Senator the Hon Bridget McKenzie
Deputy Leader of The Nationals
Senate Leader of The Nationals
Minister for Agriculture
Senator for Victoria

Ref: MS19-001509
30 OCT 2019

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

Dear Senator Polley Helen,

Thank you for the Scrutiny of Bills Committee's letter dated 17 October 2019 regarding the Agricultural and Veterinary Chemicals Legislation Amendment (Australian Pesticides and Veterinary Medicines Authority Board and Other Improvements) Bill 2019.

Further information about the measure to support computerised decision-making by the Australian Pesticides and Veterinary Medicines Authority (APVMA) is in Part 5 of Schedule 1 to the Bill, as sought by the committee in its *Scrutiny Digest 7 of 2019*, is provided below.

Authorising the APVMA to implement computerised decision-making—where applied properly and with appropriate safeguards—will provide the agency with the flexibility to further streamline services, reduce costs and liberate resources. This will support efforts by the APVMA to provide enhanced services, reduce the length of time for some transactions and generally improve efficiency.

The APVMA's decisions about implementing computerised decision-making will be guided by the best practice principles developed by the Administrative Review Council, outlined in its report *Automated Assistance in Administrative Decision Making: Report to the Attorney-General* (Report No. 46, 2004), available from the Attorney-General's Department website (arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo46.aspx).

This will ensure that decision-making done by or with the assistance of computer systems is consistent with the administrative law values of lawfulness, fairness, rationality, transparency and efficiency. Relevantly, these best practice principles include (but are not limited to) the following in relation to expert systems (automated systems that make or support decisions):

- expert systems that make a decision—as opposed to helping a decision maker make a decision—would generally be suitable only for decisions involving non-discretionary elements (principle 1)
- expert systems should not automate the exercise of discretion (principle 2)
- if expert systems are used as an administrative tool to assist in exercising discretion, they should not fetter the decision maker (principle 3)
- the construction of an expert system, and the decisions made by or with the assistance of expert systems, must comply with administrative law standards (principle 7)
- expert systems should be designed, used and maintained in such a way that they accurately and consistently reflect the relevant law and policy (principle 10).

A key issue guiding the APVMA's implementation will be the distinction between administrative decisions for which the decision maker is required to exercise discretion and those for which no discretion is exercisable once the facts are established. Full automation of the decision-making process is likely to be considered appropriate in the latter case. For example, computerised decision-making might be used for decisions involving completeness checks of applications.

Decisions that require interpretation or evaluation of evidence—such as where fact finding or weighing evidence is required—would not be made by automated systems. Complex decisions such as these will continue to be determined by a human decision maker. For example, decisions that require assessment of technical applications to issue permits, as per the scenario raised by the committee, would not be made by a computer. Such decisions require a decision-maker to take account of a broad and complex range of information and to ensure that all relevant matters are considered, in order to form a particular state of mind as the basis for exercising their judgement.

Review mechanisms provide safeguards to ensure that any automated decision is correct or preferable. For example, the APVMA will be able to substitute a decision for a decision made by a computer program if the APVMA is satisfied that the decision made by the computer program is incorrect. This ensures that if a computer program is not operating correctly, or has produced a decision that the APVMA considers is wrong, the action can be substituted by the APVMA without the need for formal administrative review.

Additionally, the items 37–43 of the Bill have the effect that a decision made by a computer program may be subject to reconsideration (review) by the APVMA and external merits review by the Administrative Appeals Tribunal. These review mechanisms are available for any computerised decision (or a decision by the APVMA in substitution of a computerised decision) and are the same as those available if the decision were made by an APVMA staff member. Judicial review is also available under the *Administrative Decisions (Judicial Review) Act 1977*.

The Bill does not prescribe a particular set of activities for which computer decision-making would be allowed. Providing for the APVMA to arrange for the use of computer programs for any purpose for which the APVMA may or must take administrative action provides the APVMA with flexibility to apply computerised decision-making as it deems appropriate for its operations. The APVMA is most appropriately placed, guided by the best practice principles and relevant legislation, to determine which of its decisions could be automated. In addition, establishing a flexible legislative regime will support future developments in information technology and business processing. As technology continues to improve, it is difficult to predict which decisions may become suitable for computerised decision making. Providing a broad power in the Bill prevents the need for legislation to be continuously amended as new types of decisions become suitable for automation.

Importantly, the measure does not require the APVMA to use computerised decision-making, but rather provides for this as an option, to increase the decision-making tools available to the regulator, where appropriate and practical to use.

Thank you once again for considering the Bill and seeking further information on this scrutiny matter.

