The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-014614

28 JUN 2018

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Helen

I refer to the Committee Secretary's letter of 21 June 2018 seeking information about the Health Legislation Amendment (Improved Medicare Compliance) Bill 2018 (the Bill). The Committee raised two issues in relation to the Bill in *Scrutiny Digest No. 6 of 2018* (the Digest) and I am pleased to provide the following additional information about those issues.

In relation to the first issue (see paragraphs 1.59 – 1.62 of the Digest), it should be noted that all existing debt provisions in the *Health Insurance Act 1973* (the HIA) are subject to internal review only. The introduction of a review right to the Administrative Appeals Tribunal (AAT) in instances where a garnishee notice has been issued is considered to be a proportionate safeguard on the introduction of the new garnishee power. As a safeguard against over-reach, the issue of a garnishee order will only be used where providers fail to enter into repayment arrangements after 90 days and no other options are available. Creating a right to external review by the AAT of decisions to issue a garnishee order is an important additional safeguard, over and above internal review.

The second issue relates to the strict liability offence in proposed subsection 20BB(4) of the HIA (see paragraphs 1.63 – 1.66 of the Digest). The existence of a valid referral is a precondition for providers to bill certain items in the Medical Benefits Schedule (MBS). However, for the convenience of patients and providers, there is no requirement to submit copies of referrals with claims for Medicare benefits relating to those MBS items.

Proposed section 20BB applies to allied health professionals and other Medicare providers and mirrors the current section 20BA of the HIA which applies to medical specialists. The provisions align because the Bill is intended to standardise administrative arrangements across the three Acts which it amends so that doctors (and other Medicare providers), pharmacists and dentists have the same requirements to retain and produce documents supporting their claims, and the same penalties if they do not. The strict liability offence attracts a fine only, not a prison sentence. Accordingly, the insertion of a strict liability offence is reasonable, necessary and proportionate to achieving the purposes of the Bill.

The explanatory memorandum also makes it clear that the offence in proposed s 20BB:

- does not apply if the person has a reasonable excuse;
- is subject to a defence of 'honest and reasonable mistake of fact' under the Criminal Code; and
- is not punishable by imprisonment but carries a maximum fine of 5 penalty units (currently $1,050).

The Bill is currently before the Senate and debate is expected to resume on Thursday, 28 June 2018. Given the tight time frame, and that there are no legal interpretation issues which could usefully be addressed, I do not propose to make any amendments to the explanatory material currently before the Senate.

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS18-002480

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 28 June 2018 in relation to issues identified by the Senate Standing Committee for the Scrutiny of Bills in its *Scrutiny Digest No. 7 of 2018* concerning the Migration (Validation of Port Appointment) Bill 2018.

Please find my advice in relation to the Committee's comments at Attachment A.

The contact officer in the Department of Home Affairs is Heimura Ringi, Assistant Secretary, Legislation Branch, who can be contacted on (02) 6264 2594.

Yours sincerely

PETER DUTTON 19/07/18

Response to the Standing Committee for the Scrutiny of Bills

The basis of the legal challenges to the validity of the 2002 appointment and the general arguments raised by the applicants in those cases

On 11 July 2018, the Federal Circuit Court handed down two decisions regarding the matters of *DBC16 v Minister for Immigration and Border Protection & Anor [2018]* and *DBB16 v Minister for Immigration and Border Protection & Anor [2018],* finding the 2002 instrument of appointment (the Appointment) to be invalid.

The validity of the Appointment was challenged on two grounds:

- that the Appointment is void for uncertainty as the result of the omission of a latitudinal coordinate in the description of the area of the proclaimed port; and
- that the Appointment was beyond the power of the Minister under paragraph 5(5)(a) of the *Migration Act 1958* (the Act) to appoint a "port" within the Territory of Ashmore and Cartier Islands as a proclaimed port.

The Court rejected the first ground.

