THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: SB19-000013

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

Dear Chair

I am writing in response to the Senate Scrutiny of Bills Committee's request for further information in relation to the Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018 (the Bill).

The purpose of the Bill is twofold: firstly, to ensure the power of the Minister to cease Australian citizenship remains an adaptable tool to protect the Australian community in the evolving threat environment; and secondly, to maintain the integrity of Australian citizenship and the privileges that attach to it.

One of the key amendments in the Bill is the removal of the requirement for an individual to be sentenced to a minimum of six years' imprisonment for one or more relevant terrorism offences. By replacing this with a requirement for an individual to be convicted of a relevant terrorism offence, the Bill broadens the cohort of offenders who may be eligible to have their Australian citizenship ceased. It also aligns the provisions in section 35A more closely with those of section 34, which provide the Minister may cancel citizenship on the basis of serious offences.

Sentences imposed for terrorism offences in Australia have ranged from 44 days to 44 years' imprisonment. This is reflective of the wide variety of matters that the court must take into account during sentencing, such as the degree to which the person has shown contrition for the offence, whether or not they pleaded guilty, and prospects for rehabilitation.

This amendment recognises that there are a number of offenders who have served, or will serve, sentences of less than 6 years' imprisonment (or less than 10 years' imprisonment, for those convicted prior to 12 December 2015) for relevant terrorism offences.

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While these offenders may be subject to intervention and rehabilitation initiatives while in custody, there is no guarantee that this will result in their complete disengagement from a violent extremist ideology. Recidivism remains a risk where offenders re-adopt or re-engage in violent extremist ideologies following their release into the community. Some of these offenders will continue to pose a threat to the community at the end of their sentence.

As such, it is important to ensure there are a range of flexible and proportionate measures available to manage the risks posed by these offenders. Cessation of Australian citizenship is one such measure, which may be considered during or after a convicted terrorist offender's prison sentence.

The Bill does not make any changes to the existing requirements for the Minister, before determining an individual ceases to be an Australian citizen, to consider whether the person's conduct demonstrates a repudiation of their allegiance to Australia, and broader public interest matters such as the severity of their offending conduct, and degree of threat they pose to the Australian community. This means the Minister retains an appropriate level of discretion when making a determination under section 35A.

I note the Committee's observation that the Bill does not require the Minister to consider the person's family or other connections to Australia, or their length of stay in Australia. The factors the Minister must consider when making a determination to cease an individual's Australian citizenship are necessarily focused on whether it is in the public interest for the individual to remain an Australian citizen, and encompass issues such as the degree of threat posed to the community, as well as the severity of their offending conduct. This does not prevent the Minister from taking other matters of public interest into account, and the Minister is also required to consider the person's connection to the other country of which the person is a national or citizen.

The Bill's application to dual citizens (regardless of how they obtained Australian citizenship) is consistent with the existing provisions in the *Australian Citizenship Act 2007*. This reflects the fact that Australian citizenship is founded on common values and carries with it a duty of allegiance to Australia. This duty applies to all Australian citizens, irrespective of how they acquired citizenship, and includes responsibilities to obey the law and uphold Australia's democratic values.

I note the Committee's concern that adjusting the threshold for determining dual nationality may result in an individual's Australian citizenship being ceased while possessing no other citizenship. The adjustment to the threshold for determining dual nationality is consistent with Australia's international obligations not to render an individual stateless. The Bill will still require the Minister to be satisfied that the person would not become stateless, should their Australian citizenship be ceased. For example, this could capture situations where an individual would automatically acquire (or re-acquire) another country's citizenship upon cessation of their Australian citizenship.

The Committee has also raised concerns that non-citizens who do not possess a valid visa ('unlawful non-citizens') may be detained indefinitely in immigration detention. Cessation of a dual national's Australian citizenship will result in the automatic issuing (by operation of law), of an ex-citizen visa. Depending on whether the individual is currently incarcerated, and the length of their sentence, this may be subject to mandatory cancellation under section 501 of the *Migration Act 1958*. Should no other visa be sought or granted to regularise the person's immigration status, they would become an unlawful non-citizen, and therefore subject to removal from Australia. The Bill does not affect or amend the existing policies and processes that support Australia's immigration and visa framework, which will continue to apply as per the current provisions of the *Migration Act*.

The minister's discretionary power to determine that a person ceases to be an Australian citizen remains subject to judicial review. As the Committee has noted, determinations made by the Minister may be reviewed on the basis of whether the Minister's satisfaction of the fact of an individual's dual citizenship was formed reasonably. This retains an important safeguard for the legislation, while providing greater flexibility to the Minister in achieving the requisite level of satisfaction that an individual would not be left stateless if their Australian citizenship was to cease.

I note the Committee's comments regarding the retrospective application of the Bill, including concern that the amendments will apply to convictions made up to 13 years ago. Broadening the retrospective application of section 35A (which already applies to convictions made up to 13 years ago, in certain circumstances) will bolster the Minister's ability to cease an individual's Australian citizenship where they have been convicted of a relevant terrorism offence, regardless of length of sentence. This reflects the fluid nature of the risk posed by convicted terrorist offenders, who may either continue to prescribe to a violent extremist ideology or subsequently re-adopt such an ideology, and are thus of concern to authorities.

I thank the Committee for its thorough consideration of the Bill, and trust that this information is of assistance. I note the Parliamentary Joint Committee on Intelligence and Security is also inquiring into the Bill.

