SENATOR THE HON RICHARD COLBECK
Minister for Aged Care and Senior Australians
Minister for Youth and Sport

Ref No: MS19-001756

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

Dear ~~Senator~~ Helen,

Thank you for the correspondence from your Committee Secretary dated 14 November 2019, requesting advice about issues identified in relation to the Aged Care Legislation Amendment (New Commissioner Functions) Bill 2019 (the Bill).

The Bill will transfer regulatory functions under Aged Care Act 1997 (Aged Care Act) to the Aged Care Quality and Safety Commissioner (Quality and Safety Commissioner). The Bill represents the second stage of the Government's commitment to establish an independent Aged Care Quality and Safety Commission (Quality and Safety Commission) to address fragmentation in the regulation of quality and safety in aged care. This reform is foreshadowed in the object of *Aged Care Quality and Safety Commission Act 2018* (Quality and Safety Commission Act) which established the Quality and Safety Commission on 1 January 2019.

I have responded to each of the issues raised in the Committee's Scrutiny Digest (Number 8), dated 13 November 2019, below.

Safeguards in relation to the 'use of force'

Subsections 74B(5) and 74D(4) of the Quality and Safety Commission Act, and subsections 92-1(6) and 92-3(4) of the Aged Care Act empower authorised officers to use such force against things as is necessary and reasonable in the circumstances. The explanatory memorandum notes authorised officers will require the ability to use force to open locked doors, cabinets, drawers and other similar objects when executing a warrant obtained in circumstances such as where entry has been demanded but refused, or where an approved provider has abandoned the premises. The Committee has requested advice on what safeguards will be implemented to ensure force is only used in appropriate circumstances.

Under the Bill, the use of force powers will only be exercised in the execution of a monitoring or investigation warrant under Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). Under subsections 32(2) and 70(2) of the Regulatory Powers Act a judicial officer can only grant a warrant if the officer is satisfied that it is reasonably necessary that an authorised officer has access to premises for the purposes of determining whether a provision is being complied with or information given in

purported compliance with a provision is correct, or where there are reasonable grounds for suspecting there is evidence of an offence on the premises within the next 72 hours, respectively. Further, as a matter of practice, it is intended authorised officers will only seek warrants where consent of occupiers to enter premises cannot be obtained. This is consistent with existing regulatory practice, where regulatory officials of the Quality and Safety Commission and authorised officers of the Department are generally able to successfully negotiate entry to premises, without resorting to the use of warrants.

While persons assisting an authorised officer are also empowered to use force, consistent with principles set out under *A Guide to framing Commonwealth offences, infringement notices and enforcement powers*, this power is appropriately limited to the use of force against things and does not extend to the use of force against persons. In practice, additional safeguards here will not be necessary since persons assisting authorised officers are intended to either be authorised officers themselves or, where these persons are not authorised officers, these persons are not intended to assist an authorised officer by using force. Please see below for further explanation regarding the intended role of persons assisting.

To ensure the use of force is only exercised when necessary and appropriate, directions could be given for this purpose. Paragraphs 23(2)(d) and 53(2)(d) of the Regulatory Powers Act will require a person assisting an authorised officer to act in accordance with a direction given by the authorised officer. Under subsections 76(2) of the Quality and Safety Commission Act, authorised officers will in turn be subject to the directions of the Quality and Safety Commissioner.

These arrangements may help ensure the power to use force is only available in circumstances where it is necessary to enter premises under warrant to determine compliance or gather evidential material where there are reasonable grounds to suspect this material is at the premises.

Broad delegation of powers and functions under Part 7B

Subsection 76(1A) of the Quality and Safety Commission Act will provide that the Quality and Safety Commissioner may, in writing, delegate any of the Commissioner's functions or powers under Part 7B to a member of the staff of the Quality and Safety Commission or to an APS employee in the Department. Broad discretion in the delegation of the functions under Part 7B is necessary to ensure the broader policy objectives of the Bill to transfer, centralise and integrate regulatory functions, can be achieved through its administration.

The Committee has requested advice on why it is necessary to allow these functions and powers to be delegated to any of these categories of persons and whether it would be appropriate to confine the scope of powers that might be delegated or the categories of persons to whom these powers might be delegated. These are set out below.

Delegation to particular persons

Limiting the delegation of the Quality and Safety Commissioner's functions under Part 7B of the Quality and Safety Commission Act to either staff members of the Quality and Safety Commission or APS employees of the Department ensures that coercive regulatory powers are only exercised by officers who are subject to the accountabilities of their employment

by the Commonwealth. This is consistent with position set out in *A Guide to framing Commonwealth offences, infringement notices and enforcement powers*.

