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Committee for the Scrutiny of Bills

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Membership of the committee

Current members

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

The committee notes with deep sadness the recent passing of Emeritus Professor James (Jim) Davis, who served as legal adviser to the committee from 1983 to 2008.

The committee pays tribute to the outstanding contribution of Professor Davis as the committee's longest serving legal adviser, having supported the committee for 25 years.

Committee members, along with the committee's secretariat and current legal adviser, extend their condolences to Professor Davis' family and friends.

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.

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1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report snapshot, *Scrutiny Digest 5 of 2024*; [2024] AUSStaCSBSD 68.

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.

Migration Amendment (Removal and Other Measures) Bill 2024[2]

Purpose	The Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill) amends the *Migration Act 1958* (the Migration Act) to set out clear legislative expectations in relation to the behaviour of non-citizens who are on a removal pathway. As amended, the Act will make clear that a non-citizen who is on a removal pathway is expected to voluntarily leave Australia, and will cooperate with steps taken under the Migration Act for the purposes of arranging the non-citizen's lawful removal from Australia. The bill also empowers the minister to designate countries as a 'removal concern country' by legislative instrument, with the effect of invalidating visa applications from citizens of that country located outside of Australia.
Portfolio	Home Affairs
Introduced	House of Representatives on 26 March 2024
Bill status	Before the Senate

Undue trespass on rights and liberties
Significant matters in delegated legislation[3]

1.2 Item 3 of Schedule 1 to the bill would insert proposed section 199B into the *Migration Act 1958* (the Migration Act), which determines the categories of persons considered 'removal pathway non-citizens'. Paragraph 199B(1)(d) specifies that this includes lawful non-citizens who hold visas prescribed by legislative instrument for the purposes of paragraph 199B(1)(d).

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2 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Removal and Other Measures) Bill 2024, *Scrutiny Digest 5 of 2024*; [2024] AUSStaCSBSD 69.

3 Schedule 1, item 3, proposed sections 199B and 199E; and Schedule 2, item 4, proposed subsection 197D(1). The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i) and (iv).

1.3 In this instance, it is unclear to the committee on what basis additional visas may be prescribed for the purposes of paragraph 199B(1)(d). The explanatory memorandum provides the following explanation:

> Paragraph 199B(1)(d) is intended to provide the Government with flexibility to prescribe categories of visa holders who could be brought under the meaning of removal pathway non-citizen, if necessary to do so in the future. Any regulations made for the purposes of this paragraph would be a disallowable legislative instrument for the purposes of the Legislation Act 2003, and appropriately subject to parliamentary scrutiny. The same safeguards in relation to the exercise of the Minister's power under new section 199C—including those set out in new section 199D—would apply in relation to the holder of any visa prescribed for the purposes of this paragraph.[4]

1.4 While noting this explanation, the committee is of the view that the ability to expand the scope of people that may be subject to removal pathway directions is a significant matter that would more appropriately be dealt with by way of primary rather than delegated legislation. This is particularly the case due to the fact that, as discussed below, the failure to comply with a removal pathway direction is a serious offence carrying a severe maximum penalty and a minimum penalty of 1 year imprisonment. The committee does not consider that the justification provided in the explanatory memorandum is sufficient, noting that the need for flexibility in the circumstances of the legislative scheme is not fully explained or balanced against the potential impact that the provision could have on individuals. The committee's concerns are heightened in this instance as paragraph 199B(1)(d) is applicable to lawful non-citizens who have been granted a visa permitting residence in Australia, who may have lived in Australia lawfully for an extended period and have no certainty or clarity as to when a visa may be subject to a removal pathway direction.

1.5 Proposed subsection 199C(1) provides the minister with the power to issue written directions to the removal pathway non-citizen cohort, with the directions set out in the subsection as an exhaustive list. Proposed subsection 199C(2) further empowers the minister to issue directions to do or not do a thing if satisfied the measure is reasonably necessary to determine whether there is a real prospect of removal under section 198 becoming practicable in the reasonably foreseeable future, or to facilitate removal under section 198. Proposed subsection 199C(4) provides that the direction must specify the period of time in which the person either must do the directed thing, or during which they must not do the directed thing. Given the significance of these measures on individual rights and liberties, the committee considers that the legislation should set out an appropriate minimum time period, such as, for example, 60 days, in which to allow the person to take steps to comply and to seek legal advice.

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4 Explanatory memorandum, p. 8.

1.6 Item 3 of Schedule 1 to the bill would also insert proposed subsection 199E(1), which creates an offence where a person who is a removal pathway non-citizen and has been given a removal pathway direction refuses or fails to comply with that direction. This offence carries a maximum penalty of 5 years imprisonment or 300 penalty units. Subsection 199E(2) also requires that the court impose a mandatory minimum sentence of 12 months imprisonment on an individual who is convicted of an offence under subsection 199E(1).

1.7 The explanatory memorandum provides the following justification for the imposition of a high maximum penalty and a mandatory minimum sentence:

> It reflects the seriousness of the offence in the context of the integrity of Australia's migration system, where a removal pathway non-citizen does not cooperate with, or otherwise frustrates, legitimate and lawful efforts to remove them under the Migration Act. The mandatory minimum term of 12 months' imprisonment on conviction for the offence is also appropriate, where the Migration Act, as amended, makes clear the expectation that a removal pathway non-citizen will voluntarily leave Australia, and that if they do not leave voluntarily, they will cooperate with removal efforts and not attempt to obstruct or frustrate their lawful removal.[5]

1.8 While the committee acknowledges that the penalty and minimum sentence are intended to reflect the seriousness of the offence and act as deterrents, the committee reiterates its longstanding view that the use of mandatory minimum sentences impedes judicial discretion.[6] The committee reiterates that the courts should not be limited in their ability to impose sentences with regard to the circumstances of the offending.

1.9 Proposed subsection 199E(3) provides that subsection 199E(1) does not apply where a person has a reasonable excuse for refusing or failing to comply with the removal pathway direction. Proposed subsection 199E(4) provides examples of what may not constitute reasonable excuses, which included a genuine fear of suffering persecution or significant harm if a person is removed to a particular country[7] and being or claiming to be a person in respect of whom Australia has non-refoulement obligations.[8] The explanatory memorandum does not provide any guidance as to how a reasonable excuse may be understood and states:

> There are restrictions in section 199D on the giving of a removal pathway direction to a non-citizen in relation to whom a protection finding has been made where the direction relates to the country with respect to which the finding was made, or who has made an application for a protection visa that is not finally determined. Those are matters that constrain the Minister's

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5 Explanatory memorandum, p. 13.

6 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023) p. 13.

7 Proposed paragraph 199E(4)(a).

8 Proposed paragraph 199E(4)(b).

> power to make a direction. However, where no such limitation is engaged, subsection 199E(4) makes it clear that certain subjectively-held fears do not amount to a 'reasonable excuse' for the purposes of subsection 199E(3).[9]

1.10 While acknowledging that the inclusion of this reasonable excuse defence is a safeguard, the committee is of the view that it may also suggest that the power of the minister to give directions under proposed section 199C may be overly broad. In the context of an offence carrying such a significant maximum penalty and a mandatory minimum sentence, the committee considers that there should be some guidance as to when an affected person will not be subject to these penalties. The breadth of the term 'reasonable excuse' may result in persons complying with directions even when it may be lawful for them to refuse to do so.

1.11 While the committee acknowledges that the legislation provides examples of when a refusal does not constitute a reasonable excuse, the committee considers that many of the matters that could be taken to be reasonable excuses would have been more appropriately dealt with by better delimitation of the directions which can be lawfully given by the minister. For example, the provision could specify that the minister may only give directions with which it is possible to comply, cannot give a direction to produce a document the non-citizen does not have or which has been destroyed, or must not give directions that do not relate to a purpose which is to enable removal.

1.12 Finally, item 5 of Schedule 1 to the bill provides that paragraphs 199B(1)(b) and 199B(1)(c) apply in relation to a non-citizen who holds a visa, whether the visa was granted before, on or after the commencement of these measures.

1.13 In addition, item 4 of Schedule 2 to the bill would repeal and replace subsection 197D(1) of the Migration Act. Section 197D of the Migration Act provides that a protection finding can be revisited in certain circumstances, when the circumstances of the country of origin or the protection visa holder have changed. Item 3 also amends existing section 197C to make consequential and machinery changes to give effect to the expansion of the minister's power to revisit protection visa decisions.

1.14 The effect of these amendments is to empower the minister to revisit the circumstances of an existing protection decision for removal pathway non-citizens and determine whether that person is no longer a person owed protection.

1.15 The explanatory memorandum explains the operation of these provisions:

> Section 197D has been amended by items 4-7 of this Schedule so as to enable the revisitation of a protection finding in relation to a broader range of non-citizens. As well as unlawful non-citizens to whom section 198 applies, amended section 197D now applies to removal pathway non-citizens, including holders of Subclass 070 (Bridging (Removal Pending))

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9 Explanatory memorandum, p. 13.

> visas and Subclass 050 (Bridging (General)) visas granted on 'final departure' grounds. Where the circumstances of the person or the country in relation to which a protection finding has been made have changed, it may be necessary to revisit the protection finding. If under subsection 197D(2) a decision is made to set aside the protection finding, the removal of the non-citizen will, or would, no longer be prevented by subsection 197C(3).
>
> A protection finding made with respect to a non-citizen who is not a removal pathway non-citizen will not be able to be revisited. The focus of this amendment, and this Bill, is on facilitating the lawful removal of non-citizens who are on a removal pathway, and apply only in circumstances where a protection finding has not been made in relation to the non-citizen, or where the Minister determines that a non-citizen is no longer a person in respect of whom any protection finding would be made.[10]

1.16 This has the effect of applying existing section 197D of the Migration Act to non-citizens if:

- they are unlawful, or a lawful non-citizen of a kind mentioned in new paragraphs 199B(1)(b),(c) or (d); and
- they have made a valid application for a protection visa that has been finally determined; and
- a protection finding was made, regardless of whether the visa was refused, granted or cancelled.

1.17 While acknowledging that the power to revisit and overturn protection visa decisions was already provided for in the Migration Act, the committee is concerned that the amendments made to sections 197C and 197D are expanding the classes of persons for whom the minister is empowered to overturn a protection decision. This is clearly a significant and rights affecting matter and it is not clear to the committee why such a power is necessary as it has not been fully explained in the explanatory memorandum. It is also unclear to the committee whether any procedural fairness protections apply in relation to any decisions made by the minister to overturn an existing protection decision.

1.18 The committee requests the minister's response to the committee's scrutiny concerns and suggested alternative approaches, outlined above, and notes that such a response could also be provided to the Senate during its consideration of the bill.

1.19 The committee otherwise draws these matters to the attention of senators and leaves to the Senate as a whole the appropriateness of the provisions.

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[10] Explanatory memorandum, p. 18.

Significant matters in delegated legislation

Broad discretionary powers[11]

1.20 Item 3 of Schedule 1 to the bill would insert proposed section 199F into the Migration Act, to empower the minister to designate a country as a 'removal concern country' by legislative instrument. Proposed subsection 199F(1) provides that the minister can make such a determination if they consider it in the national interest to do so. Proposed subsection 199F(2) provides that the minister must first consult with the Prime Minister and the minister administering the *Diplomatic Privileges and Immunities Act 1967.* Proposed subsection 199F(5) would provide that the rules of natural justice do not apply to the exercise of ministerial power to designate a removal concern country or to revoke an existing designation.

1.21 Item 3 of Schedule 1 to the bill would also insert proposed section 199G. Proposed subsection 199G(1) would provide that an application for a visa by a non-citizen is not a valid application if the applicant is a citizen of a designated removal concern country and is outside Australia at the time of application. Proposed subsection 199G(3) provide that the minister can designate a class of persons or visa applicants for the purposes of proposed paragraphs 199G(2)(e) and (f), which means that the minister can declare further exceptions to the visa ban by legislative instrument, and with no criteria for consideration set out in the primary legislation.

1.22 Some exceptions are built into the provision, including, for example, proposed subsection 199G(2) which provides that the visa application bar does not apply to spouses, de facto partners or dependent children of Australian citizens, permanent visa holders, or persons who usually reside in Australia without time limits. Proposed subsection 199G(4) also provides that minister may provide that proposed subsection 199G(1) does not apply, and allow a person to apply for a visa, if the minister thinks it is in the national interest to do so. However, proposed subsection 199G(8) provides that the minister is not required to consider a request made under proposed subsection 199G(1).

