Senator the Hon Katy Gallagher

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

REF: MC23-001853

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Chair ~~Dear~~

The Senate Scrutiny of Bills Committee (the committee) has sought my advice as to why the Advance to the Finance Minister (AFM) provisions in Appropriation Bill (No. 1) 2023-2024 and Appropriation Bill (No. 2) 2023-2024 (the Budget Bills) are significantly higher than the pre-pandemic AFM provisions.

The Budget Bills include AFM provisions of $400 million in Appropriation Bill (No. 1) and $600 million in Appropriation Bill (No. 2). Prior to the extraordinary arrangements introduced in 2020, and since 2008-09, the AFM provision in Appropriation Act (No. 1) was conventionally set at $295 million, and in Appropriation Act (No. 2) at $380 million.

The AFM provisions in the Budget Bills compared to the conventional (pre-2020) include an appropriate increase to reflect the passage of time since the normal levels were last adjusted in 2008-09. Thus, I am satisfied that the AFM provisions in the Budget Bills are not significantly higher than the AFM provisions in pre-pandemic years.

I trust this advice will assist the committee in its deliberations.

Yours sincerely

Katy Gallagher

26.6.23

The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Minister for the Arts
Leader of the House

MS23-003773

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600

By email: Scrutiny.Sen@aph.gov.au

Dear Chair Dean

I refer to the Senate Standing Committee for the Scrutiny of Bills' (the Committee) request in the *Scrutiny Digest 6/23* for further information on the Creative Australia Bill 2023 (the Bill).

The Committee has sought my advice in relation to two matters:

- the exemption of ministerial directions given to the Australia Council Board from the usual Parliamentary disallowance process (subclause 14(1)); and
- why it is considered necessary and appropriate to leave a financial limit on transactions entered into by Creative Australia to delegated legislation rather than including it within the primary legislation

Exemption from disallowance

Regarding the first matter, the Committee suggests that it may be appropriate for the Bill to be amended to provide that directions made under subclause 14(1) are subject to disallowance.

I acknowledge the Committee's concerns regarding an inconsistency between the Bill and its Explanatory Memorandum. I have tabled a correction of the Explanatory Memorandum to the Senate (**Attachment A**). The corrected Explanatory Memorandum explains that any directions provided by the Minister under clause14 are legislative instruments within the meaning of the *Legislative Instruments Act 2003,* must be tabled in Parliament and are not subject to disallowance.

The Bill makes clear that directions provided by the Minister may be in relation to the performance of functions and powers of Creative Australia, or requesting reporting or advice relating to Creative Australia's functions or powers. I note that ministerial directions to corporate Commonwealth entities are not usually legislative instruments and do not need to be tabled or published on the Federal Register of Legislation. Ministerial directions that are

not legislative instruments are not subject to disallowance or sunsetting under the *Legislation Act 2003.* Clause 14 of the Bill confirms that ministerial directions to Creative Australia will be non-disallowable legislative instruments, that they must be tabled in Parliament and registered on the Federal Register of Legislation.

By having the ministerial directions tabled in Parliament and on the public record, the public and the Parliament are empowered to hold the Government accountable for directions given to Creative Australia.

Financial limits on transactions

The Committee has also sought my detailed advice as to why it is considered necessary and appropriate to have a financial limit on transactions entered into by Creative Australia to delegated legislation rather than including it within the primary legislation.

I do not propose an amendment to the Bill as the Creative Australia Bill 2023 already prescribes a limit on financial transactions of up to $5 million. Flexibility to create a rule to prescribe a different amount has been included in this Bill, as it was in the *Australia Council Act 2013,* which enables the financial limit to be changed in future without legislative amendment. A rule of this nature must be tabled by Parliament and is subject to scrutiny, including disallowance by Parliament.

I note the concerns you have raised and I will ensure the department has the due regard to them when drafting explanatory material for future Bills.

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

Yours sincerely

THE HON TONY BURKE MP

23/ 6/ 2023

Attorney-General

Reference: MC23-020618

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600

By email: scrutiny.sen@aph.gov.au

Dear Senator

I am writing in response to correspondence received on 15 June 2023 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding Scrutiny Digest 6 of 2023 in relation to the Family Law Amendment Bill 2023 (the Bill). I thank the Committee for its consideration of the Bill and the response to my correspondence of 19 May 2023 which addressed questions previously raised by the Committee in relation to the Bill in the Scrutiny Digest 5 of 2023.

Undue trespass on personal rights and liberties and reversal of the evidential burden of proof (Part XIVB)

I thank the Committee for its response in relation to proposed new Part XIVB in Schedule 6 of the Bill. In accordance with the Committee's comments, the explanatory materials for the Bill will be updated to make clear that the prosecutorial safeguard of written consent from the Commonwealth Director of Public Prosecutions in relation to the offences contained in the Part is required to prevent systems abuse as parties may commence private prosecutions for improper reasons.

I also note that the Committee has drawn the attention of senators to the appropriateness of reversing the evidential burden of proof in relation to offences under proposed subsections 114Q(2) and 114R(2) of the Part. I confirm that the explanatory materials will also be updated to clarify the need for these offence-specific defences and reasons for the evidential burden resting with the defendant.

Significant matters in delegated legislation

I also thank the Committee for its response in relation to proposed paragraph 11K(2)(i) of the Bill. I note that the Committee has reiterated its view that the Bill should be amended to include a provision that any fee made in regulations under proposed paragraph 11K(2)(i) must not be such as to amount to taxation. The Committee has acknowledged that there is no legal need to include such a provision, but considers that it is important to include it to avoid confusion and emphasise the point that any amount calculated in regulations made under paragraph 11K(2)(i) will be a fee and not a tax.

I note the Committee's further request for advice as to whether the Bill can be amended to clarify that fees made in regulations under proposed paragraph 11K(2)(i) must not be such as to amount to taxation, and refer to my response of 19 May 2023. It is not necessary to amend the Bill to include such a provision, however the explanatory materials will be updated to provide greater clarity that any fee imposed on a family report writer by regulations made under paragraph 11K(2)(i) must not be such as to amount to a tax.

I thank the Committee for its further consideration of these matters and trust that this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
28/6 /2023

SENATOR THE HON JENNY MCALLISTER
ASSISTANT MINISTER FOR CLIMATE CHANGE AND ENERGY

MS23-002122

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Scrutiny.sen@aph.gov.au

Dear Chair

I refer to correspondence from the Senate Standing Committee for the Scrutiny of Bills (the Committee) Secretariat of 22 June 2023 seeking further information on the Greenhouse and Energy Minimum Standards Amendment (Administrative Changes) Bill 2023 (the Bill) as set out in Scrutiny Digest 7 of 2023.

I have carefully considered the Committee's question and provide my detailed response below.

Significant matters in delegated legislation

The Committee has requested detailed advice on whether the Bill can be amended to provide for a review of the operation of declarations made under proposed subsection 27A(1) within a specified time.

