Senator the Hon Bridget McKenzie

Deputy Leader of The Nationals
The Leader of The Nationals in the Senate
Minister for Agriculture
Senator for Victoria

Ref: MS19-001711

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

Via email: Scrutiny.sen@aph.gov.au

Dear Chair Helen

Thank you for the Scrutiny of Bills Committee's letter dated 14 November 2019 about the Agricultural and Veterinary Chemicals Legislation Amendment (Australian Pesticides and Veterinary Medicines Authority Board and Other Improvements) Bill 2019.

You asked that the key information provided in my previous response be included in the explanatory memorandum. You also asked whether the Bill would be amended to limit the types of decisions that can be made by computers and to provide that the APVMA must, before determining that a type of decision can be made by computers, be satisfied by reference to general principles articulated in the legislation that it is appropriate for the type of decision to be made by a computer rather than a person.

The Liberal and Nationals Government agrees to incorporate the information in the explanatory material and intends to amend the Bill to prescribe additional safeguards to help ensure that decisions made by computers will be consistent with relevant laws.

Thank you once again for your further consideration of this matter and trust this information addresses your concerns.

Yours sincerely

Bridget McKenzie

28 NOV 2019

Parliament House, Canberra ACT 2600 Telephone (02) 6277 7190 Email Minister.McKenzie@agriculture.gov.au

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: MS19-003819

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

Dear Senator

I refer to correspondence dated 14 November 2019 from Glenn Ryall, Committee Secretary, regarding the Senate Standing Committee for the Scrutiny of Bills' consideration of the Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 (the Bill).

As set out in the Committee's *Scrutiny Digest No. 8 of 2019* (p. 5-7), the Committee has identified that the Bill creates a number of offence-specific defences which require a defendant to establish one or more matters. I have considered the comments made by the Committee and will be tabling an Addendum to the Bill's Explanatory Memorandum to address the Committee's concerns (see enclosed).

As identified by the Committee, it is ordinarily the duty of the prosecution to prove all of the elements of an offence. However, the *Guide to Framing Commonwealth Offences* (the Guide) (at p. 50) provides that including a matter as an offence-specific defence may be appropriate where:

- the matter is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

The Guide also indicates that it may also be appropriate to include a matter as an offence-specific defence where only one of the above tests can be satisfied (see p. 51 of the Guide).

The offence-specific defences in the Bill allow Australian Transaction and Reports Analysis Centre information to be recorded, disclosed or otherwise used for specific purposes. The purpose of a defendant in recording, disclosing or otherwise using this information is a matter that is peculiarly within their knowledge. While external circumstances may be used as evidence of the existence of this underlying purpose, the defendant is the only person who can state with certainty their purpose in recording, disclosing or using that information.

Noting this, it would be significantly more difficult and costly for the prosecution to prove that the defendant did not record, disclose or otherwise use the information for a permitted purpose, than it would be for the defendant to point to the permitted purpose underpinning their conduct.

For example, if an official of the Australian Transaction and Reports Analysis Centre disclosed information to a lawyer in breach of the offence provision at subsection 126(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the prosecution would be required to prove beyond reasonable doubt that the official did not disclose the information for a permitted purpose under subsections 126(2) or (3). As the official's purpose for making the disclosure was only known to themselves, this would often be impossible to prove in practice. The official, on the other hand, should be readily able to point to the purpose underpinning the disclosure. If this is done, the prosecution must refute the defence beyond reasonable doubt.

As such, the offence-specific defence provisions in the Bill are consistent with Commonwealth criminal law policy and are necessary in order to preserve the integrity of Australia's anti-money laundering and counter-terrorism financing regime. The provisions will ensure agencies are empowered to better investigate and prosecute offenders.

I thank the Senate Scrutiny of Bills Committee for raising these concerns with me.

Yours sincerely

PETER DUTTON 27/11/19

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

Ref No: MC19-019653

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

Dear Senator Helen,

Thank you for your correspondence of 14 November 2019 concerning the Australian Sports Anti-Doping Authority (ASADA) Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019 and the Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019.

Please find below my response to the request for information on the issues identified by the Senate Scrutiny of Bills Committee in relation to these two bills.

Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019

Immunity from civil liability

Section 78 of the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act), as it is to be amended by the bill, is intended to promote the frank and open provision of advice by the Advisory Council to the Sport Integrity Australia Chief Executive Officer (CEO).

While the Advisory Council will not be permitted to provide advice relating to a particular individual or to a particular investigation (subsection 27(2)), inevitably, advice provided by the Advisory Council is likely to mention individuals or refer to incidents involving individuals who are capable of being identified. This will include, for example, individuals who may be, or have been, the subject of an investigation of threats to sports integrity.

In the event the Advisory Council's advice becomes publicly known, there is a risk a person mentioned in the advice might institute civil proceedings, for example for defamation, against one or more members of the Advisory Council. This is likely to inhibit the frank and open provision of advice by the Advisory Council to the CEO and, in turn, deprive Sport Integrity Australia of the benefit of the advice and experience of the Advisory Council members. Where Advisory Council members have been exercising their functions in good faith, they should not be exposed to proceedings aimed at frustrating their work and the work of Sport Integrity Australia more generally. New subsection 78(1A) will ensure Council members are appropriately protected in the performance of their functions.

Privacy

Consistent with the bill and in line with the Wood Review's recommendations, Sport Integrity Australia will function as a national platform for preventing and addressing threats to sports integrity and coordinating a national approach to matters relating to sports integrity with a view to:

- achieving fair and honest sporting performances and outcomes
- promoting positive conduct by athletes, administrators, officials, supporters and other stakeholders on and off the sporting arena
- achieving a safe, fair and inclusive sporting environment at all levels
- enhancing the reputation and standing of sporting contests and of sport overall.

The Bill defines 'threats to sports integrity' as including the:

- manipulation of sporting competitions
- use of drugs and doping methods in sport
- abuse of children and other persons in a sporting environment
- failure to protect members of sporting organisations and other persons in a sporting environment from bullying, intimidation, discrimination or harassment.

As identified in the Wood Review, '[s]ports integrity matters are now complex, globalised, connected and beyond the control of any single stakeholder.' Accordingly, to effectively execute its core functions, Sport Integrity Australia will be required to coordinate and strengthen relationships with a range of entities including sporting organisations, betting operators, domestic (Commonwealth, state and territory) and foreign law enforcement and regulatory agencies, and international organisations.

Critically, in order to 'prevent and address' threats to sports integrity, Sport Integrity Australia will be an information 'hub', collecting, analysing, interpreting and disseminating information, including personal and sensitive information, in coordination with this range of entities, often within a time-critical framework. Receiving, assessing and monitoring information from multiple and varied sources will also develop capability, knowledge and expertise to better identify current and future threats.

In terms of specific powers, Sport Integrity Australia will have the existing powers available to ASADA for anti-doping matters only, which include the powers to issue disclosure notices and to enforce breaches through the issuing of infringement notices or through instituting civil penalty proceedings.

It is fundamental to Sport Integrity Australia's role that it work side by side with conventional law enforcement bodies, sport betting regulators and sports controlling bodies and it will need the capacity to exchange information with those bodies. While Sport Integrity Australia will not directly enforce criminal laws, it will provide support and assistance to law enforcement agencies in enforcing laws relevant to sports integrity.

It is necessary to include Sport Integrity Australia in the definition of 'enforcement body' to give confidence to law enforcement agencies they can lawfully disseminate information to it. If Sport Integrity Australia is not included in the definition, it is likely law enforcement agencies will be reluctant to disseminate information they hold to Sport Integrity Australia, which will undermine its ability to achieve its purpose. It will also hinder the efforts of those law enforcement agencies to detect and prosecute criminal behaviour associated with sport.

Australian Sports Anti-Doping Authority (Enhancing Australia's Anti-Doping Capability) Bill 2019

Disclosure notices

Article 17 of the International Covenant on Civil and Political Rights prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence and protects a person's honour and reputation from unlawful attacks. This right may be subject to permissible limitations where those limitations are provided by law and are non-arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to this purpose.

The Australian Government reiterates these amendments are reasonable, necessary and proportionate to the legitimate aim of catching doping cheats and the persons who facilitate doping, particularly given the safeguards existing in the ASADA Act for the protection of information. Doping is potentially injurious to a person's health, may distort the outcome of sporting contests and, over time, undermines the overall integrity of sport. Australian governments make significant investments in sport and this investment is diminished when the integrity of sport is compromised in this way. These measures are necessary as the detection of doping is becoming increasingly reliant on effective non-analytical investigations.

