The Hon Christian Porter MP
Attorney-General

MC18-008594

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
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CANBERRA ACT 2600
scrutiny.sen@aph.gov.au

Dear ~~Senator Polley~~

Thank you for the letter of 16 August 2018 in relation to the issues that the Senate Standing Committee for the Scrutiny of Bills identified in its Scrutiny Digest No. 8 of 2018 concerning the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018. I appreciate the Committee providing an extension for a response until 4 September.

I offer the following information for the Committee's consideration.

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

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl. Response to the Senate Standing Committee for the Scrutiny of Bills

Response to the Senate Standing Committee for the Scrutiny of Bills in relation to the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018

Definition of 'domestic violence'

Committee Comment

The committee requests advice as to the type of incidents that would fall within the definition of 'domestic violence', and whether incidents involving widespread industrial action, political protests or civil disobedience could fall within the definition.

Response

Part IIIAAA provides the legislative framework authorising the Australian Defence Force (ADF) to be called out to use force to resolve 'domestic violence' occurring in Australia. The term is not defined in legislation but refers to conduct that is marked by significant force and would include a terrorist attack, hostage situation, and widespread or significant violence. Part IIIAAA uses the term 'domestic violence' as this is the term used in section 119 of the Constitution, which deals with state requests for assistance in responding to domestic violence. Peaceful industrial action, political protests or civil disobedience would not fall within the definition of 'domestic violence'.

Committee Comment

If the definition of 'domestic violence' would allow for orders to be made to stop or restrict protests, dissents, assemblies or industrial action, the committee requests advice as to whether action would be able to be taken against peaceful protesters if there is a risk that other actors may cause injury to people or serious damage to property as a direct consequence of the protest.

Response

Call out orders can only be made where domestic violence is occurring or likely to occur (subsections 33(1), 34(1), 35(1) and 36(1)). If the Governor-General makes a call out order, or in relation to a contingent call out order the circumstances specified in the order arise, subsection 39(1) requires the Chief of the Defence Force to utilise the Defence Force in such manner as is reasonable and necessary for the purposes specified in the call out order under subsection 33(3), 34(3), 35(3) or 36(3). This is subject to limitations, including that subsection 39(3) requires that in doing so the Chief of the Defence Force must not stop or restrict any protest, dissent, assembly or industrial action, except if there is a reasonable likelihood of the death of, or serious injury, to persons, or serious damage to property. Therefore, peaceful industrial action, political protests or civil disobedience, not giving rise to such circumstances, would not fall within the definition of 'domestic violence'.

Where other actors are engaging in domestic violence that may cause injury to people or serious damage to property, the ADF could be called out to respond to that violence. Part IIIAAA does provide the ADF with powers to evacuate innocent persons to places of safety, and crowd control powers to control the movement of persons and means of transport (subsection 46(7), section 51D and section 51L). These powers could be used in relation to peaceful protesters to protect them from other actors carrying out acts of violence.

It is important to note that state or territory police forces would be the first responders in such circumstances and they are well trained and equipped to respond to such situations.

Definition of 'Commonwealth interests'

Committee Comment

The committee requests advice as to what would be covered by the term 'Commonwealth interests'.

Response

The term 'Commonwealth interests' is not defined in legislation. For the purposes of Part IIIAAA, 'Commonwealth interests' would include the protection of: Commonwealth property or facilities; Commonwealth public officials; visiting foreign dignitaries or heads of state; and, major national events, including the Commonwealth Games or G20. This reflects the approach under existing Part IIIAAA.

The threshold for call out

Committee Comment

The committee requests advice as to why it is appropriate that before an order is made the authorising ministers must simply 'consider' the nature of the domestic violence and whether utilising the ADF would 'enhance' the abilities of the states and territories to protect the relevant interests, noting that this is not a precondition to the exercise of the power (but merely a matter which must be considered) and noting the stated intention that these orders only be made in exceptional circumstances.

