The Hon Ken Wyatt AM, MP

Minister for Senior Australians and Aged Care
Minister for Indigenous Health
Member for Hasluck

Ref No: MS18-002002

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

Dear Senator

Thank you for the correspondence from your Committee Secretary dated 20 September 2018, requesting advice about issues identified in relation to the Aged Care Quality and Safety Commission Bill 2018 (Bill) and the Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018 (Consequential and Transitional Bill).

As you may be aware, these Bills represent the first of a two-staged process of legislative reform to strengthen the regulatory framework that safeguards the health, safety and wellbeing of aged care consumers, by bringing together the functions performed by the Australian Aged Care Quality Agency and Aged Care Complaints Commissioner into a single agency. These Bills directly respond to the key recommendation from the *Review of National Aged Care Quality Regulatory Processes* (the Carnell-Paterson Review). The second stage, as signalled in the objects of the Bill, will result in the remaining regulatory functions performed by the Department of Health transferring to the Commission.

I have responded to the issues raised by the Committee below. While I have sought to address the Committee's concerns in full, where they may be more appropriately or equally addressed in the context of the second stage reforms, I want to assure you that they will be taken into account. I welcome further debate on the provisions of these Bills, including discussion of these issues, as they are considered by the Parliament.

Matters in delegated legislation

I understand the Committee has expressed the following concerns about the delegated, rule-making powers, under the Bill:

- that it permits significant matters, including the complaints and regulatory functions and related review rights, to be included in the Rules, as per subclauses 21(2) to (6); and
- that it provides inadequate requirements for consultation on these rules, prior to their enactment, as set out under clauses 21 and 77, and section 17 of the *Legislation Act 2003*.

The Committee seeks justification for these features of the Bill.

Executive rule making powers

The Bill provides that matters relating to the performance of the complaints and regulatory functions (among others), will be prescribed in the Rules (clause 22(2)).

All significant matters relating to the rights and responsibilities of persons involved in the complaints and regulatory functions will be established in primary legislation, including both the Bill and the *Aged Care Act 1997*, as amended by the Consequential and Transitional Bill. These Bills elevate certain matters of significance currently in delegated legislation into the primary legislation, and leave matters largely of an operational nature, that set out how the Commissioner may exercise their functions, to be prescribed in rules.

By way of explanation, the Bill provides the scope and nature of the Commissioner's complaints and regulatory functions (clauses 18 and 19) and monitoring powers and purposes for which they may be exercised in carrying out these functions (Part 8). For example, this includes the search and entry powers of regulatory officials as they relate to the Quality Agency's accreditation, quality review and monitoring functions which are currently conferred under Parts 2 and 3 of the *Accountability Principles 2014*. The Bill moves these powers from delegated legislation to primary legislation, consistent with the arrangements for the powers of authorised complaints officers. Such changes will ensure matters which directly affect the rights, and liberties of persons are also expressly provided for in primary legislation.

In addition, to support these functions, it is relevant to take into account that the *Aged Care Act 1997* sets out the enforceable responsibilities of approved providers, in relation to which the Commissioner may resolve or deal with complaints (for example, in Parts 4.1, 4.2, 4.3), and accredit, review or monitor the provision of quality of care (for example, in sections 42-1; 42-4, and Part 4.3).

The *Aged Care Act 1997* also provides the functions and powers through which these responsibilities will be enforced (Part 4.4) by the Secretary of the Department. In light of this, the Bill and Rules will not generally confer the Commissioner with any powers to ultimately determine or give effect to these rights or responsibilities, they would be expected to only set out a means for reviewing decisions of the Commissioner, as is currently provided for in the *Quality Agency Principles 2013*.

Consultation on rule making powers

Additional consultation requirements, beyond those provided for under section 17 of the *Legislation Act 2003* have not been included in the Bill, since the rules will largely deal with operational matters, as noted above. The Department of Health has been working with the aged care sector on aged care reforms, including the co-design of the new Aged Care Quality Standards, and the Government is committed to continuing this manner of consultation.

In relation to the initial Rules which will be made to commence on 1 January 2019, it is also relevant to note that the main content of these rules will broadly reflect the current *Quality Agency Principles 2013* and the *Complaints Principles 2015* and the *Quality Agency Reporting Principles 2013*, which will be replaced by the Rules. As noted in the explanatory statements for these Principles, relevant stakeholders were consulted on these Principles prior to their enactment.