Yours sincerely

PETER DUTTON 22/01/19

THE HON ALEX HAWKE MP
Special Minister of State

REF: MC18-003954

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

Dear Chair

I refer to correspondence dated 6 December 2018 from the Committee Secretary for the Standing Committee for the Scrutiny of Bills (the Committee). I am writing to provide advice as requested in the Committee's *Scrutiny Digest 15 of 2018* (Digest) regarding changes to the candidate nominations process in the Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2018 (Modernisation Bill).

The Committee has sought my advice on the necessity of publishing third party information either in the Qualification Checklist or in any additional documents provided with a candidate nomination, to support their eligibility claims, and whether that information could instead be made available only to the Electoral Commissioner.

The Committee also queried the appropriateness of mandatory publication of the Qualification Checklist and any supporting documents, and applying a requirement that the Electoral Commissioner consider privacy of third parties before publishing any document.

1. Publication of third party information (Digest, para 1.28)

AEC does not determine eligibility under the Constitution

The Australian Electoral Commission (AEC) administers the *Commonwealth Electoral Act 1918* (Electoral Act) and is responsible for running federal elections. The AEC (and the Electoral Commissioner) has no role in assessing candidate eligibility under the Constitution. Eligibility under the Constitution is a matter for the High Court sitting as the Court of Disputed Returns. The High Court has original jurisdiction to review candidate nominations.

It is vital to our democracy that the body responsible for running elections is not involved in vetting or assessing candidates. That could result in the perception that the AEC decides who nominates for an election. The Constitution requires that the Parliament be directly chosen by the people. If the AEC had a role in assessing eligibility, limiting the choices available to electors, we may risk infringing this requirement.

Third Party Details are relevant to eligibility under section 44 of the Constitution
The requirement to complete and publish the Qualification Checklist aims to reduce the risk of a recurrence of the eligibility issues we have seen in recent years. The majority of recent High Court cases have considered subsection 44(i) of the Constitution, which deals with disqualification based on citizenship grounds – a person who holds or is eligible for dual citizenship is not eligible to nominate as a candidate and serve in Parliament.

Whether a person holds or is eligible for citizenship of another country is determined by foreign laws and often depends on their individual circumstances and family background – for example, where and when their parents or grandparents were born, what the relevant law was at the time; where and when their current or former spouse was born, when they were married, divorced etc. This necessarily involves third party information.

2. Not appropriate to remove mandatory publication requirement (para 1.29)
Amending the Modernisation Bill to remove mandatory publication would prevent the Qualification Checklist from achieving its key intent – increasing transparency of information relevant to the status of candidates under section 44 of the Constitution. This is important for maintaining public confidence in Commonwealth democratic processes, as well reassuring voters that their elected representatives are qualified to sit in Parliament.

The Qualification Checklist and any supporting documents provided with the nomination will be published on the AEC website as soon as practicable from the declaration of nominations, until 40 days after the return of the writs. That is, until a petition disputing the election can no longer be filed under Part XXII of the Electoral Act. Publishing this information allows claims disputing a person's eligibility under section 44 of the Constitution to be lodged with the relevant court, based on the information disclosed (or not disclosed) in the Qualification Checklist and any supporting documents.

3. Requiring Electoral Commissioner consider privacy before publishing (para 1.29)
Demonstrating eligibility under section 44 of the Constitution may necessarily involve disclosing a level of third party information, particularly for questions related to citizenship. The Qualification Checklist is not intended to be a barrier to participation in elections. It is designed to shine light on information relevant to a candidate's eligibility status, including those elements that may involve a level of third party information.

I appreciate the Committee's concerns with respect to privacy of third parties. Nevertheless, I am satisfied that the Bill contains sufficient mitigation measures, such as allowing candidates to redact, omit, or delete any information from a document they do not wish published. This allows candidates to demonstrate their eligibility without unduly impacting on their own and others personal information. Accordingly, I am satisfied that the mandatory Qualification Checklist balances individual and third party rights to privacy, with the need to increase transparency for voters surrounding the eligibility status of candidates and those elected to parliament.

Thank you for raising these matters with me.

Alex Hawke
Special Minister of State

21 / 1 /2019

SENATOR THE HON MATHIAS CORMANN
Minister for Finance and the Public Service
Leader of the Government in the Senate

REF: MC18-004120

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

Dear Senator Polley

I am writing in response to a request from Ms Anita Coles, Secretary, Senate Scrutiny of Bills Committee (Committee) on 6 December 2018, seeking further information on the Future Drought Fund Bill 2018.

My response to the questions outlined in the Committee's *Scrutiny Digest 15 of 2018* is attached. I trust this additional information is sufficient to address the Committee's concerns.

I have copied this letter to the Treasurer, as a responsible Minister, and the Minister for Agriculture and Water Resources.

Mathias Cormann
Minister for Finance and the Public Service

16 January 2019

Response to issues raised by the Senate Scrutiny of Bills Committee in relation to the Future Drought Fund Bill 2018

1.38 The committee requests the minister's advice as to why it is considered necessary and appropriate to confer on the Agriculture Minister a broad power to make grants of financial assistance, in the absence of any guidance on the face of the bill as to how this power is to be exercised.

The Future Drought Fund Bill 2018 (Bill) ensures any financial assistance provided under the Future Drought Fund (FDF) will be subject to appropriately robust and transparent decision-making processes. This includes the overarching obligation in the Bill that spending from the FDF must enhance the public good by building drought resilience.