It is true that a 'belief' can be formed based on intelligence. But it is vital that integrity authorities can respond where there is information generating a reasonable suspicion relevant information will be realised. For example, ASADA may have financial evidence of multiple transactions between a support person and a website known to sell prohibited substances. In the absence of evidence of the substance purchased or the details of the transaction, it would be difficult to form a reasonable belief. However, a reasonable suspicion could be formed to allow for further investigation.

Similarly, information obtained as a result of a tip-off may only raise a suspicion a possible breach of a rule has occurred. If a reasonable belief is required then this information may not be able to be pursued. This is especially the case where an athlete support person is suspected of committing a possible breach of the rules as there are no further tools, such as initiating a drug test, available to obtain evidence of the possible breach. The issuing of a Disclosure Notice based on 'reasonable suspicion' would address this gap and allow ASADA to better direct its investigative resources at facilitators and sophisticated doping programs.

This approach is consistent with recent calls from Thomas Bach, President of the International Olympic Committee, 'for the urgent need to focus much more on the Athlete's entourage' ... 'using the full support of government authorities ... who have the necessary authority and tools to take action'.[1]

While the difference between the thresholds of suspicion and belief need not be enormous, the fact remains an inability to act on a suspicion may mean the suspicion is never dispelled. This is not in the interests of sport integrity. The lowering of the current 'reasonable belief' to 'reasonable suspicion' will promote the integrity of Australian sport. It is easy to dispel, or to establish, a suspicion about the conduct of a person — the ability for the ASADA CEO to be able to do this will promote expedition in the investigation of anti-doping rule violations, and in turn, the integrity of the relevant sport. On the other hand, if a suspicion is required to mature into a belief, this is likely to lead to lengthier investigations and, in turn, the existence of a continued threat to the integrity of a sport while a matter is being investigated.

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[1] Extract from speech delivered by Thomas Bach at the 5th World Conference on Doping in Sport in Katowice, Poland on 5 November 2019.

Safeguards against unauthorised use of information

Section 67 of the ASADA Act creates an offence, punishable by two years' imprisonment, for an 'entrusted person' to disclose information except in the circumstances permitted by Part 8 of the ASADA Act. For the purposes of the ASADA Act, 'protected information' means all personal information collected for or under the ASADA Act other than information in relation to an entrusted person. The World Anti-Doping Code International Standard for the Protection of Privacy and Personal Information is a mandatory International Standard imposing strict requirements on an anti-doping organisation to ensure the privacy of persons subject to doping control are fully respected. As Australia's National Anti-Doping Organisation, ASADA must comply with this standard when processing personal information pursuant to the Code.

While the purposes for which this information can be lawfully released are generally directed to giving effect to Australia's anti-doping regime, the provisions give the CEO discretion to disclose information in other circumstances, for example, if ASADA uncovers information about the misconduct of an individual who is beyond the reach of the World Anti-Doping Code or the conduct is so serious it requires attention beyond the Code such as by other law enforcement or regulatory agencies. In this way, the provisions strike an appropriate balance between the need to maintain the confidentiality of information except when disclosure is necessary for the purposes of enforcing Australia's anti-doping regime or where it is necessary due to broader public interest considerations.

Thank you for raising this matter.

Yours sincerely

Richard Colbeck

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

Ref No: MC19-019653

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

Dear Senator Helen,

Thank you for your correspondence of 14 November 2019 concerning the Australian Sports Anti-Doping Authority (ASADA) Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019 and the Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019.

Please find below my response to the request for information on the issues identified by the Senate Scrutiny of Bills Committee in relation to these two bills.

Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019

Immunity from civil liability

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While the Advisory Council will not be permitted to provide advice relating to a particular individual or to a particular investigation (subsection 27(2)), inevitably, advice provided by the Advisory Council is likely to mention individuals or refer to incidents involving individuals who are capable of being identified. This will include, for example, individuals who may be, or have been, the subject of an investigation of threats to sports integrity.