Delegation of particular powers under Part 7B

In addition, it would not be appropriate to limit the delegation of the Quality and Safety Commissioner's functions under Part 7B of the Quality and Safety Commission Act in terms of the powers or functions delegated as set out below.

Delegations to a member of the staff of the Quality and Safety Commission
The power to delegate the Quality and Safety Commissioner's functions or powers under Part 7B of the Quality and Safety Commission Act to any member of staff of the Quality and Safety Commission is intended to ensure the Commissioner retains the flexibility to determine how the functions and powers which will transfer to the Commissioner will be integrated into the Commissioner's existing functions. This is consistent with the broader policy objectives of the Bill to address fragmentation and silos in the regulation of quality of care and safety, which were identified in the Review of National Aged Care Quality Regulatory Processes. The Bill's policy objective is set out in the outline of the explanatory memorandum.

Delegations to an APS employee of the Department
Subsection 63N(2) of the Quality and Safety Commission Act provides that the Quality and Safety Commissioner's function to impose sanctions under Part 7B, is to be performed with regard to information provided by the Secretary about an approved provider's compliance with the aged care responsibilities imposed under paragraphs 63-1(1)(a) and 63-1(1)(h) of the Aged Care Act. Given the Quality and Safety Commissioner's enforcement of these responsibilities under Part 7B directly supports the Secretary's functions relating to appraisals and reappraisals of the needs of care recipients under Part 2.4 of the Aged Care Act, the Commissioner's functions under Part 7B may be delegated to an APS employee of the Department under paragraph 76(1A)(b) of the Quality and Safety Commission Act.

The Quality and Safety Commissioner is intended to have the flexibility to delegate the Commissioner's functions under Part 7B of the Quality and Safety Commission Act to any APS employee of the Department, to ensure the Commissioner's delegated functions can be integrated with those functions which will continue to be performed by the Secretary under Part 2.4 of the Aged Care Act following the commencement of the Schedules of this Bill. Integration of these overlapping functions between the Quality and Safety Commissioner and the Secretary would be hindered by limiting in legislation the Commissioner's power to delegate powers or functions under Part 7B to particular persons since the Secretary's power to delegate functions or powers under Part 2.4 is not currently limited to any particular person under the Aged Care Act. Mutually corresponding provisions governing the delegation of these particular functions or powers by the Quality and Safety Commissioner and Secretary will be necessary to facilitate the integration of these functions where the exercise of this power to delegate by the Commissioner may be informed by how the Secretary delegates the Secretary's functions and powers under the Aged Care Act.

Persons assisting

Subsections 74B(5) and 74D(3) of the Quality and Safety Commission Act and subsections 92-1(5) and 92-3(3) of the Aged Care Act will provide for an authorised officer to be assisted by other persons exercising powers or performing functions under Parts 2 and 3 of the Regulatory Powers Act. A person assisting may exercise these powers or perform these functions for the purposes of assisting an authorised officer to monitor a provision or to investigate the contravention of a civil penalty or an offence provision. Paragraphs 23(1)(a) and 53(1)(a) of the Regulatory Powers Act provide that a person exercising monitoring or investigation powers may only be assisted by another person if it is necessary and reasonable to do so. The Committee requests advice on the appropriateness of amending the Bill to require persons assisting authorised officers to have appropriate skills, training or experience.

It is unnecessary to specify in legislation that persons assisting authorised officers have particular skills or attributes relating to their training or experience given the circumstances in which the assistance of another person will be necessary and reasonable will not always require that person to have particular skills and experience relating to the exercise of any coercive regulatory powers. In most circumstances, a person assisting an authorised officer will already be an authorised officer of the Quality and Safety Commission. In other circumstances, a person will assist an authorised officer in the areas identified in the explanatory memorandum by providing relevant expertise and advice to inform an authorised officer in determining whether an approved provider has complied with a monitored provision, or in gathering evidential materials relating to a contravention of a civil penalty or offence provision. A person assisting is not expected to assist an authorised officer to determine compliance or gather evidential material by separately determining compliance or gathering evidential material under Parts 2 and 3. A person assisting would also be subject to any directions given by an authorised officer under paragraphs 23(2)(d) and 53(2)(d) who will continue to have direct responsibility and oversight of the powers exercised and functions performed under Parts 2 and 3 of the Regulatory Powers Act.