1.23 The committee is concerned that such a significant matter is being left to the broad and unfettered discretion of the minister and is to be set out in delegated legislation. The committee considers that the designation of a country as a 'removal concern country', the effect of which is to effectively ban those citizens from applying for an Australian visa, is a significant matter which is more appropriate for primary legislation and the full parliamentary consideration afforded to Acts of parliament. A legislative instrument, made by the Executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.24 It is also unclear to the committee on a reading of the bill and the explanatory memorandum whether the minister may designate multiple countries as removal

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11 Schedule 1, item 3, proposed sections 199F and 199G. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii) and (iv).

concern countries under a single instrument made under proposed section 199F, or is restricted to only designate a single country in each instrument. Noting the impact that designating multiple countries within a single instrument could have on the efficacy of parliamentary scrutiny of such legislative instruments, the committee seeks advice on this matter.

1.25 The committee requests the minister's response to the committee's scrutiny concerns, outlined above, and notes that such a response could also be provided to the Senate during its consideration of the bill.

1.26 The committee otherwise draws these matters to the attention of senators and leaves to the Senate as a whole the appropriateness of the provisions.

Parliamentary scrutiny[12]

1.27 From a scrutiny perspective, the committee notes with concern the speed with which this bill is anticipated to pass the Parliament. The bill was introduced in the House of Representatives on 26 March 2024 and passed by that House in just over two hours. While the committee welcomes that senators had the opportunity to question departmental officials in a hearing of the Legal and Constitutional Affairs Legislation Committee, later in the day on 26 March, the committee notes that the truncated time between introduction of the bill and the hearing may have impacted the ability of senators to meaningfully engage with the bill, in order to scrutinise the bill to the fullest extent.

1.28 The committee notes that the timeline for the passage of the bill also impacts the ability of this committee to undertake its usual scrutiny process, including to engage in meaningful dialogue with the Executive in order to address any possible concerns.

1.29 The committee is of the view that truncated parliamentary processes by their nature limit parliamentary scrutiny and debate. This is of particular concern in relation to bills that may seriously impact on personal rights and liberties.

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[12] The committee draws senators' attention to this matter pursuant to Senate standing order 24(1)(a)(v).

1.30 The committee notes that there has recently been a number of significant changes to the legislative framework for migration, with each such case being rapidly proposed to and passed by the Parliament outside of the normal processes. Such rapid changes prevent certainty in the law, which is of concern noting that the changes in this bill, as discussed in this entry, may have a significant impact on the rights and liberties of the individuals affected.[13]

1.31 The committee notes that the standing orders of both houses of the Parliament with respect to legislation are designed in order to provide members of the Parliament with appropriate time to consider and reconsider the proposals contained in the bills.

1.32 While the procedure to be followed in the passage of legislation is ultimately a matter for each house of the Parliament, the committee reiterates its consistent scrutiny view that legislation, particularly legislation that may trespass on personal rights and liberties, should be subject to a high level of parliamentary scrutiny.

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13 See, for example, the committee comments in relation to the Migration Amendment (Bridging Visa Conditions) Bill 2023 and the Migration Amendment (Bridging Visa Conditions and Other Measures Bill 2023, as well as the significant amendments to the latter bill. Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023) pp. 7–27; Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (25 February 2024) pp. 55–66.

National Cancer Screening Register Amendment Bill 2024[14]

Purpose	The bill seeks to amend the *National Cancer Screening Register Act 2016* to add lung cancer to the definition of 'designated cancer' and in the coverage of the National Cancer Screening Register.
Portfolio	Health
Introduced	House of Representatives on 21 March 2024
Bill status	Before the House of Representatives

Privacy[15]

1.33 The *National Cancer Screening Registration Act 2016* (the Act) sets up the National Cancer Screening Register (the Register) as a register of information to support the National Cervical Screening Program and the National Bowel Cancer Screening Program. To support a new National Lung Cancer Screening Program, item 1 of Schedule 1 to the bill seeks to amend section 4 of the Act to add 'lung cancer' to the definition of 'designated cancer'. Item 2 of Schedule 1 seeks to insert subsection 10(3) into the Act to provide that the Register may include information relating to individuals in connection with screening associated with lung cancer.

1.34 As the Register will hold an individual's private health information, this bill engages the right to privacy. Where a bill provides for the collection, use or disclosure of personal information, the committee expects that the explanatory materials to the bill should address why it is appropriate to do so, what safeguards are in place to protect the personal information, and whether these are set out in law or policy.

1.35 The statement of compatibility explains:

> Adding lung cancer as a designated cancer will extend the existing protections in the Act for the handling of information to lung cancer screening information held in the Register. These protections include prohibiting the recording, use or disclosure of personal information in the Register in connection with the NLCSP outside of the authorisations or exceptions set out in the Act. These limited authorisations and exceptions ensure that personal information is only collected, recorded, used or disclosed to or from the Register for specific purposes or in specific circumstances.

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14 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Cancer Screening Register Amendment Bill 2024, *Scrutiny Digest 5 of 2024*; [2024] AUSStaCSBSD 70.

15 Schedule 1, item 2. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

> Adding lung cancer as a designated cancer in the Act will enable the existing data breach framework to be extended to individuals' personal information relating to lung cancer screening held in the Register. This framework includes requirements for notification and handling of contraventions and possible contraventions in relation to personal information included in the Register.
>
> Adding lung cancer as a designated cancer in the Bill will also flow through the existing authorisations in subsection 17(3) of the Act for the collection, recording, use or disclosure of protected information in the Register, to protected information associated with the NLCSP.[16]

1.36 The committee previously commented on privacy concerns in relation to the bill for the Act, the National Cancer Screening Registration Bill 2016, in *Report 7 of 2016*, noting in particular that the register operates on an opt out rather than opt in basis and even where an individual opts out, their information is not deleted but is instead hidden from view.[17] As the bill seeks to expand the scope of the Register to include information relating to screening for lung cancer, and as the explanatory memorandum does not address the committee's previous comments, the committee reiterates these privacy concerns.

1.37 In light of the above, the committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding the scope of the National Cancer Screening Register, noting the impact this may have on an individual's right to privacy.

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[16] Statement of compatibility, p. 4.

[17] Senate Scrutiny of Bills Committee, *Report 7 of 2016* (12 October 2016) pp. 433–439.

Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024[18]

Purpose	The bill amends the *Therapeutic Goods Act 1989* (the TG Act) to prohibit the importation, domestic manufacture, supply, commercial possession and advertisement of non-therapeutic and disposable vaping goods. Therapeutic vaping goods will continue to be available and subject to regulation under the TG Act in line with other medicines and therapeutic goods.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 21 March 2024
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof
Strict liability offences
Significant matters in delegated legislation[19]

1.38 There are many new offence provisions being inserted into the *Therapeutic Goods Act 1989* (the TG Act) by Schedule 1 to the bill.

1.39 Item 6 of Schedule 1 the bill amends the definitions in subsection 3(1) of the TG Act to provide that the quantity of a kind of vaping goods that will be a 'commercial quantity' will be the amount set out in regulations. The definition of the commercial quantity is a central component to the offence provisions, with different penalties applying depending on the amount of the units above the commercial quantity in contravention. In addition, item 10 of Schedule 1 to the bill amends the definitions in subsection 3(1) of the TG Act to provide that the meaning of a 'unit' of vaping goods will have the meaning to be prescribed by the regulations.

1.40 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. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.41 As an example, item 11 would insert proposed section 41Q into the TG Act which would create a new criminal offence, an additional offence of strict liability, and a new civil offence, in relation to the importation of vaping goods into Australia.

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18 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024, *Scrutiny Digest 5 of 2024*; [2024] AUSStaCSBSD 71.

19 A range of clauses in Schedule 1 to the bill. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i) and (iv).

Proposed subsection 41Q(4) would provide that a person who contravenes the civil offence provision in proposed subsection 41Q(3) would commit a separate contravention in respect of each *unit* of vaping goods imported by the person into Australia. While the committee generally only comments in relation to criminal penalties, it is concerning that a significant component of a civil offence will be left to delegated legislation.

1.42 In addition, proposed section 41QC provides for a range of offences of possession where the person possesses differing amounts exceeding the commercial quantity of vaping products, with higher penalties for the larger amounts. As noted above, the prescription of the quantity of a kind of vaping goods that would amount to a 'commercial quantity' will be left to regulations, meaning that a significant component of the offences will be left to delegated legislation.

1.43 Further, most if not all the new offences are being introduced alongside offence-specific defences which reverse the evidential burden of proof. The other new offence clauses in the bill, which deal with matters such as manufacturing and possession of vaping goods, broadly follow the same framework as outlined for proposed section 41Q.

1.1 In relation to offences which have strict liability elements, the committee notes that under general principles of the common law, fault is required to be proven before a person can be found guilty of a criminal offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant had the intention to engage in the relevant conduct or was reckless or negligent while doing so.

1.2 As the imposition of strict liability undermines fundamental common law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[20] The committee notes in particular that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[21]

1.44 In this regard, while the statement of compatibility on human rights outlines the general circumstances relating to the imposition of strict liability on the offences

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

21 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

generally,[22] the committee's expectation is that the imposition of strict liability should be explained contextually against each of the relevant offences. This is especially the case in relation to offences where more than 60 penalty units are being imposed, which is the case with many of the offences in the bill. This includes, for example, proposed subsection 41Q(2), which imposes a strict liability offence with 200 penalty units attached.

1.3 Further, most of the new offences are accompanied by offence-specific defences which reverse the evidential burden of proof. At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[23] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

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

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[24]

1.5 In this regard, the committee welcomes the inclusion of an explanation against each of the reverse burden defences in the bill's explanatory memorandum. However, the committee's view is that in most of these cases it is not apparent that the matters are matters *peculiarly* within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish the matters than for the defendant to establish them.

1.6 For example, proposed subsection 41Q(5) of the bill provides an exception to the offence of importing vaping goods if the importation is not prohibited under the *Customs Act 1901*. In relation to this exception the explanatory memorandum states:

> A licence and permit would likely be the evidence a person would need to produce to avail themselves of the exception. Whether a person has an import licence and permit is a matter peculiarly within their knowledge.[25]

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22 Explanatory memorandum, p. 21.

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

24 Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011) p. 50.

25 Explanatory memorandum, p. 50.

1.45 The committee contends that whether a person has been issued a permit or licence by a government body administering the *Customs Act 1901* is surely to be knowledge retained, recorded and available to the prosecution by way of the government body who retains these records. While it may be easier for a defendant to produce this evidence than for the prosecution to disprove the existence of such an approval, this does not equate, in the committee's view, to these matters being peculiarly within the knowledge of the defendant.

1.46 The committee requests the minister's advice as to why it is necessary and appropriate for the definition of a 'unit' of vaping goods (in item 10 of Schedule 1) or the quantity of a kind of vaping goods that would amount to a commercial quantity (item 6 of Schedule 1) to be left to delegated legislation, noting the importance of these definitions to the offence provisions proposed to be inserted by the bill.

1.47 In light of the above, the committee also draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of:

- **the imposition of strict liability on offences with higher than 60 penalty units; and**
- **the use of offence-specific excuses which reverse the evidential burden of proof.**

Broad discretionary power[26]

1.48 Item 11 of Schedule 1 to the bill would insert proposed section 41RC into the TG Act. Proposed subsection 41RC(1) would empower the secretary to give consent to applications to manufacture, supply or possess vaping goods. Proposed subsection 41RC(2) empowers the secretary to grant an application subject to conditions.

1.49 However, there is no guidance on the face or the bill, nor in the explanatory memorandum, as to what criteria may be considered by the secretary when deciding whether to grant or refuse such an application, or in deciding which conditions to impose, if any. These concerns are heightened noting the relevant of consent granted under proposed subsection 41RC(1) to the offence provisions of the bill.