Bridget McKenzie

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: MS19-003523

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

Dear Chair

I write in response to a letter dated 17 October 2019 from the Senate Scrutiny of Bills Committee (the Committee) seeking further information in relation to issues raised on the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 as contained in its Scrutiny Digest No. 7 of 2019.

My response to the questions from the Committee is attached. I trust this additional information will be of assistance.

Yours sincerely

PETER DUTTON 08/11/19

Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

Ministerial Response

1.16 In light of the comments above, the committee requests the minister's more detailed justification as to the necessity and appropriateness of providing the minister with a broad discretionary power to cease a person's citizenship under sections 36B and 36D by reference to the minister's subjective satisfaction that they have repudiated their allegiance to Australia.

Response:

The essential purpose of the Bill is to replace the current operation of law provisions for citizenship loss with a decision-making model. This is consistent with the recommendation of the Independent National Security Legislation Monitor (INSLM) in his recent report on the review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the *Australian Citizenship Act 2007* (the INSLM Report).

Under the Ministerial decision-making model contained in the Bill, the Minister must consider a number of matters when making a determination to cease a person's citizenship. This includes being satisfied that the person's conduct demonstrates a repudiation of allegiance to Australia.

A requirement based on the decision-maker's satisfaction is entirely consistent with a decision-making model. The satisfaction requirement is consistent with current section 35A(1)(d) of the *Australian Citizenship Act 2007* and echoes the requirements in current section 34, that the Minister be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen and in relation to whether a person is a dual citizen or not.

In addition, the Minister's satisfaction that a person's conduct demonstrates a repudiation of their allegiance to Australia must be reasonable. The High Court has said 'satisfaction' is a state of mind, which must be formed reasonably and on a correct understanding of the law.

A decision-making model based on Ministerial satisfaction is also consistent with recommendations made in the INSLM Report.

Under existing decision-making models, relevant information is provided to the Minister via a Ministerial Submission from the Department of Home Affairs. The Submission provides extensive and detailed information relevant to the case drawn from a range of other departments and agencies.

The Bill also contains several safeguards so that, following a cessation determination, an affected person or their delegate can challenge the grounds of the Minister's satisfaction.

- Firstly, once notice of cessation is provided, the person may apply to the Minister for a revocation of the determination (section 36H). The Minister must review an application and must revoke the determination if satisfied the person did not engage in the conduct to which the determination relates, or that the person was not a national or citizen of another country at the time the determination was made. The Minister must observe the rules of natural justice in this process.
- Secondly, the Minister may, on the Minister's own initiative, revoke a determination if satisfied this is in the public interest (section 36J).

- Thirdly, the Minister's determination is automatically overturned and the person's citizenship taken never to have ceased if a court finds that the person did not engage in the conduct to which the determination relates (section 36K).
- Finally, all decisions of the Minister, whether a determination to cease citizenship or a decision not to revoke a determination, are also subject to judicial review.

In addition, as an elected official, the Minister can be held accountable to Parliament in exercising the powers conferred upon him or her by this Bill.

The Committee noted at paragraph 1.12 that "what constitutes 'repudiation' of a person's citizenship is not precisely defined beyond the conduct itself". When the terrorism-related citizenship cessation provisions were enacted through the *Allegiance to Australia Act (2015)*, the Parliament recognised that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia. This declaration of Parliament's intention is repeated in the Bill in proposed s36A. As such, what constitutes repudiation of allegiance to Australia is behaviour that all Australians would view as repugnant and in opposition to the shared values of the Australian community. As an elected representative and member of the Australian Parliament, the Minister for Home Affairs is well-placed to identify such conduct.

Noting the established and tested processes of a decision-making model based on Ministerial satisfaction, and the number of safeguards built into the proposed legislation, a model based on the Ministerial subjective satisfaction is both necessary and appropriate.

1.17 The committee also requests the minister's more detailed justification as to the necessity and appropriateness of providing the minister with a power to cease a person's citizenship under section 36B conditioned merely on the minister's satisfaction of the key matters rather than the existence of those matters in fact.

Response:

As noted above, under the Ministerial decision-making model in the Bill, the Minister may cease a person's citizenship if satisfied of a number of key matters. These include that the person engaged in specified terrorism-related conduct, that the conduct demonstrates a repudiation of allegiance to Australia, that it would be contrary to the public interest for the person to remain an Australian citizen, and that in making a cessation determination the person would not become a person who is not a national or citizen of any country. The answer above (question 1.16) outlines why a decision based on Ministerial satisfaction rather than jurisdictional fact is both necessary and appropriate.