Disclosure of protected information

The Committee raised concerns about the breadth of the protected information provisions which allow the disclosure, or the creation of further instances of disclosure of personal information. These relate to:

- clause 56(1) which requires the Commissioner to give information of a kind specified in the rules to the Secretary for the purposes of the Secretary's functions or powers;
- clause 61(1)(a) which allows the Commissioner to disclose information in a particular case, if it is necessary and in the public interest;
- clause 61(1)(j) which permits the Commissioner to disclose information of a kind, and to persons and for purposes specified in the rules.

The Committee sought further information on the necessity and appropriateness of these disclosures.

Rules specifying disclosures to Secretary

Rules specifying disclosures by the Commissioner to the Secretary are necessary given the Secretary will routinely require information acquired in the course of performing the Commissioner's functions, in order to carry out the Secretary's functions.

This information is expected to include information relating to the Commissioner's accreditation and monitoring functions as contemplated under s 65-1A of the *Aged Care Act 1997* and in the current *Quality Agency Reporting Principles 2013* (which will be replaced by the Rules). The Commissioner would disclose this information to the Secretary, for the purposes of deciding whether an approved provider has complied, or is complying, with one or more of its responsibilities under Part 4.1, 4.2 or 4.3. The Secretary may impose sanctions under Part 4.4 if a provider fails to comply with its responsibilities. The need for this provision will be reviewed during the second stage of reform, when compliance functions of the Department are transferred to the Commission.

Permitted disclosure on public interests grounds

Clause 61(1)(a) of the Bill is intended to be based on provisions contained in Division 86 *Aged Care Act 1997* and Part 7 of the *Australian Aged Care Quality Agency Act 2013*. These provisions enable disclosures of protected information on similar terms to support the complementary functions of the CEO of the Quality Agency and the Secretary of the Department under the *Aged Care Act 1997*. Clause 61(1)(a) is therefore included in the Bill to maintain consistency with the *Aged Care Act 1997*.

In addition, this broad discretion is appropriate as it will give the Commissioner the ability to disclose information in circumstances: where it will address particular risks to aged care consumers; or where it will benefit aged care providers and consumers as a whole; or which arise in relation to broader issues also affecting other areas outside the health portfolio, such as corporate governance or workplace relations. This is likely to become increasingly relevant with the insights of a single agency that has more comprehensive oversight of regulated activities.

It should be noted that any protected information that is disclosed under this provision may only include personal information (or any other protected information), where it is necessary for the public interest purpose, and will remain subject to these restrictions to prevent unrelated disclosures or disclosures for secondary purposes.

Rules to specify additional grounds for disclosure kinds of disclosures

The Bill provides for the Rules to specify additional circumstances in which disclosures of protected information may be authorised. This has been necessary to accommodate new legislation that is introduced which interacts with the *Aged Care Act 1997*. Principles made under corresponding provisions of the *Aged Care Act 1997* have been amended from time to time for this purpose. For example, the current *Information Principles 2014* enable the Secretary of the Department of Health to disclose information to the Repatriation Commission and to State and Territory authority responsible to fire safety, where the information relates to the functions of that organisation. Disclosures of this type ensure the seamless operation of related legislation related to safety, the payment of aged care subsidies, pensions and other Government payments.

The need for these provisions will also be reviewed in the second stage of reform, which will consider the information needs of the Commissioner in the context of the functions of the Commissioner as a whole from 1 January 2020, taking into account the level of executive scrutiny that is appropriate for such provisions and the views of the Committee.

Reversal of evidential burden of proof

The Committee has sought justification for the reversal of the evidential burden of proof in relation to the offence created under subclause 60(1). Subclause 60(1) makes it an offence for any person to record, use or disclose protected information that is acquired in the course of performing functions under the Bill, unless an exception applies under subclauses (3) or (4).

Consistent with Australian Government Policy – *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* – the primary reason a defendant bears an evidential burden in relation to the matters covered under subclauses 60(3) and 60(4) is because they are matters peculiarly within the knowledge of the defendant.

Conduct which qualifies for exception under these subclauses, such as disclosures to specified persons, or disclosures made on the authority provided by the person or body to whom it relates, concern matters directly connected to the defendant's conduct. In particular, in circumstances where the excluded conduct is carried out in the course of performing functions or exercising powers under the new Act or Rules as per subclause 60(1), the defendant would, as a matter of course, be expected to maintain the appropriate records relating to the purpose of the record, use or disclosure of protected information, or authority which may have been obtained to record, use of disclose this information.

