.

1.28 The committee seeks the minister's advice as to:

- **whether a complaint could be made to the Complaints Commissioner for a breach of all aspects of the Statement of Rights (or would it be required to be linked to a violation of the Code of Conduct or Aged Care Quality Standards), and if not, why it is not appropriate to amend the bill to allow for this;**
- **how subclauses 26(1) and (3) interact, and whether clause 26 of the bill can be amended to require *consideration* of the Statement of Principles when making a decision as a condition of validity.**

Exemption from disallowance[37]

1.29 Various provisions within the bill provide that determinations or directions made by the minister are legislative instruments but they are not subject to disallowance.

1.30 For example, the minister must determine a process and method to determine the number of places available for allocation to individuals for each service group,[38] but this determination is not subject to disallowance.[39]

1.31 In addition, the minister, by legislative instrument, may give written directions to the Commissioner about the performance of the Commissioner's functions.[40] A note to the subclause states that disallowance and sunsetting do not apply to the directions. This is repeated in other provisions, such as for directions given to the Complaints Commissioner,[41] and for directions to the Advisory Council.[42]

---

37 Subclauses 91(5), 94(5), 355(1), 360(1) and 384(1). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

38 Subclause 91(1).

39 The exemption from disallowance is in subclause 91(5). This is replicated in subclause 94(5).

40 Subclause 355(1).

41 Subclause 360(1).

42 Subclause 384(1).

1.32 Disallowance plays a key role in the review of legislative power delegated to the executive by the Parliament. Disallowance is the primary manner by which the Parliament exercises control of its delegated power.

1.33 As a body, the Senate acknowledged, in June 2021, the significant implications exemptions from disallowance have for parliamentary scrutiny and resolved that delegated legislation should be subject to disallowance unless exceptional circumstances can be shown which would justify an exemption. In addition, the Senate resolved that any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.[43]

1.34 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in its recent review of the *Biosecurity Act 2015*,[44] and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[45]

1.35 In cases of disallowance the committee expects the explanatory memorandum to outline the circumstances that justify the limit on parliamentary oversight and scrutiny.

1.36 In relation to the determination of the number of places available for allocation to individuals, the explanatory memorandum explains:

> The exemption from disallowance for this instrument is justified on the basis that the determination made under this clause is an internal tool to manage government spending and administration of resources in accordance with decisions made through the annual Budget process. Given the nature of the determination, the provisions ensure that the determination is not disallowable under section 42 of the Legislative Instruments Act. Treating the determination as not disallowable also minimises the risk of uncertainty that would arise if the determination was disallowed and the System Governor is unable to allocate any places for the financial year and therefore unable to make funded aged care services available to individuals.[46]

1.37 In relation to subclause 94(5), the explanatory memorandum states:

---

43 Senate resolution 53B. See *Journals of the Senate*, No. 101, 16 June 2021, pp. 3581–3582.

44 See Chapter 4 of Senate Standing Committee for the Scrutiny of Bills, *Review of exemption from disallowance provisions in the Biosecurity Act 2015: Scrutiny Digest 7 of 2021* (12 May 2021) pp. 33–44; and *Scrutiny Digest 1 of 2022* (4 February 2022) pp. 76-86.

45 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report* (December 2020); and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (March 2021).

46 Explanatory memorandum, p. 128.

> It would be inappropriate to subject these instruments to disallowance, as the risk of disallowance would be that the System Governor would be unable to allocate any places for the financial year and therefore unable to make funded aged care services available to individuals under specialist aged care programs. Additionally, it would be inappropriate for Parliament to intervene with decisions made by the Expenditure Review Committee.[47]

1.38 In relation to other instruments specified above that are exempt from disallowance, the explanatory memorandum merely restates the operation of the provisions without sufficiently justifying why the exemptions are appropriate.[48]

1.39 In this instance, it is not clear to the committee how subjecting instruments to disallowance increases uncertainty or creates an instance where the System Governor would be unable to fulfill their duties. This is because disallowance of an instrument is a rare occurrence.[49] Further, as stated by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its final report into exemption of delegated legislation from parliamentary oversight:

> A well-formed instrument that is made according to its enabling legislation and enjoys broad support will not be disallowed, and is thus unlikely to manifest any of the consequences suggested by departments. Many rationales that point to the possibility of negative outcomes call for such a significant stretch to the credulity of the Parliament that they cannot be seriously considered.[50]

1.40 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of exempting provisions from disallowance.

1.41 The committee also draws these matters to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

---

47 Explanatory memorandum, p. 131.

48 Explanatory memorandum, pp. 306, 310 and 324.

49 There have been 172 successful disallowance motions and nine successful disapproval motions (relation to determinations of the Remuneration Tribunal). The first successful disallowance motion was 29 May 1914 and the latest was on 3 April 2019. Based on research undertaken for the Senate Standing Committee on Regulations and Ordinances by Dr Michael Sloane, Parliamentary Library—Senate Standing Committee for the Scrutiny of Delegated Legislation, *Parliamentary scrutiny of delegated legislation* (3 June 2019) p. 114.

50 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: final report* (16 March 2021) p. 109.

Tabling of documents in Parliament[51]

1.42 Clause 342 of the bill provides that the System Governor must, at the end of each financial year, prepare a report for the Inspector-General of Aged Care in relation to reports received by the Department from coroners about the death of an individual accessing funded aged care services which include a recommendation to the Department.[52]

1.43 The report by the System Governor to the Inspector-General of Aged Care must contain the recommendations made to the Department, a summary of actions taken by the Department in response to said recommendations as well as an evaluation of the effectiveness of those actions.

1.44 In addition, clauses 373 and 374 provide that the minister may, by notice in writing to the Commissioner and the Complaints Commissioner, request the relevant Commissioner to inquire into and report to the minister on their functions.[53]

1.45 However, none of the provisions specify a requirement for the reports to be tabled in the Parliament, nor does the explanatory memorandum contain any further information on whether it is intended that these reports will be tabled in the Parliament.

1.46 The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. As such, the committee expects there to be appropriate justification for failing to include tabling requirements.

1.47 Noting the impact on parliamentary scrutiny, the committee requests the minister's advice as to why the bill does not provide for reports produced under clauses 342, 373 and 374 to be tabled in the Parliament.

Coercive powers[54]

1.48 The bill seeks to trigger the standard search, entry and seizure powers provided by the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). It also seeks to modify and extend this framework to provide that an authorised

---

51 Clauses 342, 373 and 374. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

52 Subclause 341(1).

53 See clause 348 for functions of the Commissioner and clause 357 for functions of the Complaints Commissioner.

54 Clauses 436 and 437. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

person, or a person assisting an authorised person, may bring to the premises any equipment reasonably necessary for the examination or processing of a thing found at the premises in order to determine whether the thing may be seized.[55] The bill also provides that a thing found at the premises may be moved to another place to determine whether it may be seized if it is significantly more practical to do so and the authorised person or person assisting suspects on reasonable grounds that the thing contains or constitutes evidential material.[56] Once the thing has been moved, it may remain there for examination or processing for 14 days, which may be extended by periods of seven days at a time.[57]

1.49 Further, the bill also provides that if electronic equipment is moved, an authorised person or the person assisting may copy any or all of the data associated by operating the electronic equipment if they suspect on reasonable grounds that any data accessed by operating the electronic equipment constitutes evidential material.[58] An authorised person or person assisting may also seize the equipment or seize any material obtained from the equipment if, after operating the equipment, they find that evidential material is accessible.[59] Equipment or data may also be seized if possession of the equipment by the occupier could constitute an offence.[60]

1.50 From these provisions, it does not appear that a warrant must be obtained in order to move or seize things, equipment or data associated with an equipment that has been recorded in another form.

1.51 In general, the committee prefers seizure to only be allowed under a warrant, even if search and entry has been authorised in the absence of a warrant. The committee considers that where a bill seeks to confer coercive powers, which include the seizing of evidential material, the explanatory memorandum should address why it is appropriate, what safeguards exist, and whether the approach taken is consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* which outlines an expectation that seizure should only be allowed under warrant, with an interim power to secure the item if necessary.[61]

1.52 The explanatory memorandum does not provide any justification as to why equipment or data associated with equipment may be seized without warrant nor does it provide any additional information as to safeguards.[62] However, in relation to

---

55 Subclause 436(1).

56 Subclause 436(2).

57 Subclauses 436(5), 436(6) and 436(8).

58 Subclause 437(2).

59 Subclause 437(4).

60 Subclause 437(4).

61 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) pp. 76-77.

62 Explanatory memorandum, pp. 351-352.

why information or equipment may need to be seized generally, the explanatory memorandum provides the following information:

> For example, where there may be a significant amount of data contained on specialist equipment, searching through all of the material or data while at the premises may not be practicable or efficient. Further, it may require a person with specialist expertise. This is particularly the case in relation to computers and other electronic equipment which may have large amounts of data that are protected by passwords or other forms of encryption.[63]

1.53 While the committee acknowledges that there may be data contained on specialist equipment that needs to be examined by experts in a separate location, the committee queries why this process must be done without a warrant. Additionally, while the committee notes that a thing (which includes electronic equipment) may only be moved either with the occupier's consent or where there is a suspicion on reasonable grounds that the thing or equipment contain or constitute evidential material, the committee does not consider that this is an appropriate substitution for a warrant. Without the requirement for a warrant, there is no means to ensure that there is an independent assessment of whether seizure of the equipment or data in the specific circumstance is justified.

1.54 The committee's concerns are heightened in this instance as it is evident the powers conferred by clauses 436 and 437 are beyond the powers granted by the provisions under Part 3 of the Regulatory Powers Act. Under the Regulatory Powers Act, a warrant must be issued specifying the kind of evidential material that may be searched, and that the evidential material of the specified kind may be seized.[64] It is unclear from the bill and the explanatory memorandum why it is necessary and appropriate to be able to search for evidential material without a warrant and in the absence of the consent of the occupier. Further, it is also unclear from the bill and explanatory memorandum why it is necessary and appropriate for any evidential material that is found, such as data, to be seized without a warrant.

1.55 Finally, the committee notes that while clause 436 specifies that a thing that has been moved to another place for examination or processing may only be done so for 14 days, this can be extended by seven-day periods on application.[65] The bill does not limit the number of extensions that may be sought and does not impose a requirement for evidential material that has been seized to be returned if it is not determined to be used as evidence. Under the Regulatory Powers Act, a seized thing must be returned 60 days following the seizure of the thing or once the reason for the

---

63 Explanatory memorandum, p. 351.

64 *Regulatory Powers (Standard Provisions) Act 2014*, section 70.

65 Subclauses 436(5), 436(8).

seizure no longer exists,[66] with only very limited exceptions.[67] It is unclear to the committee why no similar statutory requirement to return a thing that has been moved for examination has not been provided for on the face of the bill, or whether section 66 of the Regulatory Powers Act is taken to apply in this context.

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

- **why it is necessary and appropriate that clauses 436 and 437 allow for an authorised person, or a person assisting an authorised person, to move things to determine if they may be seized, and then seize a thing or data contained in the thing without a warrant;**
- **why it is necessary and appropriate for clauses 436 and 437 to confer powers that are beyond what is already provided for by Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014*;**
- **whether section 66 of the *Regulatory Powers (Standard Provisions) Act 2014* is taken to apply to these provisions;**
- **why there currently is no statutory limit on the number of times an extension may be applied for in order to retain a thing that has been moved to another location to be examined; and**
- **why the bill does not contain a requirement that a thing that has been moved or seized must be returned after a certain period or once it is no longer required for evidential purposes.**

Procedural fairness
Privacy
Significant matters in delegated legislation[68]

1.57 The bill provides that the Aged Care Quality and Safety Commissioner (the Commissioner) may make an order prohibiting or restricting a registered provider or an individual aged care worker or a responsible person of the aged care provider from involvement in the delivery of funded aged care generally or in a specified service type or in a specified activity of a registered provider (banning orders).[69] These orders may apply generally or be of limited application, be permanent or for a specified period and be made subject to specified conditions.[70] The grounds for making a banning order include where:

---

66 *Regulatory Powers (Standard Provisions) Act 2014*, subsection 66(1).

67 *Regulatory Powers (Standard Provisions) Act 2014*, subsection 66(3).