Proposed subsection 27A(1) would allow the GEMS Regulator to make a legislative instrument to declare that specified classes of products, or specified models of products, are taken to comply with requirements, or aspects of requirements, of a specified GEMS determination in specified circumstances or if specified conditions are complied with.

For example, the GEMS Regulator could make a declaration allowing new, up-to-date or equivalent international testing standards or methods to be used and remove the need for those suppliers to conduct testing specifically for the Australian market. This measure would reduce the risk of inadvertently restricting energy efficient products from entering the Australian market and reduce regulatory burden on suppliers of GEMS products, by introducing greater flexibility for suppliers to demonstrate compliance with a GEMS determination.

Proposed subsection 27A(3) limits the ability of the GEMS Regulator to make such a declaration. The GEMS Regulator may only make a declaration if they are satisfied that the declaration would be likely to promote the objects of the GEMS Act, and that any prescribed requirements in the regulation are complied with.

Read together, these provisions strike the appropriate balance to provide the necessary flexibility to respond quickly to changes in the regulatory regime due to technological advances, consumer behaviours and international and domestic markets. The limitation in proposed subsection 27A(3) provides an appropriate safeguard in primary legislation that limits matters that may be in delegated legislation.

These provisions also provide necessary flexibility to ensure that the GEMS Regulator may efficiently and effectively make and implement declarations under proposed subsection 27A(1). Importantly, this does not impose any limitations (including timeframes) on the GEMS Regulator's ability to review the operation of declarations made. Instead, as a matter of administrative and regulatory best practice, the GEMS Regulator would be able to review declarations made at any time to respond to changing regulatory settings, or on a regular basis to ensure that a declaration remains fit-for-purpose. This flexibility would also allow the GEMS Regulator to best target areas of review in the context of the entire GEMS legislative framework.

In addition, the GEMS Scheme as a whole provides significant opportunities for oversight. GEMS is established by the Intergovernmental Agreement for the GEMS Legislative Scheme (the IGA) to regulate the energy efficiency of products supplied or used within Australia. The Ministerial Council responsible for the IGA, comprising of Ministers from each jurisdiction, maintains the Inter-Jurisdictional Advisory Committee (the IJAC) to advise the Ministerial Council. The IJAC has lead responsibility for developing proposals for new or revised GEMS requirements, in consultation with the GEMS Regulator and relevant stakeholders. This includes the development and international harmonisation of test procedures and standards. To exercise the powers proposed under subsection 27A(1), the GEMS Regulator would engage with the IJAC to ensure the declaration made is fit for purpose and adjust the declaration as necessary based on IJAC feedback. The Ministerial Council responsible for the IGA would then need to approve the new or revised GEMS requirements and timing for their introduction. This process ensures Ministerial oversight of any declaration made.

For these reasons, I am satisfied that the approach taken in the Bill ensures the effective implementation of the GEMS legislative framework and that it would not be necessary or appropriate to amend the Bill to provide for review of declarations made under proposed subsection 27A(1) within a specified time.

I thank the Committee for the opportunity to respond. I have copied this letter to the Minister for Climate Change and Energy, the Hon Chris Bowen MP.

Yours sincerely

JENNY MCALLISTER

Assistant Minister for Climate Change and Energy

cc: Minister for Climate Change and Energy
The Hon Chris Bowen MP

SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
MINISTER FOR EMERGENCY MANAGEMENT

MS23-001078

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

Dear Chair Dean

I refer to the matters raised by the Senate Standing Committee for the Scrutiny of Bills (the Committee) in Scrutiny Digest 6 of 2023 in relation to the Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023 (the Bill) and the Committee's request for further advice. I welcome the opportunity to respond to the Committee's comments, as outlined below.

The Bill amends the *Inspector-General of Live Animal Exports Act 2019* (the Act) to expand the office of the current Inspector-General of Live Animal Exports to provide an enhanced focus of animal welfare in relation to livestock exports. The Bill includes additional animal welfare related objects and functions, and also renames the current office of the Inspector-General of Live Animal Exports as the 'Inspector-General of Animal Welfare and Live Animal Exports' (Inspector-General), to reflect this expansion.

Limits or Constraints on the exercise of broad discretionary powers

The Committee has requested detailed advice as to what criteria or considerations exist that limit or constrain the exercise of the Inspector-General's broad discretionary powers in proposed subsections 10(2A) and 10C(2), including whether these are contained in law or policy.

New subsection 10(2A) of the Bill provides that the Inspector-General has power to do all things necessary or convenient to be done for, or in connection with, the performance of the Inspector-General's functions.

New section 10C of the Bill provides for the independence of the Inspector-General. In particular, new subsection 10C(2) provides that the Inspector-General is not subject to direction in relation to whether or not a particular outcome or priority is to be included in a work plan; the scope, content and timing of a review; or the contents of a report.

The Inspector-General's powers in these provisions are reasonably and appropriately constrained in a number of ways.

The ancillary powers under subsection 10(2A) may only be exercised if necessary or convenient for, or in connection with, the performance of the Inspector-General's functions. Those functions are exhaustively delineated in new subsection 10(1) of the Bill. Further, each function is constrained by its express terms in subsection 10(1). For example, one of the functions of the Inspector-General in subsection 10(1) is to conduct reviews of the performance of functions, or exercise of powers, by livestock export officials. However, these reviews may only relate to a performance of functions or exercise of powers under the animal welfare and live animal export legislation and standards in relation to the export of livestock (paragraph 10(1)(a)). The term "*animal welfare and live animal export legislation and standards*" is defined as *the Export Control Act 2020*; any instrument made under that Act; and the *Australian Standards for the Export of Livestock* as it exists from time to time.

As such, the exercise of any ancillary powers under new subsection 10(2A) may only be in pursuance of the Inspector-General's functions, which are exhaustively defined and limited in scope in the legislation.

Similarly, whilst new section 10C provides for the independence of the Inspector-General, the scope of that independence is necessarily constrained by the limited range of functions of the Inspector-General in the Bill. For example, subsection 10C(2) may give discretion to the Inspector-General in relation to the subject matter of a review, how to conduct that review and the scope of that review, but each review may only be conducted into those matters listed exhaustively in new subsection 10(1) of the Bill.

Further, new section 3 of the Bill provides expanded objects for the Act. These objects are exhaustively delineated and are to be achieved with a view to ensuring that the animal welfare and live animal export legislation and standards in relation to the export of livestock are complied with. As such, the performance of the Inspector-General's functions and the exercise of the Inspector-General's powers under the Act are necessarily constrained by the objects of the Act and may only be performed or exercised in pursuance of these objects.

Safeguards to protect disclosure of an official's personal information

The Committee has requested advice as to whether the Bill can be amended to include safeguards to protect the disclosure of livestock export official's personal information.

It is not considered necessary to amend the Bill to include further safeguards to protect the disclosure of the personal information of a livestock export official.

As noted in the Explanatory Memorandum, any information or documentation, required by the Inspector-General to be provided in order to conduct a review (including personal information), will be managed in compliance with both the Act and the *Privacy Act 1988* (the Privacy Act).