Further, the matters dealt with under subclauses 60(3) and 60(4) are not central to the question of culpability for the offence under subclause 60(1), which also carries a relatively low penalty.

In relation to the strict liability offences created for failing to return an identity card (subclauses 74(3) and (4)), the evidential burden is reversed given that the exceptions provided for (i.e. the loss or destruction of a card) are also matters peculiarly in the knowledge of the defendant. If the defendant is unable to return the card because it has been destroyed, that knowledge would be held by the defendant, or alternatively, if the card has been lost by the defendant, this is also a matter specifically within the defendant's knowledge, as per the other exception to the offence.

In addition, these offences are also publishable by a relatively low penalty of one penalty unity and are not subject to a term of imprisonment.

Broad powers of delegation

The Committee has raised concerns about the broad powers given to the Commissioner to delegate his or her functions or powers under the Bill (clause 76) or Rules, as well as sub-delegate any functions or powers delegated to the Commissioner under the *Aged Care Act 1997* (item 19, Schedule 1 of the Consequential and Transition Bill), to a member of staff within the Commission.

This provision is consistent with the powers of the current Aged Care Complaints Commissioner, and this flexibility has been retained to ensure operational efficiency is maintained for the Commissioner. It is also relevant to note, that the matters dealt with in the Rules will to a large extent include routine matters of operation, as mentioned above.

Additionally, consistent with their general duties, I would expect the Commissioner to take into account not only the expertise of staff but also other appropriate factors, in delegating his or her functions under the Bill or *Aged Care Act 1997*.

For example, the Commissioner should also consider the broader governance structure which will best serve the Commission's purpose of establishing a single agency that consolidates functions and makes best use of information and resources to identify and respond to regulatory risks.

I thank the Committee for its consideration of this matter and note the recommendation put forward for the Senate's consideration. However, for the reasons outlined above, the Government's view is that the provisions of the Bill are appropriate and further refinements can be considered as part of the second stage of reforms to the powers and functions of the Commissioner.

Yours sincerely

The Hon KEN WYATT AM, MP
Minister for Senior Australians and Aged Care
Minister for Indigenous Health

04 OCT 2018

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: MS18-008039

Senator Helen Polley
Chair
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your correspondence of 19 September 2018 requesting further information on the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018.

I have attached my response to the Senate Standing Committee for the Scrutiny of Bills' Digest 11 of 2018, as requested in your correspondence.

Yours sincerely

08/10/18

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Crimes Legislation Amendment (Police Powers at Airports) Bill 2018

1.49 The Committee requests the Minister's advice as to:

• the circumstances in which it is envisaged the powers in proposed sections 3UN, 3UO and 3UQ (identification, stop and move-on directions powers) would be exercised to ensure the 'good order' of an airport, its premises, and flights, and the need for such powers; and

• whether these circumstances would extend beyond ensuring safety or disrupting or preventing criminal activity; in particular, whether the powers may be exercised to disrupt or quell a peaceful protest.

Circumstances where proposed powers may be exercised

Airports, and the aviation network more broadly, are known targets for terrorists and for serious and organised crime groups seeking to expand their operations in activities such as illicit drug trafficking, both within Australia and abroad. The Crimes Legislation Amendment (Police Powers at Airports) Bill 2018 (the Bill) will address these risks by giving police broader powers to assess and disrupt potential criminal activity and threats to aviation security, and identify the individuals involved. The powers proposed in the Bill provide a consistent approach across Australia's major airports, with the agility to address circumstances which current police powers within airports do not.

For example, police intelligence or observations may indicate that a person is behaving suspiciously in the airport – such as a person taking photos or videos of security screening points. The proposed powers under 3UN, 3UO and 3UQ will allow police to direct a person to stop, request the identification of individuals involved and, where appropriate, direct the individual to move on from the airport environment, immediately disrupting their activities, and allowing time for further investigations to occur. Under the current framework, police are unable to request the identification of persons engaging in suspicious conduct at airports without a reasonable suspicion that an offence has been, is being, or will be committed.