The Bill also contains multiple safeguards to guard against or rectify an erroneous determination.

- Firstly, once notice of cessation is provided, the person may apply to the Minister for a revocation of the determination (section 36H). The Minister must review an application and must revoke the determination if satisfied that the person did not engage in the conduct to which the determination relates, or was not a national or citizen of any other country at the time the decision was made, and may revoke if revocation would be in the public interest. The Minister must observe the rules of natural justice in relation to this process.
- Secondly, the Minister may, on the Minister's own initiative, revoke a determination if satisfied this is in the public interest (section 36J).

- Thirdly, the Minister's determination is automatically overturned and the person's citizenship taken never to have ceased in a number of circumstances (section 36K). This includes:
    - if a court finds that the person did not engage in the conduct to which the determination relates;
    - if a court finds that the person was not a national or citizen of any other country at the time the decision was made;
    - if the court conviction to which a determination under section 36D relations is reduced below the requisite three years; or
    - if a declaration under section 36C (declared terrorist organisation) is disallowed by either House of the Parliament.
- Finally, all decisions of the Minister, whether a determination to cease citizenship or a decision not to revoke a determination, are subject to judicial review generally.

In addition, as an elected official, the Minister can be held accountable to Parliament in exercising the powers conferred upon him or her by this Bill.

Noting the reasons outlined above (question 1.16) regarding the preference for Ministerial satisfaction and the number of safeguards built into the legislation, a model based on the Ministerial subjective satisfaction of the key matters is both necessary and appropriate.

1.18 The committee considers it may be appropriate that the minister amend paragraph 40 of the explanatory memorandum to more correctly describe the operation of paragraphs 36B(1)(a)–(c) and seeks the ministers advice in this regard.

Response:

The Minister agrees that paragraph 40 of the Explanatory Memorandum could be amended to note that paragraphs 36B(1)(a)-(c) outline the matters the Minister must, not may, be satisfied of when determining to cease a person's Australian citizenship.

1.22 The committee requests the minister's more detailed justification as to why it is considered necessary and appropriate to replace the existing requirement that citizenship can only be removed if the person is a national or citizen of another country, with a requirement that the minister must not make a citizenship cessation determination if the minister is satisfied that such a determination would result in the person becoming someone who is not a national or citizen of any country.

Response:

The justification for moving to a decision-making model based on the decision-maker being satisfied of certain matters has been explained above (question 1.16).

The Minister's power to make a cessation determination is dependent on the Minister being satisfied, among other things, that the person would not become a person who is not a national or citizen of any country. In forming this satisfaction, the Minister will be required to turn his or her mind to the issue, using the materials available to him or her at the time. This formulation is consistent with the provisions of the existing section 34(3)(b) which provides for the revocation of citizenship for serious offences and has been used regularly. It is also consistent with the citizenship loss provisions in the *British Nationality Act 1981*. As such, there are well-established practices and processes in this regard.

In addition, as outlined above, a decision based on satisfaction ensures demonstration of the Minister's state of mind and active engagement with the material. Further, as noted by the INSLM on

page 59 of his report on the existing loss provisions, "conditioning the power on the fact that a person is a dual citizen … may make it very uncertain whether the power is even engaged".

The Bill also contains multiple safeguards to protect from or rectify determinations that result in an individual becoming a person that is not a national or citizen of any country.

- Firstly, once notice of cessation is provided, they may apply to the Minister for a revocation of the determination (section 36H). The Minister must review an application and must revoke the determination if satisfied that the person was not a national or citizen of any other country at the time the decision was made. The Minister must observe the rules of natural justice in this process.
- Secondly, the Minister may, on the Minister's own initiative, revoke a determination if satisfied this is in the public interest (section 36J).
- Thirdly, the Minister's determination is automatically overturned and the person's citizenship taken never to have ceased if a court finds that the person was not a national or citizen of any other country at the time the decision was made (section 36K).
- Finally, all decisions of the Minister, whether a determination to cease citizenship or a decision not to revoke a determination, are subject to judicial review generally.

In addition, as an elected official, the Minister can be held accountable to Parliament in exercising the powers conferred upon him or her by this Bill.

Noting the reasons outlined above (question 1.16), a model based on the Ministerial subjective satisfaction of a person's dual citizenship is both necessary and appropriate. The Department has extensive experience and well-developed processes for implementing such legislation. Noting the number of safeguards and avenues for appeal built into the legislation, the Bill sufficiently protects a person's rights and liberties, and upholds Australia's international obligations.

1.25 The committee therefore requests the minister's advice as to why decisions under proposed sections 36B and 36D are not subject to independent merits review.