68 Clauses 141, 497, 498, 499, 501 and 507. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

69 Subclauses 497(1) and 498(1).

70 Clause 501.

- the Commissioner has revoked the registration of the entity as a registered provider;
- the Commissioner reasonably believes that the entity has been involved in, or is likely to become involved in, a contravention of the bill by another entity;
- the Commissioner reasonably believes that the entity or the individual is unsuitable to deliver funded aged care services generally or of a specified service type;
- the Commissioner reasonably believes there is a severe risk to the safety, health or wellbeing of an individual accessing funded aged cares services if the entity continues to be a registered provider or if the individual is involved or continues to be involved in a matter to which the order relates; or
- the entity has been convicted of an offence involving fraud or dishonesty or the individual has been convicted of an indictable offence involving fraud or dishonesty.[71]

1.58 The Commissioner must provide the entity (which can include an individual)[72] a notice of an intention to make a banning order prior to making a banning order under clause 497 or 498.[73] However, in the event that the Commissioner reasonably believes that there is an immediate and severe risk to safety, health or wellbeing of one or more individuals accessing funded aged care, this requirement does not apply.[74] As a notice of intention would invite the entity to make submissions to the Commissioner in relation to the matter, the non-requirement to provide a notice of intention in these circumstances would mean the entity is not afforded an opportunity to make submissions before a final banning order is made against them. The only opportunity for any type of recourse would be if the entity then applied for the order to be varied or revoked under clause 505 of the bill.

1.59 The explanatory memorandum provides the following justification for this exception:

> These exceptions to the notice requirement are intended to ensure that the Commissioner can take immediate action to ban a registered provider, responsible person or aged care worker if these circumstances exist.[75]

1.60 While the committee acknowledges the need to act quickly in the event of an immediate risk to safety, health or wellbeing, it is unclear to the committee why it is necessary and appropriate to proceed to making a final banning order where the affected entity does not have an opportunity to be heard prior to finalising the order.

---

71 Subclauses 497(2) and 498(2).

72 Explanatory memorandum, p. 372.

73 Subclause 499(1).

74 Subclause 499(2).

75 Explanatory memorandum, p. 372.

For instance, the committee queries why an interim order cannot be made for a short period, following which the Commissioner may determine if a final banning order should be made so, and hear submissions from the affected entity at that stage. This would ensure that the onus is not on the affected entity to have the order varied or revoked before they have been heard from.

1.61 The committee also notes the impact on an individual's privacy that a banning order under clause 498 can have. Under clause 507 the Commissioner is required to establish and maintain a register of banning orders, which relevantly includes the name of the individual aged care worker or responsible person, the details of the banning order and any information prescribed by the rules.[76] Further, banning orders that are no longer in force may remain on the register unless the order has been revoked on application or on the Commissioner's initiative.[77] The rules may make provision for the publication of the register of banning orders,[78] though it is unclear who will have access to these registers and by what means that access may be limited. Currently the register of banning orders is available on a public website and an internet search of the name an individual on the register will identify them as being subject to a banning order.[79]

1.62 In relation to the register of banning orders, the explanatory memorandum provides the following justification:

> This aims to ensure the safety of individuals accessing funded aged care services by putting employers on notice of individuals who were found unsuitable to provide funded aged care services or specified service types and assist registered providers in meeting their obligations in relation to their workers and responsible persons. This provision aligns with the approach taken under the NDIS (see section 73ZS of the NDIS Act). Publication of this information is considered reasonable, necessary and proportionate in order to protect the health, safety and wellbeing of individuals receiving funded aged care services.[80]

1.63 The committee acknowledges the clear importance of ensuring the safety of individuals accessing funded aged care services. However, it is not clear to the committee where and how this information will be published and who will have access to it, as currently all that is provided on the face of the bill is that the rules may make provision for the publication of the registers. For instance, although it would appear highly necessary for employers to have notice of individuals found unsuitable to provide funded aged care services, it may not be necessary for the information to be published fully on a public website rather than providing the information on request

---

76 Subclause 507(1).

77 Subclause 507(2).

78 Subclause 507(6).

79 See Aged Care Quality and Safety Commission website: Aged Care Register of banning orders.

80 Explanatory memorandum, p. 376.

where necessary. If personal details of individuals are accessible on a public website via a general internet search, this would appear to be a bigger intrusion on privacy than is necessary to achieve the stated intention of the measure. The committee is particularly concerned that banning orders that have ceased to have effect may remain indefinitely on a public website for any person to access, even if they are not an aged care provider or associated with an aged care provider.

1.64 Finally, the committee notes that information that must be included on these registers as well as other matters relating to the publication of both registers may be provided for by the rules.[81] These matters include publication of the registers in whole or in part, matters relating to the administration and operation of the registers and the correction of information on the register.[82]

1.65 The committee reiterates its longstanding view that where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill.

1.66 The explanatory memorandum does not provide a justification for why inclusion of these matters in delegated legislation is necessary and appropriate in this context. In relation to matters that may be included in the register of banning orders which the rules are able to prescribe, the explanatory memorandum states:

> The rules will also provide for exceptions to publication of information on the register, where appropriate, as well as processes for accessing and correcting information held on the register.[83]

1.67 From the above, it is unclear to the committee why these matters are appropriate for inclusion in delegated legislation and concerns remain that matters relating to the publication of private information that may potentially be accessed by the public at large will not be subject to the full range of parliamentary scrutiny that primary legislation is subject to.

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

- **why it is necessary and appropriate to allow a final banning order to be made against a person in emergency circumstances, noting that this will result in a banning order being made against the individual without providing a chance to make submissions, and whether the bill could be amended to instead**

---

81 Paragraphs 141(3)(p) and 507(1)(i), subclauses 141(8), 507(5) and 507(6).

82 Subclauses 141(8), 507(5) and 507(6).

83 Explanatory memorandum, p. 376.

provide for the making of an interim banning order and allow submissions to be made before a final banning order is made;

- **how the register of banning orders will be published, including who will have access to this register, and, if it will be published in full on a public website, why this is necessary and appropriate;**
- **why it is necessary and appropriate that information relating to banning orders that have ceased remain published;**
- **why it is necessary and appropriate to include matters in relation to information that can be included on these registers and in relation to the administration and operation of the registers in delegated legislation; and**
- **whether the bill can be amended to provide further guidance as to the types of matters the rules may make provision for in relation to the registers.**

Immunity from civil liability[84]

1.69 The bill seeks to provide that authorised officers and persons assisting authorised officers are not liable in relation to civil proceedings for all actions done in good faith in relation to powers exercised and actions taken for the purpose of the regulatory mechanisms of the bill.[85] Similarly, the bill would provide that a person is not liable to civil proceedings as a result of the person using or disclosing relevant information in a circumstance that is authorised by the bill.[86] Finally, the bill seeks to provide that the Systems Governor is not liable to civil proceedings as a result of the publication of information about the quality of funded aged care services and the performance of registered providers of such services.[87]

1.70 This therefore removes any common law right to bring an action to enforce legal rights, 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.

1.71 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 provides the

---

84 Clauses 533, 536 and 541. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

85 Clause 533.

86 Subclause 536(3).

87 Subclause 541(6).

following in relation to the immunity conferred on authorised persons and persons assisting:

> The purpose of this immunity is to protect authorised officers, and persons assisting them, from liability that might otherwise arise from the exercise of their statutory powers. For example, an authorised officer may enter and search premises under Parts 2 or 3 of the Chapter 6 of this Bill or seize and retain seized property. Without lawful authority, these actions would amount to a tort, such as trespass. The immunity is necessary to permit authorised officers to exercise their regulatory powers. The immunity is limited by excluding conduct not done in good faith.[88]

1.72 The explanatory memorandum only restates the operation of the provision conferring immunity from civil liability in relation to authorised disclosures without providing a justification. In relation to the immunity conferred on the System Governor the explanatory memorandum states:

> This is a proportionate protection as it is in the public interest to allow the System Governor to accurately assess and publish information to the public quality and performance to facilitate choice in aged care. The immunity provided under this provision ensures transparency about the performance of registered providers and that the System Governor can publish this information without the risk of costly litigation or sanction.[89]

1.73 Although the committee acknowledges the need for people employed in the positions listed above to be able to exercise their powers and perform their functions without fear of legal action, it is unclear to the committee how an affected individual or entity may seek recourse other than by providing evidence that a party mentioned above acted in bad faith.

1.74 The committee requests the minister's advice as to what recourse is available for affected individuals, other than demonstrating a lack of good faith, for actions taken by authorised persons, persons assisting authorised persons and the System Governor.

Reversal of the evidential burden of proof[90]

1.75 The bill creates an offence if non-entrusted persons use or on-disclose protected information which was disclosed to them under specific provisions, and the

---

88 Explanatory memorandum, p. 389.

89 Explanatory memorandum, p, 400.

90 Subclauses 535(3) and (4). The committee draws senators' attention to these provision pursuant to Senate standing order 24(1)(a)(i).

on-disclosure is not made for the purpose for which the information was disclosed to the non-entrusted person.[91] The penalty is up to two years imprisonment.

1.76 The bill provides two exceptions to this offence. The first exception is that the offence does not apply to a use or disclosure authorised by a provision of Division 2 of Part 2 of Chapter 7 of the bill.[92] The second exception is that the offence does not apply to the conduct of individuals who are accessing or seeking access to funded aged care services, conduct of supporters of those individuals, or conduct of registered providers.[93] The evidential burden of proof is reversed for each of these exceptions.

1.77 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.

1.78 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 Attorney-General's Department's *Guide to Framing Commonwealth Offences*, *Infringement Notices and Enforcement Powers* 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.[94]

1.79 In this instance, the explanatory memorandum does not sufficiently address how the matters relevant to these exceptions are peculiarly within the knowledge of the defendant.

1.80 The committee considers that where a provision reverses the burden of proof the explanatory memorandum should explicitly address relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[95]

1.81 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with

---

91 Subclause 535(2).

92 Subclause 535(3).

93 Subclause 535(4).

94 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) p. 48.

95 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) p. 48.

interpretation,[96] the committee considers that a justification for reversing the evidential burden of proof should have been included within the explanatory memorandum.

1.82 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 the offences under subclauses 535(3) and 535(4) of the bill.

Privacy[97]

1.83 The bill creates offences for the unauthorised use or disclosure of protected information, which includes personal information obtained or generated for the purposes of this bill. The bill provides for exceptions to these privacy requirements, including for entrusted persons[98] who are authorised to use or disclose information in specified circumstances.[99] Entrusted persons are permitted to disclose relevant information to the minister for the purposes of the minister's performance of their functions,[100] and to disclose information for obtaining legal advice[101] or for the purposes of delivering or providing access to aged care services.[102] In relation to disclosures to the minister the bill provides the safeguard that personal information is not authorised for disclosure if the purpose for which is it being disclosed can be achieved by the disclosure of de-identified information.[103]

1.84 The bill also provides for circumstances in which the System Governor and Appointed Commissioners may use or disclose information.[104] These exceptions are numerous and include, for example:

- to a wide range of specified bodies (such as Services Australia or the Fair Work Commission) for the purpose of facilitating performance of their functions or duties, or the exercise of their powers;[105]

---

96 See *Acts Interpretation Act 1901*, section 15AB.

97 Clauses 538 and 539. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

98 The definition of an entrusted person is very broad, with clause 7 of the bill specifying persons such as the minister, the system governor, an APS departmental employee, and any person engaged by the Commonwealth to provide services in connection with the department or the Commission.

99 Clause 538.

100 Subclause 538(1).

101 Subclause 538(3).

102 Subclause 538(4).

103 Subclause 538(2).

104 Clause 539.

105 Subclauses 539(3) and (4).

- for research purposes to an entity that is carrying out research into funded aged care on behalf of the Commonwealth if reasonably believed to be necessary for the research;[106] and
- for purposes necessary in the public interest.[107]

1.85 The exceptions which permit disclosure of personal information by the System Governor or an Appointed Commissioner are extremely broad. Excepting use and disclosure of personal information from these offence provisions may affect the right to privacy, and whether this unduly limits personal rights and liberties depends on the breadth of these exceptions and the justification for such exceptions. The explanatory memorandum merely restates the operation of these provisions and provides no justification for these exceptions.