I trust the responses above will assist the Committee in its scrutiny of the Bill.

Yours sincerely

The Hon Richard Colbeck
Minister for Aged Care and Senior Australians
Minister for Youth and Sport

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PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
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MC19-008157

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
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Dear Chair

Thank you for your email dated 14 November 2019 concerning the Communications Legislation Amendment (Deregulation and Other Measures) Bill 2019.

My response to the matters raised by the Committee are set out below.

Review rights under an industry managed numbering scheme

The Bill proposes amendments to the *Telecommunications Act 1997* (Tel Act) to enable the Minister for Communications to appoint an industry-based numbering manager, a function that is currently managed by the Australian Communications and Media Authority (ACMA). The changes will mean that industry, which is directly involved in developing telecommunications services, could introduce new numbering ranges for use in Australia more quickly than ACMA. Also, the reduction in regulatory involvement by ACMA could result in reduced administrative costs for the Government.

Under the proposed measure, the transition to industry-based numbering management would only take place if a number of safeguards were met. The Minister would only be able to appoint someone to be the numbering scheme manager if he or she was satisfied that they would be able to administer the scheme in accordance with the numbering scheme principles in the Bill. The Minister is not compelled to appoint an industry manager, and in this sense, the alternative arrangement is voluntary. It is expected that any proposed numbering scheme would be well-developed before the Minister would consider appointing a private numbering manager. Before determining a person to be the numbering scheme manager, the Minister would be statutorily required to consult with ACMA and the Australian Competition and Consumer Commission (ACCC). Additionally, the Minister's appointment of a numbering scheme manager would be done by a legislative instrument, which is subject to Parliamentary scrutiny through the disallowance process.

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In addition, the Minister would be able to direct the numbering scheme manager to amend the rules or change the processes of the numbering scheme in a manner consistent with the numbering scheme principles. ACMA and the ACCC would each have power to direct the scheme manager in relation to the management of the numbering scheme. The Minister will also have the power to direct the numbering scheme manager to comply with additional principles. All of these directions would be exercisable through legislative instruments subject to public and Parliamentary scrutiny and disallowance. The Bill also includes a further layer of oversight by requiring the numbering scheme manager to publicly consult on any significant changes to the numbering scheme. Ultimately, the Minister will have the power to address any problems by revoking the appointment of the numbering scheme manager.

The proposed arrangements align with the movement towards industry-based regulation of the telecommunications sector. For example, the management of electronic addressing and various numbering allocation functions have been managed by industry since 1999 and 2014 respectively. This is consistent with the objectives of the Act set out in section 4 of the Tel Act, which provides that telecommunications be regulated in a manner that promotes the greatest practicable use of industry self-regulation. A proposal for numbering to be regulated by industry, as a form of self-regulatory functions is wholly consistent with this objective.

Decisions made by the numbering scheme manager would be subject to judicial review to the extent that the decision represented the exercise of a power delegated to it by a public body or public official, or the exercise by the manager of a public function or public power with remedies available in judicial review proceedings.

The Committee has also enquired about whether additional guidance should be required in the Bill as to what would constitute an 'effective complaints process' under new paragraph 454C(2)(n) of the Tel Act. Proposed paragraph 454C(2)(n) requires the numbering scheme manager to provide an effective complaints process to both the telecommunications industry and users of carriage services. This principle requires avenues to be in place through which industry and consumers can have their complaints about actions which may affect their rights and obligations heard and addressed. This assessment process is best developed on a flexible administrative basis, as an overly prescriptive assessment process could prove impractical and could lead to increased and unnecessary costs for industry and the Government.

In the event that the numbering scheme manager does not have an effective process in place for complaints, the Minister, ACMA and the ACCC would be expected to promptly use their respective powers to direct the numbering scheme manager to remedy the situation, noting that the numbering scheme manager is obliged to comply with such directions. Similarly, the Minister will be able to revoke the appointment of the numbering scheme manager at any time.

Delegation of ACMA's administrative powers

The Bill inserts proposed section 459A into the Tel Act which would enable ACMA to delegate, by writing, any or all of the powers conferred on ACMA by the numbering plan to a body corporate. Proposed section 459A replicates existing section 467 of the Tel Act, which is being repealed by the Bill. The change will make it certain that ACMA cannot apply this provision if there is an industry-based numbering scheme manager.

ACMA has already been exercising its delegation function, with ZOAK Pty Ltd having been contracted in 2014 to undertake certain numbering functions on behalf of ACMA. The Government considers that including guidance in the Bill is not necessary, as the provision is working as intended.