The Act contains an existing information management framework in sections 23 to 31 which would provide robust protection for information provided under or in accordance with the Act (defined as "protected information"). Protected information could include personal information. The Act's information management framework allows only for limited disclosure of protected information, for the below specified purposes and circumstances:

- for the purposes of performing functions or exercising powers under the Act (section 24)
- for the purposes of law enforcement or court proceedings (sections 25 and 26)
- where required to do so by an Australian law (section 27)
- with the consent of the person to whom the information relates (section 28)
- to the person who gave the information (section 29).

Section 30 of the Act provides that rules (made by the Minister under section 41) may authorise a person to use or disclose the information for purposes other than those referred to in sections 24 to 29, however there are currently no rules made pursuant to section 30. If the Minister does make rules pursuant to section 30, such rules will be subject to Parliamentary scrutiny and may be disallowed, as provided by the *Legislation Act 2003*, as the rules are to be made by legislative instrument under section 41.

Section 31 of the Act contains an offence provision for the unauthorised disclosure of protected information. A person who contravenes this provision may face a maximum of 2 years imprisonment or a penalty of 120 penalty units, or both. As such, the Inspector-General's ability to use and disclose personal information will be constrained by both the Act and the Privacy Act. Further, it may not be appropriate to further constrain the Inspector-General's management of information without adversely impinging on the office's independence which is critical for the performance of its functions under the Act.

I thank the Committee for its consideration of this important Bill and trust this information will be of assistance.

Yours sincerely

MURRAY WATT 22 / 6 / 2023

THE HON ANDREW GILES MP

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MC23-008428

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

scrutiny.sen@aph.gov.au

Dear Senator

Thank you for your correspondence of 9 March 2023 to the Minister for Home Affairs and Cyber Security, the Hon Clare O'Neil MP, requesting advice on the *Migration Amendment (Aggregate Sentences) Act 2023*. The Minister appreciates the time you have taken to bring this matter to her attention. Your correspondence has been referred to me as the matter falls within my portfolio responsibilities.

The Migration Amendment (Aggregate Sentences) Bill 2023 was introduced into the Senate on 7 February 2023, and passed both Houses on 13 February 2023. The *Migration Amendment (Aggregate Sentences) Act 2023 (*Aggregate Sentences Act) commenced on 17 February 2023, the day after it received the Royal Assent.

The Aggregate Sentences Act amended the *Migration Act 1958* (Migration Act) to make clear that the provisions of the Migration Act, including section 501, apply no differently in relation to a single sentence imposed by a court in respect of two or more offences to the way in which those provisions apply in relation to a sentence imposed by a court in respect of a single offence.

This was in response to the Full Federal Court decision in *Pearson v Minister for Home Affairs* [2022] FCAFC 203 which found that an 'aggregate sentence' (a single sentence imposed in relation to two or more criminal offences of which a person has been convicted) could not count when establishing if a person has a 'substantial criminal record' under s 501(7)(c) of the Migration Act, and therefore, does not enliven the mandatory cancellation provisions.

In the Scrutiny Digest 2 of 2023, the Standing Committee for the Scrutiny of Bills sought advice in regards to the Aggregate Sentences Act.

A copy of the response is enclosed.

Thank you for raising this matter.

Yours sincerely

ANDREW GILES

11 / 5 / 2023

Annex A – Response to queries raised by the Committee

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS
Scrutiny Digest 1 of 2023

Migration Amendment (Aggregate Sentences) Act 2023

Minister's Response

1.40 The committee requests the Minister's detailed advice as to:

- **what alternative approaches were available to respond to the *Pearson* decision and the general concern for community safety; and**
- **in light of the potential effect of retrospective validation on the integrity of Australia's rule of law system and the significant impact of this bill on individuals, why these alternative approaches could not have been implemented in this case; and**
- **how the retrospective validation of decisions under the *Migration Act 1958* is intended to interact with decisions which have been successfully invalidated by a court or where proceedings have been instituted.**

- **what alternative approaches were available to respond to the Pearson decision and the general concern for community safety?**

Response

The Aggregate Sentences Act was implemented to allow the Government to take urgent action to address the inconsistencies in the application of the character provisions of the *Migration Act 1958* arising from the Full Federal Court's decision in *Pearson*, but does not otherwise change the framework within which the character test operates.

In the Full Federal Court's decision in *Pearson,* the Court held that an aggregate sentence is not able to be counted when establishing if someone has a 'substantial criminal record' and therefore does not enliven the mandatory cancellation provisions in the Migration Act.

This meant that a person who is sentenced to a term of imprisonment for 5 years for committing a violent offence would be found to have a substantial criminal record and would be liable for mandatory cancellation of their visa, whereas if they were convicted for a term of imprisonment of more than 5 years on the basis of that same offence plus another offence, they would not - simply because that sentence was in respect of more than one offence.

The Aggregate Sentences Act does not represent a change in Government policy on how aggregate sentences are dealt with under the Migration Act. Rather, the Act re-instates the previous bi-partisan position that aggregate sentences can be taken into account for all relevant purposes under the Migration Act, including the character test at section 501 of the Migration Act.

The Government considered only the amendments made by the Aggregate Sentences Act would be sufficient to address the issues raised by the Court's decision in *Pearson* and to restore the original policy intention of the relevant provisions of the Migration Act.

- **in light of the potential effect of retrospective validation on the integrity of Australia's rule of law system and the significant impact of this bill on individuals, why these alternative approaches could not have been implemented in this case?**

Response

As stated above, the Aggregate Sentences Act does not represent a change in policy in relation to how aggregate sentences were considered under the Act before the Court's decision in *Pearson*.

In this regard, aside from the brief period of time between the Court's decision in *Pearson* on 22 December 2022, and the commencement of the Aggregate Sentences Act on 17 February 2023, aggregate sentences have always been considered for all purposes of the Migration Act, including for the purpose of the Character test at section 501.

In this sense, the retrospective validation of decisions made prior to the commencement of the Aggregate Sentences Act did not change the Government's policy in relation to persons sentenced to aggregate sentences of 12 months (or more) imprisonment, and restored the application of the character provisions of the Act consistently with how they were previously understood to operate.

As the Government's policy in relation to persons of character concern has not changed, it was appropriate in these circumstances to ensure that those persons affected by the Court's decision in *Pearson* are treated consistently with all other persons sentenced to single or aggregate terms of 12 months or more imprisonment in the interests of community protection.

- **how the retrospective validation of decisions under the Migration Act 1958 is intended to interact with decisions which have been successfully invalidated by a court or where proceedings have been instituted?**

Response

The effect of the Aggregate Sentences Act is that a decision made before 22 December 2022 to refuse or cancel a visa under s501 in reliance on an aggregate sentence is valid, and the non-citizen is an unlawful non-citizen. Unlawful non-citizens are liable for detention and removal from Australia.

The Government recognises that some individuals who were impacted by the Full Federal Court's decision in *Pearson* may have chosen not to seek review or revocation of a mandatory cancellation decision in light of the judgment, or may have otherwise discontinued review processes.