In relation to the second ground however, the applicants were successful in contending that no actual port exists within the Territory of Ashmore and Cartier Islands. The applicants were also successful in arguing that due to the invalidity, they were not 'unauthorised maritime arrivals' (UMAs) and consequently were not 'fast track applicants' within the meaning of the Act.

The number of persons who entered the relevant waters of the Territory of Ashmore and Cartier Islands since 23 January 2002 to date. In particular, how many of these people, if any:

- ***are yet to have their asylum applications finally determined;***
- ***have been granted a protection visa;***
- ***are in offshore detention;***
- ***have had their applications refused but remain in Australia***

How the persons in each of these categories would have been treated if the 2002 appointment had not been made and the extent of any detriment such persons may suffer if the 2002 appointment is retrospectively validated

No persons will suffer a detriment if the validity of the Appointment is confirmed by passage of the Bill. Enactment of the Bill will merely confirm that the actions taken in relation to persons who entered the waters of the proclaimed port, by reference to their status as UMAs, were valid and effective.

The Appointment is critical to determining the status of persons as UMAs under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013. In addition, those who became UMAs by reason of having entered the proclaimed port between 13 August 2012 and 1 June 2013, also became 'fast track applicants' under the Act.

Subject to any appeal, the successful challenge to the Appointment means that the affected persons did not enter Australia at an excised offshore place and are not therefore, UMAs under the Act. For some, this also means that they are not fast track applicants under the Act. However, the affected persons still entered Australia without a visa that was in effect, thereupon becoming unlawful non-citizens subject to immigration detention.

By reinstating the validity of the Appointment, the Bill does not impose any new obligations or detriment on affected persons. Instead, it maintains the status quo in relation to the processing of UMAs and, where relevant, fast track applicants under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013.

The fairness of applying the Bill to persons who have instituted proceedings but where judgment is not delivered before commencement of the Act (noting that such persons may be liable to an adverse costs order):

Government policy around the management of UMAs has been highly effective in responding to the enduring threat of maritime people smuggling and protecting the integrity of Australia's migration framework. The government considers it unacceptable for individuals to seek to rely on minor and inadvertent omissions in the wording of the Appointment in an attempt to undermine this policy. In order to maintain public confidence in our border protection arrangements, it is imperative that we uphold the original intent of the Appointment. For these reasons it is appropriate for the Bill to apply to persons who have instituted proceedings but where judgment has not been delivered before the provisions commence.

With respect to the Committee's comment regarding an adverse costs order, we consider it highly unlikely that such an order would result from a court's rejection of an attack on the validity of the Appointment alone. In practice, this issue is likely to be one of several grounds raised in proceedings so in the event that an adverse costs order is made, there are likely to be a number of other factors which would contribute to the making of such an order.

Senator the Hon Michaelia Cash
Minister for Jobs and Innovation

Reference: MC18-002215

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Space Activities Amendment (Launches and Returns) Bill 2018

I thank the Senate Scrutiny of Bills Committee (the Committee) for its comments in Scrutiny Digest 6 of 2018 in relation to the Space Activities Amendment (Launches and Returns) Bill 2018 (the Bill).

The Committee has requested further advice on three issues related to this Bill. The Committee's questions and my answers follow.

(1) Why is it necessary and appropriate that the rules incorporate documents as in force or existing from time to time, rather than as in force or existing at a particular time (for example, when the rules are made)?

Section 110 of the Bill provides a general rule-making power. Rules will be disallowable legislative instruments. Several rules are proposed in relation to a number of subjects including defining high power rockets, fees and insurance, and requirements for licences and permits.

It is necessary and appropriate that the proposed rules incorporate documents as in force or existing from time to time to increase the flexibility of the instrument to respond to the rapidly evolving nature of space technologies (therefore supporting the growth of the sector), and the need to agilely review and update insurance in response to safety and market interests.

(2) The type of documents that are envisaged may be applied, adopted, or incorporated by reference in rules made under proposed section 110?