Response

The existing threshold for call out requires that authorising Ministers must be satisfied that the states and territories are not, or are unlikely to be, able to protect themselves or Commonwealth interests against domestic violence. Any such assessment inherently involves a consideration of the 'nature' of the violence (including the type of violence, types of weapons used, number of perpetrators, and the scale of violence) as well as the capability and capacity of state or territory law enforcement agencies. It also requires an assessment that the state or territory has exhausted all other options, including support from other jurisdictions. Where the Commonwealth assesses that a state or territory has both the capability and capacity to resolve the incident, it would not be able to call out the ADF under Part IIIAAA to assist a state or territory. This precondition could operate to prevent the Commonwealth from providing ADF assistance to a state or territory, even where the state or territory has requested it, and even though the ADF possesses specialist capabilities that could assist law enforcement to resolve an incident in a safer, faster, and more appropriate manner, to most effectively protect the Australian populace and save lives.

It is important that the legislative requirements for call out do not hinder the provision of unique ADF capabilities that may be best suited to resolving an incident. The proposed threshold will allow the ADF to be called out where an incident is not beyond the capability and capacity of a state or territory, but where the ADF has relevant specialist capabilities that could be brought to bear. However, this proposed threshold will not impermissibly expand the circumstances in which the ADF might be called out, or result in the ADF being called out in response to minor incidents that police routinely and appropriately deal with. This is because the authorising Ministers will need to be satisfied that the ADF *should* be called out in response to a terrorist incident or other incident of significant violence, noting that this can only occur after a state or territory request for assistance, or the Commonwealth assessing that the violence affects, or would be likely to affect, a Commonwealth interest. In making this assessment, Commonwealth authorising Ministers are required to consider the nature of the violence, and whether the ADF would be likely to enhance the state or territory response, as well as any other relevant matters. These are the same factors that authorising Ministers

would consider in making a decision under the existing threshold. The threshold in proposed sections 33 to 36 recognises that calling out the ADF to respond to an incident is a significant and exceptional act, and ensures that it is not to be done in relation to incidents that are within the ordinary capability of police.

However, by requiring authorising Ministers to consider these mandatory factors, the amended threshold will provide flexibility for the ADF to be called out in appropriate circumstances. This could occur where an incident is not beyond the capability of a state or territory, but where authorising Ministers determine that the ADF has relevant specialist capabilities that could most effectively resolve the incident. The requirement to consider 'nature' and 'enhancement' makes clear that it is not intended that the ADF be called out in response to every incident potentially falling within the meaning of 'domestic violence'.

There are a range of circumstances in which the ADF may be called out. For example in response to:

- unique types of violence, such as a chemical, biological, radiological or nuclear attack, for which the ADF maintains specialist response capabilities, or
- incidents of violence that are so widespread that law enforcement resources are in danger of being exhausted and ADF assistance is necessary to supplement the law enforcement response.

These circumstances are by their nature 'exceptional'. However, under the current threshold it may not be possible to call out the ADF to assist state and territory police in these circumstances, unless the capability and capacity of the police has been totally overwhelmed. The amendments are aimed at making it easier for the ADF to assist states and territories in responding to such incidents, where requested.

Time limitations on call out orders

Committee Comment

The committee requests advice as to why it is considered necessary to allow call out orders to remain in effect for up to 40 days.

Response

The Bill does not allow call out powers to be exercised for longer than is strictly necessary, and does not automatically allow for call out orders to remain in effect for up to 40 days. The 20 day limitation on call out orders ensures that there is adequate time during which the ADF may be utilised to respond to the domestic violence or threat specified in the order, without a new order having to be made.

