Senator the Hon Simon Birmingham

Minister for Education and Training
Manager of Government Business in the Senate
Senator for South Australia

Our Ref MS18-000270

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

23 FEB 2018

By email to: regords.sen@aph.gov.au

Dear Chair

I refer to the matters raised in the Senate Standing Committee on Regulations and Ordinances' (the Committee) *Delegated Legislation Monitor No. 1 of 2018*, with respect to the *Australian Education Amendment (2017 Measures No. 2) Regulations 2017*, and the subsequent notice of disallowance dated 15 February 2018.

Please find my response to the matters raised by the Committee enclosed.

Yours sincerely

Simon Birmingham

Encl.
Response to the Committee.

Adelaide
107 Sir Donald Bradman Drive, Hilton SA 5033
Ph 08 8354 1644

Canberra
Parliament House Canberra ACT 2600
Ph 02 6277 7350

The Senate Standing Committee on Regulations and Ordinances requests the Minister's advice as to:

- ***the manner in which the Ministerial Council disability guidelines are incorporated into the instrument,***
- ***and how the document is or may be made readily and freely available to persons interested in or affected by the instrument.***

Item 6 of the *Australian Education Amendment (2017 Measures No. 2) Regulations 2017* (the Amendment Regulation) amended, amongst other things, the existing definition of Ministerial Council disability guidelines in subsection 4(1) of the *Australian Education Regulation 2013* (the Principal Regulation), to mean the guidelines for the Nationally Consistent Collection of Data on School Students with Disability approved by the Ministerial Council for the year. This amendment to the definition of Ministerial Council disability guidelines was largely consequential to other amendments to section 58A of the Principal Regulation.

The incorporation of the Ministerial Council disability guidelines in the Principal Regulation first occurred in 2014, by way of amendments to the Principal Regulation contained in the *Australian Education Amendment (2014 Measures No. 1) Regulation 2014*. This was part of a suite of amendments that occurred in 2014, to impose the requirement in the Principal Regulation for the Nationally Consistent Collection of Data on School Students with Disability (NCCD).

Background on the NCCD

In 2008, as part of discussions on national reporting arrangements for schools, the Council of Australian Governments agreed to work towards a nationally consistent approach to identifying school students with disability.

The Nationally Consistent Collection of Data on School Students with a Disability (NCCD) is a national initiative supported by the Council of Australian Governments Education Council (Ministerial Council), which consists of the Commonwealth, and each state and territory, Minister for Education. A series of expert groups representing government and non-government education authorities and the education sector devised the model for the NCCD, which was first trialled in schools in 2011 and 2012. Following refinements to the model, the NCCD was progressively implemented from 2013 to 2015. All but one school in Australia participated in 2016.

The NCCD collects data about school students with disability across Australian schools in a consistent, reliable and systematic way. The operation of the NCCD is set out in *Ministerial Council disability guidelines*. The NCCD process aligns with, and helps to reinforce, schools' obligations under the *Disability Discrimination Act 1992* and the Disability Standards for Education 2005.

The NCCD data collection is primarily based on the professional judgement of school teachers, supported by documented evidence. Teachers determine the levels of educational adjustment that are provided to students with disability to access and participate in school education on the same basis as other students, and report those levels of educational

adjustment in the NCCD. These levels of educational adjustment are: support provided within quality differentiated teaching practice; supplementary; substantial; and extensive.

Under subsection 52(3A) and section 58A of the Principal Regulation, entities that operate government and non-government schools (approved authorities) must complete the NCCD data collection each year. The NCCD provides the Australian Government with a reliable, consistent and transparent data source for government decisions related to school funding and policy development for students with disability accessing school education in Australia.

The Ministerial Council disability guidelines

The Ministerial Council disability guidelines have been incorporated in the Principal Regulation pursuant to the regulation making power contained in section 130 of the *Australian Education Act 2013* (the Act). In particular, in reliance on subsection 130(4), which provides that despite the operation of the *Legislation Act 2003*, the regulations may provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time

The Ministerial Council disability guidelines must be approved by the Ministerial Council each year, as has occurred each year since 2015. Once approved, the Ministerial Council disability guidelines are made available on the Department of Education and Training's website. See here for the 2017 version of the guidelines, noting that the 2018 version has yet to be approved (https://www.education.gov.au/nationally-consistent-collection-data-students-disability-guidelines).

The purpose of the Ministerial Council disability guidelines is to:

- set threshold requirements for which students at a school must be included in the NCCD;
- set additional data categories (if any) that must be reported about those students, in addition to what is already specified in subsection 58A(2) of the Principal Regulation; and
- define the terms "category of disability" and "levels of adjustment" for the purposes of the NCCD.

Accordingly, the Ministerial Council disability guidelines provide additional context around the requirements for the NCCD each year, and enable elements of the NCCD to have input from the Ministerial Council each year.

Manner of incorporation of the Ministerial Council disability guidelines

As discussed above, this occurs pursuant to the regulation making power contained in subsection 130(4) of the Act.

How the Ministerial Council disability guidelines are made readily and freely available to persons interested in or affected by the NCCD

As also discussed above, once approved, the Ministerial Council disability guidelines are made available on the Department of Education and Training's website. See here for the 2017 version of the guidelines, noting that the 2018 version has yet to be approved (https://www.education.gov.au/nationally-consistent-collection-data-students-disability-guidelines).

In closing, I note that given the Ministerial Council disability guidelines have been incorporated in the Principal Regulation since 2014, that the guidelines have been available on the Department of Education and Training's website each year since 2015, and the general awareness of the NCCD (including the Ministerial Council disability guidelines) in the government and non-government school sector, I do not consider it necessary for either the Amendment Regulation or associated explanatory statement to be updated.

Minister for Revenue and Financial Services
Minister for Women
Minister Assisting the Prime Minister for the Public Service
The Hon Kelly O'Dwyer MP

22 FEB 2018

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator John

I am writing to provide a response to the concerns of the Senate Regulations and Ordinances Committee outlined in the Committee's *Delegated Legislation Monitor No. 1 of 2018* regarding the remake of the Australian Securities and Investments Commission (ASIC) Market Integrity Rules (MIRs) for Securities Markets and Futures Markets.

By way of background, under Part 7.2A of the Corporations Act, which commenced on 1 August 2010, ASIC assumed responsibility for supervising domestic licensed markets and was given power to make market integrity rules. This change addressed criticism that market operators had a conflict of interest between their supervisory obligations and the operation of their market. At the time of transfer, ASIC made market integrity rules that largely reflected the operating rules of each market operator. At the time of making the rules, the then Parliamentary Secretary to the Treasurer indicated to the Committee that ASIC would later seek to harmonise the market integrity rules.

In November 2017, ASIC made four instruments, including the MIRs for Securities and Futures Markets, to merge 13 instruments into four to create a single point of reference for MIRs that are common between domestic licensed financial markets, reducing the MIRs from over 1,300 pages to less than 550 pages. This is expected to reduce costs for business and improve efficiency of market participants. The consolidation involved minimal changes and was subject to extensive consultation in 2016-17, including a written consultation process in *Consultation Paper 277 Proposals to consolidate the ASIC market integrity rules* (CP277) and follow up meetings with respondents. There was universal support for consolidating the 13 instruments.

Parliament House, Canberra ACT 2600, Australia
Telephone: 61 2 6277 7930 | Facsimile: 61 2 6273 0434

Detailed responses to the Committee's concerns are provided at Attachment A. In summary:

- I consider the penalties imposed through the rules to be appropriate, given the scale and nature of trading on the markets governed by the delegated legislation; and
- further refinements to the MIRs are planned to remove the unnecessary provisions identified by the Committee, and to provide independent merits review of decisions in the sections highlighted by the Committee.

Yours sincerely

Kelly O'Dwyer

ATTACHMENT A

DETAILED RESPONSES TO COMMITTEE CONCERNS

1. Matters more appropriate for parliamentary enactment

The committee draws the imposition of high civil penalties of up to $1 million in delegated legislation to the attention of the Senate.

The regime in Part 7.2A of the Corporations Act is designed to be flexible and to allow ASIC to make rules to cover new and emerging issues as licensed markets adapt and innovate, often involving complex and changing financial arrangements. It is contemplated that rules may need to be applied swiftly to ensure the integrity of the market is maintained. The delegated rule making power in section 798G provides a framework so that ASIC may adapt quickly to developments in the market.

To balance this power, ASIC must obtain ministerial consent before making a market integrity rule (with emergency rules made under s798G(4) subject to alternative scrutiny under subsection 798G(5)) and, as legislative instruments, the rules are subject to parliamentary scrutiny and disallowance. In addition, ASIC engages in consultation with industry before making market integrity rules.

The Corporations Act provides that breach of a market integrity rule is a breach of a civil penalty provision, which can be taken to Court and enforced. The maximum penalty that can be imposed by a rule is $1 million (reduced from the amount in the exposure draft of the amending Bill to reflect concerns that the higher amount might be inappropriate).

The statutory cap on the penalty for contravention of a market integrity rule should be viewed alongside the nature and scale of trading activity conducted on Australia's licensed financial markets and dealt with under the rules. For example, in 2016-17, equity trading on the ASX and Chi-X markets was valued at $1,542 billion and interest rate and energy derivatives trading on ASX24 was valued at $46,864 billion (notional).

In the Securities Markets Rules and the Futures Markets Rules, the specified maximum penalties for each rule range in quantum in line with the nature of the rule and the conduct it addresses. Importantly, assessment of appropriate penalties in a particular case is a discretionary judgment based on all of the relevant factors (*Markarian v The Queen* (2005) 228 CLR 357 at [27]). The maximum penalty for a contravention provides a yardstick to be taken and balanced with all of the other relevant factors in comparing the contravening conduct in focus against the worst possible case (*Markarian* at [31]).

For example, a worst possible case of excessive trading on a managed discretionary account in contravention of Rule 3.3.2 of the Securities Markets Rules which could justify a $1 million penalty might involve a stockbroker establishing discretionary trading accounts for a large number of unsophisticated retail clients, intentionally engaging in sustained and systemic 'churning' of the securities in the accounts, causing substantial client losses in the pursuit of generating additional brokerage and commission and achieving bonus remuneration.

Section 798K of the Corporations Act and Part 7.2A of the Corporations Regulations also provide a framework for alternatives to civil penalty proceedings by which persons who are alleged to have contravened a market integrity rule may avoid Court by opting for an alternative penalty (e.g. a monetary penalty specified in an infringement notice). Such alternative penalties are without compulsion and are akin to acceptance of an offer of settlement. Any monetary amount in an alternative penalty is limited to three-fifths of the maximum civil penalty amount applicable to that market integrity rule.

ASIC's Markets Disciplinary Panel (MDP) is a peer review panel whose members, typically drawn from stock broking firms and investment banks, possess significant market or professional experience. Since August 2010, the MDP has heard 66 alternative penalty matters; most alleging contraventions of multiple market integrity rules. ASIC has issued infringement notices in 64 of those matters, specifying total penalties ranging from $20,000 to $505,000 in one matter alleging multiple contraventions. In aggregate, the penalties specified in those 64 infringement notices totalled $7,057,150. 63 of the 64 recipients of infringement notices complied with the notice, thus discharging any liability to the Commonwealth for the alleged contraventions. In the matter where the recipient did not comply with the infringement notice, ASIC has commenced civil penalty proceedings which remain before the courts. To date, ASIC has not commenced civil penalty proceedings for an alleged breach of a market integrity rule without first issuing an infringement notice.

Such remedies are vital to the ongoing success of the market integrity rule framework as they provide ASIC with a fast, effective and proportionate remedy akin to the remedies available to market operators under the market operating rule framework (with penalties including financial sanctions of up to $1 million, suspension of participation and enforcing the establishment of education and compliance programs).

2. Merits review

The committee requests the minister's advice as to whether decisions made by ASIC under sections 2.4.10, 2.4.15 and 2.4.19 of the instrument are subject to independent merits review; and if not, the characteristics of each of those decisions that would justify their exclusion from merits review.

In making the Securities Markets Rules, ASIC adopted Rules 2.4.10, 2.4.15 and 2.4.19 without substantive change from existing Rules 2.4.10, 2.4.15 and 2.4.19 of the ASIC Market Integrity Rules (ASX Market) 2010 (***ASX MIRs***) and ASIC Market Integrity Rules (Chi-X Australia Market) 2011 (***Chi-X MIRs***).

Since August 2010, under the equivalent ASX MIRs and Chi-X MIRs, ASIC has on three occasions made decisions rejecting applications for accreditation or renewal of accreditation and has imposed conditions on the accreditation of four advisers. In two of

the cases where ASIC rejected an application, the advisers were subsequently banned by ASIC from providing financial services under section 920A of the Corporations Act. In the other case, the applying Market Participant subsequently advised that the 'adviser' did not provide financial product advice and so did not require an accreditation for his role.

In making these decisions under Rules 2.4.10, 2.4.15 and 2.4.19 of ASX MIRs and Chi-X MIRs, ASIC was and is cognisant that the decisions affect the rights and liberties of the relevant individuals and market participants. Consequently, such decisions were not made lightly. In the event that an application is to be rejected or an accreditation suspended or renewed with the imposition of conditions, these matters are discussed extensively with the applicant and the relevant market participant prior to a decision being made.

The Administrative Appeals Tribunal (AAT) only has the power to review a decision where an 'enactment' provides that an application may be made to the AAT for review of decisions made either in the exercise of powers conferred by that enactment or in the exercise of powers conferred by another enactment having effect under that enactment (section 25(1) of the *Administrative Appeals Tribunal Act 1975*) (the ***AAT Act***).

The definition of 'enactment' in section 3 of the AAT Act includes 'an instrument (including rules, regulations or by-laws) made under an Act'. The Securities Markets Rules are instruments made under section 798G of the Corporations Act and so fall within the definition of enactment.

However, as it currently stands, there is no provision in the Securities Markets Rules which provides that an application may be made to the AAT for review of decisions made by ASIC under Rules 2.4.10, 2.4.15 and 2.4.19.

ASIC has also considered whether the Corporations Act provides for an application to be made to the AAT for review of decisions made by ASIC under Rules 2.4.10, 2.4.15 and 2.4.19 of the Securities Markets Rules. Section 1317B of the Corporations Act provides that 'applications may be made to the AAT for review of decisions made under this Act'. Whilst section 9 of the Corporations Act defines 'this Act'' as including the regulations made under section 1364 of the Corporations Act, it makes no reference to the rules made under section 798G.

Consequently, ASIC takes the view that decisions made by ASIC under Rules 2.4.10, 2.4.15 and 2.4.19 of the Securities Markets Rules are not subject to independent merits review by the AAT.

In considering the Committee's second question—whether there are any characteristics of the decisions under Rules 2.4.10, 2.4.15 and 2.4.19 that would justify their exclusion from merits review— guidance provided in the Australian Administrative Law Policy Guide (the Guide) issued by the Attorney-General's Department and the 1999 Administrative Review Council (ARC) publication referred to in the Guide has been considered.

On review, the characteristics of the decisions made under Rules 2.4.10, 2.4.15 and 2.4.19 do not justify their exclusion from merits review. The decisions do not fall within either of the two categories of decisions referred to in Chapter 3 of the ARC publication,

nor do any of the factors referred to in Chapter 4 of the ARC publication apply so as to justify excluding merits review.

Responding to the Committee's concern, it is proposed that a further change will be made to provide that applications may be made to the AAT for review of decisions made by ASIC under Rules 2.4.10, 2.4.15 and 2.4.19 of the Securities Markets Rules.

Further, ASIC has advised that it also proposes to review all types of decisions made under the Securities Markets Rules against the ARC guidance to ensure consistency.

3. Drafting: unnecessary penalty provisions

The committee requests the minister's advice in relation to why a $1 million penalty has been included in section 5A.3.3 of the Securities Markets Rules and section 5.3.3 of the Futures Markets Rules, when the sections only set out factors relevant to conduct already subject to a $1 million penalty under sections 5A.3.2 and 5.3.2 respectively.

The inclusion of a penalty amount in Rule 5A.3.3 of the Securities Markets Rules and Rule 5.3.3 of the Futures Markets Rules is the result of a drafting error, carried over from the equivalent, pre-existing Rule 4A.4.3 of the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011.

To address the error, it is intended to amend the legislative instrument to remove the penalty amount.

THE HON ANGUS TAYLOR MP
MINISTER FOR LAW ENFORCEMENT AND CYBER SECURITY

MC18-002716

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator John,

Thank you for your letter of 8 February 2018 to the Office of the Minister for Home Affairs concerning the AusCheck Amendment (System Functionality) Regulations 2017, [F2017L01664]. Your correspondence has been referred to me as the Minister for Law Enforcement and Cyber Security as the matter raised now falls within my portfolio responsibilities.

The explanatory memorandum, rather than the approved explanatory statement, was registered on the Federal Register of Legislation. This error has been rectified as a matter of priority.

For the Committee's information, please see attached a copy of the explanatory statement. The correct version of the explanatory statement includes details of the consultation undertaken and a statement of compatibility with human rights. The statement of compatibility with human rights was prepared in consultation with the Attorney-General's Department's Human Rights Branch.

In accordance with section 17 of the *Legislation Act 2003*, consultation on the content of this instrument occurred. Consultation was undertaken with issuing bodies, from as early as October 2016, at joint forums hosted by the Office of Transport Security (OTS) and AusCheck Issuing Body and monthly consultative committee meetings with key industry and government stakeholders.

Consultation also occurred with relevant areas within the Attorney-General's Department, the Department of Health, the then Department of Immigration and Border Protection, and the Department of Infrastructure and Regional Development.

Thank you for raising this matter.

Yours sincerely

ANGUS TAYLOR

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Justice

AusCheck Act 2007

AusCheck Regulations 2017

AusCheck Amendment (System Functionality) Regulations 2017

Introduction

The *AusCheck Amendment (System Functionality) Regulations 2017* are made under section 18 of the *AusCheck Act 2007*.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Outline

The *AusCheck Act 2007* (the Act) establishes a background checking function within the department administering the Act (the department). The purpose of the Act is to enhance national security by providing a consistent approach to background checking for individuals who require access to secure areas of airports, seaports and facilities that handle security sensitive biological agents. The Act also aims to assist law enforcement and national security agencies respond to security incidents and perform their functions.

The background checking function is performed by a branch within the department called AusCheck. Section 8 of the Act states that the regulations may provide for the establishment of the AusCheck scheme which relates to the conduct and coordination of background checks for the purposes of the *Aviation Transport Security Act 2004*, the *Maritime Transport and Offshore Facilities Security Act 2003*, and any other Act that expressly requires or permits a background check to be conducted under the AusCheck scheme.

The key amendments in the instrument have been introduced to allow for electronic verification of identification documents in the AusCheck system using the Document Verification Service (DVS) and to replace the current manual visa checking process with the new automated process using Visa Entitlements Verification Online (VEVO). Recent amendments to the *Aviation Transport Security Regulations 2005* (ATSR) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (MTOFSR) have enhanced identity verification requirements for the aviation security identification card (ASIC) and maritime security identification card (MSIC) schemes. The background check requirement for electronic verification of identification documents supports these enhancements.

This instrument has been introduced to amend the *AusCheck Regulations 2017* to provide for a new process of verifying identification documents as part of the AusCheck background checking process and would facilitate the use of VEVO for the right to work check. The background checking function and data is held on the AusCheck system. The department is undertaking the AusCheck System Replacement (ASR) Project because the current AusCheck system is unsustainable. The ASR project aims to improve identity verification processes, address and resolve technology barriers, enhance database recordkeeping and provide a technical environment for future developments.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation on the content of this instrument occurred within the department, and with the Immigration Department and Border Protection (DIBP) the Department of Infrastructure and Regional Development and with Issuing Bodies.

Regulatory Impact Statement

The Office of Best Practice Regulation was consulted about the regulations and a Regulatory Impact Statement exemption was received on 6 October 2017.

Commencement

The instrument commences on a single day to be fixed by the Minister by notifiable instrument. However, if the provisions do not commence within the period of 18 months beginning on the day after this instrument is registered, they commence on the day after the end of that period. The 18 month period is considered appropriate to provide flexibility to the development of the AusCheck system, and ensure adequate time is allowed for user testing and stability of the system.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Humans Rights (Parliamentary Scrutiny) Act 2011

AusCheck Amendment (System Functionality) Regulations 2017

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Human rights implications

This disallowable legislative interest engages the following rights:

- Right to privacy – Article 17(1) of the ICCPR

Right to privacy

Article 17(1) of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The instrument engages the right to privacy by providing for the collection, use, storage and disclosure of personal information particularly identification documents.

The instrument's limit on the right to privacy is legitimately authorised by section 13 of the *AusCheck Act 2007*. The purpose of the authorisation in relation to the AusCheck scheme is to:

- determine whether a background check is required or permitted
- conduct or advise on the outcome of a background check
- update information on an individual who has undertaken a background check
- verify the identity of an individual, and
- provide an online card verification service.

The purpose of collecting, using, storing and disclosing information is reasonable and necessary to pursue the objective of national security. This is achieved by using an individual's personal information, such as their criminal record, to identify and disclose whether they would constitute a threat to particular national facilities. The collection and storage of personal information also assists law enforcement agencies respond to security incidents by providing an up-to-date database of individuals with access to areas such as secure zones in airports and seaports.

Express consent will be required from individuals for use of the identification document verification process. Individuals who have a required identification document which cannot be electronically verified will be able to apply for an exemption from the process for the purpose of the background check. The exemption decision will be appealable to the Administrative Appeals Tribunal.

Appropriate safeguards exist to ensure that use of an individual's personal information is reasonable and proportionate. Section 29 allows the Secretary of the department to issue guidelines about the use and disclosure of information on the AusCheck database. The guidelines were established under the *AusCheck Regulations 2007* and are currently publically available on the department's website. All AusCheck staff members are required to comply with the guidelines. Section 15 of the *AusCheck Act 2007* also provides an offence provision for AusCheck staff members who unlawfully disclose AusCheck scheme personal information.

Details of the *AusCheck Amendment (System Functionality) Regulations 2017*

Section 1

This clause provides that the title of the instrument is the *AusCheck Amendment (System Functionality) Regulations 2017*.

Section 2

This clause provides that the whole instrument commences on a single day to be fixed by the Minister by notifiable instrument. However, if the provisions do not commence within the period of 18 months beginning on the day after this instrument is registered, they commence on the day after the end of that period.

A period of 18 months for the commencement of the instrument was chosen due to the uncertain nature of the IT development and to provide certainty that there is adequate time to complete the project and have a stable replacement system in place. The amendments in this instrument are necessary to allow the functionality of the AusCheck System Replacement (ASR) to be implemented.

Section 3

This clause outlines that the authority to make the instrument is the *AusCheck Act 2007* (the Act).

Section 4

This clause provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1

Item 1

Item 1 amends section 4 of the *AusCheck Regulations 2017* (the regulations) to insert definitions for Category A identification document; Category B identification document; Category C identification document; and Immigration Department. The Category A, B and C identification document definitions are taken from the *Aviation Transport Security Regulations 2005* (ATSR) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (MTOFSR).

Category A identification document is defined as an Australian birth certificate or a valid document that provides evidence of the start of the person's identity in Australia.

Category B identification document is defined as a current and valid document issued to the person by a Commonwealth, State or Territory Department or agency, or by a government of a foreign country or an agency of a government of a foreign country, that provides photographic proof of the person's identity and includes the person's signature.

Category C identification document is defined as a current and valid document that provides evidence of the person's use of identity while operating in the community (which may be a community outside Australia).

Immigration Department is defined as being the department administered by the Minister administering *Migration Act 1958*.

Item 2

Item 2 amends subparagraph 5(l)(i) to insert a clause which allows a person who does not have, or cannot use or obtain a passport in their country of origin to instead supply the number of any document which has been issued to the individual by the Immigration Department. This is to ensure flexibility in the operation of the provision where an individual may not have a passport. For example: where an individual is a refugee or humanitarian entrant to Australia.

Item 3

Item 3 amends subparagraph 5(l)(ii) to insert the words "in any case-" before the words "the number" this is to make it clear that all applicants must provide the period of stay information of any visa which has been granted to the individual enabling the individual to travel to and enter, or remain in, Australia whether they have used passport or a document issued by the Immigration Department. This provides for the additional information required to carry out an automated visa check using Visa Entitlement Verification Online (VEVO).

Item 4

Item 4 amends section 5 to insert subsection 5(m) which provides that an individual who makes an application for an aviation security identification card (ASIC) or maritime security identification card (MSIC) under subparagraph 8(1)(a) must indicate to AusCheck that the express consent of the individual whose identity is being verified has been obtained. Subsection 5(m) also requires the details of the Category A identification document to be verified, or any alternative identity verification requirements, including details of any other identification documents required by the alternative requirements, have been approved by the Secretary of the Department responsible for the administration of the ATSR and MTOFSR.

The intention of this clause is to provide that the details of the individual's identification document will be electronically verified by the official record holder through the AusCheck system using the Document Verification Service (DVS).

Express consent for an individual's identification documents to be verified with the official record holder is collected by the Issuing Body (IB), which is then required to be indicated within the AusCheck System.

Item 5

Item 5 inserts section 5A and section 5B after section 5.

Section 5A

The purpose of section 5A is to provide that an issuing body may apply, in writing, for an exemption from the requirement to provide details of a required identification document for the purpose of the background check where that document cannot be verified electronically. For example there may be circumstances where the DVS will be unable to verify an identification document due to limitations on the electronic data holdings of the official record holder, for example Norfolk Island birth certificates.

This clause will enable an IB to apply for an exemption where the individual does not have access to an electronically verifiable Category A identification document and where the individual is required to provide an electronically verifiable Category B or C identification document. The requirement to provide an electronically verifiable Category B or C identification document may arise under

alternative identification requirements approved under the ATSR and MTOFSR or as a condition of an exemption approved under this provision.

These amendments do not impact the existing identification requirements under the ATSR and MTOFSR. Subsection (m) recognises that the Secretary of the department responsible for the administration of the ATSR and MTOFSR will continue to determine the identity verification requirements for ASIC and MSIC applicants and holders, including approving alternative requirements for verifying identity, which may require Category B and C identification documents to be electronically verified.

Issuing bodies will receive a notification from the DVS system when an identification document cannot be verified. Guidance will also be made available to issuing bodies regarding DVS requirements.

The process for applying for an exemption under section 5A is a written application to the Secretary of the department administering the Act (the Secretary) which includes a statement that the individual has an identification document that AusCheck cannot use to verify electronically the individual's identity for the purposes of the background check, if the individual has another identification document - the details of that document, and any information that may assist the Secretary in making a decision about whether to grant an exemption. This is intended to be a broad provision, allowing for the provision of any other information which could be considered relevant, and provide an individual with flexibility to reflect their particular circumstances.

Section 5A also imposes a timeframe of 30 days for a decision to be made. The Secretary can request further information from an individual which will extend the timeframe to 30 days from when the information is received. The Secretary will have the ability to grant an exemption for the purposes of the background check with or without conditions, including a condition that Category B and C identification documents need to be electronically verified. Deemed refusal will occur in circumstances where a decision has not been made within the statutory timeframe.

Section 5B

The purpose of section 5B is to provide that AusCheck can cease a background check where AusCheck cannot verify an individual's required identification document using DVS. This provision would not apply where details of an identification document are not required either through the alternative verification process approved under the ATSR and MTOSFR or through an exemption under section 5A.

Section 5B preserves the integrity of the remainder of the background checking process, such as the criminal history and national security checks, as the ability to verify the identity of the individual is integral to the reliability of the results of these checks.

Background check outcomes will have a higher degree of reliability and accuracy when the identity of individuals has first been established by reference to documents verified as accurate under these processes. This provision is also intended to provide certainty and allow background checks to be ceased rather than held indefinitely in abeyance.

Item 6

Item 6 inserts subsection 13(8) to the end of section 13. The purpose of this clause is to create a mechanism to notify of the final result of an identity assessment to: the issuing body and the

individual when the individual's identity cannot be electronically verified for the purpose of the AusCheck scheme.

Item 7

Item 7 repeals the existing section 26 and substitutes it with a clause which allows an individual to apply to the Administrative Appeals Tribunal for review of decisions which refuse to grant an exemption under subsection 5A(6); or grant an exemption in relation to an individual under subsection 5A(6) subject to one or more conditions. This provision consolidates the review provisions in the regulations into one section.

Item 8

Item 8 inserts, before section 31, the title 'Division 1 – AusCheck Regulations 2017'.

Item 9

Item 9, at the end of Part 5, inserts 'Division 2 – AusCheck Amendment (System Functionality) Regulations 2017'. The purpose of this clause is to provide that the above amendments are not retrospective and will only apply to applications for background checks which are made after the instrument commences.

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 15 February 2018 regarding the *Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Continuing Effect Declaration 2018* (the Declaration).

The Declaration renewed designations against eleven persons and ten entities that I was satisfied met the relevant test: that the "person or entity is, or has been, associated with the DPRK's weapons of mass destruction program or missiles program".

The Declaration continued in effect the designation of one person and nine entities that were first designated in 2012 (and whose designations were renewed in 2015). The Department of Foreign Affairs and Trade (DFAT) undertook public consultation through its website seeking submissions from interested parties. No submissions were received.

The Declaration also continued in effect the designation and declaration of ten persons and one entity that were first designated or declared in 2015. Due to an administrative error, these ten persons and one entity were not included in the public consultations mentioned above.

DFAT will undertake public consultation through its website with respect to those ten persons and one entity. I note in this regard that, under the *Autonomous Sanctions Regulations 2011*, I can revoke a designation and/or a declaration at any time on my own initiative. In the event that the public consultations brings to light factors that would justify the revocation of a designation and/or a declaration, I would act accordingly.

I have instructed DFAT to draft an amended version of the explanatory statement for the Declaration, which will reference the specific consultation undertaken.

I trust this information is of assistance.

Yours sincerely

Julie Bishop

+61 2 6277 7500 Parliament House, Canberra ACT 2600, Australia foreign.minister@dfat.gov.au

The Hon. David Littleproud MP

Minister for Agriculture and Water Resources
Federal Member for Maranoa

Ref: MS18-000318

26 FEB 2018

Senator John Williams
Chair of Standing Committee on Senate Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I am writing in response to the request by the Standing Committee on Regulations and Ordinances as to why the *Water (SDL Adjustments) Notice 2017* (the Notice) did not accompany the *Basin Plan (SDL Adjustments) Instrument 2017* (the Instrument) when it was tabled before both Houses of Parliament on 5 February 2018.

As required under the *Water Act 2007,* the Notice was supplied to the former Minister for Agriculture and Water Resources, the Hon. Barnaby Joyce MP, at the same time as he was provided with the Instrument for consideration. Upon its adoption, the Instrument was then registered on the Federal Register of Legislation (FRoL). The accompanying Notice, under section 23B(7)(b) is not a legislative instrument and was not registered on FRoL at that time. A subsequent administrative error meant that the Notice was not supplied with the Instrument at the time it was tabled before both Houses of Parliament.

I have now arranged for the Notice to be tabled in both Houses during the next Sitting week and for it to be registered on FRoL as a notifiable instrument, in accordance with your request.

Thank you for bringing this oversight to my attention.

Yours sincerely

DAVID LITTLEPROUD MP

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7630 Email: minister@agriculture.gov.au

The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure and Transport
Leader of The Nationals
Federal Member for Riverina

Ref: MB18-000123

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

06 MAR 2018

Dear Senator John Williams

Thank you for the Committee's letter of 8 February 2018 regarding instruments listed in the Senate Standing Committee on Regulation and Ordinance's Delegated Legislation Monitor No. 1 of 2018, for which I am responsible as Minister for Infrastructure and Transport.

I have sought advice from the Civil Aviation Safety Authority (CASA) about the concerns raised by the Committee regarding the adequacy of the explanatory material for the Civil Aviation Order 20.91 Amendment Instrument 2017 (No. 1) [F2017L01471].

CASA has advised that in this case it did not consider consultation necessary because the instrument of concern simply extends the operation of an existing civil aviation order.

However, CASA has acknowledged that there should be an appropriate explanation regarding consultation and on 19 February 2018, it lodged a revised explanatory statement accordingly.

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

Yours sincerely

Michael McCormack MP

THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

MC18-002399

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

- 9 MAR 2018

Dear Senator Williams

I refer to your letter concerning the *Cockatoo Island Management Plan 2017* [F2018L00053].

I am advised the Department of the Environment and Energy (the Department) and the Sydney Harbour Federation Trust (the Trust) note the issues identified by the Committee regarding the *Cockatoo Island Management Plan 2017* (the Plan) and its explanatory statement.

The Department and the Trust note that the ICOMOS Charter for Places of Cultural Significance (the Burra Charter) cannot be incorporated in the Plan as in force from time to time. In accordance with paragraph 14(1)(b) and subsection 14(2) of the *Legislation Act 2003* (Legislation Act), the Burra Charter may only be incorporated in the Plan as in force at the time the Plan commenced. While there is wording in the Plan that suggests the Burra Charter has been incorporated from time to time, I am advised that the Legislation Act requires that the Plan be read as not including the words 'and any revisions of the Charter that might occur in the future' (see paragraph 13(1)(c) and subsection 13(2) of the Legislation Act).

The Plan will be implemented by the Department and the Trust on the basis that the Burra Charter has been incorporated as in force at the time the Plan commenced. Furthermore, the Department and the Trust have advised me that they will amend the Plan at the next available opportunity to clarify the manner in which the Burra Charter has been incorporated, noting the consultation requirements under the *Environment Protection and Biodiversity Conservation Act 1999* when amending the Plan.

I am advised that the Harbour Trust Comprehensive Plan is also incorporated as in force at the time the Plan commenced. The Significant Impact Guidelines, dated May 2006 (the Guidelines), are available at the following links:

- 1.1 – Matters of National Environmental Significance: www.environment.gov.au/archive/epbc/publications/pubs/nes-guidelines2006.pdf
- 1.2 – Actions on, or impacting upon, Commonwealth land, and actions by Commonwealth agencies: www.environment.gov.au/archive/epbc/publications/pubs/commonwealth-guidelines-2006.pdf

A supplementary explanatory statement will be prepared for the Plan and registered in due course to clarify the manner of incorporation of the Burra Charter, and also to provide the relevant information for the Harbour Trust Comprehensive Plan and the Guidelines.

Thank you for raising this matter with me.

Yours sincerely

JOSH FRYDENBERG

THE HON ANGUS TAYLOR MP
MINISTER FOR LAW ENFORCEMENT AND CYBER SECURITY

MS18-000663

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
Canberra ACT 2600

Dear ~~Chair~~ John,

Senate Regulations and Ordinances Committee – Customs (International Obligations) Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Regulations 2017

Thank you for your 8 February letter to the Assistant Minister for Home Affairs. This matter has been referred to me as it now resides within my portfolio responsibilities.

In Delegated Legislation Monitor 1 of 2018 (the Monitor), the Committee drew my attention to subsection 14(2) of the *Legislation Act 2003,* which prevents documents from being incorporated into a legislative instrument, as in force from time to time, unless there is a specific provision in the instrument's authorising Act to override this provision.

I can advise you that the relevant subsection that provides the required authority is 153XD(6) of the *Customs Act 1901* (the Customs Act), to incorporate the Singapore-Australia Free Trade Agreement, as in force from time to time for regulations made for the purposes of Division 1BA of the Customs Act. This Division sets out the rules relating to the Singapore-Australia Free Trade Agreement.

The Monitor also drew my attention to the omission of a reference to this provision in the original Regulation and the associated Explanatory Statement.

I note the Committee's observations on this matter and will ensure that in future this information will be included in Explanatory Statements for similar legislative instruments.

Thank you for raising this matter.

Yours sincerely

ANGUS TAYLOR

The Hon Christian Porter MP
Attorney-General

20 FEB 2018

MC18-001322

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Williams,~~ John

I refer to the correspondence from the Secretary of the Senate Regulations and Ordinances Committee (the Committee), Ms Anita Coles, on 8 February 2018, requesting my advice on matters raised in the *Delegated legislation monitor 1 of 2018* (the monitor).

In the monitor, the Committee noted that the explanatory statements accompanying both the *Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017* (the Extradition Regulations), and the *Telecommunications (Interception and Access) Regulations 2017* (the TIA Regulations), do not provide information relating to consultation. As such, the explanatory statements do not meet the requirements of sections 15J and 17 of the *Legislation Act 2003*.

As I am now the responsible minister for both the *Extradition Act 1988* and the *Telecommunications (Interception and Access) Act 1979*, I have approved revised explanatory statements. These statements have been updated in accordance with the requirements of the Legislation Act. They explain why consultation was not undertaken for the Extradition Regulations and the consultation that was undertaken for the TIA Regulations. I have enclosed a copy of each of the revised explanatory statements, which in due course will be tabled in both Houses of Parliament, and lodged for registration on the Federal Register of Legislation.

Thank you for the Committee's correspondence on this matter.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl. Revised explanatory statements:
Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017
Telecommunications (Interception and Access) Regulations 2017

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Justice

Extradition Act 1988

Extradition Legislation Amendment (2017 Measures No.1) Regulations 2017

The Act provides the legislative basis for Australia's extradition processes. It allows Australia to receive extradition requests from countries that are declared to be an 'extradition country' under the Act, and facilitates the making of requests for extradition by Australia to other countries.

Section 55 of the *Extradition Act 1988* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Section 5 of the Act provides that an 'extradition country' includes any country (other than New Zealand) that is declared by the regulations to be an extradition country. Subsection 11(1A) of the Act specifies that the regulations may provide that the Act applies to an extradition country subject to the limitations, conditions, exceptions or qualifications as are necessary to give effect to a multilateral extradition treaty in relation to that country. Subsection 11(1C) provides that this may be achieved by expressly applying the Act to the country subject to that treaty.

The *Extradition Legislation Amendment (2017 Measures No.1) Regulations 2017* (the Regulations) amends the *Extradition (Commonwealth Countries) Regulations 2010* (the current Commonwealth Countries Regulation) to remove reference to India from the list of extradition countries. It also amends the *Extradition (Physical Protection of Nuclear Material) Regulations 1988* and the *Extradition Regulations 1988* to amend the definition of Extradition Offences.

The *Extradition (India) Regulations 2010* (India Regulations) implements Australia's bilateral extradition treaty with India. The India Regulations declare India to be an 'extradition country' and, together with section 5 of the Act, provide the framework for Australia to consider extradition requests relating to India.

India is also declared as an 'extradition country' under the current Commonwealth Countries Regulation. The current Commonwealth Countries Regulation enables Australia to consider and make extradition requests to other Commonwealth Countries (as defined). This additional reference to India as an extradition country is unnecessary and may result in extradition requests not being considered under the India Regulations, which is the most appropriate framework for extradition requests. The Regulation removes India from the list of extradition countries in Schedule 1 to the current Commonwealth Countries Regulation. This will ensure that extradition requests from India will be considered under the India Regulations and the Act.

The Regulation amends the definition of the *Convention on the Physical Protection of Nuclear Material 1979* (Physical Protection Convention) in the *Extradition (Physical Protection of Nuclear Material) Regulations 1988* and the *Extradition Regulations 1988,* so that it has the same meaning as in the *Nuclear Non-Proliferation (Safeguards) Act 1987* (Nuclear Safeguards Act).

The *Extradition (Physical Protection of Nuclear Material) Regulations 1988* (Extradition Nuclear Material Regulation) and *Extradition Regulations 1988* (Extradition Regulations) gives effect to Australia's extradition obligations under the Physical Protection Convention. The Physical Protection Convention establishes measures to prevent, detect and prosecute offences relating to the protection,

storage, and transportation of nuclear material. Article 7 of the Physical Protection Convention includes a list of offences for which parties may request a person's extradition (Extradition Offences).

On 8 July 2005, parties agreed to the *Amendment to the Convention on the Physical Protection of Nuclear Material* (the Amended Convention) which expanded the Extradition Offences in the Physical Protection Convention to include offences against trafficking of nuclear material and sabotage of nuclear facilities with intent to cause death, injury or damage by exposure to radiation or radioactive substances (Article 7). Article 11A of the Amended Convention also added a new obligation on parties to not regard offences committed under Article 7 of the Amended Convention as a 'political offence' when considering a request for extradition or mutual assistance (the political offence exception). The Amended Convention entered into force in Australia on 8 May 2016.

The Regulation amends the definition of Physical Protection Convention so that it captures amendments made to the Convention. It does so by amending the definition of the Physical Protection Convention to reference the Nuclear Safeguards Act definition, which implements the offence provisions in the Amended Convention (Division 2, Part 3). As a result of this amendment extradition requests from parties to the Convention and the Amended Convention for these offences can be considered.

The Extradition Regulations implement political offence exception obligations under multilateral treaties. Section 5 of the Act defines 'political offence' and provides that it does not include an offence prescribed by regulations to be an extraditable offence. Subsection 2B(1) of the Extradition Regulations provides that an offence is an extraditable offence if it is constituted by conduct of a kind referred to in any of the multilateral conventions listed, which includes the Physical Protection Convention.

Both the Act and the *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act) provide that requests for extradition or mutual assistance must be refused if the offence for which assistance is sought is a political offence. Section 3 of the Mutual Assistance Act defines 'political offence' as having the same meaning as the Act. Accordingly, an update to the *Extradition Regulations 1988* is required to ensure that if Australia receives a request for extradition or mutual assistance pursuant to the Amended Convention the request will not be refused on the grounds that the alleged offending constitutes a political offence.

Consultation outside the Australian Government was not undertaken for the Regulations as they relate to criminal justice and law enforcement matters. Additionally, the Regulations do not have direct, or substantial indirect, effects on business, nor do they restrict competition.

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after they are registered with the Federal Register of Legislation.

Details of the Regulation are set out in the Attachment.

Authority: Section 55 of the *Extradition Act 1988*

ATTACHMENT

Details of the Extradition Legislation Amendment (2017 Measures No.1) Regulations 2017

Section 1 –Name of Instrument

This section provides that the title of the legislative instrument is the *Extradition Legislation Amendment (2017 Measures No.1) Regulations 2017*.

Section 2 – Commencement

This section provides that the legislative instrument will commence on the day after it is registered.

Section 3 – Authority

This section specifies that the legislative instrument is made under the *Extradition Act 1988*.

Section 4 – Schedules

This section provides that any changes to instruments specified in the legislative instrument are found in the schedules of this instrument.

Schedule 1 – Amendments

Extradition (Commonwealth countries) Regulations 2010

Item 1

Item 1 omits India from the list of extradition countries at Schedule 1 in the *Extradition (Commonwealth countries) Regulations 2010*.

Australia has ratified a bilateral extradition treaty with India, implemented domestically through the *Extradition (India) Regulations 2010*. Extradition requests between Australia and India will be considered under the *Extradition Act 1988* and the *Extradition (India) Regulations 2010.*

Extradition (Physical Protection of Nuclear Material) Regulations 1988

Items 2 and 3

Items 2 and 3 repeal the definition of 'Physical Protection Convention' in section 2 of the *Extradition (Physical Protection of Nuclear Material) Regulations 1988* and insert a new definition. The new definition provides that the Physical Protection Convention has the same meaning as in the *Nuclear Non-Proliferation (Safeguards) Act 1987*.

Section 4 of the *Nuclear Non-Proliferation (Safeguards) Act 1987* defines the Physical Protection Convention by reference to the Convention on the Physical Protection of Nuclear Material, including that convention as amended from time to time. This definition would incorporate amendments made by the *Amendment to the Convention on the Physical Protection of Nuclear Material,* and future amendments to the convention if Australia is a party.

Extradition Regulations 1988

Item 4

Item 4 inserts a new definition of 'Physical Protection Convention' into the *Extradition Regulations 1988*. This new definition states that the Physical Protection Convention has the same meaning as in the *Nuclear Non-Proliferation (Safeguards) Act 1987*.

Section 4 of the *Nuclear Non-Proliferation (Safeguards) Act 1987* defines the Physical Protection Convention by reference to the Convention on the Physical Protection of Nuclear Material, including that convention as amended from time to time. This definition would incorporate amendments made by the *Amendment to the Convention on the Physical Protection of Nuclear Material,* and future amendments to the convention if Australia is a party.

Item 5

Item 5 repeals paragraph 2B(1)(h) of the *Extradition Regulations 1988* which lists the *Convention on the Physical Protection of Nuclear Material* and substitutes a new paragraph 2B(1)(h) that references 'Article 7 of the Physical Protection Convention.'

Article 7 of the Convention on the Physical Protection of Nuclear Material lists offences for which parties may request a person's extradition to another party's territory.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The *Extradition Act 1988* (the Extradition Act) provides the legislative basis for extradition in Australia. The Act allows Australia to receive extradition requests from countries that are declared to be an 'extradition country' under the Extradition Act, and facilitates the making of requests for extradition by Australia to other countries.

The legislative instrument removes India from the list of extradition countries at Schedule 1 of the *Extradition (Commonwealth countries) Regulations 2010* (the Commonwealth countries regulation). Australia has finalised a bilateral extradition treaty with India, the Extradition Treaty between Australia and the Republic of India (the India Extradition Treaty), and implemented that treaty domestically through the *Extradition (India) Regulations 2010*. As India is declared an 'extradition country' under the *Extradition (India) Regulations* 2010 the inclusion of India in Schedule 1 of the Commonwealth countries regulation is no longer required.

The legislative instrument also amends the *Extradition (Physical Protection of Nuclear Materials) Regulations 1988* and the *Extradition Regulations 1988* to reflect amendments made to the *Convention on the Physical Protection of Nuclear Material 1979* (the Convention). The Convention is a multilateral treaty which establishes measures to prevent, detect and prosecute offences relating to the protection, storage and transportation of nuclear material. The Convention also requires signatories to provide extradition and mutual assistance to facilitate the enforcement of these offences. On 8 July 2005, signatories agreed to amendments to the Convention – the *Amendment to the Convention on the Physical Protection of Nuclear Material* (the Amended Convention) which relevantly, expanded the list of offences for which signatories may request a person's extradition. It also inserted a new obligation on signatories to not regard offences committed under the Amended Convention as a 'political offence' when considering a request for extradition or mutual assistance (the political offence exception). The Amended Convention and these updated obligations became binding on signatories on 8 May 2016.

Human rights implications

The evolving nature of, and increased threats posed by, transnational crime requires Australia to have a robust and responsive extradition system that assists in effectively combating domestic and transnational crime, while providing appropriate safeguards. It is important to ensure that criminals cannot evade justice simply by crossing borders.

Extradition can engage a range of human rights, including the:

- prohibition against torture, cruel, inhuman and degrading treatment;
- right to life;
- right to a fair hearing and fair trial;
- right to liberty; and
- right to equality and non-discrimination.

Australia's extradition regime contains a number of measures that ensure Australia meets both international criminal justice obligations and human rights obligations. The Extradition Act contains a number of mandatory requirements that must be met before Australia can make or receive an extradition request.