These powers will ensure police can respond to serious threats that arise in the aviation environment in a more tailored and proportionate way. For example, police may issue a move-on direction to exclude known members of an Outlaw Motorcycle Gang (OMCG) from the arrivals hall of an airport for a period of two hours, in circumstances where police have intelligence about an incoming flight carrying rival gang members. In such a situation, police are unlikely to meet the threshold of reasonable suspicion that a crime will be committed, but there is a strong possibility that there may be a disruption to the good order of the airport, which can be prevented by directing the OMCG members to move on from the airport premises.

Police will not be able to use the proposed powers to disrupt or quell a peaceful protest, as a peaceful protest would not pose a threat to aviation security, including the good order and safe operation of the airport, or involve the commission of a serious criminal offence.

Further explanation of the definition of aviation security

Section 3UL of the Bill inserts a definition for the term *aviation security*. For the purposes of Division 3B, *aviation security* includes the good order and safe operation of a major airport and its premises, and flights to and from a major airport.

The definition of *aviation security*, and the inclusion of the term 'good order', is designed to ensure that *aviation security* is interpreted in accordance with its ordinary meaning, and captures a wide range of disruptive behaviour that poses a risk to others in the aviation environment (including, but not limited to, criminal conduct). Threats to *aviation security*, in this context, will extend to a range of conduct, such as acts of terrorism, drug trafficking, violent behaviour, extortion, or any other activity that is disruptive to, or risks the safety of, the public and the airport. As outlined above, the Bill does not give police the ability to use the new powers to disrupt or quell a peaceful protest.

Safeguards against misuse of powers

It is also important to note that there are various safeguards on the use of the proposed powers, including those prescribed in the Bill, and those arising from other Commonwealth, State and Territory legislation, as well as the policies, procedures and specialist training of the Australian Federal Police (AFP).

For example, the Bill includes a requirement for a senior police officer to authorise a move-on direction that excludes a person for more than twelve hours or a subsequent direction within seven days, and a restriction on more than two move-on directions in relation to the same person within a seven day period. Further, as prescribed by the Bill, police will be required to issue a written move-on direction which details a person's exclusion from any or specified flights and/or airports.

The most important safeguard built into the Bill is that, to issue a direction, police must consider that there are reasonable grounds for doing so which are linked to criminal activity or aviation security. This 'reasonable grounds' requirement ensures that directions are based on actionable observations or intelligence relevant to aviation security or criminal conduct.

Commonwealth officers exercising these powers are also bound by Commonwealth anti-discrimination legislation, such as the *Privacy Act 1998*, the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. State and Territory police officers are also bound by similar legislation within their own jurisdictions.

Finally, the policies, procedures and specialist training of the AFP will ensure that the proposed identity checking, stop and move-on directions are properly exercised, and that each use of the powers is recorded appropriately. Members of the AFP are appropriately trained in Behavioural Assessment and Security Questioning to identify known behavioural traits displayed by people who are about to commit a criminal act, and to ask targeted questions of persons of interest, without prejudice or discrimination.

Police officers are also bound by professional standards that preclude them from using their powers in a discriminatory fashion. The AFP Code of Conduct, for example, requires all AFP appointees to act without discrimination or harassment in the course of AFP duties. A breach of this Code may lead to disciplinary action, including termination.

The Hon Christian Porter MP
Attorney-General

MC18-010262

04 OCT 2018

Senator Helen Polley
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Dear ~~Senator Polley~~

I refer to the letter dated 13 September 2018 from the Senate Scrutiny of Bills Committee Secretary, Ms Anita Coles, to my Senior Advisor requesting that I provide information in relation to the Committee's review of the Federal Circuit and Family Court of Australia Bill 2018 (the main Bill) and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (the consequential Bill).

Thank you for the opportunity to respond to the Committee's questions about the Bills.

The Bills bring together the Family Court of Australia and the Federal Circuit Court of Australia into a unified administrative structure to be known as the Federal Circuit and Family Court of Australia (FCFC). A new Family Law Appeal Division in the Federal Court of Australia will also be created to hear appeals in family law matters from the FCFC and appeals from the Family Court of Western Australia.

The Government is committed to improving access to justice for Australian families. The structural reforms brought by these Bills will significantly improve the efficiency of the family law system, reduce the backlog of matters before the family law courts, and drive faster, cheaper and more consistent resolution of disputes for Australian families. To assist in achieving this, both Bills preserve or replicate a number of existing provisions from the *Family Law Act 1975* (FLA), the *Federal Court of Australia Act 1976* (FCA Act), and the *Federal Circuit Court of Australia Act 1999* (FCCA Act).