1.86 In relation to disclosures by and to the minister, the committee notes this broadly allows the personal information to be disclosed to the minister for the broad 'performance of the minister's functions' and the bill also authorises the minister (or any person the information was lawfully disclosed to) to use or disclose the information to any person , so long as the disclosure is for the purpose for which it was disclosed to them.[108] The committee has some concerns that this may permit the minister to disclose personal information (which is not de-identified) publicly in situations, for example, where an individual has made adverse claims in the media and the minister may request and disclose information about that individual as relevant to respond to their claims, including their personal information.[109]

1.87 Further, the bill provides that entrusted persons are permitted to disclose relevant information relating to an individual accessing or seeking to access funded aged care for the purposes of delivering aged care services, assessing the individual's need for services, and assessing the individual's level of care needs relative to the needs of other recipients.[110] However, it is unclear to the committee why this provision is necessary as the bill permits the use or disclosure of relevant information if the individual or entity has consented to the use or disclosure.[111] It is unclear why it would be necessary to disclose this information without the consent of the individual seeking the services.

1.88 In relation to the exceptions for the System Governor,[112] the bill provides exceptions for disclosures to at least 20 specified Commonwealth bodies, with more

---

106 Subclause 539(7).

107 Subclauses 539(10) and (11).

108 Subclause 537(9).

109 See for example, Report of the Royal Commission into the Robodebt Scheme, volume 1 (2023) p. 177–179.

110 Subclause 538(4).

111 Subclause 537(5). Note that the definition of an entity also includes an individual for the purposes of the bill, as per clause 7.

112 Subclause 539(4)

that can be prescribed by the rules, for facilitating the performance of their functions and duties, without any explanation provided as to why each exception is justified. In relation to those specified for the purposes of their enforcement functions it is noted that subclause 539(8) would provide for broad disclosures if necessary for the enforcement of the criminal law, a law imposing a penalty, protection of revenue or for an integrity purpose. As such, it is unclear why it is necessary to provide a general disclosure power to some of the listed bodies, such as the Australian Securities and Investment Commission or the Australian Prudential Regulation Authority.

1.89 For the disclosure for research purposes it is unclear to the committee why the provision is not drafted in a manner to *require* the de-identification of personal information. Currently, subclause 539(7) provides that information may be disclosed if the System Governor or Appointed Commissioner 'reasonably believes the information is necessary for the research'. It does not require that information provided for research be de-identified. Instead a legislative note states that disclosure of personal information is not necessary for research if the research could be carried out with de-identified information. It is not clear why personal identifiable information should ever be provided for research purposes without the consent of the individual.

1.90 Further, there are a range of exceptions where the System Governor can disclose information in the 'public interest', but without any further guidance in the bill or the explanatory memorandum it is difficult for the committee to assess the appropriateness of this exception. Justifications for these provisions should have been provided along with examples of the types of scenarios in which it is envisaged the public interest may be enlivened. Of further concern, it appears that matters relevant to the public interest exceptions may be set out in delegated legislation, which again inhibits the ability of the committee to assess their appropriateness.[113]

1.91 Noting the impact on privacy of broad authorisations for the use or disclosure of personal information, the committee requests the minister's advice as to:

- **why each of the broad exceptions from privacy protections in clauses 538 and 539 are necessary and appropriate, in particular subclauses 538(1) and (4) and 539(4), (7), (10) and (11);**
- **whether the bill could be amended to require a person who is disclosing information for the same purpose for which it was disclosed to them (under subclause 538(9)) to de-identify the information where appropriate;**
- **whether the bill can be amended to require information disclosed for research purposes to be either de-identified or only shared with consent; and**

[113] Subclause 539(12).

- **examples or guidance as to what would constitute a public interest reason for the System Governor to disclose information.**

Broad delegation of administrative powers and functions[114]

1.92 The bill provides that the Commissioner may delegate any of their powers and functions under the bill, other than Parts 2-9 of Chapter 6 (in relation to regulatory mechanisms) to the Complaints Commissioner.[115] The Complaints Commissioner is then authorised to delegate those powers or functions to a member of the staff of the Commission.[116] There appears to be no limit as to the level of seniority to which these delegations can be made.

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

1.94 In this instance the explanatory memorandum merely restates the operation of the provision without providing any guidance as to why this broad delegation is necessary or appropriate. The committee also notes that similar delegation provisions in the bill include a requirement that the delegate consider whether the delegee has appropriate qualifications, skills or seniority , and it is unclear why this safeguard is not present in the delegation from the Commissioner to the staff of the Commission.

1.95 The committee requests the minister's advice as to why it is considered necessary and appropriate to allow for the delegation of any or all of the Commissioner's powers and functions under clause 575, and whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

---

114 Clause 575. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii)

115 Subclause 575(1).

116 Subclause 575(2).

Automated decision-making[117]

1.96 The bill seeks to provide that the System Governor may arrange for the use of computer programs to take relevant administrative action, which will be done under the System Governor's oversight.[118] The bill provides an exhaustive list of actions that are considered 'relevant administrative action', which include:

- making a decision under subsection 78(1) (dealing with classification levels);
- making a decision under subsection 86(1) (dealing with priority category decisions);
- making a decision under subsection 92(1) (dealing with allocation of places to individuals);
- making a decision under subsection 93(1) (dealing with deciding the order of allocations of places to individuals);
- giving a notice under subsections 79(1), 88(1) or 92(3); or
- doing or refusing or failing to do, anything related to making a decision under subsections 78(1), 86(1), 92(1) or 93(1).[119]

1.97 The committee notes that a number of welcome oversight and safeguard mechanisms are set out in the bill, which include the following:[120]

- the System Governor may make a decision in substitution for a decision taken by the operation of a computer program if the decision taken by the operation of a computer program is not correct;[121]
- the System Governor must take all reasonable steps to ensure that relevant administrative action taken by the operation of a computer program is relevant administrative action the System Governor could validly take;[122]
- the System Governor must do the things prescribed by the rules in relation to oversight and safeguards for automation of administrative action;[123]
- if an arrangement for the use of a computer program is made, the System Governor must cause a statement to be published on the Department's website in relation to the arrangement;[124]

---

117 Clause 582. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

118 Subclause 582(1).

119 Clause 582.

120 Clause 583.

121 Subclause 582(4).

122 Subclause 583(1).

123 Subclause 583(2).

124 Subclause 583(6).

- the System Governor must include the total number of substituted decisions made, the kinds of substituted decisions made, and the kinds of decisions taken by the operation of the computer program that the System Governor was satisfied were not correct.[125]

1.98 Further, the committee notes that a failure to comply with some of the safeguards detailed above does not affect the validity of relevant administrative action taken by the operation of a computer program.[126]

1.99 Administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

1.100 In this instance, the committee is concerned as to whether all the decisions included within the definition of 'relevant administrative action' are appropriate decisions that may be made by the operation of a computer program. For instance, the committee notes that a decision under subclause 78(1) requires the minister to establish a classification level for an individual on the basis of a classification assessment report for an individual or information that is provided as part of undertaking classification assessments.[127] The committee understands that a classification level determination relates to the nature of services that an individual requires and is determined based on that individual's needs.

1.101 Similarly, the committee understands that a priority category decision is made following a prioritisation assessment for an individual (in relation to their classification level) and a prioritisation report that is prepared after the assessment.[128]

1.102 As the explanatory memorandum does not provide a justification in relation to why the decisions that constitute relevant administrative action are appropriate for automation, it is unclear to the committee why the minister may arrange for the use of a computer program in making these decisions. While the committee welcomes that 'relevant administrative action' is defined to a limited number of decisions that cannot be expanded by delegated legislation, the committee queries how decisions that

---

125 Subclause 583(7).

126 Subclause 583(3).

127 Subclause 78(1).

128 Clause 84, subclauses 85(1) and 86(1).

involve detailed considerations of what services may be appropriate to meet an individual's needs is appropriate for automation.

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

- **why each of the decisions included within the definition of 'relevant administrative decisions' are considered appropriate for automation and whether any are discretionary in nature; and**
- **whether the Attorney-General's Department was consulted to ensure a consistent legal framework regarding automated decision-making (as per recommendations 17.1 and 17.2 of the Royal Commission into the Robodebt Scheme).[129]**

Standing appropriation[130]

1.104 The bill provides that amounts payable by the Commonwealth are to be paid out of the Consolidated Revenue Fund which is appropriated accordingly.[131] As this appropriation covers amounts payable by the Commonwealth for funding arrangements for funded aged care services, this appropriation likely represents a large amount of Commonwealth expenditure, which once established as a standing appropriation will be administrated without parliamentary oversight.

1.105 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis, usually for indefinite amounts and duration. Unlike annual appropriations which require the Executive to periodically request the Parliament to appropriate money for a particular purpose, once a standing appropriation is enacted any expenditure under it does not require regular parliamentary approval and therefore escapes direct parliamentary control. The amount of expenditure authorised by a standing appropriation may grow significantly over time, but without any mechanism for review included in the bill alongside the appropriation it is difficult for the Parliament to assess whether a standing appropriation remains appropriate.

1.106 Given the difficulty of ongoing parliamentary oversight over enacted standing appropriations, the committee expects a robust justification for why a standing appropriation should be established or expanded in the first place. To this end, the committee expects the explanatory memorandum to a bill which establishes or expands a standing appropriation to explain why it is appropriate to include a standing appropriation (rather than providing for the relevant appropriations in the annual appropriation bills). In relation to this the explanatory memorandum merely restates

---

129 Royal Commission into the Robodebt Scheme, July 2023, p. xvi.

130 Clause 598. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

131 Clause 598.

the operation of the provision without providing any justification as to its necessity and appropriateness. The committee appreciates the importance of ensuring ongoing funding for the provision of aged care services, but the committee notes that once established as a standing appropriation, Parliament retains limited oversight of this expenditure.

1.107 The committee therefore requests the minister's advice as to what mechanisms are in place to report to the Parliament on any expenditure authorised by the standing appropriation.

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024[132]

Purpose	The bill seeks to amend the *Broadcasting Services Act 1992* to combat misinformation and disinformation via new requirements on digital communications platform providers. To ensure compliance with these new requirements, the bill also seeks to expand the Australian Communications and Media Authority's regulatory and legislative powers to make rules, set standards, approve codes, impose reporting conditions and more. The bill also introduces consequential and transitional amendments across the *Australian Communications and Media Authority Act 2005* and the *Online Safety Act 2021* to insert definitions and references to the provisions created by the bill.
Portfolio	Communications
Introduced	House of Representatives on 12 September 2024
Bill status	Before the House of Representatives

Significant matters in delegated legislation[133]

1.108 This bill seeks to amend the *Broadcasting Services Act 1992* to introduce a new Schedule 9 that would impose requirements on certain digital communications platform providers[134] (providers) relating to misinformation and disinformation. These providers would be required to make specified information publicly available and comply with any requirements set out in digital platform rules. These rules would be made by the Australian Communications and Media Authority (ACMA) and would include rules relating to:

---

132 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024, *Scrutiny Digest 13 of 2024*; [2024] AUSStaCSBSD 203.

133 Schedule 1, item 2, proposed Schedule 9, Division 2, Subdivisions B-D. The committee draws senators' attention to these Subdivisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

134 Schedule 1, item 2, proposed sections 5 and 7 set out the providers who would be bound by these requirements, as being those who provide a digital communications platform, which is a digital service that is a connective media service; a content aggregation service; an internet search engine service; a media sharing service; or a kind of digital service determined by legislative instrument, but does not include an internet carriage service, SMS service or MMS service.

- risk management;[135]
- media literacy plans;[136]
- complaints and dispute handling processes.[137]

1.109 A provider who contravenes the digital platform rules would be subject to a civil penalty of up to 5,000 penalty units for a body corporate (currently $1.565 million) or 1,000 penalty units for a non-body corporate (currently $313,000).[138]

1.110 As such, the regulation of such matters largely falls to the rules, with very little set out in relation to this in the bill itself. Where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill.

1.111 In this regard, the detailed and thorough explanatory memorandum has set out why, in some instances, it may be appropriate to leave certain matters to delegated legislation. For example, in relation to proposed section 17, which requires the provider to publish certain information that meets the requirements of the rules, the explanatory memorandum explains the necessity of having the flexibility to consider how the system is operating in practice and to respond to the evolving risk landscape.[139] The committee appreciates that the area of digital technology is rapidly changing and in such cases delegated legislation may be more appropriate to respond to this challenge.