The Bill requires a Drought Resilience Funding Plan (the Plan), a legislative instrument, to be in force and for the Agriculture Minister to have regard to it in decision-making. The Plan will set out a coherent and consistent approach for making arrangements or grants in relation to drought resilience or entering agreements in relation to such grants. The Plan will be developed with a long-term focus for drought resilience funding and will be informed by the Intergovernmental Agreement on National Drought Program Reform, as agreed by all jurisdictions on 12 December 2018, and by any successive agreements, as well as by Australian Government drought policies and strategies. Extensive public consultation, including with key stakeholders, will be undertaken in accordance with the requirements of the Bill before the Plan can be finalised and tabled. Activities to be supported under the Plan will be considered through the Budget process, providing a further robust step in decision-making about spending.

In addition to the Plan, the Bill also requires the Agriculture Minister to have regard to the independent expert technical advice from the Regional Investment Corporation (RIC) Board in making decisions. The RIC Board is established and operates under the *Regional Investment Corporation Act 2018* and is required when performing its functions to act in a proper, efficient and effective manner. The RIC Board must comply with the Plan when preparing its advice to the Agriculture Minister.

These governance measures are similar to the governance structure in place under the *Medical Research Future Fund Act 2015* (the MRFF Act), which requires the Minister to seek advice from an independent advisory body. The MRFF Act also requires both the Minister and the Advisory body to have regard to public strategic guidance (the Medical Research and Innovation Strategy and Medical Research and Innovation Priorities). Similar arrangements also apply under the *Nation-building Funds Act 2008*, in respect of the Building Australia Fund (BAF) and the Education Investment Fund.

In addition, where appropriate, FDF programs identified in the Plan will have published guidelines to ensure that applicants are treated equitably, and that funding recipients are selected based on merit addressing the program's objectives. Grant programs under the FDF will be developed in accordance with the Commonwealth Grant Rules and Guidelines 2017 (CGRG) and the requirements of the *Public Governance, Performance and Accountability Act 2013*. Grant guidelines will be developed for all new grant opportunities and approved grants will be reported on the GrantConnect website no later than 21 days after the grant agreement takes effect. FDF grant administration will be conducted in a manner consistent with the CGRG's principles of:

- robust planning and design;
- collaboration and partnership;
- proportionality;
- an outcomes orientation;
- achieving value with relevant money;

- governance and accountability; and
- probity and transparency.

Procurements under the FDF will be undertaken in accordance with the Commonwealth Procurement Rules 2018 and the procurement policy framework. FDF procurements will be accountable and transparent, while meeting the core procurement principle of achieving value for money.

The terms and conditions of grants or arrangements would be set out in a written agreement between the Commonwealth and the relevant funding recipient. This approach is consistent with the CGRGs, which state that grant agreements should provide for:

- a clear understanding between the parties on required outcomes, prior to commencing payment of the grant;
- appropriate accountability for relevant money, which is informed by risk analysis;
- agreed terms and conditions in regards to the use of the grant, including any access requirements; and
- the performance information and other data that the grantee may be required to collect as well as the criteria that will be used to evaluate the grant, the grantee's compliance and performance.

I do not consider an amendment is necessary or that it would add to the effective administration of the FDF. The detailed criteria to define the activities to be funded will be developed when preparing the Plan; it will be subject to public consultations and will be revised after each four year period. As such, it would be appropriate to detail criteria in delegated legislation or guidelines rather than placing them within the primary legislation.

1.39 The committee also requests the minister's advice as to the appropriateness of amending the bill to include (at least high-level) guidance as to the terms and conditions on which financial assistance may be granted.

I consider the Bill includes sufficient high-level guidance on the terms and conditions for financial assistance to be granted. As outlined above, financial assistance will be granted through robust, well-informed decision-making processes. The process includes: independent technical expert advice from a legislated board, consideration through the Government's Budget process and alignment with the Plan, which will be a coherent and consistent approach for making arrangements or grants in relation to drought resilience or entering agreements in relation to such grants. These processes, as outlined in sections 28 and 29 of the Bill, prevent obscure decision-making or financial assistance being granted to projects without merit. The Commonwealth Grant Guidelines and the Procurement Rules provide further assurance.

The detailed terms and conditions will be developed after the Plan is agreed (to be revised after each four year period). Where appropriate, terms and conditions would be included in guidelines and funding agreements for each activity, rather than placing it within the primary legislation.

I do not consider that an amendment is necessary or would add to the effective administration of the FDF.

1.43 The committee requests the minister's advice as to:

- **the processes by which grants would be provided, and arrangements would be entered into, in accordance with clause 21 of the bill;**
- **whether decisions in relation to the provision of grants and entering into arrangements would be subject to the independent merits review; and**
- **if not, the characteristics of those decisions that would justify excluding merits review.**

As outlined above, financial assistance will be granted through robust and well-informed decision-making processes. The process includes:

- the Plan (a legislated instrument developed following public consultations) which will outline a coherent and consistent approach for making arrangements or grants in relation to drought resilience or entering agreements; and
- independent technical expert advice from a legislated board.

The processes in the Bill provide transparent and merit based decision-making for financial assistance being granted to projects that enhance the public good.

Priorities may be delivered by activities supported by, but not exclusive to, a competitive merit-based grants program, discretionary grants or a procurement process, consistent with the rules relating to the Commonwealth in the *Public Governance, Performance and Accountability Act 2013*.