1.7 The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum.

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[26] Schedule 1, item 11, proposed section 41RC. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

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

- **why it is necessary and appropriate to provide the secretary with a broad power to consent to the manufacture, supply or possession of vaping goods, or to refuse such an application, or grant it subject to conditions; and**
- **what criteria may be considered by the secretary in making a decision under proposed subsection 41RC(1).**

Enforcement notices
Availability of independent merits review[27]

1.50 Item 51 of Schedule 1 to the bill would insert proposed section 42YT into the TG Act, which would enable the secretary to issue enforceable directions under the TG Act or an instrument made under the TG Act. Proposed subsection 42YT(1) provides that the section applies if the secretary believes, on reasonable grounds, that a person is not complying with the TG Act or TG Act instrument in relation to particular goods, and it is necessary to exercise powers under this section to protect the health and safety of humans. Proposed subsection 42YT(2) provides that the secretary can issue directions to the person requiring the person to take a specified measure, within a specified period and at the person's own cost, including, for example, to relabel, or label, the goods in compliance with the TG Act or TG Act instrument (paragraph (a)), or repackage the goods in compliance with the TG Act or TG Act instrument (paragraph (b)).

1.51 Proposed subsection 42YT(4) would provide that it is an offence to fail to comply with a notice given under proposed subsection 42YT(2), with a penalty of up to 12 months imprisonment or 1000 penalty units, or both.

1.52 These are significant measures for which there is no explanation or justification provided in the explanatory memorandum. The committee is particularly concerned that notices may be issued as the result of the secretary's 'reasonable belief' without any further guidance provided on the face of the bill or the explanatory memorandum as to the factors that may lead the secretary to form such a belief.

1.53 Noting this, the committee would further expect that merits review is available for such a decision as it seems to be entirely discretionary in nature and may have a significant impact on the affected persons. However, there is no indication that that merits review has been provided for.

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[27] Schedule 1, item 51, proposed section 42YT. The committee draws senators' attention to this provision pursuant to Senate standing orders 24(1)(a)(i) and (iii).

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

- **the criteria that will be considered by the secretary when determining whether they believe on reasonable grounds that a person is not complying with the *Therapeutic Goods Act 1989* or its instruments; and**
- **whether independent merits review is available for directions issued under proposed subsection 42YT(2) of the bill, and if not, why not.**

Seizure of assets[28]

1.55 Item 54 of Schedule 1 to the bill would insert proposed section 52AAA into the TG Act, to empower the forfeiture of things seized by an authorised person under a search warrant. Proposed paragraph 52AAA(1)(b) provides that the if the secretary believes, on reasonable grounds, that any of the following criteria have been met, then the thing is forfeited to the Commonwealth:

- the thing has been imported, manufactured or supplied in contravention of the TG Act or its instruments; or
- the thing has been in the possession, custody or control of a person in contravention of the TG Act or its instruments; or
- a requirement under the TG Act or its instruments has not been complied with in relation to the thing.

1.56 Proposed subparagraph 52AAA(6)(e)(i) empowers the secretary to retain the seized goods for the purposes of proceedings in respect of which the thing may afford evidence.

1.57 The *Guide to Framing Commonwealth Offences* advises that seizure is a significant coercive power and should only be used in very limited circumstances, including where there is a significant danger to public health.[29] The Guide further notes that seized material should only be retained for as long as necessary, and that consideration should be afforded to whether use and derivative use immunity applies in relation to incidentally seized materials.[30]

1.58 A use immunity provides that information or documents produced are not admissible in evidence in most proceedings. By contrast, a derivative use immunity provides that anything obtained as a direct, or indirect, consequence of the information or documents is not admissible in most proceedings.

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28 Schedule 1, item 54, proposed section 52AAA. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

29 Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011) pp. 83-84.

30 Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011) pp. 82–83.

1.59 The committee therefore requests the minister's advice as to whether it is intended that use and derivative use immunities apply to materials incidentally seized and retained under proposed section 52AAA of the bill.

Delegation of administrative powers and functions[31]

1.60 Item 86 of Schedule 1 to the bill seeks to insert proposed subsection 57(1A) into the TG Act. Proposed subsection 57(1A) would empower the secretary to delegate all or any of their powers and functions under Chapter 5A (enforcement), section 52AAA (forfeiture of things seized under search warrant) or section 52AAB (return of retention of thing declared not to be forfeited). The delegation may be to an officer of a Department of State of a State (paragraph (a)), a Department or administrative unit of the Public Service of a Territory (paragraph (b)), or an authority of a State or of a Territory (paragraph (c)).

1.61 However, in relation to proposed subsection 57(1A), the explanatory memorandum states that the delegation is intended to be to the *head* of the relevant departments and administrative units, as opposed to any officer of these bodies as set out in the subclause itself.

1.62 Noting the relatively significant nature of the powers being delegated, including coercive powers, enforcement powers and seizure of goods, the committee's view is that this delegation is more appropriately limited to the heads of the relevant bodies as set out in the explanatory memorandum.

1.63 The committee therefore requests the minister's advice as to the intended formulation of the delegation in proposed subsection 57(1A) of the *Therapeutic Goods Act 1989*. The committee's preference is for the delegation to be limited to the head of the relevant departments and administrative units.

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[31] Schedule 1, item 86, proposed subsection 57(1A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

Private senators' and members' bills that may raise scrutiny concerns[32]

No private members' or senators' bills were introduced between 18 and 21 March 2024 that raise matters of concern to the committee.

[32] This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 5 of 2024* [2024] AUSStaCSBSD 72.

Bills with no committee comment[33]

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

- Competition and Consumer Amendment (Divestiture Powers) Bill 2024
- Customs Tariff Amendment (Tobacco) Bill 2024
- Excise Tariff Amendment (Tobacco) Bill 2024
- Health Legislation Amendment (Removal of Requirement for a Collaborative Arrangement) Bill 2024.

[33] This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 5 of 2024* [2024] AUSStaCSBSD 73.

Commentary on amendments and explanatory materials[34]

Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023

1.64 On 21 March 2024, the House of Representatives agreed to 95 Government amendments, and the Attorney-General, the Honourable Mark Dreyfus KC MP, tabled two supplementary explanatory memoranda relating to those amendments. The bill, as amended, will now be considered by the Senate.

1.65 In agreeing to amendment no. 8 on sheet UP104, the House of Representatives amended proposed paragraph 336P(2)(l) of the *Migration Act 1958*, in item 120 of Schedule 2 to the bill. That paragraph, in the bill as introduced, disapplied section 294 of the proposed Administrative Review Tribunal Act, with respect to Administrative Review Tribunal review of migration and reviewable protection decisions. The effect of this is that a person who applies to the Tribunal for review of such a decision cannot make an application to the Attorney-General for legal or financial assistance. The committee raised its concerns as to the impact of this provision on an applicant's procedural fairness rights in *Scrutiny Digest 2 of 2024*.[35] The committee has received a response from the Attorney-General to its concerns, which is reported on in this digest.[36]

1.66 The amendment agreed to by the House of Representatives replaces proposed paragraph 336P(2)(l) of the Migration Act to the effect that applications for legal or financial assistance may be made with respect to the review of a decision referred to the guidance and appeals panel by the President of the Tribunal.

1.67 The committee welcomes this amendment, while reiterating its concerns relating to the inability of applicants to apply for legal or financial assistance in respect of reviews of such decisions more generally.

Australian Research Council Amendment (Review Response) Bill 2023

1.68 On 20 March 2024, the Senate agreed to 12 amendments to the bill (5 Australian Greens, 7 Independent (Senator David Pocock) and 1 Independent (Senator Thorpe)). The amendments were agreed to by the House of Representatives on 21 March 2024 and the bill has now passed both houses of the Parliament.

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34 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 5 of 2024* [2024] AUSStaCSBSD 74.

35 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 15–16.

36 See pp. 36–37.

1.69 The Australian Greens amendment on sheet 2469 inserts section 11A into the *Australian Research Council Act 2001* to require the minister to cause an independent review to be conducted of the functions, size and membership of the board. A report of the review must be given to the minister, but there is no requirement for that report to be tabled in the Parliament.

1.70 The committee notes that not providing for the report to be tabled in the Parliament reduces the scope for parliamentary scrutiny. The process of tabling documents in the Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not otherwise available. As such, the committee expects there to be appropriate justification for not including a requirement for review reports to be so tabled. In this case, no justification was provided in the debate on the amendment.

1.71 **Noting the impact on parliamentary scrutiny of not providing for the review report to be tabled in Parliament, the committee requests the minister's advice as to whether section 11A of the *Australian Research Council Act 2001* can be amended at a future date to provide that the review report be tabled in each House of the Parliament.**

Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023

1.72 On 20 March 2024, the House of Representatives agreed to a Government amendment to the bill, a supplementary memorandum relating to which was tabled by the Deputy Prime Minister and Minister for Defence (the Honourable Richard Marles MP) the previous day. The bill is currently before the Senate, having been read a first time in the Senate on 21 March 2024.

1.73 The amendments insert four offence-specific defences relating to the offence provided in subsection 83.3(1) of the Criminal Code, which relates to military-style training involving foreign government principals (subsections 83.3(1A), (1B), (1C) and (1D)). Each such defence carries a reversal of the evidential burden of proof.

1.74 The committee's expectation is that each offence-specific defence should be justified by reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[37] Although the supplementary explanatory memorandum suggests for each defence that a defendant would have access to relevant evidential material,[38] it is not suggested in any case that the relevant matters would be peculiarly within the knowledge of the defendant or significantly more difficult and costly for the prosecution to disprove.

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37 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 50–51.

38 Supplementary explanatory memorandum, pp. 6–8.

1.75 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of a defendant charged with an offence under subsection 83.3(1) of the Criminal Code carrying an evidential burden of proof in relation to the matters in subsections 83.3(1A), (1B), (1C) and (1D).**

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

- Administrative Review Tribunal Bill 2023
    - On 21 March 2024, the House of Representatives agreed to 116 Government amendments, and the Attorney-General, the Honourable Mark Dreyfus KC MP, tabled two supplementary explanatory memoranda relating to the amendments.
- Defence Trade Controls Amendment Bill 2023
    - On 20 March 2024, the House of Representatives agreed to 36 Government amendments to the bill and the Deputy Prime Minister and Minister for Defence, the Honourable Richard Marles MP, presented a supplementary explanatory memorandum relating to those amendments.
- National Vocational Education and Training Regulator Amendment (Strengthening Quality and Integrity in Vocational Education and Training No. 1) Bill 2024
    - On 21 March 2024, the Senate agreed to six Opposition amendments to the bill.

Chapter 2
Commentary on ministerial responses

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

Administrative Review Tribunal Bill 2024[39]

Purpose	The Administrative Review Tribunal Bill 2024[40] seeks to establish a new, fit-for-purpose, federal administrative review body, to be named the Administrative Review Tribunal, which will replace the Administrative Appeals Tribunal.
Portfolio	Attorney-General
Introduced	House of Representatives on 7 December 2023
Bill status	Before the Senate

Procedural fairness – public interest certificates
Limitation of appeal[41]

2.2 Division 7 of Part 4 of the bill sets out the Administrative Review Tribunal's (the Tribunal) public interest certificate and intervention provisions.

2.3 Clause 91 of the bill empowers the Attorney-General of either the Commonwealth or of a State or Territory (the Attorney-General) to prevent disclosure of information or documents for public interest reasons.

2.4 Subclauses 91(1) and (2) set out the following reasons for which the Attorney-General may certify that the disclosure of specified information or the content of a specified document in a proceeding in the Tribunal would be contrary to the public interest:

- the disclosure would prejudice the security, defence or international relations of the Commonwealth (paragraph 91(1)(a));

39 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Administrative Review Tribunal Bill 2023, [2024] AUSStaCSBSD 75.

40 Previously the Administrative Review Tribunal Bill 2023, the title of the bill has been updated subsequent to amendments agreed to in the House of Representatives.

41 Clauses 91, 92, 93, 94 and 189. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i) and (iii).

- the disclosure would involve the disclosure of deliberations or decisions of the Commonwealth Cabinet or of a Committee of the Cabinet (paragraph 91(1)(b)) or of a State or Territory Cabinet or of a Committee of the Cabinet (paragraph 91(2)(a)); and
- any other reason that could form the basis for a claim by the Crown in right of the Commonwealth (paragraph 91(1)(c)) or of the State or Territory (paragraph 91(2)(b)) in a judicial proceeding that the information or the matter contained in the document should not be disclosed.

2.5 The effect of clause 91, as set out in subclause 91(3), would be that a public interest certificate applies to the specified information or document preventing the Tribunal from disclosing it beyond a member, the Principal Registrar or a staff member of the Tribunal in the performance of their duties.