However, the Bill imposes strict limitations governing when a call out order must be revoked, and when an order may be extended. Proposed subsection 37(3) provides that the Governor-General must revoke a call out order if: one or more authorising Ministers cease to be satisfied of the matters in proposed subsections 33(1), 34(1), 35(1) or 36(1) (as the case requires), or if, in the case of a State protection order, the government of the State or self-governing Territory withdraws its application to the Commonwealth Government for the call out order. This proposed subsection operates to require that the authorising Ministers continually monitor the domestic violence or threat in question as it evolves. Where an authorising Minister identifies that either the domestic violence is no longer occurring, or is no longer satisfied that the ADF should be called out to deal with the violence (for example because it has subsided to such an extent that ADF support is no longer necessary), then the Minister must immediately advise the Governor-General that the criteria for the call out order are no longer met, and the Governor-General must revoke it.

Further, proposed paragraph 37(1)(a) makes clear that, before the Governor-General may vary a call out order, including to extend the period during which the order is in force, the authorising Ministers must still be satisfied of the preconditions for making the call out order in the first place, as set out in proposed subsections 33(1), 34(1), 35(1) or 36(1). Further, proposed paragraph 37(1)(b) requires that the order, as varied, must comply with proposed subsections 33(3) to (5), 34(3) to (5), 35(3) to (5), or 36(3) to (5), as the case requires. Relevantly, these proposed provisions state when an order is in force, when it ceases to be in force, and what information it must contain.

As such, the same conditions that apply to the making of a call out order also apply to the subsequent varying and extension of the order. The authorising Ministers must continue to be satisfied that the conditions for making the order are met. These limitations ensure that call out powers are only available during such time as they are necessary and the conditions for call out continue to be met.

Use of force

Committee Comment
The committee requests advice as to the appropriateness of amending proposed subsection 51H(2)(b) so as to require that infrastructure can only be declared where damage or disruption would *directly* endanger life or cause serious injury.

Response

It would not be appropriate to limit infrastructure declarations to circumstances where damage or disruption would *directly* endanger life or cause serious injury. To do so would unduly limit the ADF's ability to respond to damage or disruption to infrastructure which, though indirect, would nevertheless present a grave risk to life and safety. For example, an attack on a nuclear reactor could result in the release of radioactive material that causes direct and immediate harm to people. It could also result in radioactive material being released into a water source. In that case, a person may only be harmed by actually drinking the contaminated water, and therefore suffer indirect harm. In both cases, the cause of the harm and the gravity of the harm are the same and distinguishing between direct and indirect causes would be arbitrary. It is therefore important that infrastructure declarations can be made where the damage or disruption would directly or indirectly endanger life.

There must always be a nexus between the damage or disruption to the infrastructure and the risk of death or serious injury to a person. Under proposed subsection 51H(2), authorising Ministers can only make an infrastructure declaration if they believe on reasonable grounds that there is a threat of damage or disruption to the infrastructure, and that the damage or disruption would directly or indirectly endanger a person's life or cause serious injury to them.

Committee Comment
The committee requests advice as to the appropriateness of amending proposed subsection 46(3) to require that the minister may only authorise the taking of measures against an aircraft or vessel where this is necessary and reasonable to protect the lives or safety of others.

Response
The powers in relation to aircraft and vessels in section 46 are sufficiently connected with the protection of life. In addition to the specific limitations on the use of force that is likely to cause the death of, or grievous bodily harm to, a person as set out in subsection 51N(3), Part IIIAAA sets out an overriding requirement that in exercising their powers ADF members may only use such force as is reasonable and necessary in the circumstances (subsection

51N(1)). The taking of measures against an aircraft or vessel would only be reasonable and necessary where that aircraft or vessel posed a significant threat to life.

Immunity from liability

Committee Comment

The committee requests advice as to the appropriateness of amending the bill so as to preserve legal liability in instances where an ADF member has exceeded their legal authority in circumstances that cannot be characterised as minor or technical.

Response

Proposed section 51S is not intended to remove legal liability in instances where an ADF member has exceeded their legal authority in circumstances that cannot be characterised as minor or technical. An ADF member who exceeds their legal authority in circumstances which could not be characterised as minor or technical would be highly unlikely to have exercised their powers in good faith. For example, an ADF member who uses force against a person in doing anything that is likely to cause the death of, or grievous bodily harm to, the person without believing on reasonable grounds that doing that thing satisfies one of the matters specified in subparagraphs 51N(3)(a)(i) to (iii), would be highly unlikely to have exercised their powers in 'good faith'.