Guidelines will be developed for FDF granting activities and will include detailed criteria and merit review processes where appropriate. Scope also exists to provide funding to state and territory governments to support drought resilience initiatives under arrangements consistent with both the Intergovernmental Agreement on Federal Financial Relations and the new Intergovernmental Agreement on National Drought Program Reform.

The details of financial assistance provided from the FDF will be announced on the Department of Agriculture and Water Resources' website and provided in the department's annual report, providing transparency of the outcomes.

The general exclusion of an independent merit review process in the legislation can be justified on the basis of decisions relating to the allocation of a finite resource where not all claims can be met. Allocating resources to a merit process would be disproportionate to the significance of the decisions under review – for example, small grants programs. However, where appropriate, merit review processes will be included in grant guidelines. If funding is provided to States and Territories to distribute, any independent merit review would be subject to the conditions and processes they impose on recipients. There is appropriate transparency for decisions on grants and other arrangements.

I do not consider that an amendment is necessary or would contribute to the effective administration of the FDF.

1.51 The committee requests the minister's more detailed advice as to:

- **why it is considered appropriate to leave significant elements of the drought resilience funding scheme proposed by the bill to delegated legislation, and**
- **why the relevant legislative instruments (that is, the Drought Relief Funding Plan and directions making up the Future Drought Fund's investment mandate) would not be subject to disallowance.**

As outlined above, the Bill provides a robust and transparent framework for the elements of the FDF and prevents funding activities without merit or that are inconsistent with building drought resilience.

High level detail regarding the Drought Resilience Funding Plan and the Investment Mandate is contained in the Bill in sections 31 and 41. However, it would not be possible to specify the full detail of these documents in the Bill. Both the Plan and the investment mandate documents are to be informed through public consultation and will need to be subject to change over time, in response to emergent issues, intergovernmental priorities and extrinsic factors such as financial market volatility.

Drought Resilience Funding Plan

The FDF's funding priorities will be developed in the Plan following a public consultation process. The Explanatory Memorandum states that, in developing the Plan, the Agriculture Minister will have regard to the Intergovernmental Agreement on National Drought Program Reform, as agreed by all jurisdictions on 12 December 2018 and any successive agreements, as well as any related Australian Government drought policies and strategies.

These dependencies and interconnections with other (intergovernmental) programs, as well as the variability of the effect of drought events, mean that the Drought Resilience Funding Plan is best operationalised in delegated legislation. The Drought Resilience Funding Plan is intended to endure, being in place for four years, to provide a stable and longer-term focus for drought resilience funding, while providing a review opportunity to ensure that drought resilience funding priorities remain current.

The independent expert technical advice from the RIC Board, an independent Commonwealth entity established by the Parliament under statute, and the Agriculture Minister's decision-making process must comply with the Plan.

The Plan is not subject to disallowance and I do not consider an amendment is necessary, because of governance and transparency measures already in the Bill, when these are weighed against the potential risk of certainty of operation required to inform investment and grant decisions and the need to ensure current drought resilience priorities are appropriately captured.

Future Drought Fund Investment Mandate

The Future Drought Fund investment mandate is a direction by the Treasurer and the Minister for Finance and the Public Service, as the responsible Ministers under the Bill, to a body (in this case the Future Fund Board of Guardians (FFBG)) and is, therefore, exempt from disallowance under sub-item 9(2) of the *Legislation (Exemption and other Matters) Regulation 2015*.

This is consistent with the long-standing and established operational arrangements for other funds currently managed by the Future Fund Board of Guardians (Future Fund Board), such as the Future Fund, the Medical Research Future Fund, the *DisabilityCare* Australia Fund, the Building Australia Fund and the Education Investment Fund.

The approach is also consistent with the approach, contemporaneously legislated (in 2018), for the Aboriginal and Torres Strait Islander Land and Sea Future Fund.

The investment mandate provides direction to the Future Fund Board in relation to the performance of its investment functions, and will include the setting of a benchmark rate of return and an acceptable level of risk that is aligned with the purpose of the FDF.

In setting the investment mandates for the different funds, responsible Ministers need to ensure:

- targeted returns are consistent with the policy intent (including consideration of the intended cashflows from the fund and growth of the underlying capital);
- that resultant risks are aligned with the targeted returns, are reasonable and within tolerances; and
- the mandate is informed by appropriate and expert advice and set with regard to current and expected economic and financial market conditions.

The Government is committed to maintaining the independence of the Future Fund Board's investment activities and to not interfere in investment decisions. Successive Governments have stated that they do not wish to influence the FFBG's investment decisions.

The Bill provides appropriate parliamentary and public scrutiny of the investment mandate. The Bill requires that, prior to issuing the investment mandate, the responsible Ministers must consult the Future Fund Board (section 44(1) refers).

If the Future Fund Board chooses to make a submission regarding the draft investment mandate, this submission must be tabled in both houses of Parliament (s 44(2) refers). This requirement ensures that Parliament is informed of any matters raised by the Future Fund Board.

Additionally, the Future Fund Management Agency provides annual and quarterly performance reports, including comparisons against the benchmark rates specified in the Fund investment mandates.

1.52 In relation to directions making up the Future Drought Funds' investment mandate, the committee also requests the minister's advice as to the appropriateness of amending the bill to provide that the directions are subject to disallowance but only come into force once the disallowance period has expired, unless the minister certifies that there is an urgent need to make changes and it is in the national interest that a specified direction not be subject to disallowance.