2.6 Subclause 91(6) provides that the Tribunal may decide to disclose information or documents to any or all parties to the proceedings if the certificate was given on the basis of paragraphs 91(1)(c) or (2)(b) (any other reason that could form the basis for a claim in a judicial proceeding that the information should not be disclosed). Subclause 91(7) requires the Tribunal to take into account as a primary consideration the principle that it is desirable, in the interest of ensuring the effective performance of the Tribunal's functions, for the parties to the proceedings to be made aware of all relevant matters, and to have regard to any reason specified in the certificate.

2.7 Clause 92 empowers the Attorney-General to prevent a person from answering a question for public interest reasons. Subclause 92(1) provides that, if a person is asked a question while giving evidence at the hearing of a proceeding in the Tribunal, the Attorney-General may inform the Tribunal that, in their opinion, the answering of the question would be contrary to the public interest for a reason mention in subclauses 91(1) and (2). If the Attorney-General so informs the Tribunal, the person is excused from answering the question as per subclause 92(2).

2.8 Subclause 92(3) sets out exceptions to subclause 92(1) which provide the Tribunal with discretion to determine whether a person must answer a question. Paragraph 92(3)(a) provides that, where a public interest exemption was claimed by the Attorney-General on the basis of paragraphs 91(1)(c) or (2)(b) (any other reason that could form the basis for a claim in a judicial proceeding that the information should not be disclosed), the Tribunal may decide that the answering of the question would not be contrary to the public interest.

2.9 Clause 94 applies in proceedings in which the Attorney-General has sought to have information, documents, or an answer from a person prevented from being supplied on public interest grounds, and the Tribunal has decided that the information, document or answer should be provided. Under subclause 94(3) the Tribunal is required to give each party to the primary proceeding a statement of reasons for the decision. The Attorney-General would also be a party to the proceedings under clause 93.

2.10 Clause 189 relates to documents sent to the Federal Court under Division 6 of Part 7 of the bill[42] which are subject to a public interest certificate.[43] Subclause 189(2) provides that in these circumstances the Federal Court must do all things necessary to ensure that the matter is not disclosed to any person other than a member of the court as constituted for the appeal or reference. Subclause 189(3) provides that the court may decide that a matter should be disclosed to some or all of the parties to the proceedings and therefore must permit the parties to inspect the relevant part of the document if it is covered by a certificate granted only on the basis of any other reason that could form the basis for a claim in a judicial proceeding that the information should not be disclosed, and not for any other reasons as set out in the relevant clauses.[44]

2.11 In *Scrutiny Digest 2 of 2024* the committee requested that the Attorney-General provide a comprehensive justification for the rigid approach adopted for public interest certificates, including:

- a consideration of whether fairness could appropriately be promoted by an approach which includes granting the Administrative Review Tribunal a more general discretion to consider the cogency of any public interest immunity claims (analogous to the flexibility given to a court when considering a public interest immunity claim and noting that the Administrative Review Tribunal could be required to exercise this discretion through a judicial member);
- whether the bill could be amended to require the minister to balance the extent of prejudice to the public interest with the unfairness to the individual prior to issuing a certificate under clause 91 or 92;
- whether the bill can be amended to include additional mechanisms to provide for procedural fairness, or, at a minimum, ameliorate the denial of procedural fairness;
- whether a more detailed explanation can be provided as to what other mechanisms have been considered to address the denial of procedural fairness and, if they are considered not appropriate to include in the bill, why this is the case;

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42 Relating to appeals and references of questions of law to the Federal Court.

43 This clause applies to certificates granted under subclauses 91(1) or (2), 161(2), 272(1), or under a provision listed in column 2 of the table in subclause 162(1).

44 For example, the court could not decide that a matter should be disclosed if the certificate was granted because the disclosure would prejudice the security, defence or international relations of the Commonwealth.

- a consideration of the appropriateness of a special advocate scheme in this context.[45]

Attorney-General's response[46]

2.12 The Attorney-General responded that the ART's framework balances individual fair hearing rights with the need to protect sensitive information from disclosure.

2.13 In considering the committee's query as to whether procedural fairness analogous to the flexibility given to a court when considering a public interest immunity claim could be provided in this context, the Attorney-General drew a distinction between the role of the Tribunal and the Courts. The Tribunal 'stands in the shoes' of the decision-maker and in so doing must have available to it all material that was before the original decision-maker. On the other hand, where a court considers a public interest immunity claim by parties the issue is whether all parties, including the court, may have regard to that information in proceedings.

2.14 The Attorney-General advised that it would not be appropriate for the ART to have the discretion to disclose information under certificate based on risk to security, defence or international relations as such responsibility is rightly vested in the responsible minister or the Director-General of Security, who are uniquely placed to understand the sensitivity of the material and consequences of its disclosure. The response also noted that it would not be appropriate for the Tribunal to override decisions made on the basis of Cabinet deliberations, as 'Cabinet confidentiality is a foundational principle for Westminster Cabinet governments…' and there is a '…pre-existing government-wide framework for their release'.

2.15 In addition, the Attorney-General noted, affected parties may seek review of decisions on public interest certificates in the Federal Court of Appeal.

2.16 The Attorney-General also explained that the threshold for the minister to issue a public interest certificate is appropriately limited to a requirement that the minister be satisfied that it is in the public interest to do so.

2.17 On the issue of a special advocate scheme the Attorney-General advised that the Government will not be considering such a scheme at this time, and that ART applicants are entitled to representation.

Committee comment

2.18 The committee thanks the Attorney-General for this information.

2.19 The committee remains concerned that the public interest certificate and intervention provisions will have a significant impact on an applicant's procedural

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45 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 2–6.

46 The minister responded to the committee's comments in a letter dated 15 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 5 of 2024*).

fairness rights. The committee acknowledges the importance of the policy justification of protecting sensitive information from disclosure but maintains that fairness may be legitimately adjusted whilst adopting a more flexible approach. The committee remains of the view that, as currently drafted, the bill provides only very limited discretion to the Tribunal to determine whether information that was certified as against the public interest should be put to an applicant, noting that in particular cases it may be possible to disclose the gist or part of that information to minimise any risk to the public interest. Further, the committee considers that members of the Tribunal would be cognisant and mindful of the responsible minister's vantage point in understanding the sensitivities of the material and the consequences of disclosure. The committee therefore considers that a more flexible approach would bring the benefit of ensuring that these public interest certificates are fully justified without undermining the Government's responsibility to protect genuinely sensitive information.

2.20 Nevertheless, overall the committee welcomes the information provided by the Attorney-General and the justifications as to the necessity of these measures which expands on the information set out in the bill's explanatory memorandum.

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

2.22 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the balance between procedural fairness rights and protection of the public interest in the context of the bill's public interest certificate regime.

Procedural fairness – intelligence and security jurisdiction[47]

2.23 Part 6 of the bill sets out requirements for proceedings that take place in the intelligence and security jurisdictional area of the Tribunal.[48]

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47 Clauses 136, 158, 159 and 161. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

48 The committee considered these issues in relation to substantively similar clauses of the Australian Security Amendment Bill 2023 in *Scrutiny Digest 5 of 2023* and *Scrutiny Digest 6 of 2023*. The Australian Security Amendment Bill 2023 inserted clauses into the *Administrative Appeals Tribunal Act 1975* which are currently being replicated in this bill. The concerns set out in this entry largely mirror those in the committee's previous commentary on the Australian Security Amendment Bill 2023 in which the committee ultimately drew its scrutiny concerns to the Senate for consideration.

2.24 Subclause 136(2) provides that Division 3 of Part 10 of the bill, relating to decision-makers providing reasons for decisions, does not apply to intelligence and security decisions.[49] This has the effect that applicants for these decisions cannot be provided with a statement of reasons for the decision.

2.25 Clause 158 sets out procedures for security certificates to be issued in the intelligence and security jurisdiction.[50] Subclause 158(2) provides that clause 158 applies in relation to evidence to be adduced or a submission to be made by or on behalf of any of the following:

- the agency head (paragraph 158(2)(a));
- a relevant body (paragraph 158(2)(b));
- an officer or employee of the agency's head's agency (paragraph 158(2)(c));
- an officer or employee of a relevant body (paragraph 158(2)(d)); or
- a person connected with the agency or relevant body (paragraph 158(2)(e)).

2.26 As per subclause 158(3), the responsible minister may certify in writing that disclosing the evidence or making the submission would be contrary to the public interest because it would prejudice: in any case, the security, defence or international relations of the Commonwealth (paragraph 158(3)(a)); or, in the case of a criminal intelligence assessment decision—law enforcement interests (paragraph 158(3)(b)).

2.27 Subclause 158(4) provides that if the responsible minister so certifies, when the evidence is adduced or the submission is made, the applicant must not be present (paragraph 158(4)(a)), and the applicant's representative must not be present except with the consent of the responsible minister (paragraph 158(4)(b)).

2.28 There is no opportunity provided in clause 158 for the Tribunal to determine whether sensitive information may be disclosed to the applicant.

2.29 Clause 159 sets out procedures for issuing sensitive information certificates in relation to reviews of a security clearance decision or a security clearance suitability assessment.

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[49] An intelligence and security decision is defined in clause 9 of the bill to include a criminal intelligence assessment, an exempt security record decision, a foreign acquisitions and takeovers decision, a preventative detention decision, a security assessment, a security clearance decision, or a security clearance suitability assessment.

[50] Subclause 158(1) provides that the clause does not apply to exempt security record decisions.

2.30 Subclause 159(2) provides that the Director-General of Security may certify in writing that in their opinion disclosure of information contained in a document given to the Tribunal by the Director-General in relation to a proceeding:

- would be contrary to the public interest for one or more of the following reasons (paragraph 159(2)(a)):
  - the disclosure would prejudice the security, defence or international relations of the Commonwealth (subparagraph 159(2)(a)(i));
  - the disclosure would reveal information that has been disclosed to the Australian Security Intelligence Organisation in confidence (subparagraph 159(2)(a)(ii));
  - any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the sensitive information or the matter contained in the document should not be disclosed (subparagraph 159(2)(iii)); or
- could reveal the methodology underlying a psychological assessment of the person who applied for the decision or assessment (paragraph 159(2)(b)).

2.31 Subclause 159(4) provides that if such a certificate is issued the Tribunal must do all things necessary to ensure that the sensitive information is not disclosed to the applicant or any person other than the Director-General of Security or their representative, or a member, Principal Registrar, or a staff member of the Tribunal in the course of the performance of their duties.[51]

2.32 Clause 161 makes provision for the responsible minister to issue public interest certificates. These apply to proceedings for review of an intelligence and security decision,[52] and instead of the following provisions:

- clause 91 (disclosure of information – public interest certificate);[53]
- clause 92 (Attorney-General may intervene for public interest reasons);[54]
- clause 112 (notice of decision and statement of reasons – other proceedings) to the extent to it would apply in relation to anything done under this section.[55]

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51 Subclause 159(5) provides that this requirement does not apply in relation to disclosure to the applicant or their representative to the extent that the information has already been lawfully disclosed to the applicant or is disclosed to the applicant with consent of the Director-General of Security.

52 Subclause 161(1) provides that the clause does not apply to exempt security record decisions.

53 Subparagraph 161(1)(b)(i).

54 Subparagraph 161(1)(b)(ii).

55 Subparagraph 161(1)(b)(iii).

2.33 As per subclause 161(2) the responsible minister may certify in writing that the disclosure of specified information or the content of a specified document in the proceeding would be contrary to the public interest, on the basis of the same reasons as described in paragraph [2.30] above.

2.34 Subclause 161(5) provides that if such a certificate is issued the Tribunal must do all things necessary to ensure that the sensitive information is not disclosed to the applicant or any person other than the Director-General of Security or their representative, or a member, Principal Registrar, or a staff member of the Tribunal in the course of the performance of their duties.

2.35 Subclause 161(6) permits the Tribunal to make the information or document available to any or all of the parties to the proceedings if the certificate does not specify the reasons set out in paragraph 161(2)(a),(b) or (c). This means, in effect, that the Tribunal only has the discretion to disclose information or documents covered by certificates issued on the basis of 'any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the matter contained in the document should not be disclosed'. Subclause 161(7) requires the Tribunal to take into account as a primary consideration the principle that it is desirable, in the interest of ensuring the effective performance of the Tribunal's functions, for the parties to the proceeding to be made aware of all relevant matters, and to have regard to any reason specified in the certificate.