In the event the Advisory Council's advice becomes publicly known, there is a risk a person mentioned in the advice might institute civil proceedings, for example for defamation, against one or more members of the Advisory Council. This is likely to inhibit the frank and open provision of advice by the Advisory Council to the CEO and, in turn, deprive Sport Integrity Australia of the benefit of the advice and experience of the Advisory Council members. Where Advisory Council members have been exercising their functions in good faith, they should not be exposed to proceedings aimed at frustrating their work and the work of Sport Integrity Australia more generally. New subsection 78(1A) will ensure Council members are appropriately protected in the performance of their functions.

Privacy

Consistent with the bill and in line with the Wood Review's recommendations, Sport Integrity Australia will function as a national platform for preventing and addressing threats to sports integrity and coordinating a national approach to matters relating to sports integrity with a view to:

- achieving fair and honest sporting performances and outcomes
- promoting positive conduct by athletes, administrators, officials, supporters and other stakeholders on and off the sporting arena
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The Bill defines 'threats to sports integrity' as including the:

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- failure to protect members of sporting organisations and other persons in a sporting environment from bullying, intimidation, discrimination or harassment.

As identified in the Wood Review, '[s]ports integrity matters are now complex, globalised, connected and beyond the control of any single stakeholder.' Accordingly, to effectively execute its core functions, Sport Integrity Australia will be required to coordinate and strengthen relationships with a range of entities including sporting organisations, betting operators, domestic (Commonwealth, state and territory) and foreign law enforcement and regulatory agencies, and international organisations.

Critically, in order to 'prevent and address' threats to sports integrity, Sport Integrity Australia will be an information 'hub', collecting, analysing, interpreting and disseminating information, including personal and sensitive information, in coordination with this range of entities, often within a time-critical framework. Receiving, assessing and monitoring information from multiple and varied sources will also develop capability, knowledge and expertise to better identify current and future threats.

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It is fundamental to Sport Integrity Australia's role that it work side by side with conventional law enforcement bodies, sport betting regulators and sports controlling bodies and it will need the capacity to exchange information with those bodies. While Sport Integrity Australia will not directly enforce criminal laws, it will provide support and assistance to law enforcement agencies in enforcing laws relevant to sports integrity.

It is necessary to include Sport Integrity Australia in the definition of 'enforcement body' to give confidence to law enforcement agencies they can lawfully disseminate information to it. If Sport Integrity Australia is not included in the definition, it is likely law enforcement agencies will be reluctant to disseminate information they hold to Sport Integrity Australia, which will undermine its ability to achieve its purpose. It will also hinder the efforts of those law enforcement agencies to detect and prosecute criminal behaviour associated with sport.

Australian Sports Anti-Doping Authority (Enhancing Australia's Anti-Doping Capability) Bill 2019

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The Australian Government reiterates these amendments are reasonable, necessary and proportionate to the legitimate aim of catching doping cheats and the persons who facilitate doping, particularly given the safeguards existing in the ASADA Act for the protection of information. Doping is potentially injurious to a person's health, may distort the outcome of sporting contests and, over time, undermines the overall integrity of sport. Australian governments make significant investments in sport and this investment is diminished when the integrity of sport is compromised in this way. These measures are necessary as the detection of doping is becoming increasingly reliant on effective non-analytical investigations.

It is true that a 'belief' can be formed based on intelligence. But it is vital that integrity authorities can respond where there is information generating a reasonable suspicion relevant information will be realised. For example, ASADA may have financial evidence of multiple transactions between a support person and a website known to sell prohibited substances. In the absence of evidence of the substance purchased or the details of the transaction, it would be difficult to form a reasonable belief. However, a reasonable suspicion could be formed to allow for further investigation.

Similarly, information obtained as a result of a tip-off may only raise a suspicion a possible breach of a rule has occurred. If a reasonable belief is required then this information may not be able to be pursued. This is especially the case where an athlete support person is suspected of committing a possible breach of the rules as there are no further tools, such as initiating a drug test, available to obtain evidence of the possible breach. The issuing of a Disclosure Notice based on 'reasonable suspicion' would address this gap and allow ASADA to better direct its investigative resources at facilitators and sophisticated doping programs.