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MC18-008595

31 AUG 2018

Senator Helen Polley
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Senate Scrutiny of Bills Committee
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Dear ~~Chair~~ Hel

Thank you for your letter of 16 August 2018 on behalf of the Senate Scrutiny of Bills Committee, drawing my attention to *Scrutiny Digest No. 8 of 2018*, and requests for additional information about the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018.

I appreciate the Committee's consideration of the Bill and have attached a detailed response.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl: Reponses to issues raised on the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018

Attachment – Reponses to issues raised on the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018

Procedural fairness

The committee has requested advice on three issues relating to procedural fairness:

- why it is considered necessary and appropriate to provide the court with a broad discretion to order that the mandatory requirements apply, and the appropriateness of amending the bill to provide some legislative guidance as to when the discretion should be exercised;
- the circumstances in which legal aid would be available to parties to family law proceedings involving allegations of family violence; and
- whether, in the circumstances that a person is subject to the prohibition on personal cross-examination or to other restrictions on their ability to present their own case, legal aid will be made more readily available.

Response:

It is important that judicial officers have a broad discretion to order that the mandatory requirements apply so that they are able to respond appropriately to each individual matter. As the High Court of Australia has recognised, a wide discretion maximises the possibility of doing justice in every case.[1] The definition of family violence in the *Family Law Act 1975* is very broad,[2] and there will be great variability in the circumstances in which paragraph 102NA(1)(c)(iv) could apply. For example, allegations may refer to a one-off historical event of either low or high severity, there may be cross-allegations, there may or may not be current safety concerns, a victim may or may not want the mandatory requirements to apply, and there may or may not be substantiating evidence (for example, medical records). As each victim of family violence is unique, none of these circumstances provide definitive guidance on whether or not an order should be made. A broad discretion will enable judicial officers to respond to the individual circumstances of each case.

Though the discretion in paragraph 102NA(1)(c)(iv) is broad, it is not unlimited and must be exercised judicially and in accordance with legal principles laid down in the Family Law Act.[3] The most relevant principle is that the court must have regard to the need to ensure protection from family violence.[4] This means that, when deciding whether to make an order under paragraph 102NA(1)(c)(iv), the court would consider whether such an order was necessary to protect the parties from family violence. As the family law courts deal with allegations of family violence on a daily basis, judicial officers are well placed to determine the veracity of allegations, the effects of that violence on victims, and whether or not the mandatory requirements should apply.

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[1] *Norbis v Norbis* (1986) 65 ALR 12 at 16.

[2] Section 4AB of the *Family Law Act 1975* defines family violence as any 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful'.

[3] *Norbis v Norbis* (1986) 65 ALR 12; *Stanford v Stanford* (2012) 293 ALR 70.

[4] Paragraph 43(1)(ca) of the *Family Law Act 1975*.

If necessary, the family law courts may issue practice directions and/or guidelines on the exercise of the discretion in paragraph 102NA(1)(c)(iv), or include guidance in the Family Violence Best Practice Principles. Indeed, the High Court of Australia has noted that 'it does not follow that, because a discretion is expressed in general terms, Parliament intended that the courts should refrain from developing rules or guidelines affecting its exercise'.[5] As the committee is aware, the measures will also be reviewed after two years which will provide an opportunity to assess whether the discretion is being exercised as intended (to protect victims of family violence) and whether any further amendments are required.

It may assist the committee to know that the family law courts already have a range of powers under the Family Law Act to manage proceedings and protect vulnerable witnesses. Most relevantly, in child-related proceedings, the court may give directions or make orders limiting, or not allowing, cross-examination of a particular witness.[6] As with proposed paragraph 102NA(1)(c)(iv), there is no legislative guidance on the exercise of this power.