See response above.

1.56 The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to permit the Agriculture Minister to delegate their powers to any official of a Commonwealth entity.

The Bill needs to be read in conjunction with the primary legislation governing the operation of all Commonwealth entities: the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

The PGPA Act imposes general duties on all accountable authorities of Commonwealth entities (at sections 15 to 19) including, inter alia, a duty to govern their entity in a way that promotes the proper use (efficient, effective, economical and ethical use) of public resources. Integral to that is the duty to establish and maintain systems relating to risk and control (section 16), including measures directed at ensuring that the officials of the entity comply with the finance law.

To give effect to their duties, accountable authorities would be generally expected to implement:

- delegation and decision-making processes for the proper use of public resources including, robust decision-making and control processes for the expenditure of relevant money. For example,
    - decision-making processes could be supported by requirements on the type of information that officials need to consider before making a spending decision;
    - delegation processes could be limited to particular persons or positions with particular skills and roles (financial transaction limits could be part of those system of delegation).
- appropriate oversight and reporting arrangements for activities and projects, and to address the inappropriate use of resources by officials, or the failure by officials to comply with applicable laws or Commonwealth policies.

These processes can be designed to provide an appropriate level of assurance in accordance with the accountable authorities duty to establish and maintain systems in relation to risk and control in section 16 of the PGPA Act.

The PGPA Act provides an express power of delegation to accountable authorities for reasons of practical necessity, administrative efficiency and operational efficacy. The PGPA Act requirement that the delegation is in writing ensures clarity and accountability for decision-making. Management of delegated power by delegators is crucial to the legitimacy and appropriateness of the exercise of delegated power. The accountable authority of an entity may also, by written instrument, give instructions to officials of other entities where these officials are approving the commitment of relevant money or dealing with public resources for which the accountable authority is responsible (section 22 of the PGPA Act).

When delegating PGPA Act powers accountable authorities must bear in mind their duties under the PGPA Act at sections 15 to 19, including their duty to govern their entity in a way that promotes the proper use of public resources. To give effect to this, an accountable authority may accompany their delegations of power with directions to delegates. Directions enable the accountable authority to instruct the delegate to exercise the delegated power within specified parameters. This not only allows the accountable authority to control how the delegated power is exercised consistent with the statutory requirement to promote the proper use of resources, but also allows the accountable authority to set limits on the power the delegate may exercise.

Delegates, who are officials under the PGPA Act, should understand the nature and scope of the power they have been delegated. This is reinforced through the application of the duties of officials at sections 25 to 29 of the PGPA Act, which, inter alia, requires them to exercise powers with care and diligence, honestly, in good faith and for a proper purpose.

The Department of Agriculture and Water Resources will utilise the Community Grants Hub, through a contract arrangement that it has in place with the Department of Social Services, to make payments to grant recipients. Grants Hub staff will also be officials under the PGPA Act and subject to the responsibilities outlined above.

1.57 The committee also requests the minister's advice as to the appropriateness of amending the bill to; at a minimum, require that persons exercising delegated powers possess the expertise appropriate to the relevant delegation.

The provisions of the PGPA Act endure and there is no need or intention to introduce duplicative statutory requirements. The governance outcomes sought by the Committee are already factors implemented under the PGPA Act – see response above.

1.62 Noting that there may be impacts on parliamentary scrutiny where documents associated with a significant review are not available to the Parliament, the committee requests the minister's advice as to why it is not proposed to require documents associated with the operational review of the Act to be tabled in Parliament and made available online.

The review is envisaged to be operational in nature and, as outlined in the explanatory memorandum, is intended to provide the opportunity to consider whether the Bill is providing the outcomes envisaged. In view of the expectation that the balance of the Fund could grow to $5 billion over 10 years, the review would consider whether higher annual disbursements could be sustained. Legislative amendment would be necessary in these circumstances and the resultant proposals would be subject to parliamentary oversight, inquiry and appropriate processes.

The Bill structurally follows the drafting adopted in the *DisabilityCare Australia Fund Act 2013* and the *Medical Research Future Fund Act 2015.* Both contain a requirement for a review of the operation of the Acts to be undertaken, but do not require the results of the review to be tabled in the Parliament.

The Future Drought Fund Bill 2018 also contains a requirement for a review of the operation of the Act but does not require the results of the review to be tabled in the Parliament. However, should the legislation be enacted, I note that there is nothing preventing the Treasurer and I, as the responsible Ministers, from tabling the report of the review in the Parliament.

Senator the Hon Marise Payne
Minister for Foreign Affairs

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

Dear Senator Helen

I am writing to provide a response to the request for information from the Senate Scrutiny of Bills Committee (the Committee) outlined in the *Scrutiny Digest 15 of 2018* (pages 21-24) regarding the Intelligence Services Amendment Bill 2018 (the Bill).

I appreciate the Committee's consideration of the Bill. A response to the issues raised by the Committee is in the Attachment to this letter.

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

Yours sincerely

MARISE PAYNE
21 JAN 2019

The committee requests the minister's advice as to:

- **the circumstances in which it is envisaged that force, or the threat of force, might be used against a person to protect the 'operational security' of the Australian Secret Intelligence Service from interference by a foreign person or entity;**
- **the circumstances in which it is envisaged that pre-emptive force would be used to prevent, mitigate or remove risks; and**
- **the appropriateness of amending the bill to specify that pre-emptive force may only be used to address immediate risks or threats.**

Operational Security and use of pre-emptive force

The Committee has requested advice in relation to circumstances in which it is envisaged that force, or the threat of force, might be used against a person to protect the 'operational security' of the Australian Secret Intelligence Service from interference by a foreign person or entity, and in particular, the use of 'pre-emptive' force to address immediate risks or threats.