This approach is consistent with recent calls from Thomas Bach, President of the International Olympic Committee, 'for the urgent need to focus much more on the Athlete's entourage' ... 'using the full support of government authorities ... who have the necessary authority and tools to take action'.[1]

While the difference between the thresholds of suspicion and belief need not be enormous, the fact remains an inability to act on a suspicion may mean the suspicion is never dispelled. This is not in the interests of sport integrity. The lowering of the current 'reasonable belief' to 'reasonable suspicion' will promote the integrity of Australian sport. It is easy to dispel, or to establish, a suspicion about the conduct of a person — the ability for the ASADA CEO to be able to do this will promote expedition in the investigation of anti-doping rule violations, and in turn, the integrity of the relevant sport. On the other hand, if a suspicion is required to mature into a belief, this is likely to lead to lengthier investigations and, in turn, the existence of a continued threat to the integrity of a sport while a matter is being investigated.

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[1] Extract from speech delivered by Thomas Bach at the 5th World Conference on Doping in Sport in Katowice, Poland on 5 November 2019.

Safeguards against unauthorised use of information

Section 67 of the ASADA Act creates an offence, punishable by two years' imprisonment, for an 'entrusted person' to disclose information except in the circumstances permitted by Part 8 of the ASADA Act. For the purposes of the ASADA Act, 'protected information' means all personal information collected for or under the ASADA Act other than information in relation to an entrusted person. The World Anti-Doping Code International Standard for the Protection of Privacy and Personal Information is a mandatory International Standard imposing strict requirements on an anti-doping organisation to ensure the privacy of persons subject to doping control are fully respected. As Australia's National Anti-Doping Organisation, ASADA must comply with this standard when processing personal information pursuant to the Code.

While the purposes for which this information can be lawfully released are generally directed to giving effect to Australia's anti-doping regime, the provisions give the CEO discretion to disclose information in other circumstances, for example, if ASADA uncovers information about the misconduct of an individual who is beyond the reach of the World Anti-Doping Code or the conduct is so serious it requires attention beyond the Code such as by other law enforcement or regulatory agencies. In this way, the provisions strike an appropriate balance between the need to maintain the confidentiality of information except when disclosure is necessary for the purposes of enforcing Australia's anti-doping regime or where it is necessary due to broader public interest considerations.

Thank you for raising this matter.

Yours sincerely

Richard Colbeck

The Hon Dan Tehan MP
Minister for Education

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7350

Our Ref: MC19-004560

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

Dear Senator Helen,

Thank you for the email of 14 November 2019 regarding the Education Legislation Amendment (2019 Measures No.1) Bill 2019.

I appreciate the Senate Standing Committee for the Scrutiny of Bills (the Committee) consideration of the Bill and my response to the issue raised in the Committee's Scrutiny of Bills Digest 8 of 2019 is provided below.

Education Legislation Amendment (2019 Measures No. 1) Bill 2019

> 1.53 As the explanatory materials do not address this issue, the Committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The Committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences (the Guide).

The amendments to offence provisions in Schedule 3 to the Bill provides for three kinds of exception to existing offences in the *Higher Education Support Act 2003* (HESA) and the *VET Student Loans Act 2016* (VSL Act). I note at the outset that the amendments add exceptions to existing offences rather than broaden the offences or remove any existing burden on the prosecution to establish those offences, and consequently are beneficial for defendants.

The three kinds of exception added to existing offences are:

(a) the person to whom the information protected by the offence provision relates has agreed to its use or disclosure (new subsection 179–10(2) and subclause 73(2) of Schedule 1A to HESA; new subsection 99(2) and subsections 100(2A) and (5) of the VSL Act)
(b) the use or disclosure of the information protected by the offence provision is authorised by Commonwealth law (new subsection 179–10(3) and subclause 73(3) of Schedule 1A to HESA)

(c) the use or disclosure of the information protected by the offence provision is authorised by a prescribed law of a State or Territory (new subsection 179–10(4) and subclause 73(4) of Schedule 1A to HESA).

Exceptions (b) and (c) are formulations of the "lawful authority" defence. It appears as a defence in section 10.5 of the Criminal Code, to which section 13.3 of the Criminal Code applies. "Lawful authority" is a defence of general application to a criminal offence and is neither an element of the relevant offences nor an offence-specific defence as referred to in the Guide.