Those requirements are supplemented by further safeguards contained in multilateral or bilateral treaties, including the India Extradition Treaty and the Amended Convention. Additionally, Australia will consider each individual extradition request on a case-by-case basis in light of its domestic legislative framework as well as international obligations.

The extradition process

The extradition process consists of three broad stages, and the Extradition Act requires consideration of safeguards at all three stages. First, the Attorney-General or the Minister for Justice (the decision-maker) has a discretion under section 16 of the Extradition Act whether to accept an extradition request. The decision-maker can only accept an extradition request, if they are of the opinion that the person sought is an extraditable person in relation to the extradition country. A person is an extraditable person if, there is a warrant in force in the requesting country for their arrest or, where the person has been convicted, the requesting country either intends to sentence that person, or if they have been sentenced, the whole or part of their sentence remains outstanding. In addition, the relevant offence must be an extradition offence, and the person must be believed to be outside of the country making the extradition request.

The second step is for a magistrate or eligible Federal Circuit Court Judge to determine whether the person is eligible for surrender under section 19 of the Extradition Act. A person is only eligible for surrender if:

- the necessary documents are produced;
- any additional requirements imposed by regulations are met;
- the magistrate or Judge is satisfied that the person's alleged conduct amounts to an offence in both countries; and
- the magistrate or Judge is satisfied there are no substantial grounds for believing there is an 'extradition objection.'

Section 7 of the Extradition Act provides that an extradition objection arises where:

- the person is sought for a political offence in relation to the extradition country; or
- the person is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions; or
- the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions; or
- the conduct constituting the offence for which the person is sought constitutes a military offence, but not a criminal offence; or
- the offence for which the person is sought is an offence for which they have been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia, or have undergone the punishment provided by the law of that country or Australia, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence (a double jeopardy ground of refusal).

Finally, if the person is found eligible for surrender, then the decision-maker must make a determination whether the person should be surrendered under section 22 of the Extradition Act. A person must not be surrendered where:

- there is an extradition objection in relation to the offence; or

- there are substantial grounds for believing that, if surrendered, the person would be in danger of being subjected to torture; or
- the requesting country has not given an assurance that the person sought will only be tried for the offences contained in the extradition request.

Further, paragraph 22(3)(c) of the Extradition Act provides that where an offence is punishable by a penalty of death, Australia cannot surrender a person unless an undertaking is given by the requesting party that:

- the person will not be tried for the offence; or
- if the person is tried for the offence, the death penalty will not be imposed on the person; or
- if the death penalty is imposed on the person, it will not be carried out.

The decision-maker also has a broad discretion under subsection 22(f) of the Extradition Act to refuse surrender.

At this stage of the extradition process, the person subject to extradition has the opportunity to make representations regarding any matter that they consider relevant to the decision-maker's determination, including human rights concerns. In circumstances where a person believes that human rights concerns were not adequately considered in the extradition process, they may seek review under the Extradition Act or under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution.

The specific human rights engaged by this legislative instrument are discussed below.

Prohibition against torture, cruel, inhumane and degrading treatment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR) contain prohibitions on torture or cruel inhuman or degrading treatment or punishment. This includes *non-refoulement* obligations not to return a person to a country where they would be at risk of harm by way of torture or cruel inhuman or degrading treatment or punishment.

Paragraph 22(3)(b) of the Extradition Act prohibits extradition where the decision-maker has substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture. This language is consistent with Article 3 of the CAT.

The decision whether to surrender a person is made by the relevant decision-maker on a case-by-case basis, in accordance with the safeguards in the Extradition Act and Australia's international obligations. For the purposes of considering whether to refuse surrender under subsection 22(3), the decision-maker may consider all material reasonably available to assist in determining whether the person may be subjected to torture. This may include relevant international law obligations, any representations or assurances from the requesting country, country information, reports prepared by government or non-government sources, information provided through the diplomatic network and those matters raised on behalf of by the person who is the subject of the extradition request.

It is open to the decision-maker to consider, where appropriate, whether ongoing monitoring of an extradited individual's prosecution, sentence, and welfare should be a condition of the extradition. It is also open to the person who is the subject of an extradition request to challenge decisions at each stage of the extradition proceedings.

Article 4(3)(d) of the India Extradition treaty also allows a request for extradition to be refused if the surrender is likely to have exceptionally serious consequences for the person whose extradition is sought, because of the person's age or state of health.

Article 12 of the Amended Convention also requires signatories to provide fair treatment to an accused at all stages of proceedings carried out in connection with any of the relevant offences.

This legislative instrument is consistent with a person's right in respect of prohibition against torture, cruel, inhuman, and degrading treatment.

Right to life

Article 6 of the ICCPR provides that every human being has the inherent right to life. This right shall be protected by law and no one shall be arbitrarily or unlawfully deprived of his or her life. Australia has a *non-refoulement* obligation under Article 6 not to remove a person to a country where there is a real risk that the person will be subject to the death penalty.

The Extradition Act reflects Australia's *non-refoulement* obligations and is consistent with the Australian Government's longstanding opposition to the death penalty. Paragraph 22(3)(c) of the Extradition Act requires an extradition request to be refused where the offence is punishable by a penalty of death, unless an undertaking has been provided that the person will not be tried for that offence or, if tried, the death penalty will not be imposed; or, if the death penalty is imposed, it will not be carried out.

Death penalty undertakings are an established tool in extradition. It is the Australian Government's longstanding experience that undertakings in relation to the death penalty in extradition cases have always been honoured. Undertakings are written government assurances and a breach of an undertaking would have serious consequences for the extradition relationship, and the broader bilateral cooperation relationship with the foreign country. The decision-maker would consider the reliability of any death penalty undertaking on a case-by-case basis.

Given the public nature of extradition, the Australian Government would most likely be aware of a breach of a death penalty undertaking. Australia monitors Australian citizens who have been extradited through its consular network and it is also open to the decision-maker to consider, where appropriate, whether ongoing monitoring of an extradited individual's prosecution, sentence and welfare should be a specific condition of the extradition.

It is open to the person who is the subject of an extradition request to challenge decisions at each stage of the extradition proceedings.

Article 4(1)(c) of the India Extradition Treaty also contains a mandatory ground of refusal in circumstances where the person sought may be sentenced to death for the offence for which the extradition is requested, unless the Requesting Party provides an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out. This provision is consistent with paragraph 22(3)(c) of the Extradition Act, as discussed above.

This legislative instrument is consistent with the right to life under the ICCPR and the Second Optional Protocol to the ICCPR.

Right to a fair hearing and fair trial

Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against them, or of their rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.

The Australian Government's position is that Article 14 of the ICCPR does not contain *non-refoulement* obligations. However, the Extradition Act operates in a way that enables the decision-maker to consider humanitarian considerations such as a right to a fair trial in deciding

whether to surrender a person. Section 7(e) of the Extradition Act includes a double jeopardy ground of refusal. A person cannot be extradited if they have been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia, or have undergone the punishment provided by the law of that country or Australia, in respect of the extradition offence or another offence constituted by the same conduct that constitutes the extradition offence. This consideration is taken into account at the section 19 (eligibility hearing before a magistrate) stage of the extradition process.

Paragraph 22(3)(f) of the Extradition Act contains a general discretion to refuse surrender, which enables the decision-maker to consider human rights concerns, which, could include whether an extradited individual would have access to a fair trial. Relevant considerations may include the extent to which an individual would receive appropriate procedural guarantees in a criminal trial in the country to which he or she is being extradited. In accordance with the principle of procedural fairness, the person subject to extradition also has the opportunity to make representations regarding any human rights concerns.

It is open to the relevant decision-maker to request assurances from the requesting country about the treatment and conditions applying to a person upon extradition where concerns exist about whether that person would receive a fair trial. Assurances could include that the trial be held in open court, that the person has access to legal representation, that the person has an opportunity to test the evidence against them or that the person will be imprisoned in a particular jail. The decision-maker would consider any individual's claims and any representations or assurances provided by the requesting country. The decision-maker may also consider country information, reports prepared by government or non-government sources and information provided through the diplomatic network.

It is open to the person who is the subject of an extradition request to challenge decisions at each stage of the extradition proceedings.

Article 4(1)(b) of the India Extradition Treaty also requires extradition to be refused if under the law of the requesting state, the alleged offence has become immune from prosecution or punishment by reason of lapse of time. In addition, Article 4(3) grants both countries the ability to refuse extradition if:

- the person has been tried and finally dealt with in respect of the offence for which extradition is sought (Article 4(3)(a)); or
- the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting state by an extraordinary or ad hoc court or tribunal (Article 4(3)(c)).

Article 12 of the Amended Convention also requires signatories to provide fair treatment to an accused at all stages of proceedings carried out in connection with any of the relevant offences.

Other engagement with this right

The right to a fair hearing would also be engaged in relation to an extradition request received under the Amended Convention or the Indian extradition treaty.

If Australia receives a request under the Amended Convention then the 'no evidence' standard of evidence would apply. This is the international approach adopted in the United Nations Model Treaty on Extradition. The term 'no evidence' does not mean 'no information.' Rather, as provided for under the Extradition Act a range of documents are required which the relevant magistrate or eligible Federal Circuit Court Judge will consider under section 19 of the Extradition Act when determining whether the person is eligible for surrender. Evidence sufficient to prove each element of each alleged offence under the laws of the requested country (such as 'prima facie' evidence including witness statements and affidavits) is not required. This is because extradition is not a criminal process. Rather, it is an

administrative process to determine whether a person is to be surrendered to face justice in the Requesting Party. The purpose of extradition proceedings is not to determine guilt or innocence.

If Australia receives a request under the India Extradition Treaty, then supporting documentation to establish that the person sought has committed the offence must be provided. Indian domestic legal requirements have necessitated a departure from Australia's preferred 'no evidence' standard.

It is open to the person who is the subject of an extradition request to challenge decisions at each stage of the extradition proceedings.

The provisions in the India Extradition Treaty and the Amended Convention given effect by this legislative instrument operate consistently with the right to a fair hearing and fair trial under article 14 of the ICCPR.

Right to liberty

Article 9(1) of the ICCPR protects the right to freedom from arbitrary detention. The use of the term 'arbitrary' means that the detention, in all the circumstances, must be reasonable, necessary and proportionate to the end that is sought. Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement. This right may be limited under article 12(3) where the limitation is provided by law, and is necessary to protect national security, public order, public health or morals or the rights and freedoms of others.

In the extradition context, a magistrate must not release a person on bail unless there are special circumstances justifying such release, for example where the person is in extremely poor health and cannot be treated in prison. This ensures the Extradition Act is suitably flexible to accommodate exceptional circumstances that may necessitate granting a person bail.

The presumption against bail for persons sought for extradition is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. Reporting and other bail conditions are not always sufficient to prevent individuals who wish to evade extradition by absconding. In extradition cases, there is an increased risk of persons absconding before they can be surrendered to the requesting country. If a person who has been remanded on bail absconds during extradition proceedings, it jeopardises Australia's ability to extradite the person which in turn would impede Australia's treaty obligations to return a person to the requesting country. Ultimately, it can also lead to a state of impunity where a person can disappear and continue to evade law enforcement authorities. The validity of Australia's process of remanding a person during extradition proceedings has been confirmed by the High Court in *Vasiljković v Commonwealth* [2006] HCA 40.

This is consistent with accepted international practice for a person to be held in administrative detention pending extradition proceedings. The Extradition Act provides that when a surrender warrant is issued, Australia has generally two months from the date of the warrant to transfer the person to the foreign country. This timeframe ensures that a person will not be held in custody indefinitely while awaiting transfer.

Article 12(3) of the India Extradition Treaty alternatively requires an individual to be held for a 'reasonable period.'

It is open to the person who is the subject of an extradition request to challenge decisions at each stage of the extradition proceedings.

To the extent that this legislative instrument limits the right to liberty, it does so in a way that is reasonable and proportionate.

Right to equality and non-discrimination

Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Section 7 of the Extradition Act promotes this right by prohibiting extradition where:

- surrender is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions; or
- the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions.

The person subject to the extradition has an opportunity to make representations to the decision-maker regarding all of the protected attributes in Article 26 of the ICCPR.

Article 4(3)(b) of the India Extradition Treaty also provides that the requested State may refuse surrender if they have substantial grounds to believe that the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, sex, religion, nationality or political opinion or that that person's position may be prejudiced for any of those reasons.

Article 11B of the Amended Convention also promotes this right by allowing a requested state to refuse a request for extradition if it has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

This legislative instrument is consistent with the right to equality and non-discrimination.

Conclusion on this instrument and human rights implications

While this legislative instrument engages with and limits some human rights, the protections in the Extradition Act, the India Extradition Treaty and the Amended Convention ensure that this legislative instrument does so in a reasonable and proportionate way.

EXPLANATORY STATEMENT

Select Legislative Instrument 2017

Issued by the authority of the Attorney General

Telecommunications (Interception and Access) Act 1979

Telecommunications (Interception and Access) Regulations 2017

1. The *Telecommunications (Interception and Access) Act 1979* (Act) regulates access to telecommunications content and data. It provides the legal framework for intelligence and law-enforcement agencies to access information held by communications providers for the investigation of criminal offences and other activities that threaten safety and security. The Act prohibits the interception of telecommunications, except in specified circumstances. The Act outlines the issue of warrants for authorising the interception of telecommunications.

2. Section 300 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that the Act requires or permits to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

3. Section 180X of the Act provides that the Prime Minister shall declare, in writing, one or more persons to be Public Interest Advocates, with provision that the regulations may prescribe matters relating to the performance of the role of a Public Interest Advocate (subsection 180X(3)).

4. Regulations were made under the Act in 1987 as the *Telecommunications (Interception and Access) Regulations 1987.* Those regulations will sunset on 1 April 2017.

5. The *Telecommunications (Interception and Access) Regulations 2017* (the Regulations) will remake the *Telecommunications (Interception and Access) Regulations 1987* in substantially the same form, with minor modifications to ensure the regulations remain fit for purpose. The Regulations will update references to the Commonwealth Legal Services Directions.

6. The purpose of the Regulations is to prescribe the matters necessary for the effective operation of the Act.

7. The Regulations will:

   - support the legal framework under the Act;
   - prescribe the forms in relation to issuing warrants and authorisations;
   - prescribe roles relating to the performance of the role of a Public Interest Advocate (PIA).

8. The Regulations provide forms for a service warrant issued under section 46 of the Act, named person warrant issued under section 46A of the Act, warrant for entry on

premises under section 48 of the Act, stored communication warrants under section 116 of the Act and journalist information warrants under section 180T of the Act.

Service Warrants

9. A service warrant can provide the authorisation to intercept telecommunications to or from a service used or likely to be used by a person of interest. The warrant can further authorise the interception of telecommunications to or from a service used or likely to be used by a person who is not under investigation but is known to communicate with the person of interest in certain circumstances (B-Party warrant). The Regulations ensure that the form prescribed for service warrants envisages the interception of a single service utilised by multiple people.

Named person Warrants

10. A named person warrant can provide the authorisation to intercept telecommunications services used or likely to be used by a person of interest. The warrant can further authorise the interception of communications to or from any telecommunications devices used or likely to be used by a person of interest.

Warrant for entry on premises

11. A warrant for entry on premises can authorise entry on premises where an agency was also able to apply for a warrant under section 46 of the Act, which authorises interceptions of communications to or from a service.

Stored Communications Warrants

12. A stored communications warrant can authorise access to any stored communications made or received by the person in respect of whom the warrant is issued. The prescribed form under the Regulations reflects the limited range of agencies who may apply for stored communication warrants to the narrower category of 'criminal law enforcement agencies' set out in the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*.

Journalist Information Warrants

13. A journalist information warrant can authorise access to telecommunications data relating to a journalist, or their employer, for the purposes of identifying a journalist's source. In order for a journalist information warrant to be provided, the Minister (in the case of ASIO) or the issuing authority (in the case of enforcement agencies) must be satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source.

14. The Regulations prescribe roles relating to the performance of the role of a PIA and matters that are necessary or convenient to be prescribed for carrying out or giving effect to the role of the PIA.

15. Details of the Regulations are set out in the Attachment.

16. The Act does not specify any conditions that need to be met before the power to make the Regulations may be exercised.

17. In drafting the updated Regulations, the department's consultation process began in late July 2017. The department sought feedback on whether the Regulations may be improved or amended to enhance the operation of the Act.

18. The law enforcement agencies consulted were:
    - the police force of every state and territory
    - the Australian Commission for Law Enforcement Integrity
    - the Australian Criminal Intelligence Commission
    - the Australian Federal Police
    - the Victorian Independent Broad-based Anti-corruption Commission
    - the Queensland Crime and Corruption Commission
    - the Western Australian Corruption and Crime Commission
    - the South Australian Independent Commissioner Against Corruption
    - the New South Wales Independent Commission Against Corruption
    - the New South Wales Law Enforcement Conduct Commission
    - the New South Wales Crime Commission
    - the Australian Securities and Investments Commission
    - the Australian Competition and Consumer Commission, and
    - the then Department of Immigration and Border Protection.

19. The following telecommunications providers were consulted: Telstra, Optus, Vodafone, TPG and the National Broadband Network.

20. The department received a small number of responses, all of which were to confirm law enforcement agencies or providers had no comments.

21. The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

22. The Regulations will commence on 1 April 2018.

Authority: Section 300 of the *Telecommunications (Interception and Access) Act 1979*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Telecommunications (Interception and Access) Regulations 2017

23. This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

24. The *Telecommunications (Interception and Access) Regulations 2017* (Regulations) are made by the Governor-General under section 300 of the *Telecommunications (Interception and Access) Act 1979* (Act).

25. The Regulations remake the *Telecommunications (Interception and Access) Regulations 1987* (TIA Regulations) in their current form, with minor amendments. The Regulations preserve existing arrangements in the TIA Regulations but have been remade in accordance with current drafting practices.

26. The Act regulates access to telecommunications content and data. It provides the legal framework for intelligence and law-enforcement agencies to access information held by communications providers for the investigation of criminal offences and other activities that threaten safety and security. The TIA Regulations give effect to key provisions in the Act to support the legal framework of the Act by prescribing the forms in relation to issuing warrants and authorisations, including journalist information warrants (JIW), and prescribes roles relating to the performance of the role of a Public Interest Advocate (PIA). The TIA Regulations currently underpin the functions of law-enforcement and intelligence agencies and issuing authorities under the Act.

27. The TIA Regulations are scheduled to sunset in accordance with section 50 of the *Legislation Act 2003*. The Regulations remake the existing TIA Regulations. The Regulations will also make minor amendments to the extant version to update references to the Commonwealth Legal Services Directions.

28. The Regulations will retain existing arrangements for prescribing forms in relation to issuing warrants and authorisations, including JIWs, and prescribe roles regarding PIAs.

Human rights implications

29. The Regulations engage the right to protection against arbitrary and unlawful interferences with privacy under article 17 and freedom of expression under article 19 of the International Covenant on Civil and Political Rights (ICCPR).

The right to protection against arbitrary and unlawful interferences with privacy

30. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation, and that everyone has the right to the protection of the law against such interference or attacks.

31. Interferences with privacy may be permissible where they are authorised by law and not arbitrary. In order for an interference with the right to privacy not to be arbitrary, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable under the circumstances.

32. The United Nations Human Rights Committee (the HRC) has interpreted 'reasonableness' to mean that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'.

33. The Regulations engage the right to privacy by prescribing the forms in relation to issuing warrants and authorisations, including journalist information warrants. These warrants and authorisations allow the interception of telecommunications, limiting the right to protection from arbitrary and unlawful interference with privacy under Article 17 of the ICCPR.

34. The limitation of the right to privacy under the prescribed warrants and authorisations regime are for the legitimate end of the protection of national security, public safety, addressing crime, and protecting the rights and freedoms of individuals.

35. Regulations 6 and 7 describe the listing of criminal organisations and confiscation and forfeiture laws. These regulations go to the legitimate end of addressing crime.

36. The journalist information warrant regime requires that the Minister or issuing authority be satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source before a warrant may be issued. This ensures that competing public interests have been considered and appropriately weighed.

37. Furthermore, the journalist information warrant regime requires that prior to issuing a warrant an issuing authority must have regard to any submissions of a Public Interest Advocate (PIA). The PIA represents the 'public interest' in this regime. The PIA will review the requests and applications made by ASIO and enforcement agencies for a JIW and will make submissions to the Minister (for a request by ASIO) and Part 4-1 issuing authorities (for a request by enforcement agencies) whether the warrant should be issued and whether any conditions or restrictions should be imposed on the warrant.

38. This process ensures that any interference with the privacy of any person or persons that may result from disclosing telecommunications data would be lawful, justifiable and proportionate.

39. The Regulations create the necessary safeguards that apply to the journalist information warrant regime through:

a. prescribing that only senior members of the legal profession may be appointed as PIAs (Senior Counsel, Queen's Counsel, former Commonwealth judges, or former State or Territory superior court judges), ensuring that PIAs are persons of the highest integrity and impartiality with extensive experience in making public interest arguments

b. requiring that agencies provide a PIA with a copy of a proposed request or application for a JIW or notify a PIA prior to making an oral application

c. enabling PIAs to receive further information provided to the Minister or issuing authority by agencies further to the information contained in the request or application

d. enabling PIAs to prepare a new or updated submission based on any further information provided and

e. placing decisions about any exceptions from the above requirements with PIAs, Ministers or issuing authorities instead of with the agencies.

40. The Regulations prescribe criteria for appointment of Public Interest Advocates that ensure the Advocates are appropriately skilled and independent and able to advocate in the public interest. To the extent that the issuing of a warrant itself entails a limitation on the right to privacy that limitation is reasonable, necessary and proportionate.

Freedom of expression

41. Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds. The right to freedom of expression carries special duties and responsibilities.

42. The right to freedom of expression may be subject to certain restrictions, as are provided for by law and are necessary for specified purposes including the protection of national security or public order (including law enforcement).

43. The Regulations do not limit the right to freedom of expression. The journalist information warrant and the Public Interest Advocate regimes seek to promote the protection of freedom of expression by requiring security and law-enforcement agencies to apply for a warrant before accessing a journalists' or their employers' telecommunications data where a purpose is to identify a source. The Regulations support those protections by prescribing relevant process requirements and criteria necessary to enable the functioning of Public Interest Advocates.

44. A journalist's right to protect confidential information is derived from the right to freedom of expression and is a fundamental tenet of an open and unimpeded press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. The existence of robust oversight of authorisation requests protects against access to source information occurring in a way which is inconsistent with the assurances of confidentiality that may be given by a journalist to a source save where the public interest outweighs the maintenance of confidentiality. Independent authority, through the creation of journalist information

warrants issued by a judicial officer or AAT member minimises the potential for deterring sources from actively assisting the press to inform the public on matters of public interest and ensures that the freedom of the press is not adversely affected by the measure.

45. The Regulations promote freedom of expression and are compatible with Article 19 of the ICCPR because they strengthen the procedural safeguards that apply to agencies seeking access to information for the purpose of identifying a source. The Public Interest Advocate process further supports the right to freedom of expression by requiring the balance of competing public interests between disclosure of information for national security and law enforcement purposes and the protection of confidential sources which support freedom of expression.

Conclusion

46. The measures in the Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.* To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate.

NOTES ON SECTIONS

Telecommunications (Interception and Access) Regulations 2017

Details of the proposed *Telecommunications (Interception and Access) Regulations 2017*

Part 1 - Preliminary

Regulation 1 – Name of Regulations

47. Regulation 1 provides that this Regulation is the *Telecommunications (Interception and Access) Regulations 2017*.

Regulation 2 – Commencement

48. Regulation 2 provides that the Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Authority

49. Regulation 3 provides that the instrument is made under the *Telecommunications (Interception and Access) Act 1979* (Act).

Regulation 4 – Schedules

50. Regulation 4 provides that each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned. Regulation 4 further provides that any other item in a Schedule to these Regulations has effect according to its terms.

Regulation 5 – Definitions

51. Regulation 5 defines 'Act' as the *Telecommunications (Interception and Access) Act 1979*.

Part 2 – General Matters

Regulation 6 – Criminal Organisations

52. Regulation 6 prescribes section 7 of the *Serious Crime Control Act* (NT) for the purposes of paragraph (b) of the definition of *criminal organisation* in the Act. A range of criminal offences relating to *criminal organisations* are *serious offences* within the meaning of the Act, for which interception agencies may apply for and obtain interception warrants under Part 2-5 of the Act.

Regulation 7 – Prescribed Acts for proceedings for confiscation or forfeiture or for pecuniary penalty

53. Regulation 7 prescribes the following acts for the purposes of paragraph 6K(c) of the Act:

    a. *Proceeds of Crime Act 2002;*

b. *Confiscation of Proceeds of Crime Act 1989* (NSW);
c. *Criminal Assets Recovery Act 1990* (NSW);
d. *Confiscation Act 1997* (Vic);
e. *Criminal Proceeds Confiscation Act 2002* (QLD);
f. *Criminal Property Confiscation Act 2000* (WA);
g. *Criminal Assets Confiscation Act 2005* (SA);
h. *Crime (Confiscation of Profits) Act 1993* (Tas);
i. *Confiscation of Criminal Assets Act 2003* (ACT);
j. *Criminal Property Forfeiture Act* (NT).

Regulation 8 – Warrants authorising agencies to intercept telecommunications

54. Regulation 8 prescribes Form 1 to Form 5 in Schedule 1 for authorising agencies to intercept telecommunications for the purposes of subparagraph 49(1) of the Act. The effect of this regulation is to specify the forms for warrants issued under Part 2-5 of the Act, which authorise agencies to intercept telecommunications.

Regulation 9 – Stored Communications warrants

55. Regulation 9 prescribes Form 6 in Schedule 1 for the purposes of paragraph 118(1)(a) of the Act. The effect of this regulation is to specify the form for warrants issued under Part 3-3 of the Act, which authorise criminal law enforcement agencies to access stored communications.

Regulation 10 – Journalist Information warrants

56. Regulation 10 prescribes Form 7 in Schedule 1 for the purposes of subsection 180U(1) of the Act. The effect of this regulation is to specify the form for journalist information warrants issued to enforcement agencies under Part 4-1 of the Act.

Part 3 – Access to telecommunications Data

Division 1 – Journalist Information Warrants

Regulation 11 – Public Interest Advocate to be given proposed journalist information warrant request made by the Director-General of Security

57. Section 180J of the Act provides that the Director-General of Security (Director-General) may request the Minister to issue a journalist information warrant in relation to a particular person.

58. Subregulation 11(1) requires that, before requesting a journalist information warrant under section 180J of the Act, the Director-General must give a copy of the proposed request to a Public Interest Advocate.

59. Such a requirement is necessary to ensure that Public Interest Advocates are aware of each request, and are therefore able to prepare submissions under paragraph 180X(2)(a) of the Act for the Minister to have regard to under subparagraph 180L(2)(b)(v) of the Act.

60. Subregulation 11(1) additionally limits the range of Public Interest Advocates to whom the Director-General may give a proposed request, being Public Interest Advocates who:

    a. hold an equivalent security clearance to that of an ASIO employee (within the meaning of the Act and the *Australian Security Intelligence Organisation Act 1979*); or

    b. a former judge of a Chapter III court, or of a State or Territory superior court.

61. Subparagraph 18(1)(a) provides that the Prime Minister must be satisfied that a Queen's Counsel or Senior Counsel has been cleared for security purposes to a level that the Prime Minister considers appropriate before declaring the person to be a Public Interest Advocate. In practice, this may result in different Advocates holding clearances at different levels, depending on the likely classification of applications that each Advocate is likely to review. However, in the case of warrant applications by ASIO it will be appropriate that consideration of the application is limited to those Public Interest Advocates that either hold a security clearance equivalent to an ASIO employee or are former superior court justices to ensure that sensitive information is appropriately protected, and only a limited number of Public Interest Advocates will be required to undergo the more rigorous security clearance process required for ASIO employees. In particular, subregulation 11(1) will ensure that the Director-General will not be required, as a result of the operation of subregulation 11(2), to give a proposed request to an Advocate who is not cleared to review highly sensitive information.

62. Subregulation 11(2) provides that, if a copy of a proposed request is given to a Public Interest Advocate, as required under subregulation 11(1), and the Advocate advises that he or she is unable to prepare a submission in relation to the proposed request for any reason, the Director-General must ensure that a copy of the proposed request is given to another Public Interest Advocate. The purpose of this requirement is to ensure that the proposed request is given to an Advocate who is able to consider it. In the rare circumstance that the proposed request has been given to all Public Interest Advocates who meet the requirements of subregulation 11(1), subregulation 11(2) should not be interpreted as requiring the Director-General to continue giving the proposed requests to those Advocates where it would be futile to do so.

63. The Minister has a discretion to refuse to issue a journalist information warrant, under section 180L of the Act. This discretion would extend, for example, to circumstances where a request has been made without a submission if no Public Interest Advocates were available, where the Minister considers that, in all the circumstances, the request should not be granted until a Public Interest Advocate has become available and prepared a submission. Conversely, it would be open to the Minister to issue a warrant in the rare circumstance that no Public Interest Advocates are able to prepare a submission, or in exigent circumstances where a submission has not been prepared.

64. Regulation 11 relies on the 'necessary and convenient' power in subsection 300(1)(b) of the Act. Regulation 11 is necessary to enable a Public Interest Advocate to make submissions as they are permitted to do so pursuant to section 180X(2) of the Act. The Regulation also enables the Minister to have regard to any submissions made by a Public Interest Advocate as required by subparagraph 180L(2)(b)(v) of the Act by facilitating the making of such submissions and prescribing the circumstances and

manner in which applications are provided to Public Interest Advocates. Accordingly, Regulation 11 is necessary to give effect to the Act.

Regulation 12 – Public Interest Advocate to be given proposed journalist information warrant applications made by an enforcement agency

65. Section 180Q of the Act provides that an enforcement agency may apply to a Part 4-1 issuing authority (within the meaning of the Act) for a journalist information warrant in relation to a particular person.

66. Subregulation 12(1) requires that, before making a written application for a journalist information warrant under section 180Q of the Act, the person must give a copy of the proposed application to a Public Interest Advocate.

67. Subregulation 12(2) requires that, before making an oral application for a journalist information warrant under section 180Q of the Act, the person must notify a Public Interest Advocate. Subsection 180Q(5) of the Act provides that an application may be made 'in writing or in any other form'. The term 'oral application' includes any form of oral communication, such as applications made in person, or via telephone or video-conference.

68. Such a requirement is necessary to ensure that Public Interest Advocates are aware of each application, and are therefore:

    a. *(in the case of written applications)* able to prepare submissions under paragraph 180X(2)(b) of the Act for the Part 4-1 issuing authority to have regard to under subparagraph 180T(2)(b)(v) of the Act; and

    b. *(in the case of oral applications)* able to attend the application hearing to make oral submissions under paragraph 180X(2) of the Act for the Part 4-1 issuing authority to have regard to under subparagraph 180T(2)(b)(v) of the Act.

69. Subregulation 12(3) provides that, if a copy of a proposed application is given to a Public Interest Advocate, as required under subregulation 12(1) and the Advocate advises that he or she is unable to prepare a submission in relation to the proposed application for any reason, the person making the application must ensure that a copy of the proposed application is given to another Public Interest Advocate. This subregulation imposes a requirement to notify another Public Interest Advocate of a proposed oral application where the previously-notified Advocate has advised they are unable to attend the hearing of the application. The purpose of this requirement is to ensure that the proposed application is given or notified to an Advocate who is able to consider it. In the rare circumstance that the proposed application has been given or notified to all Public Interest Advocates, subregulation 12(3) should not be interpreted as requiring the person to continue giving or notifying the proposed application to those Advocates where it would be futile to do so.

70. Issuing authorities have a discretion to refuse to issue a journalist information warrant, under section 180T of the Act. This discretion would extend, for example, to circumstances where an application has been made without a submission as no Public Interest Advocates were available, but where the issuing authority considers that, in all

the circumstances, the application should not be granted until a Public Interest Advocate has become available and prepared a submission. Conversely, it would be open to the issuing authority to issue a warrant in the rare circumstance that no Public Interest Advocates are able to prepare a submission, or in exigent circumstances where a submission had not been prepared.

71. Similar to Regulation 11, Regulation 12 relies on the 'necessary and convenient' power in subsection 300(1)(b) of the Act. Regulation 12 is necessary to enable a Public Interest Advocate to make a submission as they are permitted to do so pursuant to section 180X(2) of the Act. The Regulation also enables a Part 4-1 issuing authority to have regard to any submissions made by a Public Interest Advocate as required by subparagraph 180T(2)(b)(v) of the Act by facilitating the making of such submissions and prescribing the circumstances and manner in which applications are provided to Public Interest Advocates. Accordingly, Regulation 12 is necessary to give effect to the Act.

Regulation 13 – Public Interest Advocate to deal with proposed journalist information warrant requests and applications

72. Subregulation 13(1) provides that upon receiving a request or written application, the Public Interest Advocate may consider the request or application and, as soon as reasonably practical, advise the agency requesting or applying for a journalist information warrant, that:

    a. he or she will prepare a submission in relation to the request or application; or

    b. he or she is unable to consider the proposed request or application—for example, because the Public Interest Advocate is unavailable due to other commitments, or because the Public Interest Advocate would face a conflict of interest in considering the particular proposed request or application.

73. Subregulation 13(2) mirrors subregulation 13(1) in relation to proposed oral applications for journalist information warrants by enforcement agencies.

74. Subregulation 13(3) addresses the situation where a Public Interest Advocate is given further information under subregulations 14(6) or 15(5). The effect of subregulation 13(3) is that the Public Interest Advocate will be required to consider the further information as if it were a proposed request or application and, as soon as reasonably practical, advise the agency requesting or applying for a journalist information warrant that:

    a. he or she will prepare a submission in relation to the request or application; or

    b. he or she is unable to consider the proposed request or application—for example, because the Public Interest Advocate is unavailable due to other commitments, or because the Public Interest Advocate would face a conflict of interest in considering the particular proposed request or application.

75. Subregulations 14(6), (7) and (8) deal with the preparation of a new or updated submission by a Public Interest Advocate who has agreed to consider further information

relating to a request or application for a journalist information warrant. This is discussed below.

Regulation 14 – Public Interest Advocate to prepare submissions

76. Subregulation 14(1) requires a Public Interest Advocate to prepare a submission relating to a proposed request or application for a journalist information warrant within a reasonable period, but not later than 7 days after being given the proposed request or application.

77. Subregulation 14(2) requires the submission to include all facts and considerations the Public Interest Advocate considers are relevant to either the Minister (in the case of requests by the Organisation) or the Part 4-1 issuing authority (in relation to applications by an enforcement agency) in relation to:

    a. the decision whether to issue a journalist information warrant (including any facts and considerations which support the conclusion that a journalist information warrant should not be issued); or

    b. the decision about the imposition of any conditions or restrictions in the warrant.

78. Subregulations 14(2) and (3) will ensure that the Public Interest Advocate puts to the Minister or Part 4-1 issuing authority all facts and considerations that he or she considers relevant to the decision about whether or not to issue or refuse to issue a journalist information warrant or impose any conditions or restrictions. This requirement will not limit the Public Interest Advocate from including other information in submissions, but additionally requires the Public Interest Advocate to address any facts or considerations not adequately dealt within the Director-General's request or enforcement agency's application.

79. Subregulation 14(3) ensures that the ability of the Public Interest Advocate to make submissions is not limited, and nothing in the regulation would prevent the Public Interest Advocate from addressing matters already covered in the request or application.

80. Subregulation 14(4) requires the Public Interest Advocate to take into account the following in determining what is a reasonable time to prepare a submission:

    a. the time that could reasonably be expected to be required to prepare a submission—which would incorporate consideration of the complexity of the proposed request or application, and the issues raised;

    b. the gravity of the matter in relation to which the proposed request or application relates;

    c. the urgency of the circumstances in which the proposed request or application is made; and

    d. any other matter that the Public Interest Advocate considers relevant.

81. Subregulation 14(5) requires a Public Interest Advocate to provide a copy of his or her written submission to the Director-General, in the case of ASIO, or in the case of an enforcement agency to either the person who made the application or, if the Advocate does not know the identity of the applicant or the applicant is unavailable, to the chief officer of the enforcement agency. This requirement enables those agencies to attach a copy of the submission to the request or application, and is intended to facilitate the efficient consideration of the warrant request and application processes by ensuring that agencies are able to provide the Minister or issuing authority, as the case may be, with all relevant documents as part of their request or application.

82. Subregulations 14(6), (7) and (8) deal with the preparation of a new or updated submission by a Public Interest Advocate who has agreed to consider further information relating to a request or application for a journalist information warrant. Subregulation 14(6) requires a Public Interest Advocate to prepare a new submission, or update a previous submission on the application, taking into account the additional information provided by the agency. Subregulation 14(7) requires that the Public Interest Advocate must prepare any new or updated submission in accordance with subregulation 14(1) and do so within a reasonable period, but no later than seven days after being given the further information or summary. Subregulation 14(8) will ensure that in providing an additional or updating a previous submission, the Public Interest Advocate includes all facts and circumstances that they consider relevant in relation to that additional material for the consideration of the Minister or Part 4-1 issuing authority.

83. Subregulation 14(9) provides discretion for the Minister or issuing authority to consider late submissions or updated submissions from a Public Interest Advocate where that Advocate has not been able to meet the 7 day timeframe provided for in regulation 14(1) or (7).

Regulation 15 – Public Interest Advocate's attendance at hearing of oral application by an enforcement agency for a proposed journalist information warrant

84. Subregulation 15(1) provides for a Public Interest Advocate's attendance at a hearing of an oral application for a journalist information warrant by an enforcement agency under subsection 180Q(5) of the Act. This includes the ability for a Public Interest Advocate to attend the hearing by telephone or other means of voice communication (for example, by video conference), and to make oral submissions to the issuing authority in the presence of the relevant enforcement agency.

85. Subregulation 15(2) provides for submissions by the Public Interest Advocate to be made in the presence of the relevant enforcement agency.

86. Similar to written applications, subregulation 15(3) requires a Public Interest Advocate to include all facts and considerations the Public Interest Advocate considers would likely be relevant to either the Minister (in the case of requests by the Organisation) or the Part 4-1 issuing authority (in relation to applications by an enforcement agency) in relation to:

    a. the decision whether to issue a journalist information warrant (including any facts and considerations which support the conclusion that a journalist information warrant should not be issued); or

b. the decision about the imposition of any conditions or restrictions in the warrant.

87. Subregulation 15(3) will ensure that the Public Interest Advocate puts to the Part 4-1 issuing authority all facts and considerations that he or she considers relevant to the decision about whether or not to issue or refuse a journalist information warrant or impose any conditions or restrictions. This requirement will not limit the Public Interest Advocate from including other information in submissions; but additionally requires the Public Interest Advocate to address any facts or considerations not adequately addressed within the enforcement agency's application.

88. Subregulation 15(4) ensures that the ability of the Public Interest Advocate to make submissions is not limited, and nothing in the regulation would prevent the Public Interest Advocate from addressing matters already covered in the request or application.

89. Subregulation 15(5) deals with the preparation of a new or updated submission by a Public Interest Advocate who has confirmed his or her availably to attend an oral application when further information is given to the issuing authority and the Public Interest Advocate. Subregulation 15(5) requires a Public Interest Advocate to prepare a new submission, or update a previous submission on the application, taking into account the additional information or summary provided by the agency.

Regulation 16 – Further information, or a copy or summary of information, to be given to Public Interest Advocate

90. Sections 180K and 180R of the Act enable the Minister or a Part 4-1 issuing authority, respectively, to require that an agency provide him or her with further information relating to a request or application for a journalist information warrant.

91. Where the Minister or issuing authority requires an agency to provide further information, Regulation 16 gives the Minister or Part 4-1 issuing authority the discretion to also require the agency to provide that information to a Public Interest Advocate. Regulations 13, 14 and 15 contain related provisions that would apply where a Public Interest Advocate is given such information.

92. Where the Minister or issuing authority has been given further information in writing, paragraphs 16(1)(a) and (3)(a) provide that the Minister or issuing authority may require that information, or a copy of it, to be given to a Public Interest Advocate. Where the Minister or issuing authority have been given further information orally, paragraphs 16(1)(b) and (3)(b) provide that the Minister or issuing authority may require that the information, or a summary of it, be given to the Public Interest Advocate, and may require the information or summary thereof to be given in a particular form—either orally or in another form, such as in writing. The ability of the Minister or issuing authority to require the Director-General or an enforcement agency to provide a Public Interest Advocate with a summary of further information that has been given orally reflects the practical reality that it may be challenging for the Director-General or agency to provide the Advocate with a verbatim transcript or restatement of the information.

93. The power to require the Director-General or an enforcement agency to give further information, under sections 180K and 180R of the Act, has a wide range of potential applications, ranging from enabling the Minister or issuing authority to clarify minor

and/or technical details in a request or an application, through to requiring the Director-General or agency to provide further information in support of the request or application. The purpose of providing the Minister and issuing authority with a discretion to require the Director-General or agency to also provide the further information to a Public Interest Advocate, as opposed to requiring the Director-General or agency to do so in all cases, is to enable the Minister and issuing authorities to account for circumstances where, for example:

a. the further information would not likely materially affect any public interest considerations relevant to the decision to issue a journalist information warrant, such as where the further information is trivial or technical in nature;

b. the Public Interest Advocate's submission draws a conclusion that is expressed as being based on a particular assumption, and the further information merely confirms that assumption; or

c. the matter is sufficiently serious and urgent that, on balance, it is desirable to proceed immediately to decide whether to issue the warrant.

94. This discretion reflects the underlying purpose of the Public Interest Advocate scheme, being to ensure that relevant public interest considerations are brought to the relevant issuing authority's attention as part of the request or application for a journalist information warrant. The scheme is not intended to impose procedural barriers to requests or applications.

95. The Minister's and issuing authorities' power to require an agency to provide further information to a Public Interest Advocate is discretionary, enabling them to make a decision that is appropriate in light of all of the relevant circumstances and considerations. However, when considering whether to exercise this power, subregulations 16(2) and (4) provide that the Minister or issuing authority may have regard to:

a. the extent to which further information would be likely to be relevant to a Public Interest Advocate's preparation of a new submission, or the updating of his or her submission, relating to the request or application; and

b. the gravity of the matter in relation to which the request or application relates; and

c. the urgency of the circumstances in which the request or application is being made; and

d. any other matter that the Minister or issuing authority considers relevant.

96. The purpose of these subregulations is to provide guidance to the Minister and issuing authorities about the kinds of matters that should generally be taken into account when considering whether to require the Director-General or enforcement agency to revert back to a Public Interest Advocate with further information.

Regulation 17 – Public Interest Advocate to return proposed journalist information warrant requests and applications

97. Regulation 17 requires a Public Interest Advocate to return to the requesting agency any documents relating to requests or applications for journalist information warrants.

98. The Regulation includes the requirement to return any requests, applications, submissions, documents, copies or extracts relating to the application or request. This requirement will ensure that all sensitive material, including working drafts or notes, are required to be returned and appropriately ensures the ongoing protection of that information. This is similar to requirements in a range of Commonwealth and State legislation, including:

    a. subsection 32(3) of the *Australian Security Intelligence Organisation Act 1979* which requires the Minister to return requests for warrants to the Director-General;

    b. subsection 10(3) of the *Telecommunications Interception Act 2009* (Qld), which requires the Queensland Public Interest Monitor to return any documents relating to a warrant application to the applicant agency; and

    c. subsection 4D(3) of the *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) which requires the Victorian Public Interest Monitor to return any documents relating to a warrant application to the applicant agency.

Division 2 – Public Interest Advocates

Regulation 18 – Eligibility for Appointment

99. Subregulation 18(1) provides eligibility criteria that the Prime Minister must be satisfied of before declaring a person to be a Public Interest Advocate. A Public Interest Advocate must be:

    a. a Senior Counsel or Queen's Counsel who has a security clearance to a level that the Prime Minister considers appropriate;

    b. a former judge of the High Court of Australia or a court that is or was created by the Parliament under Chapter III of the Constitution (collectively referred to as Chapter III courts); or

    c. a former judge of a State or Territory Supreme Court or District Court (or equivalent, such as the Victorian County Court) (collectively referred to as State or Territory superior courts).

100. Silks and former members of the judiciary are generally recognised as being persons of the highest integrity and impartiality and have extensive training in reviewing complex materials, such as warrant applications, supporting affidavits, and in formulating and making public interest arguments.

101. The reference to a 'court that… was created by the Parliament under Chapter III of the Constitution' is intended to include former courts.

102. Subregulation 18(2) provides that certain classes of person must not be declared as Public Interest Advocates. Most significantly, paragraph 18(2)(e) provides that persons employed by the Commonwealth, a State or Territory must not be appointed. Government employees might face a conflict of interest in the performance of the functions of a Public Interest Advocate, notwithstanding their being appointed in their personal capacity.

103. Subregulation 18(2) does not preclude the appointment of persons who hold statutory or non-statutory offices under the Commonwealth, a State or Territory, in recognition of the fact that Senior Counsel, Queen's Counsel and former members of the judiciary are often appointed to a range of public offices, such as inquiries, reviews, advisory panels and councils. Imposing a prohibition on a person who holds such offices being appointed as an Advocate would significantly limit the range of candidates eligible to be appointed. Senior Counsel, Queen's Counsel and former members of the judiciary are generally recognised as being persons of the highest integrity, with extensive experience in appropriately managing conflicts of interest (real or apparent).

104. Subregulation 18(2) does exclude persons holding certain statutory offices from being appointed as Public Interest Advocates, regardless of whether the person is a Senior Counsel, Queen's Counsel or former member of the judiciary. The listed public offices represent offices that would likely pose an inherent and irreconcilable conflict of interest (real or apparent) to the performance of the role of a Public Interest Advocate. The list is not intended to be exhaustive, and other persons falling outside those categories may nevertheless be otherwise unsuitable for appointment.

Regulation 19—Term of appointment

105. Regulation 19 provides that Public Interest Advocates may be declared for a fixed term of up to five years in duration. A person may be re-appointed as a Public Interest Advocate, in accordance with section 33AA of the *Acts Interpretation Act 1901*.

Regulation 20—Remuneration

106. Regulation 20 provides for the remuneration of Public Interest Advocates.

107. Subregulations 20(1) and (2) provide that Public Interest Advocates may charge agencies for the time spent in performing their functions. This can include but is not limited to reviewing requests and applications, liaising with the agency applying for the warrant, preparing submissions, attending applications and preparing new or updated submissions when additional information is needed. The cost is to be borne by the agency.