As the Committee would appreciate, ASIS operations are necessarily highly classified. The location, nature and substance of those operations varies and is not able to be disclosed publicly. The Australian Government has put as extensive an account as possible into the public domain as part of the material associated with the Bill. 'Operational security' in this context relates to the secrecy of the purpose of the ASIS activity, and indeed, the fact of ASIS involvement. Importantly, force or the threat of force may only be used where there is a significant risk to the integrity of ASIS operations from interference by a foreign person or entity. In practice, this means that such use of force will need to be reasonable and necessary in order to protect the liberty of ASIS staff members or agents undertaking an operation overseas. It could also apply where the sensitivity and the value of the operation to Australia's national interests, as determined by the Minister having consulted with the Prime Minister, Attorney-General, Minister for Defence and other responsible Ministers, is such that the use of force to restrain, control or compel a person in order to protect the integrity of that operation would be reasonable and proportionate. While it is not possible to be proscriptive about the particular operations, which would be of such significance, it is the case that this ability to use force will not apply to routine ASIS intelligence activities. Reasonable and necessary force in this context might involve, for example, temporarily restraining a person who is uncooperative and/or who poses a threat of compromise to the intelligence operation. Such force might also be used to search a person including to seize a potential weapon or communications device, for example, where the device is likely to be used to alert others to the ASIS operation.

The Act does not permit an ASIS staff member or agent to use force in self-defence beyond the concept as it applies under common law. At common law, whether pre-emptive acts are appropriate or not does not necessarily depend on whether an attack was imminent or a person immediately threatened, but whether the accused person's perception of danger led him or her to believe that the use of defensive force was necessary, and the reasonableness of the grounds for that belief. That may be affected by the lack of immediacy of the threat, although Courts have recognised that this will not necessarily always be the case.

Circumstances involving 'pre-emptive' activities involving the use of limited force by ASIS staff members or agents under Schedule 3 of the Act to prevent, mitigate or remove risks might include temporary stopping, detention and searching of foreign persons who are in the immediate vicinity of, or purporting to cooperate in, an ASIS activity - but in a context in which a prudent intelligence agency would take reasonable steps to ensure continued safety of its personnel and integrity of the operation such as undertaking a search for physical threats (e.g. hidden weapons) or technical threats (e.g. electronic communications devices) that would seriously jeopardise the safety and security of an operation. The 'immediacy' of the risks and threats and when they crystallise may not always be apparent, although such matters, if undetected, have a real prospect of increasing attention from persons who may wish to do harm to the ASIS officers and also potentially causing long–term harm to Australia's national interests. The inclusion of additional words of limitation, such as "immediate risks or threats" may not be helpful in such instances. This is because such a requirement risks leaving a problem to escalate to a point where greater force would be required to address what due to the delay in responding would now be an immediate threat of harm to the staff member or agent or a colleague or other protected person.

ASIS activities are intentionally clandestine in nature and / or very 'low key' and, in the case of activities undertaken pursuant to Schedule 3 of the Act only take place after rigorous internal operational approvals and as approved by the Minister following consultation with the Prime Minister, Attorney-General, Defence Minister and other relevant Ministers.

I note the Parliamentary Joint Committee on Intelligence and Security (PJCIS) exists to examine legislation that relates to the performance by ASIS of its functions in a context where classified information may be disclosed to it. The PJCIS did not recommend the inclusion of provisions as the Committee contemplates in the digest.

As such, I do not believe that the Act requires further amendment to specify that pre-emptive force may only be used to address 'immediate' risks or threats.

However, as the Minister responsible for ASIS, I share and respect the Committee's perspective in ensuring appropriate rigour and oversight of the activities of ASIS and I will, as the Minister responsible for ASIS continue to ensure that its legislative framework remains balanced and that all its activities are proportionate, necessary and that the nature and consequences of ASIS operations remain reasonable. In particular, I have asked ASIS to have regard to the committee's comments in the development of the new guidelines for the use of force.

The committee requests the minister's advice as to:

- **why it is considered necessary and appropriate to leave significant matters relating to the use of force to non-statutory guidelines; and**
- **the type of consultation that it is envisaged would be conducted prior to making the guidelines. The committee also seeks the minister's advice as to the appropriateness of amending the bill to:**
- **require that the guidelines made under clause 2 of proposed Schedule 3 be made by disallowable legislative instrument; and**
- **include specific consultation obligations (beyond those in section 17 of the Legislation Act 2003), with compliance with those obligations a condition of the validity of the guidelines.**

Consultation and ASIS Guidelines

The ASIS Guidelines on the Use of Force and Self Defence Techniques have been in place since 2004 when the Act was amended to permit ASIS to engage in training in and the provision of weapons and equipment for the purposes of protection for ASIS staff members and agents.

They were originally drafted in close consultation with the Australian Government Solicitor and originally based on similar rules of engagement by the Australian Federal Police (Commissioner's Orders). They were initially approved by the National Security Committee of Cabinet.