The Aggregate Sentences Act makes provision for refreshed review periods for impacted individuals, on commencement of the legislation, as long as they were within the appropriate timeframe to seek review prior to the *Pearson* decision.

Where a person's visa cancellation or refusal has been validated on commencement of the legislation, they will be restored any review or revocation rights they had immediately before 22 December 2022 (the date the Full Federal Court handed down its judgment in Pearson). Any person whose review or revocation proceedings remain on-hand will not be impacted, and those applications will continue to be considered by the Minister or the relevant body, such as the Administrative Appeals Tribunal or a court.

Any person whose revocation and review rights were exhausted as at 22 December 2022 will not have any new review or revocation right re-enlivened due to the passage of the Aggregate Sentences Act.

THE HON ANDREW GILES MP

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MC23-018288

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

Dear Senator

Response to the Senate Scrutiny of Bills Committee – Scrutiny Digest 6/23 – Migration Amendment (Giving Documents and Other Measures) Bill 2023

I refer to your correspondence of 15 June 2023 to the Minister for Home Affairs and Minister for Cyber Security, concerning matters raised by the senate Scrutiny of Bills Committee (the **Committee**) in Scrutiny Digest 6 of 2023, for advice in relation to the Migration Amendment (Giving Documents and Other Measures) Bill 2023 (the **Bill**). I appreciate the time you and the Committee have taken considering this Bill. Your correspondence has been referred to me as the matter falls within my portfolio responsibilities as Minister for Immigration, Citizenship and Multicultural Affairs.

I thank the Committee for its request for detailed advice as to whether consideration has been given to framing the test of complying with content requirements in proposed section 494E in terms of the materiality of the error and, if not, why it is considered necessary and appropriate to adopt a broader standard than what has been considered by the courts to result in jurisdictional error. I provide the advice below for the Committee's consideration, alongside the Bill and its Explanatory Memorandum.

Proposed section 494E – substantial compliance with content requirements

Schedule 1 to the Bill introduces a substantial compliance framework into the *Migration Act 1958* (the **Migration Act**) to make clear that strict adherence to the relevant statutory requirements is not required in all situations. This adopts a common sense approach to the administration of the complex migration framework, and provides certainty to the Minister and to the recipient in relation to the giving of documents.

Proposed section 494E is concerned with the validity of notices given under the Migration Act, where there is non-compliance with a statutory requirement to include particular information in the notice. The proposed provision will operate to preserve the validity (as a matter of law) of documents given under the Migration Act in certain circumstances.

Proposed section 494E has two key components. The first requirement is that a document complies substantially (as opposed to strictly) with statutory content requirements. The second is that the failure to strictly comply with relevant requirements does not, or is not likely to, cause substantial prejudice to the person's rights (including, but not limited to, rights to seek review in connection with the matter to which the document relates).

The Committee has expressed the view that:

> a test of 'material prejudice' would…be more narrowly directed and better aligned with the accepted judicial approach to immaterial error by asking whether or not the error could have made no difference to any adverse effect that might, or has been occasioned by, the error in the notice.

Consideration has been given to framing the test of complying with the content requirements in terms of the materiality of the error. As explained further below, in my view it is both necessary and appropriate to use the term 'substantial prejudice' rather than 'material prejudice'.

Appropriateness of 'substantial prejudice' as opposed to 'material prejudice'

I acknowledge that the test of 'materiality' can be useful and important in some circumstances. However, the concept of materiality is a developing concept, and its meaning continues to evolve in different statutory contexts. Using the term 'material' in the new substantial compliance provision risks introducing a level of confusion and complexity to its interpretation.

In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Parata* [2021] FCAFC 46, the Court found that an erroneous denial of jurisdiction by the Administrative Appeals Tribunal (the **AAT**) following a notice that does not comply with 'content requirements' is sufficient, without more, to demonstrate jurisdictional error in the AAT's decision. In other words, a failure to comply with 'content requirements' would result in the Tribunal's 'no jurisdiction finding' being affected by jurisdictional error (without an additional requirement of materiality). That is so even if there is no evidence that the defect in the notice any way in fact caused or contributed an applicant to miss the deadline for lodging an application for review.

In that same judgment, the court used the term 'material' in the context of describing Parliament's intention when including the requirements in s 127 to include particular information. The majority said (at [52]-[53], with emphasis added):

> Just as s 347 of the Act is concerned with objective matters of manner and form, so too is s 127. Its purpose is to provide all persons affected by reviewable decisions with the information that Parliament has determined should be provided to all persons to fairly comprehend not only the existence of the right of the review but also to ascertain the conditions for a valid application. Parliament intended that the information be provided contemporaneously with the person becoming aware of the decision affecting his or her immigration status, and not at a later time. It was open to Parliament to leave it to all prospective review applicants to identify such matters for themselves within the limited timeframes prescribed elsewhere in the Act or the Regulations, but that approach was not adopted. In that sense, **Parliament has determined the information that is of material assistance**. It has not qualified the obligation to provide the information by reference to whether the assistance is needed on the facts of a particular case.
>
> These considerations weigh heavily against the construction favoured by Emmett J in *Yu*. With respect, the "distinction" identified by his Honour is not supported by the context of the provisions in question within the regime as a whole. It severs the requirement that the affected person receive "notice of the decision" from the requirement to give a "notification of a decision" that complies with s 127. That leaves open the possibility that the person receives **information that Parliament considered material to his or her ability to make an application for review** (the "notification") after the time for making that application has expired (seven days after receiving the "notice"). Moreover, the focus is not to be confined to the purpose of each condition in s 127(2) of the Act, but must also be on the purpose to be served by fixing the time period under s 347 of the Act objectively by reference to the time that the notification under s 127 is given.

Used in this sense, the term 'material' is used to describe any information required by the Parliament to be included in a notice. On this approach, it might be argued that any error might be seen to be 'material'. Therefore, setting a threshold of 'material prejudice' could be an ineffective statutory test and fails to achieve the purpose of the legislation.

In this context, for the purposes of the Bill, it is considered that a more useful and readily understandable test is 'substantial' – it can be understood at face value. Using this term, as opposed to 'material prejudice', means it will not be necessary to turn to evolving case law on materiality to understand and apply section 494E. The Department considers it preferable to have a word used in the provision that is explicable on its face to the reader.

Example of substantial prejudice

The Committee also expressed a concern that the examples in the Bill and explanatory memorandum are only those "where it is clear that there has been no material prejudice at all." I would like to draw the Committee's attention to the first note under proposed section 494E in Schedule 1 to the Bill, where three scenarios serve as examples to demonstrate operation of the provision. The second of these three scenarios provide an instance where an error did cause substantial prejudice to a visa applicant ('George'), and hence indicates substantial prejudice is not intended to apply in such circumstances.

I trust that the information provided above will assist the Committee in its consideration of the Bill.

I have copied this letter to the Hon Clare O'Neil MP, Minister for Home Affairs and Minister for Cyber Security.