Response:

Avenues for review exist in the Bill. Many of these avenues are in addition to those provided for in the existing legislation. These avenues have been outlined in the response to question 1.17.

In addition, a person can access merits review of the Australian Security Intelligence Organisation's Qualified Security Assessment, which will inform the Minister's satisfaction that a person has engaged in relevant conduct, in the Security Appeals Division of the Administrative Appeals Tribunal.

Consistent with the approach in the *Migration Act 1958*, it is not appropriate for the Tribunal to review a decision made personally by the Minister, who is responsible to Parliament, in relation to the public interest.

1.27 The committee requests the minister's more detailed justification as to the necessity and appropriateness of leaving the declaration of terrorist organisations under section 36C to delegated legislation.

Response:

The Bill repeals current section 35AA and repeats it unchanged into the new legislation. There are no substantive changes to the intent or substance of the section.

Under proposed section 36C, the Minister maintains the power to declare, by legislative instrument, a declared terrorist organisation, within the meaning of paragraph (b) of the definition of terrorist

organisation in subsection 102.1(1) of the *Criminal Code*. This reflects the existing power in current subparagraph 35AA(1), which also allows the Minister to declare a declared terrorist organisation by legislative instrument. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to respond quickly to potential threats and emerging issues from terrorist organisations.

A declaration under proposed section 36C is a legislative instrument that is subject to the scrutiny framework set out by the *Legislation Act 2003*, including the provisions related to disallowance. In the event that either House of Parliament considered that the declaration under proposed section 36C was not appropriate, it would be possible for the instrument to be disallowed. A further consequence of disallowance is that any cessation determination reliant on that declaration is automatically revoked (section 36K) and the person's citizenship taken never to have ceased.

A declaration under proposed section 36C is also subject to additional scrutiny by the Parliamentary Joint Committee on Intelligence and Security, as set out in proposed subsection 36C(4). This will allow the Committee to review the declaration and report the Committee's recommendations to each House of Parliament, within specified timeframes, as is now the case with declarations under existing s35AA.

Given the complex and dynamic nature of potential threats, and noting the oversight mechanisms available to the Parliament, the use of delegated legislation for the purpose of a declaration under proposed section 36C remains necessary and appropriate.

1.32 In light of the above, the committee requests the minister's more detailed justification as to why, in relation to the powers under section 36D, it is necessary or appropriate to reduce the relevant sentence from six years to three years.

Response:

The Bill provides that section 36D applies to a person convicted of a specified terrorism offence from 29 May 2003 onwards if the period or periods of imprisonment totals at least 3 years. In practice, this lowers the existing threshold from 6 years for convictions from 12 December 2015 to present and from 10 years for convictions from 12 December 2005 to 12 December 2015.

This amendment better acknowledges the seriousness of conduct that has resulted in conviction for a terrorism offence. It recognises that citizens convicted of certain terrorism-related offences may have engaged in conduct incompatible with the shared values of the Australian community and have severed the common bond bestowed through citizenship. This, in itself, justifies the Minister being able to consider whether a person has repudiated their allegiance to Australia, and whether it is in the public interest for the person to remain an Australian citizen. However, in considering whether it would be in the public interest for the person to remain an Australian citizen, the Minister must have regard to the matters set out in s36E, including the severity of the relevant conduct and the degree of threat currently posed by the person to the Australian community.

The INSLM supported this view in his review of the current citizenship cessation. He states at page xiii of his report 'a serious terrorism offence is the paradigm case of an offence against the Australian community and one which may be fairly seen to break to common bond'.

While the Bill acknowledges that terrorism-related conduct is serious enough to warrant consideration for citizenship cessation, there are appropriate safeguards in place. This includes that the Minister:

- be satisfied that the conviction/s demonstrates the person has repudiated allegiance to Australia;

- have regard to severity of the conduct that was the basis of the conviction(s); and
- factor in any leniency a person received in the sentence.

1.43 In light of the above comments, the committee requests the minister's more detailed advice as to why it is necessary and appropriate to remove the obligation of the minister to observe the requirements of natural justice when making a determination to cease a person's citizenship under section 36B or 36D.

Response:

The Bill does not remove natural justice from the citizenship cessation process. Under existing sections 33AA and 35, natural justice is not afforded to the person unless the Minister considers rescinding and exempting them from the cessation. Existing section 35A provides natural justice at the point in time when the Minister considers making a cessation determination.