The existing use of force Guidelines issued by the Director-General under Schedule 2 and the new guidelines to be issued under Schedule 3 of the Act necessarily contain a significant amount of sensitive and classified detail concerning ASIS's internal structure and positions as well as contextual details concerning methods of carriage of different types of weapons, locations and types of operations. These are not matters that can be disclosed publicly as part of disallowable instrument processes without jeopardising Australia's national security. I do not consider it appropriate that they be made by disallowable legislative instrument.

The type of consultation envisaged for amendments to the guidelines includes consultation with the Australian Government Solicitor and the policy divisions of the Attorney-General's Department (taking into account domestic and international law considerations) as well as the Office of the Inspector-General of Intelligence and Security. I note that under the Act, the IGIS must brief the PJCIS on the content and effect of the Guidelines if the Committee requests it or if the guidelines change. As part of the amendments this briefing of the PJCIS will extend for the first time to include the ASIS Guidelines on the Use of Force and Self Defence Techniques which have been in place since 2004. The Department of Foreign Affairs and Trade will also have visibility through the normal Ministerial submission process.

I consider these bodies to be the most appropriate and reasonably practicable entities for the purpose of consultation consistent with section 17 of the Legislation Act 2003. In assessing that the guidelines would not be characterised as legislative instruments ASIS relied upon advice from the Administrative Law Section in the Attorney-General's Department. This advice was reflected in the Explanatory Memorandum.

THE HON DAVID COLEMAN MP
MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: SB19-000014

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

Dear Senator

Thank you for your correspondence of 6 December 2018 requesting detailed advice concerning the Migration Amendment (Streamlining Visa Processing) Bill 2018 (the Bill).

The Committee's *Scrutiny Digest 15 of 2018* specifically sought advice as follows:

- explanation of why it would be necessary and appropriate to leave significant elements of the visa processing framework – including matters that may have significant impacts on individuals' privacy to non-disallowable legislative instruments;
- consideration of the nature of any consultation that is envisaged would be undertaken prior to making an instrument under subsection 46(2B); and
- consideration of the appropriateness of amending the Bill to:
    - at a minimum, require that determinations made under proposed subsection 46(2B) be disallowable; and
    - include specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*), including a requirement to consult with and consider the views of the Privacy Commissioner, with compliance with those obligations a condition of the validity of a determination made under proposed subsection 26(2B).

The Bill enables the Department of Home Affairs to require personal identifiers from applicants, as an application validity requirement. The amendments will allow the Department to conduct identity, security, law enforcement and immigration checks immediately following lodgement of a visa application, which will improve the integrity of our visa application process, while reducing the time taken to process visa applications.

In response to your first query, the purpose of the Bill is not to expand or impact the nature or type of personal identifiers that can be required, or amend the purposes for which they can be collected. The Department already has broad powers under section 257A of *the Migration Act 1958* (the Migration Act), to require any visa applicant to provide personal identifiers *after* they have lodged a valid visa application. This process is well established and operates onshore within Australia and in 46 countries overseas.

Section 5A of the Migration Act defines 'personal identifiers' and lists the purposes for which they can be collected.

- Subsection 5A(1) defines a personal identifier to include: fingerprints or handprints, measurement of a person's height and weight, photograph or other image of a person's face and shoulders, an audio or a video recording of a person, an iris scan, a person's signature and any other personal identifier prescribed by the *Migration Regulations 1994* (the Migration Regulations).
- Subsection 5A(3) provides the purposes of collecting personal identifiers includes: assisting in the identification of, and authenticating the identity of, any person who can be required under the Act to provide a personal identifier; improving procedures for determining visa applications and combating document and identity fraud in immigration matters.

Both of these subsections in 5A of the Migration Act have been subject to Parliamentary scrutiny. The Bill *will* not expand or amend the types of personal identifiers authorised to be collected, the purpose for which they are collected, or impose any additional privacy concerns.

Further, as the provisions relate to how a person is to make a visa application, and more broadly to the 'arrival, presence and departure of persons' and 'the application for visas', it is appropriately located in Part 2 of the Migration Act. By virtue of its location in Part 2 of the Act, and in accordance with Item 20 of the table in s10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, any instrument made under new subsection (2B) will be non-disallowable.

Therefore there is no need for Parliament to reconsider these same matters in relation to this Bill. On this basis it is appropriate that the instruments made under proposed subsection 46(2B) are to be non-disallowable.

Continuing to exempt instruments made under Part 2 of the Act from disallowance ensures certainty in visa operational matters for the Department, as well as certainty to visa applicants in terms of knowing what they need to do in order to make a valid visa application. If these instruments were subject to disallowance, the Australian Government would be less agile in addressing emerging issues relating to trends in identity fraud. On the basis of the above mentioned, instruments made under proposed subsection 46(2B) will be non-disallowable.

With regard to your second query, I do not intend that any specific consultations would be undertaken prior to making the instrument under subsection 46(2B). Decisions on which cohorts will be included in the instrument will be determined in line with operational priorities, intelligence, identifiable fraud risks and other factors. While these decisions may be made with the input of relevant stakeholders, it would not be appropriate to mandate such consultations as it would reduce the Department's flexibility in responding quickly to emerging trends and threats.

Similarly, with regard to your third query, I do not consider it appropriate to amend the Bill to include specific consultation obligations with the Privacy Commissioner. The Privacy Commissioner was consulted when section 5A was inserted into the Migration Act.

Thank you for bringing this matter to my attention.