1.112 However, it is not clear why all of the detail regarding risk management assessments, media literacy plans and complaint handling processes are to be left to the rules. The bill provides only that the rules 'may require' certain broad matters, with few limits on what the rules will provide. The explanatory memorandum does not explain why, for example, matters such as a complaints and dispute handling process for misinformation complaints should be entirely set out in delegated legislation. The committee considers the ability of persons to complain about the operation of this scheme is integral to the operation of the scheme, and as such considers further detail regarding this should be included on the face of the legislation. As it stands, no such rules are required to be made, meaning, in theory, there could be no legislative requirement for providers to establish a complaints and dispute handling process, or

---

135 Schedule 1, item 2, proposed Subdivision B, Division 2, Part 2, Schedule 9.

136 Schedule 1, item 2, proposed Subdivision C, Division 2, Part 2, Schedule 9.

137 Schedule 1, item 2, proposed Subdivision D, Division 2, Part 2, Schedule 9.

138 Schedule 1, item 2, proposed sections 20, 23 and 26 together with Schedule 2, item 20, proposed subsection 205F(5E).

139 Explanatory memorandum, p. 67.

such processes may only be required in limited circumstances. It is not clear why a requirement could not be provided for in the bill itself.

1.113 Moreover, the bill provides that applications may be made to the Administrative Review Tribunal for review of decisions of the ACMA made under the rules, so long as those rules provide that the decision is a reviewable decision.[140] The explanatory memorandum explains:

> As some, but not all, decisions the ACMA may empower itself to make under those provisions may be appropriate for merits review, subsection 204(4A) would enable the ACMA, in developing rules, to provide for merits review where it is appropriate. For example, it is likely the ACMA would provide for merits review where its decision would affect the interests of a person, but that it may not be necessary to do so where decisions would be of a procedural or preliminary nature, would have no appropriate remedy or would have such limited impact that the costs of review cannot be justified.[141]

1.114 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. The committee understands that it is not possible at this stage to determine which decisions are appropriate for merits review as the content of the ACMA's decision-making power is not yet clear, as this will be provided for in the rules. The committee considers this exemplifies the problems with leaving significant matters to be dealt with in delegated legislation. Even so, the committee considers it would be possible for the bill to provide that all decisions made by the ACMA under the rules should be subject to merits review, with the option for the ACMA to specifically exclude in the rules certain decisions. This would then require the ACMA to consider each decision and justify each opt out, including allowing for parliamentary oversight of any decision to exclude merits review.

1.115 The committee therefore seeks the minister's advice as to:

- **why it is considered necessary and appropriate to leave to the rules all detail regarding risk management, media literacy plans and complaints;**
- **why there is no requirement to make digital platform rules regarding complaints and dispute handling processes for misinformation complaints;**
- **whether further detail could be included on the face of the primary legislation, noting the importance of parliamentary scrutiny; and**

---

140 Schedule 2, item 15.

141 Explanatory memorandum, pp. 137–138.

- **whether the bill could provide that all ACMA's decisions made under the rules are subject to merits review, unless ACMA specifically excludes merits review in individual cases.**

Privacy

Significant matters in delegated legislation[142]

1.116 The bill also provides the ACMA with the power to make rules to place record keeping and reporting requirements on providers in relation to misinformation and disinformation.[143] Proposed section 30 states that the rules may require providers to make and retain records relating to misinformation or disinformation and measures implemented by providers to respond to this (the ACMA may also require providers to give records to the ACMA if necessary for it to perform its monitoring and compliance functions).[144] The bill provides that before making such rules the ACMA must consider the privacy of end-users, and that rules must not require providers to make or retain records of the content of 'private messages' or of VoIP communications (non-recorded real-time voice communication using the internet). What constitutes a private message is a message between two end-users or to numerous end-users that does not exceed the number specified in the rules, or if no number is specified, 1,000.[145] Failure to comply with the rules would be subject to a civil penalty (up to 5,000 for a body corporate or 1,000 for a non-body corporate).[146]

1.117 Enabling rules to be made that specify the collection, use or disclosure of personal information may impact on the right to privacy. As such, 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 addition, these are significant matters being left to the rules and as set out above, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation. In this instance, the explanatory materials accompanying the bill have provided a detailed analysis of the privacy implications of this measure.

1.118 The statement of compatibility states that it is possible that in making such a rule the ACMA could effectively require providers to make and retain records that

---

142 Schedule 1, item 2, proposed section 2, definition of 'private message' and section 30. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

143 Schedule 1, item 2, proposed sections 30–32.

144 Schedule 1, item 2, proposed section 34.

145 Schedule 1, item 2, proposed section 2, definition of 'private message'.

146 Schedule 1, item 2, proposed section 31 together with Schedule 2, item 20, proposed subsection 205F(5E).

include personal information. It states that the objective behind this, and the power to gather information:

> is to enable the ACMA to collect data regarding the spread of misinformation and disinformation, so as to enable it to assess the steps being taken by digital communications platform providers to manage the risk of misinformation and disinformation on their platforms [and] are also aimed at enabling the ACMA to publish information about the prevalence and nature of misinformation and disinformation on digital communications platforms, and about the steps being taken by digital communications platform providers to prevent and respond to misinformation and disinformation. This in turn is aimed at empowering end-users to identify misinformation and disinformation on digital communications platforms.[147]

1.119 The explanatory memorandum expands on the safeguards that are available, noting that the ACMA must consider the privacy of end-users before making a rule in relation to records:

> This requirement would be particularly important if the ACMA were to make a digital platform rule for the purpose of this clause requiring digital communications platform providers to make and retain records containing personal information, as that term is defined in section 6 of the Privacy Act. This might arise, for example, if the ACMA were to make a digital platform rule requiring a digital communications platform provider to make and retain records of examples of misinformation and disinformation posted by individual end-users that have been removed from the digital communications platform.
>
> When considering the privacy of end-users before making a digital platform rule in relation to records, the ACMA would be expected to consider the extent to which particular records are necessary and reasonable for the purpose of regulating misinformation and disinformation. For example, it is expected that the ACMA would consider the extent to which it may be feasible to use de-identified records to achieve the objectives stated in the legislation, and should ensure that if digital communications platform providers are required to retain records of personal information, these are only required to be retained for the period of time reasonably necessary to achieve those objectives. Any risks to the privacy of end-users would also be minimised by the fact that the rules would not be permitted to require digital communications platform providers to make or retain records of the content of private messages or VoIP communications (subclause 30(3) …). In addition, the ACMA must comply with the requirements of the Privacy Act when dealing with personal information, including Australian Privacy Principle 11 (about security of personal information).[148]

---

147 Statement of compatibility, p. 16.

148 Explanatory memorandum, p. 86.

1.120 The requirement that the ACMA must consider the privacy of end-users before making a rule in relation to records is an important safeguard. However, the committee notes that this would require the ACMA only to 'consider' privacy rather than require the ACMA to make rules that are consistent with the right to privacy. Moreover, it is not clear why the protections the explanatory memorandum states the ACMA would be expected to consider are not set out on the face of the bill itself. It is unclear to the committee why, for example, the length of time such records should be retained for cannot be included in the bill.

1.121 A further important safeguard is that the rules cannot require providers to make or retain records of the content of private messages. What qualifies as a private message, however, is to be determined by the rules (or if the rules are silent on this, the number of users is 1,000). The rules may make the definition extremely wide (for example, messages sent to 2,000 people may be considered private) or they may make it extremely narrow (for example, messages sent between only ten people or less may be considered private, meaning messages sent to 11 or more people would not be considered private). The explanatory memorandum sets out why the rules should be able to set out the number of recipients:

> Allowing the maximum number of end-users to whom a private message may be sent to be specified in the digital platform rules, as opposed to in Schedule 9, allows the determination of this number to be informed by information made available to the ACMA pursuant to the operation of other provisions in Schedule 9. It would be expected, for example, that the determination of the maximum number of recipients that may receive a private message – with the result that such messages would not be subject to record keeping and reporting obligations (clause 30), the ACMA's information gathering powers (clauses 33 and 34) or misinformation codes or standards – may be informed by information on misinformation complaints, made available by digital communications platform providers pursuant to any digital platform rules made under paragraph 25(2)(c) and any additional information regarding misinformation and disinformation on digital communications platforms obtained by the ACMA pursuant to clauses 33 and 34.[149]

1.122 While the committee acknowledges this explanation, it is unclear why the bill cannot set a minimum number of end-users to ensure the rules are not empowered to set an overly narrow number of end-users and therefore undermine this important privacy protection.

1.123 The committee seeks the minister's advice as to:

- **why it is considered necessary and appropriate to leave to the rules all details regarding record keeping relating to misinformation or disinformation;**

[149] Explanatory memorandum, p. 27.

- **why privacy protections specified in the explanatory memorandum are not included in the bill itself, such as in relation to de-identification and that records should only be retained for as long as is reasonably necessary; and**
- **why the bill does not contain a minimum number of end-users as to what constitutes a 'private message' (noting that if the rules set a low number, important privacy protections would not apply to such messages).**

Freedom of expression
Significant matters in delegated legislation [150]

1.124 The bill specifies that providers in the digital platform industry may develop misinformation codes. If the ACMA is satisfied that a body or association represents a particular section of the digital platform industry, the ACMA may request that they develop a misinformation code.[151] The ACMA may make a misinformation standard if such a request is not complied with; or the ACMA considers a particular section of industry is not represented by a body or association; a code is not providing adequate protection; or there are exceptional and urgent circumstances.[152]

1.125 The bill does not set out what must be in such codes or standards. Instead it provides examples of matters that *may* be included depending on which section of the digital platform industry is involved. Examples of what might be in codes or standards include:

- preventing or responding to misinformation or disinformation (including that which constitutes an act of foreign interference);
- preventing advertising that constitutes misinformation or disinformation;
- supporting fact checking;
- giving information to end-users about the source of political or issues-based advertising, improving media literacy of end-users, and allowing end-users to detect and report misinformation or disinformation; and
- policies and procedures for receiving and handling reports and complaints from end-users.[153]

1.126 The ACMA may approve a code developed by industry if the ACMA is satisfied that there has been appropriate consultation, the code requires participants to implement measures to prevent or response to misinformation or disinformation, and

---

150 Schedule 1, item 2, proposed Division 4. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (iv).

151 Schedule 1, item 2, proposed section 48.

152 Schedule 1, item 2, proposed sections 55–59.

153 Schedule 1, item 2, proposed sections 55–59.

enables assessment of compliance with the measures.[154] In addition, the ACMA may only approve a code, or make a standard, if the ACMA is satisfied that:

- it is reasonably appropriate and adapted to achieving the purpose of providing adequate protection for the Australian community from serious harm caused or contributed to by misinformation or disinformation; and
- goes no further than reasonably necessary to give that protection.[155]

1.127 Once the ACMA has approved a code, or made a standard, the code or standard would be a disallowable legislative instrument.[156]

1.128 If providers did not comply with a code or standard they would be subject to significant civil penalties. For non-compliance with a code, a body corporate provider could face a civil penalty of up to 10,000 units (or $3.13 million) or up to two per cent of their yearly annual turnover, whichever is greater. This increases to 25,000 units (or $7.825 million) or 5 per cent of annual turnover for non-compliance with a standard.[157]

1.129 As such, providers could face substantial penalties if they were not to comply with a code or standard requiring them to prevent or respond to misinformation or disinformation on their platforms. While the bill does not itself empower the ACMA to directly regulate content on the internet, providers are incentivised (by the threat of substantial penalties) to remove content on their platforms that might constitute misinformation or disinformation. In doing so, this impacts on freedom of expression, and depending on how this is applied in practice, may unduly trespass on individual rights and liberties.

1.130 The statement of compatibility recognises this, noting:

> These measures could feasibly incentivise digital communications platform providers to take an overly cautious approach to the regulation of content that could be regarded as misinformation and disinformation – or in other words, they could have a 'chilling effect.'[158]

1.131 It goes on to say that the measures are aimed at addressing the risk that misinformation and disinformation could cause or contribute to serious harm and argues that the measures are focused on systems and processes rather than regulation of actual content and there are safeguards in that there are exemptions for certain content and privacy protections.[159]

---

154 Schedule 1, item 2, proposed sections 47.

155 Schedule 1, item 2, proposed sections 47 and 54.

156 Schedule 1, item 2, proposed subsections 47(6), 55(2), 56(2), 57(3), 58(3), and 59(2).

157 Schedule 1, item 2, proposed sections 52 and 62 together with Schedule 2, item 20, proposed subsections 205F(5G) and (5H). Note that a non-body corporate would face up to 2,000 penalty units for non-compliance with a code and up to 5,000 penalty units for non-compliance with a standard.

158 Statement of compatibility, p. 18.

159 Statement of compatibility, p. 19.

1.132 The potential impact on freedom of expression relates to how providers will interpret their obligations under relevant codes or standards. As to whether freedom of expression is adequately protected will depend on a mixture of how robust the free speech protections are in the codes or standards, and how they are applied in practice.