2.36 In *Scrutiny Digest 2 of 2024* the committee requested the Attorney-General provide a comprehensive justification for the rigid approach adopted for decisions made in the intelligence and security jurisdiction of the Tribunal, including:

- why it is necessary and appropriate for subclause 136(2) to provide a blanket ban on reasons for intelligence and security decisions from being provided to applicants, and whether consideration has been given to drafting the provision so that the default position required reasons for a decision to be provided with grounds for exceptions for non-disclosure;
- a consideration of whether fairness could appropriately be promoted by an approach which includes granting the Administrative Review Tribunal a more general discretion to consider the cogency of the public interest immunity claims for intelligence and security decisions (analogous to flexibility given to a court when considering a public interest immunity claim and noting that the Administrative Review Tribunal could be required to exercise this discretion through a judicial member);
- whether the bill can be amended to require the minister to balance the extent of prejudice to the public interest with the unfairness to the individual prior to issuing a certificate under clauses 159, 160 or 161;
- whether the bill can be amended to include additional mechanisms to provide for procedural fairness, or, at a minimum, ameliorate the denial of procedural fairness;

- whether a more detailed explanation can be provided as to what other mechanisms have been considered to redress the denial of procedural fairness and, if they are considered not appropriate to include in the bill, why this is the case; and
- a consideration of the appropriateness of a special advocate scheme in this context.[56]

Attorney-General's response[57]

2.37 The Attorney-General noted that while decision-makers are not required to provide reasons for intelligence and security decisions upon request, they are not prevented from doing so.

2.38 Further, the Attorney-General advised that it has been longstanding policy not to provide reasons for intelligence and security decisions noting that all information drawn on in making such decisions is protected information.

2.39 Notification to applicants that a decision has been made would, the Attorney-General argues, strike a sufficient balance between applicants' procedural fairness needs and the need to protect sensitive information from disclosure. The response also pointed to a range of proposed clauses which would strengthen procedural fairness including clauses 152, 153 and subclause 161(6).

2.40 In response to the committee's request as to whether the bill can be amended to include additional procedural fairness mechanisms, the Attorney-General advised that the risks between disclosure of protected information and applicant trial rights is appropriately balanced. The response also noted that stakeholders did not raise significant concerns about the operation of the Security Division under the AAT Act in the public consultation process to inform the design of the ART Bill.

2.41 Finally, the response noted that the Administrative Review Council has a role in assessing the Tribunal's arrangements and as part of that ongoing review process the Council could monitor and inquire into these measures.

Committee comment

2.42 The committee thanks the Attorney-General for this information and notes the importance of protecting sensitive information from disclosure.

2.43 The committee notes that, although the Attorney-General points out that subclause 136(2) exempts decision-makers from the requirement to provide reasons upon request rather than prevents them from doing so, the fact that it is longstanding

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56 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 7–12.

57 The minister responded to the committee's comments in a letter dated 15 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 5 of 2024*).

policy not to do so makes it difficult to conclude that there is a practical difference to the impact of the provision on procedural fairness rights.

2.44 The committee notes the advice that information drawn on in making decisions under Part 6 of the bill is exclusively protected information. This advice clarifies the explanation provided in the explanatory memorandum, which only indicates that sensitive information *may form the basis* of such decisions. The information provided in the response differs substantially from that in the explanatory memorandum and the committee's view is that the explanatory memorandum should be updated to reflect the Attorney-General's views on response.

2.45 The committee also is of the view that the Attorney-General did not provide advice about why the sensitive information certificate regime set out in clause 159 and the public interest certificate regime for the intelligence and security division set out in clause 161 are necessary in light of clauses 91 to 94, discussed above. The committee therefore reiterates its views that these certificates are granted to prevent the disclosure of information or documents for the same public interest reasons prescribed in subclauses 159(2) and 161(2).

2.46 The committee notes that the Attorney-General indicated that the Government will not be considering additional mechanisms to provide for procedural fairness in the Intelligence and Security Jurisdictional Area, such as a special advocates scheme. The committee remains of the view that there is room to recalibrate the balance of the risk of disclosure against the applicant's right to a fair hearing in a manner which better recognises the fundamental nature of that right, due to its importance in ensuring correct decisions are made, and also in treating individuals with respect and dignity. Although the committee notes the Attorney-General's advice in relation to the public consultation process which informed the design of the bill, it considers that the decision not to consider additional mechanisms for the protection of a fair hearing in the Intelligence and Security Jurisdictional Area is a lost opportunity.

2.47 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the limitations on procedural fairness in Part 6 of the bill, in relation to the intelligence and security jurisdictional area of the Administrative Review Tribunal.

2.48 The committee requests that an addendum to the explanatory memorandum be tabled in the Parliament as soon as practicable, containing the key information provided by the Attorney-General in relation to the nature of information drawn on in making decisions under Part 6 of the bill. This request is made in recognition of the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

Broad discretionary power[58]

2.49 Clause 294 provides that certain people can apply for legal or financial assistance in relation to Tribunal proceedings, specifically:

- someone who applies, or proposes to apply to the Tribunal for review of a reviewable decision;
- someone who applies, or proposes to apply, to have a Tribunal decision referred to the guidance and appeals panel;
- a party to a Tribunal proceeding, or a person who proposes to become a party to that proceeding;
- someone who commences, or intends to commence, a court proceeding relating to a Tribunal proceeding; and
- someone who is a party, or proposes to become a party, in a court proceeding relating to a Tribunal proceeding.

2.50 Subclause 294(7) provides that if the Attorney-General of the Commonwealth considers that it would involve hardship to the person to refuse the person's application, and in all the circumstances, it is reasonable that the person's application should be granted, the Attorney-General may authorise the provision by the Commonwealth to the person of legal or financial assistance determined by the Attorney-General in respect of the proceeding. Subclause 294(8) further provides that the legal or financial assistance is subject to any conditions determined by the Attorney-General.

2.51 In *Scrutiny Digest 2 of 2024* the committee requested the Attorney-General's detailed advice as to:

- the criteria against which the Attorney-General will consider an application to grant financial or legal assistance; and
- whether consideration has been given to including appropriate criteria or considerations in the bill that can guide the exercise of the Attorney-General's broad discretionary power to authorise the provision of legal or financial assistance.[59]

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58 Clause 294. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii).

59 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 12–13.

Attorney-General's response[60]

2.52 The Attorney-General advised that the Commonwealth Guidelines for Legal Financial Assistance provide the criteria against which the Attorney-General may decide to authorise legal or financial assistance to an ART applicant. These criteria include a range of considerations such as the cost of the proceedings and the availability of legal aid.

2.53 The Attorney-General further advised that proposed clause 294 'creates a scheme that is separate from the legal assistance provided by legal aid, community legal centres and other legal assistance providers', and that whether a person has such assistance will factor into the Attorney-General's decision to grant legal or financial assistance.

2.54 Finally, the Attorney-General advised that broader support is provided via the National Legal Assistance Partnership, which is more suited to providing legal or financial assistance to large cohorts such as social security and migration decision ART applicants.

Committee comment

2.55 The committee thanks the Attorney-General for this further advice and welcomes the information in relation to the avenues available for legal and financial assistance for ART applicants.

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

2.57 In light of the information provided the committee makes no further comment on this matter.

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60 The minister responded to the committee's comments in a letter dated 15 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 5 of 2024*).

Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024[61]

Purpose	The Consequential Bill[62] supports the Administrative Review Tribunal Bill 2024 by repealing the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), making consequential amendments across 138 Commonwealth Acts and providing transitional rules which facilitate the smooth transition from the Administrative Appeals Tribunal to the Administrative Review Tribunal.
Portfolio	Attorney-General
Introduced	House of Representatives on 7 December 2023
Bill status	Before the Senate

Procedural fairness[63]

2.58 Item 120 of Schedule 2 to the bill would insert proposed section 336P into the *Migration Act 1958* (the Migration Act), dealing with the interaction between the Migration Act and the Administrative Review Tribunal Act. Paragraph 336P(2)(l) disapplies section 294 of the Administrative Review Tribunal Act, with the effect that a person who applies to the Tribunal for review of a reviewable migration and protection decision cannot make an application to the Attorney-General for legal or financial assistance.

2.59 In *Scrutiny Digest 2 of 2024* the committee requested the Attorney-General's advice as to why it is considered necessary and appropriate to restrict a person's right to apply for legal or financial assistance in relation to a review of a migration or protection decision.[64]

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61 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, *Scrutiny Digest 5 of 2024*; [2024] AUSStaCSBSD 76.

62 Previously the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, the title of the bill has been updated subsequent to amendments agreed to in the House of Representatives.

63 Schedule 2, item 120, proposed paragraph 336P(2)(l). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

64 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 15–16.

Attorney-General's response[65]

2.60 The Attorney-General advised that legal and financial assistance for applicants for migration and protect decisions has generally not been available through the type of assistance provided in proposed clause 294 of the bill, due to capacity and funding. Assistance is available, however, through other targeted programs such as the National Legal Assistance Partnership and discrete funding programs, and the Immigration Advice and Application Assistance Scheme, which provide funding to legal services.

Committee comment

2.61 The committee welcomes the advice that legal funding and assistance is available through the measures advised by the Attorney-General in their response.

2.62 However, it remains unclear to the committee the proportion of these resources that are specifically provided to support migration and protection decision applicants in the ART. The committee therefore reiterates its concerns that a lack of legal or financial assistance may limit the ability of a person adversely affected by a decision to seek review.

2.63 The committee notes that proposed paragraph 336P(2)(l) was recently amended by the House of Representatives. The committee's consideration of that amendment is discussed in Chapter 1 to this digest.[66]

2.64 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the lack of specific financial or legal assistance in relation to applications for the review of a migration or protection decision at the Administrative Review Tribunal.**

Procedural fairness[67]

2.65 Item 161 of Schedule 2 would insert proposed subsection 359A(4A) into the Migration Act. This subsection would provide that the Tribunal is not required to give particulars of information mentioned in existing subsection 359A(4) to the applicant before making a decision on the application under section 105 of the Administrative Review Tribunal Act or section 349 of the Migration Act. The effect of proposed subsection 359A(4A) is that the Tribunal would not have to furnish an applicant with particulars of information that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member,

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65 The minister responded to the committee's comments in a letter dated 15 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 5 of 2024*).

66 See p. 21.

67 Schedule 2, item 160, proposed paragraphs 359A(4)((d) and (e); and item 161, proposed subsection 359A(4A). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

or that the applicant provided as part of their application, or that is non-disclosable information.

2.66 Item 160 would add two new paragraphs to existing subsection 359A(4), to cover information that was included or referred to in the written statement of the decision that is under review (paragraph 359A(4)(d)), or that is prescribed by the regulations (paragraph 359A(4)(e)). Such information would also not have to be provided to an applicant.

2.67 In *Scrutiny Digest 2 of 2024* the committee requested the Attorney-General's advice as to:

- for proposed subsection 359A(4A), whether consideration was given to how non-disclosure of information about a class of persons to which the applicant is a member could have a significant impact on an applicant's claim for protection and how their procedural fairness rights are balanced;
- for paragraph 359A(4)(d), whether consideration was given to whether applicants may not be aware of information provided in the original written decision being considered adverse to their case, and whether further justification as to the necessity of this paragraph can be provided; and
- for paragraph 359A(4)(e), why it is considered to be necessary and appropriate for the regulations to be empowered to prescribe further types of information upon which the Tribunal may base their decision without disclosing the information to the applicant.[68]

Attorney-General's response[69]

2.68 The Attorney-General advised that existing section 359A of the Migration Act requires the Tribunal to give the applicant the opportunity to comment on information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision under review, and that this provides a process for ensuring the applicant has had an opportunity to comment on any adverse information. The Attorney-General further advised that it does not prevent the Tribunal from putting any information to the applicant that the member considers necessary and conducive to the review process.

2.69 In relation to proposed subsection 359(4A), the Attorney-General provided some general information about the intent of the provision.

2.70 In relation to proposed subsection 359A(4)(d) the Attorney-General advised that it is unnecessary to provide any adverse information provided to the applicant as

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68 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 17–19.

69 The minister responded to the committee's comments in a letter dated 15 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 5 of 2024*).

part of the primary decision as they will already be aware of the contents. Further, a requirement to provide this information on review would '…impede the efficiency of Tribunal reviews and contribute to delays and backlogs…'.

2.71 In relation to proposed paragraph 359(4)(e), the Attorney-General advised that the provision is necessary to ensure that the Migration Regulations 1994 can be updated as the type of information or materials to be prescribed change quickly and therefore flexibility is needed to allow the Government to resolve uncertainty.