Yours sincerely

ANDREW GILES

20 / 06 / 2023

THE HON TANYA PLIBERSEK MP
MINISTER FOR THE ENVIRONMENT AND WATER

MC23-023225

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

scrutiny.sen@aph.gov.au

Dear Chair

I refer to correspondence of 11 May 2023 from Ms Fattimah Imtoual, Acting Committee Secretary, regarding the Senate Standing Committee for the Scrutiny of Bills (Committee) request seeking further information regarding the Nature Repair Market Bill 2023 (the NRM Bill) and the Nature Repair Market (Consequential Amendments) Bill 2023 (NRM Consequential Amendments Bill) as set out in Scrutiny Digest 5 of 2023.

I have carefully considered the Committee's requests, including whether the NRM Bill or the NRM Consequential Amendments Bill could be amended to address the issues raised by the Committee.

I am satisfied that the approach taken in the NRM Bill and the NRM Consequential Amendments Bill would ensure the effective functioning of the scheme to be established by this legislation and that it would not be appropriate to amend these Bills to address the issues raised. My detailed response is in the Attachment.

I thank the Committee for the opportunity to respond.

Yours sincerely

TANYA PLIBERSEK

Enc Response to Senate Standing Committee for the Scrutiny of Bills

20.6.23

ATTACHMENT

RESPONSE TO SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS
SCRUTINY DIGEST 5 of 2023

NATURE REPAIR MARKET BILL 2023
NATURE REPAIR (CONSEQUENTIAL AMENDMENTS) BILL 2023

NATURE REPAIR MARKET BILL

Significant matters in delegated legislation

Committee comments:

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

- **why it is considered necessary and appropriate to leave much of the information relating to the scope and operation of the nature repair market scheme to delegated legislation; and**
- **whether the bill can be amended to include further detail in relation to the scheme on the face of the primary legislation.**

Response:

This NRM Bill sets out the framework for the new nature repair market (NRM), which would allow for eligible persons to undertake projects to enhance or protect biodiversity through a tradeable certificate scheme. It would also create a public register to track biodiversity projects and certificates.

Some matters relevant to the scope and operation of the NRM scheme would be provided for in delegated legislation. This is appropriate as the specific matters generally relate to issues that:

- are intended to be the subject of a co-design process, with opportunities for stakeholder and public engagement, consultation and participation (such as methodology determinations). The intent is that experts would be able to input knowledge that is relevant to the delegated legislation under development and that this process would provide opportunities for Indigenous knowledge of biodiversity, cultural heritage and practices to be recognised and appropriately considered; or
- require tailored requirements for different kinds of biodiversity projects; or
- may need to be updated regularly to ensure they continue to be fit for purpose based on evolving technological developments; or
- may need to be updated regularly to ensure continued compliance with Australia's international obligations.

However, where matters under the NRM scheme are left for delegated legislation, the NRM Bill generally sets clear parameters for that legislation including, in some case, matters that must be included and tests that must be applied. The delegated legislation would also be subject to ordinary Parliamentary scrutiny processes, such as disallowance and sunsetting.

In respect of the specific examples noted by the Committee:

- Methodology determinations would be legislative instruments made by the Minister and which set out requirements on how a kind of registered biodiversity projects is to be carried out. It is appropriate that this information be in delegated legislation (rather than the NRM Bill itself) because each methodology determination would apply to a kind of biodiversity project and would set requirements that are tailored to that specific kind of project. For instance, marine projects are likely to have different requirements to terrestrial projects. However, clause 45 of the NRM Bill would set clear parameters in what must be included in a methodology determination, while clause 57 would set biodiversity integrity standards with which a methodology determination must comply.

- Similarly, while the purpose of a biodiversity assessment instrument is to achieve appropriate consistency in how methodology determinations measure and assess biodiversity (including both a baseline and changes in biodiversity over time), tailored requirements are likely to be needed for different kinds of projects (or classes of projects). For instance, it may be appropriate for a biodiversity assessment instrument to prescribe standard terminologies, interpretation or factors that are required to be used in methodology determinations dealing with water-based projects, but that are not appropriate to apply for land-based projects. For this reason, it is appropriate for such requirements to be set in delegated legislation rather than the NRM Bill itself. However, clause 58 of the NRM Bill would set clear parameters in what must be included in a biodiversity assessment instrument.

- Clause 33 of the NRM Bill would allow the Minister to make rules to prescribe particular kinds of biodiversity projects to be *excluded biodiversity projects*, which would not be able to be registered (on the basis that such projects are likely to have material adverse impacts). It is appropriate that the kinds of biodiversity projects that are excluded from the scheme set out in the rules (rather than the NRM Bill itself) because the material adverse impacts of a kind of project may differ over time, based on evolving technologies, practices and Australia's international obligations.

- The fit and proper person test in clauses 97 to 99A of the NRM Bill requires the Regulator to have regard to a number of matters that are set out in the NRM Bill itself. It also allows the rules to prescribe additional matters to which the Regulator must have regard when deciding whether a person is a fit and proper person. This is appropriate because it allows the fit and proper person test to be updated overtime to take into account other factors that may become relevant. For example, the person's compliance history under other new legislation that is enacted after the NRM Bill may be considered relevant. This would ensure the fit and proper person test under the NRM Bill remains fit for purpose.

- Subclause 167(1) would allow the rules to make provision for and in relation to the Register. Subclause 167(2) would provide a non-exclusive list of matters that rules made for the purposes of subclause 167(1) may cover, including matters relating to the operation of the Register (such as requirements for register accounts). It is appropriate for the rules to set out these matters because it may be necessary to tailor requirements and circumstances to different kinds of information and different kinds of projects. In addition, as technology and international obligations evolve, regular changes and updates to the requirements relating to the Register are likely to be necessary.

- Similarly, rules made under clause 168 would be able to prevent a person from:

    - using information about a person that they obtained from the Register to, for example, send abusive or advertising material to that person, or

- disclosing information that was obtained from the Register and is about another person if they know the information is likely to be used to contact or send material to the other person.

It is appropriate that these requirements be set out in the rules because it may be necessary to tailor requirements and circumstances to different kinds of information and projects (including as technology evolves). However, the criteria set out at subclauses 168(1) and (2) would set clear parameters in the NRM Bill that the Minister would need to comply with when making such rules.

For these reasons, it is not considered appropriate to amend the NRM Bill to include further detail in relation to the NRM scheme on the face of the primary legislation, including in relation to the above matters.

Exemption from disallowance

Committee comments:

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

- **why it is considered necessary and appropriate to provide that directions made under clauses 55 and 65A are not subject to disallowance; and**
- **whether the bill could be amended to provide that these directions are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.**

Response:

Clause 55 of the NRM Bill would allow the Minister, by legislative instrument, to direct the Nature Repair Market Committee to have regard to one or more specified matters in giving advice about the making, varying or revoking of a methodology determination. Similarly, clause 65A of the NRM Bill would allow the Minister, by legislative instrument, to direct the Nature Repair Market Committee to have regard to one or more specified matters in giving advice about the making, varying or revoking of a biodiversity assessment instrument.