108. Subregulation 20(3) provides that Public Interest Advocates may charge a daily rate equivalent to the maximum daily rate at which senior counsel may be engaged, without the approval of the Attorney-General (or of the Office of Legal Services Coordination in the Attorney-General's Department, acting as the Attorney-General's delegate) in accordance with Appendix D of the *Legal Services Directions 2017*. Alternatively, the Advocate may charge an hourly rate of one-sixth the daily rate, if the amount of time is less than 6 hours in a single day.

109. Public Interest Advocates are not counsel engaged on behalf of the Commonwealth, or Commonwealth agencies, and so are not directly covered by the *Legal Services Directions 2017*. However, the Directions offer an established framework for the Commonwealth's engagement of legal professionals. In the context of the Public Interest Advocate role, the Directions provide a benchmark for appropriate remuneration.

110. The setting of fixed daily and hourly rates for Public Interest Advocates is appropriate for Public Interest Advocates, being former superior court judges or senior members of the legal profession, working on an infrequent and ad hoc basis, and potentially at short notice, and reflects the need to ensure a rate commensurate with the appointment of senior members of the legal profession as Public Interest Advocates.

111. Setting a fixed rate of remuneration for Public Interest Advocates, rather than allowing each Advocate to negotiate a rate on a standing or case-by-case basis, reflects the need to ensure a consistent rate of remuneration across all Public Interest Advocates, so as to avoid creating an adverse incentive for agencies to approach Advocates who charge at a lower rate.

112. The incorporation of the *Legal Services Directions 2017* ensures that the remuneration of Public Interest Advocates remains commensurate to that of other senior members of the legal profession engaged by the Commonwealth. In addition, this ensures that the remuneration of Public Interest Advocates keeps pace with any changes to remuneration of Commonwealth counsel as prescribed under the Directions from time-to-time.

Regulation 21—Disclosure of interests to the Minister

113. Regulation 21 requires Public Interest Advocates to give written notice to the Prime Minister of all interests, pecuniary or otherwise, that they have or acquire, that gives rise to an actual or potential conflict with the proper performance of their functions. This requirement supports the integrity of the Public Interest Advocate regime.

Regulation 22—Conflict of interest

114. Subregulation 22(1) requires that if a Public Interest Advocate believes that he or she has a conflict of interest, the Public Interest Advocate is to take reasonable steps to avoid any real or apparent conflict of interest in connection with the proper performance of his or her functions in that role. The purpose of Regulation 22 is to support the integrity of the role of Public Interest Advocate.

115. Should the Public Interest Advocate believe he or she has a real or apparent conflict of interest in relation to the subject-matter of the proposed request or application, subregulation 22(2) requires a Public Interest Advocate to advise an applicant for a journalist information warrant that:

a. *(in the case of a proposed request or written application)* he or she is unable to prepare a submission in relation to the proposed request or written application; or

b. *(in the case of a proposed oral application)* he or she is unable to attend the hearing of the application.

116. Queen's Counsel and Senior Counsel routinely manage conflicts of interest in accordance with well-established professional rules. Accordingly, Regulation 22 does not, of itself, prohibit a Public Interest Advocate from merely engaging in paid work for or on behalf of a media organisation or Government agency from time-to-time. Rather, Regulation 22 is intended to mirror the professional obligation on legal professionals to appropriately manage real and apparent conflicts on a case-by-case basis, in all of the circumstances.

Regulation 23—Resignation

117. Regulation 23 allows a Public Interest Advocate to submit his or her written resignation to the Prime Minister. The resignation would take effect on the day it is received by the Prime Minister, or if a later day is specified in the written resignation, on that later day.

Regulation 24—Termination of appointment

118. Subregulation 24(1) prescribes the circumstances in which the Prime Minister may revoke the declaration of a Public Interest Advocate.

119. Subregulation 24(2) identifies the circumstances in which the Prime Minister must revoke the declaration of a Public Interest Advocate. For example, the Prime Minister would be required to revoke the declaration of a Public Interest Advocate who becomes bankrupt or ceases to meet the criteria for declaration as a Public Interest Advocate under subregulation 18(1).

Regulation 25—Immunity from legal action

120. Regulation 25 provides that a Public Interest Advocate is protected against civil liability for an act done, or an omission made, in good faith in the performance of their functions.

Division 3 – Miscellaneous

Regulation 26 – Arrangements with States and Territories

121. Regulation 26 provides that the Governor-General may make arrangements with the Governor of a State, the Chief Minister of the Australian Capital Territory, or the Administrator of the Northern Territory, in connection with the appointment of full-time office-holders and employees of a State or Territory as a Public Interest Advocate. Regulation 26 contemplates that State office holders may be declared as Public Interest Advocates and would enable arrangements to be entered into to give effect to the performance by State office holders of the Public Interest Advocate role.

Part 4 – Transitional Matters

Regulation 27 – Things done under the Telecommunications (Interception and Access) Regulations 1987

122. Regulation 27 provides that if a thing was done for a particular purpose under the *Telecommunications (Interception and Access) Regulations 1987* as in force immediately before those regulations were repealed and the thing could be done for that purpose

under this instrument, the thing has effect for the purposes of this instrument as if it had been done under this instrument.

Schedule 1 – Forms of warrants

123. Forms 1 to Form 3 are the forms prescribed for telecommunications service warrants, including B-party and named person warrants. These Forms are consistent with the requirements under section 46 and 46A of the Act.

124. Form 4 is the Form prescribed for telecommunications devices, named person warrants. This Form is consistent with the requirements under section 46A of the Act.

125. Form 5 is the Form prescribed for warrants for entry on premises and interception of communications. This Form is consistent with the requirements under section 48 of the Act.

126. Form 6 is the Form prescribed for stored communication warrants. This Form is consistent with the requirements under section 116 of the Act.

127. Form 7 is the Form prescribed for journalist information warrants. This Form is consistent with the requirements under section 180T of the Act.

Schedule 2 – Repeals

128. This Schedule 2 of the Regulations repeals the whole of the instrument of the *Telecommunications (Interception and Access) Regulations 1987*.

SENATOR THE HON MATHIAS CORMANN

Minister for Finance
Leader of the Government in the Senate

REF: MS18-000379

Senator John Williams
Chair
Senate Standing Committee
on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I refer to the Committee Secretary's letter dated 8 February 2018 sent to my office seeking further information about certain items in the following instruments:

- the *Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 6) Regulations 2017*; and
- the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 7) Regulations 2017*.

The Ministers who are responsible for the items in these instruments have provided responses to the Committee's requests. The attached response includes responses from the Minister for Education and Training, Senator the Hon Simon Birmingham, and the Minister for Sport, Senator the Hon Bridget McKenzie. I trust this advice will assist the Committee with its consideration of the instruments.

I have copied this letter to the relevant Ministers.

Thank you for bringing the Committee's comments to the Government's attention.

Kind regards

Mathias Cormann
Minister for Finance

15 March 2018

Attachment

Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 6) Regulations 2017

Response provided by the Minister for Education and Training

The Senate Standing Committee on Regulations and Ordinances requests the Minister's advice as to whether grant decisions made under the 'Quality assurance of data relating to students with disabilities' program (quality assurance program) will be subject to merits review; and if not, what characteristics of those decisions justify their exclusion from merits review.

Background to the quality assurance program
Under subsection 52(3A) and section 58A of the *Australian Education Regulation 2013* (the Regulation), entities that operate government and non-government schools (approved authorities) must complete a data collection each year termed the Nationally Consistent Collection of Data on School Students with Disability (NCCD). The NCCD collects data about school students with disability across Australian schools in a consistent, reliable and systematic way.

The NCCD data collection is primarily based on the professional judgement of school teachers, supported by documented evidence. Teachers determine the levels of educational adjustment that are provided to students with disability to access and participate in school education on the same basis as other students, and report those levels of educational adjustment in the NCCD. These levels of educational adjustment are: support provided within quality differentiated teaching practice, supplementary, substantial, and extensive.

Accordingly, the primary purpose of the NCCD is to collect information about the levels of educational adjustment provided to students with disability, with reference to categories of disability and other student characteristics, in order to provide the Australian Government key information to inform funding and policy development.

The NCCD ensures that the Australian Government has a reliable, consistent and transparent data source for governmental decisions related to funding and policy development for students with disability accessing school education in Australia. Further to this, the NCCD is supported by the Council of Australian Governments Education Council (the Education Council), consisting of the Commonwealth, State and Territory Education Ministers.

The NCCD is an ongoing requirement for approved authorities to receive Commonwealth recurrent schools funding under the *Australian Education Act 2013* (the Act). From 2018, the NCCD also informs the student with disability recurrent schools funding loading, calculated under section 36 of the Act. As part of the Australian Government's *Quality Schools* agenda, schools will be provided recurrent funding loadings for students with disability, on the basis of the levels of educational adjustment provided for those students. Loading amounts are set out in section 17 of the Regulation.

The quality assurance program
As part of ongoing quality assurance processes in relation to the NCCD, and to help ensure that NCCD data is as accurate as possible given it informs Commonwealth recurrent schools funding, the Department of Education and Training (the Department) is aiming to improve the quality and consistency of NCCD data through:

(a) Funding activities that contribute to a national end-to-end quality assurance program for the NCCD, including targeted activities to enhance understanding of the NCCD data collection by schools and school teachers.

(b) Funding activities that will help facilitate opportunities for cross-jurisdictional and cross-sectoral engagement and collaboration, in the government and non-government school sectors, in relation to the NCCD.

(c) Funding activities that will assist approved authorities and schools to transition to formal post-enumeration and audit activities in relation to the NCCD, and support targeted feedback and ongoing assistance in the data collection processes. As the NCCD will now inform Commonwealth recurrent schools funding, approved authorities and schools will need to adjust to changes to the nature of the data (additional demographic variables), the timing permitted for providing data, and the manner in which the data is collected.

(d) The establishment of a single online source of information, resources and materials relating to the NCCD, the *Disability Discrimination Act 1992* and the *Disability Standards for Education*. The primary purpose for this will be to assist schools and school teachers in their compliance with the Act and Regulation in relation to the NCCD data collection.

    A single online source of information, resources and materials relating to the NCCD will complement quality assurance activities, and will ensure that schools and school teachers can access the information they need to make evidence-based decisions when completing the NCCD data collection.

The Department will also work with the government and non-government school education sectors, and school education government authorities, to extend existing data quality assurance activities. This approach takes into account existing practices and jurisdictional differences.

Implementation of the quality assurance program
To date, the Department has directly engaged PricewaterhouseCoopers, under an existing panel arrangement (standing offer), in order to develop specific auditing processes and procedures for the NCCD, to be implemented from 2018, to assess the accuracy of the NCCD data collection and compliance by approved authorities with the NCCD. As this has been conducted as a procurement, under an existing panel arrangement, and for a specific entity (PricewaterhouseCoopers) and purpose, no merits review mechanism was afforded.

Further to this, the Department is also currently exploring the direct engagement of Education Services Australia (ESA), a company the membership of which consists of the Commonwealth, and State and Territory Education Ministers, to develop a single online source of information, resources and materials relating to the NCCD. The Department is currently considering providing a grant to ESA for this purpose, primarily due to ESA's unique position in the school education sector, including its long-standing objective and purpose in the provision of online resources, materials and support for schools, school leaders and teachers, and its representation of all States and Territories. No merits review is currently being considered with respect to the provision of this grant, given that it is being provided to a specific entity (ESA), for a specific purpose, and ESA's existing role in the school education sector as discussed above.

The Department is also currently developing an implementation strategy for the use of funding for the purposes of the quality assurance program. While funding is to be used for the purposes identified at paragraphs (a) – (d) above, in relation to quality assurance activities for the NCCD, the Department has yet to finalise its implementation arrangements, including the full breadth of specific quality assurance activities to be funded, and how much of the funding may be delivered by way of procurements or grants, including to persons other than States and Territories. The Department is still to engage in consultation with relevant stakeholders with respect to any implementation arrangements.

As such, the characteristics of any grants, and the appropriateness or applicability of merits review in relation to such grants, is still to be determined and worked through by the Department.

Having said this, where grants are provided to States and Territories, merits review will not be made available for such grants. As these grants will be for specific entities (States and Territories), for specific purposes, and with the overall intention that each State and Territory work collaboratively and cooperatively with each jurisdiction, both the government and non-government school sectors, and relevant representative organisations for non-government schools, merits review will not be available.

In closing and noting the above, any grants provided in relation to the quality assurance program will be conducted in accordance with the *Commonwealth Grants Rules and Guidelines,* will adhere to applicable grant reporting requirements, and where relevant, will be administered by the Community Grants Hub (www.communitygrants.gov.au/). Further to this, any procurement process undertaken in relation to the quality assurance program will be subject to the requirements of the Commonwealth's resource management framework, including the *Commonwealth Procurement Rules* and the *Public Governance, Performance and Accountability Act 2013*.

Attachment

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 7) Regulations 2017

Response provided by the Minister for Sport

Response to the Committee's questions about item 258 inserted into Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* by way of the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 7) Regulations 2017*.

External affairs power

Item 258 references the external affairs power (section 51(xxix) of the Constitution). The external affairs power supports legislation which implements a treaty to which Australia is a party. In particular, the power supports Commonwealth legislation:

- to implement the particular terms of a relevant treaty; and
- to provide for the partial implementation of a treaty.

Many treaties to which Australia is a party leave it to the individual parties to choose the precise measures they will take to fulfil their obligations.

Item 258 relates to a measure being taken to fulfil Australia's obligations under the *Convention on the Rights of the Child* [1991] ATS 4 (CRC).

Pursuant to Article 4 of the CRC, Australia is required to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention'. The particular steps listed in Articles 6(2), 18(2), 24(2) and 31(2) define with a degree of specificity what the State Parties to the CRC are obliged to do with respect to the rights recognised in Articles 6(1), 24(1) and 31(1).

Article 6(1) of the CRC recognises 'that every child has the inherent right to life'. Article 6(2) refers to '[ensuring] to the maximum extent possible the survival and development of the child'. Risks associated with unsafe behaviour around water constitute a threat to the survival of children. The Water and Snow Safety program is designed in part to ameliorate these risks through activities preventing water-related accidents or death of children.

Article 18(2) of the CRC provides that '[f]or the purpose of guaranteeing and promoting the rights set forth in the present Convention, State Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children'. The Water and Snow Safety program is directed in part to assist parents to promote the best interests of children in ensuring water safety.

Article 24(1) of the CRC recognises the 'right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'.

The steps listed in Article 24(2) include '[ensuring] that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition … and the prevention of accidents' (Article 24(2)(e)) and '[developing] preventive health care' (Article 24(2)(f)). The Water and Snow Safety program is directed in part to ensuring that parents and children and the broader community are aware of the risks posed to children by water, and have access to education and information on water safety.

Article 31(1) of the CRC recognises 'the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child'. The steps listed in Article 31(2) include '[encouraging] the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity'. The Water and Snow Safety program is directed in part to supporting and promoting the right to play, by giving children information about safe play in or near water, and by giving parents, caregivers and communities the tools to teach children how to play safely in such an environment.

Communications power

Item 258 references the communications power (section 51(v) of the Constitution). The communications power supports legislation with respect to 'postal, telegraphic, telephonic, and other like services'.

The Water and Snow Safety program is directed in part to the preparation and dissemination of educational materials and other information relating to water and snow safety by online means involving the use of a telecommunications service.

Commonwealth executive power and the express incidental power

Item 258 references the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix) of the Constitution). The Commonwealth executive power in section 61, together with section 51(xxxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

The Water and Snow Safety program supports a national, coordinated approach to water and snow safety. Financial assistance is provided to national bodies established independently of government. The issues addressed and outcomes achieved by the water and snow safety activities undertaken directly by these bodies, and the associated research outcomes, are nationally significant.

The Hon Christian Porter MP
Attorney-General

MS18-000362

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
Canberra ACT 2600
regords.sen@aph.gov.au

- 9 MAR 2018

Dear Senator

I am writing in response to a letter from Ms Anita Coles, the Committee Secretary of the Standing Committee on Regulations and Ordinances, dated 8 February 2018. Ms Coles' letter refers to the committee's *Delegated Legislation Monitor 1 of 2018* and seeks further information from me about the Marriage Regulations 2017 (the Marriage Regulations).

Upon consideration of the issues raised by the Committee, I agree it would be appropriate to treat the instruments made under paragraph 39C(1)(b) of the *Marriage Act 1961* and section 53 of the Marriage Regulations as legislative instruments, and to register them as such on the Federal Register of Legislation. I have approved the enclosed replacement Explanatory Statement to the Marriage Regulations to reflect the instruments' status as legislative instruments for the purposes of the *Legislation Act 2003*. The replacement Explanatory Statement will be published on the Federal Register of Legislation and tabled in Parliament as soon as practicable.

I also note the Committee's concern that subsection 53(7) of the Marriage Regulations provides that the instrument made under subsection 53(3) of the Marriage Regulations is not a legislative instrument. As you have stated, due to the operation of the *Legislation Act 2003*, subsection 53(7) has no legal effect. My department will take steps to have this subsection of the Marriage Regulations repealed at the first opportunity. I anticipate further amendments to the Marriage Regulations will occur in 2018, and this amendment will be included as part of that process.

Thank you for raising these matters with me. I trust this information addresses the Committee's concerns.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

REPLACEMENT EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Marriage Act 1961

Marriage Regulations 2017

The *Marriage Act 1961* (the Act) establishes the legal framework for marriage in Australia, including the requirements for marriages to be validly solemnised under Australian law and foreign marriages to be legally recognised under Australian law.

Section 120 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted, or necessary or convenient, to be prescribed for carrying out or giving effect to the Act.

The *Marriage Regulations 1963* (the current regulations), which will sunset on 1 April 2018, provide procedural and technical support for the marriage framework established by the Act. Broader marriage policy issues, such as eligibility to marry, must be addressed through the Act. The *Marriage Regulations 2017* (the Regulations) will repeal and replace the current regulations from 1 April 2018. The Regulations will support the Act in largely the same manner as the current regulations, streamlining and simplifying many of the requirements of the current regulations, removing obsolete or unnecessary provisions and reducing the regulatory burden imposed on authorised celebrants and other stakeholders. The Regulations will provide for:

- procedural requirements for application to a Judge or magistrate under section 12 of the Act, which requires judicial authorisation for the marriage of a minor, including the practices and procedures to be followed in the conduct of an inquiry into whether such an order should be made, and the requirement for such orders to be provided to a person solemnising a marriage of a minor
- requirements for a valid consent of a person required to consent to an intended marriage of a minor under sections 13 and 14 of the Act, and processes and procedures for: a prescribed authority to dispense with the consent of a person required to consent to a proposed marriage of a minor under section 15 of the Act; and a Judge or magistrate to provide consent in place of a person under section 16 of the Act
- the maintenance of state and territory registers of ministers of religion and the Commonwealth register of marriage celebrants under Subdivisions A and C of Division 1 of Part IV of the Act respectively
- the professionalism of marriage celebrants, by specifying: the qualifications or skills necessary to be entitled to be registered as a marriage celebrant; ongoing professional development requirements for marriage celebrants; performance reviews of marriage celebrants; procedures for dealing with complaints about marriage celebrants relating to the solemnisation of a marriage; and a Code of Practice for marriage celebrants

- the continued implementation of cost recovery arrangements for the registration and ongoing regulation of marriage celebrants, by providing for: the determination of fees; processes to obtain, and grounds on which to grant, exemptions from paying the registration application fee or the celebrant registration charge; internal reviews of exemption decisions; and additional requirements for the notice of liability for, and notice about non-payment of, the celebrant registration charge, respectively issued under sections 39FA and 39FB of the Act

- requirements in relation to the paperwork for a marriage, including for: the identification of the appropriate registering authority for a marriage; the reliability of the certificate of marriage issued to couples under section 50 of the Act, and protection of that certificate against fraud or misuse; dealing with official certificates of marriage, including lost certificates; and completing marriage paperwork if a second marriage ceremony is being performed under section 113 of the Act

- requirements to support Defence Force chaplains solemnising marriages under Part V of the Act

- circumstances in which a prescribed authority may authorise a marriage despite less than one month's notice being received by an authorised celebrant, and

- the repeal of, and arrangements to manage the transition from, the current regulations.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised. However, section 17 of the *Legislation Act 2003* requires the rule-maker to be satisfied that appropriate and reasonably practicable consultation has been undertaken, before making a legislative instrument.

The Attorney-General's Department sought stakeholder views in 2015, to inform a review of the current regulations and develop the *Exposure Draft Marriage Regulations 2017* (the Exposure Draft). In July 2017, a targeted consultation was undertaken on the Exposure Draft with the following stakeholders: state and territory registries of births, deaths and marriages (including Norfolk Island); marriage celebrant associations; registered training organisations approved to deliver the Certificate IV in Celebrancy; the Department of Defence; the Australian Bureau of Statistics; the Australian Skills Quality Authority; the National Accreditation Authority for Translators and Interpreters Ltd; the Disability Discrimination Commissioner of the Australian Human Rights Commission; the Family Court of Australia; the Federal Circuit Court of Australia; and the Chief Magistrate of the New South Wales Local Court (other state and territory local courts were consulted via state and territory justice departments). The Regulations reflect the feedback and comments received on the Exposure Draft.

The Office of Best Practice Regulation was consulted about the Regulations and advised that a Regulatory Impact Statement is not necessary (OBPR ID 20639).

The Regulations will be compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is set out in Attachment A.

The Regulations will be a legislative instrument for the purposes of the *Legislation Act 2003*. Details of the Regulations are set out in Attachment B.

The Regulations will commence on 1 April 2018.

Authority: Section 120 of the *Marriage Act 1961*.

ATTACHMENT A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Marriage Regulations 2017

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulations

The *Marriage Regulations 2017* (the Regulations) will repeal and replace the *Marriage Regulations 1963* (the current regulations), which will sunset on 1 April 2018.

The Regulations will provide procedural and technical support for the marriage framework established by the *Marriage Act 1961* (the Act). Broader marriage policy issues, such as eligibility to marry, must be addressed through the Act. The Regulations will continue to support the Act in largely the same manner as the current regulations, streamlining and simplifying many of the requirements of the current regulations, removing obsolete or unnecessary provisions and reducing the regulatory burden imposed on authorised celebrants and other stakeholders.

Human rights implications

The Regulations will engage the following human rights:

- freedom of thought, conscience and religion or belief in Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR)
- privacy in Article 17 of the ICCPR
- fair trial and fair hearing in Article 14 of the ICCPR, and
- presumption of innocence in Article 14(2) of the ICCPR.

The right to respect for the family, including the right of men and women of marriageable age to marry contained in Article 23(2) of the ICCPR, will not be directly engaged by the Regulations. The Regulations merely support the Act's engagement with this right.

Right to freedom of thought, conscience and religion or belief

Article 18 of the ICCPR provides that everyone shall have the right to freedom of thought, conscience and religion.

Disclosure of religion

When registering a person on the register of marriage celebrants established under the Act, paragraph 43(1)(d) of the Regulations will require the Registrar of Marriage Celebrants to enter details about whether the person will conduct religious ceremonies and, if so, details of the religious body or religious organisation under whose authority the person will conduct those ceremonies.

This requirement is reasonable, necessary and proportionate to achieve the legitimate objective of assisting members of the public to identify the type of marriage services a marriage celebrant will provide.

Regulation of persons performing religious marriage ceremonies

The Act regulates *legal* marriages and provides a framework by which *religious* marriages can have legal status or recognition if certain requirements are met. A key requirement is that the person solemnising the marriage is an authorised celebrant.

A person wishing to solemnise legally recognised religious marriage ceremonies in Australia has two pathways under the Act to become an authorised celebrant: registering as a marriage celebrant under section 39D of the Act; or registering as a minister of religion of a recognised denomination under section 30 of the Act. The Regulations impose requirements in relation to marriage celebrants (regardless of whether they perform civil or religious marriage ceremonies) that are not imposed in relation to ministers of religion of recognised denominations.

A person seeking registration as a marriage celebrant will be required, by section 39 of the Regulations, to have a Certificate IV in Celebrancy, a celebrancy qualification awarded by a university or specified celebrancy skills. Additionally, to support obligations imposed on marriage celebrants by section 39G of the Act, the Regulations will create a Code of Practice for marriage celebrants (section 52 and Schedule 2) and impose requirements about undertaking professional development activities (section 53). The Act also subjects marriage celebrants to performance reviews, complaint processes, and the imposition of disciplinary measures, all matters that will be supported by the Regulations.

These requirements are reasonable, necessary and proportionate to support the cost recovered Marriage Celebrants Programme, administered by the Registrar of Marriage Celebrants. Marriage celebrants are the only category of authorised celebrants regulated by the Commonwealth under the Act and the Regulations. Ministers of religion of recognised denominations are regulated by state and territory authorities, making it impracticable to impose these requirements for that category of authorised celebrant. The Programme has the legitimate aims of applying appropriate scrutiny to aspiring marriage celebrants, supporting the availability of marriage services across Australia and regulating marriage celebrants' performance to ensure delivery of professional, knowledgeable and legally correct marriage services to the community.

The ability of a religious body or religious organisation to become a recognised denomination, and thus open up that registration pathway for its ministers, is a matter dealt with under the Act, not the Regulations.

Privacy

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, or attacks on their reputation.

The Regulations will provide for the lawful collection, storage, use, disclosure and publication of personal information, by the Registrar of Marriage Celebrants, Registrars of Ministers of Religion, registering authorities, authorised celebrants, religious bodies and religious organisations, chaplains and army, naval and air force headquarters. The measures are reasonably necessary in order to achieve the legitimate objectives of upholding the legal framework for marriage in Australia, regulating marriage celebrants, enabling registration of marriages by registering authorities and ensuring details of a marriage can be confirmed after the marriage has taken place.

The Registrar of Marriage Celebrants is an APS employee (see section 39A of the Act), bound by the requirements established under the *Archives Act 1983* and *Privacy Act 1988* with regards to collecting, storing, using and disclosing personal information. Registrars of Ministers of Religion and registering authorities are state and territory government officers and agencies, required to comply with similar schemes for protecting personal information established in their state or territory.

Under the Act, there are three categories of authorised celebrants: marriage celebrants (registered under section 39D of the Act); ministers of religion of recognised denominations (registered under section 30 of the Act); and state and territory officers (authorised under section 39 of the Act). Marriage celebrants will be obliged under the Code of Practice in Schedule 2 of the Regulations to ensure personal information is dealt with appropriately and securely stored. Ministers of religion will incorporate marriage paperwork into the records of their religious body or religious organisation. Religious bodies and religious organisations will generally be subject to the requirements of the *Privacy Act 1988*. State and territory officers will generally be bound by state and territory schemes for protecting personal information.

Chaplains will retain marriage paperwork for a short period before sending it to army, naval, or air force headquarters, which, as Australian Government agencies, will be subject to the requirements of the *Archives Act 1983* and *Privacy Act 1988*.

Fair hearing rights

Article 14 of the ICCPR provides that all persons shall be equal before courts and tribunals. This includes the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

Under the Act, a Judge or magistrate may conduct an inquiry into the proposed marriage of a minor. In conducting such an inquiry, Judges or magistrates are acting in their personal capacity and do not have access to the powers, and practice and procedures, they can access in respect of their general functions as Judges and magistrates. As such, the Regulations will establish the practice and procedure for the conduct of these inquiries.

The Regulations will support the right to a fair hearing by: specifying requirements designed to ensure all persons with an interest in the inquiry are given an opportunity to be heard; enabling persons to be summoned to attend or provide documents to an inquiry; requiring written evidence to be provided by affidavit and enabling oral evidence to be given under oath or affirmation; and providing protections for Judges and magistrates conducting inquiries, barristers and solicitors representing persons at inquiries, self-represented persons, and persons summoned to attend or appearing at inquiries.

Presumption of innocence

Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law.

Strict liability offences engage the presumption of innocence through the imposition of liability without the need to prove fault. The Regulations will impose two strict liability offences (subsections 74(1) and 81(1)) for failure to keep records relating to certificates of marriage (required by sections 73(5) and 80(5)). The offences will be identical, aside from who may potentially commit the offence. Imposing strict liability will remove the fault element for the offences. The defence of honest and reasonable mistake of fact, provided in clause 9.2 of the Criminal Code, will be available for these offences.

The record keeping frameworks established in sections 73 and 80 are designed to ensure the integrity of individual certificates of marriage, protect certificates against misuse and fraud, and ensure certificates are traceable for a minimum period of time. Failure by a person to keep the records as required would frustrate the objectives of the frameworks. Additionally, these requirements are regulatory in nature, and there is an expectation that authorised celebrants and chaplains will be familiar with the obligations and requirements of being a person legally permitted to solemnise marriages. As the requirements will be the same as existing requirements of the current regulations, all persons are already on notice of these requirements.

To the extent that strict liability for these offences will limit the right to be presumed innocent, this limitation is reasonable, necessary and proportionate to achieve the legitimate objective of ensuring the integrity and protection frameworks for certificates of marriage are upheld and maintained.

Conclusion

The Regulations are compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

ATTACHMENT B

Details of the *Marriage Regulations 2017*

The *Acts Interpretation Act 1901* and *Electronic Transactions Act 1999* contain definitions and other provisions that will affect the interpretation and application of the *Marriage Regulations 2017*. For example, section 28A of the *Acts Interpretation Act 1901* will be relied upon with regards to how a document or other thing may be 'given' by one person to another. Similarly, section 9 of the *Electronic Transactions Act 1999* will be relied upon to enable documents required to be given in writing to be given electronically, such as by email, and section 12 will be relied upon to enable information to be retained in an electronic form.

Part 1 – Preliminary

Section 1 – Name

This section will provide that the title of the Regulations is the *Marriage Regulations 2017*.

Section 2 – Commencement

This section will provide for the Regulations to commence on 1 April 2018. The Regulations are intended to replace the *Marriage Regulations 1963* (the old regulations—see the definition in section 5 of the Regulations), which will sunset on 1 April 2018.

Section 3 – Authority

This section will provide that the Regulations are made under the *Marriage Act 1961* (the Act).

Section 4 – Schedules

This section will provide that each instrument set out in a Schedule to the Regulations is amended or repealed as set out in the Schedule, and that any other clause or item in a Schedule to the Regulations has effect according to its terms.

Section 5 – Definitions

This section will define the key terms used throughout the Regulations.

Paragraph 13(1)(b) of the *Legislation Act 2003* indicates that expressions used in an instrument have the same meaning as in the enabling legislation as in force from time to time.

The Note to section 5 is intended to direct the reader to subsection 5(1) of the Act, where a number of terms used in the Regulations are defined. These terms are: ***authorised celebrant***, ***celebrant registration charge***, ***chaplain***, ***Judge***, ***magistrate***, ***marriage*** and ***prescribed authority***. The note is not intended to have substantive effect.

Section 5 will define a number of terms by referring to their definition under the Act, namely: ***official certificate*** (paragraphs 50(1)(b) and 80(1)(b) of the Act), ***Registrar of Marriage***

Celebrants (subsection 39A(2) of the Act), ***Registrar of Ministers of Religion*** (subsection 27(1) of the Act) and ***registration application fee*** (subsection 39D(1B) of the Act).

Section 5 will also define a number of terms in a manner that is self-explanatory (***Act*** and ***old regulations***) or by reference to other sections in the Regulations (***appropriate registering authority***, ***approved form***, ***celebrancy qualification***, ***celebrancy skills***, ***Certificate IV in Celebrancy***, ***charge exemption application fee***, ***professional development exemption application fee*** and ***registration exemption application fee***).

Definition of 'accreditation authority'

Section 5 will provide that the term ***accreditation authority*** means the National Accreditation Authority for Translators and Interpreters Ltd (ACN 008 596 996) (NAATI). This definition supports the new requirement in section 11, that the translation of a non-English consent to a marriage of a minor must be done by a person accredited or recognised by the accreditation authority.

Definition of 'birth certificate'

Section 5 will provide that ***birth certificate***, in relation to a person, means an official certificate, or an official extract of an entry in an official register, showing the date and place of birth of the person. This definition is consistent with one of the forms of evidence a marrying person may provide to an authorised celebrant under paragraph 42(1)(b) of the Act to prove the person's date and place of birth.

Definition of 'engage in conduct'

Section 5 will provide that ***engage in conduct*** means doing an act or omitting to perform an act. This definition has been included to support the physical element of the offences in sections 27 and 29 of the Regulations. It is the same definition of ***engage in conduct*** as contained in subclause 4.1(2) of the *Criminal Code Act 1995*.

Definition of 'listed professional development activities'

Section 5 provides that ***listed professional development activities*** means the professional development activities for a calendar year that are set out in a statement published under subsection 53(3) of the Regulations.

Definition of 'remote area'

Section 5 will provide that ***remote area*** means an area classed as Remote Australia or Very Remote Australia in the Australian Statistician's Australian Statistical Geography Standard Remoteness Structure (ASGS Remoteness Structure) as in force on 1 April 2018. The ASGS Remoteness Structure is available on the website of the Australian Bureau of Statistics (ABS), and is generally amended every five years, following each census.

Under the Regulations, marriage celebrants or aspiring marriage celebrants who live in remote or very remote areas may be eligible for an exemption from the registration

application fee and the celebrant registration charge. Utilising the ASGS Remoteness Structure ensures consistency in determining whether exemptions should be granted, by providing an external reference when considering what constitutes a remote area for the purposes of an exemption, and gives greater certainty to persons considering applying for an exemption.

Section 6 – Appropriate registering authority for a marriage

This section will provide that the ***appropriate registering authority*** for a marriage is ascertained in accordance with the table provided for by this section.

The term 'appropriate registering authority' is used throughout the Regulations. The definition supports subparagraph 50(4)(a)(i) of the Act, which requires the Regulations to establish a process for ascertaining the appropriate registering authority for a marriage. Under subparagraph 50(4)(a)(i) of the Act, an authorised celebrant who is required to prepare two official certificates of marriage must forward one of those certificates to the appropriate registering authority, as well as the notice given under section 42 of the Act, any order issued under section 12 of the Act and any statutory declarations, consents and dispensations relating to the marriage.

Table items 1–11 will indicate that the appropriate registering authority (column 3) will be determined by reference to the state or territory in which the marriage took place (column 2). Under subsection 5(1) of the Act, 'territory' is defined to include Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands.

Generally, the appropriate registering authority will be the registrar of births, deaths and marriages of the state or territory in which the marriage took place. The exception to this will be that the Registrar of Births, Deaths and Marriages of Western Australia will be the appropriate registering authority for Christmas Island and Cocos (Keeling) Islands. This is intended to reflect that, by the application of the *Interpretation Act 1984 (W.A.) (C.I.) (Amendment) Ordinance 1992* and *Interpretation Act 1984 (W.A.) (C.K.I.) (Amendment) Ordinance 1992*, under Part 6 of the *Births, Deaths and Marriages Registration Act 1998* (WA) the WA Registrar is responsible for registering marriages that take place on Christmas Island and Cocos (Keeling) Islands.

Part 2 – Marriage of minors

Division 1 – Authorisation for marriage of a minor

Section 7 – Application for authorisation of marriage of minor

This section will provide for the form of an application made under section 12 of the Act, what information must be included in the application and what documents or evidence must accompany the application.

Under subsection 12(1) of the Act, a person aged at least 16 years, but less than 18 years, may apply to a Judge or magistrate for an order authorising them to marry a particular person

of marriageable age. To grant the order, subsection 12(2) of the Act requires the Judge or magistrate to be satisfied that the person is at least 16 years of age, and the circumstances are so exceptional and unusual as to justify the order being made.

Paragraph 7(a) will establish the form of the application—in writing—and require the application to be lodged with the Judge or magistrate. The requirement to 'lodge' is intended to give applicants, Judges and magistrates maximum flexibility in how applications are received. Judges and magistrates exercising the powers conferred by section 12 of the Act are acting in their personal capacity and as such the usual procedural rules governing court matters do not apply.

Paragraphs 7(b) to (e) will identify documents which, if available, must accompany an application made under section 12 of the Act.

Paragraph 7(b) will require the applicant's birth certificate to be provided, unless it will be impracticable to obtain this certificate. Providing the birth certificate will enable a Judge or magistrate to verify the age of the applicant and establish that the first condition (the applicant is aged between 16 and 18 years) for issuing such an order is met. Where a birth certificate cannot be practicably obtained, there will be nothing to prevent a Judge or magistrate requesting the applicant provide other information or evidence to satisfy the Judge or magistrate of the applicant's age.

Paragraph 7(c) will require any consent given by, or in place of, a person required to consent to the intended marriage under section 14 of the Act to be provided. Paragraph 7(d) will require a translation of any consent that is not in English. This translation will need to meet the requirements in section 11 of the Regulations.

Paragraph 7(e) will require any dispensation granted under subsection 15(1) of the Act to be provided. Such a dispensation removes the need for the applicant to obtain the consent of one or more persons to the intended marriage that is required under section 13(1)(a)(i) of the Act. Being aware of whether the applicant has obtained, or successfully dispensed with, the consents required to the intended marriage under subsection 13(1) of the Act may assist a Judge or magistrate in determining whether the second condition (the presence of exceptional and unusual circumstances) for issuing such an order is met.

Paragraph 7(f) will apply if the applicant has previously made an application under section 12 of the Act. Paragraph 7(f) will require the application to state the decision made in relation to the previous application, the name of the Judge or magistrate who made the decision and the date of the decision. This requirement will enable the Judge or magistrate to ascertain whether the subsequent application is being made in the allowed timeframe; under paragraph 19(1)(c) of the Act a person cannot make a further application under section 12 within six months of the date of the refusal.

This section will rely on the necessary or convenient power in section 120 of the Act. This section will be ancillary to section 12 of the Act. Judges and magistrates exercise the powers conferred by section 12 of the Act in their personal capacity. This means Judges and

magistrates are unable to rely on powers and procedural rules established by legislation for, or the inherent powers of, the court to which they are appointed. This section will replicate the requirements, normally covered by court rules or other legislation, of the form in which an application may be made, what information must be included in the application and what documents or evidence must accompany the application.

Section 8 – Order authorising marriage

This section will establish what must be done in relation to a marriage where one of the parties to the marriage is a minor.

Subsection 8(1) will make clear that section 8 will only apply in relation to a marriage where one of the parties to the marriage is a minor (less than 18 years of age).

Subsection 8(2) will require the minor to give to the person solemnising the marriage (an authorised celebrant or chaplain) an order made under section 12 of the Act. An order under section 12 of the Act authorises a minor to marry a particular person of marriageable age. Section 28A of the *Acts Interpretation Act 1901* will be relied on with regards to how the order may be given to the authorised celebrant or chaplain. Section 9 of the *Electronic Transactions Act 1999* will be relied on, to enable the order to be given electronically.

Subsection 8(3) will prohibit a person from solemnising a marriage where one of the parties to the marriage is a minor unless they have been given an order in accordance with subsection 8(2).

Requiring the minor to provide the order, and prohibiting a person from solemnising a marriage where one of the parties is a minor without having been given an order, minimises the risks of: a marriage being solemnised where there is a legal impediment; a marriage being considered void; and a person solemnising the marriage committing an offence under the Act.

Under paragraph 23B(1)(e) of the Act, a marriage is void if either of the parties to the marriage is not of marriageable age. Section 11 of the Act specifies that a person is of marriageable age if they are 18 years of age or older. The rule in section 11 is subject to section 12, which provides that a person, who is at least 16 years of age but less than 18 years of age, may apply to a Judge or magistrate for an order authorising them to marry a particular person of marriageable age. Under section 100 of the Act, a person commits an offence if they solemnise, or purport to solemnise, a marriage and they had reason to believe there was a legal impediment to the marriage or the marriage would be void.

Subsection 8(4) will apply if a chaplain solemnised the marriage. Under subsection 8(4), the chaplain will be required to forward the order to the Registrar-General under the *Registrar-General Act 1993* (ACT) (the ACT Registrar-General) after the marriage is solemnised. The ACT Registrar-General currently registers marriages solemnised overseas by chaplains in accordance with Part V of the Act. This requirement mirrors that imposed on authorised celebrants by the Act.

The note to subsection 8(4) is intended to direct the reader to the relevant requirement in subparagraph 50(4)(a)(i) of the Act, that authorised celebrants forward any order made under section 12 of the Act to the appropriate registering authority. The note is not intended to have substantive effect.

In 2002, the provisions in the Act establishing the 'Registrar of Overseas Marriages' were erroneously repealed. One role performed by the Registrar of Overseas Marriages was registering marriages solemnised overseas by chaplains in accordance with Part V of the Act. Short-hand references to this Registrar still appear in Part V of the Act. Previous Commonwealth Attorneys-General have appointed the ACT Registrar-General to perform the function of the Registrar of Overseas Marriages. Despite the repeal of the office of the Registrar of Overseas Marriages, the ACT Registrar-General has continued to register marriages solemnised by chaplains overseas.

This section will rely on the necessary or convenient power in section 120 of the Act. This section will be incidental to the requirement in subparagraph 50(4)(a)(i) of the Act for authorised celebrants to forward a copy of the order issued by a Judge or magistrate in relation to a marriage to the appropriate registering authority for the marriage. Additionally, this section will minimise the risk of authorised celebrants and chaplains engaging in offending conduct by solemnising a marriage where they have reason to believe—due to not having been given an order—there is a legal impediment to the marriage (paragraph 23B(1)(e) and section 100 of the Act).

Division 2 – Consent to marriage of minor

Section 9 – Consent of parent etc. to marriage of minor

This section will establish requirements in relation to the consents necessary for an intended marriage of a minor, for the purposes of subparagraph 13(1)(a)(i) of the Act.

Under subparagraph 13(1)(a)(i) of the Act, a marriage involving a minor must not be solemnised unless the person solemnising the marriage, or in whose presence the marriage will be solemnised, has been given the written consent of each person required by section 14 of the Act to consent to the marriage. However, subparagraph 13(1)(a)(ii) of the Act provides for a person to accept a written consent of a Judge or magistrate in place of the consent of a person required by section 14 of the Act to consent to the marriage.

Subsection 9(1) will specify that a consent made for the purposes of subparagraph 13(1)(a)(i) of the Act must: identify who is the person giving the consent; identify who are the parties to the intended marriage; and indicate how or why the person is required to consent to the intended marriage.

Requiring this information to be included in the consent will assist those to whom the consent may be given—Judges, magistrates, prescribed authorities, authorised celebrants, chaplains and appropriate registering authorities—to be assured that the consent relates to a particular marriage, and that the person giving consent was a person required to do so under section 14 of the Act.

Subsection 9(2) will require a person solemnising a marriage (an authorised celebrant or a chaplain) to write on any consent provided to them how they satisfied themselves that the person giving the consent is required to do so by section 14 of the Act. The requirement in subsection 9(2) will ensure that the authorised celebrant or chaplain solemnising the marriage of a minor has turned their mind to whose consent is required under section 14 of the Act, and taken steps to satisfy themselves that the consent has been given by a person required to consent.

Subsection 9(3) will operate as an exception to subsection 9(2); subsection 9(2) will not apply if the consent of both parents of the minor is provided to the person solemnising the marriage. Under section 14 and the Schedule of the Act, the default position is that both parents of a minor must consent to the minor's marriage. As such, it is necessary in the situation where only one person has given consent to the minor's marriage for the authorised celebrant or chaplain to confirm that all necessary persons have consented to the marriage.

The use of the term 'celebrant' in subsections 9(2) and (3) is for narrative purposes only, and is not intended to exclude chaplains from the application of these provisions.

Subsection 9(4) will clarify that section 9 does not apply in relation to a consent given by a Judge or magistrate under Part II of the Act. The matters which will be required to be included in a consent by subsection 9(1) will be irrelevant where the consent is given by a Judge or magistrate in place of the consent of a person required by section 14 of the Act to consent to the marriage. Additionally, in such circumstances it will not be necessary for an authorised celebrant or chaplain to turn their mind to whose consent is required under section 14 of the Act (subsection 9(2)).

The Note to section 9 is intended to direct the reader to the relevant requirements under subparagraph 50(4)(a)(i) and paragraph 80(4)(b) of the Act, for an authorised celebrant or chaplain to forward any consent to the appropriate registering authority or, in the case of chaplains, the ACT Registrar-General (see section 8 above). The note is not intended to have substantive effect.

This section will rely on the necessary or convenient power in section 120 of the Act. This section will be ancillary to subparagraph 13(1)(a)(i) of the Act, by specifying minimum requirements for what information a consent must contain. Additionally, this section will minimise the risk of authorised celebrants and chaplains engaging in offending conduct, by solemnising a marriage where they have reason to believe—due to not having confirmed that the correct persons have consented to the marriage—there is a legal impediment to the marriage (paragraph 23B(1)(e) and section 100 of the Act).

Section 10 – Consent not in English

This section will provide that where a person solemnising an intended marriage of a minor (an authorised celebrant or chaplain) is given a consent for the purposes of paragraph 13(1)(a) of the Act, and the consent is not in English, the authorised celebrant or chaplain must attach a translation of the consent into English before solemnising the marriage.

There will be no requirements specifying who is responsible for obtaining a translation of a consent that is not in English, or for providing such a translation to the person solemnising the marriage. These are matters for the authorised celebrant or chaplain to determine with the parties to the marriage and any other relevant persons.

The Note to section 10 is intended to direct the reader to the relevant requirements under subparagraph 50(4)(a)(i) and paragraph 80(4)(b) of the Act, for an authorised celebrant or chaplain to forward any consent to the appropriate registering authority or, in the case of chaplains, the ACT Registrar-General (see section 8 above). As the translation is attached to the consent, it will be forwarded along with the consent. The note is not intended to have substantive effect.

This section will rely on the necessary or convenient power in section 120 of the Act. This section will be necessary to ensure that where a registering authority for a marriage is provided with a consent that is not written in English, the registering authority will also be provided with a translation to provide certainty that the marriage was solemnised in accordance with the legal requirements of the Act.

Section 11 – Translation of consent

This section will prescribe requirements that a translation of a non-English consent given under section 13 of the Act must meet for the purposes of paragraph 7(d), section 10 and paragraphs 12(c), 14(1)(e) and 15(3)(d) of the Regulations.

Paragraph 11(a) will require a translation of a consent to be prepared by a person who is accredited or recognised by the accreditation authority (defined in section 5 of the Regulations) in relation to translating into English documents that are written in the language in which the consent is written. Paragraph 11(b) will require the person who performs the translation to be competent to do the translation.

Using accredited or recognised translators will improve the quality of translations and enable judges, magistrates, prescribed authorities, authorised celebrants, chaplains and appropriate registering authorities to have confidence that consents have been accurately translated. There will be no limitation on the level of accreditation or recognition that a translator must hold. If an authorised celebrant or chaplain translates a consent, they will also need to meet the requirements of this section.

This section will rely on the necessary or convenient power in section 120 of the Act. This section will be necessary to provide certainty that a consent, that is not in English, complies with the requirements of sections 13 and 14 of the Act.

Division 3 – Dispensing with consent to marriage of minor

Section 12 – Application to dispense with consent

This section will specify what information must be included in an application made under section 15 of the Act and what documents or evidence must accompany the application.