1.133 The breadth of the definition of what constitutes misinformation or disinformation is particularly relevant to this. Misinformation is defined in the bill to mean dissemination of content to end-users in Australia if:

- the content contains information that is reasonably verifiable as false, misleading or deceptive;
- the provision of content is reasonably likely to cause or contribute to serious harm, which is defined exhaustively and relates to harm to electoral process; public health; physical injury; imminent damage to critical infrastructure or disruption of emergency services; or imminent harm to the economy, and that has significant and far-reaching consequences for the community or severe consequences for an individual; and
- is not dissemination of content that is parody or satire; professional news content; or for any academic, artistic, scientific or religious purpose.[160]

1.134 Disinformation is defined in the same way as misinformation with the addition that there must be grounds to suspect the person disseminating the content intends that it deceive another person, or the dissemination involves 'inauthentic behaviour'.[161]

1.135 The committee considers it important that an exhaustive definition of 'serious harm' is provided for in the bill, with a high threshold, particularly by reference to the need for the harm to have significant and far-reaching consequences for the community or severe consequences for an individual. The bill also sets out that in determining whether content is reasonably likely to cause or contribute to serious harm regard must be had to a range of factors including the circumstances in which it is disseminated; the subject matter of the information; its potential reach and speed of dissemination; and the author and purpose of the dissemination. The bill provides that the minister may, by legislative instrument, determine a matter which may be considered as part of this test. The explanatory memorandum provides a useful justification for including this matter in delegated legislation, noting that 'it is possible that in light of evolutions in technology, the minister may determine that there is another factor that is so significant that it should be explicitly prescribed as a matter to be considered'.[162]

---

160 Schedule 1, item 2, proposed subsection 13(1) and sections 14 and 16.

161 Schedule 1, item 2, proposed subsection 13(2) and section 15.

162 Explanatory memorandum, p. 46.

1.136 The breadth of the exceptions is also relevant when considering the limit on freedom of expression. In this regard, the bill excludes the dissemination of professional news content from what constitutes misinformation or disinformation. This is defined in the bill as news content produced by a person who publishes it in a range of formats and is subject to various Australian editorial standards or to rules or standards that are analogous to this if it relates to the provision of quality journalism and the person has editorial independence.[163] The explanatory memorandum states that for rules or standards to be considered analogous:

> internal editorial standards should include, at a minimum:
>
> • a mechanism for accepting, adjudicating and notifying complainants of the outcome of complaints about news content, and
>
> • standards relating to the accuracy and impartiality of news content.[164]

1.137 While the definition of misinformation and disinformation require that the content must be provided to one or more end-users in Australia, the person posting the content does not need to be in Australia. As such, it is likely that a significant amount of news content will be produced by persons located overseas, and it is unclear how providers, particularly individual fact-checkers, would be able to ascertain if the person who produced the content was subject to appropriate editorial standards. If this is interpreted overly narrowly there is the potential for news content produced by journalists from countries without established journalistic rules or standards to be blocked, despite the content reporting important news. The explanatory memorandum is silent on how journalistic content from overseas counties will be treated in practice.

1.138 Ultimately, whether these measures will unduly trespass on the right to freedom of expression will depend on the processes by which each industry participant determines what individual content will constitute misinformation or disinformation. The burden of determining if particular content is reasonably verifiable as false, misleading or deceptive will likely fall on individual fact checkers. While the explanatory memorandum does a good job of giving examples of some matters that could be considered in determining if content is reasonably verifiable (including expert opinions, multiple reliable and independent sources, similar complaints),[165] a significant burden would appear to rest on the fact checker to be able to assess this. Similarly, fact checkers would need to assess, in relation to disinformation, whether there are grounds to suspect that a person intends that content deceive another person. Again, the explanatory memorandum provides useful examples of what this might include, such as where similar complaints have been made, or content is a doctored image or false content using logos of trusted sources.[166] But again, much will

---

163 Schedule 1, item 2, proposed subsection 16(2).

164 Explanatory memorandum, p. 64.

165 Explanatory memorandum, p. 44.

166 Explanatory memorandum, p. 45.

depend on how individual fact checkers apply this in practice. This is why reviewing how these measures are working in practice to protect freedom of expression is vitally important. The bill provides for a review of this scheme every three years, which includes assessing the impact of the scheme on freedom of expression.[167] In the interim it will be important for industry participants to be transparent about their processes. Yet the detail of this will be set out in the codes and standards, rather than in primary legislation. The committee considers that without knowing the detail of what will be included in these codes or standards, including no *requirement* as to what must be included, it is difficult to adequately assess whether this measure may unduly trespass on rights and liberties.

1.139 Finally, the committee notes that the approach of this proposed scheme is to incentivise providers to remove content assessed to be misinformation or disinformation. Substantial penalties apply if inappropriate content is not adequately managed. Yet, no penalty is applicable if providers go too far in limiting freedom of expression. If providers were to take the view that all content in relation to a particular contentious topic were to be blocked, there is no legislation that would prevent them from doing so. The bill seeks, in some degree, to address this by requiring the ACMA, when approving codes or making standards, to be satisfied that it is reasonably appropriate and adapted to achieve the purpose of protecting the community from serious harm and goes no further than is reasonably necessary.[168] The explanatory memorandum explains the basis for these provisions:

> this requirement is aimed at ensuring that the power conferred on the ACMA is wholly valid, by making clear on the face of the legislation that the power it confers cannot be exercised in a way that would transgress the constitutional limits imposed by the implied freedom of political communication, which the High Court of Australia has recognised as impliedly protected by the Australian Constitution.[169] Freedom of political communication in this context means people's ability to communicate 'information and opinions about matters relevant to the exercise and discharge of governmental powers and functions on their behalf'.[170] … It means that before determining a standard, the ACMA must carefully consider the way in which each of the measures contained in the standard burden the implied freedom of political communication, and whether in all the circumstances, the burden imposed by the standard overall is reasonable and not excessive.[171]

---

167 Schedule 1, item 2, proposed section 70.

168 Schedule 1, item 2, proposed subparagraph 47(1)(d)(ii) and (iv), 50(1)(d)(ii) and (iv), section 54 and subsection 60(2).

169 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

170 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ).

171 Explanatory memorandum, pp. 114–115.

1.140 The committee considers that requiring the ACMA to consider whether measures in a code or standard would burden the implied freedom of political communication is an important protection. However, the committee notes that the right to freedom of expression is broader than just that of political communication. It applies to other types of speech that may not involve discussion of political matters. Given the only oversight of what private providers do in response to this scheme is through enforcement of these codes and standards, requiring those codes and standards to appropriately balance the right to freedom of expression is essential. As such, it is not clear to the committee why the bill does not explicitly require the ACMA to consider whether the right to freedom of expression is appropriately balanced before approving a code or making a standard.

1.141 The committee considers the explanatory materials accompanying this bill to be of particularly high quality, especially in providing examples of how key aspects of the proposed scheme are likely to apply in practice. The committee notes, however, that the scheme has the potential to apply a chilling effect on freedom of expression, as it incentivises providers to remove content that might constitute misinformation or disinformation, while there is no incentive for providers to respect the right to freedom of expression.

1.142 Noting the above comments, the committee seeks the minister's advice as to:

- **whether the definition of 'professional news content' is overly narrow in requiring that the person producing the content be bound by specific editorial standards, and how this is likely to operate in practice in relation to journalists producing content in countries that may not have analogous standards;**
- **why it is considered necessary and appropriate to leave to codes and standards all processes by which participants in a digital platform industry are to prevent or respond to misinformation or disinformation, including why there is no requirement as to what such a code or standard must contain; and**
- **whether the bill could be amended to require the ACMA to be satisfied that a misinformation code or standard appropriately balances the importance of protecting the community from serious harm with the right to freedom of expression.**

Privacy and Other Legislation Amendment Bill 2024[172]

Purpose	The bill seeks to amend multiple Acts, primarily the *Privacy Act 1988* (the Privacy Act), to introduce new measures, powers, definitions and penalties related to privacy. The bill also seeks to introduce a new tort of serious invasion of privacy and a new criminal offence for the release of personal data using carriage services (known as 'doxxing').
Portfolio	Attorney-General
Introduced	House of Representatives on 12 September 2024
Bill status	Before the House of Representatives

Exemption from disallowance[173]

1.143 The bill seeks to enable the minister to direct the Information Commissioner (the Commissioner) to develop a temporary Australian Privacy Principle code (APP code) if the minister is satisfied that it is in the public interest for the code to be developed, for the Commissioner to develop the code, and that the code should be developed urgently.[174] It also provides that while such a code is a legislative instrument, it would not be subject to disallowance.[175]

1.144 The *Privacy Act 1988* (Privacy Act) already provides that the Prime Minister or the minister may make declarations relating to events of national significance or events outside of Australia.[176] The effect of such a declaration is that certain privacy protections in the Privacy Act do not apply. Currently those declarations are not legislative instruments. The bill amends the existing provisions to provide that these declarations are legislative instruments, and they are exempt from disallowance.[177]

1.145 The committee notes that disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the Executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance

---

172 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Privacy and Other Legislation Amendment Bill 2024, *Scrutiny Digest 13 of 2024*; [2024] AUSStaCSBSD 204.

173 Schedule 1, item 5, proposed subsection 26GB(8), item 10, item 12 and item 43, proposed section 26X. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

174 Schedule 1, item 5, proposed subsection 26GB(1).

175 Schedule 1, item 5, proposed subsection 26GB(8).

176 *Privacy Act 1988*, sections 80J and 80K.

177 Schedule 1, items 10 and 12.

unless exceptional circumstances can be shown which would justify an exemption. In addition, the Senate resolved that any claim that circumstances justify an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.[178]

1.146 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in its review of the *Biosecurity Act 2015*[179], and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[180]

1.147 In light of these comments and the resolution of the Senate, the committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. This justification should include an explanation of the exceptional circumstances that are said to justify the exemption and how they apply to the circumstances of the provision in question.

1.148 The explanatory memorandum states, in relation to the exemption from disallowance for a temporary APP code, that:

> [i]t is necessary to exempt the instrument from disallowance to ensure that decisive action can be taken in urgent situations or where circumstances are rapidly evolving. This would establish an immediate, clear and certain legal basis for entities to handle personal information in accordance with the temporary APP code. Without an exemption, entities may be discouraged from meeting temporary APP code requirements, and not set up new processes or systems or change their practices until the disallowance period has concluded.[181]

1.149 The explanatory memorandum proceeds to list safeguards provided in lieu of disallowance, including that the temporary APP code would be developed by the Commissioner who has expertise in the field, the minister would need to be satisfied that it is in the public interest for the development of the code, and that the code would be in force for no longer than 12 months.

1.150 In relation to the emergency declaration, the explanatory memorandum provides a similar explanation noting:

---

178 Senate resolution 53B. See *Journals of the Senate*, No. 101, 16 June 2021, pp. 3581–3582.

179 See Chapter 4 of the Senate Standing Committee for the Scrutiny of Bills, *Review of exemption from disallowance provisions in the Biosecurity Act 2015: Scrutiny Digest 7 of 2021* (12 May 2021) pp. 33–44; and *Scrutiny Digest 1 of 2022* (4 February 2022) pp. 76–86.

180 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report* (2 December 2020); and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (16 March 2021).

181 Explanatory memorandum, pp. 34–35.

> It is necessary to exempt the instruments from disallowance to ensure that decisive action can be taken during an emergency or disaster. This would establish an immediate, clear and certain legal basis for entities to handle personal information in accordance with the emergency declaration. Without an exemption, entities may be discouraged from disclosing information where this may be time critical to prevent harm or render assistance to individuals at risk of harm.[182]

1.151 While the committee acknowledges the necessity of an immediate, clear and certain legal basis for entities to know their obligations, the committee considers this is achievable while allowing parliamentary oversight. The committee notes that a legislative instrument has effect from the day of commencement, which may be the day of registration, thereby establishing an immediate legal basis, and will continue to have effect unless it is disallowed within the disallowance period. The committee does not consider the need for certainty in this context to be an indication of exceptional circumstances that warrant an exemption from disallowance. The committee also notes the point made by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its final report into the exemption of delegated legislation from parliamentary oversight:

> A well-formed instrument that is made according to its enabling legislation and enjoys broad support will not be disallowed, and is thus unlikely to manifest any of the consequences suggested by departments. Many rationales that point to the possibility of negative outcomes call for such a significant stretch to the credulity of the Parliament that they cannot be seriously considered.[183]

1.152 Further, the committee notes that other legislative instruments within the Privacy Act have succeeded in establishing legislative certainty despite being subject to disallowance, such as the APP and Credit Reporting codes included on the Codes Register.[184]

1.153 The committee therefore draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of exempting temporary Australian Privacy Principle codes and emergency declarations from disallowance.