Committee comment

2.72 The committee is of the view that, by failing to directly respond to the committee's query as to whether consideration was given to how non-disclosure of information about a class of persons to which the applicant in a member could have a significant impact on an applicant's claim for protection, the response has not fully considered its concerns in relation to proposed subsection 359(4A). The committee therefore reiterates its concerns that information that is not specifically about the applicant but is rather about a relevant class of persons could form part of a decision made against an applicant without having been put to the applicant. In the committee's view, information about a class of persons to which the applicant is a member could have relative significance to a protection visa application. Given the significance of adverse information for migration and protection decisions it is regrettable that the response did not address this point in more detail.

2.73 In relation to proposed subsection 359(4)(d), the committee's scrutiny concern as set out in *Scrutiny Digest 2 of 2024* is that circumstances may arise where information included in the original statement of decision may not clearly be information that the applicant would consider adverse but is nevertheless relied on by the Tribunal as part of its reasons to affirm the original decision. These concerns are compounded by fact that applicants for protection visa decisions may have limited access to legal assistance and limited English-language skills. Again, it does not appear that the Attorney-General has considered this aspect of the committee's request in their response.

2.74 Finally, in relation to proposed subsection 359(4)(e), the committee generally does not accept a need for flexibility to justify the inclusion of significant matters in delegated legislation. The committee reiterates its concern that in the absence of any guidance on the face of the legislation that would limit that matters that could be prescribed as a matter the Tribunal could rely on but not need to disclose to an applicant, the fair hearing rights of applicants could be severely impacted.

2.75 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole to consider the procedural fairness implications of proposed subsection 359(4A) and proposed paragraphs 359(4)(d) and (e).

Parliamentary scrutiny[70]

2.76 Item 188 of Schedule 2 to the bill would substitute existing section 378 of the *Migration Act 1958* (the Migration Act). Proposed subsection 378(1) would provide that an entrusted person[71] must not be required to produce or disclose a protected document or protected information to a parliament if:

- the document or information relates to a reviewable protection decision;[72] and
- the production or disclosure is not necessary for the purposes of carrying into effect the provisions of the Administrative Review Tribunal Act[73] or another enactment conferring powers on the Administrative Review Tribunal.[74]

2.77 Proposed subsection 378(3) defines parliament to include a House of the Commonwealth Parliament or of a state or a territory parliament, or a parliamentary committee of a House of the Commonwealth Parliament or of a state or territory parliament.

2.78 Proposed subsection 378(2) provides that proposed subsection 378(1) applies despite subsection 274(1) of the Administrative Review Tribunal Act (ART Act),[75] which sets out requirements around confidentiality of protected information and documents, relevantly, that entrusted persons must not be required to disclose information or documents to a court, tribunal, authority or person (other than a parliament).[76]

2.79 In *Scrutiny Digest 2 of 2024* the committee requested the Attorney-General's advice as to:

- why it is considered necessary and appropriate to specifically exclude entrusted persons from providing protected documents and information to the Parliament, particularly noting the existing structures in place for the protection of sensitive information such as the ability for ministers to raise

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70 Schedule 2, item 188, proposed section 378. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

71 Proposed subsection 378(3) defines an entrusted person to have the same meaning as the Administrative Review Tribunal Act. Clause 4 of the Administrative Review Tribunal Bill defines an entrusted person as a person who is or has been a member, or the Principal Registrar, or a staff member, or a person engaged to provide services to the Tribunal.

72 Proposed paragraph 378(1)(a).

73 The bill for this Act, the Administrative Review Tribunal Bill 2023, is before the Parliament at the time of writing.

74 Proposed paragraph 378(1)(b).

75 The bill for this Act, the Administrative Review Tribunal Bill 2023, is before the Parliament at the time of writing.

76 Administrative Review Tribunal Bill 2023, subclause 274(1).

public interest immunity claims and for committees to receive evidence on an in-camera basis; and

- whether the bill could be amended to remove proposed section 378 of the Migration Act, noting that such a provision should not be enacted except in the rarest and most extraordinary of cases.[77]

Attorney-General's response[78]

2.80 The Attorney-General advised that the purpose of the proposed provision, which retains existing restrictions, is to provide protection to the privacy and safety of persons involved in reviews of a reviewable protection decision.

2.81 The effect of the provision is to prevent a person from using or disclosing information or documents other than for a purpose under the ART Act by preventing a person from being compelled to do so by a parliament.

2.82 The Attorney-General further advised that the drafting of clause 378 prevents disclosure to a parliament only if it is not necessary for carrying into effect the provisions of the ART Act or another enactment conferring powers on the Tribunal and that, for example, the President of the Tribunal would be able to disclose such information if it forms part of a systemic issue in the Tribunal.

2.83 Finally, the Attorney-General stated that the limitation is appropriate as the information contained in such reviews contains highly sensitive information, the open disclosure of which in the Parliament could endanger the applicant or others.

Committee comment

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

2.85 The committee acknowledges that documents or information that relate to reviewable protection decisions may contain sensitive information and that the intention of the provision is to provide protection to the privacy and safety of persons involved in reviews of such decisions.

2.86 The committee notes the minister's advice that the bill will retain current legislative settings. In this regard, the committee's long-standing scrutiny position is that the fact that an existing provision contains a similar prohibition is not, in itself, sufficient justification for a new provision. Any legislative provision that could raise a matter of possible scrutiny concern should be appropriately addressed in explanatory materials to enable the committee to discharge its duties under the standing orders,

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77 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 19–23.

78 The minister responded to the committee's comments in a letter dated 15 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 5 of 2024*).

and ultimately, in this case, enable the Parliament to decide on the appropriateness of a provision that would restrict its own powers.[79]

2.87 The committee reiterates its significant scrutiny concerns in relation to the provision and notes that the justification does not appropriately balance the need to protect sensitive information against the public interest in not encroaching unnecessarily upon the powers of the Parliament.

2.88 The Attorney-General, in responding to the committee's scrutiny concerns, has not engaged with the substance of those concerns. In failing to do so it appears that insufficient weight has been given to the importance of safeguarding the Parliament's powers.

2.89 In particular, the committee notes that the Attorney-General has failed to address whether existing mechanisms within parliaments would be sufficient to protect against disclosure without the need to resort to such legislative encroachment. The committee in *Scrutiny Digest 2 of 2024* referred to various mechanisms that enable parliaments to appropriately deal with genuinely sensitive information where disclosure would not be in the public interest. One such mechanism is the ability of the Executive to raise public interest immunity claims in response to orders for the production of documents or information, which also applies in relation to questioning before committees. Committees have also agreed in the past to receive information on an in-camera basis, if making the information public was not in the public interest or necessary for the committee to perform its functions. The committee is of the view that such mechanisms would adequately protect from public release information relating to reviewable protection decisions where disclosure is not in the public interest.

2.90 The committee acknowledges that the Attorney-General's response draws the committee's attention to the construction of clause 378 and that it would enable disclosure if it was necessary for the purposes of carrying into effect the provisions of the ART Act. This would, for example, enable the President of the Tribunal to disclose protection visa information when such information forms part of a systemic issue in the Tribunal. As noted by the committee in its initial comments, at a practical level, it is unlikely that a House of the Parliament or one of its committees would require the provision of sensitive information or documents relating to a specific individual, as the Parliament is more likely to inquire into systemic issues than the individual cases. As such, the Attorney-General's clarification is welcomed.

2.91 However, the committee is concerned that there is a lack of clarity in how the provision would operate. There is a risk that this lack of clarity may result in members of Parliament and others being uncertain about the scope of information that could

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79 For the purposes of this entry, later references to parliaments in this entry should be read as also including committees of such parliaments.

be disclosed. This uncertainty could impact the ability of a house of the Parliament to perform its functions.

2.92 Further, the committee notes the statement that the construction of the provision will provide 'that only necessary information would be disclosed to the Parliament'. The committee is of the view that it is appropriately a matter for a parliament to determine what is 'necessary information' for its purposes and that it is undesirable for legislative provisions to unnecessarily limit the scope of the Parliament's ability to do so. As such, this aspect of the provision does little to ameliorate the committee's scrutiny concerns.

2.93 The committee is of the view that if a proposal was put before a house of a parliament to require the provision of information relating to a reviewable protection decision, the sensitivity of the information and the consequences of its disclosure would inevitably be raised in the consideration of that proposal. The house would be mindful of these sensitivities in deciding whether or not to agree to the proposal. The committee is of the view that parliaments should be trusted to exercise their powers responsibly.

2.94 If it is to be accepted that it is ever appropriate for a legislative provision to restrict the powers of the Parliament to require information, the committee is of the view that this would only be in the most extraordinary of cases. The onus is on the proponent of such a provision to make a clear case, in the explanatory materials to the bill, and ultimately for the Parliament to accept, that the nature of the information warrants the curtailment of parliamentary powers. In considering whether there is a demonstrated need for the provision, factors to consider include the sensitivity of the information and the existence of mechanisms to safeguard against the risk that public disclosure of the information may present.

2.95 In light of the above, the committee is of the view that item 188 of Schedule 2 to the bill should be amended so as not to insert proposed new section 378 into the *Migration Act 1958*.

2.96 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of the provision.

Availability of appeal[80]

2.97 Item 237 of Schedule 2 inserts Division 1A into the Migration Act, which relates to the interaction between the Migration Act and the Administrative Review Tribunal Act. Proposed subsection 474AA(1) provides that Part 7 of the Administrative Review Tribunal Act (appeals and references of questions of law to the Federal Court) does not apply to an application in relation to, or a proceeding for the review of, a privative

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80 Schedule 2, item 237, new Division 1A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

clause decision[81], a purported privative clause decision[82], and an Administrative Review Tribunal Act migration decision.[83] This prevents parties in Tribunal proceedings from appealing to the Federal Court on questions of law and appears to cover all migration and protection decisions. The Tribunal has the power, on its own initiative, to refer questions of law in relation to a reviewable migration or protection decision to the Federal Court as a result of subsections 474AA(2) and (4).

2.98 The committee notes that parties to proceedings would be able to apply for judicial review of migration and protection decisions to the High Court in its jurisdiction under its constitutional sources of jurisdiction and that the Migration Act also contains provisions empowering other federal courts to undertake judicial review.[84]

2.99 In *Scrutiny Digest 2 of 2024* the committee requested the Attorney-General's advice as to why it is necessary and appropriate to limit the right to appeal to the Federal Court on a question of law in the context of migration and protection decisions.[85]

Attorney-General's response[86]

2.100 The Attorney-General advised that '[t]he overall judicial review framework is outside the scope of these current reforms…' and new Division 1A of the Migration Act as inserted by the bill is consistent with the current judicial review framework for migration and protection decisions.

Committee comment

2.101 The committee reiterates its consistent position that the existence of similarly enacted provisions does not, in itself, provide sufficient justification relating to any scrutiny concerns raised by newly proposed provisions.

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81 Subsection 474(2) of the *Migration Act 1958* defines a privative clause decision to mean a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under the Migration Act or instrument other than a decision as outlined in subsections 474(4) or (5).

82 Section 5E of the *Migration Act 1958* defines a purported privative clause decision to be a decision purportedly made, proposed to be made, or required to be made under the Migration Act or instrument that would be a privative clause decision if there were not a failure to exercise jurisdiction, or an excess or jurisdiction, in the making of the decision.

83 Item 238, proposed substituted section 474A(2) lists the decisions under the Administrative Appeals Tribunal Act which are considered to be Administrative Appeals Tribunal Act migration decisions.

84 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial review of government action and government liability*, 7th ed, Lawbook Co., 2022, pp. 58–59.

85 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 23–25.

86 The minister responded to the committee's comments in a letter dated 15 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 5 of 2024*).

2.102 In this regard, while noting the advice provided that a reform of the existing judicial review landscape is outside the scope of the current reforms, the committee is of the view that the explanatory memorandum or the Attorney-General's response should have at a minimum justified why judicial review is not appropriate in this context.

2.103 In light of the above the committee makes no further comment on this matter.

Procedural fairness[87]

2.104 Item 43 of Schedule 4 to the bill inserts proposed section 83CA into the *Australian Security Intelligence Organisation Act 1979*. This provision provides that when an application has been made to the Tribunal for review of a security clearance decision or a security clearance suitability assessment, and the Director-General of Security gives a copy of a security clearance standard (or a part of a standard) to the Tribunal that is certified in writing as relating to the Commonwealth's highest level of security clearance, then:

- the applicant or any person representing them cannot be present while the Tribunal is hearing submissions made or evidence adduced in relation to the copy of the standard unless it has already been disclosed to the applicant, or
- the Director-General of Security consents to the applicant being present.