The exception (b) defences recreate the "lawful authority" defence of general applicability found in section 10.5 of the Criminal Code. I'm advised that the defence of lawful authority was inserted in the Criminal Code by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, in recognition of the fact that a defence of lawful authority was a longstanding common law principle which would need to be recognised in the Criminal Code if it were to continue to apply. Exception (b) defences do not extend to any scenarios where the general Criminal Code defence of lawful authority do not already apply. Under subsection 13.3(2) of the Criminal Code, the defence bears the evidential burden for a defence of lawful authority. Given exception (b) defences are intended to operate identically to the existing defence of lawful authority (albeit limited to their specific offences) it is appropriate that the defendant bears an evidential burden for the exception (b) defences.

The exception (c) defences mirror the exception (b) defences except that they provide a lawful authority defence where the conduct is authorised under state or territory law rather than Commonwealth law. Apart from that distinction, these defences are intended to operate in an identical fashion to the Criminal Code defence of lawful authority and the exception (b) defences. Given that, it is appropriate that the evidential burden is also treated in a similar way, and is applied to the defendant.

In connection with exception (a), the question of whether the person to whom the information protected by the offence provision has consented to the relevant use or disclosure by the alleged offender will, in those cases where a prosecution is brought, be a matter peculiarly within the knowledge of the defendant. As noted in the Explanatory Memorandum to the Bill, the principal purpose of including exception (a) in the relevant offence provisions is to enable officers of Commonwealth agencies to use and disclose students' information collected under HESA and the VSL Act with the consent of those students. This consent will typically be provided in forms (such as application forms) filled out by the students. Consequently, the Commonwealth will generally have a good record of the consents provided by students to the use of disclosure of their information.

In circumstances where an offence against one of the relevant provisions is alleged to have occurred, it will be the case that the Commonwealth Director of Public Prosecutions, advised of all the consents to use or disclosure of which the Commonwealth is aware, is satisfied that no such consent has been given. Any consent to an otherwise unlawful use or disclosure of the protected information that is not in the form of written consents obtained by the Commonwealth as part of it usual administration of HESA and the VSL Act will have been given by a student to the defendant independently through some action of the defendant, such as requesting the student's consent. Such a matter is peculiarly within the knowledge of the defendant. Accordingly, it is appropriate that evidence of consent that is not in the Commonwealth's possession is provided by the defendant.

Providing that the defendant bears an evidential burden of proof in establishing whether a person has consented to the use or disclosure of information giving rise to the alleged offence is consistent with the principles on defence-specific offences in the Guide.

Thank you for bringing this matter to my attention, and I trust the above addresses the Committee's concerns.

Yours sincerely

DAN TEHAN

27/11/19

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

Ref No: MC19-019099

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

27 NOV 2019

Dear Senator Polley

I refer to the letter of 14 November 2019 from the Committee Secretary concerning the Medical and Midwife Indemnity Legislation Amendment Bill 2019 and the committee's *Scrutiny Digest 8 of 2019* which requests further information on the following:

1. Computer decision-making

On 1 November 2019, I wrote to the Committee providing a response to this issue, specifically:

- the Chief Executive Medicare will determine the types of decisions which are suitable for automation through the claims IT system. These decisions will be limited to ensuring that required claims information has been submitted by insurers. For example, whether the doctor's name, registration and current insurance policy details are submitted when a claim is lodged
- Schedule 3 Item 15 of the Bill also provides that the Chief Executive Medicare may substitute a decision taken by the operation of a computer program
- matters of substantive administrative decision-making, such as assessment of the merits of claims and whether payments should be made, will continue to be made manually by Department officers.

As a result, the Australian Government does not propose to make any further amendments to the Bill or Explanatory Memorandum.

2. Reversal of evidential burden of proof

I note the feedback from the Scrutiny Committee on the reversal of evidential burden of proof. This was addressed in my response to the Committee dated 1 November 2019. The Government does not propose to make any further amendments to the Bill or Explanatory Memorandum as there is already sufficient explanation on this issue.

3. Broad delegation of legislative power

All legislative instruments to be made under the proposed Bill will be subject to Senate Scrutiny in 2020. The Government is currently consulting with key stakeholders on these instruments following a Medical Indemnity Stakeholder Workshop held on 18 November 2019.