The Bill provides that if the Minister gives notice of cessation to the affected person, that person may apply to the Minister to have the determination revoked (section 36H). The Minister must observe the rules of natural justice in relation to that process. As such, the Bill introduces natural justice for a person ceased under section 36B (current 33AA and 35) and alters the point in time when natural justice is afforded to a person ceased under section 36D (current 35A). The removal of the requirement to provide natural justice in advance of a determination under section 36D is offset by the provision in proposed section 36H, which provides the right to seek revocation of a cessation determination. Likewise, under the current provisions, while the Minister must provide natural justice if exercising the discretionary power to rescind and exempt a person from the cessation, the Bill reverses this position and provides that the Minister must consider an application under 36H.

The structure of an initial decision without natural justice, followed by a revocation process in which natural justice applies, mirrors provisions in the *Migration Act 1958*. In addition, affording natural justice after the cessation determination removes the potential for the Minister's determination being frustrated by the person taking steps to remove their second citizenship, thus nullifying the Minister's ability to consider the person for cessation of citizenship. This possibility was also recognised by the INSLM, whose recommended model also excluded natural justice at the initial stage (see page 59 of the INSLM Report).

Although natural justice is excluded from the Minister's cessation determination, it is relevant to note that an affected person has the right to access judicial review of that decision.

1.44 The committee considers that it may be appropriate to (a) amend proposed subsection 36F(3) to require that the minister must give additional notice in circumstances where the original notice was not received and the minister is aware of the person's electronic address; and (b) amend paragraph 36H(2)(b) to allow for applications for revocation of the determination in these circumstances to be made within 90 days. The committee requests the minister's advice in relation to this.

The Minister will consider amending the Bill so that section 36F(3) provides requires that the Minister must, not may, give additional notice in circumstances where the original notice was not received and the Minister is aware of the person's electronic address.

The Minister will also give consideration to amending the Bill so that section 36H(2)(b) provides an affected person a period greater than 30 days to make an application for revocation if notice of the cessation is provided a second time in accordance with section 36F(3).

1.50 In light of the comments above, the committee requests the minister's more detailed advice as to whether proposed section 36K provides adequate judicial oversight of the factual determinations upon which cessation of citizenship decisions (made under sections 36B, 36D and 36H) are, in substance, based.

Response:

A determination by the Minister under section 36B and 36D, or a decision by the Minister under proposed subsection 36H(3) is subject to judicial review by the Federal Court and High Court. As such, the usual grounds for judicial review of administration decisions would be available. This allows the Federal Court and High Court to have adequate oversight over issues such as whether the Minister has reached his or her satisfaction reasonably by identifying the correct issues, asking the correct questions or taking into account relevant material, or whether the decision is affected by irrationality, illogicality or unreasonableness.

Paragraphs 36K(1)(a) to (c) do not limit the scope of a court's powers or the usual grounds of judicial review identified above. Rather, it sets out additional consequences if the events in paragraphs 36K(1)(a) to (c) occur, by outlining that the determination made under subsection 36B(1) and 36D(1) is taken to be revoked, without any decision or exercise of power by the Minister. If this occurs, then the person's citizenship is also taken never to have ceased.

The Bill affords appropriate mechanisms for judicial review, which allow a court to consider whether or not the powers under proposed sections 36B, 36D and 36H have been exercised lawfully.

1.56 The committee requests the minister's more detailed advice as to the necessity and appropriateness of retrospectively applying the power to remove citizenship based on conduct engaged in or convictions made up to 16 years ago.

Response:

The Bill proposes that section 36B(5)(a)-(h) and 36D apply from 29 May 2003 as this was the date the offences referenced in 36D were fully enacted in the *Criminal Code Amendment (Terrorism) Act 2003*. Providing for both 36B and 36D to apply in respect of conduct (s36B) or convictions (s36D) to the same date ensures legislative consistency between the two provisions. Further, there is a natural synergy to use that date as the point in time to assess conduct, as the conduct provisions are broadly based on the offences.

In adopting a Ministerial decision-making model, not everyone who has engaged in conduct or was subject to a terrorist-related conviction from 29 May 2003 onwards will necessarily have their citizenship ceased. Under the proposed model, the Minister must consider a range of factors including the severity of the conduct and the degree of threat currently posed by the person at the time of consideration. This requires the Minister to weigh up a number of public interest considerations in deciding whether a person's citizenship should cease. Further, once the Minister makes a cessation determination, the person's citizenship is taken to have ceased from the date of that determination.

For conduct specified in proposed paragraph 36B(5)(j) which relates to where an individual serves in the armed forces of a country at war with Australia, proposed section 36B applies to any such conduct before or after commencement of the Bill. This reflects a long standing provision dating back to the *Australian Citizenship Act 1948*, which provided that an Australian citizen who, under the law of a foreign country, is a national or citizen of that country and serves in the armed forces of a country at war with Australia shall, upon commencing so to serve, cease to be an Australian citizen.