2.105 In *Scrutiny Digest 2 of 2024* the committee requested the Attorney-General's advice as to why it is considered necessary and appropriate to restrict a person's access to security clearance standards, and what consideration has been given to allowing access as the default position.

Attorney-General's response[88]

2.106 The Attorney-General advised that security clearance standards are particularly sensitive information to which improper access could risk the integrity of the security clearance process. The response explains that it is necessary to restrict access to the security clearance standard to 'minimise the risk of foreign intelligence services and others from gaining access…and undermining the security clearance process'. The Attorney-General also advised that intentional and unintentional disclosures of security clearance standard information could also result in harm.

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87 Schedule 4, item 43, proposed section 83CA. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

88 The minister responded to the committee's comments in a letter dated 15 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 5 of 2024*).

Committee comment

2.107 The committee welcomes this further explanation as to the importance of protecting security clearance standards and therefore the necessity of restricting the provision of this information upon review at the ART.

2.108 In light of the information provided the committee makes no further comment on this matter.

Modification of the operation of primary legislation by delegated legislation (akin to Henry VIII clause)
Retrospectivity[89]

2.109 Item 16 of Schedule 1 to the bill seeks to insert proposed subsection 798G(2) into the *Corporations Act 2001* (the Corporations Act). The effect of proposed subsection 798G(2) is that market integrity rules made under existing section 798G of the Corporations Act may modify the operation of the Administrative Review Tribunal Act[90] when making provision for applications to be made to the Administrative Review Tribunal (the Tribunal).

2.110 Items 23 and 39 of Schedule 15 to the bill would insert subsections 115B(12) and 216(2) into the *Veterans' Entitlements Act 1986* (Veteran's Entitlements Act). Proposed subsection 115B(12) would empower the Veterans' Vocational Rehabilitation Scheme (VVRS) to modify the operation of sections 18 and 19 of the Administrative Review Tribunal Act as it applies in relation to a decision made under the VVRS. Proposed subsection 216(2) would empower regulations made under the *Veterans' Entitlements Act 1986* to modify the operation of section 18 of the Administrative Review Tribunal Act as it applies in relation to a decision made under the regulations.

2.111 Subitem 51(1) of Schedule 16 to the bill provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted by this Act to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Subitems 51(2) and (3) provide that the rules may prescribe matters of a transitional nature, and may modify provisions, or provide for the application of provisions, of this Act or the Administrative Review Tribunal Act to matters to which they would otherwise not apply, and can modify the operation of this Act.

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89 Schedule 1, item 16, proposed subsection 798G(2). Schedule 15, item 23, proposed subsection 115B(12) and item 39, proposed subsection 216(2); Schedule 16, item 51. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and(iv).

90 The bill for this Act, the Administrative Review Tribunal Bill 2023, is before the Parliament at the time of writing.

2.112 Further, subitem 51(4) provides that, despite subsection 12(2) of the *Legislation Act 2003*, the rules may be expressed to take effect from a date before the rules are registered under that Act. This means that the rules can commence retrospectively. Subitem 51(5) clarifies that, if the rules are expressed to take effect from a date before they are registered under the *Legislation Act 2003* and a person engaged in conduct before the registration date and, but for the retrospective effect of the rules, the conduct would not have contravened a provision of an Act, then a court must not convict the person of an offence, or order the person to pay a pecuniary penalty, in relation to the conduct on the grounds that it contravened a provision of that Act.

2.113 In *Scrutiny Digest 2 of 2024* the committee requested the Attorney-General's advice as to:

- why it is necessary and appropriate for proposed subsection 798G(2) of the bill to allow delegated legislation made under the *Corporations Act 2001* to amend the operation of the Administrative Review Tribunal Act;
- why it is necessary and appropriate for proposed subsections 115B(12) and 216(2) of the bill to empower legislative instruments to amend the operation of the Administrative Review Tribunal Act;
- why it is considered necessary and appropriate to restrict the operation of subsection 12(2) of the *Legislation Act 2003* and what steps, if any, will be taken to avoid any disadvantage to an individual and ensure procedural fairness for affected persons;
- why it is necessary and appropriate for rules to be made under subitems 51(2) and (3) that may modify provisions, or provide for the application of provisions, of the Act or the Administrative Review Tribunal Act; and
- whether the power to make transitional rules which may modify provisions of Acts or the operation of Acts can be restricted to a period of time after the Act has come into force.[91]

Attorney-General's response[92]

2.114 The Attorney-General explained the general approach advanced by clause 5(2) to the ART Bill – which provides that legislative instruments may modify the operation of the proposed ART Act but only where provided for by primary legislation. This subclause reflects the principle that 'while Henry VIII style provisions are generally to be avoided, the proximity of decision-making power and rights of review in the same

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91 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 14–15; pp. 25–28.

92 The minister responded to the committee's comments in a letter dated 15 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 5 of 2024*).

Act or legislative instrument allows individuals to be able to easily ascertain their review rights'. This prevents review rights from being spread across multiple pieces of legislation.

2.115 In relation to proposed subsection 798G(2) of the Corporations Act, the Attorney-General advised that the provision will not change the scope of the rule-making power that already exists, but would provide certainty to ASIC of their ability to make such rules consistently with subclause 5(2) of the ART bill. Existing instruments made under the existing section modify provisions of the AAT Act that would otherwise lead to impractical outcomes.

2.116 In relation to proposed subsections 115B(12) and 216(2) of the *Veterans' Entitlements Act 1986*, the Attorney-General advised that, in line with the current approach, the relevant instruments should provide for review timeframes which are equal or more beneficial to applicants than the default provisions under the bill. This reflects the nature of veterans' decisions.

2.117 In relation to subitems 51(2) and (3) of Schedule 16 to the bill, the Attorney-General advised that as the transitional measures in Schedule 16 will impact on a large number of applications it '…may not be possible to anticipate the full range of circumstances…' that need to be dealt with in the bill. The Attorney-General also advised that modification of existing provisions may become necessary in light of unforeseen matters and if the existing arrangements give rise to unforeseen or undesirable outcomes.

2.118 In relation to retrospectivity, the Attorney-General advised that it may be necessary for transitional rules to apply to rights or liabilities prior to commencement, for example, to rectify a gap in procedural obligations or rights that existed prior to commencement. The Attorney-General further advised that while subsection 12(2) of the *Legislation Act 2003* is disapplied, proposed subitem 51(5) of Schedule 16 to the bill would ensure that the rules cannot retrospectively criminalise conduct or apply a penalty. Further, the rule-making power is confined to matters of a transitional nature and will be subject to disallowance.

Committee comment

2.119 The committee appreciates the Attorney-General's further advice on why it is necessary for these provisions to allow delegated legislation to modify the operation of primary laws.

1.9 The committee's longstanding position is that provisions authorising delegated legislation to modify the operation of primary legislation may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the Executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

2.120 The committee accepts that proposed subclause 5(2) of the ART Bill is an improvement over the comparable provision in the *Administrative Appeals Tribunal Act 1975*. The committee also is of the view that where primary legislation empowers instruments to provide for the making of decisions, it is desirable that as many of those decisions as possible be subject to external merits review by the Administrative Review Tribunal. In this light, it is accepted that the circumstances of a particular legislative scheme may require modification of the general provisions for the making of applications to the ART laid out in the ART Bill.

2.121 However, the committee's preference is that the explanatory materials to such legislative provisions should explain why the particular circumstances of the legislative scheme require a different approach to be taken. In this light, although the committee acknowledges that there may be utility in locating provisions relating to review rights, including any specific procedural requirements, together with the decision-making power, this, in itself, is not sufficient justification for the need for those specific procedural requirements in the circumstances of the particular legislative scheme. This is particularly the case where the specific procedural requirements may limit the availability of merits review, as opposed to the general procedural requirements in the ART Bill.

2.122 In relation to instruments to be made under section 798G of the Corporations Act, while noting the Attorney-General's advice that the standard provisions of the AAT Act would 'lead to impractical outcomes', the committee would have appreciated further detail as to what is meant by impractical outcomes. In particular, although there may be adequate justification for the restriction of the making of applications for review of decisions to market participants directly affected by decisions, no such justification has been provided in the explanatory memorandum or the response. It a justification of this nature that the committee was seeking in its initial comment.

2.123 In relation to instruments to be made under subsection 115B(1) and section 216 of the Veterans' Entitlements Act, the committee thanks the Attorney-General for the explanation that more beneficial timeframes than those set out in the general provisions in the ART Bill are appropriate for appeals for veterans 'noting the specific personal circumstances that this cohort may be affected by, such as injury'. The committee notes, however, that proposed subsections 115B(12) and 216(2) do not restrict modifications of the ART Act to be provided in such instruments to those that are more beneficial for applicants.

2.124 In relation to the making of transitional rules under subitem 51(1) of Schedule 16 to the bill that have retrospective effect, although noting the Attorney-General's advice that appropriate safeguards are contained in the bill such that the rules could not retrospectively criminalise conduct or apply a penalty, the committee notes that the potential detrimental effect of such rules could be of a different nature. The committee notes the advice that such rules will be subject to disallowance, and is of the view that any instruments that apply with retrospective effect should be closely scrutinised.

2.125 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of market integrity rules, made under section 798G of the Corporations Act, and instruments made under subsection 115B(1) and section 216 of the Veterans' Entitlements Act being empowered to amend the operation of the ART Act.

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

Social Services and Other Legislation Amendment (Military Invalidity Payments Means Testing) Bill 2024[93]

Purpose	The bill seeks to amend the *Social Security Act 1991* and *Veterans' Entitlements Act 1986* to confirm the income support treatment of certain military invalidity pensions affected by the Full Federal Court decision in *Commissioner of Taxation v Douglas* [2020] FCAFC 220.
Portfolio	Social Services
Introduced	House of Representatives on 15 February 2024
Bill status	Before the Senate

Retrospective validation[94]

2.127 Schedule 1 to the bill seeks to amend the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to clarify the classification of military invalidity pensions within the social security and veterans' entitlements means test respectively, following the decision in *Commissioner of Taxation v Douglas* [2020] FCAFC 220 (*Douglas*). Items 37 and 39 of Schedule 1 to the bill seek to validate past assessments of the military invalidity payment to ensure the payments continue to be treated as exempt from the assets test in both the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986*.

2.128 In *Scrutiny Digest 3 of 2024*, the committee requested the minister's advice as to whether any persons are likely to be detrimentally affected by the retrospective application of the legislation and, if so, to what extent their interests are likely to be affected.[95]

Minister for Social Services' response[96]

2.129 The Minister for Social Services (the minister) advised that the amendments provide a clear legal foundation for the classification of military invalidity pensions affected by the *Douglas* decision. The amendments will ensure the income provided

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93 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Social Services and Other Legislation Amendment (Military Invalidity Payments Means Testing) Bill 2024, *Scrutiny Digest 5 of 2024*; [2024] AUSStaCSBSD 77.

94 Schedule 1, items 37 and 39. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

95 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 46–47.

96 The minister responded to the committee's comments in a letter dated 19 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 5 of 2024*).

by these payments continues to be assessed in line with the intent of policy and legislation before *Douglas* and also validates past mean test assessments which may be invalid in light of *Douglas*.

2.130 The minister advised that it is highly unlikely that any veteran and/or their partner would be detrimentally affected by the operation of the validation provisions because they deem the historical treatment of the affected payments in the means test to be valid and effective, and to have always been so. The provisions do not operate retrospectively to change anything that occurred in the past and they cannot result in any debts arising for past periods. The validation provisions do not remove people's rights of review or appeal in cases where decisions may have been invalid for other reasons.

2.131 The minister offered that the explanatory memorandum to the bill could be updated to include this further explanation of the issue.

Committee comment

2.132 The committee thanks the minister for their response and their constructive offer to update the explanatory memorandum to the bill with the additional information provided.

2.133 The committee acknowledges the minister's explanation that it is highly unlikely any veteran and/or their partner would be detrimentally affected by the operation of the validation provisions as they continue the assessment of the military invalidity pensions in line with the policy intent and legislation pre-*Douglas*. The committee welcomes the minister's advice that retrospectivity in this case cannot result in any debts arising for past periods.