The Australian Space Agency envisages documents such as the Flight Safety Code and the Maximum Probable Loss Methodology being applied, adopted, or incorporated by reference into the proposed rules. These documents are currently defined in the *Space Activities Regulations 2001*.

For example, the Bill makes it clear that the definition for 'high power rocket' will be prescribed by the rules. This provides the flexibility for the definition to be readily updated when necessary to maintain currency with changing practice. It is anticipated that this proposed rule will incorporate by reference the Flight Safety Code. The Flight Safety Code may also be incorporated by reference in proposed rules dealing with the application process for (for example) launches to space; as it sets out requirements for applicants to demonstrate that their proposed launch activities will be safe and effective. Flexibility is needed in case safety requirements change.

The Bill provides that the insurance required for each launch or return will be specified in the rules, noting that the amount will not exceed $100 million. Moving the detail of the insurance requirements to the rules allows for greater flexibility to update requirements as the nature of space activities evolves. It is anticipated that this proposed rule will incorporate by reference the Maximum Probable Loss Methodology as this is a method for determining insurance requirements based on risks and potential consequences during phases of flight of space vehicles beginning at ignition and ending either on orbit, impact or recovery.

The Bill also provides for a person making an application for a licence, permit or authorisation to pay the Commonwealth the relevant fee prescribed by the rules. The proposed rules will also further set out the basis on which the Minister may exercise discretion to waive or partially waive a fee. It is anticipated that these proposed rules will not incorporate any documents by reference.

(3) Whether these documents be made freely available to all persons interested in the law?

All documents applied, adopted, or incorporated by reference into the rules will be made freely available on the Australian Space Agency website. Where documents relate to licensing they will be identified on the Australian Business Licence and Information Service website.

All explanatory statements will include information about the incorporated documents, and where they can be freely accessed in accordance with the Guideline on incorporation of documents published by the Standing Committee on Regulations and Ordinances.

I trust this information facilitates the Committee's consideration of the Bill.

Yours sincerely

Senator the Hon Michaelia Cash

27/07/2018

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

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Helen

Thank you for your email on behalf of the Senate Scrutiny of Bills Committee (the Committee) dated 21 June 2018, drawing my attention to the Committee's *Scrutiny Digest No. 6 of 2018* which seeks further advice on the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018.

I appreciate the Committee's further consideration of this Bill. My response in relation to the Bill is attached at Attachment A.

I trust that this information will be of assistance to the Committee.

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

ATTACHMENT A

Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

No-invalidity clause

The Committee has requested the following:

> *As the information provided by the minister does not adequately address the committee's concerns, the committee again requests the minister's detailed justification for the no-invalidity clause in proposed subsection 353-30(4), which provides that the Commissioner's failure to notify a taxpayer of a decision to refuse to admit certain evidence in proceedings on review or appeal will not affect the validity of that decision.*

By way of background, Schedule 8 to the Bill includes amendments rewriting provisions relating to offshore information notices from the *Income Tax Assessment Act 1936* into Schedule 1 to the *Taxation Administration Act* 1953. The ongoing rewriting of the taxation laws has been continually progressed by successive Governments with a continuing focus on simplifying the expression of the taxation laws for the broad benefit of taxpayers and their advisers. These exercises are undertaken in close consultation with affected stakeholders. The detailed material included in the explanatory memorandum is generally limited to areas of policy change so as not to unintentionally alter the well-established meaning of, and judicial findings on, the existing law.

The Committee has sought my views on proposed subsection 353-30(4) in Schedule 1 to the *Taxation Administration Act 1953* which, consistent with the existing provisions in the *Income Tax Assessment Act 1936*, requires the Commissioner of Taxation to provide a taxpayer with a written notice advising them of the Commissioner views, if:

- the Commissioner has come to a view that the taxpayer has failed to comply with an offshore information notice[1]; and
- the Commissioner is unlikely to consent to the information requested in the notice being admitted to evidence.[2]

The subsection also includes what the Committee has referred to as a no-invalidity clause. The effect of this clause is that the Commissioner's failure to provide a written notice does not affect the validity of his decision to ultimately withhold consent to the admission of evidence in proceedings.