Under subsection 15(1) of the Act, a minor may apply in writing to a prescribed authority to dispense with the requirement for a person to consent to a proposed marriage of the minor. Subsection 15(1) of the Act sets out the matters which a prescribed authority must consider in deciding whether to grant a dispensation. To grant the dispensation, under paragraphs 15(1)(a) to (c) of the Act the prescribed authority must: be satisfied that it is impracticable, or impracticable without unreasonable delay, to ascertain the views of the person to the proposed marriage; have no reason to believe the person would refuse their consent; and have no reason to believe that facts exist which mean it would be improper to dispense with the consent.

Paragraphs 12(a) to (c) will identify documents which, if available, must accompany an application made under section 15 of the Act. Paragraph 12(a) will require the applicant's birth certificate to be provided, unless it will be impracticable to obtain this certificate. Providing the birth certificate will enable a prescribed authority to verify the age of the applicant and establish that the applicant is a minor. Where a birth certificate cannot be practicably obtained, there will be nothing to prevent a prescribed authority requesting the applicant provide other information or evidence to satisfy the prescribed authority of the applicant's age.

Paragraph 12(b) will require any consent given by, or in place of, a person required to give consent to the intended marriage under section 13 of the Act to be provided. Paragraph 12(c) will require a translation of any consent that is not in English. This translation will need to meet the requirements in section 11 of the Regulations.

This section will rely on the necessary or convenient power in section 120 of the Act. This section will be necessary in order to ensure prescribed authorities have the minimum information necessary to enable them to make a decision under section 15 of the Act.

Section 13 – Notice of dispensation or refusal to dispense with consent

This section will set out requirements a prescribed authority must meet when granting a dispensation of, or refusing to dispense with, the requirement for a person to consent to a proposed marriage of a minor under section 15 of the Act.

Paragraph 13(1)(a) will require, if a prescribed authority dispenses with the consent of a person under section 15 of the Act, the prescribed authority to give the minor the dispensation in writing.

Paragraph 13(2)(a) will require, if a prescribed authority refuses to dispense with the consent of a person under section 15 of the Act, the prescribed authority to give the minor written notice of refusal and reasons for the refusal within 14 days of making the decision to refuse the application made under subsection 15(1) of the Act. Imposing a timeframe of 14 days to notify a minor that dispensation has been refused will enable the minor to expeditiously make a new application under subsection 15(1) of the Act, or make an application under section 16 of the Act for a Judge or magistrate to give consent in place of the person required to consent under section 14 of the Act. Requiring written notice of the reasons for the refusal is intended

to assist a Judge or magistrate considering an application under section 16 of the Act; under paragraph 14(c) of the Regulations, a minor applying to a Judge or magistrate under section 16 of the Act for consent in place of a person must provide any notice given under paragraph 13(2)(a) of the Regulations.

Section 28A of the *Acts Interpretation Act 1901* will be relied on with regards to how the prescribed authority may give a notice under paragraph 13(1)(a) or 13(2)(a) to the minor. Section 9 of the *Electronic Transactions Act 1999* will be relied on, to enable the notice to be given electronically.

Paragraphs 13(1)(b) and 13(2)(b) will require the prescribed authority to return any documents that accompanied the application made under section 15 of the Act. The requirement to return the documents is intended to assist the minor in providing their birth certificate when making an application under section 12 of the Act (see section 7 of the Regulations).

This section will rely on the necessary or convenient power in section 120 of the Act. This section will be ancillary to section 15 of the Act, as it will ensure that a prescribed authority communicates a decision under section 15 of the Act to the applicant, and that an applicant is given sufficient information to undertake further action if their application is refused.

Division 4 – Consent by Judge or magistrate in place of parent etc.

Section 14 – Consent by Judge or magistrate to marriage of minor

This section will provide for the form of an application made under subsection 16(1) or 16(5) of the Act, and what information must be included in, and what documents or evidence must accompany, an application under subsection 16(1) of the Act. This section will also enable the joining of subsection 16(1) and (5) applications, and establish the form of any consent given by a Judge or magistrate in relation to such applications.

Under subsection 16(1) of the Act, a minor may apply to a Judge or magistrate to give consent in place of a person required to provide consent under section 14 of the Act (a subsection 16(1) application). A subsection 16(1) application can be made if the person required to consent has refused to give their consent or a prescribed authority has refused an application by the minor for the consent to be dispensed with under section 15 of the Act.

Paragraph 14(1)(a) will establish the form of a subsection 16(1) application —in writing— and require the application to be lodged with the Judge or magistrate. Paragraphs 14(1)(b) to (e) will identify documents which, if available, must accompany a subsection 16(1) application. Paragraph 14(1)(b) will require the applicant's birth certificate to be provided, unless it will be impracticable to obtain this certificate.

Paragraph 14(1)(c) will require any notice refusing dispensation with the consent of a person to the proposed marriage given under paragraph 13(2)(a) of the Regulations to be provided.

Paragraph 14(1)(d) will require any consent given by, or in place of, a person required to consent to the intended marriage under section 14 of the Act to be provided.

Paragraph 14(1)(e) will require a translation of any consent that is not in English. This translation will need to meet the requirements in section 11 of the Regulations.

Paragraph 14(1)(f) will apply if a minor has previously made a subsection 16(1) application, or a request under section 17 of the Act (for a Judge to re-hear the decision of a magistrate on an application under section 16 of the Act). Paragraph 14(1)(f) will require the application to state the name of the Judge or magistrate who made the decision on the previous application or request, and the date and details of the decision.

Subsection 14(2) will apply to an application made under subsection 16(5) of the Act, requiring the application to be in writing and lodged with the Judge or magistrate. Under subsection 16(5) of the Act, when a Judge or magistrate is considering a subsection 16(1) application the minor may also apply to the Judge or magistrate to give consent in the place of any other person (a different person to the one whose consent is being considered in relation to the application made under subsection 16(1) of the Act).

Subsection 14(3) will allow a Judge or magistrate to join a subsection 16(1) application with any application the minor makes under subsection 16(5) of the Act.

Under subsection 16(2) of the Act, a Judge or magistrate must conduct an inquiry into the relevant facts and circumstances in relation to a subsection 16(1) application. Enabling these applications to be joined together will allow a Judge or magistrate to make use of any information received through such an inquiry when a making a decision in relation to an application under subsection 16(5) of the Act. It will also streamline the process for a minor to apply for multiple consents from a Judge or magistrate.

Subsection 14(4) will require a Judge or magistrate to give the consent in writing, if the Judge or magistrate gives consent in place of another person following an application under subsection 16(1) or (5) of the Act.

This section will rely on the necessary or convenient power in section 120 of the Act.

Section 15 – Re-hearing of application for consent to marriage of a minor

This section will establish the timeframe in which a request under subsection 17(1) of the Act must be made, the form the request must take, and what information must be included in, and what documents or evidence must accompany, the request. This section will also enable a request under subsection 17(1) of the Act to be joined with an application under subsection 16(5) of the Act.

Under subsection 17(1) of the Act, a Judge may re-hear an application that a magistrate has granted or refused under subsection 16(1) or (5) of the Act (for the magistrate to give consent in place of a person required to give consent to the marriage of a minor under section 14 of

the Act). A request under subsection 17(1) of the Act may be made by the minor or the person in relation to whose consent the application under subsection 16(1) or (5) was made.

Subsection 15(1) will specify that a request under subsection 17(1) of the Act must be made within 14 days after the day on which the application the request relates to was granted or refused. For example, if an application were granted or refused on the 1st of a month, the request must be made on or before the 15th of that month.

Subsection 15(2) will allow a Judge to join a request under subsection 17(1) of the Act with any application made under subsection 16(5) of the Act.

Subsection 17(2) of the Act enlivens subsection 16(2) of the Act for the purposes of a Judge conducting a re-hearing under subsection 17(1) of the Act. Under subsection 16(2) of the Act, a Judge or magistrate must conduct an inquiry into the relevant facts and circumstances in relation to an application under subsection 16(1) of the Act. Enabling a request under subsection 17(1) of the Act and an application under subsection 16(5) of the Act to be joined together will allow a Judge to make use of any information received through such an inquiry when a making a decision in relation to an application under subsection 16(5) of the Act. It will also streamline the process for a minor to apply for multiple consents from a Judge.

Paragraph 15(3)(a) will establish the form of the application made under subsection 16(1) of the Act—in writing—and require the application to be lodged with the Judge.

Paragraphs 15(3)(b) to (e) will identify documents which, if available, must accompany a request made under section 17 of the Act. Paragraph 15(3)(b) will require the applicant's birth certificate to be provided, unless it will be impracticable to obtain this certificate. Where a birth certificate cannot be practicably obtained, there will be nothing to prevent a Judge requesting the applicant provide other information or evidence to satisfy the Judge of the applicant's age.

Paragraph 15(3)(c) will require the request to be accompanied by any consent given by, or in place of, a person required to consent to the intended marriage under section 14 of the Act, and paragraph 15(3)(d) will require a translation of any consent that is not in English. This translation will need to meet the requirements in section 11 of the Regulations. These requirements will ensure that the Judge is provided with any consents obtained in the period between an application being made under subsection 16(1) or (5) of the Act and the making of a request under subsection 17(1) of the Act.

Paragraph 15(3)(e) will require a copy of the application that was made under subsection 16(1) or (5) of the Act to be provided, including any documents that accompanied that application. This will ensure the Judge has all the information before them that was provided to the magistrate who made the original decision in relation to the application under subsection 16(1) or (5) of the Act.

Subsections 15(2) and (3) will rely on the necessary or convenient power in section 120 of the Act. These subsections will be ancillary to section 17 of the Act.

Section 16 – Notice of request to be served on magistrate

This section will require a magistrate to be informed of, and provide documents in relation to, any request made under subsection 17(1) of the Act for a Judge to re-hear a decision of the magistrate under subsection 16(1) or (5) of the Act.

Subsection 16(1) will require a person requesting a re-hearing under subsection 17(1) of the Act to give a copy of the request to the magistrate whose decision under subsection 16(1) or (5) of the Act is the subject of the request. The person will be required to provide the request to the magistrate within 7 days after the request is lodged with a Judge under subsection 15(3) of the Regulations. Section 28A of the *Acts Interpretation Act 1901* will be relied on with regards to how the person may give the notice to the magistrate. Section 9 of the *Electronic Transactions Act 1999* will be relied on, to enable the notice to be given electronically.

Subsection 16(2) will require a magistrate, who has received a copy of a request in accordance with subsection 16(1) of the Regulations, to forward any documents to the Judge that relate to the inquiry which is the subject of the request.

This section will rely on the necessary or convenient power in section 120 of the Act. This section will be ancillary to section 17 of the Act.

Division 5 – Practice and procedure in relation to inquiries

Section 17 – Application of this Division

This section will establish that Division 5 of Part 2 of the Regulations applies in relation to: applications and inquiries under section 12 of the Act; applications and inquiries under section 16 of the Act; and requests and inquiries under section 17 of the Act.

Paragraph 120(b) of the Act provides for Regulations to prescribe matters relating to the practice and procedure for inquiries under Part II of the Act, in recognition that, when exercising the powers conferred by sections 12, 16 and 17 of the Act, Judges and magistrates are acting in their personal capacity and do not have access to the court rules or other legislation pertaining to such matters available to them in respect of their general functions as Judges and magistrates.

Section 18 – Affidavits in support of application or request

This section will set out requirements in relation to utilising affidavits to support an application or request under Part II of the Act.

Subsection 18(1) will require a person making an application under sections 12 or 16 of the Act, or a request under section 17 of the Act, to state the facts in support of their application or request in an affidavit as far as practicable. Subsection 18(2) will specify that an affidavit can only be used or considered in an inquiry if it has been given to the Judge or magistrate conducting the inquiry. Requiring affidavits to be used for written evidence will provide assurance that the information contained within the affidavit is true, and establish consistency in the provision of oral and written evidence to an inquiry. Under section 23 of the

Regulations, a Judge or magistrate may require a person who has been summoned to give evidence to an inquiry to take an oath or make an affirmation.

The Regulations will not specify the form an affidavit must take, or who may witness a person swear or affirm an affidavit, as the intention is to rely on the ordinary meaning: an affidavit is a written statement where a person has sworn or affirmed before a witness that the contents are true.

Section 28A of the *Acts Interpretation Act 1901* will be relied on with regards to how the person may give the affidavit to the Judge or magistrate. Section 9 of the *Electronic Transactions Act 1999* will be relied on, to enable affidavits to be given electronically.

Section 19 – Time and place of inquiry

This section will establish procedures relating to setting a time, date and place for an inquiry under Part II of the Act to be held, and notifying relevant persons of the details of the inquiry.

Subsection 19(1) will require a Judge or magistrate, as soon as practicable after an application is made under sections 12 or 16 of the Act, or a request is made under section 17 of the Act, to fix a time, date and place to hold an inquiry into the relevant facts and circumstances. Alternatively, the Judge or magistrate will be required to direct another person to fix a time, date and place for the inquiry. This requirement will limit the potential for delay in a Judge or magistrate dealing with an application or request.

Subsection 19(2) will require a person who fixes the time, date and place for an inquiry under subsection 19(1) to notify the person who made the application or request of the time, date and place fixed for the inquiry. Subsection 19(3) will require the person who made the application or request to personally serve notice of the time, date and place fixed for the inquiry, and a copy of the application or request, on each person who is required to be given an opportunity to be heard at the inquiry under subsection 18(1) of the Act.

Paragraph 19(4)(a) will provide for a Judge or magistrate, at the request of the person who made the application under sections 12 or 16 of the Act, or the request under section 17 of the Act, to dispense with the requirement for the person to serve notice of the details of the inquiry and a copy of the application or request on another person under subsection 19(3) of the Regulations. Paragraph 19(4)(b) will provide for a Judge or magistrate, at the request of the person who made the application or request, to specify an alternative manner (other than personal service) by which the person may serve notice of the details of the inquiry and a copy of the application or request on another person under subsection 19(3) of the Regulations. Alternatively, the Judge or magistrate will be able to direct another person to dispense with service or specify an alternative manner of service. Enabling service to be dispensed with, or an alternative manner of service to be used, reflects that the requirement in subsection 18(1) of the Act for a Judge or magistrate to give an opportunity to any person to be heard at the inquiry whose consent is required to the marriage under section 14 of the Act is limited to providing a reasonably practicable opportunity.

Section 20 – Inquiries

This section will establish matters relating to the procedure or operation of an inquiry under Part II of the Act.

Subsection 20(1) will enable a Judge or magistrate to adjourn an inquiry to a different place or time and subsection 20(2) will enable a Judge or magistrate to conduct an inquiry without regard to legal formalities and technicalities. These provisions will ensure that persons who are self-represented or unfamiliar with court processes and procedure can participate effectively in the inquiry. The Judge or magistrate will also have the flexibility to exercise their discretion to determine the most appropriate way to proceed with the inquiry.

Subsection 20(3) will provide for the examination and cross-examination of witnesses at an inquiry by a person given the opportunity to be heard at an inquiry or that person's legal representative. This subsection will also provide for such a person, or their legal representative, to address the Judge or magistrate. This will ensure that where a person objects to the application or request before a Judge or magistrate, they will have the opportunity to express that view, or adduce evidence from witnesses in support of their view.

Section 21 – Forwarding documents to Judge or magistrate conducting inquiry

This section will provide for a Judge or magistrate to transfer an application made under section 12 or 16 of the Act to a second Judge or magistrate.

Subsection 21(1) will specify that section 21 applies if a Judge or magistrate under subsection 12(4) of the Act, or a magistrate under subsection 16(3) of the Act, refuses to deal with an application because they are satisfied that the matter could be more properly dealt with by a Judge or magistrate sitting at a place nearer to the location where the applicant ordinarily resides. Subsection 21(2) will specify that a Judge or magistrate transfers an application by forwarding to the second Judge or magistrate the application, any documents accompanying the application and any affidavit relating to the application. This will ensure that the applicant does not need to reapply to the second Judge or magistrate, minimising any inconvenience or delay the transfer may cause.

Section 22 – Power to send for witnesses and documents

This section will empower a Judge or magistrate to summon a person to attend an inquiry being conducted under Part II of the Act.

Summoning a person to answer questions or produce information or documents is a coercive power. Generally, coercive powers should be contained in a parent Act, rather than in subordinate legislation (see 7.3.4 of *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide to Framing Commonwealth Offences)). However, this section will be made under paragraph 120(b) of the Act, which envisages the Regulations prescribing practices and procedures in relation to the summoning of witnesses for inquiries under Part II of the Act.

Additionally, this power will not be new; under regulation 23 of the old regulations, Judges and magistrates may issue a summons requiring a person to appear as a witness for an inquiry under Part II of the Act. However, the power in section 22 has been revised to be more consistent with the limitations and safeguards outlined in Chapter 9 of the Guide to Framing Commonwealth Offences.

Subsection 22(1) will specify that section 22 applies if a Judge or magistrate conducting an inquiry under Part II of the Act reasonably believes that a person has information, documents or other things that are relevant to the inquiry. This is consistent with the principles at 9.1.1, 9.3.1, 9.3.2, 9.3.3 of the Guide to Framing Commonwealth Offences that: the threshold for issuing a notice should be 'reasonable grounds to believe'; a notice should be in writing; a notice should be issued to a person; and a notice should contain all relevant details.

Subsection 22(2) will provide for the Judge or magistrate to summons a person to attend the inquiry on a specified day to give evidence or produce documents or other things identified in the summons. Section 28A of the *Acts Interpretation Act 1901* will be relied upon with regards to how a summons may be served on a person.

Subsection 22(3) will require the specified day in the summons issued under subsection 22(2) to be at least 14 days after the summons is given to the person. This is consistent with the principle at 9.3.4 of the Guide to Framing Commonwealth Offences that a person should be given a minimum of 14 days to comply with a notice.

This section is not intended to displace or override the common law privilege against self-incrimination: the right not to answer questions or produce material that may tend to implicate the person in a criminal offence or expose them to a civil penalty (see 9.5.1 of the Guide to Framing Commonwealth Offences).

Section 23 – Power to examine on oath or affirmation

This section will enable a Judge or magistrate to examine a person under oath or affirmation in an inquiry conducted under Part II of the Act.

Paragraph 23(1)(a) will enable a Judge or magistrate to require a person to take an oath or make an affirmation, and paragraph 23(1)(b) will provide for the Judge or magistrate to administer the oath or affirmation. Subsection 23(2) will specify that the oath or affirmation must be one that the evidence the person will give will be true.

Sections 24 to 31 – Offences

The following sections will provide for offences to uphold the integrity of an inquiry conducted under Part II of the Act.

In conducting inquiries under Part II of the Act, Judges and magistrates are acting in their personal capacity and do not have access to legislation outlining court practice and procedure that is available to them in their general functions as Judges and magistrates. For example,

legislation providing for contempt of court proceedings will not be available to Judges and magistrates in respect of inquiries conducted under Part II of the Act.

The defences of general application under the *Criminal Code Act 1995* will be available in relation to the following offences, including: mistake of ignorance of fact (clause 9.1 of the Code); duress (clause 10.2 of the Code); and lawful authority (clause 10.5 of the Code).

Section 24 – Offence in relation to failure to comply with summons

Section 24 will provide that a person commits an offence if the person:

- is summoned to attend an inquiry under section 22 of the Regulations, and
- fails to comply with the summons.

Clause 5.6 of the *Criminal Code Act 1995* will apply to determine the fault elements for this offence.

This offence will be consistent with the principle at 9.4.1 of the Guide to Framing Commonwealth Offences that a non-compliance offence can be used to encourage a person to comply with a notice to produce or attend.

The Guide to Framing Commonwealth Offences recommends that the penalty for such an offence should be six months' imprisonment and/or a 30 penalty unit fine. The penalty for this offence will be 2 penalty units, significantly lower than the Guide's recommendation. Under paragraph 120(j) of the Act, the Regulations may prescribe penalties not exceeding a fine of 2 penalty units for offences against the regulations.

Section 25 – Offence in relation to refusal to be sworn

Section 25 will provide that a person commits an offence if the person:

- is summoned to attend an inquiry under section 22 of the Regulations
- attends the inquiry
- is required by the Judge or magistrate holding the inquiry to take an oath or make an affirmation, and
- refuses or fails to take the oath or make the affirmation as required.

Clause 5.6 of the *Criminal Code Act 1995* will apply to determine the fault elements for this offence.

The penalty for this offence will be 2 penalty units.

Section 26 – Offence in relation to refusal to answer

Section 26 will provide that a person commits an offence if the person:

- is summoned to attend an inquiry under section 22 of the Regulations
- attends the inquiry
- is required by the Judge or magistrate holding the inquiry to answer a question, and
- refuses or fails to answer the question.

Clause 5.6 of the *Criminal Code Act 1995* will apply to determine the fault elements for this offence.

The penalty for this offence will be 2 penalty units.

Section 27 – Offence in relation to insulting or disturbing a Judge or magistrate

Section 27 will provide that a person commits an offence if the person:

- engages in conduct, and
- the conduct insults or disturbs a Judge or magistrate in the conduct of an inquiry.

The term 'engage in conduct' will be defined in section 5 of the Regulations to include doing an act or omitting to perform an act.

Clause 5.6 of the *Criminal Code Act 1995* will apply to determine the fault elements for this offence.

The penalty for this offence will be 2 penalty units.

Section 28 – Offence in relation to using insulting language

Section 28 will provide that a person commits an offence if the person:

- uses insulting language towards another person
- is reckless as to whether the language is insulting, and
- the other person is a Judge or magistrate who is holding an inquiry.

The fault element for this offence will be recklessness, as specified in paragraph 28(b).

The penalty for this offence will be 2 penalty units.

Section 29 – Offence in relation to interrupting an inquiry

Section 29 will provide that a person commits an offence if the person:

- engages in conduct, and

- the conduct interrupts an inquiry being held by a Judge or magistrate.

The term 'engage in conduct' will be defined in section 5 of the Regulations to include doing an act or omitting to perform an act.

Clause 5.6 of the *Criminal Code Act 1995* will apply to determine the fault elements for this offence.

The penalty for this offence will be 2 penalty units.

Section 30 – Offence in relation to improper influence

Section 30 will provide that a person commits an offence if the person:

- uses words (written or oral) with the intention of improperly influencing another person, and
- the other person is a Judge or magistrate conducting an inquiry or a witness attending an inquiry.

Clause 5.6 of the *Criminal Code Act 1995* will apply to determine the fault elements for this offence.

The penalty for this offence will be 2 penalty units.

Section 31 – Offence in relation to bringing Judge or magistrate into disrepute

Section 31 will provide that a person commits an offence if the person:

- uses words (written or oral) with the intention of bringing another person into disrepute in connection with an inquiry being held by a Judge or magistrate, and
- the other person is the Judge or magistrate.

Clause 5.6 of the *Criminal Code Act 1995* will apply to determine the fault elements for this offence.

The penalty for this offence will be 2 penalty units.

Section 32 – Protection of Judges and magistrates etc.

This section will provide protections and immunities for Judges and magistrates performing functions, barristers and solicitors representing persons, and persons attending at or appearing before inquiries conducted under Part II of the Act.

As Judges and magistrates conduct inquiries under Part II of the Act in their personal capacity, Judges, magistrates, barristers, solicitors and persons attending or appearing at inquiries do not have access to the general protections and immunities available in respect of court matters.

Subsection 32(1) will provide that a Judge or magistrate performing or exercising a function or power under Part 2 of the Regulations or Part II of the Act will have the same protection and immunity as a Judge of the Supreme Court of the state or territory in which the function is performed or the power is exercised. For example, if a magistrate in Queensland summons a person to attend an inquiry under section 22 of the Regulations, the magistrate will have the same protection and immunity as a Judge of the Supreme Court of Queensland.

Subsection 32(2) will provide that a barrister or solicitor representing a person at an inquiry will have the same protection and immunity as a barrister appearing for a party before the Supreme Court of the state or territory in which the inquiry is being held. For example, if a solicitor is representing a person at an inquiry being held in Victoria, the solicitor will have the same protection and immunity as a barrister appearing before the Supreme Court of Victoria.

Subsection 32(3) will provide that a person appearing unrepresented before a Judge or magistrate holding an inquiry will have the same protection and immunity as an unrepresented party to proceedings in the Supreme Court of the state or territory in which the inquiry is being held. For example, if an unrepresented person appears before an inquiry being held in South Australia, the solicitor will have the same protection and immunity as an unrepresented person appearing before the Supreme Court of South Australia.

Subsection 32(4) will provide that a person summoned to attend or appear at an inquiry held by a Judge or magistrate, to give evidence or produce documents or things, will have the same protection and immunity as a witness in proceedings in the Supreme Court of the state or territory in which the inquiry is being held. For example, if a witness appears before an inquiry being held in Tasmania, the witness will have the same protection and immunity as an witness appearing before the Supreme Court of Tasmania.

Section 33 – Return of documents to applicant

This section will require the return of any document that accompanied an application under section 12 or 16 of the Act, or request under section 17 of the Act, to the person who made the application or request. The return of any document will be required once a Judge or magistrate has heard and dealt with an application or request, unless the Judge or magistrate directs otherwise.

Part 3 – Solemnisation of marriages in Australia

Division 1 – Ministers of religion

Section 34 – Notice of intention to remove person's name from register

This section will specify the means by which a Registrar of Ministers of Religion may notify a person of an intention to remove the person's name from the register of ministers of religion.

Subsection 33(1) of the Act outlines the circumstances in which a Registrar of Ministers of Religion shall remove a person's name from the register of ministers of religion. Paragraph 33(2)(a) of the Act requires the Registrar, before removing the person's name, to serve on the person a written notice stating the intention to remove the person's name and informing the person that the Registrar will consider any representations the person makes before a specified date.

Paragraph 34(a) will apply if the Registrar of Ministers of Religion holds or performs the duties of an office under state or territory law. Generally, a Registrar of Ministers of Religion is the same person who performs state and territory functions as a Registrar of Births, Deaths and Marriages. Paragraph 34(a) will enable such a Registrar to give a notice under paragraph 33(2)(a) of the Act in the same manner as they would give a notice in the course of their state or territory duties—by giving it to the person in any way that they are authorised to give notices under a state or territory law.

Paragraphs 34(b) and 34(c) will respectively provide for a Registrar to send a notice to the person's email address, or to the person's principal residential address (or postal address, if different from the principal residential address).

Section 35 – Notice of removal of name from Register

This section will require a Registrar of Ministers of Religion to notify a person's recognised denomination in writing if the person's name is removed from the register. The notification will be required to take place after the person's name is removed.

This requirement will ensure that the recognised denomination is aware that the person is no longer authorised to solemnise marriages under Part IV of the Act, and can take steps to nominate a replacement person if necessary.

Section 28A of the *Acts Interpretation Act 1901* will be relied on with regards to how the Registrar may give the notice to the recognised denomination. Section 9 of the *Electronic Transactions Act 1999* will be relied on, to enable the notice to be given electronically.

This section will rely on the necessary or convenient power in section 120 of the Act. This section will be complementary to section 33 of the Act, and will provide a recognised denomination with the opportunity to nominate a minister to replace the person who has been removed from the register.

Section 36 – Notice of change of address etc.

This section will specify how a person may notify a Registrar of Ministers of Religion of changes in the person's details or the person's entitlement to exercise functions of a minister of religion for a recognised denomination.

Under subsection 35(1) of the Act, a person must advise the Registrar of Ministers of Religion (who maintains the register on which the person is registered) within 30 days if the

person changes their name, address or designation, or ceases to be a minister for the recognised denomination which nominated them for registration.

Subsection 36(1) will require a person to notify the Registrar of Ministers of Religion of the matters specified in subsection 35(1) of the Act in writing. Subsection 36(2) will further require the person, if their name, address or designation has changed, to specify their name, address and designation both before the change and after the change.

Section 37 – Notice seeking information about ministers of religion

This section will provide for a Registrar of Ministers of Religion to seek information from a recognised denomination about a person listed on the register maintained by the Registrar.

Requiring a recognised denomination to provide information is a coercive power. Generally, coercive powers should be contained in a parent Act, rather than in subordinate legislation (see 7.3.4 of the Guide to Framing Commonwealth Offences). However, this section will be made under paragraph 37(a) of the Act, which envisages regulations establishing a process for a Registrar of Ministers of Religion to receive information from a recognised denomination. Such information is intended to assist the Registrar to determine whether a person should remain registered under Subdivision A of Division 1 of Part IV of the Act.

Additionally, this power will not be new; under regulation 37 of the old regulations, a Registrar of Ministers of Religion may require a recognised denomination to provide a statement containing information. However, the power in section 37 of the Regulations has been revised and is intended to reflect the limitations and safeguards outlined in Chapter 9 of the Guide to Framing Commonwealth Offences.

Subsection 37(1) will provide for a Registrar of Ministers of Religion to, by written notice, require a recognised denomination to give the Registrar specified information about one or more persons whose names are in the register maintained by the Registrar under subsection 27(4) of the Act and who are registered as ministers of religion of the denomination. The written notice must specify a day by which the denomination must provide the information to the Registrar; subsection 37(2) will require this day to be at least 14 days after the notice is given.

Section 28A of the *Acts Interpretation Act 1901* will be relied on with regards to how a recognised denomination must give the information to the Registrar in response to a notice issued under subsection 37(1). Section 9 of the *Electronic Transactions Act 1999* will be relied on, to enable the information to be given electronically.

Subsection 37(3) will limit what the Registrar may require the recognised denomination to provide information about. The Registrar will only be able to require the denomination to provide information about matters affecting the right of the persons named in the notice to be registered.

This provision will depart from the general threshold for issuing a notice: ‘reasonable grounds to believe’ (see 9.1.1 of the Guide to Framing Commonwealth Offences). This is

considered appropriate given the narrowness of who can be required to provide the information—only the person's recognised denomination could be issued with a notice under section 37. Additionally, the information that could be required is limited—only information relevant to the person's registration can be required.

Subsection 37(4) will specify how a recognised denomination complies with a notice issued under subsection 37(1). A member of the denomination will be required to sign the document containing the information in response to the notice and certify that the information is correct.

Section 38 – Annual list of ministers of religion

This section will require a recognised denomination to provide a list to each state and territory Registrar of Ministers of Religion of all persons belonging to the denomination who are listed on the register maintained by the Registrar.

Subsection 38(1) will provide that section 38 applies to a recognised denomination if there are one or more persons who are exercising the functions of a minister of religion of the denomination, and registered as a minister of the denomination under section 30 of the Act, on 1 January of a year. Subsection 38(2) will require the denomination to give to the Registrar of Ministers of Religion for each state and territory a list of each a person residing in that state or territory who meet the requirements of subsection 38(1). The list will be required to specify the full name, address and designation of each person, and explain, if a person's name was on the previous year's list but is not on this year's list, why that person is not on the new list. The denomination will be required to provide this information by 1 February of that year.

Section 28A of the *Acts Interpretation Act 1901* will be relied on with regards to how a recognised denomination must give the list to the Registrar. Section 9 of the *Electronic Transactions Act 1999* will be relied on, to enable the list to be given electronically.

Receiving this annual list is intended to assist each Registrar of Ministers of Religion to maintain their state or territory's register of ministers of religion established under subsection 27(4) of the Act.

Division 2 – Marriage celebrants

Subdivision A – General provisions

Section 39 – Qualifications and skills required of a marriage celebrant

This section will specify requirements the Registrar of Marriage Celebrants must meet when, under paragraph 39C(1)(b) of the Act, determining in writing the qualifications and skills a person must have to be entitled to be registered as a marriage celebrant.

A determination made under paragraph 39C(1)(b) of the Act will be treated as a legislative instrument for the purposes of the *Legislation Act 2003* and will be registered on the Federal Register of Legislation.

Subsection 39(1) will specify matters that must be included in the determination the Registrar makes under paragraph 39C(1)(b) of the Act.

Paragraph 39(1)(a) will require the determination to provide that it is necessary for a person to have at least one of the following:

- a ***Certificate IV in Celebrancy***.

  Subsection 39(2) will define a Certificate IV in Celebrancy as a qualification with that name that is awarded by a registered training organisation or NVR registered training organisation, and includes each unit, and uses all the materials, specified in the determination. The Regulations will use the terms 'registered training organisation' and 'NVR registered training organisation' as defined in the *National Vocational Education and Training Regulator Act 2011*. These different terms will capture all organisations registered on the National Register of Vocational Education and Training regardless of whether the organisation was registered by a state or territory regulator or the National VET Regulator (NVR). Defining Certificate IV in Celebrancy in this manner will ensure that aspiring marriage celebrants must obtain a qualification from an organisation required to meet the *Standards for Registered Training Organisations (RTOs) 2015*, which relevantly include requirements for organisations to ensure trainers are appropriately qualified, with current industry skills. The limb of the definition requiring the Certificate IV in Celebrancy to include the units, and use all materials, specified in the determination is intended to support the requirement in paragraph 39(1)(b).

- a ***celebrancy qualification***.

  Subsection 39(3) will define a celebrancy qualification as a qualification that is awarded by a university specified in the determination, and includes each unit, and uses all the materials, specified in the determination. The limbs of the definition requiring the university to be specified in the determination, and to include the units, and use all materials, specified in the determination, are intended to support the requirements in paragraph 39(1)(d) and (c) respectively.

  Currently, no Australian university offers a celebrancy qualification. Previously, Monash University offered a Graduate Certificate, Graduate Diploma and Masters in Civil Ceremonies. Maintaining the flexibility for the Registrar to specify a celebrancy qualification will ensure that should a university in the future offer a celebrancy qualification, that celebrancy qualification could be added to the determination.

- the ***celebrancy skills***.

  Subsection 39(4) will define celebrancy skills as:

  - fluency in an Indigenous language

- the ability to liaise with clients, and other members of the indigenous community if appropriate, in planning a marriage ceremony
- the ability to conduct a marriage ceremony and to complete and deal with the required documentation in accordance with the Act and this instrument, and
- the ability to communicate effectively.

A person will be required to hold all of the above skills in order to demonstrate that they have the 'celebrancy skills' required by the determination made by the Registrar under paragraph 39C(1)(b) of the Act. This is intended to support the registration of marriage celebrants to service Indigenous communities, without the need for aspiring marriage celebrants to undertake a formal qualification.

Paragraph 39(1)(b) will require the determination to specify any units and materials the Registrar considers necessary to have been included in the Certificate IV in Celebrancy. Paragraph 39(1)(c) will impose the same requirement with respect to a celebrancy qualification. This discretion to specify units and materials will enable the Registrar to ensure that a person is only entitled to be registered as a marriage celebrant on the basis that the qualification the person undertook contained content about conducting a legal marriage ceremony, or referred to materials a marriage celebrant should be familiar with (such as marriage forms or marriage legislation). For example, the current Certificate IV in Celebrancy (CHC41015) contains three units that are focussed on the legal requirements for marriage ceremonies; a Certificate IV in Celebrancy obtained without those units being studied may not be suitable to entitle a person to registration.

Paragraph 39(1)(d) will require the Registrar to include in the determination that a celebrancy qualification must be awarded by a university specified in the determination. Subsection 39(5) will require the Registrar to publish the determination made under paragraph 39C(1)(b) of the Act on the internet and in any other way the Registrar considers appropriate. This will ensure that the qualification requirements for entitlement to be registered as a marriage celebrant can be easily identified by any person.

Section 40 – Minister may determine fees

This section will provide for the Minister to set fees for the registration application fee (as defined in section 5 of the Regulations) and for an application for exemption from paying the registration application fee.

Subsection 40(1) will provide for the Minister to determine the registration application fee by legislative instrument.

Subsection 40(2) will provide for the Minister to determine the ***registration exemption application fee***—a fee to be paid with respect to an application for exemption from liability to pay the registration application fee -by legislative instrument.

The note to subsection 40(1) is intended to refer the reader to the term 'registration application fee', as defined in the definitions in section 5 of the Regulations. Both the notes to subsections 40(1) and (2) are intended to direct the reader to subsection 39D(1D) of the Act, which provides for regulations to specify these fees, or to provide for the Minister to determine these fees by legislative instrument. The notes are not intended to have substantive effect.

These fees are intended to recognise the costs incurred for the work undertaken by the Attorney-General's Department in assessing applications for registration as a marriage celebrant made under subsection 39D(1) of the Act and applications for exemptions from liability made under subsection 41(1) of the Regulations.

Section 41 – Application for exemption from registration application fee

This section will provide for the making of an application for exemption from liability to pay the registration application fee.

Subsection 41(1) will require the application to be made in writing to the Registrar of Marriage Celebrants, if the person believes that the grounds specified in paragraphs 42(2)(a) and (b) might apply to the person. Subsection 41(2) will require the application to be made before the person applies for registration as a marriage celebrant under subsection 39D(1) of the Act. The application for exemption will be required to be accompanied by the registration exemption application fee (defined in subsection 40(2) of the Regulations) and any information or documents that may assist the Registrar in making a decision on the application.

Subsection 41(3) will enable the Registrar to ask an applicant to give the Registrar additional information within a specified period to assist the Registrar in making a decision on the application. The Registrar will be required to make this request by written notice. Section 28A of the *Acts Interpretation Act 1901* will be relied on with regards to how the Registrar gives this notice to the applicant. Section 9 of the *Electronic Transactions Act 1999* will be relied on, to enable the notice to be given electronically.

Following the Registrar requesting additional information under subsection 41(3), the Registrar will not be required to consider the application while waiting for additional information to be provided (subsection 41(4)) and the application will be taken to be withdrawn if the applicant does not provide the additional information within the time specified in the Registrar's written notice or any longer time the Registrar has allowed by a subsequent written notice (subsection 41(5)).

Section 42 – Decision on application for exemption from registration application fee

This section will provide for the circumstances in which the Registrar of Marriage Celebrants may decide to exempt a person from liability to pay the registration application fee.

Subsection 42(1) will clarify that if the Registrar receives an application for an exemption from paying the registration application fee, the Registrar must make a decision on the application.

Subsection 42(2) will provide that the Registrar may grant an exemption from paying the registration application fee if satisfied that the applicant's principal residential address is in a remote area and there is only one other marriage celebrant whose principal residential address is in that same remote area and has the same postcode. The term 'remote area' will be defined in section 5 of the Regulations. This exemption is intended to support remote or very remote communities in Australia that have limited or no existing marriage celebrant services.

The note to subsection 42(2) is intended to direct the reader to section 45 of the Regulations. The note is not intended to have substantive effect.

Subsection 42(3) will require the Registrar to advise the applicant of the decision within 21 days after receiving the application or additional information (where the Registrar requested additional information under subsection 41(3) of the Regulations). The notice advising of the decision will be required to be in writing.

The note to subsection 42(3) is intended to direct the reader to section 50 of the Regulations. The note is not intended to have substantive effect.

Section 43 – Details in register of marriage celebrants

This section will specify what details of a marriage celebrant must be included when registering a person on the register of marriage celebrants established under section 39B of the Act, and when the Registrar of Marriage Celebrants must amend the register.

Subsection 43(1) will specify that, when registering a person under subsection 39D(5) of the Act, the Registrar must enter into the register:

- the person's full name and title
- the person's suburb, town or locality, postcode and state or territory
- any contact details the person wishes to be entered into the register (contact details could include, but are not limited to, an email address or telephone number)
- if the person will conduct religious marriage ceremonies, the religious body or organisation under whose authority the person will conduct such ceremonies, and
- the date the person is registered.

Under subsection 39B of the Act, the Registrar is required to maintain a register of marriage celebrants, and all information contained in the register must be made available on the internet. To meet these requirements, the Registrar must store and disclose personal information about marriage celebrants. Section 43 will require the disclosure of some of this personal information. Requiring details that include personal information to be entered in the

register is intended to ensure members of the public can verify whether a person is registered as a marriage celebrant, and locate the services of, and contact, a marriage celebrant in their local area. The requirement to identify on the register if a marriage celebrant will be performing religious marriage ceremonies, including the religion, is intended to assist members of the public to identify the type of marriage services a marriage celebrant will provide.

This requirement to disclose personal information will not be new; under regulation 37I of the old regulations, the Registrar is required to enter the same personal information about a marriage celebrant in the register, with one difference. This difference will be that the contact details to be entered in the register under paragraph 43(1)(c) will be limited to those contact details a marriage celebrant wishes to be entered in the register, as opposed to all contact details the Registrar holds for the celebrant.

Paragraphs 43(2)(a) to (f) will specify the circumstances in which the Registrar must amend the register. Paragraph 43(2)(a) will require the register to be amended where a marriage celebrant has used the self-service portal to advise the Registrar of a change to the celebrant's details. The self-service portal is an access platform made available by the Registrar via the Attorney-General's Department website. All Commonwealth-registered marriage celebrants with a valid email address are provided with a user ID and password to securely access the portal and its associated services, which include a celebrant managing the details they provide to the Registrar and have published on the register.

Paragraphs 43(2)(b) and (d) will require the register to be amended to reflect any information the marriage celebrant gives to the Registrar about changes to their details or times they will be unavailable. Section 28A of the *Acts Interpretation Act 1901* will be relied on with regards to how the marriage celebrant may give information to the Registrar. Section 9 of the *Electronic Transactions Act 1999* will be relied on, to enable the information to be given electronically.

Paragraph 43(2)(c) will require the correction of any clerical errors in the register of which the Registrar becomes aware.

Paragraph 43(2)(e) and (f) will require the Registrar to remove a marriage celebrant's details from the register if the marriage celebrant notifies the Registrar they no longer wish to be registered or they have become a minister of religion of a recognised denomination, or where the Registrar is satisfied the marriage celebrant has died.

The Act provides for other circumstances in which the register may be amended, such as where a celebrant is suspended or deregistered under paragraphs 39I(2)(c) and (d) of the Act.

Subsection 43(3) will clarify that any amendment to the register under subsection 43(2) takes effect on the day it appears on the register.

Section 44 – Notice of liability for celebrant registration charge

This section will provide additional requirements for a notice about the celebrant registration charge payable for a financial year sent under subsection 39FA(2) of the Act.

Under subsection 39FA(1) of the Act, all persons registered as marriage celebrants on 1 July of a financial year, or who become a marriage celebrant at a later date in the financial year, are liable to pay a celebrant registration charge for that financial year. Subsection 39FA(2) of the Act requires the Registrar of Marriage Celebrants to send a notice to each person liable to pay a celebrant registration charge. Section 39FB of the Act sets out the consequences for failing to pay a celebrant registration charge by the charge payment day—deregistration of the person.

Subsection 44(1) will clarify that a notice sent under subsection 39FA(2) of the Act must comply with subsections 44(2), (3) and (4).

Paragraphs 44(2)(a) to (e) will specify matters which must be stated in the notice (in addition to any matters required by the Act to be included in the notice):

- the person is liable to pay the celebrant registration charge unless they are granted an exemption before the end of the charge payment day (paragraph 44(2)(a))
- the charge amount is a debt the person owes to the Commonwealth and can be recovered by court action (paragraph 44(2)(b))
- the person can seek an exemption under section 48, by making an application and paying any fee imposed for such an application no later than 21 days after the day on which the notice is sent (paragraphs 44(2)(c) and (d)), and
- the person will be deregistered under section 39FB of the Act if the person fails to pay the celebrant registration charge by the charge payment day (paragraph 44(2)(e)).

Requiring these matters to be stated in the notice is intended to ensure that a marriage celebrant understands their liability to pay the celebrant registration charge, the nature of the charge and their ability to apply for an exemption from paying the charge.

Subsection 44(3) will provide that a notice does not need to state the matters specified in paragraphs 44(2) and may instead state that the person is exempt from paying the celebrant registration charge. Subsection 44(3) will only apply where a marriage celebrant is exempt from liability to pay the celebrant registration charge under sections 45 or 46 of the Regulations at the time at which the notice is sent to the celebrant.

Paragraph 39FA(3)(a) of the Act enables regulations to provide for exemptions to be granted from paying the celebrant registration charge. The Regulations will provide two exemptions (sections 45 and 46) that the Registrar will be required to grant automatically if a marriage celebrant meets the relevant criteria. A marriage celebrant may be granted one of these automatic exemptions before being sent a notice about the charge under subsection 39FA(2)

of the Act. Despite the marriage celebrant being exempt from the charge, the Act will still require the Registrar to send the celebrant a notice about the charge. Subsection 44(3) will allow the Registrar to send such a marriage celebrant a notice that reflects the fact that the marriage celebrant has already been granted an exemption.

Subsection 44(4) will specify how the Registrar must send a notice under subsection 39FA(2) of the Act to a marriage celebrant—to the marriage celebrant's email address or, if the Registrar has no email address for the celebrant, the principal residential address or postal address (if different from the residential address). Under this subsection, email will be the default method for sending these notices. This is the most efficient method for the Registrar to send such notices. It will be inferred that a celebrant, by providing an email address to the Registrar, has consented to receiving communications by email. Inferring consent in this manner is consistent with the *Electronic Transactions Act 1999*, which will continue to apply where the Registrar sends a notice under subsection 39FA(2) of the Act to a marriage celebrant's email address.

Section 45 – Automatic exemption from first year of celebrant registration charge—person exempt from registration application fee

This section will provide for a marriage celebrant to be exempt from paying the celebrant registration charge if the celebrant was granted an exemption from the registration application fee under section 42 of the Regulations.

Section 45 will require the Registrar to exempt a person from paying the celebrant registration charge for a financial year where:

- the person became registered as a marriage celebrant in that financial year
- the person was granted an exemption from paying the registration application fee under section 42 of the Regulations, and
- the application in relation to which the person was granted the exemption under section 42 is the same application which led to the person being registered as a marriage celebrant.

This automatic exemption is intended to streamline the exemption process for a person who was granted an exemption under section 42 from paying the registration application fee, and who would likely be eligible for an exemption under section 48 of the Regulations from paying the celebrant registration charge. The application under section 48 would likely be on the same grounds on which the exemption under section 42 of the Regulations was granted (remote area). As such, providing an automatic exemption will prevent the person and the Registrar duplicating effort and work, by collating, submitting and reviewing the same or similar evidence.

The requirement that the section 42 exemption be tied to the person's successful application will avoid a person who made multiple applications to become a marriage celebrant being granted an exemption under section 45 where the application leading to their being registered

was not the application for which they were granted a section 42 exemption. For each subsequent financial year, the marriage celebrant will be required to apply for an exemption and pay the application fee in order to obtain an exemption from paying the celebrant registration charge (unless the exemption in section 46 applies to the celebrant).

A person who is exempt under section 45 will be sent a notice under subsection 39FA(2) of the Act that complies with subsection 44(3) of the Regulations.

No formal merits review mechanism will be available for decisions made under section 45, as such decisions are automatic—the Registrar is required to grant the exemption if the circumstances giving rise to the exemption exist. There will be no exercise of discretion by the Registrar.