1.154 The committee also draws these provisions to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

---

182 Explanatory memorandum, pp. 35–36 & 48–49.

183 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: final report* (16 March 2021) p. 109.

184 *Privacy Act 1988*, sections 26A, 26M and 26U.

Reversal of the evidential burden of proof[185]

1.155 Currently, the Privacy Act provides that a person (the first person) commits an offence[186] if they disclose information provided to them about an individual to another person and they (the first person) are not a responsible person for the individual whose information they have disclosed.[187]

1.156 The bill seeks to include new offence-specific defences which provide that the offence in subsection 80Q(1) does not apply if:

- a disclosure is for the purposes of carrying out a State's constitutional functions, powers or duties; and
- a disclosure is for the purposes of obtaining or providing legal advice in relation to the operation of Part VIA.[188]

1.157 A note to this subsection confirms that these offence-specific defences reverse the evidential burden of proof.

1.158 Additionally, the bill seeks to insert a new offence into the Privacy Act with similar offence-specific defences which reverse the evidential burden of proof.[189] The offence would occur when a person discloses personal information that relates to an individual that was disclosed to the first person under specified provisions of the bill.

1.159 However, the offence does not apply to a number of disclosures, including the disclosures listed above as well as disclosures to an individual, a court, to the person whom the information relates and more.[190]

1.160 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.

1.161 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 Attorney-General's Department's *Guide to Framing Commonwealth Offences*, *Infringement Notices and Enforcement Powers* 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:

---

185 Schedule 1, item 28, proposed paragraphs 80Q(2)(b), 80Q(2)(ba) and item 43, proposed subsection 26XC(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

186 Subsection 80Q(1).

187 See section 6AA of the *Privacy Act 1988* for the definition of a responsible person.

188 Schedule 1, item 28, proposed paragraphs 80Q(2)(b) and (ba).

189 Schedule 1, item 43, subdivision C, proposed section 26XC.

190 Schedule 1, item 43, subdivision C, proposed subsection 26XC(2).

- 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.[191]

1.162 In this instance, the explanatory memorandum does not provide any justification as to why it is appropriate to reverse the evidential burden of proof in relation to proposed paragraphs 80Q2(b) and (ba). The explanatory memorandum does briefly state, in relation to proposed subsection 26XC(2), that:

> [i]t is appropriate for the defendant to bear the onus of proving these matters as they are matters that, by their nature, are peculiarly within the knowledge of the defendant.[192]

1.163 The committee does not consider, with specific exception,[193] that the proposed matters for both offences are *peculiarly* within the defendant's knowledge. For example, whether or not a disclosure was for the purposes of carrying out a State's constitutional functions, powers or duties is not, in the committee's view, a matter peculiarly within the defendant's knowledge.

1.164 The committee considers that where a provision reverses the burden of the proof the explanatory memorandum should explicitly address relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.* [194]

1.165 The committee requests that an addendum to the explanatory memorandum containing a justification of these reverse burden provisions 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.[195]

1.166 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 the defences and exceptions in the provisions detailed above.

---

191 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) p. 48.

192 Explanatory memorandum, p. 51.

193 See proposed paragraphs 80Q(2)(ba), 26XC(2)(c) and (e).

194 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) p. 48.

195 See *Acts Interpretation Act 1901*, section 15AB.

Significant matters in delegated legislation[196]

1.167 Part 6 of Schedule 1 to the bill seeks to amend the Privacy Act to introduce new exceptions for Australian Privacy Principle entities (APP entities) in assessing overseas recipients prior to releasing personal information to said recipients.

1.168 Currently, the Privacy Act requires an APP entity to:

> …take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the Australian Privacy Principles (other than Australian Privacy Principle 1) in relation to the information.[197]

1.169 The amendments introduced via the bill would allow for APP entities to not take reasonable steps when the minister is satisfied the laws of the country, in which the personal information will be disclosed to, or a binding scheme, have an effect which is, overall, similar to the Australian Privacy Principles. Additionally, the minister must also be satisfied that there are mechanisms which individuals are able to access to enforce the protection of their personal information.[198]

1.170 However, item 38 of the bill[199] informs that countries, binding schemes, and conditions which exempt countries or binding schemes from being scrutinised prior to the disclosure of personal information, will be prescribed by the regulations.

1.171 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. While the committee is accepting of listed countries or binding schemes being prescribed by the regulations, as these may change from time to time outside the control or remit of the executive, it is unclear to the committee why conditions which exempt countries or binding schemes from regard are prescribed by the regulations. These conditions would not, in the committee's view, be subject to frequent variability due to their need to reflect the Australian Privacy Principles.

1.172 The committee expects the explanatory memorandum to provide a sound justification for the use of delegated legislation. However, in this instance, the explanatory memorandum states:

> [t]he purpose of these items is to reduce the burden on APP entities in assessing whether an overseas recipient is subject to a substantially similar framework under APP 8.2(a), and help establish Australia as a trusted trading partner and support Australian businesses to compete more effectively in international markets.[200]

---

196 Schedule 1, part 6, items 36, 37 and 38. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

197 Australian Privacy Principle 8.1

198 Schedule 1, part 6, item 36, proposed subsection 100(1A).

199 Australian Privacy Principle proposed subprinciple 8.3.

200 Explanatory memorandum, p. 44.

1.173 The committee does not consider that this provides an explanation for the use of delegated legislation in prescribing conditions which are better suited for inclusion in primary legislation.

1.174 The committee requests that an addendum to the explanatory memorandum containing a justification for the inclusion of significant matters in delegated legislation 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.[201]

1.175 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of including significant matters in delegated legislation.

1.176 The committee also draws these provisions to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

201 See *Acts Interpretation Act 1901*, section 15AB.

Bills with no committee comment[202]

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

- Competition and Consumer Amendment (Make Price Gouging Illegal) Bill 2024

[202] This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2024*; [2024] AUSStaCSBSD 205.

Chapter 2
Commentary on ministerial responses

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

Family Law Amendment Bill 2024[203]

Purpose	This bill seeks to amend the *Family Law Act 1975* and make consequential amendments to the *Evidence Act 1995*, *Federal Circuit and Family Court of Australia Act 2021*, *Federal Proceedings (Costs) Act 1981*, *Child Support (Registration and Collection) Act 1988* and *Child Support (Assessment) Act 1989*. Schedule 1 seeks to amend the property framework in the *Family Law Act 1975* to codify aspects of the common law and ensure the economic effects of family violence are considered in property and spousal maintenance proceedings. Schedule 2 seeks to provide a regulatory framework for Children's Contact Services. Schedule 3 seeks to improve case management in family law proceedings by, amongst other matters: permitting the family law courts to determine if an exemption to the mandatory family dispute resolution requirements applies; safeguarding against the misuse of sensitive information in family law proceedings; and amending Commonwealth Information Order powers and expanding the category of persons about which violence information must be provided to the family law courts in child related proceedings. Schedule 4 seeks to insert definitions of 'litigation guardian' and 'manager of the affairs of a party', remake costs provisions, and require superannuation trustees to review actuarial formulas used to value superannuation interests to ensure courts have access to accurate and reasonable valuations.

[203] This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Family Law Amendment Bill 2024, *Scrutiny Digest 13 of 2024*; [2024] AUSStaCSBSD 206.

	Schedule 5 provides for review of the operation of the bill and tabling of a report of the review in the Parliament.
Portfolio	Attorney-General
Introduced	House of Representatives on 22 August 2024
Bill status	Before the Senate

Immunity from civil liability[204]

2.2 The bill provides that no action, suit or proceeding would lie against the Commonwealth or its officers in relation to any act done, or omitted to be done, in good faith in the performance or exercise of, or the purported performance or exercise, of a function, power or authority conferred by the Accreditation Rules.[205]

2.3 In *Scrutiny Digest 11 of 2024* the committee requested the Attorney-General's advice as to remedies available to individuals whose legal rights have been limited to where lack of good faith is shown and the necessity and appropriateness of granting the whole Commonwealth immunity in this context.[206]

Attorney-General's response[207]

2.4 In relation to available legal remedies, the Attorney-General advised that the decisions to be made under the scheme will be set out in the Accreditation Rules, with the government intending that decisions affecting the rights of a party will be subject merits review and judicial review. Other legal mechanisms that may be available to parties include claims in tort, complaints to the Australian Human Rights Commission, or the Compensation for Detriment Caused by Defective Administration Scheme (CDDA).

2.5 Further, the Attorney-General noted that where the government or government officer has acted in bad faith, immunity provisions do not apply.

2.6 In response to the committee's query on the Commonwealth, as a whole, being granted immunity to civil liability, the Attorney-General provided three justifications:

- firstly, if the Commonwealth was not granted immunity it could be held accountable for the actions of its officers, even for actions done in good faith;

---

204 Schedule 2, item 14, proposed section 10AA of the Family Law Act 1975. The committee draws senator's attention to this provision pursuant to Senate standing order 23(1)(a)(i).

205 Proposed section 10AA. The Accreditation Rules are prescribed by the regulations as empowered by section 10A of the *Family Law Act 1975*.

206 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2024* (11 September 2024) pp. 2–4.

207 The minister responded to the committee's comments in a letter dated 23 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 13 of 2024*).

- secondly, as protection against taxpayer money being used to settle claims or damages arising out of lawful and good faith actions taken by government officers;
- finally, to prevent a situation where, if the Commonwealth were subject to lawsuits for every action or decision taken in good faith by its officers, the operation of essential public services would suffer due to constant litigation.

2.7 The Attorney-General cited legal cases which supported the precedent of the Commonwealth as an immune entity, including *Northern Territory v Mengel* (1995) 185 CLR 307 and *Commonwealth v Connell* (1988) 5 NSWLR 218.

Committee comment

2.8 The committee notes the advice that decisions to be made under the scheme and their accompanying review mechanisms will be set out in the Accreditation Rules, and that claims in tort and other remedies are available to affected parties. The committee also welcomes the advice that compensation may be available via the CDDA. However, this does not resolve the committee's concerns in relation to the remedies that are available to affected persons where a decision has been made against their interests in purported good faith.

2.9 In relation to the vicarious liability of the Commonwealth, the committee's view is that it is appropriate for the Commonwealth to be liable for actions taken by its officers who are carrying out functions and making decisions on behalf of the Commonwealth, especially where those decisions may negatively affect individuals. While noting the advice that actions in tort are open to affected parties, the committee considers it is unclear how this would work in practice given the officers and the Commonwealth will have immunity from civil action. Further, the committee does not accept that the impact on public revenue should outweigh an individual's right to seek remedies for adverse actions.

2.10 In light of the above, the committee draws to the attention of senators and leaves to the Senate as a whole the appropriateness of the bill providing that no action, suit or proceeding would lie against the Commonwealth or its officers in relation to any act done under the bill and its legislative instruments.

Privacy[208]

2.11 The bill makes provision for the protection of certain safety-related information held by entrusted persons who are children's contact services (CCS)

---

208 Schedule 2, item 15, proposed section 10KE. The committee draws senators' attention to this provision pursuant to Senate standing order 23(1)(a)(i).

practitioners or businesses.[209] Safety information would be information that relates to the risks of harm to a child or a member of a child's family, or to the identification and management of such risks in relation to the provision of children's contact services.

2.12 The bill sets out a range of exceptions as to when an entrusted person would be able to disclose safety information, including (but not limited to):

- if the disclosure is reasonably necessary for the purpose of complying with law;[210]
- where consent of the information communicated by an individual is provided, dependant on the individual's age;[211] and
- where the entrusted person reasonably believes that disclosure is necessary for the protection of a child from risk of harm, to prevent threat to life or health of a person or to prevent the commission of violence.[212]

2.13 In *Scrutiny Digest 11 of 2024* the committee requested the Attorney-General's advice as to:

- whether children's contact services workers (including volunteers) would have the appropriate skills and experience to assess when protected information must be disclosed, and what training would they be provided with in order to be able to make a fully informed assessment of when it is appropriate to disclose personal information;
- what safeguards are in place to protect privacy and what oversight mechanisms would apply once the information was disclosed; and
- examples of to whom it is intended the information will be disclosed, including how the person or body to whom the information is disclosed will handle the information, and whether further detail could be provided on the face of the bill.[213]

Attorney-General's response[214]

2.14 In relation to Children's Contact Services workers (CCS workers), the Attorney-General advised that minimum requirements for skills, training or other attributes to

---

209 Children's contact services are third-party providers who provide children of separated parents with a safe place to maintain contact with both parents or other family members where it would have otherwise been unmanageable without assistance.