Offshore information notices are an effective means by which the Commissioner can access information that is held outside Australia and are necessary for the Commissioner to properly administer and enforce Australia's taxation laws. Australia's offshore information rules are modelled very closely on rules existing in many overseas

---

[1] The automatic consequences of non-compliance being inadmissibility of certain information as evidence in Part IVC proceedings.

[2] The Commissioner has broad discretion to allow information to be used as evidence despite non-compliance with an offshore information notice but must have regard to certain matters in doing so.

jurisdictions. These rules reflect the inherent difficulties in tax authorities accessing information held in foreign jurisdictions where taxpayers have little incentive to comply because most domestic sanctions are unenforceable or very difficult and costly to enforce.

My Department has looked into the history of the no-invalidity clause. They have ascertained that the clause was introduced to prevent sophisticated taxpayers, who are generally the recipients of offshore information notices, from attempting to avoid the sanctions of failing to comply with a notice by raising procedural technicalities during Part IVC proceedings.

The inadmissibility of information as evidence is an automatic sanction for taxpayers who fail to comply with an offshore information notice. As the recipient of a notice, these taxpayers will be well aware of their actions in refusing or failing to comply with a notice and therefore will understand that they will not be able to admit information covered by that notice as evidence in any Part IVC proceedings without the Commissioner's consent. It is for this reason that taxpayers are unlikely to be detrimentally affected by a failure by the Commissioner to provide written notice of his views.

In an unlikely situation in which a taxpayer did not receive a written notice and was detrimentally affected by the failure to receive a notice, this is best mitigated by the Court or Tribunal hearing the Part IVC proceedings as part of their case management, rather than as part of any separate proceeding. The outcome of a separate proceeding would not assist the taxpayer because any finding that the notice procedures were not followed would not result in the admissibility of the information.

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

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 21 June 2018, drawing my attention to the Committee's *Scrutiny Digest No. 6 of 2018,* which seeks advice about the Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 (the Bill) that is currently before the Senate.

The Committee has requested advice as to:

- whether decisions by the Commissioner to disqualify a person from the amnesty in relation to superannuation guarantee shortfalls would be subject to merits review; and
- if not, the characteristics of such decisions that would justify excluding merits review.

Schedule 1 of the Bill provides a one-off 12-month amnesty with reduced penalties and fees to encourage employers to disclose historical superannuation guarantee (SG) non-compliance and pay any SG charge imposed in relation to the disclosed SG shortfall. To further encourage payment of SG, the amnesty allows employers who qualify for the amnesty to claim tax deductions for payments of SG charge and contributions made to offset SG charge made during the amnesty period. Requiring employers to pay the SG charge allows the Commissioner of Taxation (Commissioner) to ensure that employees are paid their full SG entitlement.

The Commissioner may, by written notice, disqualify an employer from the beneficial treatment provided by the amnesty if the employer has failed to pay to the Commissioner any SG charge imposed on the disclosed SG shortfall on or before the

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

day the SG charge becomes payable, or has failed to enter into and comply with a payment arrangement in relation to that amount. The effect of such a notice is that the employer ceases to qualify, and is taken to have never qualified, for the amnesty in relation to the SG shortfall for the quarters for which the SG charge has not been paid. In such cases, the Commissioner can unwind any benefits that have accrued to the employer under the amnesty by amending the assessments of the employer.

The standard objection processes set out in Part IVC of the *Taxation Administration Act 1953* generally provide for merits review of tax administration decisions. However, this review process does not apply to decisions of the Commissioner to disqualify an employer from the amnesty.

Generally, decisions involving the exercise of administrative discretion that may materially affect an individual's interest would be subject to merits review. However, in this context disqualification can only occur based on objective circumstances. That is, an employer should cease to qualify for the amnesty if the employer has failed to pay or enter into and comply with a payment arrangement. These conditions are purely factual and there is no determination or opinion that the Commissioner must form. The amendments provide the Commissioner with discretion about whether to issue a disqualification notice only where such objective circumstances are present.