The first note to section 45 is intended to direct the reader to paragraph 39FA(3)(a) of the Act, which enables regulations to provide for exemptions to be granted from paying the celebrant registration charge. The second note is intended to acknowledge that section 45 does not require a person to make an application in order to be granted the exemption. The Registrar will already hold all the information necessary to grant the exemption, without an application being made: the date of the person's registration; the information that the person was granted an exemption under section 42; and the information that the application in respect of which the section 42 exemption was granted is the same application that led to the person's registration. Neither note is intended to have substantive effect.

Section 46 – Automatic exemption from celebrant registration charge—person resigns as a marriage celebrant etc.

This section will provide that a marriage celebrant is exempt from paying the celebrant registration charge if the celebrant resigns or becomes a minister of religion of a recognised denomination, provided certain conditions are met.

Section 46 will require the Registrar to exempt a person from paying the celebrant registration charge for a financial year where, before the end of the charge payment day, the person:

- has not paid the charge, and
- notifies the Registrar after the start of the financial year that the person no longer wishes to be registered as a marriage celebrant or has become a minister of religion of a recognised denomination.

This automatic exemption will mean that the Registrar will not be required, under section 39FB of the Act, to deregister a marriage celebrant who resigns or becomes a minister of religion of a recognised denomination prior to the end of the charge payment day for failing to pay the celebrant deregistration charge. Additionally, the person will not owe the amount of the charge as a debt due to the Commonwealth that could be recovered by court action.

Where a person notifies the Registrar in accordance with paragraph 46(b) prior to the person being sent a notice under subsection 39FA(2) of the Act, the person will be sent a notice that complies with subsection 44(3) of the Regulations.

No formal merits review mechanism will be available for decisions made under section 46, as such decisions are automatic—the Registrar is required to grant the exemption if the circumstances giving rise to the exemption exist. There will be no exercise of discretion by the Registrar.

The first note to section 46 is intended to direct the reader to paragraph 39FA(3)(a) of the Act, which enables regulations to provide for exemptions to be granted from paying the celebrant registration charge. The second note is intended to acknowledge that section 46 does not require a person to make an application in order to be granted the exemption. The Registrar will already hold all the information necessary to grant the exemption, without an application being made. Neither note is intended to have substantive effect.

Section 47 – Minister may determine charge exemption application fee

This section will provide for the Minister to determine the ***charge exemption application fee***—a fee to be paid with respect to an application for exemption from liability to pay the celebrant registration charge—by legislative instrument.

The note to section 47 is intended to refer the reader to subsection 39FA(4) of the Act, which provides for regulations to specify this fee, or to provide for the Minister to determine this fee by legislative instrument. The note is not intended to have substantive effect.

This fee is intended to recognise the costs incurred for the work undertaken by the Attorney-General's Department in assessing applications for exemptions from liability made under subsection 48(1) of the Regulations.

Section 48 – Application for exemption from celebrant registration charge

This section will provide for the making of an application for exemption from liability to pay the celebrant registration charge.

Subsection 48(1) will require the application to be made in writing to the Registrar of Marriage Celebrants, if the person believes that one or more of the grounds specified in paragraphs 49(2)(a), (b) or (c) might apply to the person.

Paragraph 48(2)(a) will require the application to be made within 21 days after the day the person is sent a notice under subsection 39FA(2) of the Act. For example, if the person is sent a notice on 1 March, the first day on which the person may make an application is 2 March and the last day on which the person may make an application is 22 March.
Paragraph 48(2)(b) will require the application for exemption to be accompanied by the registration exemption application fee (defined in subsection 47 of the Regulations) and any information or documents that may assist the Registrar in making a decision on the application.

Subsection 48(3) will enable the Registrar to ask an applicant to give the Registrar additional information within a specified period to assist the Registrar in making a decision on the application. The Registrar will be required to make this request by written notice. Section 28A of the *Acts Interpretation Act 1901* will be relied on with regards to how the Registrar gives this notice to the applicant. Section 9 of the *Electronic Transactions Act 1999* will be relied on, to enable the notice to be given electronically.

Following the Registrar requesting additional information under subsection 48(3), the Registrar will not be required to consider the application while waiting for additional information to be provided (subsection 48(4)) and the application will be taken to be withdrawn if the applicant does not provide the additional information within the time specified in the Registrar's written notice or any longer time the Registrar has allowed by a subsequent written notice (subsection 48(5)).

Section 49 – Decision on application for exemption from celebrant registration charge

This section will provide for the ground upon which the Registrar of Marriage Celebrants may decide to exempt a person from liability to pay the celebrant registration charge.

Subsection 49(1) will clarify that if the Registrar receives an application for an exemption from paying the registration application fee, the Registrar must make a decision on the application.

The note to subsection 49(1) is intended to direct the reader to paragraph 39FA(3)(a) of the Act, which enables regulations to provide for exemptions to be granted from paying the celebrant registration charge. The note is not intended to have substantive effect.

Paragraph 49(2)(a) to (c) will specify grounds on which, if the Registrar is satisfied the ground exists, the Registrar may grant an exemption from paying the celebrant registration charge.

Paragraph 49(2)(a) will provide that a ground for an exemption is that the applicant's principal residential address is in a remote area and there is only one other marriage celebrant whose principal residential address is in that same remote area and has the same postcode. The term 'remote area' will be defined in section 5 of the Regulations. This ground is intended to support remote or very remote communities in Australia that have limited or no existing marriage celebrant services.

Paragraph 49(2)(b) will provide that a ground for an exemption is that the applicant will not reside in Australia during the financial year. This ground will allow a marriage celebrant to obtain an exemption if work, travel or other circumstances require them to reside outside Australia for a financial year. The ground will not be available if the celebrant spends any part of the financial year in Australia.

Paragraph 49(2)(c) will provide that a ground for an exemption is that the applicant will be unable to perform as a marriage celebrant for at least 6 months of the financial year due to serious illness or caring responsibilities. This ground will allow a celebrant to obtain an

exemption where their personal circumstances are such that they are will be substantially unlikely to solemnise, or would have difficulty solemnising, marriages in the financial year.

The grounds in paragraphs 49(2)(b) and (c) are not intended to allay financial hardship experienced by marriage celebrants, but to enable a celebrant who is unlikely to solemnise, or would have difficulty solemnising, marriages during a financial year to remain registered. Without the exemption, a celebrant who will be overseas, or unable to solemnise marriages due to serious illness or caring responsibilities, would be required to choose between maintaining their registration by paying the celebrant registration charge or not paying the charge and consequently being deregistered under section 39FB of the Act. A marriage celebrant applying on these grounds will be seeking relief from paying the charge for the remainder of the financial year to which the charge relates, and as such would be expected to, at the time of making the application, be able to demonstrate that the circumstances or facts supporting one of these grounds already exist.

Subsection 49(3) will require the Registrar to advise the applicant of the decision within 21 days after receiving the application or additional information (where the Registrar requested additional information under subsection 48(3) of the Regulations). The notice advising of the decision will be required to be in writing.

The note to subsection 49(3) is intended to direct the reader to section 50 of the Regulations, which provides for internal review of a decision made under section 49. The note is not intended to have substantive effect.

Section 50 – Internal review of decision to refuse to grant certain exemptions

This section will provide for internal review of decisions refusing to grant exemptions under sections 42 and 49 of the Regulations.

Decisions to grant exemptions under section 42 and 49 of the Regulations will affect the interests of the persons who applied for those exemptions. Refusal to grant the exemption means that the person will either be required to pay a registration application fee in order to make an application to become a marriage celebrant under section 39D of the Act, or will remain liable to pay a celebrant registration charge with the potential consequence of deregistration under section 39FB of the Act if the person fails to pay the charge. The formal internal merits review mechanism is intended to safeguard the decision-making process, by ensuring that the correct or preferable decision is made. External merits review of these decisions will not be available as the costs associated with external review would outweigh the benefits of providing it, particularly as the costs may be higher than the registration application fee and celebrant registration charge which the person is seeking an exemption from paying.

Subsection 50(1) will provide that an application for internal review must be made to the Registrar of Marriage Celebrants and must be made in writing. An application will be for a review of the original decision: the decision to refuse to grant an exemption from liability to

pay a registration application fee under section 42; or the decision to refuse to grant an exemption from liability to pay the celebrant registration charge under section 49.

Subsection 50(2) will require the application to set out the reasons for making the application and to be made within 14 days after the day the person received notice of the original decision. For example, if the person receives notice of the original decision on 1 March, the first day on which the person may apply is 2 March and the last day is 15 March.

Subsection 50(3) will require the Registrar to ensure that the Australian Public Service employee conducting the internal review has a classification that is equivalent to or higher than the classification of the original decision-maker.

Subsection 50(4) will enable the internal reviewer to ask an applicant to provide additional information within a specified period to assist the internal reviewer in making a decision on the application. The internal reviewer will be required to make this request by written notice.

Following the internal reviewer requesting additional information under subsection 50(4), the internal reviewer will not be required to consider the application while waiting for additional information to be provided (subsection 50(5)) and the application will be taken to be withdrawn if the applicant does not provide the additional information within the time specified in the internal reviewer's written notice or any longer time the internal reviewer has allowed by a subsequent written notice (subsection 50(6)).

Where the internal review is of a decision made under section 42 of the Regulations, subsection 50(7) will provide that the internal reviewer must either confirm the original decision or grant an exemption under section 42 with effect from the time the internal review decision is made. Where the internal review is of a decision made under section 49 of the Regulations, subsection 50(8) will provide that the internal reviewer must either confirm the original decision or grant an exemption under section 49 with effect from the time the original decision was made. The differing points in time for when internal review decisions takes effect will reflect the different requirements of paragraphs 39D(1E)(b) and 39FA(5)(b) of the Act.

Subsection 50(9) will require the internal reviewer to advise the person of the internal review decision within 21 days after receiving the application or additional information (where the internal reviewer requested additional information under subsection 50(4) of the Regulations). The notice advising of the decision will be required to be in writing.

Section 51 – Notice about non-payment of celebrant registration charge

This section will provide additional requirements for a notice about non-payment of the celebrant registration charge payable for a financial year sent under subsection 39FB(1) of the Act.

Under subsection 39FB(1) of the Act, the Registrar of Marriage Celebrants must send a notice to all persons who were liable to pay the celebrant registration charge and have not paid the charge at the end of the charge payment day (unless the Registrar considers the

person's liability may be affected by an internal review or other circumstances of which the Registrar is aware). Subsection 39FB(3) of the Act requires the Registrar to deregister a person who fails to pay the celebrant registration charge by the charge payment day.

Subsection 51(1) will specify that a notice sent under subsection 39FB(1) of the Act must comply with subsections 51(2) and (3).

Subsection 51(2) will require the notice to state (in addition to any matters required by the Act to be included in the notice) that the person may apply to the Administrative Appeals Tribunal (AAT) for review of the Registrar's decision under subsection 39FB(3) of the Act to deregister the person. Paragraph 39J(1)(c) of the Act provides a person with a right to apply to the AAT to review a decision to deregister a person. This requirement is intended to ensure that a marriage celebrant is aware of their right to seek review.

Subsection 51(3) will specify how the Registrar must send a notice under subsection 39FB(1) of the Act to a marriage celebrant—to the marriage celebrant's email address or, if the Registrar has no email address for the celebrant, the principal residential address or postal address (if different from the residential address). Under this subsection, email will be the default method for sending these notices. This is the most efficient method for the Registrar to send such notices. It will be inferred that a celebrant, by providing an email address to the Registrar, has consented to receiving communications by email. Inferring consent in this manner is consistent with the *Electronic Transactions Act 1999*, which will continue to apply where the Registrar sends a notice under subsection 39FA(2) of the Act to a marriage celebrant's email address.

Section 52 – Code of Practice for marriage celebrants

This section will indicate that the Code of Practice for marriage celebrants, envisaged by paragraph 39G(1)(a) of the Act, is set out in Schedule 2 of the Regulations.

Paragraph 39G(1)(a) of the Act requires a marriage celebrant to conduct themselves in accordance with the Code of Practice prescribed by regulations.

Section 53 – Professional development for marriage celebrants

This section will establish the requirements the Registrar of Marriage Celebrants must meet when specifying professional development activities marriage celebrants will be required to undertake in accordance with paragraph 39G(1)(b) of the Act.

Subsection 53(1) will provide that a marriage celebrant must, each calendar year, undertake professional development activities that take at least five hours to complete and include any activity identified as compulsory for the year. The professional development activities will be required to be on the list published by the Registrar under subsection 53(3). Subsection 53(2) will clarify that a marriage celebrant is not required to comply with the requirements of subsection 53(1) for a year if the celebrant is granted an exemption under section 54, 55 or 58 of the Regulations.

Subsection 53(3) will require the Registrar to publish a written statement setting out a list of professional development activities which marriage celebrants may undertake during the year and specifying which, if any, of those activities are compulsory. Paragraph 53(3)(b) will make clear that there is a limit of two compulsory activities for a year. The statement will be required to be published as soon as practicable after the start of each calendar year. For the first calendar year in which these Regulations operate, this requirement will be as soon as practicable after the commencement date of the Regulations (1 April 2018). Subsection 53(6) will allow the Registrar to add activities to this list throughout the year, but the Registrar will not be able to add a compulsory activity later in the year.

Subsection 53(5) will require the Registrar to publish the statement on the internet (for example, on the Attorney-General's Department website) and in any other way the Registrar considers appropriate (for example, via a newsletter or circular to all marriage celebrants).

In publishing the list of professional development activities, under subsection 53(4) the Registrar will be able to, at their discretion, include information about: the ways in which the activities may be undertaken (for example, if the activity is delivered online or through visual media (such as a DVD) or requires physical attendance); who may provide the activity (for example, if marriage celebrants may only undertake an activity if it is taught by a specific organisation); and any other information the Registrar considers appropriate.

Subsection 53(7) will provide that the statement published under subsection 53(3) is not a legislative instrument. Subsection 53(7) has no legal effect due to the operation of the *Legislation Act 2003*. This statement will be rectified at the first practicable opportunity, to ensure that the text of section 53 reflects the legal effect of section 8 of the *Legislation Act 2003*. A statement under subsection 53(3) will be treated as a legislative instrument for the purposes of the *Legislation Act 2003* and will be registered on the Federal Register of Legislation.

Section 54 – Automatic exemption from undertaking professional development activities for certain marriage celebrants

This section will provide for a marriage celebrant to be exempt from the requirement in subsection 53(1) of the Regulations to undertake professional development activities for a calendar year if the celebrant was registered in that year, provided certain conditions are met.

Subsection 54(1) will require the Registrar of Marriage Celebrants to exempt a person from the requirement to undertake professional development activities for a calendar year where the person:

- became registered as a marriage celebrant in the calendar year, and
- was awarded a Certificate IV in Celebrancy in the 12 month period ending on the day the person was registered.

The first note to subsection 54(1) is intended to direct the reader to paragraph 39G of the Act, which places an obligation on marriage celebrants to undertake professional development

activities as required by the Registrar in accordance with regulations. The second note is intended to acknowledge that section 54 does not require a person to make an application in order to be granted the exemption. The Registrar will already hold all the information necessary to grant the exemption, without an application being made. Neither note is intended to have substantive effect.

No formal merits review mechanism will be available for decisions made under subsection 54(1), as such decisions are automatic—the Registrar is required to grant the exemption if the circumstances giving rise to the exemption exist. There will be no exercise of discretion by the Registrar.

Subsection 54(2) will require the Registrar to advise the person in writing of the decision to grant them this exemption. In practical terms, this notification will take place at the same time the person is advised that they have been registered as a marriage celebrant under subsection 39D(5) of the Act.

Section 55 – Exemption from undertaking professional development activities for late year registration

This section will provide for the Registrar of Marriage Celebrants to grant a marriage celebrant an exemption from the requirement in subsection 53(1) of the Regulations to undertake professional development activities for a year if the Registrar is satisfied of certain matters.

Subsection 55(1) will enable the Registrar to exempt a person from the requirement to undertake professional development activities for a calendar year where the Registrar is satisfied that, due to the date the person became registered as a marriage celebrant, it would be onerous for that person to be required to undertake the professional development activities. It is not intended that this exemption be available for calendar years other than the year in which the person was registered. In recent years, under the equivalent exemption in regulation 37MB of the old regulations, the Registrar would generally exempt any person who became registered on or after a particular date late in a calendar year.

The first note to subsection 55(1) is intended to direct the reader to paragraph 39G of the Act, which places an obligation on marriage celebrants to undertake professional development activities as required by the Registrar in accordance with regulations. The second note is intended to acknowledge that section 55 does not require a person to make an application in order to be granted the exemption. The Registrar will already hold all the information necessary to grant the exemption, without an application being made, from the application process. Neither note is intended to have substantive effect.

No formal merits review mechanism will be available for decisions made under subsection 55(1). As the basis for the exemption will be on the basis that undertaking professional development activities will be onerous due to the date of registration, to provide a formal review mechanism for persons registered the day before the date selected by the Registrar, or on an earlier day in the calendar year, may reduce the timeframe within which

those persons must complete activities if the review is unsuccessful. However, the Regulations will not preclude the Registrar or the Attorney-General's Department establishing an administrative internal review process.

Subsection 55(2) will require the Registrar to advise the person in writing of the decision to grant them this exemption. In practice, this notification will take place at the same time the person is advised that they have been registered as a marriage celebrant under subsection 39D(5) of the Act.

Section 56 – Minister may determine professional development exemption application fee

This section will provide for the Minister to determine the professional development exemption application fee—a fee to be paid with respect to an application for exemption from the requirement in subsection 53(1) to undertake professional development activities—by legislative instrument.

The purpose of this fee is to partially recover the costs incurred by the Commonwealth in assessing applications for exemptions made under subsection 57(1) of the Regulations.

Section 57 – Application for exemption from undertaking professional development activities

This section will provide for the making of an application for exemption from the requirement to undertake professional development activities.

Subsection 57(1) will require the application to be made in writing to the Registrar of Marriage Celebrants, if the person believes that they will not be able to comply with the requirement to undertake professional development activities under subsection 53(1) for the year owing to exceptional circumstances. Paragraph 57(2)(a) will require the application to be made during the calendar year for which the exemption is being sought.

The note to subsection 57(1) is intended to direct the reader to paragraph 39G of the Act, which places an obligation on marriage celebrants to undertake professional development activities as required by the Registrar in accordance with regulations.

Paragraph 57(2)(b) will require the application to explain the exceptional circumstances the person is relying on, and paragraph 57(2)(c) will require the application to be accompanied by the professional development exemption application fee (defined in subsection 56 of the Regulations) and any information or documents that may assist the Registrar in making a decision on the application.

Subsection 57(3) will enable the Registrar to ask an applicant to give the Registrar additional information within a specified period to assist the Registrar in making a decision on the application. The Registrar will be required to make this request by written notice.

Following the Registrar requesting additional information under subsection 57(3), the Registrar will not be required to consider the application while waiting for additional information to be provided (subsection 57(4)). The application will be taken to be withdrawn if the applicant does not provide the additional information within the time specified in the

Registrar's written notice or any longer time the Registrar has allowed by a subsequent written notice (subsection 57(5)).

Section 58 – Decision on application for exemption from undertaking professional development activities

This section will provide for the Registrar of Marriage Celebrants to decide whether to exempt a person from the requirement under subsection 53(1) to undertake professional development activities.

Subsection 58(1) will clarify that if the Registrar receives an application for an exemption from paying the registration application fee, the Registrar must make a decision on the application.

The note to subsection 58(1) is intended to direct the reader to paragraph 39G of the Act, which places an obligation on marriage celebrants to undertake professional development activities as required by the Registrar in accordance with regulations.

Subsection 58(2) will provide that the Registrar may grant the exemption if satisfied that due to exceptional circumstances the person has not been or will not be able to meet the requirements of subsection 53(1) (to undertake five hours of professional development activities in a calendar year, including any compulsory activities). Exceptional circumstances may include serious illness, ongoing health problems or carer responsibilities which prevented the person from meeting the professional development requirements for a significant proportion of the year. Generally, it is not intended that circumstances such as remoteness, financial hardship, short term or temporary illness, being inactive as a marriage celebrant or long term absence from Australia will be considered exceptional circumstances warranting an exemption from professional development requirements. Similarly, an unforeseen short-term issue that arises late in the calendar year is not intended to be considered an exceptional circumstance.

Subsection 58(3) will require the Registrar to advise the applicant of the decision. The notice advising of the decision will be required to be in writing.

No formal merits review mechanism will be available for decisions made under section 58. An application under section 57 will be able to be made at any point in a calendar year. As such, the later an application is made in the calendar year, the greater the chance the person may be in a position where they are unable to comply with the professional development requirements if the application for exemption is refused. Providing formal merits review mechanisms may further reduce the timeframe within which a person must comply with the requirements if the review is unsuccessful. However, the Regulations will not preclude the Registrar or the Attorney-General's Department establishing an administrative internal review process. In relation to the current equivalent exemption available under regulation 37MA of the old regulations, the department has put in place processes (such as factsheets and newsletters) to encourage marriage celebrants to apply for an exemption

sufficiently early that if the exemption is refused, a celebrant may still be able to comply with the professional development requirements.

Section 59 – Performance reviews

This section will specify the matters the Registrar of Marriage Celebrants must consider when conducting a performance review of a marriage celebrant under section 39H of the Act and requirements the Registrar must comply with at the conclusion of a performance review.

Paragraphs 59(1)(a) to (h) will specify the matters the Registrar must consider when reviewing the performance of a marriage celebrant for a period under subsection 39H(1) of the Act:

- any complaint about the marriage celebrant the Registrar has dealt with during the period (paragraph 59(1)(a))
- any disciplinary measure taken against the marriage celebrant during the period and whether the celebrant complied with any such disciplinary measure (paragraphs 59(1)(b) and (c))
- whether the marriage celebrant complied with any requirements imposed by the Registrar or any undertakings given by the celebrant during the period (paragraph 59(1)(d))
- any information about the marriage celebrant's performance of their duties received by the Registrar during the period (paragraph 59(1)(e))
- whether the marriage celebrant complied with a Code of Practice that applied at any time during the period—for example, if a period contains any time before the commencement of these Regulations, compliance with the Code of Practice that applied at that time will be considered (paragraph 59(1)(f))
- whether the marriage celebrant has undertaken the professional development activities required for the calendar year ending before the end of the period (paragraph 59(1)(g)), and
- whether the marriage celebrant has developed any physical, intellectual or mental disability that prevents the celebrant from being able to continue to carry out the duties of a celebrant (paragraph 59(1)(h)).

Subsection 59(2) will require the Registrar to advise the marriage celebrant in writing of the outcome of the performance review as soon as practicable after completing the review. Subsection 39H(4) of the Act establishes processes where the Registrar is considering finding a celebrant's performance not satisfactory, including seeking and considering any representations from the celebrant prior to making a final decision.

Section 60 – Disciplinary measures

This section will specify that the Registrar can impose any one or more of the following as a professional development activity a marriage celebrant must undertake as a disciplinary measure for the purposes of paragraph 39I(2)(b) of the Act:

- one or more professional development activities included in the statement published by the Registrar under subsection 53(3) of the Regulations
- a Certificate IV in Celebrancy (as defined in subsection 39(2) of the Regulations)
- a celebrancy qualification (as defined in subsection 39(3) of the Regulations), and
- a unit in a Certificate IV in Celebrancy or celebrancy qualification.

Section 61 – Records to be kept by Registrar of Marriage Celebrants

This section will require the Registrar of Marriage Celebrants to keep a copy of the following documents for the purposes of paragraph 39K(b) of the Act:

- any application for, and notice, of registration—the use of 'any' is intended to accommodate marriage celebrants appointed prior to 1 September 2003, who were authorised under subsection 39(2) of the Act and as such did not make an application or receive a notice of registration (paragraphs 61(a) and (b))
- any notice of intention to find a marriage celebrant's performance unsatisfactory given under paragraph 39H(4)(a) of the Act and any representation made by a marriage celebrant, in response to such a notice, considered by the Registrar under paragraph 39H(4)(b) of the Act ((paragraphs 61(c) and (d))
- any written determination under paragraph 39H(4)(c) that a marriage celebrant's performance was not satisfactory (paragraph 61(e))
- any notice of the outcome of a performance review given under subsection 59(2) of the Regulations or subregulation 37N(3) of the old regulations (paragraph 61(f))
- any notice of disciplinary measures given under subsection 39I(4) of the Act (paragraph 61(g)), and
- any notice of determination in relation to a complaint given under subsections 68(5) or 69(2) of the Regulations or subregulations 37(1) or (2) of the old regulations (paragraphs 61(h) and (i)).

The requirement to collect and store these documents—which may contain personal information—is intended to assist the Registrar in carrying out their functions as the regulator of marriage celebrants. This requirement will not be new; under regulation 37P of the old regulations, the Registrar is required to keep the same documents. Generally, any personal information contained in these documents will have been provided by the marriage celebrant. If the personal information was not provided by the celebrant, the celebrant will be aware that the Registrar holds the information. For example, if under subsection 39H(3) of the Act the

Registrar considers a physical disability of a celebrant when reviewing the celebrant's performance, as required by paragraph 59(1)(h) of these Regulations, the celebrant will be made aware of this upon receiving the notice issued under subsection 59(2) of the Regulations.

As is current practice, it is intended that the documents will be kept on a secure database maintained by the Registrar and the Attorney-General's Department, and only departmental officers directly involved with the regulation of marriage celebrants will be given access to the database.

Subdivision B – Complaints resolution procedures

Section 62 – Complaints resolution procedures for complaints relating to marriage celebrants

This section will require the Registrar of Marriage Celebrants to establish complaints resolution procedures that are consistent with Subdivision B of Division 2 of Part 3 of these Regulations. Under paragraph 39K(c) of the Act, the Registrar must establish complaints resolution procedures to resolve complaints about the solemnisation of marriages by marriage celebrants. The requirements to solemnise a marriage which a marriage celebrant must meet are set out in Division 2 of Part IV of the Act.

Subdivision B of Division 2 of Part 3 of these Regulations will establish the minimum requirements that the complaints resolution procedures must meet. It is intended that, if desired, the Registrar can establish a procedure with additional requirements, provided the additional requirements are not inconsistent with those set out below. It is envisaged that any additional requirements added to the procedure by the Registrar will reflect key administrative law principles, such as natural justice and procedural fairness.

Section 63 – Approved form for complaint

This section will require a complaint about the solemnisation of a marriage by a marriage celebrant to be made using an approved form, if one exists. Subsection 63(2) will empower the Registrar to approve a form for the purposes of subsection 63(1), at their discretion.

Approving such a form would mean that the Registrar can make clear to, and obtain from, complainants the information required to consider a complaint.

Section 64 – Registrar may request more information

This section will enable the Registrar, at their discretion, to request further information in relation to a complaint from the complainant. For example, the Registrar may request copies of email correspondence between the complainant and the marriage celebrant.

Section 65 – Decision on whether to deal with complaint

This section will require the Registrar of Marriage Celebrants to decide whether to deal with a complaint, and specify the reasons why the Registrar may decide not to deal with a complaint.

Subsection 65(1) will require the Registrar to make a decision on whether to deal with a complaint and to make this decision as soon as practicable after receiving the complaint.

Paragraphs 65(2)(a) to (h) will identify various reasons why the Registrar may choose not to deal with a complaint. It is not intended that the Registrar must refuse to deal with the complaint if one or more of these is present; it is a matter for the Registrar's discretion whether the complaint should be dealt with. The Registrar will be able to decide not to deal with a complaint if they are satisfied that:

- the approved form for complaints has not been used, if one has been approved under subsection 63(2) (paragraph 65(2)(a)). It is intended that an approved form would require a complainant to provide the minimum information needed by the Registrar to deal with a complaint. As such, where there is an approved form, a complaint not made using that form may lack the information needed by the Registrar to deal with the complaint.

- the complaint is not about the solemnisation of a marriage by a marriage celebrant (paragraph 65(2)(b)). The complaint resolution procedures to be established under paragraph 39K(c) of the Act are limited to complaints about the solemnisation of marriages by marriage celebrants. Division 2 of Part IV of the Act sets out the requirements to solemnise a marriage. This reason would also enable the Registrar to refuse to deal with a complaint where a marriage was solemnised by a person who was not a marriage celebrant, in recognition that the Registrar does not regulate other categories of authorised celebrants.

- the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith (paragraph 65(2)(c)).

- the complainant does not have a sufficient interest in the subject matter of the complaint (paragraph 65(2)(d)). For example, if the complainant is dissatisfied with the quality of service provided by the marriage celebrant and has only made the complaint in order to obtain a refund (the Registrar will not have the power to order a celebrant to provide a refund or compensation).

- the complainant became aware of the subject matter of the complaint more than three months before making the complaint (paragraph 65(2)(e)). For example, a marriage celebrant who solemnises a large number of marriages may have difficulty recalling details of a marriage that took place a significant time in the past.

- the substance of the complaint was the subject of a previous complaint (paragraph 65(2)(f)). For example, this reason is intended to capture situations where the Registrar receives multiple complaints on the same matter from different persons, or a person dissatisfied with the outcome of a previous complaint seeks to have the matter reconsidered as a new complaint.

- the complaint is the subject of a legal proceeding or another complaints resolution procedure (paragraph 65(2)(g)). For example, dealing with a complaint in such a situation may jeopardise the other proceeding. Additionally, the Registrar may prefer to make use of the outcome of such a proceeding under section 39I of the Act, without the need to undertake the full complaint resolution process.

- the subject matter of the complaint would be more appropriately dealt with by another person or body (paragraph 65(2)(h)). For example, a complaint raising issues of visa fraud (such as contrived marriage) may be more appropriately dealt with by the Department of Immigration and Border Protection.

Subsection 65(3) will require the Registrar to give the complainant a written notice advising whether or not the Registrar will deal with the complaint, and the reasons for the Registrar's decision.

No formal merits review mechanism will be available for decisions made under subsection 65(1). Decisions under subsection 65(1) will be of a law enforcement nature, as they are decisions about undertaking an investigation into whether a marriage celebrant has failed to meet the requirements for solemnising a marriage under Division 2 of Part IV of the Act. The discontinued Administrative Review Council has indicated that decisions of a law enforcement nature should not be made subject to merits review (Administrative Review Council, *What decisions should be subject to merit review?* 1999).

Section 66 – Ceasing to deal with complaints in certain circumstances

This section will enable the Registrar of Marriage Celebrants to decide not to continue to deal with a complaint or to temporarily cease dealing with a complaint.

Paragraph 66(1)(a) will enable the Registrar to decide not to continue to deal with a complaint for any of the reasons set out in subsection 65(2). For example, this will enable the Registrar to stop the complaints process where, partway through the process, information comes to the Registrar's attention that would have caused the Registrar to decide not to deal with the complaint under subsection 65(1), had the Registrar had that information at the time of making the decision under subsection 65(1). The Registrar will only be able to stop dealing with a complaint under paragraph 66(1)(a) if the complaint process has not reached the point where the Registrar has made a determination under paragraph 68(2)(c).

Paragraph 66(1)(b) will enable the Registrar to temporarily cease to deal with a complaint while the subject matter of the complaint is being dealt with by another person or body. For example, if a complaint raises issues relating to consumer law, and the complainant is pursuing a separate complaint process with a consumer affairs or fair trading body, the Registrar may wish to delay dealing with the complaint until the outcome of the consumer affairs or fair trading body's process is known. The Registrar will only be able to temporarily cease dealing with a complaint under paragraph 66(1)(b) if the complaint process has not reached the point where the Registrar has made a determination under paragraph 68(2)(c).

Subsection 66(2) will apply if the Registrar stops dealing with a complaint under paragraph 66(1)(a). The Registrar will be required to give a written notice to the complainant and the marriage celebrant (who the complaint is about) advising that the Registrar has decided not to continue to deal with the complaint. As a matter of good administrative practice, the Registrar should indicate the reason (one of those listed in subsection 65(2)) for this decision.

Subsection 66(3) will apply if the Registrar temporarily ceases dealing with a complaint under paragraph 66(1)(b). The Registrar will, at their discretion, be able to give a written notice to both, or one of, the complainant and the marriage celebrant (who the complaint is about) advising that the Registrar has decided to not deal with the complaint while the subject matter of the complaint is being considered by another person or body. The Registrar will need to consider it appropriate in all the circumstances to give this written notice; for example, it may not be appropriate where the other body is a law enforcement body, and notifying the celebrant of this fact may jeopardise an investigation by that body.

No formal merits review mechanism will be available for decisions made under subsection 66(1). Decisions under paragraph 66(1)(a) will be of a law enforcement nature, as they are decisions about undertaking an investigation into whether a marriage celebrant has failed to meet the requirements for solemnising a marriage under Division 2 of Part IV of the Act. Decisions under paragraph 66(1)(b) will be preliminary or procedural decisions, as they will simply delay the complaints process and the making of a substantive decision. The discontinued Administrative Review Council has indicated that decisions of a law enforcement nature and preliminary or procedural decisions are unsuitable for merits review (Administrative Review Council, *What decisions should be subject to merit review?* 1999).

Section 67 – Notice to marriage celebrant if Registrar decides to deal with complaint

This section will require the Registrar of Marriage Celebrants to give a written notice to a marriage celebrant if the Registrar decides to deal with a complaint about the celebrant.

Subsection 67(1) will require the Registrar to give a written notice about a complaint to the marriage celebrant concerned, stating that the Registrar has decided to deal with the complaint under subsection 65(1). Under paragraphs 67(1)(a) and (c) to (e), the notice must inform the marriage celebrant that:

- the Registrar is dealing with the complaint and invite the celebrant to give the Registrar a written response to the complaint (paragraphs 67(1)(a) and (c))
- the complainant may be given a copy of any written response the celebrant makes and materials accompanying that response (paragraph 67(1)(d)), and
- the Registrar may continue to deal with the complaint without further notice to the celebrant if a written response is not received by the date specified in the notice (this will ensure that the process for dealing with a complaint is not unnecessarily delayed by a celebrant's failure to acknowledge or respond to a notice) (paragraph 67(1)(e)).

Paragraph 67(1)(b) will require the notice to be accompanied by a copy of the complaint and any material that accompanied the complaint.

In providing the complaint and any material accompanying it to the marriage celebrant, or the celebrant's written response and any material accompanying it to the complainant, it is intended that any contact details be redacted (paragraphs 67(1)(b) and (d)).

Subsection 67(2) will clarify that, despite the requirement in paragraph 67(1)(b) to provide a copy of the complaint and accompanying materials to the marriage celebrant, the Registrar can provide an extract of the complaint or materials. This will provide the Registrar with flexibility to ensure that the celebrant is provided with sufficient information to respond to the complaint, whilst protecting the complainant's privacy (for example, if the complaint contains personal or sensitive information) or avoiding unnecessarily providing inflammatory material to the celebrant (for example, where a complainant has expressed strong derogatory opinions about a celebrant that are not relevant to the subject matter of the complaint). The Registrar will have the same flexibility in relation to providing the celebrant's response to the complainant, as paragraph 67(1)(d) will give the Registrar discretion to decide whether to provide these documents.

Subsection 67(3) will specify additional requirements for the notice given under subsection 67(1), in relation to the invitation in the notice for the marriage celebrant to respond to the complaint. Paragraph 67(3)(a) will require the notice to specify the day by which the Registrar must receive the celebrant's response; this day will be required to be at least 21 days after the date of the notice. Paragraph 67(3)(b) will allow the celebrant to request, before the day specified in the notice, additional time to respond to the complaint. Paragraph 67(3)(c) will clarify that the response may be accompanied by supporting material, such as signed witness statements.

Section 68 – Procedure after notice given to marriage celebrant

This section will establish the minimum procedural steps the Registrar of Marriage Celebrants must take after giving a notice to a marriage celebrant under subsection 67(1) of the Regulations.

Subsection 68(1) will clarify that section 68 will only apply if a marriage celebrant has been invited, via a notice sent under subsection 67(1), to provide a written response to a complaint. This will ensure that the Registrar will only be able to make a determination about a complaint where a celebrant has been given an opportunity to review and respond to the complaint.

Paragraphs 68(2)(a) to (d) will require the Registrar to perform the following actions as soon as practicable after receiving a written response to the complaint from the marriage celebrant:

- consider the complaint and material given to the Registrar by the complainant and marriage celebrant and any other written information held by the Registrar that is relevant to the complaint (paragraphs 68(2)(a) and (b)). The term 'material' is intended to be read broadly, to capture any written response provided by the celebrant.

- determine whether the Registrar is satisfied that the marriage celebrant has contravened, or committed an offence against, a provision of the Act, these Regulations, or the old regulations, on the basis of the complaint, material and information considered above (paragraph 68(2)(c)). Where the subject matter of the complaint occurred prior to the commencement of these Regulations, it is intended that the Registrar consider whether the celebrant contravened the old regulations; where the conduct occurred following the commencement of these Regulations, it is intended the Registrar consider whether the celebrant contravened these Regulations.

- decide whether it is appropriate to take disciplinary measures against the marriage celebrant and/or take any other action in relation to the complaint, if the Registrar is satisfied that the celebrant has contravened, or committed an offence against, a provision of the Act, these Regulations, or the old regulations (paragraph 68(2)(d)). The disciplinary actions the Registrar will be able to take are established by subsection 39I(2) of the Act. Other action the Registrar will be able to take will include a request or recommendation that the celebrant modify their marriage celebrancy practice; for example, a recommendation that a celebrant ensure couples sign particular forms (such as the Declaration of No Legal Impediment to Marriage form) closer to the marriage ceremony.

Clause 11.6 of the *Criminal Code Act 1995* will apply to the reference to 'offence' in paragraphs 68(2)(c) and (d), with the effect that these references will capture ancillary offences (such as attempt, incitement and conspiracy) against the Criminal Code.

The Regulations will not require the Registrar to consult with a marriage celebrant before making a decision under subparagraph 68(2)(d)(i) whether to impose a disciplinary measure. This will reflect that the Regulations will specify the minimum requirements that the complaint resolution procedure established by the Registrar under paragraph 39K(c) of the Act must meet. This will be consistent with the legislative requirements for other situations where disciplinary measures may be imposed, such as failure to comply with the obligation to undertake professional development activities (see paragraphs 39G(1)(b) and 39I(1)(b) of the Act) or in relation to performance reviews (see section 39H and paragraph 39I(1)(c) of the Act). In both of these situations, there is no legislative requirement to consult prior to imposing a disciplinary measure. However, as a matter of good administrative practice, the Registrar generally consults marriage celebrants prior to imposing disciplinary measures, particularly where more harsh measures (such as suspension or deregistration) are being considered.

Subsection 68(3) will restrict the Registrar to only considering the parts of the complaint and/or accompanying material provided by the complainant that were given to the marriage celebrant. The Registrar will not be able to consider any part of the complaint and/or accompanying material that was not provided to the celebrant. This will ensure that when the Registrar determines whether the celebrant has contravened, or committed an offence against, a provision of the Act, these Regulations or the old regulations, they can only consider

documents or information in relation to which the celebrant was given an opportunity to review and respond.

The note to subsection 68(3) is intended to direct the reader to subsection 67(2) of the Regulations, which will enable the Registrar to give the marriage celebrant an extract of a complaint and/or accompanying material, rather than the full document. The note is not intended to have substantive effect.

Subsection 68(4) will allow the Registrar to take into account any other written information they hold about the marriage celebrant when deciding, under paragraph 68(2)(d), whether it is appropriate to take disciplinary measures or other action. This is intended to allow the Registrar to consider decisions made on any other complaints about the celebrant, and the celebrant's general compliance with their obligations (such as their obligation under paragraph 39G(1)(b) to undertake professional development activities).

Subsection 68(5) will require the Registrar to give the complainant and marriage celebrant a written notice of the Registrar's determination, under paragraph 68(2)(c), that the celebrant has not contravened, or committed an offence against, a provision of the Act, these Regulations, or the old regulations. The Registrar will be required to give this written notice as soon as practicable, and to sign and date the notice. The notice will also be required to include reasons for the determination. Section 69 will establish procedural steps the Registrar must follow if they determine the celebrant has contravened a provision or committed an offence.

No formal merits review mechanism will be available for decisions made under paragraph 68(2)(c) and subparagraph 68(2)(d)(ii). External merits review will be available in relation to some decisions made under subparagraph 68(2)(d)(i).

It is unlikely that a complainant will have interests that are affected by any decisions under paragraph 68(2)(c) or subparagraphs 68(2)(d)(i) and (ii), as this complaints process is intended to be focussed on addressing a celebrant's non-compliant behaviour and not on expiatory outcomes for complainants (such as compensation or actions aimed at alleviating or remedying hardship or suffering).

A decision under paragraph 68(2)(c) in and of itself will not affect a marriage celebrant's interests, as this decision will not have consequences for the celebrant (such as impacting the celebrant's ability to perform marriage ceremonies) or impose any obligation on the celebrant. However, decisions under subparagraphs 68(2)(d)(i) and (ii) to impose a disciplinary measure or take other action (such as making a recommendation) may affect the celebrant's interests. If the Registrar decides, under subparagraph 68(2)(d)(i), to impose a disciplinary measure, and imposes a disciplinary measure of a period of suspension or deregistration, the celebrant will be able to apply for review of that decision by the Administrative Appeals Tribunal under paragraphs 39J(1)(b) and (c) of the Act. The absence of formal merits review mechanisms in other instances (less harsh disciplinary measures and other action, such as recommendations) will not preclude the Registrar or the Attorney-General's Department establishing an administrative internal review process.

Section 69 – Procedure if marriage celebrant has contravened, or committed an offence against, a provision of the Act etc.

This section will establish the minimum procedural steps the Registrar of Marriage Celebrants must take if the Registrar has determined under paragraph 68(2)(c) that the marriage celebrant a complaint concerns has contravened, or committed an offence against, a provision of the Act, these Regulations, or the old regulations.

Subsection 69(2) will require the Registrar to give the complainant and marriage celebrant a written notice of the Registrar's determination, under paragraph 68(2)(c), that the celebrant has contravened, or committed an offence against, a provision of the Act, these Regulations, or the old regulations. The Registrar will be required to give this written notice as soon as practicable, and to sign and date the notice. The notice will also be required to include reasons for the determination.

Paragraphs 69(2)(b) and (c) will require the notice to indicate whether the Registrar has decided it is appropriate to take disciplinary measures and/or any other action in relation to the complaint, what those disciplinary measures and/or any other action are and the reasons for these decisions.

The note to subsection 69(2) is intended to direct the reader to subsection 39I(4) of the Act, which requires the Registrar to give written notice to a marriage celebrant if the Registrar decides it is appropriate to take disciplinary action against the celebrant, and enables the Registrar to inform the community of this decision. The note is also intended to direct the reader to section 39J of the Act, which provides a celebrant with a right to apply for review by the Administrative Appeals Tribunal of a decision to suspend or deregister the celebrant. The note is not intended to have substantive effect.

Division 3 – Marriages by authorised celebrants

Section 70 – Notice of intended marriage and related documents

This section will specify requirements for the notice of an intended marriage given to an authorised celebrant under paragraph 42(1)(a) of the Act.

Subsection 70(1) will require an authorised celebrant who receives a notice of intended marriage to write on that notice the date it was received by the celebrant. This requirement will ensure it is clear on the face of the notice whether it was received by the celebrant within the timeframe required under subsection 42(1)(a) of the Act.

Paragraphs 70(2)(a) to (d) will identify information that an authorised celebrant must record on the notice before the celebrant solemnises the marriage to which the notice relates. The celebrant will be required to record:

- what kind of document/s each party to the marriage provided to the celebrant as required by paragraph 42(1)(b) of the Act (paragraph 70(2)(a)). This requirement will

ensure it is clear on the face of the notice that the parties provided correct evidence of their date and place of birth.

- where a party to the marriage is a minor, that the celebrant was given an order made under section 12 of the Act authorising the marriage, and consents and any dispensations for the marriage as required by paragraphs 13(1)(a) and (b) of the Act (paragraph 70(2)(b)). This requirement will ensure it is clear on the face of the notice that the minor's marriage was consented to and authorised under section 12 of the Act.

- where one or both parties to the marriage were previously married, that the celebrant was given evidence of that party's divorce or the death of the party's spouse as required by subsection 42(10) of the Act, or evidence of an annulment. This requirement will ensure it is clear on the face of the notice that the person is free to marry again.

- where the notice was received by the celebrant less than one month before the marriage is to take place, that a prescribed authority has authorised the marriage taking place under subsection 42(5) of the Act. This requirement will ensure it is clear on the face of the notice that the marriage was authorised to occur despite not being received within the timeframe required under subsection 42(1)(a) of the Act.

Subsection 70(3) will require an authorised celebrant to record the date and place a marriage was solemnised on the notice relating to the marriage after the celebrant solemnises the marriage. This will ensure that it is clear on the face of the notice that it is spent, and the marriage it refers to has taken place.

This section will rely on the necessary or convenient power in section 120 of the Act. This section will be complementary to section 42 of the Act, and will ensure that where a registering authority is provided with a notice of intended marriage under subparagraph 50(4)(a)(i) of the Act, the notice will, on its face, provide certainty for the registering authority that the marriage was solemnised in accordance with the legal requirements of the Act.

Section 71 – Declaration before authorised celebrant

This section will specify that the declaration each party to a proposed marriage must make under paragraph 42(1)(c) of the Act must include a declaration as to whichever of the following matters is pertinent for the party:

- that the party is 18 years or older, or

- the party's date of birth and that an order has been made under section 12 of the Act in relation to the party.

Section 11 of the Act specifies that a person is of marriageable age if they are 18 years of age or older. Section 11 is subject to section 12 of the Act; under subsection 12(1) of the Act, a

person aged at least 16 years, but less than 18 years, may apply to a Judge or magistrate for an order authorising them to marry a particular person of marriageable age. The granting of an order under subsection 12(2) in effect makes a person of marriageable age.

This requirement will ensure that the declaration made by each party under paragraph 42(1)(c) of the Act covers all pertinent matters going towards whether the proposed marriage raises a legal impediment.

Section 72 – Notice of intended marriage received less than one month before solemnisation

This section will indicate that the circumstances set out in Schedule 3 are prescribed for the purposes of subsection 42(5) of the Act. Subsection 42(5) of the Act provides that a prescribed authority may authorise a marriage to take place despite notice of the intended marriage not being received by an authorised celebrant within the timeframe required under subsection 42(1)(a) of the Act, where one or more prescribed circumstances have been met.

Section 73 – Certificate of marriage

This section will prescribe a form as the certificate of marriage, and specify requirements relating to the preparation, supply, security and record-keeping of certificates of marriage.

Subsection 73(1) will prescribe that the form of a certificate of marriage for the purposes of paragraph 50(1)(a) of the Act is Form 15 in Schedule 1 of the Regulations. This will be the certificate provided to a marrying couple immediately following the solemnisation of their marriage, in accordance with paragraph 50(1)(a) of the Act.