210 Schedule 2, item 15, proposed subsection 10KE(4).

211 Schedule 2, item 15, proposed subsection 10KE(7).

212 Schedule 2, item 15, proposed subsection 10KE(8).

213 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2024* (11 September 2024) pp. 2–4.

214 The minister responded to the committee's comments in a letter dated 23 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 13 of 2024*).

maintain a CCS worker's ability to supervise or interact with children would be included in the Accreditation Rules.

2.15 Further, the Attorney-General advised that the burden lies on service providers to ensure that 'entrusted persons'[215] possess the appropriate skills, experiences, and training to assess when protected information must be disclosed. The Attorney-General provided examples of how service providers may upskill staff for roles within a Children's Contact Service such as long-term tertiary qualifications, training modules, staff training, induction programs or ongoing professional development.

2.16 In relation to safeguards and oversight mechanisms relating to disclosed personal information, the Attorney-General drew the committee's attention to proposed section 10KE of the bill which sets out the definitions of 'entrusted persons' as well as the responsibilities attributed to that class of individual.

2.17 The Attorney-General noted that 'the exact operational measures' for implementing the provisions was the responsibility of service providers, who would be required to comply with guidelines found in the Accreditation Rules, made after the bill's passage through Parliament. In terms of oversight mechanisms, the Attorney-General advised that that a 'comprehensive accreditation framework will be developed in consultation with the sector and key stakeholders', and that providers will remain subject to penalty under section 10KG.

2.18 In providing examples to the committee in relation to whom personal information could be disclosed, the Attorney-General listed 'police, courts, or court-appointed officials, such as Independent Children's Lawyers.' The Attorney-General noted in addition that specific provisions may require other legal obligations for notifying child protection authorities. However, besides these examples, information is only able to be disclosed with consent from the affected party or by authorised personnel within the organisation, as necessary to deliver children's contact services.

2.19 The Attorney-General also noted that the provision did not oblige a CCS to share information outside of any legal obligations.

Committee comment

2.20 The committee thanks the Attorney-General for this response. The committee is concerned with the advice that most, if not all, of the conditions for skills, training or attributes which will qualify a CCS worker to engage with children is being left delegated legislation. The committee reiterates its long-standing scrutiny position that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.21 Noting that CCS workers, including volunteers, would be disclosing safety information that relates to the risks of harm to a child or a member of a child's family,

---

[215] Schedule 2, item 1, definition of 'entrusted person' and item 15, proposed subsection 10KE(2).

or to the identification and management of such risks in relation to the provision of children's contact services, the committee is of the opinion that the requirements for an individual to be qualified in this setting should be set out in primary legislation. In addition, the committee notes that the Attorney-General's response does not include a justification for why these requirements will be set out in delegated legislation.

2.22 The committee does not consider it appropriate in this context for the 'onus' of ensuring entrusted persons for service providers are appropriately qualified to rest on service providers. These matters are more appropriate for parliamentary consideration and should be set out in legislation to ensure that a consistent standard is applied by all CCS providers.

2.23 In relation to the Attorney-General's advice on safeguards and oversight mechanisms for privacy and information disclosure, the committee notes the privacy protections in proposed section 10KE and reiterates its consistent scrutiny concern in leaving significant matters such as privacy protections for child and family information to the Accreditation Rules.

2.24 Finally, the committee welcomes the Attorney-General's examples of classes of persons to whom information is intended for disclosure. The committee also welcomes the confirmation that the provision does not oblige information sharing beyond what is legally required. It is, however, unclear to the committee whether the classes of specified recipients are specified in legislation or merely more generally intended recipients. The committee's preferred position is that such matters should be set out in legislation.

2.25 In light of the above, the committee draws to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed section 10KE regarding issues of privacy and significant matters in delegated legislation.

2.26 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.[216]

Reversals of the evidential burden of proof
Strict liability offences[217]

2.27 The bill imposes a range of offences in relation to a failure for children's contact services to be accredited as per the Accreditation Rules, or for employees of CCS organisations failing to hold accreditation. For example, an individual would commit an offence if they provide a children's contact service, and the Accreditation

---

216 See *Acts Interpretation Act 1901*, section 15AB.

217 Schedule 2, item 15, proposed subsection 10KH(1) – (9). The committee draws senators' attention to these provisions pursuant to Senate standing order 23(1)(a)(i).

Rules provide for accreditation of CCS practitioners, and the individual is not a CCS practitioner.[218] The offence would carry a penalty of 50 penalty units and would be subject to strict liability. Further, the bill provides offence-specific defences for these offences which reverse the evidential burden of proof.[219] The defences require that the defendant provide evidence about their mistaken but reasonable belief about certain matters relevant to the offence.

2.28 In *Scrutiny Digest 11 of 2024* the committee requested an addendum to the explanatory memorandum containing a justification for the strict liability and reversed burden provisions within the bill and left the matter as a whole to the Senate for consideration.[220]

Attorney-General's response[221]

2.29 The Attorney-General advised that the requested addendum would be provided as soon as possible, and noted this would happen following consultation with the Parliamentary Joint Committee on Human Rights, should that committee also suggest amendments to the explanatory memorandum.

Committee comment

2.30 The committee welcomes the Attorney-General's undertaking to provide an addendum to the explanatory memorandum.

---

218 Schedule 2, item 15, proposed subsection 10KH(1).

219 Schedule 2, item 15, proposed subsections 10KH(4),(7) and (9).

220 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2024* (11 September 2024) pp. 7–9.

221 The minister responded to the committee's comments in a letter dated 23 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 13 of 2024*).

Parliamentary Workplace Support Service Amendment (Independent Parliamentary Standards Commission) Bill 2024[222]

Purpose	The bill seeks to amend the *Parliamentary Workplace Support Service Act 2023* to establish two bodies: the Independent Parliamentary Standards Commission (IPSC) and the Parliamentary Joint Committee on Parliamentary Standards. The bill also seeks to amend a number of other Acts which interact with the IPSC's responsibilities and functions as an investigative entity, such as the *Freedom of Information Act 1982* and the *National Anti-Corruption Commission Act 2022*.
Portfolio	Finance
Introduced	House of Representatives on 21 August 2024
Bill status	Received the Royal Assent on 17 September 2024

Immunity from civil liability[223]

2.31 This bill seeks to confer immunity from liability in civil proceedings to Parliamentary Workplace Support Services (PWSS) and IPSC officials, including the PWSS Chief Executive Officer (CEO), the Commissioners of the IPSC, the staff of the PWSS, persons whose services are made available to the PWSS and IPSC and consultants engaged to assist the IPSC or a Commissioner or the PWSS in the performance of their functions. The immunity from liability is only applicable to an act done or omitted to be done in good faith in the exercise of the person's functions, powers or duties.

2.32 In *Scrutiny Digest 11 of 2024* the committee requested advice on recourse available to individuals affected by actions by PWSS or IPSC officials. In particular, the committee sought clarification for whether the Commonwealth was, or was not, exempt from avenues for recourse due to actions of negligence or defamation undertaken by its officials.[224]

---

222 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Parliamentary Workplace Support Service Amendment (Independent Parliamentary Standards Commission) Bill 2024, *Scrutiny Digest 13 of 2024*; [2024] AUSStaCSBSD 207.

223 Schedule 1, item 51, proposed section 40C. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

224 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2024* (11 September 2024), pp. 18–19.

Minister for the Public Service's response[225]

2.33 The minister advised that the immunity provision only applies to individuals and not the Commonwealth. As such, affected persons are able to seek remedy from the Commonwealth even in situations where they are unable to seek remedy from a protected individual who has acted in good faith.

2.34 Further, the minister noted two other avenues for remedy available to individuals. These remedies include judicial review under legislation and complaints on administrative actions taken by the PWSS and IPSC to the Commonwealth Ombudsman.

Committee comment

2.35 The committee thanks the minister for this response.

2.36 **On the basis of the advice provided to the committee by the minister that the immunity provisions are applicable to individuals and not the Commonwealth, which leaves affected persons able to seek a remedy from the Commonwealth, the committee makes no further comment on this bill.**

2.37 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.[226]

---

225 The minister responded to the committee's comments in a letter dated 26 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 13 of 2024*).

226 See *Acts Interpretation Act 1901*, section 15AB.

Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024[227]

Purpose	This bill seeks to amend various Acts to provide for all claims for compensation and rehabilitation received from 1 July 2026 to be determined under the *Military Rehabilitation and Compensation Act 2004*. To support this 'single ongoing Act' model, the *Veterans' Entitlements Act 1986* and the *Safety, Rehabilitation and Compensation (Defence-Related Claims) Act 1988* are proposed to continue in a limited form and be closed to new claims for compensation and rehabilitation.
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 3 July 2024
Bill status	Before the House of Representatives

Standing appropriations[228]

2.38 This bill seeks to insert the following new purposes for which the Consolidated Revenue Fund may be appropriated:

- compensation under an instrument made by the Military Rehabilitation and Compensation Commission (the Commission) relating to the obtaining of financial and legal advice by persons for the purposes of the *Military Rehabilitation and Compensation Act 2004* (MRC Act);[229]
- advancing payments for compensation a person is expected to become entitled to in respect of a journey or accommodation related to their treatment;[230] and
- fees and allowances of witnesses summoned to appear before the Veterans' Review Board.[231]

---

227 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024, *Scrutiny Digest 13 of 2024*; [2024] AUSStaCSBSD 208.

228 Schedule 1, item 200, proposed paragraph 423(da); Schedule 2, item 106, proposed paragraph 423(caa) and Schedule 3, item 14, proposed new paragraph 423(cb). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

229 Schedule 1, item 200, proposed paragraph 423(da), in relation to a legislative instrument made under proposed new section 424M (to be inserted by Schedule 1, item 201).

230 Schedule 2, item 106, proposed paragraph 423(caa) in relation to payments made in accordance with proposed section 291A (to be inserted by Schedule 2, item 103).

231 Schedule 3, item 14, proposed new paragraph 423(cb) in relation to fees payable in relation to proposed section 353T (to be inserted by Schedule 3, item 10).

2.39 In *Scrutiny Digest 9 of 2024* the committee requested the minister's advice as to mechanisms to report to the Parliament on expenditure authorised by the standing appropriation.[232]

Minister for Veterans' Affairs' response[233]

2.40 The minister drew the committee's attention to the annual financial statements for the Department of Veterans' Affairs (the Department) which are tabled in Parliament as part of the Department's annual report.

2.41 The minister also noted the Department's portfolio budget statement, and the Department of Finance's publication, *Budget Paper No. 4 –Agency Resourcing*, as sources of information on expenditure from standing appropriations, special appropriations as well as actual and forecasted expenditure.

Committee comment

2.42 The committee thanks the minister for this response. The committee notes the minister's advice that the annual financial statements of the Department contain information about special appropriations and are tabled in Parliament. The committee also notes the minister's advice in relation to estimated expenditure from special appropriations being included in the Department of Finance's publications as part of the annual budget process.

2.43 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation,[234] the committee considers that this information relating to mechanisms to report on expenditure authorised by the standing appropriation should be included in the explanatory memorandum and requests that the explanatory memorandum be updated to include it.

2.44 The committee concludes its examination of this matter and makes no further comment.

Incorporation of external materials as existing from time to time[235]

2.45 This bill seeks to amend the MRC Act to provide that an instrument made for the purpose of determining a class of persons eligible for services under the Veteran

---

232 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 26–27.

233 The minister responded to the committee's comments in a letter dated 20 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 13 of 2024*).

234 See *Acts Interpretation Act 1901*, section 15AB.

235 Schedule 2, item 124, proposed subsection 287B(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

Suicide Prevention Pilot may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.[236]

2.46 In *Scrutiny Digest 9 of 2024* the committee requested the minister's advice on whether the documents applied, adopted or incorporated by reference would be freely available, and the necessity of applying these documents in force or existing from time to time instead of when the instrument was first made.[237]

Minister for Veterans' Affairs' response[238]

2.47 The minister advised that it is the Department's practice to freely publish any documents incorporated by reference into legislative instruments.