The NRM Bill would not exempt directions given under either clause 55 or 65A from being subject to disallowance. Rather, any directions given under clause 55 or 65A would be exempt from disallowance because of the operation of paragraph 44(2)(b) of the *Legislation Act 2003* (the Legislation Act). This is an automatic exemption that applies by force of law for legislative instruments that are prescribed by regulation for the purpose of paragraph 44(2)(b) of the Legislation Act. This is explained in the note following proposed clauses 55 and 65A of the NRM Bill.

Section 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (LEOM Regulations) is made for the purpose of paragraph 44(2)(b) of the Legislation Act and prescribes classes of legislative instruments that are not subject to the disallowance regime provided under section 42 of the Legislation Act. Item 2 of the table in section 9 of the LEOM Regulations has the effect that a direction by a Minister to any person or body will not be subject to disallowance. The explanatory memorandum for the LEOM Regulations states that this exemption recognises that executive control is intended in the instance of a ministerial direction. It also states that this item preserves the previous exemption in item 41 of the table in subsection 44(2) of the (former) *Legislative Instruments Act 2003*.

The NRM Bill does not seek to expand or otherwise affect this automatic exemption.

It is appropriate that ministerial directions given under proposed clauses 55 or 65A of the NRM not be subject to disallowance. The purpose of such directions is to inform the content of the advice provided to the Minister by the Nature Repair Market Committee regarding making, varying or revoking (respectively) a methodology determination or a biodiversity assessment instrument. This would ensure that such advice addresses the matters the Minister considers relevant to the decision, providing the Minister with confidence that their decision whether to make, vary or revoke a methodology determination or biodiversity instrument is properly informed, fit for purpose and consistent with the statutory requirements. This need for executive control over the matters addressed by the Committee's advice is consistent with the rationale for exempting ministerial directions from disallowance under the Legislation Act and the LEOM Regulations.

The directions given under proposed clauses 55 or 65A would not substantively affect any persons other than the Committee and the Minister. Rather, it is the Minister's decision to make, vary or revoke the methodology determination or biodiversity instrument that would affect other persons. Both a methodology determination and a biodiversity assessment instrument would be legislative instruments that are subject to disallowance in accordance with the ordinary requirements of section 42 of the Legislation Act.

For these reasons, and consistently with Parliament's rationale for including paragraph 44(2)(b) of the Legislation Act and the Governor-General's rationale for including item 2 of the table in section 9 of the LEOM Regulations, it is appropriate that the Ministerial directions given under proposed clauses 55 and 65A would not be subject to disallowance.

Tabling of documents in Parliament

Committee comments:

1.147 The committee requests the minister's advice as to why it is appropriate not to include a requirement that reports written under clauses 172 and 175 be tabled.

Response:

Clause 172 of the NRM Bill would provide that, as soon as practicable after the end of a financial year, the Regulator must publish on the Regulator's website a report about the activities of the Regulator under this Act during the financial year (subclause 172(1)). The report would be required to deal with any matters prescribed by the rules (subclause 172(2)).

Clause 175 of the NRM Bill would allow the Secretary to publish, on the Department's website, a report, in relation to a financial year, on various matters relating to the Commonwealth's entry into biodiversity conservation contracts and the Commonwealth's purchase of biodiversity certificates. The power to publish a report under clause 175 would not be mandatory.

The NRM Bill would not prevent reports published under clause 172 or 175 from being tabled in Parliament by the Minister where the Minister considers it appropriate to do so. However, it is not considered appropriate for this to be a mandatory requirement under the proposed legislation.

Both the powers in clause 172 and 175 would be vested in persons other than the Minister, being the Regulator and the Secretary. This is appropriate as these reports relate to matters that fall within the responsibility of the Regulator (concerning the Regulator's activities) and the Secretary (concerning the Commonwealth's entry into biodiversity conservation contracts and the Commonwealth's purchase of biodiversity certificates) under the proposed legislation. The NRM Bill has been designed so that the policy responsibility (the Minister), the administration of the Scheme (the Regulator) and power to purchase biodiversity certificates under the legislation on behalf of the Commonwealth (the Secretary)

are vested in separate entities. This is to reduce the possibility of conflicts of interest, consistent with the recommendations of the recent independent review into the *Carbon Credits (Carbon Farming Initiatives) Act 2011*.

The reports provided for by clause 172 and 175 would not relate to matters within the Minister's responsibility; the Minister would have no power in relation to their content or publication. In addition, neither the Regulator nor the Secretary have the power to table documents in Parliament. As such, it would not be appropriate to include a mandatory requirement that such reports to be tabled in Parliament.

Further, the publication of a report by the Secretary under clause 175 would not be mandatory. This is because the relevant matters concerning Commonwealth's entry into biodiversity conservation contracts and the Commonwealth's purchase of biodiversity certificates may, in some cases, deal with commercial or other sensitive issues that would not be appropriate to publish. It would be a matter for the Secretary to determine whether publication of matters relevant to a particular biodiversity conservation contract or the purchase of particular biodiversity certificate is appropriate. Where the publication of a report is discretionary, it is not considered appropriate to include a mandatory requirement that such report be tabled in Parliament.

Clause 236 of the NRM Bill would require the Minister to cause an independent review of the operation of the NRM Bill every five years, which must consider the extent to which the objects of the Act have been achieved (paragraph 236(2)(a)). Noting the importance of the Regulator's activities and the Commonwealth's purchase of biodiversity certificates to the operation of the NRM scheme, an independent review would likely address such matters. The report made as part of an independent review would be required to be tabled in Parliament (subclause 236(6)).

For these reasons, it is not considered appropriate to amend the Bill to require reports published under clause 172 and 175 to be tabled in Parliament.

Immunity from civil liability

Committee comments:

1.154 The committee requests the Minister's more detailed advice as to why it is considered necessary and appropriate to confer immunity from liability for damages on such a broad class of persons, such that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

1.155 The committee's consideration of this issue will be assisted if the Minister's advice addresses what, if any, alternative protections are afforded to an affected individual given that the normal rules of civil liability have been limited by the bill.

Response:

Clause 228 of the NRM Bill would have the effect that certain persons cannot be held liable in an action or other proceeding for damages for or in relation to an act or matter done in the performance (or purported performance) of functions or the exercise (or purported exercise) of powers under the NRM Bill, provided the act or matter was done in good faith.

The relevant persons would be the Minister (or delegate), the Secretary (or delegate), the Regulator (or delegate), an inspector, a person assisting an inspector, an audit team leader, a person assisting an audit team leader, a Nature Repair Market Committee member and a person assisting a Nature Repair

Market Committee member. This list is appropriate as it reflects the persons who would exercise powers and perform functions under the NRM Bill.