I look forward to working with the Senate on the legislative instruments so we can be ready for implementation on 1 July 2020.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC19-031596

02 DEC 2019

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

Dear ~~Chair~~ Helen

Thank you for your correspondence of 14 November 2019 regarding the Native Title Legislation Amendment Bill 2019. I appreciate the time the Senate Standing Committee for the Scrutiny of Bills has taken to review the Bill, and thank you for the opportunity to address the Committee's concerns.

The Committee has requested I provide advice as to the necessity and appropriateness of retrospectively validating section 31 agreements, and for more detailed information regarding whether there will be a detrimental effect to any involved parties.

According to data held by the National Native Title Tribunal, as of October 2019 there are 3656 section 31 agreements across Australia. The majority of these agreements are located in Western Australia and Queensland. The advice of stakeholders across the sector – including native title holders and their representatives, industry and state governments – was that hundreds of section 31 agreements may require validation as a result of *McGlade v Native Title Registrar* [2017] FCAFC 10 (*McGlade*).

For example, in its February 2018 submission on the options paper for native title reform, the Western Australian Government advised it was aware of 307 mining leases, 11 land tenure grants and four petroleum titles which had section 31 agreements possibly affected by *McGlade*. This submission is available on my department's website.

There has been widespread consultation on the proposed approach to validation. Those consultations have indicated that it is well-supported by the native title and Indigenous representatives, states and territories and peak industry groups.

Section 31 agreements, reached between native title groups, project proponents and relevant governments, can underpin resources projects and can provide benefits for native title groups. The uncertainty created by the potential invalidity poses risks to both those projects and the related benefits flowing to native title groups. These benefits may include employment, monetary payments and other arrangements.

The amendment seeks to restore the situation as the relevant parties understood it to be prior to *McGlade*. I note that the if amendment results in an acquisition of property other than on just terms, provision has been made for compensation to be payable (under Schedule 9 of the Bill).

Thank you again for bringing the Committee's concerns to my attention. I trust this information is of assistance to you.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: MS19-003428

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

By email: scrutiny.sen@aph.gov.au

Dear Chair

Transport Security Amendment (Serious Crime) Bill 2019

I thank the Committee for its consideration of the Transport Security Amendment (Serious Crime) Bill 2019 (the 2019 Bill), and note that that the Committee seeks further information about the 2019 Bill as outlined in Scrutiny Digest No 8 of 2019 (pages 29-31).

The issues raised by the Committee concern:

(1) the eligibility criteria for the aviation security identification card (ASIC) and maritime security identification card (MSIC) schemes, and

(2) possibly amending the Bill to either include all relevant penalties and offences in the primary legislation or for maximum penalties to be reduced to be consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Commonwealth Guide).

I also note that the 2019 Bill substantially replicates the Transport Security Amendment (Serious or Organised Crime) Bill 2016, which was introduced in the previous Parliament by the then Minister for Infrastructure and Transport (the 2016 Bill).

In comparison to the 2016 Bill, the 2019 Bill has been amended to capture new classes of ASICs and MSICs that have been introduced into the *Aviation Transport Security Regulations 2005* (the Aviation Regulations) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (the Maritime Regulations) respectively.

Further changes were made to align the regulation-making powers supporting the MSIC scheme in the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act) with correlating powers supporting the ASIC scheme in the *Aviation Transport Security Act 2004* (the Aviation Act).

Eligibility criteria for ASICs and MSICs

The Committee has raised concerns regarding the appropriateness of leaving the new eligibility criteria for holding an ASIC or MSIC under the Aviation and Maritime Regulations.

Current arrangements

Under the ASIC and MSIC schemes, a person is ineligible to be issued with an ASIC or MSIC if they have been convicted of an aviation-security-relevant-offence or a maritime-security-relevant-offence and sentenced to imprisonment specified by operation of paragraph 6.28(1)(d) of the Aviation Regulations and paragraph 6.08C(1)(e) of the Maritime Regulations.

The offences that may be prescribed as an aviation-security-relevant-offence or a maritime-security-relevant-offence are limited to offences that pertain to the general purposes of the Aviation and Maritime Acts, to prevent the unlawful use of aviation, and maritime transport or offshore facilities.