In this context, the exercise of discretion may only be used in favour of an employer to avoid potentially harsh or unintended outcomes arising from a strict operation of the law. For example, an employer that pays SG charge one day after the due date would technically have failed to comply with a payment arrangement. Rather than automatically disqualify such an employer from the beneficial treatment provided by the amnesty, administrative flexibility is provided to allow the Commissioner to accommodate instances of minor or technical non-compliance with the conditions of the amnesty where those conditions have been complied with in substance. This provides practical flexibility for the Australian Taxation Office (ATO) to administer arrangements for payment in a manner consistent with the ATO's existing debt recovery policy.

I appreciate the Committee's consideration of this Bill, and I trust this information will be of assistance to the Committee.

Yours sincerely

Kelly O'Dwyer

THE HON MELISSA PRICE MP
ASSISTANT MINISTER FOR THE ENVIRONMENT

MC18-010052

10 JUL 2018

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Polley~~ Helen,

I am writing in response to the letter dated 21 June 2018 from the Committee Secretary of the Senate Standing Committee for the Scrutiny of Bills (the Committee), Ms Anita Coles. The letter refers to the Committee's comments in *Scrutiny Digest No. 6 of 2018* requesting further advice and action in relation to Underwater Cultural Heritage Bill 2018 (the Bill).

Broad delegation of administrative power

The Committee has expressed the view that it would be appropriate for the Bill to be amended so as to require that any person assisting an authorised person has the expertise appropriate to the function or power being carried out.

The Committee's further comments have been carefully considered, and I am confident that sufficient protections exist to safeguard the rights of the regulated community and ensure persons assisting authorised persons under the Bill have appropriate expertise. Therefore no further amendments to the Bill are proposed at this time.

Forfeiture

The Committee requests further detailed advice, with reference to the relevant principles as set out in the Guide to Framing Commonwealth Offences, as to why the proposed forfeiture provision does not expressly incorporate safeguards to protect the interests of innocent third parties.

I have considered the Committee's further request for detailed advice, and reaffirm that the Bill safeguards the interests of third parties by allowing a court to determine whether to make a forfeiture order, in circumstances where the court has found that a person has contravened a civil penalty provision or has been convicted of an offence under the Bill. Further detailed advice in relation to the protection of innocent third parties' rights will be included in an addendum to the explanatory memorandum.

Addendum to explanatory memorandum

The Committee has requested key information, provided in my previous response to the Committee dated 31 May 2018, to be included in the explanatory memorandum to the Bill. I agree with this request and confirm that this information will be included in an addendum to the explanatory memorandum, to be tabled when the Bill is debated in the Senate.

I appreciate the Committee's consideration of this Bill, and I trust this information will be of assistance.

Yours sincerely

MELISSA PRICE

CC: Minister for the Environment and Energy, the Hon Josh Frydenberg MP

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS18-002409

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to correspondence dated 28 June 2018 from Anita Coles, Committee Secretary, regarding the Senate Standing Committee for the Scrutiny of Bills' consideration of the Unexplained Wealth Legislation Amendment Bill 2018 (the Bill).

As set out in the Committee's Scrutiny Digest No.7 of 2018, the Committee has sought additional information about a number of matters in relation to the Bill. I have considered the requests of the Committee and my responses are detailed below at Attachment A.

I thank the Committee for the opportunity to clarify these matters, and for its important work in considering legislation before the Parliament.

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

Yours sincerely

12/07/18

PETER DUTTON

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Attachment A

Exemption from disallowance

The Committee has sought a justification for exempting declarations made under proposed subsection 14F(4) of the *Proceeds of Crime Act 2002* (the POC Act) from disallowance under the *Legislation Act 2003*. This subsection allows the Minister to declare by legislative instrument that a State is not a *'cooperating State'*, preventing this State from gaining particular benefits under the new equitable sharing arrangements at Schedule 5 to the Unexplained Wealth Legislation Amendment Bill 2018 (the Bill).