These protections are considered necessary and appropriate to ensure efficient and effective administration of the Bill. In particular, immunity from damages for acts or matters where good faith is shown is considered necessary to maintain the integrity of the regulatory framework. In this scheme many decisions would be based on a complex matrix of scientific information. The exercise of finely balanced judgment in the context of complex decisions would be required. This immunity would ensure that persons exercising this judgement are able to do so in accordance with statutory processes and without risk of civil action. In the absence of immunity to persons exercising powers and performing functions under the NRM Bill, it would be difficult to effectively administer the NRM scheme. For example, such persons may be unwilling to perform functions or exercise powers under the NRM Bill if there was a risk they could be held personally liable for damages even if they acted in good faith.

Acts or omissions that are not performed in good faith (such as those performed with malice or fraudulently) would still be subject to potential civil proceedings, which is considered appropriate as powers, duties and functions under legislation must be exercised in good faith for a proper purpose. In addition, clause 228 would not protect the relevant persons from criminal proceedings.

In addition, this immunity would not prevent challenges to the validity of decisions made under the NRM Bill. Such decisions would be subject to the usual principles of administrative law. Decisions made under the NRM Bill would be able to be challenged under the *Administrative Decisions (Judicial Review) Act 1977* (for administrative decisions) or the *Judiciary Act 1903* (for administrative or legislative decisions) on the basis of an error of law. Most administrative decisions under the NRM Bill would be also subject to merits review, including by the Administrative Appeals Tribunal.

Accordingly, affected persons would still be able to bring actions to enforce their legal rights.

Granting immunity from civil damages to persons exercising (or purportedly exercising) powers and performing (or purportedly performing) functions under legislation is also relatively common across Commonwealth legislation. In this regard, clause 228 would be consistent with similar immunities that protect the Commonwealth and other relevant persons against liability for acts performed in good faith in the performance of legislative functions and powers. These include:

- section 180 of the *Recycling and Waste Reduction Act 2020*;
- section 430 of the *Export Control Act 2020*;
- section 441 of the *Biosecurity Act 2015*; and
- section 74T of the *Broadcasting Services Act 1992*.

For these reasons, it is considered necessary and appropriate to confer immunity from liability for damages on the persons listed in clause 228 for or in relation to an act or matter done in the performance (or purported performance) of functions or the exercise (or purported exercise) powers under the NRM Bill, provided the act or matter was done in good faith.

NATURE REPAIR (CONSEQUENTIAL AMENDMENTS) BILL 2023

Broad delegation of administrative functions and powers

Committee comments:

1.162 The committee requests the Minister's more detailed advice as to:

- **why it is considered necessary and appropriate to empower the Regulator to delegate any or all of its functions or powers to an Executive Level 2 employee in the Biodiversity Department rather than limiting the delegation to the Senior Executive Service level; and**

- **whether the bill could be amended to limit the functions and powers that may be delegated to an Executive Level 2 employee in the Biodiversity Department.**

Response:

Regulator's existing powers to delegate

Existing paragraphs 35(1)(d) and (e) of the *Clean Energy Regulator Act 2011* (CER Act) have the combined effect that the Regulator may, by writing, delegate any or all of its functions and powers to a person who is both:

- a person assisting the Regulator under section 37 of that Act; and

- either an SES employee (or acting SES employee) in the Department, or an APS employee who holds or performs the duties of an Executive Level 2 position (or an equivalent person) in the Department.

The reference to 'the Department' in existing paragraphs 35(1)(d) and (e) refers to the Department that is administered by the Minister who is responsible for the CER Act. This is currently the Department of Climate Change, Energy, the Environment and Water (DCCEEW).

As such, under the existing administrative arrangement orders, the Regulator would be able to delegate any or all of its functions and powers under the NRM Bill to either an SES or Executive Level 2 employee in DCCEEW, provided that person is also a person assisting the Regulator under section 37 of that Act.

Purpose of the proposed amendment

The purpose of the proposed amendment in item 7 of the Nature Repair Market (Consequential Amendments) Bill 2023 (NRM Consequential Amendments Bill) is to provide for the potential future scenario where the Ministers responsible for the CER Act and the NRM Bill administer different departments.

Where responsibility for the CER Act and NRM Bill lies in different departments, the existing delegation powers in paragraphs 35(1)(d) and (e) would only apply to officials of the department responsible for the CER Act. However, noting that officers and employees of any public service agency can be made available to assist the Regulator under section 37 of the CER Act, it is important that the Regulator is able to delegate its functions and powers under the NRM Bill specifically to officials of the department responsible for the NRM Bill. This is because they would be officials assisting the Regulator that hold expertise relevant to the NRM Bill.

In this situation, item 7 of the NRM Consequential Amendment Bill would maintain the status quo and to ensure that appropriate officials in the Department that is responsible for the NRM Bill could continue to exercise the same delegated powers and functions under that Bill. This would ensure that the NRM scheme can be administered in an efficient and effective manner.

Delegation to Executive Level 2 positions

Delegating powers and functions to persons in Executive Level 2 (or equivalent) positions is consistent with the Australian Administrative Law Guide which provides that it may be appropriate for such officers to make decisions, particularly where there is a limited exercise of discretion (such as many of the powers Regulator's functions and powers in the NRM Bill). It is envisaged that the Regulator would carefully consider the skills and experience required of officials at the Senior Executive Service levels and Executive Level 2 as part of delegating their powers.

For these reasons, it is considered necessary and appropriate to empower the Regulator to delegate any or all of its functions or powers to an Executive Level 2 employee rather than limiting such delegation to the Senior Executive Service level. For the same reasons, it is not considered appropriate to amend the NRM Consequential Amendment Bill to limit the functions and powers that may be delegated to an Executive Level 2 employee.

Senator the Hon Katy Gallagher

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

REF: MC23-053197

Ms Fattimah Imtoual
Acting Committee Secretary
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600

Dear Ms Imtoual

I am writing in relation to the Senate Standing Committee for the Scrutiny of Bills *Scrutiny Digest 7 of 2023*. The Committee has sought advice in relation to the Public Service Amendment Bill 2023 (the bill). I appreciate the opportunity to respond to the matters raised by the Committee. Please find a response below.

Tabling of documents in Parliament

The Committee has sought further advice as to:

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

Capability reviews

Subsections 44A(4)(d) and 44B(1)(d) of this bill provide that a capability review report and action plan must be published on an Agency website. This transparency measure is intended to drive accountability, and build confidence in the integrity of capability review findings.

An Agency Head is required to publish an action plan within 90 days of receiving the final capability review report, to ensure prompt response and implementation to raise capability. These changes bolster the transparency mechanisms already present within the *Public Service Act 1999* (the Act), whereby the APS Commissioner must table information on the state of the APS during the year.

I note the Committee's comments that there does not appear to be an intention for capability review reports of the Australian Public Service Commission (APSC) to be published. Subsection 44A(4)(d) provides that reviews must be published where they are caused by the Secretary of the Department of the Prime Minister and Cabinet under subsection 44A(3). This includes capability reviews of the APSC.