Thank you again for bringing your concerns to my attention.

Yours sincerely

Paul Fletcher

25 / 11 / 2019

The Hon Greg Hunt MP
Minister for Health
Minister Assisting the Prime Minister for the Public Service and Cabinet

Ref No: MC19-019089

Senator Helen Polley
Chair of Standing Committee for the Scrutiny of Bills
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Dear Senator

I refer to your correspondence of 14 November 2019 on behalf of the Senate Scrutiny of Bills Committee (Committee) concerning the Health Legislation Amendment (Data-matching and Other Matters) Bill 2019 (Bill). The Committee has requested that I clarify two matters in relation to the Bill.

Significant matters in delegated legislation

I note the Committee's view that significant matters, such as the principles for how a data-matching scheme will operate, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided.

I wish to draw the Committee's attention to the significant operational provisions that govern the data matching scheme which are set out in primary legislation. These include:

- The restriction to data matching for specified compliance-related permitted purposes only (defined in section 132A of the Bill)
- Existing secrecy provisions in the *Health Insurance Act 1973* and the *National Health Act 1953* which govern disclosure of information obtained in the course of duties, including information which would form part of the data matching program
- The powers of the Australian Information Commissioner apply in relation to a breach of Part VIIIA of the Bill or the Australian Privacy Principles (section 132E of the Bill) and additional assessment powers also apply to the principles (proposed amendment to section 33C(1) of the *Privacy Act 1988*)
- Minimum requirements about what must be included in the principles and the requirement that the principles take into account the Australian Information Commissioner's *Guidelines to Data-matching in Australian Government Administration* (section 132F of the Bill).

In particular, section 132F of the Bill prescribes minimum requirements which must be included in the principles. For example, the principles must require the Chief Executive Medicare to take reasonable steps to ensure that personal information that is matched is accurate, complete and up to date, and must require the Chief Executive Medicare to take reasonable steps to destroy personal information that has been matched if the information is no longer needed for any purpose for which it was matched. In effect, the primary legislation ensures these protections will be in place.

However, the technical nature of the principles and the level of detail that is anticipated would not, in my view, be appropriate for primary legislation.

I refer to the *National Health (Privacy) Rules 2018* and the Australian Information Commissioner's *Guidelines to Data-matching in Australian Government Administration* as examples of detailed, technical information of this kind included in legislative instruments or non-legislative guidelines.

The principles made in a legislative instrument rather than primary legislation, allows necessary flexibility to respond in a timely fashion to changes in best practice in a rapidly evolving technological and privacy environment and to be responsive to advice provided by the Australian Information Commissioner and Australian National Audit Office.

The principles will sunset in 10 years which will enable an automatic review of their appropriateness to ensure they are modern and reflect contemporary realities. As the principles will be a legislative instrument for the purposes of the *Legislation Act 2003*, the making of the principles will require consultation and the scrutiny processes of that Act will also apply.

It would not be appropriate to amend the Bill to include the data matching principles for the reasons set out above. I trust this addresses the Committee's concerns in relation to this issue.

<u>Broad delegation of administrative powers</u>

I note the Committee's concerns in relation to legislation that allows the delegation of administrative powers to a relatively large class of persons, and the Committee's view that it prefers to see a limit set on either the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated.

It is important for the Committee to note that under the Bill, delegates will be exercising their powers subject to the directions of the Chief Executive Medicare and only for the permitted purpose of Medicare compliance as defined in the Bill. In addition, any delegate under this Bill is required to comply with the secrecy provisions in the *National Health Act 1953* and will only have access to information consistent with exercising the delegation for the permitted purpose of Medicare compliance.

The nature of the powers in the Bill are unusual in that they do not relate to the making of decisions but to the task or act of matching data. Decisions in relation to compliance action taken as a result of data-matching are not changed, authorised or delegated in the Bill.

Data matching is highly technical and specialised and carried out by data experts who may not be holders of nominated office and unlikely to be Senior Executive Service officers. Therefore, the powers of delegation cannot be limited to these classes. It is also difficult to define qualifications and attributes to which a narrowing of the delegation may be hinged because of the diversity of qualifications and experience that is relevant in this field and the rapidly evolving technical environment.

For these reasons, it is preferred that the delegation power to a person remains which is also consistent with the existing delegation power in the *National Health Act 1953*.

I thank the Committee for its consideration of the legislation.

Yours sincerely

Greg Hunt
24 November 2019