The exemption from disallowance at proposed subsection 14F(5) is justifiable as an instrument made under proposed subsection 14F(4) is intended to facilitate the operation of the National Cooperative Scheme on Unexplained Wealth (the Scheme), which would involve the Commonwealth and one or more States. It is vital that the Commonwealth Parliament should not, as part of a legislative instruments regime, be permitted to unilaterally disallow instruments that are part of a multilateral scheme. This principle is enshrined in subsection 44(1) of the *Legislation Act 2003*.

A State's ongoing participation in the Scheme as a *'cooperating State'* is intended to facilitate continued good faith negotiations with the Commonwealth and encourage the State to fully commit to the Scheme at a later date. The Minister's ability to remove this status by legislative instrument is vital in ensuring that a State cannot continue to indefinitely benefit from the equitable sharing arrangements where it has demonstrated it has no intention of re-engaging with the Scheme.

If there is a risk that such an instrument would be disallowed, this would jeopardise the ongoing effectiveness of the Scheme. The exemption from disallowance therefore supports the Scheme and should be preserved.

Privilege against self-incrimination

The Committee has pointed out that, under proposed paragraph 5(1)(a) to Schedule 1 of the POC Act, a person will not be permitted to rely on the privilege against self-incrimination to excuse themselves from producing a document sought through a production order.

Part 9.5.3 of the Guide to Framing Commonwealth Offences (the Guide) provides that it may be appropriate to override the privilege against self-incrimination where its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence.[1]

[1] The Guide to Framing Commonwealth Offences can be found at: https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx.

In some unexplained wealth matters, relevant information on property may only be obtainable from persons who have had some connection to criminal conduct. This may be the individual who committed the original crime, a financial institution that dealt with property suspected of being proceeds of an offence or professional intermediaries responsible for laundering the property through legal structures.

Allowing these individuals to rely on the privilege against self-incrimination would frustrate the operation of production orders and, in many cases, would prevent law enforcement from gathering the information required to support the unexplained wealth action.

Combatting unexplained wealth and, as a result, serious and organised crime groups, provides a benefit that outweighs the loss to personal liberty produced through the abrogation of the privilege against self-incrimination.

Nevertheless, the proposed production orders are designed to minimise the impact on a person's privilege against self-incrimination.

Production orders must be made by the courts, and a magistrate retains the discretion not to make a production order under subclause 1(1) of proposed Schedule 1 of the Act.

A production order under paragraph 1(3)(a) can also only require the production of documents which are in the possession, or under the control, of a corporation or are used, or intended to be used, in the carrying on of a business. The narrow scope of these orders minimises the possibility that the privilege will be abrogated, as corporations do not benefit from the privilege and documents which do not relate to the carrying on of a business cannot be produced.

Documents gained through production orders that would otherwise attract a claim of privilege also cannot be used against the person who produced them in criminal proceedings under subclause 5(2). This 'use immunity' will continue to apply to subsequent disclosures of the information contained in the documents under proposed subclause 18(3).

It should also be noted that the abrogation of the privilege against self-incrimination in proposed paragraph 5(1)(a) of Schedule 1 to the POC Act already exists for production orders under existing paragraph 206(1)(a) of the Act. These aspects of Commonwealth law have not been changed, but have merely been extended to States and Territories that participate in the Scheme.

The abrogation of the privilege against self-incrimination at paragraph 5(1)(a) can therefore be justified on the basis that it is necessary to ensure the effectiveness of unexplained wealth laws, and provides a public benefit that outweighs the loss of the privilege against self-incrimination.

Legal professional privilege

The Committee has pointed out that, under proposed paragraph 5(1)(c) of Schedule 1 to the POC Act, a person will not be able to rely on legal professional privilege to excuse themselves from producing a document sought through a production order.