THE HON MICHAEL SUKKAR MP

Minister for Housing and Assistant Treasurer

Ref: MS19-002536

24 OCT 2019

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

I am writing in response to a letter from the Senate Scrutiny of Bills Committee (the Committee) requesting information in relation to issues raised in the Committee's *Scrutiny Digest 7 of 2019* regarding the Currency (Restrictions on the Use of Cash) Bill 2019 (the Bill).

The Committee sought advice as to:

- why it is considered necessary and appropriate to leave all of the exceptions to these offences to delegated legislation; and
- whether it would be appropriate for the Bill to be amended to include a non-exhaustive list of the currently known kinds of transactions that will be exempt, with further kinds of exempt transactions able to be specified in delegated legislation (the Rules).

The Committee also sought advice as to the justification for the significant custodial penalty proposed in clause 13 of the Bill and, in particular, specific examples of applicable penalties for comparable Commonwealth offence provisions.

Issue 1: exceptions in delegated legislation

As outlined in the Explanatory Memorandum, the cash payment limit offences apply to a very wide range of transactions and it was considered important to provide flexibility to ensure that new kinds of transactions or business practices are not inappropriately affected by the cash payment limit.

As the Committee notes, such flexibility could in theory be provided by setting out the known exceptions (defences) in the primary law and providing a power to specify further defences in the Rules.

However, while the scope of any future changes is unknown, it is expected that it would be more likely to involve expanding or limiting the scope of the current proposed defences rather than creating entirely new defences. While making such adjustments to defences in the primary law, using the Rules, may be technically possible, it would be cumbersome and introduce unnecessary complexity. Given the wide scope of an economy-wide cash payment limit, it was not reasonable to potentially require that all affected entities

to deal with that degree of legal uncertainty and complexity, leading to the imposition of avoidance compliance costs and red tape.

It would also give rise to concerns around system complexity and access to law, as understanding the scope of an expanded defence would require a close reading of the primary law in conjunction with the Rules, which could be challenging for some stakeholders to work out how the law deals with their particular circumstances.

Additionally, it was also considered that placing all of the defences in the Rules, rather than splitting them between the primary law and the Rules, would result in simpler legislation that would be easier to find, understand and apply. While ideally all of the defences would be set out in the primary law, it was necessary to provide flexibility to establish new defences in the Rules and it is likely that this flexibility would need to be used. Given this, the only way to ensure all defences could be found in one place, minimising compliance costs and red tape for business, was to place them all in the Rules which are subject to full Parliamentary scrutiny.

Issue 2: penalties

The proposed offences relating to the cash payment limit seek to prohibit conduct that facilitates or enables other criminal behaviour. Given this, it was identified that the existing offences to which they were most closely comparable were the offences relating to dealing in the proceeds of crime in Division 400 of the Criminal Code as these offences similarly involve conduct that facilitates or enables other criminal activity.

The maximum penalties for the proceeds of crime offences vary based on the amount of assets in question and the knowledge or intention of the party. A person who deals in proceeds of crime with a value of $10,000 or more, being reckless about the fact that the money or property is or may become the proceeds of crime is subject to a maximum penalty of 5 years imprisonment or 300 penalty units or both. A person who does the same thing but is negligent about the fact that the money or property is or may become the proceeds of crime is subject to a maximum penalty of 2 year imprisonment or 120 penalty units.

The cash payment limit mental element offences most closely resemble the proceeds of crime offence for which the mental element is recklessness. However, as the cash payment limit offences involve less direct assistance to other criminal activity, it was considered that they were less serious. Given this, the penalty for the cash payment limit offences was aligned to the maximum penalty that applies to the proceeds of crime offences for which the mental element is the lower standard negligence, where culpability is similarly less.

More generally, I consider that it is important that an appropriate period of imprisonment be available to the courts as a maximum penalty for entities that recklessly flout the cash payment limit. Criminal activity associated with the black economy is a serious problem for Australia. The use of large cash payment is key in facilitating activity in the black economy and a substantial deterrent is required to change existing practices and behaviours that enable this conduct.

Thank you for bringing these concerns to my attention. I trust that this further information will be of assistance to the Committee.