Yours sincerely

David Coleman

30 / 1 / 2019

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Families and Social Services

MS18-002003

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

Dear Senator Polley

I write in response to a request from the Senate Scrutiny of Bills Committee on 6 December 2018, requesting information on issues relating to the Social Services and Other Legislation Amendment (Supporting Retirement Incomes) Bill 2018 (the Bill).

The Committee requested advice on why it is appropriate to make a number of instruments under the Bill notifiable instruments rather than legislative instruments.

There are two notifiable instrument making powers in the first schedule of the Bill, which are mirrored in the amendments to the *Social Security Act 1991* (SSA) and the *Veterans' Entitlements Act 1986* (VEA).

In both cases, an instrument made under these provisions would not be a legislative instrument, as it does not purport to determine or alter the content of the law, or have the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

Notifiable instruments are instruments that are not appropriate to be registered as legislative instruments, but for which public accessibility and centralised management is desirable. I understand that the main criterion, when considering whether an instrument that is not legislative in character should be a notifiable instrument, is whether the public in general, or a member of the public, would benefit from access to an authoritative form of the instrument from a centrally managed source.

The Bill uses notifiable instruments to allow the new means test rules to refer to specific pieces of external information integral to the rules. The Office of Parliamentary Counsel consulted with the Attorney-General's Department when drafting the Bill and obtained approval for the use of notifiable instrument making powers for this purpose.

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A notifiable instrument has been used in proposed subsections 1120AB(8) of the SSA and 52BAB(9) of the VEA to define the relevant considerations for the making of an administrative decision, and is therefore not legislative in character. This instrument simply allows the new means test rules to refer to a piece of external information, the public accessibility and centralised management of which is desirable for the purposes of the SSA and VEA.

The Bill states the conditions of release identified by the Secretary (or Commission) must also be conditions of release in the *Superannuation Industry (Supervision) Regulations 1994*. The explanatory memorandum to the Bill clarifies that this notifiable instrument should mirror the specific conditions of release currently outlined in sub-regulation 106A(3)(a) of the *Superannuation Industry (Supervision) Regulations 1994*.

A notifiable instrument has been used in proposed subsections 1120AB(11) of the SSA and 52BAB(12) of the VEA to specify the number that should be used when referring to the expected age of death of a 65-year-old male, which is relevant when calculating a person's 'threshold day'. This is in order to refer directly to the information in a centrally managed source, to ensure consistency if the location of the information changes in the future (e.g. if the Australian Government Actuary publishes their life tables in a different format). These Australian Government Actuary's life tables are also large and complex, therefore from a clearer law perspective, it is desirable to replicate the relevant information in a notifiable instrument.

For this instrument, the Bill states the Secretary (or Commission) must have regard to the most recent life tables published by the Australian Government Actuary and the expected age at death of a 65-year-old male detailed therein.

Given the constraints above, and that the both these instruments are designed to only point to available external information to allow for the proper application of policy, the use of notifiable instruments was considered appropriate.

Yours sincerely

Paul Fletcher

9/1/2018

Senator the Hon Matthew Canavan

Minister for Resources and Northern Australia

MS19-000065

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

I refer to the Committee Secretary's correspondence of 6 December 2018 concerning the Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill 2018 (the Bill).

The Committee has sought justification for the delegation of legislative power under proposed new subsection 11(3) of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act). That proposed new subsection is to be inserted by item 3 of Schedule 1 of the Bill. It would allow for rules under the BCIIP Act to modify the application of the BCIIP Act in the Greater Sunrise special regime area (special regime area).

As noted in the explanatory memorandum to the Bill, the inclusion of proposed subsection 11(3) is to allow rules to be made to ensure the BCIIP Act applies in a manner consistent with Australia's obligations under the *Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing Their Boundaries in the Timor Sea* (Treaty) and to facilitate the cooperative exercise of jurisdiction in the special regime area.

Jurisdiction over employment standards (and the establishment of associated employment bodies) such as those established by the BCIIP Act are not explicitly governed by the terms of the Treaty. The object and purpose of the Treaty, insofar as it relates to the special regime area, is to establish a cooperative scheme for the joint development, exploitation and management of the special regime area. While Australia and Timor-Leste are not precluded from applying their respective employment laws to the special regime area, it would be consistent with this cooperative scheme for the parties to consult on how their employment law is to apply in the special regime area. This is to ensure that the simultaneous exercise of jurisdiction does not result in a conflict of laws within the special regime area.

Consultations on the cooperative exercise of jurisdiction are ongoing, and as such it is not known at this stage whether, and to what extent, the application of the BCIIP Act will need to be modified, insofar as it relates to the special regime area, to facilitate the cooperative exercise of jurisdiction in the special regime area. This may be particularly relevant in terms of ensuring there is no conflict between the local content requirements referred to in the Treaty and the provisions of the *Code for the Tendering and Performance of Building Work 2016* (if applicable to particular building work carried out in the special regime area).

In light of the above, I consider it both necessary and appropriate to include the rule making power in the Bill to ensure the Australian Government can flexibly and expeditiously alter the application of the BCIIP Act in the special regime area to reflect its international obligations.

The rule making power is limited to the special regime area and does not allow for the modification of the BCIIP Act in other areas in waters above the continental shelf or in the exclusive economic zone. Further, any rules made for the purposes of proposed subsection 11(3) will be disallowable and therefore subject to parliamentary scrutiny, including by the Senate Standing Committee on Regulations and Ordinances.

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

Yours sincerely

Matthew Canavan

CC: The Hon Kelly O'Dwyer MP, Minister for Jobs and Industrial Relations