The exceptional nature of the conduct which the Bill is seeking to address justifies the abrogation of this privilege. Legal professional privilege can obstruct the investigation of serious and organised criminal activity and can undermine the central purpose of the proposed production orders, namely the identification, location and quantification of property relevant to State and Territory unexplained wealth matters.

Serious and organised crime groups frequently set up elaborate financial and legal structures to conceal or disguise their wealth. Lawyers can become unwittingly caught up in this process if they provide advice to a client on matters such as setting up a trust structure, incorporating a business or selling property.

However, in other circumstances, lawyers may become professional facilitators. The use of legal practitioners to launder illicit funds is an internationally established money laundering method, and law enforcement have reported that it can be difficult in many cases to distinguish legitimate legal advice from advice given to intentionally frustrate the operation of future investigations.

As production orders can be issued prior to restraint action or during a covert investigation, if legal professional privilege was not removed tension could also arise between a lawyer's professional obligations to their client and the fact that they could not take instructions to clarify or waive legal professional privilege from their client due to the non-disclosure requirements under proposed clause 16 of Schedule 1. The abrogation of legal professional privilege prevents this tension from arising.

The Committee has also requested information on the safeguards attaching to any potential abrogation of legal professional privilege.

Production orders must be made by the courts, and a magistrate retains the discretion not to make a production order under subclause 1(1) of proposed Schedule 1 of the Act.

Documents gained through production orders that would otherwise attract a claim of privilege also cannot be used against the person who produced them in criminal proceedings under subclause 5(2). This 'use immunity' will continue to apply to subsequent disclosures of the information contained in the documents under proposed subclause 18(3).

It should also be noted that the abrogation of legal professional privilege in proposed

paragraph 5(1)(c) of Schedule 1 to the POC Act already exists for production orders under existing paragraph 206(1)(c) of the Act. These aspects of Commonwealth law have not been changed, but have merely been extended to States and Territories that participate in the Scheme.

The abrogation of legal professional privilege can therefore be justified on the basis that it is necessary to address the exceptional conduct of organised crime groups, which frequently use this privilege to hide the origins of unexplained wealth.

Legal professional privilege and privilege against self-incrimination – Derivative use immunity

The Committee has sought advice on why a derivative use immunity has not been included to prevent information indirectly obtained from production orders from being used in proceedings against the person.

Applying a derivative use immunity to civil investigations would defeat the central purpose of production orders under subparagraph 1(6)(a)(i) of proposed Schedule 1 to the POC Act, which is to gain information required to determine whether to take further civil action, including investigative action, under State and Territory *'unexplained wealth legislation'*.

If a derivative use immunity was applied to criminal investigations, this would have the potential to severely undermine the existing ability of authorities to investigate and prosecute serious criminal conduct.

For example, if a derivative use immunity was included, where an investigator in a criminal matter could potentially have access to privileged material, the prosecution may be required to prove the provenance of all subsequent evidentiary material before it can be admitted. This creates an unworkable position wherein pre-trial arguments could be used to inappropriately undermine and delay the resolution of charges against the accused.

This would be contrary to the aims of the existing production order regime, the proposed production order regime and the associated information sharing provisions under existing section 266A of the POC Act and proposed clause 18 of Schedule 1 to the POC Act.

These provisions only allow for the derivative use and sharing of produced documents where the documents are shared with a specific authority for a legitimate purpose. For example, a document obtained under a production order may be given to an investigative authority of a State under item 3 of subclause 28(2) only if the person giving this document believes on reasonable grounds that the document will assist in the prevention, investigation or prosecution of an offence punishable by at least 3 years or life imprisonment.

It is also pertinent to note that production orders do not affect the inherent power of the court to manage criminal prosecutions and civil proceedings that are brought before it where it finds that those proceedings have been unfairly prejudiced or that there is a real risk of prejudice to the defence of an accused.