New eligibility criteria

One of the purposes of the 2019 Bill is to provide for the consolidation and harmonisation of the existing eligibility criteria already prescribed in the ASIC and MSIC schemes, as well as to expand these criteria to include additional criminal offences for the purpose of preventing the use of aviation, and maritime transport or offshore facilities, in connection with serious crime.

As indicated in the Explanatory Memorandum to the 2019 Bill, the proposed eligibility criteria have been developed following consultation with stakeholders across the aviation, maritime and offshore oil and gas sectors, as well as with relevant Commonwealth, State and Territory government agencies.

After careful consideration, I consider it necessary and appropriate to include the new eligibility criteria in the Aviation and Maritime Regulations for the following reasons:

- the current ASIC and MSIC eligibility criteria, for offences relating to unlawful interference, are prescribed in the Aviation and Maritime Regulations, and it would be incongruous for guidance about eligibility criteria to be included in the principal Acts for some offences (relating to serious crime) and not for others (relating to unlawful interference)

- maintaining the detail of the ASIC and MSIC schemes, including the eligibility criteria, in the Aviation and Maritime Regulations means that the reader of the legislation is able to review the schemes in a single piece of legislation and enhances the readability and understanding of the legislative schemes

- any amendment to provide high level guidance for the eligibility criteria in the primary legislation would trigger significant consequential amendments to the Aviation and Maritime Acts for other provisions enabling the prescription of the ASIC and MSIC schemes, which would unnecessarily delay the passage of the 2019 Bill.

- making these amendments would also be contrary to the intended purposes of the Bill and the consultation already undertaken in relation to the Bill and the eligibility criteria, and

- the prescription of the eligibility criteria in the Aviation and Maritime Regulations would provide suitable flexibility to respond to changes in the threat environment at security controlled airports, seaports and offshore facilities. For example, this may include the creation of State or Territory criminal laws that are considered appropriate for inclusion in the eligibility criteria.

It is also noted that any changes to the ASIC and MSIC schemes by way of amendment to the Aviation and Maritime Regulations would be subject to parliamentary scrutiny (including potential disallowance) once made.

Maximum penalties for offences in the Aviation and Maritime Regulations

The Committee has raised concerns that the maximum penalty that could be prescribed by regulations made under the proposed provisions of the Bill may be up to 200 penalty units, which is above what is recommended by the Commonwealth Guide.

As set out in the Explanatory Memorandum, the penalties are considered an appropriate deterrence mechanism given the security-sensitive environment at airports, seaports and offshore facilities which may be targeted by criminal enterprises to facilitate the movement of illicit goods.

As also set out in the Explanatory Memorandum, the provisions would align with other regulation-making provisions of the Aviation Act. The Commonwealth Guide states that penalties prescribed by legislation should be consistent with penalties prescribed for existing offences of a similar kind or of a similar seriousness (see page 39). This advice was given primary consideration in the course of drafting the Bill.

The 200 penalty unit maximum penalty threshold does not apply to the public at large, it only applies to offences committed by an 'airport operator or aircraft operator' as defined by the Aviation Act (see clause 4) or a 'port operator, ship operator, port facility operator or offshore facility operator' as defined by the Maritime Act (see clause 17). A 100 penalty unit maximum penalty threshold only applies to offences committed by 'an aviation industry participant' (clause 4) or a 'maritime industry participant' (clause 17) subject to limited exceptions.

I also note that nothing in the proposed provisions requires offences to be prescribed with a maximum penalty greater than 50 penalty units. The Bill only provides a discretion for greater penalties to be prescribed. Appropriate consideration will be given to the penalty thresholds for regulations made under the proposed provisions and, if required to be above the general 50 penalty unit threshold, appropriate justification would be provided in explanatory materials.

After consideration of the concerns raised by the Committee, I consider that the current penalty threshold is effective and appropriate. The 2019 Bill seeks to extend the application of the current penalty threshold so that it applies consistently across all parts of the ASIC and MSIC schemes. I do not consider that amendments to the 2019 Bill are required to include all penalties and offences in the Acts or to reduce the maximum penalties permitted by the Acts.

I thank the Committee again for bringing these issues to my attention.

Yours sincerely

26/11/19

PETER DUTTON