Subsection 73(2) will specify requirements that a certificate of marriage must meet in order to be in the prescribed form:

- the wording of the certificate will be required to strictly comply with the wording of Form 15 in Schedule 1 (paragraph 73(2)(a)). This requirement will override section 25C of the *Acts Interpretation Act 1901*, that substantial compliance is sufficient where an Act prescribes a form. This will ensure that all marriage certificates issued to couples in Australia will have identical wording.

- the certificate will be required to be a document prepared and supplied as an incomplete certificate by a person authorised to do so under subsection 73(3) and to be identifiable as a unique document by measures acceptable to the Minister (paragraph 73(2)(b)). These requirements will ensure the integrity of individual certificates, and protect certificates against misuse and fraud.

Subsection 73(3) will enable the Minister to authorise a person to prepare and supply certificates of marriage under subparagraph 73(2)(b)(i) by notifiable instrument. This will ensure public accessibility of the arrangement for the preparation and supply of certificates of marriage. Subsection 73(4) will require the Minister to ensure only one person is authorised at a time to prepare and supply certificates of marriage under subparagraph 73(2)(b)(i).

Subsections 73(5), (6) and (7) will specify record keeping requirements in relation to certificates of marriage. These requirements will apply to both a person currently authorised as a celebrant and a person whose authorisation has been revoked or ceased (for example, a marriage celebrant who has resigned or been deregistered).

Paragraphs 73(5)(a) to (e) will identify information that a person (who is or was an authorised celebrant) must keep in relation to each certificate of marriage. For all certificates, the person will be required to record any serial number printed on the form by the supplier authorised under subparagraph 73(2)(b)(i) (paragraph 73(5)(a)). For each certificate, the person will be required to record the details of the event by which the certificate became unusable by the celebrant:

- if the person used the certificate for a marriage, the date and full names of the parties to the marriage must be recorded (paragraph 73(5)(b))
- if the person transferred the certificate to another authorised celebrant, the date of the transfer and the name and authorisation number (if any) of that celebrant (paragraph 73(5)(c)), or
- if the certificate was destroyed, the date of and reason for the destruction (paragraph 73(5)(d)).

Additionally, if any other event occurs in relation to a certificate (for example, loss or theft) the celebrant must record the details of that event (paragraph 73(5)(e)).

Paragraph 73(6)(a) will require a person (who is or was an authorised celebrant) to keep the records outlined in subsection 73(5) in a form acceptable to the Minister. This will ensure that all persons keep the records in a consistent manner.

Paragraph 73(6)(b) will require a person (who is or was an authorised celebrant) to keep the records outlined in subsection 73(5) for a period of six years. The six year period for the record of each certificate will commence on the day after the date of the relevant event identified in paragraphs 73(5)(b) to (e). For example, where a person destroys a certificate on 1 March 2018, the six year period for which the person will be required to keep the record relating to that certificate (the serial number, and date of and reasons for destroying it) will end on 2 March 2024. Subparagraphs 73(6)(b)(i) and (ii) will outline situations in which the person may cease to keep the records despite the six year period not having concluded: where the person dies or becomes permanently incapacitated; or, where a person's authorisation under section 39 of the Act ceases. A person authorised under section 39 of the Act is an officer of a state or territory; as the person performs marriages as a consequence of their holding a particular office, rather than as an individual, it will be appropriate for such a person to cease to be responsible upon ceasing to hold that office. Such records may then fall within the scope of any applicable state or territory laws governing retention of state or territory records.

Subsection 73(7) will provide that the Minister may request a copy of the records kept by a person under subsection 73(5). The Minister will be required to make such a request by a written notice, and to identify the person the records must be given to and a period within which the records must be given.

The requirement to store these records—which may contain personal information, if a certificate was used for a marriage—is intended to protect certificates against misuse and ensure certificates are traceable for a minimum period of time. This requirement will not be new; under regulation 40 of the old regulations, authorised celebrants are required to keep the same records with no specified date on which the obligation to keep the records ceases. Under these regulations, the requirement will be limited to six years.

Subsections 73(5), (6) and (7) will rely on the necessary or convenient power in section 120 of the Act. These subsections will be complementary to paragraph 50(1)(a) of the Act, which requires a prescribed form to be used as the certificate of marriage to be issued to the married couple. Requiring records about these certificates to be kept will support the requirement to use a prescribed form, and that those prescribed forms should only be used by authorised celebrants.

Section 74 – Offences in relation to record keeping

This section will create two offences, relating to a person's obligations to keep records about certificates of marriage under section 73.

Subsection 74(1) will provide that a person commits an offence of strict liability if the person contravenes subsection 73(5).

Clause 6.1 of the *Criminal Code Act 1995* will apply to the offence in subsection 74(1). This will ensure that that there is no fault element for the single physical element of this offence (whether the person failed to keep the records). The defence of honest and reasonable mistake of fact will be available in relation to this offence (clause 9.2 of the *Criminal Code Act 1995*).

The Guide to Framing Commonwealth Offences (at 2.2.6) sets out matters which an offence generally must meet in order for strict liability to be considered appropriate, consistent with the principles identified by the Scrutiny of Bills Committee in its Report 6/2002. The offence in subsection 74(1) is intended to reinforce the framework established by section 73, which is designed to ensure the integrity of individual certificates of marriage, protect certificates against misuse and fraud, and ensure certificates are traceable for a minimum period of time. The absence of a fault element for the offence in subsection 74(1) will significantly enhance the effectiveness of this framework; failure by a person to keep the records as required by subsection 73(5) would frustrate the objectives of the framework.

There are also legitimate grounds for penalising persons lacking fault; the offence in subsection 74(1) will only apply to a limited group of persons (those who are or were authorised celebrants) and these persons will be on notice to guard against the possibility of contravention. This strict liability offence will not be new; under subregulation 40(5) of the old regulations, it is an offence of strict liability to fail to keep records relating to certificates

of marriage in accordance with subregulation 40(4) of those Regulations. In practice, when a person places an order with the authorised supplier of certificates of marriage, a document is provided with the certificates to enable the person to keep the records required by old subregulation 40(4). This practice is intended to continue under these Regulations.

The offence will not be punishable by imprisonment. The penalty for the offence in subsection 74(1) will be a fine of up to 2 penalty units.

Subsection 74(2) will provide that a person commits an offence if the person:

- is given a notice under subsection 73(7) of the Regulations, and
- fails to comply with that notice.

Clause 5.6 of the *Criminal Code Act 1995* will apply to determine the fault elements for the offence in subsection 74(2).

The defences of general application under the *Criminal Code Act 1995* will be available in relation to the offence in subsection 74(2), including: mistake of ignorance of fact (clause 9.1 of the Code); duress (clause 10.2 of the Code); and lawful authority (clause 10.5 of the Code).

The penalty for the offence in subsection 74(2) will be 2 penalty units.

Section 75 – Only one official certificate to be prepared by certain authorised celebrants

This section will indicate that if an authorised celebrant holds or is acting in an office of a state or territory, and that office is listed in Schedule 4 of the Regulations, the authorised celebrant is required to prepare only one official certificate of marriage.

Subsection 50(1A) of the Act envisages that regulations may provide for a person holding or acting in a state or territory office to be required to prepare only one official certificate for the purposes of paragraph 50(1)(b) of the Act.

Section 76 – Forwarding of official certificate etc.to appropriate registering authority for a marriage

This section will specify that the documents referred to in subparagraph 50(4)(a)(i) of the Act must be forwarded to the appropriate registering authority for the marriage. The term ‘appropriate registering authority’ will be defined in section 6 of the Regulations.

Section 77 – Dealing with retained official certificates

This section will specify the record keeping obligations in relation to official certificates of marriage prepared under paragraph 50(1)(b) of the Act. These requirements will apply to both a person currently authorised and a person whose authorisation has been revoked or ceased (for example, a marriage celebrant who has resigned or been deregistered). Section 77 is intended to apply both to a person who solemnised a marriage or in whose presence a marriage was solemnised in accordance with section 45 of the Act.

Under subparagraph 50(4)(a)(ii) and paragraph 50(4)(b) of the Act, all authorised celebrants retain one official certificate of marriage and are required to deal with that certificate in accordance with regulations.

Subsection 77(2) will specify how a person deals with the official certificate of marriage if that person solemnised a marriage as a minister of religion. Under the Act, a person who is a minister of religion may be authorised to solemnise marriages due to their being registered following nomination by a recognised denomination (section 30 of the Act) or following an application to become a marriage celebrant (section 39D of the Act). It is intended that:

- where a marriage took place in a church located in a parish or district that is in charge of a minister of religion of the relevant religious body or religious organisation, the certificate for the marriage must be added to the religious body or religious organisation's records for that parish or district (paragraph 77(2)(a))

- where a marriage took place in a church that is located in another type of parish or district, the certificate for the marriage must be added to the relevant religious body or religious organisation's records for that church (paragraph 77(2)(b)), or

- for any other marriage, the certificate for the marriage must be added to records of the relevant religious body or religious organisation (paragraph 77(2)(c)).

Subsection 77(3) will specify how a person permitted by section 75 to only prepare one official certificate of marriage deals with that certificate. It is intended that the person:

- deal with the certificate in accordance with any state or territory law that requires the person to deal with the certificate in a particular way (such as binding the certificate into a register) (paragraph 77(3)(a)), or

- send the certificate to, or deal with it as authorised by, the appropriate registering authority for the marriage (see section 6 of the Regulations) if there are no state or territory laws setting out how the person must deal with the certificate (paragraph 77(3)(b)).

The note to subsection 77(3) is intended to direct the reader to Schedule 4 of the Regulations, which lists those offices the holder of whom is required to prepare only one official certificate of marriage. The note is not intended to have substantive effect.

Subsections 77(4), (5) and (6) will specify record keeping requirements for official certificates for marriages not captured by subsections 77(2) or (3). Subsection 77(4) will require the certificate for the marriage to be kept by the person who solemnised the marriage for six years starting on the day after the day the marriage took place.

Subsections 77(5) and (6) will outline situations in which the person may cease to keep the records despite the six year period not having concluded. Under subsection 77(5), a person who was authorised to solemnise the marriage under section 39 of the Act will cease to be required to keep the certificate if their authorisation ceases before the end of the six year

period. A person authorised under section 39 of the Act is an officer of a state or territory and is authorised to perform marriages as a consequence of their holding a particular office. The person will be required to deal with the certificate by sending the certificate to, or dealing with it as authorised by, the appropriate registering authority for the marriage. Under subsection 77(6), a person will cease to be required to keep the certificate if the person dies or becomes permanently incapacitated before the end of the six year period.

The requirement to store these certificates—which will contain personal information about the parties to a marriage—is intended to enable the parties to a marriage, or the appropriate registering authority for a marriage, to obtain the information necessary to demonstrate that a marriage took place or register a marriage in accordance with state or territory laws. Under subsection 45(3) of the Act, an official certificate of marriage, prepared and signed in accordance with section 50 of the Act, is conclusive evidence that the marriage was solemnised in accordance with section 45.

Section 78 – Lost official certificates

This section will establish a process to enable an appropriate registering authority to be sent the details of a marriage if the official certificate of marriage sent to the authority in accordance with subparagraph 50(4)(a)(i) of the Act is not received, or is received but is lost or destroyed by the authority.

Subsection 78(1) will specify that section 78 applies where the official certificate of marriage sent to the appropriate registering authority is not received, or is received but is lost or destroyed by the authority. The note to subsection 78(1) is intended to direct the reader to subsection 50(7) of the Act. Subsection 50(7) of the Act enables regulations to provide for furnishing substitute certificates where certificates are lost or destroyed. The note is not intended to have substantive effect.

Subsection 78(2) will enable the appropriate registering authority for a marriage to request the person who solemnised the marriage, or another person who the authority reasonably believes may be able to comply with the request, to do one of the following within 14 days after the notice is given:

- make a copy of the certificate (that has been retained in accordance with subparagraph 50(4)(a)(ii) of the Act), certify that the copy is a true copy and send that copy to the authority, if the person has custody or control of the official certificate for the marriage (paragraph 78(2)(a)), or

- make reasonable inquiries to find out the name and address of any other person who does have custody or control of the official certificate, and notify the authority of the outcome of those inquiries, if the person does not have custody or control of the certificate (paragraph 78(2)(b)).

Requiring a person to provide information is a coercive power. Generally, coercive powers should be contained in a parent Act, rather than in subordinate legislation (see 7.3.4 of the

Guide to Framing Commonwealth Offences). However, this section will be made under subsection 50(7) of the Act, which envisages regulations establishing a process for a substitute official certificate of marriage to be provided to the appropriate registering authority. Official certificates are intended to assist the appropriate registering authority to register marriages. Additionally, this power will not be new; under regulation 43 of the old regulations, an appropriate registering authority may require a person to provide a copy of an official certificate they hold or provide information about who may hold an official certificate for a marriage.

The power in subsection 78(2) of the Regulations has been revised and is intended to reflect the limitations and safeguards outlined in Chapter 9 of the Guide to Framing Commonwealth Offences. The authority will be required to make this request by written notice and a person will have 14 days to respond. Additionally, an authority can only issue a notice to the person who solemnised the marriage (who is generally required under section 77 to retain the official certificate for the marriage) or another person the authority reasonably believes could comply with the request. These limitations on issuing a notice are consistent with the principles in the Guide to Framing Commonwealth Offences (at 9.1.1, 9.3.1, 9.3.2, 9.3.3 and 9.3.4) that: the threshold for issuing a notice should be 'reasonable grounds to believe'; a notice should be in writing; a notice should be issued to a person; a notice should contain all relevant details; and a person should be given a minimum of 14 days to comply with a notice.

Subsection 78(3) will clarify that the copy of a certificate certified under subsection 78(2) has the same force and effect as an original certificate for the marriage. This is intended to enable the certificate to be used as conclusive evidence of the matters referred to in subsection 45(3) of the Act.

Part 4 – Marriages of members of the Defence Force overseas

Section 79 – Declaration before chaplain

This section will specify that the declaration each party to a proposed marriage must make under paragraph 74(1)(c) of the Act must include a declaration as to whichever of the following matters is pertinent for the party:

- that the party is 18 years or older, or
- the party's date of birth and that an order has been made under section 12 of the Act in relation to the party.

Section 11 of the Act specifies that a person is of marriageable age if they are 18 years of age or older. Section 11 is subject to section 12 of the Act. Under subsection 12(1) of the Act, a person aged at least 16 years, but less than 18 years, may apply to a Judge or magistrate for an order authorising them to marry a particular person of marriageable age. The granting of an order under subsection 12(2) in effect makes a person of marriageable age.

This requirement will ensure that the declaration made by each party under paragraph 74(1)(c) of the Act covers all pertinent matters going towards whether the proposed marriage raises a legal impediment.

Section 80 – Marriage certificates for marriages solemnised overseas

This section will prescribe a form as the certificate of marriage, and specify requirements relating to the preparation, supply, security and record-keeping of certificates of marriage.

Subsection 80(1) will prescribe that the form of a certificate of marriage for the purposes of paragraph 80(1)(a) of the Act is Form 15 in Schedule 1 of the Regulations. This will be the certificate provided to a marrying couple immediately following the solemnisation of their marriage, in accordance with paragraph 80(1)(a) of the Act.

Subsection 80(2) will specify requirements that a certificate of marriage must meet in order to be in the prescribed form:

- the wording of the certificate will be required to strictly comply with the wording of From 15 in Schedule 1 (paragraph 80(2)(a)). This requirement will override section 25C of the *Acts Interpretation Act 1901*, that substantial compliance is sufficient where an Act prescribes a form. This will ensure that all marriage certificates issued to couples in Australia will have identical wording.

- the certificate will be required to be a document prepared and supplied as an incomplete certificate by a person authorised to do so under subsection 80(3) and to be identifiable as a unique document by measures acceptable to the Minister (paragraph 80(2)(b)). These requirements will ensure the integrity of individual certificates, and protect certificates against misuse and fraud.

Subsection 80(3) will enable the Minister to authorise a person to prepare and supply certificates of marriage under subparagraph 80(2)(b)(i) by notifiable instrument. This will ensure public accessibility of the arrangement for the preparation and supply of certificates of marriage. Subsection 80(4) will require the Minister to ensure only one person is authorised at a time to prepare and supply certificates of marriage under subparagraph 80(2)(b)(i).

Subsections 80(5), (6) and (7) will specify record keeping requirements in relation to certificates of marriage.

Paragraphs 80(5)(a) to (e) will identify information that a chaplain must keep in relation to each certificate of marriage. For all certificates, the chaplain will be required to record any serial number printed on the form by the supplier authorised under subparagraph 80(2)(b)(i) (paragraph 80(5)(a)). For each certificate, the person will be required to record the details of the appropriate event by which the certificate became unusable by the chaplain:

- if the chaplain used the certificate for a marriage, the date and full names of the parties to the marriage must be recorded (paragraph 80(5)(b))

- if the chaplain transferred the certificate to another chaplain or an authorised celebrant, the date of the transfer and the name and authorisation number (if any) of that celebrant (paragraph 80(5)(c)), or

- if the certificate was destroyed, the date of and reason for the destruction (paragraph 80(5)(d)).

Additionally, if any other event occurs in relation to a certificate (for example, loss or theft) the chaplain must record the details of that event (paragraph 80(5)(e)).

Paragraph 80(6)(a) will require the chaplain to keep the records outlined in subsection 80(5) in a form acceptable to the Minister. This will ensure that all persons keep the records in a consistent manner.

Paragraph 80(6)(b) will require the chaplain to keep the records outlined in subsection 80(5) for a period of six years, unless the chaplain dies or becomes permanently incapacitated before the end of the six year period. The six year period for the record of each certificate will commence on the day after the date of the relevant event identified in paragraphs 80(5)(b) to (e). For example, where a chaplain destroys a certificate on 1 March 2018, the six year period for which the chaplain will be required to keep the record relating to that certificate (the serial number, and date of and reasons for destroying it) will end on 2 March 2024.

Subsection 80(7) will provide that the Minister may request a copy of the records kept by a person under subsection 80(5). The Minister will be required to make such a request by a written notice, and to identify the person the records must be given to and a period within which the records must be given.

The requirement to store these records—which may contain personal information, if a certificate was used for a marriage—is intended to protect certificates against misuse and ensure certificates are traceable for a minimum period of time. This requirement will not be new; under regulation 47 of the old regulations, chaplains are required to keep the same records with no specified date on which the obligation to keep the records ceases. Under these regulations, the requirement will be limited to six years.

Subsections 80(5), (6) and (7) will rely on the necessary or convenient power in section 120 of the Act. These subsections will be complementary to paragraph 80(1)(a) of the Act, which requires a prescribed form to be used as the certificate of marriage to be issued to the married couple. Requiring records about these certificates to be kept will support the requirement to use a prescribed form, and that those prescribed forms should only be used by authorised celebrants.

Section 81 – Offences in relation to record keeping

This section will create two offences, relating to a chaplain's obligations to keep records about certificates of marriage under section 80.

Subsection 81(1) will provide that a person commits an offence of strict liability if the person contravenes subsection 80(5).

Clause 6.1 of the *Criminal Code Act 1995* will apply to the offence in subsection 81(1). This will ensure that that there is no fault element for the single physical element of this offence (whether the person failed to keep the records). The defence of honest and reasonable mistake of fact will be available in relation to this offence (clause 9.2 of the *Criminal Code Act 1995*).

The penalty for the offence in subsection 81(1) will be a fine of up to 2 penalty units.

Subsection 81(2) will provide that a person commits an offence if the person:

- is given a notice under subsection 80(7) of the Regulations, and
- fails to comply with that notice.

Clause 5.6 of the *Criminal Code Act 1995* will apply to determine the fault elements for the offence in subsection 81(2).

The defences of general application under the *Criminal Code Act 1995* will be available in relation to the offence in subsection 81(2), including: mistake of ignorance of fact (clause 9.1 of the Code); duress (clause 10.2 of the Code); and lawful authority (clause 10.5 of the Code).

The penalty for the offence in subsection 81(2) will be 2 penalty units.

Section 82 – Dealing with retained official certificates

This section will specify the record keeping obligations in relation to official certificates of marriage prepared under paragraph 80(1)(b) of the Act.

Under paragraph 80(4)(c) of the Act, a chaplain is required to retain one official certificate for a marriage for a prescribed period and deal with that certificate in accordance with regulations.

Subsection 82(1) will specify that three months is the prescribed period for the purposes of paragraph 80(4)(c) of the Act.

Subsection 82(2) will require a chaplain to send the retained official certificate for a marriage to the Australian headquarters for the Navy, Army or Air Force, depending on the Service in which the chaplain is or was a member.

Section 83 – Prescribed overseas countries

This section will indicate that countries for the purposes of paragraph 85(1)(a) of the Act are prescribed in Schedule 5 of the Regulations.

Section 85 of the Act provides a process for a chaplain to facilitate a copy of a marriage certificate for a marriage that took place in a country prescribed by regulations to be stored in Australia, provided certain conditions are met.

Part 5 – Miscellaneous

Section 84 – Endorsement in case of second marriage ceremony

This section will specify the endorsement that must be included on all certificates and official certificates of marriage issued for a marriage under section 50 or 80 of the Act as required by subsection 113(4) of the Act, to make clear that the marriage is a second marriage ceremony.

Section 84 will require the endorsement to be signed by the person who solemnised the marriage, or in whose presence the marriage took place, under subsection 113(2) of the Act.

Part 6 – Transitional provisions

This part will establish arrangements to manage the transition from the old regulations to the Regulations.

Section 85 – Pre-commencement applications for exemption from registration application fee

Subsections 85(1) and (2) will specify that an application for exemption from the registration application fee, made under the old regulations prior to the commencement of the Regulations and where a decision on the application has not yet been made, should be dealt with in accordance with the old regulations.

Subsection 85(3) will preserve any notice issued by the Registrar of Marriage Celebrants under the old regulations requesting additional information in relation to the application, where the information has not been provided by the commencement date of the Regulations and the period for providing the information has not ended.

Section 86 – Pre-commencement applications for exemption from celebrant registration charge

Subsections 86(1) and (2) will specify that an application for exemption from the celebrant registration charge, made under the old regulations prior to the commencement of the Regulations and where a decision on the application has not yet been made, should be dealt with in accordance with the old regulations.

Subsection 86(3) will preserve any notice issued by the Registrar of Marriage Celebrants under the old regulations requesting additional information in relation to the application, where the information has not been provided by the commencement date of the Regulations and the period for providing the information has not ended.

Section 87 – Pre-commencement applications for internal review of refusal to grant certain exemptions

Subsections 87(1) and (2) will specify that an application for internal review of a refusal to grant an exemption, made under the old regulations prior to the commencement of the Regulations and where an internal review decision has not yet been made, should be dealt with in accordance with the old regulations.

Subsection 87(3) will preserve any notice issued by the Registrar of Marriage Celebrants under the old regulations requesting additional information in relation to the internal review application, where the information has not been provided by the commencement date of the Regulations and the period for providing the information has not ended.

Section 88 – Internal review of pre-commencement decisions to refuse to grant certain exemptions

This section will ensure that internal review will be available under the Regulations for decisions made under the old regulations refusing to grant exemptions where the time period in which a person may apply for internal review of the refusal has not ended.

Section 89 – Pre-commencement complaints about the solemnisation of marriages by marriage celebrants

Subsections 89(1) and (2) will specify that a complaint received under the old regulations will continue to be dealt with in accordance with the old regulations if no final decision has been made on the complaint and the Registrar of Marriage Celebrants has issued a notice to the complainant (under subregulation 37T(3) of the old regulations) advising of the outcome of the Registrar's preliminary assessment of the complaint.

A complaint not captured by subsection 89(1) will be dealt with in accordance with section 93.

Subsection 89(3) will ensure that the Registrar can continue to do anything in relation to a complaint in accordance with the old regulations that the Registrar has commenced, but not finished, doing under the old regulations prior to the commencement of the Regulations. Subsection 89(3) will only apply in relation to a complaint captured by subsection 89(1).

Subsection 89(4) will preserve any notice issued by the Registrar of Marriage Celebrants under the old regulations in relation to a complaint, where the period for complying with the notice has not ended.

Section 90 – Application—re-hearing of application for consent to marriage of a minor

This section will apply the time period, specified in subsection 15(1) of the Regulations, for requesting a re-hearing of an application to an application that was granted or refused before, on or after the commencement of the Regulations. This will ensure that the time period in which a re-hearing can be requested will continue to run, despite the repeal of the old regulations and the commencement of the Regulations.

Section 91 – Application—application for exemption from celebrant registration charge

This section will apply the time period, specified in paragraph 48(2)(a) of the Regulations, for making an application for exemption from the celebrant registration charge to an application made in relation to a notice about the charge that was sent before, on or after the commencement of the Regulations. This will ensure that the time period in which an exemption application can be made will continue to run, despite the repeal of the old regulations and the commencement of the Regulations.

Section 92 – Application—professional development activities for marriage celebrants

Subsection 92(1) will specify that section 53 of the Regulations will apply in relation to the calendar year starting on 1 January 2018 and each calendar year after that. For the 2018 calendar year, the requirement in subsection 53(3) that the Registrar of Marriage Celebrants publish a written statement as soon as practicable after the start of the calendar year will be imposed when the Regulations commence on 1 April 2018. In order not to disadvantage marriage celebrants who undertake professional development activities on or after 1 January 2018 and on or before 31 March 2018, it is intended that the written statement that will be published under subsection 53(3) will, to the extent practicable, be identical to the written statement published under subregulation 37M(1) of the old regulations.

Subsection 92(2) will specify that section 54 of the Regulations will apply in relation to the calendar year starting on 1 January 2019 and each calendar year after that. Section 54 will exempt certain marriage celebrants from the requirement to undertake professional development activities for the calendar year in which they are registered. As the Regulations will commence on 1 April 2018, the application of section 54 (and hence the availability of the exemption) will be delayed until 1 January 2019, in order to not disadvantage those marriage celebrants who become registered on or after 1 January 2018 and on or before 31 March 2018.

Section 93 – Application—complaints resolution procedures

This section will specify that Subdivision B of Division 2 of Part 3 of the Regulations will apply in relation to a complaint made:

- on or after 1 April 2018, or
- before 1 April 2018, if the Registrar of Marriage Celebrants has not issued a notice to the complainant (under subregulation 37T(3) of the old regulations) advising of the outcome of the Registrar's preliminary assessment of the complaint.

This section will not apply to a complaint which is captured by section 89.

Section 94 – Savings—notice given to recognised denomination

This section will apply to any notice to a recognised denomination by a Registrar of Ministers of Religion under the old regulations given prior to the commencement of the Regulations on 1 April 2018 and for which the time period for responding to the notice has not expired. The

notice will continue to have effect, and the old regulations will continue to apply in relation to the notice, despite the repeal of the old regulations.

Section 95 – Savings—determination of qualifications and skills required of marriage celebrants

This section will apply to a determination made under the Act prior to the commencement of the Regulations, which was in force immediately before the commencement of the Regulations on 1 April 2018. Despite the repeal of the old regulations, the determination will continue to have effect and will apply in relation to undecided applications for registration as a marriage celebrant under section 39D of the Act made before the commencement of the Regulations.

Section 96 – Savings—determination of fees

This section will apply to a determination setting fees made under the old regulations that is in force immediately before the Regulations commence. Despite the repeal of the old regulations, the determination will continue to be in force and may be dealt with and treated as if it were a determination made under the Regulations. This will ensure that any fees specified in a determination in force immediately prior to the commencement of the Regulations will continue to be the fees when the Regulations commence.

Section 97 – Savings—authorisation of suppliers of marriage certificates

This section will apply to an authorisation of a supplier of marriage certificates made under the old regulations, which is in force immediately before the commencement of the Regulations on 1 April 2018. Despite the repeal of the old regulations, the authorisation will continue in force and may be dealt with and treated as if it were an authorisation made under the Regulations. This will ensure that any supplier authorised immediately prior to the commencement of the Regulations will continue to be the supplier when the Regulations commence. The preservation of an authorisation of a supplier will preserve any unused marriage certificates produced by that supplier.

Schedule 1 – Form of certificate of marriage

This schedule will prescribe the Form 15—Certificate of Marriage. This will be the form and words required for a certificate of marriage for the purposes of paragraph 50(1)(a) of the Act.

It will be possible to omit the text identified by an asterisk (and according to the rites of) from the version of the Form 15 used. This text is intended to be used in certificates of marriages where the form or ceremony for the marriage contained religious rights in accordance with subsection 45(1) of the Act.

The note to the Schedule is intended to refer the reader to sections 73 and 80 of the Regulations, which will establish requirements regarding the use of the Form 15. This note is not intended to have substantive effect.

Schedule 2 – Code of Practice for marriage celebrants

This schedule will establish the Code of Practice for marriage celebrants, which marriage celebrants are required to conduct themselves in accordance with under paragraph 39G(1)(a) of the Act.

Marriage celebrant associations were consulted extensively prior to the introduction of the Code of Practice by the *Marriage Amendment Regulations 2003 (No. 2)*. Views of marriage celebrant associations were sought in 2015 on the Code of Practice in the old regulations and associations were consulted on an Exposure Draft of this Code of Practice in July 2017.

The note to the Schedule is intended to refer the reader to section 52 of the Regulations. This note is not intended to have substantive effect.

Clause 1 – Application of this Code of Practice

This clause will clarify that this Code of Practice applies to marriage celebrants (a term defined in the Act). It will not apply to authorised celebrants who are not marriage celebrants, such as a minister of religion of a recognised denomination or a state or territory officer.

The first note to this clause is intended to direct the reader to the definition of 'marriage celebrant' contained in subsection 5(1) of the Act. The second note is intended to direct the reader to paragraph 39I(1)(b) of the Act, under which the Registrar of Marriage Celebrants may impose a disciplinary measure if a marriage celebrant fails to comply with the Code of Practice as required by paragraph 39G(1)(a) of the Act. Neither note is intended to have substantive effect.

Clause 2 – High standard of service

This clause will require a marriage celebrant to maintain a high standard of service in their professional conduct and practice. It will specify that a high standard of service includes, without limitation, ensuring: appropriate personal presentation for marriage ceremonies; punctuality for marriage ceremonies; and accuracy in preparation of documents and in the conduct of marriage ceremonies. This list is not intended to limit what conduct and practice is captured by this item. For example, other conduct or practice captured by this clause may include confirming details about a marriage with the parties to the marriage, and ensuring that an appropriately high standard of service is provided where the marriage celebrant is solemnising multiple marriages on the same day.

Clause 3 – Recognition of significance of marriage

This clause will require a marriage celebrant to recognise the social, cultural and legal significance of marriage and the marriage ceremony in the Australian community. It will also require a marriage celebrant to recognise the importance of strong and respectful family relationships.

Clause 4 – Compliance with the Act and other laws

This clause will require a marriage celebrant to

- comply with the requirements of the Act and the Regulations which apply to the marriage celebrant (paragraph 4(a)). This paragraph is intended to ensure that where a marriage celebrant fails to comply with their legal obligations, particularly in relation to the solemnisation of marriage, the Registrar of Marriage Celebrants will be able to take disciplinary action.

- observe the laws of the Commonwealth and of any state or territory in which the marriage celebrant solemnises marriages. This paragraph is intended to ensure that marriage celebrants comply with any relevant legal obligations imposed outside of the Act or the Regulations, for example the Australian Consumer Law. While the Registrar of Marriage Celebrants may be able to form a view on whether a marriage celebrant has observed a law other than a marriage law, it is not intended that the Registrar will be able to make findings in relation to compliance with other laws.

- avoid unlawful discrimination in the provision of marriage celebrancy services. Under Commonwealth, state and territory anti-discrimination laws, persons are generally required to avoid acting in a manner that unlawfully discriminates against another person or group of persons. This paragraph is intended to make clear the importance of marriage celebrants complying with anti-discrimination laws in providing marriage celebrancy services. Compliance with these laws assists to ensure marriage celebrancy services are accessible to all eligible couples.

Clause 5 – General requirements for marriage ceremonies

This clause will require a marriage celebrant to respect the importance of the marriage ceremony to the parties to the marriage and other persons (for example, family members) organising the marriage ceremony. It will specify that respecting the importance of the marriage ceremony includes, without limitation:

- giving the parties to the marriage information and guidance to enable them to choose or compose a marriage ceremony, including information to assist the parties to decide whether they need a marriage ceremony rehearsal, or whether having a rehearsal would be appropriate for them (paragraph 5(a)).

- respecting the privacy and confidentiality of the parties to the marriage (paragraph 5(b)). This will include: arranging for appropriate facilities for interviews (for example, some parties may require more privacy than others); maintaining appropriate facilities for the secure storage of records (under section 77 of the Regulations, marriage celebrants will be required to keep records relating to a marriage for six years); and ensuring all of the parties' personal documents are returned as soon as practicable.

- giving the parties to the marriage information about how they may make a complaint to the Attorney-General's Department regarding the marriage services provided by the marriage celebrant (paragraph 5(c)).

Clause 6 – Knowledge and understanding of family relationships services

This clause will require a marriage celebrant to maintain an up-to-date knowledge about appropriate family relationships services in the community. A marriage celebrant will also be required to inform marrying parties about the range of information and services available to the parties to enhance, and sustain them throughout, their relationship.

Schedule 3 – Circumstances for authorising marriage despite late notice

This schedule will specify the circumstances in which a prescribed authority may authorise a marriage to take place under subsection 42(5) of the Act, despite notice of the intended marriage not being received by an authorised celebrant within the timeframe required under subsection 42(1)(a) of the Act.

Various prescribed authorities were consulted on an Exposure Draft of this Schedule.

The note to the Schedule is intended to refer the reader to section 72 of the Regulations. This note is not intended to have substantive effect.

Subclauses 1(1), 2(1), 3(1), 4(1) and 5(1) will specify circumstances in which a prescribed authority may be satisfied under subsection 42(5) of the Act that a marriage should take place despite notice of the marriage having been received by an authorised celebrant less than one month before the date of the marriage. These circumstances will be where:

- a party to the marriage, or someone involved with the proposed wedding (for example, a bridesmaid or close family member), has employment commitments that require the party's or person's absence from the location of the proposed wedding for a considerable period of time (paragraph 1(1)(a))

- a party to the marriage, or someone involved with the proposed wedding (for example, a bridesmaid or close family member), has other travel commitments (paragraph 1(1)(b))

- binding wedding arrangements or celebration arrangements have been made in connection with the marriage (paragraph 2(1)(a))

- there is a religious consideration (paragraph 2(1)(b))

- a party to the marriage, or someone involved with the proposed wedding (for example, a bridesmaid or close family member), is suffering from a medical condition of a serious nature (subclause 3(1))

- a party to the marriage is involved in a legal proceeding (subclause 4(1))

- due solely to an error by the authorised celebrant (or a person the parties to the marriage believed was an authorised celebrant), the notice was not given and arrangements have been made for the proposed wedding to take place within less than one month (subparagraph 5(1)(a)(i) and paragraph 5(1)(b))

- due solely to an error by the authorised celebrant (or a person the parties to the marriage believed was an authorised celebrant), the notice as given was invalid, and arrangements have been made for the proposed wedding to take place within less than one month (subparagraph 5(1)(a)(ii) and paragraph 5(1)(b)), or

- due solely to an error by the authorised celebrant (or a person the parties to the marriage believed was an authorised celebrant), the notice was given in time, but was lost and arrangements have been made for the proposed wedding to take place within less than one month (subparagraph 5(1)(a)(iii) and paragraph 5(1)(b)).

These circumstances are not intended to provide a means to circumvent or avoid the notice of intended marriage requirements specified in subsection 42(1) of the Act.

The examples to subclauses 1(1), 2(1), 3(1), 4(1) and 5(1) are intended to provide guidance only, and are not intended to be exhaustive or to have substantive effect.

Subclauses 1(2), 2(2), 3(2), 4(2) and 5(2) will indicate matters that a prescribed authority may take into account in deciding whether it is satisfied that the relevant circumstance has, or circumstances have, been met. These lists of matters are not intended to be exhaustive. A prescribed authority will be able to exercise its discretion to take any or all of these matters into account, or to take other matters into account.

Schedule 4 – Specified offices of States and Territories

This schedule will specify offices for a state and territory for which the office holder, or a person acting in the office, is required by subsection 50(1A) of the Act to prepare only one official certificate of marriage for the purposes of paragraph 50(1)(b) of the Act.

The note to the Schedule is intended to refer the reader to section 75 of the Regulations. This note is not intended to have substantive effect.

The appropriate registering authorities for states and territories were consulted to identify the offices to be included in this schedule.

Schedule 5 – Prescribed overseas countries

This schedule will prescribe overseas countries for the purposes of paragraph 85(1)(a) of the Act. Section 85 of the Act provides a process for a chaplain to facilitate a copy of a marriage certificate for a marriage that took place in a country prescribed by regulations to be stored in Australia, provided certain conditions are met.

The note to the Schedule is intended to refer the reader to section 83 of the Regulations. This note is not intended to have substantive effect.

The Department of Defence was consulted on the countries to be included in this schedule.

Schedule 6 – Repeals

This schedule will repeal the whole of the *Marriage Regulations 1963*. The Regulations are intended to replace the *Marriage Regulations 1963*, which will sunset on 1 April 2018, the same date these Regulations will commence.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-002849

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

06 MAR 2018

Dear Chair John

I refer to your letter of 8 February 2018 concerning the Senate Regulations and Ordinances Committee's queries about three disallowable legislative instruments. The Committee's concern that instruments clearly state the manner in which documents are incorporated and how they may be obtained is appreciated, and clarification of the references in these instruments is provided below.

Therapeutic Goods (Manufacturing Principles) Determination 2018
The intended incorporation of the documents noted in the Committee's Monitor 1 of 2018 in relation to this instrument, and their availability, are as follows:

Incorporated document	**Intended incorporation**	**How document may be obtained**
Australian Standard AS ISO 13485-2003 Medical devices – Quality management systems – Requirements for Regulatory purposes.	As published by Standards Australia on 31 December 2003.	From the website of SAI Global Limited https://infostore.saiglobal.com/ for a fee of $211.68 pdf (a range of standards including Australian Standards are sold and distributed by SAI Global Limited). A free 9 page sample of this standard is also available on this website.
European Standard EN 556:1994 Sterilization of medical devices – requirements for medical devices to be labelled 'Sterile'.	As published by the European Committee for Standardization on 30 June 1995.	An identical version, as published by the National Standards Authority of Ireland, is available from the website of SAI Global Limited https://infostore.saiglobal.com/ for a fee of $64.72 (pdf).
Guideline on the scientific data requirements for a plasma master file EMEA/CPMP/BWP/3794/03.	As published by the European Medicines Agency on 15 November 2006.	From the website of the European Medicine Agency (http://www.ema.europa.eu), free.
Guideline for the preparation of Technical Master Files for blood, blood components and haematopoietic progenitor cells.	As published by the Therapeutic Goods Administration (TGA) on 22 July 2008.	From the TGA's website (www.tga.gov.au), free.

Therapeutic Goods Order No.95 Child-resistant packaging requirements for medicines 2017
The intended incorporation of the documents noted in the Committee's Monitor 1 of 2018 in relation to this instrument, and their availability, are as follows:

Incorporated document	**Intended incorporation**	**How document may be obtained**
ISO 8317:2015 Child-resistant packaging – Requirements and testing procedures for reclosable packages.	As published by the International Organization for Standardization (ISO) on 5 November 2015.	From the ISO website (https://www.iso.org) for a fee of $121 pdf. A free preview is also available on this website.
Australian Standard AS 1928-2007 Child-resistant packaging – Requirements and testing procedures for reclosable packages (ISO 8317:2003 MOD).	As published by Standards Australia on 31 October 2007.	From the website of SAI Global Limited https://infostore.saiglobal.com/ for a fee of $130.23 pdf. A free 9 page sample of this standard is also available on this website.
British Standards Institution Standard BS EN ISO 8317:2015 Child-resistant packaging – Requirements and testing procedures for reclosable packages.	As published by the British Standards Institution on 31 December 2015.	From the website of SAI Global Limited https://infostore.saiglobal.com/ for a fee of $157.06 (hardcover) or $309.79 pdf. A free preview is also available from the British Standards website (https://www.bsigroup.com/).
Canadian Standards Association Standard CSA Z76.1-16 Reclosable child-resistant packages.	As published by the Canadian Standards Association on 1 December 2016.	From the website of the Canadian Standards Association (http://www.csagroup.org/) for a fee of $111.05 pdf. A brief overview is also available on this website without charge.

The above documents incorporated in the *Therapeutic Goods (Manufacturing Principles) Determination 2018* or in *Therapeutic Goods Order No.95 Child-resistant packaging requirements for medicines 2017* are adopted because they represent critical Australian or international benchmarks of safety and quality in relation to the safety of manufacturing processes and child-resistant packaging for medicines. It would not be feasible from a regulatory perspective to not adopt such benchmarks because they are not available for free.

While most of these documents attract a fee for access, it is expected that the persons most affected by their adoption – manufacturers and sponsors of therapeutic goods – would have access to the documents and be familiar with their terms.

It is also noted that paragraph 15J(2)(c) of the *Legislation Act 2003* requires that an explanatory statement indicate how incorporated documents may be obtained, but does not appear to require that such documents be obtainable without charge.

Replacement explanatory statements, with the above clarifications, will be arranged as soon as possible for these instruments.

National Health (Supplies of out-patient medication) Determination 2017
In relation to the National Health (Supplies of out-patient medication) Determination 2017 [F2017L01632], the explanatory statement has been updated to include information on consultation undertaken in relation to this Instrument (Attachment A). This amended explanatory statement will be uploaded onto the Federal Register of Legislative Instruments in due course.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

EXPLANATORY STATEMENT

NATIONAL HEALTH ACT 1953

NATIONAL HEALTH (SUPPLIES OF OUT-PATIENT MEDICATION) DETERMINATION 2017

PB 111 of 2017

Authority

Subsection 84BA(2) of the *National Health Act 1953* (the Act) provides that the Minister must determine the amount that will be taken to have been paid to a public hospital for supplies of out-patient medication for the purposes of safety net.

Purpose

Part VII of the Act regulates when benefits will be paid by the Commonwealth in respect of drugs and medicinal preparations that are listed on the Pharmaceutical Benefits Scheme (PBS). As such, it is the legislative basis by which the Commonwealth provides reliable, timely and affordable access to a wide range of medicines to Australians.

Division 1A of Part VII of the Act provides for a 'safety net scheme' in relation to pharmaceutical benefits. The safety net scheme is designed to provide financial protection for those patients and their families who require a large number of pharmaceutical benefits.

Subsection 84(1) defines 'out-patient medication' as meaning a drug or medicinal preparation that is supplied through the out-patient department of a public hospital. A drug or medicinal preparation that is supplied by a public hospital as out-patient medication may or may not be a pharmaceutical benefit under Part VII of the Act.

Subsection 84BA(1) of the Act provides that the purpose of section 84BA is to make provision so that account may be taken of payments made by a person to a public hospital authority for supplies of out-patient medication, when it is being ascertained, for the purpose of Part VII of the Act, whether the person is eligible to be issued with a safety net concession card or a safety net entitlement card.

Subsection 84BA (2) of the Act provides that prior to the commencement of the relevant entitlement period (a calendar year), the Minister must determine in writing the amounts that will be taken to have been paid to a public hospital for supplies of out-patient medication made by a hospital during the relevant entitlement period.

Subsection 84BA(3) of the Act provides that, in making a determination, the Minister may determine:

a) different amounts in respect of a supply of out-patient medication, having regard to the State or Territory in which the hospital supplying the medication is situated; and
b) different amounts in respect of supplies made to
    i. concessional beneficiaries and their dependants,
    ii. holders of a concession card; and
    iii. general patients (other than holders of a concession card).

This instrument differs from the instrument made under subsection 84BA(2) for the previous entitlement period because the maximum value of the supply of out-patient medication to a person who is a general patient and who is not the holder of a concession card has changed from $31.00 to $31.60. This instrument, among other things, determines different amounts in respect of the supply of out-patient medication by public hospitals depending on whether the public hospital is participating in Pharmaceutical Reform Arrangements within the meaning of the National Health Reform Agreement.

The *Federal Financial Relations Act 2009* refers to the National Health Reform Agreement as agreed to by the Council of Australian Governments on 2 August 2011 as amended from time to time. A copy of the National Health Reform Agreement can be obtained at the Council of Australian Governments (COAG) website at http://www.coag.gov.au.

Details of this instrument are set out in the Attachment.

This instrument commences on 1 January 2018.

This instrument is a legislative instrument for the purpose of the *Legislation Act 2003.*

Consultation

Historically, the Department of Health has consulted with the State and Territory Health Departments on Commonwealth funding for specialised medicines supplied through public hospitals through the Highly Specialised Drugs Working Party (HSDWP). The HSDWP was a working party of the Australian Health Ministers' Advisory Council (AHMAC) and was made up of representatives from each State and Territory Health Department and the Australian Government. This Working Party was discontinued in 2008 on recommendations endorsed by AHMAC.

Through the HSDWP, the State and Territory Health Departments agreed to the value of out-patient medication being 80 per cent of the general PBS co-payment. As per section 99G of the Act, the general PBS co-payment is indexed according to the Consumer Price Index (CPI) on 1 January each year, and the value of out-patient medication is adjusted accordingly. State and Territory Health Departments are advised of the updated fee each year.

It was considered that further consultation for this Instrument was unnecessary due to the nature of the consultation that had already taken place.

ATTACHMENT

Details of the National Health (Supplies of out-patient medication) Determination 2017

1 Name of Instrument

This section provides that the name of this Determination is the *National Health (Supplies of out-patient medication) Determination 2017* and that it can also be cited as PB 111 of 2017.

2 Commencement

This section provides that this Determination commences on 1 January 2018.

3 Revocation

This section revokes the previous determination made under subsection 84BA(2), being the *National Health (Supplies of out-patient medication) Determination 2016* (PB 107 of 2016).

4 Interpretation

This section provides for the meaning of certain words and phrases appearing in the Determination, and also states that unless the contrary intention appears, a word or expression that is defined in the Act shall be taken to have the same meaning as in the Act.

5 Amount taken to have been paid to a public hospital for the supply of out-patient medication

This section provides that the amount, for the purposes of Part VII of the Act, taken to have been paid to a public hospital for the supply of out-patient medication is the lesser of either:

- the maximum value of the supply of out-patient medication; or
- the amount charged.

The term ***out-patient medication*** is defined in subsection 84(1) of the Act to mean a drug or medicinal preparation supplied through the out-patient department of a public hospital.

6 Maximum value of the supply of out-patient medication to a person who is a concessional beneficiary, a dependent of a concessional beneficiary or a holder of a concession card

This section provides that the maximum value of the supply of out-patient medication to a person who is a concessional beneficiary, a dependant of a concessional beneficiary or the holder of a concession card is an amount that is equivalent to the amount referred to in paragraph 87(2)(a) of the Act for the supply of a pharmaceutical benefit by an approved pharmacist or approved medical practitioner.