2.48 On the matter of the necessity to apply these documents in force or as existing from time to time, the minister advised that proposed subsection 287B(3) mirrors the drafting of the currently in-force subsection 88B(3) of the *Veterans' Entitlements Act 1986* (the Veterans' Entitlements Act). The minister referred to the following justification in the explanatory memorandum for the Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 2) Bill 2018 (which inserted subsection 88B(3) into the Veterans' Entitlements Act) which the minister believes remains relevant for proposed subsection 287B(3):

> The subsection would ensure that any document incorporated into an instrument under subsection 88B(2) in relation to the Veteran Suicide Prevention pilot is automatically incorporated into and effective for this section.[239]

Committee comment

2.49 The committee thanks the minister for this response. The committee notes the minister's advice that the Department's practice is to publish freely any documents that are incorporated by reference. The committee also notes the justification provided as to why documents are incorporated as existing from time to time.

2.50 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation,[240] the committee considers that this information should be included

---

236 Schedule 2, item 124, proposed subsection 287B(3).

237 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) p. 28.

238 The minister responded to the committee's comments in a letter dated 20 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 13 of 2024*).

239 Explanatory memorandum to the Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 2) Bill 2018, p. 14.

240 See *Acts Interpretation Act 1901*, section 15AB.

in the explanatory memorandum and requests that the explanatory memorandum be updated to include it.

2.51 The committee concludes its examination of this matter and makes no further comment.

Undue trespass on rights and liberties
Broad scope of offence provisions
Significant penalties[241]

2.52 The bill seeks to make it an offence for a person to undertake a number of actions that would be deemed to be contempt of the Veterans' Review Board (the Board).[242] The Board is a specialist tribunal that reviews decisions relating to veterans' entitlements and compensation. The offences include:

- engaging in conduct that insults another person in, or in relation to, the exercise of their powers or functions under the MRC Act (relating to review of original determinations by the Board);
- engaging in conduct that interrupts the proceedings of the Board;
- creating a disturbance that is in or near a place where the Board is sitting;
- takes part in creating or continuing a disturbance that is in or near a place where the Board is sitting;
- engaging in conduct that, if the Board were a court of record, constitute a contempt of that court.

2.53 In *Scrutiny Digest 9 of 2024* the committee requested the minister's advice on a range of matters such as:

- the appropriateness of the penalties proposed in subsection 353L and their broad equivalence to similar offences in Commonwealth legislation;
- guidance on the intended operation of the proposed offences under subsection 353L;
- the necessity and appropriateness of limiting freedom of expression and the right to protest, including why this offence extends to disturbances where the Board is sitting but also to 'near a place' where they are sitting; and
- the necessity to criminalise conduct such as interrupting a proceeding, creating a disturbance, or any conduct that insults a person in relation to their

---

241 Schedule 3, item 10, proposed section 353L. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

242 This seeks to remake an existing provision, namely the *Veterans Entitlements Act 1986*, section 170.

powers and functions in addition to proposed subsection 353L(5) which further criminalises engaging in conduct that constitutes contempt of the Board.[243]

Minister for Veterans' Affairs' response[244]

2.54 The minister advised the committee that the government are considering suggested amendments by the Parliamentary Joint Committee on Human Rights[245] in relation to the offence provisions under proposed section 353L. In addition, the minister advised that the government would consider any recommendations that may arise out of the Senate Standing Committee on Foreign Affairs, Defence and Trade's inquiry into the bill.[246]

Committee comment

2.55 The committee thanks the minister for this response and welcomes the minister's undertaking to consider amendments suggested by the Parliamentary Joint Committee on Human Rights. That committee notes that the proportionality of the measure may be assisted were the bill amended to remove subsection 353L(1) to (4), which would remove all offences except the contempt of Board offences, or at a minimum remove subsection 353L(3) and (4), which make it an offence to create or take part in creating or continuing, a disturbance in or near a place where the Board is sitting. They also recommended that the bill be amended to provide that the conduct each offence seeks to criminalise must reach such a level that the Board is effectively unable to operate.[247]

2.56 However, the committee considers the minister's response did not address this committee's questions in relation to the breadth of the offence provisions, the appropriateness of the penalties currently imposed and the necessity of criminalising certain conduct, such as 'causing a disturbance'. It remains unclear to the committee what part of the amendments proposed by the Parliamentary Joint Committee on Human Rights will be accepted and when they will be introduced.

2.57 As such, the committee considers that undertaking to consider amendments is not sufficient to address any of its present concerns. The committee remains concerned that there is still a lack of clarity as to how the provisions under proposed section 353L should be understood, such as 'creating a disturbance', 'continuing a

---

243 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 29–31.

244 The minister responded to the committee's comments in a letter dated 20 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 13 of 2024*).

245 Parliamentary Joint Committee on Human Rights, *Report 6 of 2024* (24 July 2024) pp. 10–15.

246 See the Senate Standing Committee on Foreign Affairs, Defence and Trade's inquiry into Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 [Provisions].

247 Parliamentary Joint Committee on Human Rights, *Report 6 of 2024* (24 July 2024) pp. 14–15.

disturbance' and 'interrupts the proceedings of the board'. Further, the committee also remains concerned that these offences are subject to custodial penalties that appear to be disproportionate to the conduct that is being criminalised.

2.58 The committee welcomes the minister's advice that the government will consider amendments made by the Parliamentary Joint Committee on Human Rights in relation to section 353L of the bill that deal with many of the matters raised by this committee.

2.59 However, without further detail and in the absence of the specific amendments being made, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the breadth of the offence provisions under proposed section 353L, the application of custodial penalties to these offences, and the necessity and appropriateness of criminalising conduct relating to freedom of expression.

Reversal of the evidential burden of proof
Strict liability offences[248]

2.60 The bill proposes to introduce the following offences:

- failure of a person served with a summons to appear before the Board as required;[249]
- failure of a person appearing at a hearing to take an oath or make an affirmation;[250]
- failure of a witness to answer a question required by the Board;[251]
- failure of a person served with a summons to comply with a requirement to produce a document.[252]

2.61 All of these proposed offences would be offences of strict liability with a defence of reasonable excuse available to the defendant, subject to six months imprisonment or 30 penalty units. These offences largely mirror existing provisions in the Veterans' Act.[253]

2.62 In *Scrutiny Digest 9 of 2024* the committee requested the minister's advice as to the necessity and appropriateness of imposing strict liability on these offences, with

---

248 Schedule 3, item 10, proposed sections 353H and 353J. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

249 Schedule 3, item 10, proposed section 353H.

250 Schedule 3, item 10, proposed subsection 353J(1).

251 Schedule 3, item 10, proposed subsection 353J(2).

252 Schedule 3, item 10, proposed subsection 353J(3).

253 See *Veterans' Entitlements Act 1986*, sections 168 and 169 (note the existing provisions have a penalty of 6 months imprisonment or 10 penalty units or both).

note to the maximum penalty of six months imprisonment and the imposition of the evidential burden on a defendant.[254]

Minister for Veterans' Affairs' response[255]

2.63 The minister advised that proposed sections 353H and 353J are modelled on existing sections 168 and 169 of the Veterans' Entitlements Act, and that one of the government's objectives with the bill is to merge the provisions which govern the operation of the Veterans' Review Board into the *Military Rehabilitation and Compensation Act 2004* as the singular, ongoing Act.

2.64 The minister noted that retaining the substance of these provisions provides certainty to both the Veterans' Review Board and its users, and therefore places further changes to these provisions outside the scope of the current reform process. However, the minister did note that the committee's proposal may be considered in the future.

Committee comment

2.65 The committee thanks the minister for this advice. While the committee acknowledges the minister's advice that the committee's proposal may be considered in the future, the committee does not consider that this acknowledges any of its present concerns.

2.66 The committee also does not consider that modelling these offence provisions on existing provisions of the Veterans' Entitlements Act justifies the necessity of making the offences in proposed sections 353H and 353J offences of strict liability or reversing the evidential burden of proof. The committee particularly remains deeply concerned that custodial penalties may be imposed in relation to offences that are subject to strict liability.

2.67 Further, the committee notes that these provisions were inserted into the Veterans Entitlements Act in 2001 and have since only been amended in 2016 to increase the monetary penalty amounts applying to these offences.[256] It is not clear to the committee how reviewing the appropriateness of these offence provisions is outside of the scope of the current reform process. The committee reiterates its position that it is not appropriate for these offences to be of strict liability when custodial penalties are imposed in relation to them and when the evidential burden of proof is also reversed.

2.68 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying strict liability to

---

254 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 31–34.

255 The minister responded to the committee's comments in a letter dated 20 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 13 of 2024*).

256 Items 499 and 500, *Statute Update Act 2016*.

offence provisions under proposed sections 353H and 353J that are subject to a custodial penalty.

Broad delegation of administrative powers[257]

2.69 Currently, the Veterans' Act provides that the minister may delegate to a commissioner of the Military Rehabilitation and Compensation Commission (the Commission) or person appointed or engaged under the *Public Service Act 1999* any or all of the minister's powers.[258] This bill seeks to repeal and remake this with a power to allow the minister to delegate any or all of the minister's powers to a commissioner or an APS employee.[259] The Veterans' Act and the MRC Act also currently provide that the Commission may delegate any or all of its powers to a commissioner, a member of staff assisting the Commission, an APS employee or a contractor.[260] The bill would amend this to provide the Repatriation Commission may delegate any or all of its functions or powers to a commissioner, a member of staff assisting the Commission, or a contractor engaged by the Commission.[261]

2.70 In *Scrutiny Digest 9 of 2024* the committee requested the minister's advice on the necessity and appropriateness of two matters:

- the delegation of any or all of the minister's powers to any APS employee under proposed subsection 212(1) of the bill; and
- the delegation of any or all of the Commission's powers to contractors engaged by the Commission under proposed section 360DB.[262]

Minister for Veterans' Affairs' response[263]

2.71 The minister advised that it would not be practical, and would create material delays for claims decision making, if delegations were limited to Senior Executive Staff.

---

257 Schedule 3, item 105, proposed subsection 212(1) and Schedule 4, item 23, proposed section 360DB. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii).

258 *Veterans' Entitlements Act 1986*, section 212. A person engaged under the *Public Service Act 1999* refers to an APS employee under section 22 of that Act.

259 Schedule 3, item 105, proposed subsection 212(1).

260 *Veterans' Entitlements Act 1986*, section 213 and *Military Rehabilitation and Compensation Act 2004*, section 384.

261 Schedule 4, item 23, proposed section 360DB.

262 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 34–35.

263 The minister responded to the committee's comments in a letter dated 20 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 13 of 2024*).

2.72 The minister provided the context that as at 31 July 2024, 'the Department had 77,992 claims on hand, and made decisions on over 100,000 claims in 2023-24.' Due to this high volume of claims, which require individual discretion in their assessment, the minister emphasised the need for the Repatriation Commission and the minister to delegate their functions and powers more broadly.

Committee comment

2.73 The committee thanks the minister for this response. The committee notes the advice that a large number of claims have been received and that decisions need to be made in relation to these in a timely manner, which requires delegations to be made to junior officials.

2.74 However, it is still unclear to the committee why the Commission's powers can be delegated to contractors under proposed section 360DB. Further, while the committee acknowledges the need for delegations to APS employees below the Senior Executive Service level, the committee considers that safeguards such as a requirement for the delegate to possess necessary skills, qualifications or experience should have been included on the face of the bill and in the explanatory memorandum.

2.75 The committee recommends that consideration be given to amending the bill to require the Commission to be satisfied that a person who has been delegated the Commission's powers possesses the necessary skills, qualifications or experience to perform the delegated functions or exercise the delegated powers.

2.76 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the minister and the Commission's powers being delegated to any APS employees and to contractors under proposed sections 212 and 360DB respectively of the bill, with no safeguards in relation to skills, qualifications or experience being included on the face of the bill.

Chapter 3
Scrutiny of standing appropriations[264]

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.[265] It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

> (iv) inappropriately delegate legislative powers; or
>
> (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.[266]

3.4 The committee draws the following bill to the attention of senators:

- Aged Care Bill 2024[267]

Senator Dean Smith
Chair

---

264 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, ; [2024] AUSStaCSBSD 209.

265 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*.

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

267 Clause 598 of the bill provides that amounts payable by the Commonwealth are to be paid out of the Consolidated Revenue Fund which is appropriated accordingly.