The Hon Michael Sukkar MP

Senator the Hon Michaelia Cash
Minister for Employment, Skills, Small and Family Business

Reference: MS19-001670

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

Dear Senator

Thank you for your correspondence on 17 October 2019, on behalf of the Senate Standing Committee for the Scrutiny of Bills ('the Committee') in relation to the Education Legislation Amendment (Tuition Protection and Other Measures) Bill 2019, the Higher Education Support (HELP Tuition Protection Levy) Bill 2019, and the VET Student Loans (VSL Tuition Protection Levy) Bill 2019.

The Committee has requested my advice on a range of matters within these Bills. I have addressed each of the Committee's queries in the attached response.

I thank the Committee for its interest and I trust this information is of assistance. I have provided a copy of this letter, and the response to Scrutiny Digest 7 of 2019, to the Hon Dan Tehan MP, Minister for Education.

Yours sincerely

Senator the Hon Michaelia Cash
24 / 10 / 2019

Encl.

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Response to the Standing Committee for the Scrutiny of Bills

Education Amendment (Tuition Protection and Other Measures) Bill 2019

Significant matters in delegated legislation

Concern:

- **1.79: In relation to the power in proposed paragraph's 66A(1)(b) and 166-5(1)(b), the committee requests the minister's advice as to the appropriateness of amending the Bill to provide at least high-level guidance as to the circumstances in which Rules and Guidelines may exempt higher education providers from the operation of the tuition protection scheme.**
- **1.80: The committee otherwise draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of including potentially significant matters in delegated legislation.**

Response:

1. The committee expresses valid concerns about whether the Education Amendment (Tuition Protection and Other Measures) Bill 2019 ('the TP Bill') should include high-level guidance as to the circumstances in which Rules and Guidelines may exempt higher education providers from the operation of the tuition protection scheme. In this instance however, it is not desirable or necessary to include such explicit guidance.

2. The purpose of the TP Bill is to provide a sustainable framework for the provision of tuition protection for students accessing VET Student Loans, FEE-HELP or HECS-HELP at a private education provider or TAFE. In part, this will be achieved by ensuring that there are adequate funds in the VET Student Loans Tuition Protection Fund and the HELP Tuition Protection Fund. It is therefore implicit from the overarching purpose of the new tuition protection scheme that generally it is those providers that are of minimal risk of default and/or have the capability to protect students in the event of a default, who are likely to be exempt from the schemes. Table A providers (i.e. public universities) have been expressly excluded from this regime given they are considered very low risk, and in the unlikely event of a default, should have the capacity and capability to place students without the assistance of a Director.

3. Further, it is desirable to allow the delegated legislation maximum flexibility to exempt classes of providers. This is because the circumstances and classes of providers for which it may be appropriate to exempt are not certain and cannot necessarily be foreseen. Specifying this detail in the delegated legislation may avoid the need to amend the primary legislation in order to exempt a class of provider not currently contemplated for an exemption.

4. The reliance on the Guidelines and the Rules for the purposes of proposed subsections 49A(2) and 19-66A(3) is appropriate because it will allow administrative and technical details of the schemes to be adjusted relatively quickly (compared to the provisions of the primary legislation), in the event that changes in policy give rise to the need for changes in the administration of the schemes. The use of delegated legislation allows the Minister, with appropriate parliamentary scrutiny, to work out the application of the law as it applies to the

administrative details of the schemes. For instance, it is desirable that Rules be able to be made relating to the refund, remission and waiver of tuition protection levies, in order to provide greater flexibility in responding to circumstances where this may be appropriate.

Broad discretionary power

Concerns:

- **1.85: The committee request the minister's detailed advice as to why it considered necessary and appropriate to permit the minister to determine by non-legislative instrument, individual providers to which the tuition protection scheme is proposed Part 5-1A of the *Higher Education Support Act 2003* applies.**
- **1.86: The committee also requests the minister's advice as to the appropriateness of amending the Bill to:**
  - **Provide that determinations made under proposed subsection 166-5(2) are legislative instruments; and**
  - **Provide at least high-level guidance as to how the minister's power to make such determinations is to be exercised.**

Response:

1. The power for the Minister to determine, by non-legislative instrument, individual providers to which the tuition protection scheme in the proposed Part 5-1A of the *Higher Education Support Act 2003* (proposed Part 5-1A) applies, enables the Minister to react to changes in a dynamic sector, while retaining the discretion to consider the relevant and unique circumstances of individual providers.

2. Provider funding and governance structures, historical arrangements, existing and emerging compliance risks, and other characteristics vary widely across the sector, and continue to evolve. In recognition of this, the Minister can make a determination that proposed Part 5-1A does not apply to a provider based on the individual circumstances of that provider. Anticipating through legislation the factors the Minister must consider before making a determination risks restricting the Minister's ability to consider individual provider circumstances.