The terms ***concessional beneficiary***, ***dependant*** and ***concession card*** are defined in subsection 84(1) of the Act.

The relevant charge under paragraph 87(2)(a) of the Act will be $6.40 when this instrument commences on 1 January 2018. These charges are periodically adjusted under section 99G of the Act.

7 Maximum value of the supply of out-patient medication to a person who is a general patient and who is not a holder of a concession card

Subsection 7(1) provides that the maximum value of the supply of out-patient medication to a person who is a general patient and who is not the holder of a concession card is $31.60.

Subsection 7(2) provides that this section does not apply to supplies of out-patient medication made by a public hospital located in Queensland or a public hospital that is participating in Pharmaceutical Reform Arrangements within the meaning of the National Health Reform Agreement. The National Health Reform Agreement is defined in section 4 of this Determination.

8 Maximum value of the supply of out-patient medication by a Queensland public hospital to person who is a general patient and who is not the holder of a concession card

This section provides for the maximum value of a supply of out-patient medication to a person who is a general patient and who is not the holder of a concession card for supplies of out-patient medication made by public hospitals located in Queensland.

Paragraph 8(2)(a) specifies that where the medication is a pharmaceutical benefit and the Commonwealth price for that pharmaceutical benefit exceeds the amount referred to in paragraph 87(2)(e) of the Act, the maximum value is an amount equivalent to the amount referred to in paragraph 87(2)(e) of the Act for the supply of a pharmaceutical benefit by an approved pharmacist or an approved medical practitioner.

The relevant amount under paragraph 87(2)(e) of the Act will be $39.50 when this instrument commences on 1 January 2018. These charges are periodically adjusted under section 99G of the Act.

Paragraph 8(2)(b) specifies that where the medication is a pharmaceutical benefit and the Commonwealth price for that pharmaceutical benefit does not exceed the amount referred to in paragraph 87(2)(e) of the Act, the maximum value is the price for that pharmaceutical benefit ascertained in accordance with the determination made under subsection 84C(7) of the Act as in force from time to time.

Paragraph 8(2)(c) specifies that where the medication is a drug or medicinal preparation that is not a pharmaceutical benefit, the maximum value is the amount ascertained by taking as a basis the cost to the hospital of that drug or medicinal preparation and applying, as if that cost were the approved ex-manufacturer price or proportional ex-manufacturer price, the determination under subsection 84C(7) of the Act as in force from time to time.

9 Maximum value of the supply of out-patient medication by a participating public hospital to a person who is a general patient and who is not a holder of a concession card

This section provides for the maximum value of a supply of out-patient medication to a person who is a general patient and who is not the holder of a concession card for supplies of out-patient medication made by public hospitals that are participating in Pharmaceutical

Reform Arrangements within the meaning of the National Health Reform Agreement, except if the public hospital is located in the State of Queensland.

Paragraph 9(2)(a) specifies that where the medication is a pharmaceutical benefit, the maximum value of the pharmaceutical benefit shall be the maximum value of the pharmaceutical benefit ascertained in accordance with subregulation 6(1) of the *National Health (Pharmaceutical Benefits) Regulations 2017* as if the pharmaceutical benefit had been supplied by an approved pharmacist or an approved medical practitioner.

Paragraph 9(2)(b) specifies that where the medication is a drug or medicinal preparation that is not a pharmaceutical benefit, the maximum value is the amount ascertained by taking as a basis the cost to the hospital of that drug or medicinal preparation and applying, as if that cost were the approved ex-manufacturer price or proportional ex-manufacturer price, the determination under subsection 84C(7) of the Act as in force from time to time.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Health (Supplies of out-patient medication) Determination 2017

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This legislative instrument is made pursuant to subsection 84BA(2) of the Act and determines the amounts that will be taken to have been paid to a public hospital for supplies of out-patient medication.

This instrument differs from the instrument made under subsection 84BA(2) for the previous entitlement period because the maximum value of the supply of out-patient medication to a person who is a general patient and who is not the holder of a concession card has changed from $31.00 to $31.60. This is in line with s99G of the Act which refers to indexation under the CPI as it should be applied to the remuneration prices for the medications under the Determination.

Human rights implications

This legislative instrument engages Articles 2 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by assisting with the progressive realisation by all appropriate means of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The Pharmaceutical Benefits Scheme (PBS) is a benefit scheme which assists with advancement of this human right by providing for subsidised access by patients to medicines.

Conclusion

This Legislative Instrument is compatible with human rights because it advances the protection of human rights.

Natasha Ploenges
Acting Assistant Secretary
Private Health Insurance and Pharmacy Branch
Technology Assessment and Access Division
Department of Health

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-002854

15 FEB 2018

Senator John Williams
Chair
Standing Committee on Senate Regulations and Ordinances
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to your letter of 8 February 2018 concerning the Senate Regulations and Ordinances Committee Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 6) [F2017L01513].

My Department took prompt action to rectify an error in the Private Health Insurance (Prostheses) Rules 2017 (No.2) once it was brought to its attention. The private health insurers, private hospitals and sponsors were made aware of the error, and subsequent correction, via the PHI Circular 53/17 published on the 23 November 2017. http://www.health.gov.au/internet/main/publishing.nsf/Content/health-phicircular2017-53

My Department is not aware of any person being disadvantaged between 28 September and 23 November 2017 by the error.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-003801

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

27 FEB 2018

Dear Chair

I refer to your letter of 8 February 2018 concerning the PHI (Prostheses) Amendment Rules 2017 [No.6].

Background regarding the Prostheses Rules

The Private Health Insurance (Prostheses) Rules (Rules), made under the *Private Health Insurance Act 2007* (Act), list over 11,000 items for which a health insurance policy that covers hospital treatment must provide a minimum benefit, and specify the minimum benefit for each listed prosthesis. The list of prostheses specified in the Rules is generally referred to as the Prostheses List. The current Rules are the *Private Health Insurance (Prostheses) Rules 2017 (No. 2)* (2017 Rules).

After the Prostheses List Advisory Committee recommends the listing of a new or amended product on the Prostheses List, it is included in the next amendment to the Rules. The Rules are a legislative instrument registered on the Federal Register of Legislation (FRL), and are subject to a disallowance period in accordance with the *Legislation Act 2003*. Normally the Prostheses Rules are amended to update the Prostheses List twice a year. However, due to the benefit reductions negotiated by the Government with the Medical Technology Association Australia in 2017, two additional amendments to update the 2017 Rules are required in 2018. The first of these, the *Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 5)* (Amendment Rules No. 5), was registered on 13 October 2017 and commenced on 1 February 2018.

Before tabling the Rules in the Australian Parliament, applicants for listed products (sponsors) are provided with up to four opportunities to review their products listed, or about to be listed. Currently all updates to the Prostheses List are manually entered into my Department's information management system. My Department has commenced systems development work to reduce manual intervention.

Incorrect listing of benefit for product DD005

The initial error in this situation related to product DD005, which is a shoulder joint device. This product was incorrectly listed as an elbow joint device in the 2017 Rules. During the second review of the draft Rules, but prior to their registration, the sponsor of product DD005 identified that their product had been incorrectly categorised. The draft instrument was changed to correct the category error. However, when this occurred, the minimum benefit specified for product DD005 was not corrected, resulting in an incorrect lower benefit being specified. This is because the elbow product has a lower benefit than the shoulder product.

This error was inadvertently included in the 2017 Rules when they were registered in August 2017. Further amendments to the Private Health Insurance (Prostheses) Rules 2017 (amendments No. 3 and No. 4) were made to accommodate Trans Aortic Valve Implants and other Medical Benefits Services approved items.

To implement the agreed benefits reductions, my Department commenced work on the Amendment Rules No. 5 in September 2017. As noted above, the Amendment Rules No. 5 were registered on 13 October 2017 with a commencement date of 1 February 2018. They included an update to every item in Parts A and C of the Prostheses List set out in the Rules to reflect the first tranche of benefit reductions. The Amendment Rules No. 5 replicated the error relating to the benefit amount for product DD005 that had been included in the 2017 Rules.

After the Amendment Rules No. 5 were registered on the FRL, but before the expiry of the disallowance period, the sponsor of the product notified my Department that the benefit for product DD005 was lower than all other shoulder products within the category. This was because, as outlined above, the elbow product benefit was incorrectly listed for product DD005, rather than the shoulder product benefit.

This error appeared in both the 2017 Rules and the Amendment Rules No.5, which at that point in time had yet to commence. This meant that the benefit amount for product DD005 in the 2017 Rules would be reproduced when the Amendment Rules No. 5 commenced and amended the 2017 Rules.

Registration of incorrect version of instrument

To ensure the sponsor and private patients were not disadvantaged, the *Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 6)* (Amendment Rules No. 6) were made to correct the error. This required two amendments to the 2017 Rules: an amendment that commenced the day after the registration of the Amendment Rules No. 6 to correct the error that was in the 2017 Rules as in force at that time, and a further amendment to the 2017 Rules that commenced after the Amendment Rules No. 5 to correct the error replicated in that instrument.

Due to an administrative error, when submitting the Amendment Rules No. 6 to FRL for registration an incorrect earlier draft of the instrument that was missing one of the necessary Schedules was registered with FRL. This was quickly identified by my Department, and the correct instrument with both Schedules was registered with FRL by 6 December 2018.

To prevent this occurring in the future, my Department has commenced improved version control and quality assurance processes to ensure all documentation submitted for registration is correct. These new processes include ensuring that requirements set out in an instrument registration checklist are met in relation to each instrument, and documents checked and reviewed by several officers prior to lodgement for registration.

Yours sincerely

Greg Hunt

THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

MS18-000137

20 FEB 2018

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Via email: regords.sen@aph.gov.au

Dear Senator Williams

I refer to a letter from the Committee Secretary, Anita Coles, concerning the Senate Standing Committee for Regulations and Ordinances' consideration of the *Renewable Energy (Electricity) Amendment (Exemptions and Other Measures) Regulations 2017* [F2017L01639] (the Regulations).

The Committee requested advice as to why a statement of compatibility with human rights was not included in the explanatory statement to the Regulations and requested that the explanatory statement be updated to include one, in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003*.

The explanatory statement to the Regulations did not include the statement of compatibility with human rights due to an administrative oversight. A supplementary explanatory statement providing a statement of compatibility with human rights has been prepared. The supplementary explanatory statement will be registered on the Federal Register of Legislation in due course. I have attached a copy of the approved supplementary explanatory statement.

Thank you for writing on this matter.

Yours sincerely

JOSH FRYDENBERG

Enc

SUPPLEMENTARY EXPLANATORY STATEMENT

Issued by the Authority of the Minister for the Environment and Energy

Renewable Energy (Electricity) Act 2000

Renewable Energy (Electricity) Amendment (Exemptions and Other Measures) Regulations 2017

Background

The *Renewable Energy (Electricity) Act 2000* (the Act) establishes the Renewable Energy Target (RET) scheme. The Act provides for exemptions from RET liability for electricity used by businesses undertaking emissions-intensive trade-exposed (EITE) activities.

Amendments to the method to calculate the quantity of exemption

The *Renewable Energy (Electricity) Amendment (Exemptions and Other Measures) Regulations 2017* (the Regulations) amend the *Renewable Energy (Electricity) Regulations 2001* to introduce a new method of determining the amount of EITE exemption. The new method is specific to the electricity used in undertaking one or more EITE activities at a site.

The Regulations allow exemptions for eligible EITE activities to more effectively deliver a 100 per cent exemption for an individual site in each year and avoid the risk that some entities receive an exemption that exceeds (or is less than) the RET cost associated with undertaking the EITE activity.

The details of the Regulations are set out in the Explanatory Statement for the Regulations.

Purpose

The purpose of this Supplementary Explanatory Statement is to provide a statement of compatibility with human rights for the Regulations. The statement is set out in Attachment A.

ATTACHMENT A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Renewable Energy (Electricity) Amendment (Exemptions and Other Measures) Regulations 2017

The *Renewable Energy (Electricity) Amendment (Exemptions and Other Measures) Regulations 2017* (the Regulations) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Regulations amend the *Renewable Energy (Electricity) Regulations 2001* in order to provide full exemption from the Renewable Energy Target liability for Emissions-Intensive Trade-Exposed (EITE) activities by introducing a new method to determine the amount of exemption that is specific to the electricity used in undertaking one or more EITE activities at a site. The Regulations also make minor technical amendments relating to various aspects of the RET scheme. These amendments are minor in nature and consistent with the amendments to the Act passed by Parliament.

Human rights implications

The Regulations do not engage any of the applicable human rights or freedoms.

Conclusion

The Regulations are compatible with human rights as they do not raise any human rights issues.

MINISTER FOR INDIGENOUS AFFAIRS

Reference: MS17-005807

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter regarding the matters contained in the Senate Standing Committee on Regulations and Ordinances (SSCRO) *Delegated legislation monitor 16 of 2017* concerning the Torres Strait Regional Authority Election Rules 2017 [F2017L01279] (TSRA Election Rules).

As outlined in my letter of 29 November 2017, the Department of the Prime Minister and Cabinet has revised the Explanatory Statement for the TSRA Election Rules (attached) by:

1. Justifying sub-delegation powers of the Electoral Commissioner.
2. Justifying strict liability offences.
3. Justifying reversing the burden of proof for a number of offence provisions.

I trust the revised Explanatory Statement addresses the matters raised by the Committee.

Yours sincerely

NIGEL SCULLION

19 March 2018

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Indigenous Affairs

Aboriginal and Torres Strait Islander Act 2005, section 143G

Torres Strait Regional Authority Election Rules 2017

Overview

Section 143G of the *Aboriginal and Torres Strait Islander Act 2005* (the Act) provides that the Minister may, after consulting the Torres Strait Regional Authority (TSRA) and the Electoral Commissioner, make rules not inconsistent with the Act for the conduct of TSRA elections. Rules made under section 143G are a legislative instrument (subsection 143G(8)), and disallowable by either House of Parliament under section 42 of the *Legislation Act 2003*.

The *Torres Strait Regional Authority Election Rules 2017* (the Election Rules) cover all matters relating to nomination of candidates for election, conduct of the election including postal voting, pre-poll voting, the poll, scrutiny of ballot papers, declaration of the poll and electoral offences.

The Election Rules largely mirror those in the *Torres Strait Regional Authority Election Rules 1996* which were due to sunset on 1 October 2017.

As per section 143G(6) of the Act, the Election Rules reflect the desire for the TSRA elections to be conducted in a manner similar to the manner in which elections for the Parliament are conducted. The aim is to increase the understanding of, and participation in, elections for the Parliament by Torres Strait Islanders and Aboriginal persons living in the Torres Strait area.

Background

Section 142 of the Act establishes the TSRA as a corporate Commonwealth entity to deliver programmes for Torres Strait Islanders and Aboriginal persons living in the Torres Strait area.
Under section 142R, the TSRA consists of the eligible number of members elected in accordance with Division 5 of Part 3A of the Act (the Minister has not otherwise determined the constitution of the TSRA under section 142S of the Act).

Division 5 of Part 3A of the Act deals with TSRA elections, including the entitlement of persons to vote, qualification to be elected to the TSRA, timing of elections and voting. Section 143G enables the Minister to make rules for the conduct of elections.

The TSRA was originally established on 1 July 1994 under the *Aboriginal and Torres Strait Islander Commission Act 1989*, as a separate authority from the Aboriginal and Torres Strait Islander Commission. The Election Rules are adapted from the *Aboriginal and Torres Strait Islander Commission (Regional Council Election) Rules 1990*, and the Casual Vacancy Rules in Part 6 are adapted from the *Aboriginal and Torres Strait Islander Commission (Regional Council Election) (Casual Vacancies) Rules 1990*.

Regulatory Impact Statement

The Office of Best Practice Regulation has advised that a Regulatory Impact Statement is not required for the Election Rules as it remakes the previous instrument with minor non-substantive changes.

Commencement

The Election Rules commence on the day after they are registered on the Federal Register of Legislation.

Consultation

Before making rules for the conduct of elections, the Minister is required:

- to consult with the TSRA and the Electoral Commissioner under section 143G of the Act; and
- to undertake any consultation that the Minister considers to be appropriate and reasonably practicable to undertake under section 17 of the *Legislation Act 2003*.

The Minister wrote to the Australian Electoral Commission (AEC) and the TSRA in mid-2016 proposing minor technical amendments to the previous Election Rules be made in the re-making of the Election Rules and inviting feedback.

On behalf of the Minister, officials from the Department of the Prime Minister and Cabinet have worked with TSRA and AEC officials on the Election Rules.

Explanation of the Election Rules

Parts 1 to 6

Part 1 sets out the name of the Election Rules, when the Election Rules commence, defines key terms and specifies collection districts.

To mitigate the risk of uncertainty, the Australian Bureau of Statistic's 'Census Collection District' (CCD) maps are used as a reference point for the ward boundaries in Rule 8, despite being no longer in use for the National Census. CCD maps will be replaced in the future and amendments to reflect these changes will be made to these Election Rules.

Part 2 sets out the requirements for candidate nomination.

Part 3 provides for the conduct of the election. Division 1 sets out some general requirements such as prohibiting multiple votes by one person and how votes should be secured and counted. Division 2 stipulates the requirements for postal voting. Division 3 provides for pre-poll voting. Division 4 sets out the arrangements for the poll including the requirements for ballot boxes, ballot papers and related procedures.

Part 4 stipulates how voting in the election is to be scrutinised.

Part 5 deals with the declaration of the poll and how errors are to be corrected.

Part 6 provides for how causal vacancies are to be treated, including recounting of votes and conduct of by-elections.

Part 7 – Electoral offences

Part 7 details a suite of electoral offences.

Notes on offences with elements of strict liability

The instrument contains two offences with elements of strict liability:

- paragraph 154(1)(a) provides that it is an offence where a person in a polling booth on polling day engages in conduct that disrupts, or tends to disrupt, the operation of the poll. Subrule 154(2) provides that strict liability applies to whether the conduct disrupts, or tends to disrupt, the operation of the poll.
- subrule 155(1) provides that it is an offence where a person has been removed from a polling booth at the direction of the presiding officer given under subrule 154(3), and re-enters the booth without permission. Subrule 155(2) provides that strict liability applies to whether such a direction was given by the presiding officer under rule 154.

The objective of imposing strict liability for such offences is to provide for the proper conduct of elections and ensure that voters are free to exercise their democratic rights without interference or disruption. In the interests of public safety and the broader public interest, it is reasonable that only the conduct of the accused be proved. Honest and reasonable mistake of fact remains an allowable defence, as per section 9.2 of the *Criminal Code*.

The penalties for the above offences do not include a term of imprisonment and are significantly less than the 60 penalty unit limit generally considered appropriate for strict liability offences under the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Notes on offences providing a defence which imposes an evidential or stronger legal burden of proof on the defendant

Four provisions in the instrument set out a defence to an offence, but impose on the defendant an evidential burden of proof, requiring the defendant to raise evidence about the defence:

- subrule 73(3), defence to unlawfully entering a polling booth without permission if the person had permission from the Presiding Officer;
- rule 135, defence to divulging information about the vote of a voter if done for the purposes of Part 4 (scrutiny of the votes);
- subrule 139(2), defence to distributing certain electoral advertising material if the material is of specified kinds; and
- subrule 144(2), defence to leaving voting directions in polling booths if the document is an official instruction displayed by proper authority.

An evidential burden requires a person to provide evidence of an asserted fact in order to prove that fact to a court. In the above instances, the Election Rules place an evidential burden on the defendant as he or she is best placed to raise evidence of any assertions he or she are seeking to rely upon in defending the charges.

Five further offences specify defences but impose on the defendant a stronger, legal burden of proof, requiring the defendant to positively prove the defence:

- subrule 140(3), defence to offences in relation to the publication and distribution of misleading or deceptive material if the person proves that they did not know, or could not be reasonably expected to know, that the thing was likely to mislead a voter;
- subrule 140(4), defence to offences in relation to publication of false representations of ballot papers if the person proves that they did not know, or could not be reasonably expected to know, that the representation was likely to induce a voter to vote informally;
- subrules 153(4) and (5), defences to offences in relation to making an official mark on a ballot paper if the person proves that he or she acted with lawful authority; and
- subrule 156(2), defence to offence of defamation of candidates if the person proves that he or she had reasonable grounds for believing and did in fact believe the statement made to be true.

As per the Attorney General's Department Guidance Sheet on the presumption of innocence, under international human rights law, "a reverse onus provision will not necessarily violate the presumption of innocence provided that the law is not unreasonable in the circumstances and maintains the rights of the accused."

The policy objective of the above-listed provisions is to ensure the integrity of TSRA elections, and to safeguard voters from being misled by officials or purported officials. By imposing on the defendant the evidential burden of proof, it ensures that people will be on notice as to any potential contravention; requiring that proper care is taken in the exercise of official duties, in communicating with voters and producing material. In such cases, it is more practical for the defendant to prove, on the balance of probabilities, that he or she held a reasonable belief about his or her own conduct, than the prosecution to have to disprove it.

Subrules 140(3) and (4) – in relation to publication of deceptive material - are consistent with the burden of proof stipulated under section 329 of the *Commonwealth Electoral Act 1918* (Electoral Act), while subrule 156(2), which refers to alleged defamation, is consistent with the usual approach to defamation under the general law.

Furthermore, any decision to charge a person under these provisions would remain subject to Commonwealth Prosecution Policy.

Part 8 – Miscellaneous

Part 8 includes a range of miscellaneous provisions related to the election, including if further elections are required, the storage of electoral papers and the collection of statistical information.

Note on Rule 166 – delegation powers

Rule 166 provides that where a power or function is conferred on the Electoral Commissioner under the Election Rules, the Electoral Commissioner may by written notice, delegate that power or function to the Deputy Electoral Commissioner or a member of staff of the Electoral Commission. This broad sub-delegation is similar to section 16 of the Electoral Act.

The broad power of delegation is necessary and extends to individuals with relevant qualifications and attributes necessary to exercise the powers or functions. The functions given to the Electoral Commissioner under the Election Rules are essentially administrative in nature and deal with the appointment of officers, polling places, times for polling and approving forms, amongst other functions that relate to the conduct of TSRA elections, a core function that the Australian Electoral Commission has successfully performed over a long period.

The Electoral Commissioner, the Deputy Electoral Commissioner and "a member of staff of the Commission" referred to in rule 166 are the same people who undertake the election functions under the Electoral Act. The Australian Electoral Commission ensures that all staff are trained in the conduct of elections such that they are able to perform their allocated tasks during an election.

Schedules 1 to 3

Schedule 1 repeals the previous instrument, the *Torres Strait Regional Authority Election Rules 1996*.

Schedule 2 details the grounds on which a voter can apply for a postal or pre-poll vote.

Schedule 3 stipulates the procedure to be followed in a recount.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Torres Strait Regional Authority Election Rules 2017

The Torres Strait Regional Authority Election Rules 2017 (the Election Rules) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

The Election Rules establish rules for the conduct of Torres Strait Regional Authority (TSRA) elections. These rules largely mirror those in the *Torres Strait Regional Authority Election Rules 1996*, which were due to sunset on 1 October 2017.

Background

Section 142 of the *Aboriginal and Torres Strait Islander Act 2005* (the Act) establishes the TSRA as a corporate Commonwealth entity to deliver programmes for Torres Strait Islanders and Aboriginal persons living in the Torres Strait area.

Under section 142R, the TSRA consists of the eligible number of members elected in accordance with Division 5 of Part 3A of the Act (the Minister has not otherwise determined the constitution of the TSRA under section 142S of the Act).

Section 143G of the Act enables the Minister to make rules for the conduct of TSRA elections.

Human rights implications

The Election Rules engage the following rights:

- the *right to self-determination* in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the *right to take part in public affairs and elections* in Article 25 of the ICCPR;
- the *rights of equality and non-discrimination* in Article 2, 16 and 26 of the ICCPR and Article 2 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD); and
- the *right, when charged with a criminal offence, to be presumed innocent until proved guilty according to law* in Article 14 of the ICCPR.

Right to self-determination

Article 1 of the ICCPR and ICESCR recognises the rights of all peoples to participate effectively in public life. The UN Committee on the Elimination of Racial Discrimination has stated that the right to self-determination involves 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference.'[1]

The Election Rules advance the right to self-determination of Aboriginal and Torres Strait Islander persons in the Torres Strait area.

Right to take part in public affairs and elections

Article 25 of the ICCPR guarantees the rights of citizens to stand for public office, to vote in elections and to have access to positions in the public service.

The UN Human Rights Committee has stated that the conduct of public affairs relates to the exercise of legislative, executive and administrative powers, and covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.[2] Citizens participate directly in the conduct of public affairs when they are elected to public office. They also do so when they vote to decide public issues through a referendum or other electoral process. Indirect participation takes place when people elect bodies such as parliaments to represent them.

The Election Rules advance the rights of Aboriginal and Torres Strait Islander persons in the Torres Strait area. The Election Rules:

- enable Aboriginal and Torres Strait Islander persons to participate directly in the affairs of the TSRA by establishing a mechanism for eligible candidates to be elected to the TSRA; and
- enable Aboriginal and Torres Strait Islander persons to participate indirectly in the affairs of the TSRA by enabling them to determine a candidate to stand for election to the TSRA.

Rights of equality and non-discrimination

Articles 2, 16 and 26 of the ICCPR affirm the rights of all people to be treated equally. Article 2 of the ICERD further prohibits discrimination on the basis of race.

The Election Rules favour the interests of Aboriginal and Torres Strait Islander persons in the Torres Strait area over those of other persons. In doing so, the Election Rules treat Aboriginal and Torres Strait Islander persons differently on the basis of their race, with the result that other persons do not benefit from being able to participate in the affairs of the TSRA. This means that those persons cannot enjoy certain rights (such as political rights in Article 5(c) of ICERD) to the same extent as Aboriginal and Torres Strait Islanders.

While the Election Rules constitute differential treatment on the basis of race, it can be characterised as a 'special measure' with the meaning of Article 1(4) of the ICERD. Article 1(4) provides that 'special measures' are deemed not to be discrimination. Special measures are designed to 'secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.' For a measure to be characterised as a 'special measure' it must:

- be for a particular group or individuals;
- be taken for the sole purpose of securing the adequate advancement of those groups or individuals;
- be 'necessary'; and
- not continue after its objectives have been achieved.

The Election Rules meet these criteria. The Election Rules:

- apply directly to Aboriginal and Torres Strait Islander persons in the Torres Strait area;
- have as their sole purpose the effective involvement of Aboriginal and Torres Strait Islander persons in the formulation of policies and programmes affecting them;
- are necessary to empower Aboriginal and Torres Strait Islander persons to participate in public affairs, and is a reasonable and proportionate response given historical marginalisation from public life of this particular group; and
- have a purpose which has yet to be achieved, as ongoing disadvantage experienced by Aboriginal and Torres Strait Islander persons demonstrates.

The right, when charged with a criminal offence, to be presumed innocent until proved guilty according to law

Article 14.2 of the ICCPR states that, "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

The Election Rules provide nine offences that require a defendant to either raise evidence about their defence (evidential burden) or positively prove the defence (legal burden, discharged on the balance of probabilities).

Each of the nine electoral offence relates to alleged misconduct that may undermine the integrity of an election or impact upon (or prevent) voters in exercising their right to self-determination and right to participate in elections.

By imposing on the defendant the evidential or legal burden of proof, it ensures that people will be on notice as to any potential contravention; requiring that voters are cautious to avoid disruption to other voters or the election and that proper care is taken in the exercise of official duties, in communicating with voters and producing material.

Where the Election Rules place an evidential burden on the defendant, it is only in cases where the defendant is the best placed to raise evidence of any assertions he or she are seeking to rely upon in defending the charges.

In regards to where the legal burden of proof is reversed, the nature of the offences suggest that it is not unreasonable for the defendant to prove, on the balance of probabilities, that he or she held a reasonable belief about his or her own conduct or acted according to law, than the prosecution to have to disprove it.

The penalties for the nine relevant offences do not include a term of imprisonment and carry a 10 penalty unit or less fine.

Any potential defendant would still be protected by their general rights at law. It is also noted that the decision to charge a person under these provisions would remain subject to Commonwealth Prosecution Policy.

Conclusion

The Election Rules are compatible with human rights. The Election Rules advance the rights of Aboriginal and Torres Strait Islander persons in the Torres Strait area to self-determination and participation in public affairs and elections. While it involves differential treatment on the basis of race, the Election Rules constitute a special measure within the meaning of Article 1(4) of the ICERD. To the extent that the Election Rules may limit the rights of those charged with an electoral offence, the limitations are not unreasonable in the circumstances, maintain the rights of the accused and support the broader legitimate objective of ensuring Torres Strait Islanders' right of self-determination and electoral participation.

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[1] UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21*, CERD, 48th sess, contained in UN Doc A/51/18 (15 March 1996).

[2] UN Committee on Human Rights, *General Comment No 25*, UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996).

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield

Minister for Urban Infrastructure and Cities

PDR ID: MS18-000239

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

Vehicle Standard (Australian Design Rule 33/01 – Brake Systems for Motorcycles and Mopeds) 2017

I am writing to inform the Senate Standing Committee on Regulations and Ordinances (the Committee) of changes recently made to the Explanatory Statement (ES) for the Vehicle Standard (Australian Design Rule 33/01 – Brake Systems for Motorcycles and Mopeds) 2017 (the Determination).

In accordance with the Committee's Guideline on incorporation, the ES has been revised to specify the manner in which the Determination incorporates a number of other documents by reference, as well as information on how to access each of these documents.

1. Manner of incorporation of documents

Clause 7 of the Determination incorporates references to the United Nations (UN) Regulation No. 78 (R 78) and the UN Global Technical Regulation No. 3 (GTR 3). These are international standards, which specify equivalent requirements and test methods to Appendix A of the Determination.

Appendix A of the Determination incorporates references to the Consolidated Resolution on the Construction of Vehicles (R.E.3), UN Regulation No. 10, ISO 7117:1995, ISO 2575:2010/Amd1:2011 (ISO 7000-2623), ASTM E1136-93 and ASTM E1337-90.

As these standards are not legislative instruments, subsections 14(1)(b) and 14(2) of the Legislation Act 2003 (the Legislation Act) have the effect that the Determination can only incorporate the standards as in force at the time the Determination commenced (1 December 2017), and not 'as in force or existing from time to time'.

Level 2, 280 Pacific Highway, Lindfield NSW 2070 • T 02 9465 3950 • F 02 9465 3999
P O Box 6022 Parliament House, Canberra ACT 2600 • T 02 6277 7790 • F 02 6245 4396
paul.fletcher.mp@aph.gov.au • www.paulfletcher.com.au

2. Access to incorporated documents

The Consolidated Resolution on the Construction of Vehicles (R.E.3.), the UN Regulations and the UN Global Technical Regulations are freely available online through the UN World Forum for the Harmonization of Vehicle Regulations (WP.29). The WP.29 website is **www.unece.org/trans/main/welcwp29.html**.

ISO 7117:1995 and ISO 2575:2010/Amd1:2011 are available for purchase only, through the International Organization for Standardization (ISO). However, these are optional standards, typically accessed by vehicle manufacturers and test facilities as part of their professional library, and alternative methods and requirements are specified directly in the text of Appendix A of the Determination. Further, the ISO 7000-2623 symbol referred to in Appendix A of the Determination (symbol B.18 as specified in ISO 2575:2010/Amd1:2011), has been included in the replacement ES.

ASTM E1136-93 and ASTM E1337-90 are freely available online through the ASTM International Reading Room. This requires registration using an email and password. The ASTM International Reading Room website is **www.astm.org/readinglibrary/**.

A marked up copy of the revised ES, is provided for your information at Attachment A. I understand the replacement ES will shortly be registered on the Federal Register of Legislation.

I trust this information will be of assistance to the Committee.

Yours sincerely

Paul Fletcher

7 / 2 /2018

Enc

Vehicle Standard (Australian Design Rule 33/01 – Brake Systems for Motorcycles and Mopeds) 2017

Made under section 7 of the *Motor Vehicle Standards Act 1989*

Replacement Explanatory Statement

Issued by the authority of the Minister for Urban Infrastructure and Cities

~~November 2017~~

February 2018

CONTENTS

1. LEGISLATIVE CONTEXT

Vehicle Standard (Australian Design Rule 33/01 – Brake Systems for Motorcycles and Mopeds) 2017 is made under the *Motor Vehicle Standards Act 1989* (the Act). The Act enables the Australian Government to establish nationally uniform standards that apply to new road vehicles when they are first supplied to the market in Australia. The Act applies to such vehicles whether they are manufactured in Australia or imported.

The making of the vehicle standards necessary for the Act's effective operation is provided for in section 7 which empowers the Minister to "determine vehicle standards for road vehicles or vehicle components".

Vehicle Standard (Australian Design Rule 33/01 – Brake Systems for Motorcycles and Mopeds) 2017 (ADR 33/01) replaces ADR 33/00 2007.

2. CONTENT AND EFFECT OF ADR 33/01 – BRAKE SYSTEMS FOR MOTORCYCLES AND MOPEDS

2.1. Overview of the ADR

The function of this standard is to ensure safe braking under normal and emergency conditions for motorcycles (ADR categories LC, LD and LE) and mopeds (ADR categories LA and LB). It will apply to new model vehicles of these categories from 1 November 2019 and all new vehicles of these categories from 1 November 2021.

The standard is based upon United Nations (UN) Regulation No. 78.

2.2. Effect of the ADR

The standard is being made to set mandatory requirements for advanced braking systems. Advanced braking systems include Anti-lock Braking Systems (ABS) and Combined Braking Systems (CBS).

The standard is expected to reduce the cost of road trauma, particularly in relation to serious and fatal motorcyclist injury.

2.3. Incorporated Documents

The ADR incorporates references to a number of standards of a highly technical nature. These standards are typically accessed by vehicle manufacturers and test facilities as part of their professional library.

Clause 7 of the ADR incorporates references to international standards ~~United Nations~~UN Regulation No 78 – UNIFORM PROVISIONS CONCERNING THE APPROVAL OF VEHICLES OF CATEGORIES L1, L2, L3, L4 AND L5 WITH REGARD TO BRAKING (R 78) and ~~United Nations~~UN Global Technical Regulation No. 3 – MOTORCYCLE BRAKE SYSTEMS (GTR 3). These standards specify equivalent requirements and test methods to Appendix A of the ADR.

Appendix A of the ADR incorporates references to the Consolidated Resolution on the Construction of Vehicles (R.E.3.) – document TRANS/WP.29/78/Rev.1/Amend.2 as last amended by Amend.4, Regulation No. 10 (R 10), ISO 7117:1995, ISO 2575:2010/Amd1:2011 (ISO 7000-2623), ASTM E1136-93 and ASTM E1337-90.

In accordance with subsections 14(1)(b) and 14(2) of the *Legislation Act 2003* these standards are incorporated as in force at the commencement of the Determination.

The ~~standards~~Consolidated Resolution on the Construction of Vehicles (R.E.3.), the UN Regulations (including R 10 and R 78) and the UN Global Technical Regulations (including GTR 3) are international standards, which may be freely accessed online through the ~~United Nations~~UN World Forum for the Harmonization of Vehicle Regulations (WP.29). The WP.29 website is ~~https://~~**www.unece.org/trans/main/welcwp29.html**.

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ISO 7117:1995 (which specifies a method for determining the maximum speed of a motorcycle) and ISO 2575:2010/Amd1:2011 (which specifies conventional symbols for vehicle controls, indicators and tell-tales) are available for purchase only, through the International Organization for Standardization (ISO). However, these are optional standards, typically accessed by vehicle manufacturers and test facilities as part of their professional library, and alternative methods and requirements are specified directly in the text of Appendix A of the ADR. Further, the ISO 7000-2623 symbol referred to in Appendix A of the ADR (symbol B.18 as specified in ISO 2575:2010/Amd1:2011), is reproduced below:

ASTM E1136-93 (which specifies a standard reference test tyre) and ASTM E1337-90 (which specifies a method for determining the peak braking coefficient of road test surfaces) may be freely accessed online through the ASTM International Reading Room. This requires the user to register using an email and password. The ASTM International Reading Room website is **www.astm.org/readinglibrary/**.

3. BEST PRACTICE REGULATION

3.1. Business Cost Calculator

There are costs associated with mandating the ADR but as indicated by the Regulation Impact Statement (RIS) these are significantly outweighed by benefits. Overall, the new ADR will provide a reduction in road trauma estimated at a total of 580 lives saved from a 15 year period of regulation. Net benefits will be $1.66 billion.

3.2. General Consultation Arrangements

It has been longstanding practice to consult widely on proposed new or amended vehicle standards. For many years there has been active collaboration between the Commonwealth and the state/territory governments, as well as consultation with industry and consumer groups. Much of the consultation takes place within institutional arrangements established for this purpose. The analysis and documentation prepared in a particular case, and the bodies consulted, depend on the degree of impact the new or amended standard is expected to have on industry or road users.

Depending on the nature of the proposed changes, consultation could involve the Technical Liaison Group (TLG) and the Australian Motor Vehicle Certification Board (AMVCB), the Strategic Vehicle Safety and Environment Group (SVSEG) and the Austroads Safe Vehicles Theme Group (SVTG), the Transport and Infrastructure Senior Officials' Committee (TISOC) and the Transport and Infrastructure Council (the Council).

- TLG consists of technical representatives of government (Australian and state/territory), the manufacturing and operational arms of the industry (including organisations such as the Federal Chamber of Automotive Industries and the Australian Trucking Association) and of representative organisations of consumers and road users (particularly through the Australian Automobile Association). AMVCB consists of the government members of TLG.
- SVSEG consists of senior representatives of government (Australian and state/territory), the manufacturing and operational arms of the industry and of representative organisations of consumers and road users (at a higher level within each organisation as represented in TLG). SVTG consists of the government members of SVSEG.
- TISOC consists of state and territory transport and/or infrastructure Chief Executive Officers (CEOs) (or equivalents), the CEO of the National Transport Commission, New Zealand and the Australian Local Government Association.
- The Council consists of the Australian, state/territory and New Zealand Ministers with responsibility for transport and infrastructure issues.

Editorial changes and changes to correct errors are processed by the Department of Infrastructure ~~and~~, Regional Development and Cities. This approach is only used where the amendments do not vary the intent of the vehicle standard.

Proposals that are regarded as significant need to be supported by a RIS meeting the requirements of the Office of Best Practice Regulation (OBPR) as published in *the Australian Government Guide to Regulation* and the Council of Australian Governments' *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies.*

3.3. Specific Consultation Arrangements for this Vehicle Standard

State and territory governments, industry and road user groups have been consulted using the established consultation mechanisms for the development of the ADRs. In addition, the Department conducted preliminary consultation meetings with motorcycling interest groups to discuss the results of commissioned research on the topic. The Department subsequently released a public discussion paper for comment.

In accordance with OBPR requirements, a consultation RIS was then released for a six-week public consultation period in May 2017. The RIS conforms to requirements established by the OBPR for regulatory proposals where the decision maker is the Australian Government's Cabinet, the Prime Minister, minister, statutory authority, board or other regulator. The OBPR reference number for the RIS is 22202.

4. STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The following Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.1. Overview of the Legislative Instrument

ADR 33/01 is a new standard. It sets mandatory requirements for advanced braking systems to ensure safe braking under normal and emergency conditions for motorcycles (ADR categories LC, LD and LE) and mopeds (ADR categories LA and LB).

4.2. Human Rights Implications

ADR 33/01 does not engage any of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.3. Conclusion

ADR 33/01 is compatible with human rights as it does not raise any human rights issues.

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield

Minister for Urban Infrastructure and Cities

PDR ID: MS18-000495

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

Vehicle Standards (Australian Design Rule 13/00, 19/02, 33/01, 67/00, 74/00, 84/00, 86/00 and 87/00)

I refer to the letter dated 8 February 2018 from the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee) regarding Vehicle Standards (Australian Design Rule 13/00, 19/02, 33/01, 67/00, 74/00, 84/00, 86/00 and 87/00).

The Committee has requested further information from me about scrutiny issues identified in relation to these Determinations. I would like to provide the following advice to the Committee in response to these matters as they appear in the Delegated Legislation Monitor No. 1 of 2018. I note that Australian Design Rule (ADR) 33/01 has been dealt with separately in my letter to the Committee dated 7 February 2018.

1. Manner of incorporation of documents

All of the subject Determinations incorporate references to United Nations (UN) Regulations. These are international standards, which specify equivalent requirements and test methods to Appendix A within each of a number of the Determinations. Specifically, UN R48, 53, 91, 93, 77 and 119 are listed as acceptable alternative standards. In addition, there a number of incorporated references that sit within these primary references. These are as follows: UN R1, 3, 4, 6, 7, 8, 13, 13-H, 18, 19, 20, 23, 31, 37, 38, 45, 48, 50, 57, 70, 72, 77, 78, 87, 88, 91, 97, 98, 99,104, 107, 112, 113, 116, 119, 121, 123 and 128. Appendix A of each of these Determinations also incorporates references to E/ECE/324-E/ECE/TRANS/505/Rev.2 and in some cases the Consolidated Resolution on the Construction of Vehicles (R.E.3).

Level 2, 280 Pacific Highway, Lindfield NSW 2070 • T 02 9465 3950 • F 02 9465 3999
P O Box 6022 Parliament House, Canberra ACT 2600 • T 02 6277 7790 • F 02 6245 4396
paul.fletcher.mp@aph.gov.au • www.paulfletcher.com.au

In addition, ADR 13/00 specifically references the Guide to Meteorological Instruments and Methods of Observation, Sixth Edition, Commission Internationale de l'Eclairage (CIE) Publication 15.2, 1986 Colorimetry, CIE 1931 standard colorimetric observer, and CIE Publication No. 70, Vienna 1987, Federal Motor Vehicle Safety Standards (FMVSS) 108 Lamps, Reflective Devices and Associated Equipment. ADRs 19/02 and 67/00 reference International Standards Organisation (ISO) 2575:2004 - Road vehicles - Symbols for controls, indicators and tell-tales. ADR 84/00 refers to ISO 612:1978 Road vehicles - Dimensions of motor vehicles and towed vehicles. ADR 74/00, 86/00 and 87/00 references International Electrical Commission (IEC) publication 60061.

As these standards are not legislative instruments, Sub-sections 14(1)(b) and 14(2) of the Legislation Act 2003 (the Legislation Act) have the effect that the Determination can only incorporate the standards as in force at the time the Determination commenced, and not 'as in force or existing from time to time'.

I note the Committee's comments on facilitating the public's ability to understand the operation of the Determinations. For this reason, I instructed the Department of Infrastructure, Regional Development and Cities to amend the Explanatory Statements to explicitly state that these standards are incorporated as in force at the commencement of the Determinations.

2. Access to incorporated documents.

I understand the importance of ensuring persons interested in or affected by an instrument have adequate access to its terms, including any incorporated documents.

The UN Regulations, E/ECE/324-E/ECE/TRANS/505/Rev.2 and R.E.3 are freely available online through the UN World Forum for the Harmonization of Vehicle Regulations (WP.29). The WP.29 website is **www.unece.org/trans/main/welcwp29.html**.

The Guide to Meteorological Instruments and Methods of Observation, Sixth Edition, is freely available at **https://library.wmo.int/opac/#.Woo8bkpsZaQ**.

ISO 2575:2004 is a minor standard that is available for purchase only, through the ISO. This is a highly technical standard, which specifies requirements and recommendations for measurement techniques involving the instrumentation used in lighting devices on road vehicles. It has been referenced in the ADRs, other national/regional vehicle standards and international vehicle standards for many years as an optional requirement. Vehicle test facilities (in particular lighting laboratories) access this standard as part of their professional library. ISO 612:1978 is also available for purchase and both ISO documents are available at **www.iso.org/home.html**.

FMVSS 108 is accessible free of charge via the United States Government Publishing Office website at **www.gpo.gov/fdsys/search/showcitation.action**.

IEC publication 60061 is a minor standard that is available for purchase only, through the IEC. This is a highly technical standard, which specifies requirements and recommendations for measurement techniques involving electrical requirements for road vehicles. It has been referenced in the ADRs, other national/regional vehicle standards and international vehicle standards for many years. Vehicle test facilities (in particular lighting laboratories) access this standard as part of their professional library. Documents are available at **www.iec.ch/**.

CIE publications are minor standards that are available for purchase only, through the CIE. These are highly technical standards, which specify requirements and recommendations for measurement techniques involving lighting requirements for road vehicles. They have been referenced in the ADRs, other national/regional vehicle standards and international vehicle standards for many years. Vehicle test facilities (in particular lighting laboratories) access these standards as part of their professional library. Documents are available at **www.cie.co.at/**.

In line with best-practice and consistent with section 15J of the Legislation Act, I have instructed the department to amend the Explanatory Statements to include a description of these standards as well as details of how to access them.

Marked up copies of the revised Explanatory Statements are enclosed for your information. I understand these replacement Explanatory Statements will shortly be registered on the Federal Register of Legislation.

I trust this information supports the Committee in finalising its consideration of the Determination.

Yours sincerely

Paul Fletcher

4 / 3 /2018

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Vehicle Standard (Australian Design Rule 13/00 – Installation of Lighting and Light Signalling Devices on other than L-Group Vehicles) 2005 Amendment 6

Made under section 7 of the *Motor Vehicle Standards Act 1989*

Replacement Explanatory Statement

Issued by the authority of the Minister for Urban Infrastructure and Cities
~~Issued by the authority of the Minister for Urban Infrastructure~~

February 2018

~~**November 2017**~~

CONTENTS

1. LEGISLATIVE CONTEXT

Vehicle Standard (Australian Design Rule 13/00 – Installation of Lighting and Light Signalling Devices on other than L-Group Vehicles) 2005 Amendment 6 is made under the *Motor Vehicle Standards Act 1989* (the Act). The Act enables the Australian Government to establish nationally uniform standards that apply to new road vehicles when they are first supplied to the market in Australia. The Act applies to such vehicles whether they are manufactured in Australia or imported.

The making of the vehicle standards necessary for the Act's effective operation is provided for in section 7 which empowers the Minister to "determine vehicle standards for road vehicles or vehicle components".

Vehicle Standard (Australian Design Rule 13/00 – Installation of Lighting and Light Signalling Devices on other than L-Group Vehicles) 2005 was originally determined in 2005.

2. CONTENT AND EFFECT OF ADR 13/00 AND THE AMENDMENT

2.1. Overview of the ADR

The function of Australian Design Rule (ADR) 13/00 is to prescribe requirements for the number and mode of installation of lighting and light signalling devices on road vehicles other than L-group (motorcycles and mopeds) vehicles. This includes main-beam and dipped-beam headlamps, fog, direction indicator, position, stop, reversing, parking, daytime running and cornering lamps, hazard warning signals and retroreflectors. The standard includes the technical content of United Nations (UN) Regulation No. 48.