The committee has expressed concern that an order that the mandatory requirements apply could potentially require a party to argue their case without the opportunity to cross-examine the other party. The Government intends that representation through legal aid commissions would be available where a party cannot obtain the services of a private lawyer. The Government is working with National Legal Aid to determine the impacts of meeting demand introduced by the Bill. The eligibility criteria that would apply for legal aid in cases where the mandatory requirements apply are part of the Government's discussions with National Legal Aid.

The details regarding funding for the measures, including the circumstances in which legal aid will be available, will be announced prior to debate in the Senate in accordance with the recommendation of the Senate Standing Committees on Legal and Constitutional Affairs.

Parliamentary scrutiny—no requirement to table certain documents

The committee has requested advice on the following issues relating to parliamentary scrutiny:

- why it is not proposed to require documents associated with the review of proposed Division 4, conducted pursuant to proposed section 102NC, be tabled in Parliament; and
- whether the documents associated with the review of proposed Division 4 will be made available online.

Response:

The results of the review will be made available on the Attorney-General's Department website.

The intention of the review is to inform Government about whether the amendments are operating as intended to protect victims of family violence, while also maintaining procedural fairness for all parties. Based on the results, the Government will determine whether any changes or further amendments are required. As the committee has noted, the Attorney-General's Department will review the amendments internally, in consultation with the family law courts, National Legal Aid and other relevant stakeholders.

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[5] *Norbis v Norbis* (1986) 65 ALR 12 at 16.

[6] Paragraph 69ZX(2)(i) of the *Family Law Act 1975.*

The Government recognises the importance of parliamentary scrutiny, and considers that making the results of the review available online will ensure the opportunity for the Parliament to do so, noting that the primary purpose of the review will be to inform future policy development.

The Hon Christian Porter MP
Attorney-General

MC18-008650

31 AUG 2018

Senator Helen Polley
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Senate Scrutiny of Bills Committee
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Dear ~~Senator Polley~~ Helen

Thank you for the letter of 16 August 2018 in relation to the issues identified by the Senate Standing Committee for the Scrutiny of Bills (the Committee) in its Scrutiny Digest No.8 of 2018 concerning the Office of National Intelligence Bill 2018 (the Bill).

I offer the following information for the Committee's consideration.

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

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl. Response to the Senate Standing Committee for the Scrutiny of Bills
CC. The Prime Minister, the Hon Scott Morrison MP

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Response to the Senate Standing Committee for the Scrutiny of Bills in relation to the Office of National Intelligence Bill 2018

Reversal of the evidential burden of proof

Committee Comment

The committee seeks advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in relation to the matters in proposed subclauses 42(2) and (3), 43(2) and (3) and 44(3) and (4).

Response

Consistent with section 13.3 of the Criminal Code, the defendant bears an evidential burden in relation to the offence-specific defences in proposed subclauses 42(2) and (3), 43(2) and (3) and 44(3) and (4).

The *Guide to Framing Commonwealth Offences* (the Guide) acknowledges that it is appropriate to reverse the onus of proof and place a burden on the defendant in certain circumstances. This includes where a matter is peculiarly within the knowledge of the defendant and where it would be significantly more difficult and costly for the prosecution to disprove the matter than for the defendant to establish the matter.

The offences in clauses 42 and 44 of the Bill (including the offence-specific defences) are almost identical to the existing secrecy offences in sections 40A, 40J and 40K of *the Intelligence Services Act 2001* (IS Act) that currently apply to the communication of, and dealing with, information acquired by or on behalf of the Office of National Assessments (ONA) in connection with its functions. They are also consistent with the secrecy offences in the IS Act, including the offence-specific defences, that apply in relation to other intelligence agencies.

The offences in clauses 42 and 44 will only apply where the information or matter came into the person's knowledge or possession by reason of one the following circumstances: that the person is or was a staff member of ONI, that the person has entered into any contract, agreement or arrangement with ONI, or that the person has been an employee or agent of a person who has entered into a contract, agreement or arrangement with ONI.