The abrogation of the privilege against self-incrimination and legal professional privilege therefore remains appropriate in the absence of a 'derivative use' immunity, as including this immunity would not be appropriate and the derivative use of documents obtained through a production order is suitably restricted.

Immunity from liability

The Committee has also requested a justification as to why, under subclause 14(1) of proposed Schedule 1 to the POC Act, it is considered appropriate to confer immunity from civil and criminal liability in relation to certain actions taken under a notice to a financial institution or under the mistaken belief that the action was required under the notice.

Subclause 14(1) replicates existing subsection 215(1) of the POC Act, which was introduced at the recommendation of the Australian Law Reform Commission.[2] The Commission found that financial institutions and their employees could expose themselves to civil and criminal liability for the mere act of providing financial information or documents to an authorised officer, even where they were compelled to do so.

On this basis, the Commission recommended that financial institutions and their employees should be protected from any action, suit or proceedings in relation to its or their response to a notice.

The Committee has also noted that this immunity will apply even if the relevant action was not taken in good faith. The breadth of the immunity, however, only extends to actions carried out under the notice or under the mistaken belief that the action was required under the notice.

Under subclauses 12 and 13 of proposed Schedule 1 to the POC Act, a notice must state the documents or information to be provided, the form and manner in which these are to be provided and may only permit documents or information to be provided to a specific authorised State/Territory officer.

A person receiving this written notice will be clearly informed of their specific obligations. Given the narrow nature of these obligations, the immunity will not protect an employee from civil or criminal liability if they deliberately engage in conduct that clearly falls outside of the parameters of the notice.

Therefore it is appropriate that financial institutions and their employees should

[2] *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (ALRC Report 87) pp. 308-319.

retain immunity from civil and criminal liability under subclause 14(1) as the immunity is appropriately restricted to actions taken under a particular notice and the immunity is necessary to ensure that these notices function as intended.

Significant matters in delegated legislation

The Committee has also requested a justification for allowing the regulations to prescribe classes of persons in a self-governing Territory authorised to issue notices to financial institutions under paragraph 12(3)(d) of proposed Schedule 1 to the POC ACT.

The regulation-making power at paragraph 12(3)(d) arose out of negotiations with the States and Territories and was created to ensure that the Scheme was sufficiently flexible to allow appropriate officials in the Territories to issue notices to financial institutions in unexplained wealth cases.

Defining a specific class of officials for the Australian Capital Territory (ACT) under paragraph 12(3)(d), however, was not possible as the ACT does not currently have an unexplained wealth scheme, and it is therefore not possible to define the characteristics of the appropriate official with sufficient certainty.

The operation of this regulation-making power will also be subject to the disallowance mechanism under section 42 of the *Legislation Act 2003* and the oversight of the Parliamentary Joint Committee on Law Enforcement under proposed clause 19 of Schedule 1 to the POC Act.

These oversight mechanisms will be informed by the Territories' obligation to provide annual reports to the Commonwealth on the operation of proposed Schedule 1 to the POC Act under clause 20 of this Schedule. These reports are required to be tabled in Parliament under subclause 20(2) of the Schedule.

Limitations on amending the Bill

While the Bill is before Parliament amendments cannot be made to Schedules 1 and 4 to the Bill. This is because Schedules 1 and 4 to the Bill in their present form are currently being referred to the Commonwealth by the New South Wales Parliament in accordance with paragraph 51(xxxvii) of the Constitution (see Schedules 2 and 3 of the Unexplained Wealth (Commonwealth Powers) Bill 2018 (NSW)).

To preserve the constitutional basis of these Schedules, any amendments to their provisions would need to be made after the NSW referral and enactment of the Bill.

Once enacted, the provisions in the Bill could be amended pursuant to the amendment reference power at proposed section 14C of the POC Act, which will allow the Commonwealth Parliament to amend these provisions and still have them apply as a law of national application. Under the intergovernmental agreement,

however, these amendments would also require the unanimous approval of the parties.