2.2. Effect of the ADR Amendment

This amendment removes clauses associated with Australian-specific lighting types where those are now covered under UN ~~Regulations.~~ regulations. It also includes clauses to address new ADRs for cornering and parking lamps.

Additionally, this amendment clarifies driving lamp permitted locations, and allows for amber and white external cabin lamps as requested by ~~AMVCB.~~the Australian Motor Vehicle Certification Board.

Finally, this amendment incorporates the latest version of UN Regulation No. 48 (supplement 6 to the 06 series of amendments).~~-~~ As UN Regulation No. 48 is already applied by Australia, this change has no significant effect on stringency apart from clarifying Australia's vehicle lighting requirements.

This amendment is part of a package of introductions and amendments to ADRs associated with vehicle lighting generally, with the aims of addressing parking and cornering lamps more explicitly and clearly, and improving the quality of the lighting ADR suite.

2.3. Incorporated Documents

This amendment does not introduce additional references to the documents already incorporated in the ADRs.

The amended Clause 11 continues to incorporate a reference to UN Regulation No. 48 - UNIFORM PROVISIONS CONCERNING THE APPROVAL OF VEHICLES WITH REGARD TO THE INSTALLATION OF LIGHTING AND LIGHT-SIGNALLING DEVICES. This standard specifies the equivalent test methods and standards to Appendix A of the ADR. Applicable sections of UN Regulation No. 48 in turn reference UN Regulation Nos. 3, 4, 6, 7, 13, 13-H, 19, 23, 37, 38, 45, 70, 77, 87, 88, 91, 97, 98, 104, 107, 112, 116, 119, 121 and 123. Additionally the UN regulations reference the Commission Internationale de l'Eclairage (CIE) publications - CIE Publication 15.2, 1986 Colorimetry; CIE 1931 standard colorimetric observer; and CIE Publication No. 70, Vienna 1987. CIE publications are available for purchase at http://www.cie.co.at/.

In addition, the Guide to Meteorological Instruments and Methods of Observation, Sixth Edition is referenced in the UN regulations and is available, free of charge via: http://www.wmo.int/pages/index_en.html

While these standards are highly technical in nature and typically accessed by manufacturers and test facilities as part of their professional library. UN regulations are accessible free of charge via the UN World Forum for the Harmonization of Vehicle Regulations (WP.29) website at https://www.unece.org/trans/main/welcwp29.html.

Clause 11 also continues to incorporate an updated reference to Federal Motor Vehicle Safety Standards (FMVSS) 108 Lamps, Reflective Devices and Associated Equipment (amended by Amendment(s) up to that published February 8, 2016).

FMVSS 108 is accessible free of charge via the U.S. Government Publishing Office website at https://www.gpo.gov/fdsys/search/showcitation.action.

In accordance with subsections 14(1)(b) and 14(2) of the *Legislation Act 2003*, referenced standards are incorporated as in force at the commencement of the Determination.

3. BEST PRACTICE REGULATION

3.1. Business Cost Calculator

There is no significant cost or saving associated with this ADR amendment as it has no significant effect on stringency.

3.2. General Consultation Arrangements

It has been longstanding practice to consult widely on proposed new or amended vehicle standards. For many years there has been active collaboration between the Federal Government and the state/territory governments, as well as consultation with industry and consumer groups. Much of the consultation takes place within institutional arrangements established for this purpose. The analysis and documentation prepared in a particular case, and the bodies consulted, depend on the degree of impact the new or amended standard is expected to have on industry or road users.

Depending on the nature of the proposed changes, consultation could involve the Strategic Vehicle Safety and Environment Group (SVSEG), Australian Motor Vehicle Certification Board (AMVCB), Technical Liaison Group (TLG), Transport and Infrastructure Senior Officials' Committee (TISOC) and the Transport and Infrastructure Council (TIC).

- SVSEG consists of senior representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry (including organisations such as the Federal Chamber of Automotive Industries and the Australian Trucking Association) and of representative organisations of consumers and road users (particularly through the Australian Automobile Association).
- AMVCB consists of technical representatives of government regulatory authorities (Australian and state/territory) that deal with ADR and other general vehicle issues, and the National Transport Commission and the National Heavy Vehicle Regulator.
- TLG consists of technical representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry and of representative organisations of consumers and road users (the same organisations as represented in SVSEG).
- TISOC consists of state and territory transport and/or infrastructure Chief Executive Officers (CEO) (or equivalents), the CEO of the National Transport Commission, New Zealand and the Australian Local Government Association.
- The TIC consists of the Australian, state/territory and New Zealand Ministers with responsibility for transport and infrastructure issues.

Editorial changes and changes to correct errors are processed by the Department. This approach is only used where the amendments do not vary the intent of the vehicle standard.

Proposals that are regarded as significant need to be supported by a Regulation Impact Statement meeting the requirements of the Office of Best Practice Regulation (OBPR) as published in the *Australian Government Guide to Regulation* and the Council of Australian Government's *Best Practice Regulation: A Guide for Ministerial Councils and Standard-Setting Bodies*.

3.3. Specific Consultation Arrangements for this Vehicle Standard

The incorporation of UN Regulations for parking and cornering lamps which drives this amendment was discussed and agreed at SVSEG meeting 9 in 2014. The specifics of this amendment were discussed with and agreed by TLG in September 2016.

As the amendment is minor in nature, and does not increase the stringency of the ADR, there is no need for further consultation through TISOC, the Transport and Infrastructure Council, or the public comment process.

3.4. Regulation Impact Statement

As the proposed amendment does not increase the stringency of the ADR, a Regulation Impact Statement is not required.

Since the decision is made by the Minister for Urban Infrastructure and Cities without reference to the TIC and the proposal is not considered significant, the Office of Best Practice Regulation requirements have been met for this regulatory proposal (OBPR Reference ID 21346).

4. STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The following Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

4.1. Overview of the Legislative Instrument

This amendment removes clauses associated with Australian-specific content related to requirements for lighting and light-signalling devices not covered by UN Regulations, improves the quality of the ADR and incorporates the latest version of the UN Regulation.

4.2. Human Rights Implications

This amendment to ADR 13/00 does not engage any of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.3. Conclusion

This amendment to ADR 13/00 is compatible with human rights as it does not raise any human rights issues.

Vehicle Standard (Australian Design Rule 19/02 – Installation of Lighting and Light Signalling Devices on L-Group Vehicles) 2005 Amendment 1

Made under section 7 of the *Motor Vehicle Standards Act 1989*

Replacement Explanatory Statement

Issued by the authority of the Minister for Urban Infrastructure and Cities ~~Issued by the authority of the Minister for Urban Infrastructure~~

~~November 2017~~February 2018

CONTENTS

1. LEGISLATIVE CONTEXT

Vehicle Standard (Australian Design Rule 19/02 – Installation of Lighting and Light Signalling Devices on L-Group Vehicles) 2005 Amendment 1 is made under the *Motor Vehicle Standards Act 1989* (the Act). The Act enables the Australian Government to establish nationally uniform standards that apply to new road vehicles when they are first supplied to the market in Australia. The Act applies to such vehicles whether they are manufactured in Australia or imported.

The making of the vehicle standards necessary for the Act's effective operation is provided for in section 7 which empowers the Minister to "determine vehicle standards for road vehicles or vehicle components".

Vehicle Standard (Australian Design Rule 19/02 – Installation of Lighting and Light Signalling Devices on L-Group Vehicles) 2005 was originally determined in 2005.

2. CONTENT AND EFFECT OF ADR 19/02 AND THE AMENDMENT

2.1. Overview of the ADR

The function of Australian Design Rule (ADR) 19/02 is to prescribe requirements for the number and mode of installation of lighting and light signalling devices on L-group (motorcycles and mopeds) vehicles. This includes main-beam and dipped-beam headlamps, fog, direction indicator, position, stop, reversing, parking, and daytime running lamps, hazard warning signals and retroreflectors. The standard includes the technical content of United Nations (UN) Regulation No. 53.

2.2. Effect of the ADR Amendment

This amendment removes clauses associated with Australian-specific lighting types where those are now covered under UN Regulations, and obsolete lamp types (including search lamps and internal lamps). It also includes clauses to address the new ADR for parking lamps.

Finally, this amendment incorporates the latest version of UN Regulation No. 53 (supplement 17 to 01 series of amendments). As UN Regulation No. 53 is already applied by Australia, this change has no significant effect on stringency apart from clarifying Australia's vehicle lighting requirements. This also addresses the issue of the latest version of UN Regulation No. 53 making daytime running lamps (or an always-on headlamp) mandatory – this clause has been made optional for ADR 19/02 compliance.

This amendment is part of a package of introductions and amendments to ADRs associated with vehicle lighting generally, with the aims of addressing parking and cornering lamps more explicitly and clearly, and improving the quality of the lighting ADR suite.

2.3. Incorporated Documents

This amendment does not introduce additional references to the documents already incorporated in the ADRs.

Amended Clause 12 continues to incorporate a reference to UN Regulation No. 53 - UNIFORM PROVISIONS CONCERNING THE APPROVAL OF CATEGORY L_3

VEHICLES WITH REGARD TO THE INSTALLATION OF LIGHTING AND LIGHT- SIGNALLING DEVICES. This standard specifies the equivalent test methods and standards to Appendix A of the ADR. Applicable sections of UN Regulation No. 53 in turn reference UN Regulation Nos. 1, 6, 7, 8, 20, 48, 50, 57, 72, 78, 87, 97, 98, 99, 112 and 113.

While these standards are highly technical in nature and typically accessed by manufacturers and test facilities as part of their professional library, they are accessible free of charge via the UN World Forum for the Harmonization of Vehicle Regulations (WP.29) website at https://www.unece.org/trans/main/welcwp29.html.

This amendment introduces an additional reference to a newly incorporated document in the ADR. The reference is to International Standards Organisation (ISO) 2575:2004. Compliance with the referenced standard is optional.

ISO standards are highly technical in nature and typically accessed by manufacturers, and test facilities as part of their professional library. ISO standards are available for purchase at https://www.iso.org/store.html.

In accordance with subsections 14(1)(b) and 14(2) of the *Legislation Act 2003*, referenced standards are incorporated as in force at the commencement of the Determination.

3. BEST PRACTICE REGULATION

3.1. Business Cost Calculator

There is no significant cost or saving associated with this ADR amendment as it has no significant effect on stringency.

3.2. General Consultation Arrangements

It has been longstanding practice to consult widely on proposed new or amended vehicle standards. For many years there has been active collaboration between the Federal Government and the state/territory governments, as well as consultation with industry and consumer groups. Much of the consultation takes place within institutional arrangements established for this purpose. The analysis and documentation prepared in a particular case, and the bodies consulted, depend on the degree of impact the new or amended standard is expected to have on industry or road users.

Depending on the nature of the proposed changes, consultation could involve the Strategic Vehicle Safety and Environment Group (SVSEG), Australian Motor Vehicle Certification Board (AMVCB), Technical Liaison Group (TLG), Transport and Infrastructure Senior Officials' Committee (TISOC) and the Transport and Infrastructure Council (TIC).

- SVSEG consists of senior representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry (including organisations such as the Federal Chamber of Automotive Industries and the Australian Trucking Association) and of representative

organisations of consumers and road users (particularly through the Australian Automobile Association).

- AMVCB consists of technical representatives of government regulatory authorities (Australian and state/territory) that deal with ADR and other general vehicle issues, and the National Transport Commission and the National Heavy Vehicle Regulator.
- TLG consists of technical representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry and of representative organisations of consumers and road users (the same organisations as represented in SVSEG).
- TISOC consists of state and territory transport and/or infrastructure Chief Executive Officers (CEO) (or equivalents), the CEO of the National Transport Commission, New Zealand and the Australian Local Government Association.
- The TIC consists of the Australian, state/territory and New Zealand Ministers with responsibility for transport and infrastructure issues.

Editorial changes and changes to correct errors are processed by the Department. This approach is only used where the amendments do not vary the intent of the vehicle standard.

Proposals that are regarded as significant need to be supported by a Regulation Impact Statement meeting the requirements of the Office of Best Practice Regulation (OBPR) as published in the *Australian Government Guide to Regulation* and the Council of Australian Government's *Best Practice Regulation: A Guide for Ministerial Councils and Standard-Setting Bodies*.

3.3. Specific Consultation Arrangements for this Vehicle Standard

The incorporation of UN Regulations for parking and cornering lamps which drives this amendment was discussed and agreed at SVSEG meeting 9 in 2014. The specifics of this amendment were discussed with and agreed by TLG in September 2016.

As the amendment is minor in nature, and does not increase the stringency of the ADR, there is no need for further consultation through TISOC, the Transport and Infrastructure Council, or the public comment process.

3.4. Regulation Impact Statement

As the proposed amendment does not increase the stringency of the ADR, a Regulation Impact Statement is not required.

Since the decision is made by the Minister for Urban Infrastructure and Cities without reference to the TIC and the proposal is not considered significant, the Office of Best Practice Regulation requirements have been met for this regulatory proposal (OBPR Reference ID 21346).

4. STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The following Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

4.1. Overview of the Legislative Instrument

This amendment removes clauses associated with Australian-specific content related to requirements for lighting and light-signalling devices not covered by UN Regulations, improves the quality of the ADR and incorporates the latest version of the UN Regulation.

4.2. Human Rights Implications

This amendment to ADR 19/02 does not engage any of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.3. Conclusion

This amendment to ADR 19/02 is compatible with human rights as it does not raise any human rights issues.

Vehicle Standard (Australian Design Rule 67/00 – Installation of Lighting and Light Signalling Devices on Three-Wheeled Vehicles) 2006 Amendment 1

Made under section 7 of the *Motor Vehicle Standards Act 1989*

Replacement Explanatory Statement

Issued by the authority of the Minister for Urban Infrastructure and Cities
~~Issued by the authority of the Minister for Urban Infrastructure~~

~~November~~ February 2018 ~~2017~~

CONTENTS

1. LEGISLATIVE CONTEXT

Vehicle Standard (Australian Design Rule 67/00 – Installation of Lighting and Light Signalling Devices on Three-Wheeled Vehicles) 2006 Amendment 1 is made under the *Motor Vehicle Standards Act 1989* (the Act). The Act enables the Australian Government to establish nationally uniform standards that apply to new road vehicles when they are first supplied to the market in Australia. The Act applies to such vehicles whether they are manufactured in Australia or imported.

The making of the vehicle standards necessary for the Act's effective operation is provided for in section 7 which empowers the Minister to "determine vehicle standards for road vehicles or vehicle components".

Australian Design Rule (ADR) 67/00 was originally determined in *Road Vehicle (National Standards) Determination No 2 of 1992* and was remade to comply with the requirements of the *Legislative Instruments Act 2003* in 2006.

2. CONTENT AND EFFECT OF ADR 67/00 AND THE AMENDMENT

2.1. Overview of the ADR

The function of Australian Design Rule (ADR) 67/00 is to prescribe requirements for the number and mode of installation of lighting and light signalling devices on three-wheeled L-group (motor tricycle) vehicles. This includes main-beam and dipped-beam headlamps, fog, direction indicator, position, stop, reversing, parking, cornering, and daytime running lamps, hazard warning signals and retroreflectors.

2.2. Effect of the ADR Amendment

This amendment removes clauses associated with Australian-specific lighting types where those are now covered under ~~UN Regulations~~United Nations (UN) regulations, and obsolete lamp types (including search lamps, conspicuity lamps and internal lamps).

This amendment also defines zones for white-to-rear and red-to-front light spill visibility, clarifies visibility angle requirements for direction indicators, and sets installation requirements for daytime running lamps.

It also includes clauses to address the new ADRs for parking and cornering lamps.

Finally, the amendment improves the quality of the ADR by removing typographical errors and improving the clarity of the wording.

This amendment is part of a package of introductions and amendments to ADRs associated with vehicle lighting generally, with the aims of addressing parking and cornering lamps more explicitly and clearly, and improving the quality of the lighting ADR suite.

2.3. Incorporated Documents

This amendment introduces an additional reference to a newly incorporated document in the ADR. The reference is to International Standards Organisation (ISO) 2575:2004. Compliance with the referenced standard is optional.

ISO standards are highly technical in nature and typically accessed by manufacturers, and test facilities as part of their professional library. ISO standards are available for purchase at https://www.iso.org/store.html.

In accordance with subsections 14(1)(b) and 14(2) of the *Legislation Act 2003*, referenced standards are incorporated as in force at the commencement of the Determination.

3. BEST PRACTICE REGULATION

3.1. Business Cost Calculator

There is no significant cost or saving associated with this ADR amendment as it has no significant effect on stringency.

3.2. General Consultation Arrangements

It has been longstanding practice to consult widely on proposed new or amended vehicle standards. For many years there has been active collaboration between the Federal Government and the state/territory governments, as well as consultation with industry and consumer groups. Much of the consultation takes place within institutional arrangements established for this purpose. The analysis and documentation prepared in a particular case, and the bodies consulted, depend on the degree of impact the new or amended standard is expected to have on industry or road users.

Depending on the nature of the proposed changes, consultation could involve the Strategic Vehicle Safety and Environment Group (SVSEG), Australian Motor Vehicle Certification Board (AMVCB), Technical Liaison Group (TLG), Transport and Infrastructure Senior Officials' Committee (TISOC) and the Transport and Infrastructure Council (TIC).

- SVSEG consists of senior representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry (including organisations such as the Federal Chamber of Automotive Industries and the Australian Trucking Association) and of representative organisations of consumers and road users (particularly through the Australian Automobile Association).
- AMVCB consists of technical representatives of government regulatory authorities (Australian and state/territory) that deal with ADR and other general vehicle issues, and the National Transport Commission and the National Heavy Vehicle Regulator.
- TLG consists of technical representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry and of representative organisations of consumers and road users (the same organisations as represented in SVSEG).

- TISOC consists of state and territory transport and/or infrastructure Chief Executive Officers (CEO) (or equivalents), the CEO of the National Transport Commission, New Zealand and the Australian Local Government Association.
- The TIC consists of the Australian, state/territory and New Zealand Ministers with responsibility for transport and infrastructure issues.

Editorial changes and changes to correct errors are processed by the Department. This approach is only used where the amendments do not vary the intent of the vehicle standard.

Proposals that are regarded as significant need to be supported by a Regulation Impact Statement meeting the requirements of the Office of Best Practice Regulation (OBPR) as published in the *Australian Government Guide to Regulation* and the Council of Australian Government's *Best Practice Regulation: A Guide for Ministerial Councils and Standard-Setting Bodies*.

3.3. Specific Consultation Arrangements for this Vehicle Standard

The incorporation of UN Regulations for parking and cornering lamps which drives this amendment was discussed and agreed at SVSEG meeting 9 in 2014. The specifics of this amendment were discussed with and agreed by TLG in September 2016.

As the amendment is minor in nature, and does not increase the stringency of the ADR, there is no need for further consultation through TISOC, the Transport and Infrastructure Council, or the public comment process.

3.4. Regulation Impact Statement

As the proposed amendment does not increase the stringency of the ADR, a Regulation Impact Statement is not required.

Since the decision is made by the Minister for Urban Infrastructure and Cities without reference to the TIC and the proposal is not considered significant, the Office of Best Practice Regulation requirements have been met for this regulatory proposal (OBPR Reference ID 21346).

4. STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The following Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

4.1. Overview of the Legislative Instrument

This amendment removes clauses associated with Australian-specific content related to requirements for lighting and light-signalling devices not covered by UN Regulations, improves the quality of the ADR and incorporates the latest version of the UN Regulation.

4.2. Human Rights Implications

This amendment to ADR 67/00 does not engage any of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.3. Conclusion

This amendment to ADR 67/00 is compatible with human rights as it does not raise any human rights issues.

Vehicle Standard (Australian Design Rule 74/00 – Side Marker Lamps) 2006 Amendment 1

Made under section 7 of the *Motor Vehicle Standards Act 1989*

Replacement Explanatory Statement

Issued by the authority of the Minister for Urban Infrastructure and Cities
~~Issued by the authority of the Minister for Urban Infrastructure~~

~~November 2017~~February 2018

CONTENTS

1. LEGISLATIVE CONTEXT

Vehicle Standard (Australian Design Rule 74/00 – Side Marker Lamps) 2006 Amendment 1 is made under the *Motor Vehicle Standards Act 1989* (the Act). The Act enables the Australian Government to establish nationally uniform standards that apply to new road vehicles when they are first supplied to the market in Australia. The Act applies to such vehicles whether they are manufactured in Australia or imported.

The making of the vehicle standards necessary for the Act's effective operation is provided for in section 7 which empowers the Minister to "determine vehicle standards for road vehicles or vehicle components".

Australian Design Rule (ADR) 74/00 was originally determined in *Road Vehicle (National Standards) Determination 1 of 2001*, and was remade to comply with the requirements of the *Legislative Instruments Act 2003* in 2006.

2. CONTENT AND EFFECT OF ADR 74/00 AND THE AMENDMENT

2.1. Overview of the ADR

The function of Australian Design Rule (ADR) 74/00 is to prescribe the photometric requirements of side marker lamps which are used to increase the visibility of the sides of road vehicles.

2.2. Effect of the ADR Amendment

This amendment incorporates the latest version of United Nations (UN) Regulation No. 91 (from the 00 series of amendments and including up to the 03 series of amendments~~,~~), which permit LED light modules, amongst other typographical and clarifying changes.

This amendment also incorporates alternative Australian-specific requirements for side marker lamps. These requirements were previously contained within ADR 45/01 – Lighting and Light Signalling Devices not Covered by ECE Regulations, and have been removed from that ADR by a parallel amendment.

Finally, the amendment improves the quality of the ADR by removing typographical and layout errors.

This amendment corrects typographical and layout errors and is part of a package of introductions and amendments to ADRs associated with vehicle lighting generally, with the aims of addressing parking and cornering lamps more explicitly and clearly, and improving the quality of the lighting ADR suite.

2.3. Incorporated Documents

This amendment does not introduce additional references to the documents already incorporated in the ADRs.

The amended Clause 8 maintains an existing reference to UN Regulation No. 91 - UNIFORM PROVISIONS CONCERNING THE APPROVAL OF SIDE MARKER LAMPS FOR MOTOR VEHICLES AND THEIR TRAILERS. Applicable sections of

UN Regulation No. 91 in turn reference UN Regulation Nos. 1, 3, 6, 7, 8, 23, 37, 38, 48, 91, 128 and International Electrical Commission (IEC) Publication 60061.

While these standards are highly technical in nature and typically accessed by manufacturers and test facilities as part of their professional library, the UN regulations are accessible free of charge via the UN World Forum for the Harmonization of Vehicle Regulations (WP.29) website at https://www.unece.org/trans/main/welcwp29.html. IEC publications are available for purchase at https://webstore.iec.ch/?ref=menu.

In accordance with subsections 14(1)(b) and 14(2) of the Legislation Act 2003, referenced standards are incorporated as in force at the commencement of the Determination.

3. BEST PRACTICE REGULATION

3.1. Business Cost Calculator

There is no significant cost or saving associated with this ADR amendment as it has no significant effect on stringency.

3.2. General Consultation Arrangements

It has been longstanding practice to consult widely on proposed new or amended vehicle standards. For many years there has been active collaboration between the Federal Government and the state/territory governments, as well as consultation with industry and consumer groups. Much of the consultation takes place within institutional arrangements established for this purpose. The analysis and documentation prepared in a particular case, and the bodies consulted, depend on the degree of impact the new or amended standard is expected to have on industry or road users.

Depending on the nature of the proposed changes, consultation could involve the Strategic Vehicle Safety and Environment Group (SVSEG), Australian Motor Vehicle Certification Board (AMVCB), Technical Liaison Group (TLG), Transport and Infrastructure Senior Officials' Committee (TISOC) and the Transport and Infrastructure Council (TIC).

- SVSEG consists of senior representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry (including organisations such as the Federal Chamber of Automotive Industries and the Australian Trucking Association) and of representative organisations of consumers and road users (particularly through the Australian Automobile Association).
- AMVCB consists of technical representatives of government regulatory authorities (Australian and state/territory) that deal with ADR and other general vehicle issues, and the National Transport Commission and the National Heavy Vehicle Regulator.
- TLG consists of technical representatives of government agencies (Australian and state/territory), the National Transport Commission and the National

Heavy Vehicle Regulator, the manufacturing and operational arms of the industry and of representative organisations of consumers and road users (the same organisations as represented in SVSEG).

- TISOC consists of state and territory transport and/or infrastructure Chief Executive Officers (CEO) (or equivalents), the CEO of the National Transport Commission, New Zealand and the Australian Local Government Association.
- The TIC consists of the Australian, state/territory and New Zealand Ministers with responsibility for transport and infrastructure issues.

Editorial changes and changes to correct errors are processed by the Department. This approach is only used where the amendments do not vary the intent of the vehicle standard.

Proposals that are regarded as significant need to be supported by a Regulation Impact Statement meeting the requirements of the Office of Best Practice Regulation (OBPR) as published in the *Australian Government Guide to Regulation* and the Council of Australian Government's *Best Practice Regulation: A Guide for Ministerial Councils and Standard-Setting Bodies*.

3.3. Specific Consultation Arrangements for this Vehicle Standard

The incorporation of UN Regulations for parking and cornering lamps which drives this amendment was discussed and agreed at SVSEG meeting 9 in 2014. The specifics of this amendment were discussed with and agreed by TLG in September 2016.

As the amendment is minor in nature, and does not increase the stringency of the ADR, there is no need for further consultation through TISOC, the Transport and Infrastructure Council, or the public comment process.

3.4. Regulation Impact Statement

As the proposed amendment does not increase the stringency of the ADR, a Regulation Impact Statement is not required.

Since the decision is made by the Minister for Urban Infrastructure and Cities without reference to the TIC and the proposal is not considered significant, the Office of Best Practice Regulation requirements have been met for this regulatory proposal (OBPR Reference ID 21346).

4. STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The following Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.1. Overview of the Legislative Instrument

This amendment updates the version of the incorporated UN Regulation, and incorporates alternative side marker lamp requirements which were previously held in another ADR.

4.2. Human Rights Implications

This amendment to ADR 74/00 does not engage any of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.3. Conclusion

This amendment to ADR 74/00 is compatible with human rights as it does not raise any human rights issues.

Vehicle Standard (Australian Design Rule 84/00 – Front Underrun Impact Protection) 2009 Amendment 1

Made under section 7 of the *Motor Vehicle Standards Act 1989*

Replacement Explanatory Statement

Issued by the authority of the Minister for Urban Infrastructure and Cities

~~Issued by the authority of the Minister for Urban Infrastructure~~

~~November 2017~~February 2018

CONTENTS

1. LEGISLATIVE CONTEXT

Vehicle Standard (Australian Design Rule 84/00 – Front Underrun Impact Protection) 2009 Amendment 1 is made under the *Motor Vehicle Standards Act 1989* (the Act). The Act enables the Australian Government to establish nationally uniform standards that apply to new road vehicles when they are first supplied to the market in Australia. The Act applies to such vehicles whether they are manufactured in Australia or imported.

The making of the vehicle standards necessary for the Act's effective operation is provided for in section 7 which empowers the Minister to "determine vehicle standards for road vehicles or vehicle components".

Vehicle Standard (Australian Design Rule 84/00 – Front Underrun Impact Protection) 2009 was originally determined in 2009.

2. CONTENT AND EFFECT OF ADR 84/00 AND THE AMENDMENT

2.1. Overview of the ADR

The function of Australian Design Rule (ADR) 84/00 – Front Underrun Impact Protection is to specify the design, construction and performance requirements of underrun protection devices fitted additionally or incorporated into the design of rigid and articulated heavy goods vehicles. The requirements are that the front structures of these vehicles are designed in such a way that, in the event of a frontal collision with a light vehicle, they enable the occupant protection measures of the light vehicle to be fully engaged.

These requirements cover all new heavy goods vehicles (NC Category) manufactured on or after 1 January 2011 and all heavy goods vehicles (NC Category) after 1 January 2012.

2.2. Effect of the ADR Amendment

This amendment removes ambiguity and reduces stringency by removing the requirement for manufactures of Front Underrun Protection Devices (FUPDs) to comply with the requirements of structurally integrated Front Underrun Protection (FUP).

2.3. Incorporated Documents

~~The ADR incorporates~~This amendment does not introduce additional references to ~~United Nations~~the documents already incorporated in the ADRs.

The amended Clause 7 continues to incorporate a reference to United Nations (UN) Regulation No. 93 – UNIFORM PROVISIONS CONCERNING THE APPROVAL OF:

I. FRONT UNDERRUN PROTECTIVE DEVICES (FUPDs)
II. VEHICLES WITH REGARD TO THE INSTALLATION OF AN FUPD OF AN APPROVED TYPE
III. VEHICLES WITH REGARD TO THEIR FRONT UNDERRUN PROTECTION (FUP)

Applicable sections of UN Regulation No. 93 in turn reference UN Regulation No. 31 and ISO 612:1978.

While these standards are highly technical in nature and typically accessed by manufacturers and test facilities as part of their professional library, the UN regulations are accessible free of charge via the UN World Forum for the Harmonization of Vehicle Regulations (WP.29) website at https://www.unece.org/trans/main/welcwp29.html. ISO standards are available for purchase at https://www.iso.org/store.html.

In accordance with subsections 14(1)(b) and 14(2) of the *Legislation Act 2003* these standards are incorporated as in force at the commencement of the Determination.

~~United Nations (UN) regulations may be freely accessed online through the UN World Forum for the Harmonization of Vehicle Regulations (WP.29). The WP.29 website is https://www.unece.org/trans/main/welcwp29.html.~~

3. BEST PRACTICE REGULATION

3.1. Business Cost Calculator

This amendment removes the cost imposed on FUPD manufacturers in interpretation and complying with paragraph 6.4 of ADR 84/00. It is estimated that the cost benefit to the industry will be approximately $250,000 annually.

3.2. General Consultation Arrangements

It has been longstanding practice to consult widely on proposed new or amended vehicle standards. For many years there has been active collaboration between the ~~Federal~~Australian Government and the state/territory governments, as well as consultation with industry and consumer groups. Much of the consultation takes place within institutional arrangements established for this purpose. The analysis and documentation prepared in a particular case, and the bodies consulted, depend on the degree of impact the new or amended standard is expected to have on industry or road users.

Depending on the nature of the proposed changes, consultation could involve the Technical Liaison Group (TLG) and the Australian Motor Vehicle Certification Board (AMVCB), the Strategic Vehicle Safety and Environment Group (SVSEG) and the Austroads Safe Vehicles Theme Group (SVTG), the Transport and Infrastructure Senior Officials' Committee (TISOC) and the Transport and Infrastructure Council (the Council).

- TLG consists of technical representatives of government (Australian and state/territory), the manufacturing and operational arms of the industry (including organisations such as the Federal Chamber of Automotive Industries and the Australian Trucking Association) and of representative organisations of consumers and road users (particularly through the Australian Automobile Association). AMVCB consists of the government members of TLG.
- SVSEG consists of senior representatives of government (Australian and

state/territory), the manufacturing and operational arms of the industry and of representative organisations of consumers and road users (at a higher level within each organisation as represented in TLG). SVTG consists of the government members of SVSEG.

- TISOC consists of state and territory transport and/or infrastructure Chief Executive Officers (CEOs) (or equivalents), the CEO of the National Transport Commission, New Zealand and the Australian Local Government Association.
- The Council consists of the Australian, state/territory and New Zealand Ministers with responsibility for transport and infrastructure issues.

Editorial changes and changes to correct errors are processed by the Department of Infrastructure ~~and~~, Regional Development and Cities. This approach is only used where the amendments do not vary the intent of the vehicle standard.
Proposals that are regarded as significant need to be supported by a Regulation Impact Statement (RIS) meeting the requirements of the Office of Best Practice Regulation (OBPR) as published in the *Australian Government Guide to Regulation* and the Council of Australian Government's *Best Practice Regulation: A Guide for Ministerial Councils and Standard-Setting Bodies*.

3.3. Specific Consultation Arrangements for this Vehicle Standard

This amendment was requested by the Australian Trucking Association (ATA) at AMVCB meeting 221 and TLG meeting 41 in 2015. Following full review and consideration of technical issues and consultations, the proposals was agreed in January 2017.

As the amendment is to provide exemption to the stringency of ADR 84/00 paragraph 6.4, there is no need for further consultation through TISOC, the Council or the public comment process.

3.4. Regulation Impact Statement

As the proposed amendment does not increase the stringency of the ADR, a RIS is not required.

Since the decision is made by the Minister for Urban Infrastructure and Cities without reference to the Council and the proposal is not considered significant, OBPR requirements have been met for this regulatory proposal (OBPR Reference ID 21984).

4. STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The following Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.1. Overview of the Legislative Instrument

This amendment to ADR 84/00 removes ambiguity and reduces stringency by removing the requirement for manufactures of FUPDs to comply with the requirements of structurally integrated FUP. It does not affect the original intent or operation of the standard.

4.2. Human Rights Implications

This amendment to ADR 84/00 does not engage any of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.3. Conclusion

This amendment to ADR 84/00 is compatible with human rights as it does not raise any human rights issues.

Vehicle Standard (Australian Design Rule 86/00 – Parking Lamps) 2016

Made under section 7 of the *Motor Vehicle Standards Act 1989*

Replacement Explanatory Statement

Issued by the authority of the Minister for Urban Infrastructure and Cities

~~Issued by the authority of the Minister for Urban Infrastructure~~

~~November 2017~~February 2018

CONTENTS

1. LEGISLATIVE CONTEXT

Vehicle Standard (Australian Design Rule 86/00 – Parking Lamps) 2016 is made under the *Motor Vehicle Standards Act 1989* (the Act). The Act enables the Australian Government to establish nationally uniform standards that apply to new road vehicles when they are first supplied to the market in Australia. The Act applies to such vehicles whether they are manufactured in Australia or imported.

The making of the vehicle standards necessary for the Act's effective operation is provided for in section 7 which empowers the Minister to "determine vehicle standards for road vehicles or vehicle components".

2. CONTENT AND EFFECT OF ADR 86/00

2.1. Overview of the ADR

The function of Australian Design Rule (ADR) 86/00 is to specify requirements for parking lamps, used to draw attention to the presence of a stationary vehicle. This ADR incorporates the technical requirements of the current version of United Nations (UN) Regulation No. 77 - Uniform provisions concerning the approval of cornering lamps for power-driven vehicles in its original form.

2.2. Effect of the introduction of the ADR

Parking lamps compliant with the UN Regulation are already permitted through an ADR 13/00 reference to UN Regulation No. 77. Parking lamp installation is optional for Australian vehicles. Introducing this ADR incorporating the UN Regulation will clarify the requirements for vehicles fitted with parking lamps.

The introduction of this ADR is part of a package of introductions and amendments to ADRs associated with vehicle lighting generally, with the aims of addressing parking and cornering lamps more explicitly and clearly, and improving the quality of the lighting ADR suite.

It is the intent of the Department of Infrastructure ~~and~~, Regional Development and Cities (the Department) to apply UN Regulation No. 77.~~-~~ This application will mean that all future updates to UN Regulation No. 77 will flow through automatically to the ADRs. ~~-~~This will allow for future vehicles with the latest technology in parking lamps to be introduced into the Australian market as quickly as possible, providing savings to industry and consumers.

2.3. Incorporated Documents

Clause 7 of ADR 86/00 references United Nations Regulation No. 77 – UNIFORM PROVISIONS CONCERNING THE APPROVAL OF CORNERING LAMPS FOR POWER-DRIVEN VEHICLES. This standard specifies the equivalent test methods and standards to Appendix A of the ADR. Applicable sections of UN Regulation No. 77 in turn reference UN Regulation Nos. 18 (Appendix 2, version E/ECE/324-E/ECE/TRANS/505/Rev.2), 37, 48 and 128, and International Electrical Commission (IEC) Publication 60061.

While these standards are highly technical in nature and typically accessed by manufacturers and test facilities as part of their professional library, the UN regulations are accessible free of charge via the UN World Forum for the

Harmonization of Vehicle Regulations (WP.29) website at https://www.unece.org/trans/main/welcwp29.html. IEC publications are available for purchase at https://webstore.iec.ch/?ref=menu).

In accordance with subsections 14(1)(b) and 14(2) of the *Legislation Act 2003*, referenced standards are incorporated as in force at the commencement of the Determination.

3. BEST PRACTICE REGULATION

3.1. Business Cost Calculator

There is no significant cost or saving associated with the introduction of this ADR, as it simply clarifies the current vehicle standards as relate to parking lamps and supports the application of the UN Regulation.

Any potential cost saving under the Commonwealth's Regulatory Burden Measurement framework would only be apparent and realised after the introduction of the International Whole Vehicle Type Approval (IWVTA) in 2017.

3.2. General Consultation Arrangements

It has been longstanding practice to consult widely on proposed new or amended vehicle standards. For many years there has been active collaboration between the Federal and the state/territory governments, as well as consultation with industry and consumer groups. Much of the consultation takes place within institutional arrangements established for this purpose. The analysis and documentation prepared in a particular case, and the bodies consulted, depend on the degree of impact the new or amended standard is expected to have on industry or road users.

Depending on the nature of the proposed changes, consultation could involve the Strategic Vehicle Safety and Environment Group (SVSEG), Australian Motor Vehicle Certification Board (AMVCB), Technical Liaison Group (TLG), Transport and Infrastructure Senior Officials' Committee (TISOC) and the Transport and Infrastructure Council (the Council).

- SVSEG consists of senior representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry (including organisations such as the Federal Chamber of Automotive Industries and the Australian Trucking Association) and of representative organisations of consumers and road users (particularly through the Australian Automobile Association).

- AMVCB consists of technical representatives of government regulatory authorities (Australian and state/territory) that deal with ADR and other general vehicle issues, and the National Transport Commission and the National Heavy Vehicle Regulator.

- TLG consists of technical representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry and of representative organisations of consumers and road users (the same organisations as represented in SVSEG).

- TISOC consists of state and territory transport and/or infrastructure Chief Executive Officers (CEO) (or equivalents), the CEO of the National Transport Commission, New Zealand and the Australian Local Government Association.
- The Council consists of the Australian, state/territory and New Zealand Ministers with responsibility for transport and infrastructure issues.

Editorial changes and changes to correct errors are processed by the Department. This approach is only used where the amendments do not vary the intent of the vehicle standard.

Proposals that are regarded as significant need to be supported by a Regulation Impact Statement meeting the requirements of the Office of Best Practice Regulation (OBPR) as published in the *Australian Government Guide to Regulation* and the Council of Australian Government's *Best Practice Regulation: A Guide for Ministerial Councils and Standard-Setting Bodies*.

3.3. Specific Consultation Arrangements for this Vehicle Standard

The explicit incorporation of UN Regulation No. 77 within the ADRs generally was discussed and agreed at SVSEG meeting 9 in 2014. The specific solution of creation of a new ADR was discussed with and agreed by TLG in September 2016.

As the introduction of this ADR will only have a minor administrative effect on vehicle standards, and does not increase the stringency of the ADRs generally, there is no need for further consultation through TISOC, The Council, or the public comment process.

3.4. Regulation Impact Statement

As the proposed introduction does not increase the stringency of the ADRs generally, a Regulation Impact Statement is not required.

Since the decision is made by the Minister for Urban Infrastructure and Cities without reference to the Council and the proposal is not considered significant, the Office of Best Practice Regulation requirements have been met for this regulatory proposal (OBPR Reference ID 21346).

4. STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The following Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.1. Overview of the Legislative Instrument

This ADR contains technical requirements covering parking lamps for fitment to road vehicles.

4.2. Human Rights Implications

The introduction of ADR 86/00 does not engage any of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.3. Conclusion

The introduction of ADR 86/00 is compatible with human rights as it does not raise any human rights issues.

Vehicle Standard (Australian Design Rule 87/00 – Cornering Lamps) 2016

Made under section 7 of the *Motor Vehicle Standards Act 1989*

Replacement Explanatory Statement

Issued by the authority of the Minister for Urban Infrastructure and Cities

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1. LEGISLATIVE CONTEXT

Vehicle Standard (Australian Design Rule 87/00 – Cornering Lamps) 2016 is made under the *Motor Vehicle Standards Act 1989* (the Act). The Act enables the Australian Government to establish nationally uniform standards that apply to new road vehicles when they are first supplied to the market in Australia. The Act applies to such vehicles whether they are manufactured in Australia or imported.

The making of the vehicle standards necessary for the Act's effective operation is provided for in section 7 which empowers the Minister to "determine vehicle standards for road vehicles or vehicle components".

2. CONTENT AND EFFECT OF ADR 87/00

2.1. Overview of the ADR

The function of Australian Design Rule (ADR) 87/00 is to specify requirements for cornering lamps, which are used to provide supplementary illumination of that part of the road which is located near the forward corner of the vehicle at the side towards which the vehicle is going to turn. This ADR incorporates the technical requirements of the current version of United Nations (UN) Regulation No. 119 - Uniform provisions concerning the approval of parking lamps for power-driven vehicles incorporating the 01 series of amendments.

2.2. Effect of the introduction of the ADR

Cornering lamps compliant with the UN Regulation are already permitted through an ADR 13/00 reference to UN Regulation No. 119. Cornering lamp installation is optional for Australian vehicles. The ADRs have included Australian-specific alternative requirements for cornering lamps in ADR 45/01 - Lighting and Light Signalling Devices not Covered by ECE Regulations, but these requirements were vague, and on discussion with industry, not in use. Introducing this ADR incorporating the UN Regulation will clarify the requirements for vehicles fitted with parking lamps, and align Australian requirements with international vehicle standards.

The introduction of this ADR is part of a package of introductions and amendments to ADRs associated with vehicle lighting generally, with the aims of addressing parking and cornering lamps more explicitly and clearly, and improving the quality of the lighting ADR suite.

It is the intent of the Department of Infrastructure ~~and,~~ Regional Development and Cities (the Department) to apply UN Regulation No. 119. This application will mean that all future updates to UN Regulation No. 119 will flow through automatically to the ADRs. This will allow for future vehicles with the latest technology in cornering lamps to be introduced into the Australian market as quickly as possible, providing savings to industry and consumers.

2.3. Incorporated Documents

Clause 7 of ADR 87/00 references United Nations Regulation No. 119 – UNIFORM PROVISIONS CONCERNING THE APPROVAL OF PARKING LAMPS FOR POWER-DRIVEN VEHICLES. This standard specifies the equivalent test methods and standards to Appendix A of the ADR. Applicable sections of UN Regulation No. 119 in turn reference UN Regulation Nos. 18 (Appendix 2, version E/ECE/324-

E/ECE/TRANS/505/Rev.2), 37 and 128, and International Electrical Commission (IEC) Publication 60061.

While these standards are highly technical in nature and typically accessed by manufacturers and test facilities as part of their professional library, the UN regulations are accessible free of charge via the UN World Forum for the Harmonization of Vehicle Regulations (WP.29) website at https://www.unece.org/trans/main/welcwp29.html. IEC publications are available for purchase at https://webstore.iec.ch/?ref=menu.

In accordance with subsections 14(1)(b) and 14(2) of the *Legislation Act 2003*, referenced standards are incorporated as in force at the commencement of the Determination.

3. BEST PRACTICE REGULATION

3.1. Business Cost Calculator

There is no significant cost or saving associated with the introduction of this ADR, as it simply clarifies the current vehicle standards as relate to cornering lamps and supports the application of the UN Regulation.

Any potential cost saving under the Commonwealth's Regulatory Burden Measurement framework would only be apparent and realised after the introduction of the International Whole Vehicle Type Approval (IWVTA) in 2017.

3.2. General Consultation Arrangements

It has been longstanding practice to consult widely on proposed new or amended vehicle standards. For many years there has been active collaboration between the Federal and the state/territory governments, as well as consultation with industry and consumer groups. Much of the consultation takes place within institutional arrangements established for this purpose. The analysis and documentation prepared in a particular case, and the bodies consulted, depend on the degree of impact the new or amended standard is expected to have on industry or road users.

Depending on the nature of the proposed changes, consultation could involve the Strategic Vehicle Safety and Environment Group (SVSEG), Australian Motor Vehicle Certification Board (AMVCB), Technical Liaison Group (TLG), Transport and Infrastructure Senior Officials' Committee (TISOC) and the Transport and Infrastructure Council (the Council).

- SVSEG consists of senior representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry (including organisations such as the Federal Chamber of Automotive Industries and the Australian Trucking Association) and of representative organisations of consumers and road users (particularly through the Australian Automobile Association).
- AMVCB consists of technical representatives of government regulatory authorities (Australian and state/territory) that deal with ADR and other

general vehicle issues, and the National Transport Commission and the National Heavy Vehicle Regulator.

- TLG consists of technical representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry and of representative organisations of consumers and road users (the same organisations as represented in SVSEG).
- TISOC consists of state and territory transport and/or infrastructure Chief Executive Officers (CEO) (or equivalents), the CEO of the National Transport Commission, New Zealand and the Australian Local Government Association.
- The Council consists of the Australian, state/territory and New Zealand Ministers with responsibility for transport and infrastructure issues.

Editorial changes and changes to correct errors are processed by the Department. This approach is only used where the amendments do not vary the intent of the vehicle standard.

Proposals that are regarded as significant need to be supported by a Regulation Impact Statement meeting the requirements of the Office of Best Practice Regulation (OBPR) as published in the *Australian Government Guide to Regulation* and the Council of Australian Government's *Best Practice Regulation: A Guide for Ministerial Councils and Standard-Setting Bodies*.

3.3. Specific Consultation Arrangements for this Vehicle Standard

The explicit incorporation of UN Regulation No. 119 within the ADRs generally was discussed and agreed at SVSEG meeting 9 in 2014. The specific solution of creation of a new ADR was discussed with and agreed by TLG in September 2016.

As the introduction of this ADR will only have a minor administrative effect on vehicle standards, and does not increase the stringency of the ADRs generally, there is no need for further consultation through TISOC, The Council, or the public comment process.

3.4. Regulation Impact Statement

As the proposed introduction does not increase the stringency of the ADRs generally, a Regulation Impact Statement is not required.

Since the decision is made by the Minister for Urban Infrastructure and Cities without reference to the Council and the proposal is not considered significant, the Office of Best Practice Regulation requirements have been met for this regulatory proposal (OBPR Reference ID 21346).

4. STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The following Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

4.1. Overview of the Legislative Instrument

This ADR contains technical requirements covering cornering lamps for fitment to road vehicles.

4.2. Human Rights Implications

The introduction of ADR 87/00 does not engage any of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.3. Conclusion

The introduction of ADR 87/00 is compatible with human rights as it does not raise any human rights issues.