2.134 However, it remains unclear to the committee, irrespective of previous policy intent, whether it is possible that any veteran (or their partner) who received one of the relevant invalidity benefit payments and also an income support payment from the social security system would have been entitled to a greater payment in the past than that which they received, in accordance with the law as it stands following the *Douglas* decision. If so, it is also unclear what rights such persons would have to claim additional amounts of payment but for the respective validation provisions contained in the bill. This is central to the question of whether retrospective validation would trespass on personal rights and liberties, which the committee has a duty to consider.

2.135 The committee, however, notes the minister's explanation that the legal basis for the historical treatment of affected payments is unclear and that the bill seeks to address this by the inclusion of the validation provisions. The need for clarity may appropriately justify retrospective validation in this case.

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

2.137 **The committee otherwise draws to the attention of senators and leaves to the Senate as a whole the appropriateness of retrospectively validating past assessments of the military invalidity payment.**

Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023[97]

Purpose	The bill seeks to amend a range of Acts to make consequential amendments; enable the disclosure of information about a recognised assessment activity in relation to a registered entity in certain circumstances; reduce the frequency of certain periodic reviews; make miscellaneous and technical amendments in the Treasury portfolio; provide four licensing exemptions for foreign financial services providers; and modernise the payments regulatory framework.
Portfolio	Treasury
Introduced	House of Representatives on 30 November 2023
Bill status	Before the House of Representatives

Henry VIII clause – modification of primary legislation by delegated legislation[98]

2.138 Item 5 of Schedule 7 to the bill seeks to insert proposed section 911F into the *Corporations Act 2001* (the Corporations Act). Proposed section 911F would allow regulations made under the Corporations Act to prescribe particular financial products or services, or particular classes, to which the professional investor exemption does not apply.[99] The professional investor exemption provides that a person is not required to hold an Australian Financial Services License in specified circumstances.

2.139 In *Scrutiny Digest 1 of 2024* the committee requested the Treasurer's advice as to:

- what would constitute 'exceptional circumstances' permitting regulations made under proposed section 911F to amend the operation of the *Corporations Act 2001*, and whether any examples of such exceptional circumstances could be provided,
- whether there is any guidance or relevant matters to be considered in exercising this power; and

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97 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023, *Scrutiny Digest 5 of 2024*; [2024] AUSStaCSBSD 78.

98 Schedule 7, item 5, proposed section 911F of the *Corporations Act 2001*. The committee draws senators' attention to the bill provision pursuant to Senate Standing Order 24(1)(a)(iv).

99 The professional investor exemption is set out in subsection 911A(2E) of the Corporations Act.

- whether proposed section 911F can be amended to include an express requirement that the regulations may only prescribe financial products, services, or classes of such as being exempt from the professional investor exemption in exceptional circumstances.[100]

Assistant Treasurer's response[101]

2.140 The Assistant Treasurer and Minister for Financial Services (the Assistant Treasurer) explained that the explanatory memorandum makes clear that the intent behind the bill is that the power to make exemptions to the professional investor exemption via regulations is only to be used in exceptional circumstances. However, the Assistant Treasurer advised that as financial markets are constantly evolving and governments require flexibility to address changing conditions.

2.141 The Assistant Treasurer stated that as the regulation making power is intended to enable prompt response if such exceptional circumstances arise, identifying specific examples or inserting an express requirement in the legislation may constrain the use of the power in a manner that is contrary to the clear legislative intent.

2.142 Further, the Assistant Treasurer advised that the decision as to whether the professional investor exemption should be disapplied due to exceptional circumstances is an appropriate matter for the government of the day.

Committee comment

2.143 The committee thanks the Assistant Treasurer for confirming that the explanatory memorandum clearly indicates that the power under proposed section 911F is only for exceptional circumstances.

2.144 However, it is unclear how, on the one hand, it can be clear from the explanatory memorandum that proposed section 911F is only intended for exceptional circumstances but then, on the other hand, it would be contrary to the legislative intent of the bill for the provision itself to reflect this position. The purpose of the explanatory memorandum is to provide context, further explanation and clarification as to how the provisions of the bill are to be interpreted so it is unclear how this could be the case. If the provision is intended to only be used in exceptional circumstances then the committee cannot see how it would be contrary to the intent of the legislation for the provision to reflect this requirement.

2.145 Further, the committee requested examples of the types of circumstances that may constitute exceptional circumstances, or the guidance or matters that are to be considered in exercising this power, to which the Assistant Treasurer responded that the identification of specific examples may limit use of the power. It is unclear to the committee how the provision of such examples would constrain the exercise of

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100 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 24–26.

101 The minister responded to the committee's comments in a letter received by the committee on 19 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 5 of 2024*.

power, noting that the committee was requesting preliminary information and context upon which to make an assessment as to the appropriateness of the provisions. The response therefore makes it difficult for the committee to consider how the power may be used in practice and whether or not the delegation of legislative power to exempt from primary legislation has been properly considered and is necessary and appropriate.

2.146 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed section 911F providing that regulations can provide for exemptions to the professional investor exemption as set out in primary legislation.

Instruments not subject to an appropriate level of parliamentary oversight[102]

2.147 Schedule 8 to the bill amends the payments regulatory framework set out in the *Payment Systems (Regulation) Act 1998* (the PSRA). The Schedule would insert a range of powers to make legislative instruments which are not subject to parliamentary oversight:

- proposed subsection 11B(1) would provide the minister with the power to designate a payment system as a special designated payment system by notifiable instrument if the minister considers to do so is in the national interest;
- proposed subsection 12(1A) would provide that a nominated special regulator can impose an access regime by legislative instrument;
- proposed subsection 18(1B) would provide that the Reserve Bank or the nominated special regulator may specify participants or classes of participants to whom standards do not apply or apply differently; and
- amended subsection 18(6) would provide that the Reserve Bank or the nominated special regulator must provide a notification when determining, varying or revoking a standard.

2.148 Instruments made under proposed subsections 12(1A), 18(1B) and 18(6) would be exempt from disallowance as per table item 26 in section 10 of the Legislation (Exemptions and Other Matters) Regulations 2015. Notifiable instruments made under proposed subsection 11B(1) would not be subject to parliamentary scrutiny due to their status as non-legislative instruments.

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[102] Schedule 8, item 29, proposed subsection 11B(1), item 33, subsection 12(1A), and items 61 and 63, subsections 18(1B) and 18(6) in the *Payment Systems (Regulation) Act 1998*. The committee draws senators' attention to the bill provision pursuant to Senate Standing Order 24(1)(a)(iv).

2.149 In *Scrutiny Digest 1 of 2024* the committee requested the Treasurer's advice as to:

- why it is necessary and appropriate for instruments made under proposed subsections 12(1A), 18(1B) and 18(6) to be exempt from disallowance, and
- why it is necessary and appropriate for instruments made under proposed subsection 11B(1) to be notifiable instruments which are exempt from the full range of parliamentary scrutiny.[103]

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

Assistant Treasurer's response

2.151 The Assistant Treasurer advised that, as per the explanatory memorandum, these instruments are ministerial directions and are therefore exempt from disallowance due to sections 9 and 11 of the Legislation (Exemptions and Other Matters) Regulation 2015. It is consistent with the principle of ministerial responsibility that directions, which may require consideration of the national interest, are not subject to uncertainty by being subject to disallowance or sunsetting.

2.152 The Assistant Treasurer elaborated that the exemption is appropriate in this context to ensure that the Minister's intended outcomes are complied with. Noting the serious circumstances in which these powers may be exercised, and that any designation or direction must be in the national interest, it is intended that there is Executive control over the instruments.

Committee comment

2.153 While this response slightly expands on the justifications provided for the exemptions in the explanatory memorandum, the committee is of the view that the explanation provided falls short of the robust justification expected by the committee for any exemptions from parliamentary scrutiny.

2.154 The fact that an instrument will fall within one of the classes of exemption in the Legislation (Exemptions and Other Matters) Regulation 2015 is not, of itself, a sufficient justification for excluding parliamentary disallowance.[104] The committee agrees with the comments of the Senate Standing Committee for the Scrutiny of

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103 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 26–28.

104 The committee further notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has recommended that the blanket exemption of instruments that are 'a direction by a Minister to any person or body' should be abolished. See 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. 101.

Delegated Legislation that 'any exclusion from parliamentary oversight…requires that the grounds for exclusion be justified in individual cases, not merely stated'.[105]

2.155 The committee notes that the making of the determinations and notifiable instruments in question is an exercise by the Executive of legislative power that has been delegated to it by the Parliament in pursuance of the objectives of a scheme legislated by the Parliament. As such, the committee is of the view that, unless there is a clear and well justified reason not to do so, the Parliament should maintain oversight of such instruments through the disallowance process.

2.156 The committee also understands that consideration of the national interest is a precondition to the exercise of the power under at least proposed subsection 11B(1). However, if the exercise of such power was subject to disallowance the Parliament would be cognisant of this in considering any proposal to disallow an instrument. Views of the Executive concerning the national interest would be appropriately weighed by a house of the Parliament and would inevitably be a subject of debate in the rare situation that a proposal to disallow such an instrument was put to that house. The committee considers that the Parliament should be trusted to exercise its powers with due regard to the national interest.

2.157 Finally, the committee notes the Assistant Treasurer's mention of 'the potential serious circumstances in which this power may be exercised'. It is the view of the committee that the seriousness of the circumstances in which a power may be exercised strengthens the case that the need for parliamentary scrutiny of the exercise of such a power is required rather than weakens it.

2.158 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of instruments made under proposed subsections 12(1A), 18(1B) and 18(6) to be exempt from disallowance, and of notifiable instruments made under proposed subsection 11B(1).

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105 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, pp. 75–76.

Treasury Laws Amendment (Foreign Investment) Bill 2024[106]

Purpose	The bill seeks to provide an express ordering rule to ensure the law imposing non-Australian tax prevails in the event of any inconsistency with the provisions of Australia's bilateral tax treaties.
Portfolio	Treasury
Introduced	House of Representatives on 7 February 2024
Bill status	Before the Senate

Retrospective application[107]

2.159 Item 1 of Schedule 1 to the bill seeks to insert subsection 5(3) into the *International Tax Agreements Act 1953*, which provides that the operation of a provision of an agreement provided for in subsection 5(1) is subject to anything inconsistent with the provision contained in a law of the Commonwealth, or of a state or territory, that imposes a tax other than Australian tax,[108] unless expressly provided otherwise in that law. Item 2 of Schedule 1 clarifies that the amendment applies in relation to taxes (other than Australian tax) payable on or after 1 January 2018, and in relation to tax periods that end on or after 1 January 2018.

2.160 The effect of this amendment is that where a provision of a tax treaty listed in subsection 5(1) of the *International Tax Agreements Act 1953* is inconsistent with a law of the Commonwealth, state or territory, the provision of the tax treaty will not operate to the extent of the inconsistency. The explanatory memorandum explains that this is to clarify any uncertainty and to ensure that the Commonwealth, state or territory tax continues to apply as intended and that taxes collected since 1 January 2018 are valid.[109]

2.161 The committee reported on its scrutiny concerns in relation to the matter in *Scrutiny Digest 3 of 2024*[110] and on the Treasurer's response to these concerns in *Scrutiny Digest 4 of 2024*.[111]

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106 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (Foreign Investment) Bill 2024, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 79.

107 Schedule 1, item 2. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

108 Section 3 of the *International Tax Agreements Act 1953* defines Australian tax to mean: income tax imposed as such by an Act or fringe benefits tax imposed by the *Fringe Benefits Tax Act 1986*.

109 Explanatory memorandum, p. 35.

110 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 48–50.

111 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2024* (20 March 2024) pp. 61–63.

2.162 Following receipt of correspondence concerning the bill, the committee wrote to the Treasurer seeking further advice.[112] The correspondence and the further advice received from the Treasurer concerning the matter are available on the committee's webpage.

2.163 The committee thanks the Treasurer for his constructive engagement with the committee on this matter.

2.164 **In light of the Treasurer's response, the committee makes no further comment.**

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112 See correspondence relating to *Scrutiny Digest 5 of 2024*.

Chapter 3
Scrutiny of standing appropriations[113]

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.[114] 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.[115]

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

Senator Dean Smith

Chair

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113 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 5 of 2024* [2024] AUSStaCSBSD 80.

114 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*.

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