Long-term insights reports

Subsection 64A of this bill provides that long-term insights reports must be published on an Agency website. The reports will make available information about medium-term and long-term trends, risks and analysis; and information and impartial analysis relating to those trends risks and opportunities.

Long-term insights reports will not provide recommendations, or policy advice on approaches, or solutions to issues raised. The reports will build the capability of the Australian Public Service (APS) to consider cross-cutting issues in a linked up way.

APS Employee Census

Subsection 78B(3) of this bill provides that an Agency Head must publish on an Agency website, both aggregate census results and an action plan responding to results. This change bolsters the transparency mechanisms already present within the Act, whereby the APS Commissioner must table information on the state of the APS during the year.

Conclusion

Documents created by the APS through capability reviews, long-term insights reports, and the APS Employee Census are internally focused and would not be further serviced by tabling in Parliament. These processes and resulting documents perform an enabling function, rather than one that requires the Parliament to act. They foster a culture of continuous improvement and drive uplift in capability within and across agencies, enabling the APS to better serve the Government, the Parliament and the Australian public into the future.

Further, the bill requires publication of documents created by the APS in the above circumstances on an Agency website, maintaining an appropriate level of public transparency in relation to this work. For these reasons, I do not consider the bill would be improved by requiring these documents to be tabled in Parliament.

Importantly, the bill does not preclude the tabling of reports or documents, and so there is discretion to table in appropriate circumstances, in accordance with usual Parliamentary procedures.

Privacy

The Committee has sought detailed advice as to whether the bill can be amended to include safeguards to protect non-Senior Executive Service (SES) employees' personal information.

Section 44A of this bill provides for regular, independent and transparent capability reviews. Capability reviews are forward-looking and assess an Agency's ability to meet future objectives and challenges. They are designed to be short and sharp and provide an opportunity to focus on organisational strengths and development areas in the context of the anticipated future operating environment.

Capability reviews will be informed by the views of Agency staff, meaning that personal information may be collected in the initial analysis stages of consultation. This would be subject to the *Privacy Act 1988* (Cth) including the safeguards provided in the disclosure of personal information.

While the capability reports will present high-level findings against a consistent framework and would not include publication of details which could reasonably identify an individual, I acknowledge the Committee's concerns. As a result, I have asked the Department of the Prime Minister and Cabinet to review whether it is appropriate to provide an amendment to the bill to address the matters raised.

Broad delegation of administrative powers or functions

The Committee has sought further advice as to:

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

I note the Committee has drawn this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

The bill incorporates an amendment to exclude members of the Australian Defence Force (ADF) from the definition of 'outsider' for the purposes of an Agency Head's delegation power. This will bring the Act in line with updates made to the Public Service Regulations 2023 (the Regulations). The purpose of this change is to allow the Secretary of Defence and other Agency Heads to delegate their functions or powers to members of the ADF without first seeking the APS Commissioner's written approval to do so. The amendment will allow agencies whose workforces include members of the ADF to operate in an integrated way, and eliminate an unnecessary administrative burden.

I have previously given that committee advice on why delegation powers are required in the Regulations, and this advice also applies to subsection 78(7) of the Act. The delegation powers prescribed under subsection 78(7) of the Act are administratively necessary and provide sufficient flexibility to enable Agency Heads to carry out their functions.

The delegation power for Agency Heads reflects that the APS consists of many Agencies of different sizes and differing operational requirements. The relevant Agency Head is best placed to determine who may exercise their employer powers or functions, and to which level their powers and functions are appropriate to delegate. It is in the interest of each Agency Head to ensure that they delegate powers as appropriate, and that the persons to whom their employer powers or functions have been delegated have the appropriate skills, qualifications, and experience to exercise the powers or functions.

I note the Committee's preference to limit the scope of powers that might be delegated, or that delegates be confined to the holders of nominated offices or members of the SES. However, I consider such limits unlikely to be practicable, given the breadth of APS agencies' functions, and noting that some agencies are so small as to have very few members of the SES.

I thank the Committee for its consideration of the bill, and I trust this information is of assistance.

Yours sincerely

Katy Gallagher

03 JUL 2023

THE HON MATT KEOGH MP
MINISTER FOR VETERANS' AFFAIRS
MINISTER FOR DEFENCE PERSONNEL

MC23-002632

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111 Parliament House
CANBERRA ACT 2600

Dear Senator Smith, Dean,

VETERANS' AFFAIRS LEGISLATION AMENDMENT (MISCELLANEOUS MEASURES NO. 2) BILL

Thank you for your correspondence of 15 June 2023 regarding the Senate Scrutiny of Bills Committee's request for information in regard to the *Veterans' Affairs Legislation Amendment (Miscellaneous Measures No. 2) Bill.*

Schedule two of the Bill provides that veterans and their family members who receive income support payments from the Department of Veterans' Affairs (DVA) are not negatively impacted under the income test when undertaking employment programs, as determined by the Secretary of Employment.

I note the Committee raised the same issue about the nature of the legislative instruments which achieve the purpose of determining particular employment programs in relation to social security payments with the then Minister for Employment, Education and Skills, in relation to the *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021*. That Bill inserted subsection 8(8AC) into the *Social Security Act 1991* (SSA), to allow the Secretary of Employment, by notifiable instrument, to determine programs to be 'employment programs' for the purpose of considering the amount received as excluded income under the SSA. That Bill received Royal Assent on 1 April 2022.

This Bill merely seeks to rely upon the same instruments for the purposes of equivalent DVA payments. In this respect, the same policy basis also applies. I understand that the former Minister for Employment, Education and Skills provided the Committee in 2021 with a response concerning the queries raised in respect to the nature of the Instruments which states: "The proposed instruments reflect the need to be able to rapidly vary administrative arrangements in response to changing programs - including in response to emergencies or rapid creation of new programs. This could include new programs needed rapidly in response to sudden industry downturns, or mass lay-offs. I therefore consider that the provisions of the

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Bill in relation to these instruments are appropriate." This response can be found on page 59 of the Scrutiny Digest 10 of 2021.

The *Veterans' Affairs Legislation Amendment (Miscellaneous Measures No.2) Bill* (the Bill) contains four schedules, including this minor amendment to ensure veterans undertaking employment programs have the same beneficial income-testing treatment as other Australians. All of the schedules to the Bill are beneficial for veterans and their families. It is the Government's intention that these schedules commence as soon as possible to ensure that veterans and their families are not disadvantaged. It is hoped passage of the Bill will occur in the current sitting week.

While I note the Committee's views on the instrument making provision of 8(8AC) of the SSA, I also note that this provision provides additional benefits to income support recipients undertaking employment programs that are included under an instrument utilising this provision. The current design of this provision allows the Secretary of Employment to quickly determine an employment program is exempt ensuring vulnerable groups receiving income support payments are not adversely affected.

For these reasons, while I appreciate the Committee's concerns, I do not consider it appropriate to amend the current Bill.

Thank you for taking the time to bring this matter to my attention. I trust this information is of assistance.

Yours faithfully,

HON MATT KEOGH MP

20 June 2023