1. Delegation of administrative powers under clauses 32 and 113 of the main Bill

The Committee has queried the persons or bodies that the Chief Justice and the Chief Judge may authorise to handle complaints under clauses 32 and 113 of the main Bill, and asked whether it is appropriate that the legislation provide that the Chief Justice or Chief Judge be satisfied the person or body has the expertise appropriate to the role. These clauses and the relevant subclauses reflect existing provisions in the FLA (sections 21B(1B) and (3A)), the FCCA Act (sections 12(3AA) and (3AB)) as well as in the FCA Act (sections 15(1AAA) and (1AAB)).

The Federal Court, the Family Court and the Federal Circuit Court all employ a consistent practice in relation to the authorisation of persons or bodies to handle complaints. In each Court, the respective Chief Justice or Chief Judge has authorised the Deputy Principal Registrar of that Court to assist with the handling of complaints against judges of that Court. In the Family Court, the Chief Justice has also authorised the Deputy Chief Justice to assist with the handling of complaints. The Deputy Principal Registrars are legally qualified, experienced and occupy Senior Executive positions. Each Court has complaint handling strategies, which include the escalation of complaints to the Chief Justice or Deputy Chief Justice, as appropriate.

In the FCFC, I anticipate that the persons authorised to handle complaints would continue to be limited to the Deputy Principal Registrars and the Deputy Chief Justice of the FCFC (Division 1), and would also likely include the Deputy Chief Judge of the FCFC (Division 2). However, and as outlined in the Explanatory Memorandum to the main Bill, having a broad delegation power will allow flexibility in the complaint handling process, which may involve a wide variety of circumstances.

Given that no substantive issues have been raised by the Committee in relation to the current operation of the existing provisions, I am of the view that it is not necessary to make amendments to the main Bill. If it would assist in explaining the operation of clauses 32 and 113 of the main Bill, the Explanatory Memorandum to the main Bill could be amended to provide further clarity about the types of persons who may be authorised to handle complaints.

2. Delegation of administrative powers under clauses 72, 234 and 235 of the main Bill and proposed sections 18PB and 18PE of the Federal Court of Australia Act as inserted by the consequential Bill

The Committee has queried the rationale underpinning clauses 72, 234 and 235 of the main Bill and proposed sections 18PB and 18PE of the FCA Act, and the appropriateness of confining the powers in those provisions to persons with expertise appropriate to the function or power being carried out.

These provisions would allow the Sheriff, the Deputy Sheriff, the Marshal and the Deputy Marshal of the FCFC (Division 1), the FCFC (Division 2) and the Federal Court to authorise any person to assist in exercising powers or performing functions. These provisions are modelled on existing provisions in the FLA (section 38P(4)), the FCCA Act (sections 108 and 111) and the FCA Act (section 18P(4)).

Those persons currently authorised to provide such assistance within the Family Court, the Federal Circuit Court and the Federal Court are State and Territory Sheriff's officers. These officers execute the Courts' orders in relation to civil enforcement matters. As such, they execute civil enforcement warrants to seize and sell property or take vacant possession of property in strict accordance with the order issued by the respective Court. State and Territory Sheriff's officers perform the same duties in relation to enforcement orders issued by State and Territory Courts, are trained in accordance with State and Territory requirements and are generally uniformed and carry photo identity cards. Where violence is anticipated, authorised officers seek assistance of local police and do not arrest people in connection with this type of process.

It is essential that there is provision for such authorisation. State and Territory Sheriff's officers assist the federal courts, which do not have personnel with the necessary training and powers to undertake such duties. In the FCFC and the Federal Court, the persons authorised under the provisions would continue to be limited to State and Territory Sheriff's officers.

Given that no substantive issues have been raised by the Committee in relation to the current operation of the existing provisions, I am of the view that it is not necessary to make amendments to the proposed clauses and provisions of the main Bill and consequential Bill. However, if it would assist in explaining the operation of the proposed clauses and provisions, the Explanatory Memorandums accompanying the Bills could be amended to provide further clarity on the types of persons who may be authorised under the relevant provisions.

Thank you again for the opportunity to respond to the Committee's questions. I trust this information is of assistance to the Committee.

The Hon Christian Porter MP
Attorney-General