This is in recognition of the special duties and responsibilities that apply to ONI staff and people with whom the agency has an agreement or arrangement. It is expected that such persons would be well aware of the sensitivity of the information being communicated or dealt with and the importance of ensuring appropriate authorisation when communicating and dealing with that information.

Subclauses 42(2) and 44(3) – Information or matter lawfully available

It is considered appropriate to cast the matters set out in subclauses 42(2) and 44(3) as an exception to the offences rather than including them as elements of the offence. Evidence of whether there was a reasonable possibility of a prior, authorised public disclosure of the relevant information or matter is evidence peculiarly within the knowledge of the defendant.

Given the generally classified nature of the information covered by the offences, this exception is likely to be of relevance in limited situations where a case is being referred for prosecution. It would be significantly more difficult and costly for the prosecution to prove in every case, beyond a reasonable doubt, that there was no prior authorised communication of the relevant information to the public.

Subclauses 42(3) and 44(4) – communication to IGIS officials

The exceptions in subclauses 42(3) and 44(4) replicate exceptions in the existing secrecy provisions in the IS Act. These exceptions were included at the recommendation of the Parliamentary Joint Committee of Intelligence and Security following their consideration of the *National Security Legislation Amendment Bill (No.1)2014*, to make explicit the intention that the offences should not apply to disclosures to an Inspector-General of Intelligence and Security (IGIS) official, and ensure that they did not operate as a perceived disincentive or barrier to the provision of information, or the making of complaints to, the office of the IGIS.

It is considered appropriate to provide for this as exceptions to the offences rather than as elements of the offences. Evidence of a reasonable possibility that the conduct related to providing information to an IGIS official for the purpose of that official exercising a power, or performing a function or duty as such an official is evidence peculiarly within the knowledge of the defendant. It would be significantly more difficult and costly for the prosecution to prove in every case, beyond a reasonable doubt, that the communication of the relevant information was not for the purpose of an IGIS official exercising a power, or performing a function or duty as an IGIS official.

Subclauses 43(2) and (3)

The development of the Bill overlapped with the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) consideration of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018 (EFI Bill). Noting the PJCIS' recommendations in relation to the EFI Bill, and the form in which that Bill passed the Parliament, the ONI Bill, including the Explanatory Memorandum, will be amended to remove clause 43 in its entirety.

Inclusion of a general defence for all government officials

Committee Comment

The committee requests advice as to the appropriateness of amending the Bill to include a general defence to the offences in clauses 42 to 44 for all government officials who engage in relevant conduct for the purpose of exercising powers, or performing functions or duties, as a government official.

Response

As outlined above, clauses 42 and 44 of the Bill are almost identical to existing secrecy provisions in the I S Act. The Government has agreed to undertake a review of specific secrecy provisions following the passage of the general secrecy provisions in the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*.

Until such time that this review is completed, an amendment to include a general defence for all government officials is not considered necessary on the basis that the Bill already contains mechanisms to facilitate the appropriate communication of, or dealing with, ONI information by government officials.

The offences only apply to government officials who have obtained ONI information by reason of being a staff member of ONI, having entered into a contract, agreement or arrangement with ONI or being an employee or agent of another person who has entered into a contract, agreement or arrangement with ONI. The offences also do not apply in the circumstances set out in paragraph 42(1)(c), paragraph 44(1)(d) and paragraph 44(2)(d). This includes communication made with the specific authority or approval of the Director-General of National Intelligence or another person authorised by the Director-General.

Delegated legislation not subject to disallowance

Committee Comment

The committee requests detailed advice as to why it is necessary to declare the entirety of the privacy rules not to be a legislative instrument (and therefore not subject to the usual disallowance and sunsetting procedures under the *Legislation Act 2003*), given that it is intended that they will generally be made public.

Response

Clause 53 of the Bill, which is the enabling provision for the privacy rules, is based upon section 15 of the I S Act which requires the responsible Ministers for the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO) to make privacy rules to protect Australians.

Rules made under section 15 are currently made available to the public. However, subsection 15(7) of the IS Act provides that they are not legislative instruments, in recognition that it may sometimes not be appropriate for all privacy rules to be made publicly available through the tabling process. Clause 53(8) is consistent with that approach.

As noted, it is anticipated that the privacy rules will generally be made public. Additionally, rules made under clause 53 will be subject to a form of Parliamentary oversight through the Parliamentary Joint Committee on Intelligence and Security. Subclause 53(6) requires the IGIS to brief that Committee on the content and effect of the privacy rules if requested to do so, or if the rules change. Amendments contained in the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018 will also place a requirement on the IGIS to report in its public annual report on ONI's compliance with the privacy rules. This will include compliance with any rules that are classified in nature and not publicly available.

Significant matters in delegated legislation

Committee Comment

The committee requests detailed advice as to the appropriateness of amending the Bill to provide high-level regulation of the collection of identifiable open source information and the communication, handling and retention by ONI of identifiable information.

Response

As outlined above, clause 53 of the Bill is in similar terms to section 15 of the IS Act which forms the basis for the making of privacy rules that apply to ASIS, ASD and AGO. Although ONA currently prepares privacy guidelines that are similar to the rules made under the I S Act, there is not a legislative requirement to do so. The inclusion of a privacy rules regime in the Bill clearly supports enhanced privacy protection, as recognised by the Australian Government Solicitor in their independent privacy impact assessment of the establishment of ONI.

In addition, before making proposed privacy rules, the Prime Minister must consult the IGIS and the Attorney-General. This will ensure that the rules are informed by the independent advice and consideration of both national security and broader legal perspectives, including in relation to privacy.

Setting out ONI's obligations in relation to the collection, communication, handling and retention of identifiable information in rules rather than the primary legislation is appropriate. This approach will enable ONI's fulfilment of those obligations to be more responsive and adaptive to changing circumstances and community expectations about the collection, use and disclosure of sensitive and personal information by intelligence agencies.

TREASURER

Senator Helen Polley
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Dear Chair

Thank you for the letter to my Office on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 16 August 2018, drawing my attention to the Committee's *Scrutiny Digest No. 8 of 2018* which seeks further information about the Treasury Laws Amendment (Financial Sector Regulation) Bill 2018.

The Committee has asked for further advice on the approach taken to prescribe the fit and proper test in delegated legislation and whether specific consultation obligations on this delegated legislation should be undertaken.

The amendments contained in the Treasury Laws Amendment (Financial Sector Regulation) Bill 2018 are intended to encourage innovation and greater participation and competition in the financial system by reducing barriers faced by new entrants.

However, it is necessary that appropriate safeguards to protect consumers and financial system stability against risks associated with concentrated ownership of financial sector companies are maintained including a fit and proper test.

As the Committee notes, the 'fit and proper' test will be prescribed in delegated legislation made by APRA. The nature of fit and proper in the context of the owners of a prudentially regulated institution has broad considerations which necessitate a test that can be readily adapted or articulated more fully as needed.

The need for flexibility and adaptability is the reason the test is contained in delegated legislation. It is also consistent with APRA's other powers which allow it to draft delegated legislation in a similar space.

The legislative instrument setting out the fit and proper test will be subject to parliamentary disallowance and ministerial approval. In this way the instrument will be largely subject to the same parliamentary scrutiny as primary legislation. They are capable of being debated, referred to committees and being voted down (disallowed). In this way there would not appear to be much difference had the test been included in primary legislation or regulations.

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I note the Committee's suggestion that specific consultation requirements be included in the Bill. Given APRA's record for undertaking timely and substantive consultation of generally three months it does not seem necessary to include a requirement to consult in the legislation. APRA has noted that consultation in this complex space will be particularly advantageous to get the right balance in its considerations.

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

Yours sincerely

The Hon Josh Frydenberg MP

4 / 9 / 2018