3. As a non-legislative instrument, a determination under proposed subsection 166-5(2) enables rapid response to provider and sector changes. This is critical as conditions or time limitations specific to individual providers made under subsections 166-5(3)(a) and (b) can be introduced, amended or revoked without delay. Non-legislative instruments give certainty to providers that the Minister's decision is final and not capable of disallowance. This ensures that providers have certainty about whether the tuition assurance obligations apply to them, which assists with financial and compliance planning. This level of certainty is particularly important for providers given that the Minister's determination has the additional consequence that the provider is not a 'leviable provider' for the purposes of the Higher Education Support (HELP Tuition Protection Levy) Bill 2019 ('HELP Levy Bill').

4. On the question of the appropriateness of amending the TP Bill to provide that determinations made under proposed subsection 166-5(2) are legislative instruments, the overarching purpose of the Bill is to ensure that students are adequately protected in the

event of provider failure. It is essential that changes in provider circumstances can be responded to rapidly and with certainty for students, as well as for the HELP Tuition Protection Director. This purpose can be achieved by retaining the current proposed subsection 166-5(4).

5. On the question of the appropriateness of amending the Bill to provide guidance on how the Minister is to make determinations under proposed subsection 166-5(2), it is impractical and restrictive to anticipate the factors that the Minister may take into account when considering whether to make a determination, and therefore, it is not appropriate to amend the Bill.

Broad delegation of administrative powers

Concerns:

1.95: The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to permit the VSL Tuition Protection Director and the HELP Tuition Protection Director to delegate their powers and functions to officers at the APS 6 level. The committee's consideration of these matters would be assisted if the minister's response addressed the following matters:

- **the anticipated nature and volume of matters to be determined by the VSL Tuition Protection Director and HELP Tuition Protection Director; and**
- **whether the relevant work could be performed by officers below the Senior Executive Service (SES) level, with an SES officer giving final authorisation.**

1.96: The committee also requests the minister's advice as to the appropriateness of amending the Bill to restrict delegations to members of the SES or, at a minimum, to require that delegates possess expertise appropriate to the delegated power or function.

Response:

1. The committee expresses valid concerns about the delegation of administrative powers to a relatively large class of persons without specification as to the delegates' qualifications, attributes or expertise. In this instance, however, I consider it necessary and appropriate to permit the VSL Tuition Protection Director and the HELP Tuition Protection Director to be able to delegate their powers and functions to officers at the APS 6 level for the reasons articulated below. I have explained this rationale in relation to the VSL Tuition Protection Director specifically but the same rationale, albeit different provisions, applies to the HELP Tuition Protection Director.

2. Firstly, a key role of each Director is to provide support to students when their provider defaults. While reforms have been implemented, especially in the vocational and education sector, to minimise the risk of provider failure, it is inevitable that defaults will occur from time to time. Such defaults cause significant disruption and stress to students for whom support needs to be provided as soon as practicable. It is difficult to anticipate with precision the nature and volume of matters to be determined by the Directors, but suffice to say the office of the Director needs to be able to respond in a timely fashion at times of crisis and for this, needs to have within his or her powers, the ability to delegate to a broad class of persons. For example, the catastrophic failure of Careers Australia impacted over 16,000 students. The Director, under proposed section

66E of the VSL Act will be required to assess for each individual student whether there is a suitable replacement course. This will most likely require a broad level of delegation if the students are to be given the appropriate support. In circumstances such as these, I do not consider a delegation to only a senior executive level will ensure the necessary student support is delivered in a timely manner.

3. Secondly, the same person is undertaking the role of TPS Director, VSL Tuition Protection Director and HELP Tuition Protection Director. It is often the case that providers enrol students in all three sectors, and so it is reasonable to assume that in the event of a default, the volume of the resultant workload will be significant.

4. Thirdly, whilst the VSL Tuition Protection Director has a range of powers and functions, most of these are more administrative and process driven rather than being decisions of significant consequence. Notably, the critical function of the Director – having to make the legislative instrument under the VSL Student Loans (VSL Tuition Protection Levy) Bill ('the VSL Levy Bill') – has not been delegated. For example:

   (a) a key function of the Director is to assess under proposed section 66E whether there is a suitable replacement course for a student, having regard to the matters listed in section 66E(2). While such a decision has important implications for an individual student, this decision is reviewable (proposed section 74), and cannot be reviewed by the same delegate, and must be reviewed by a person who occupies a position at a level not lower than that of the delegate who made the decision (proposed section 78A);

   (b) powers of the Director in proposed sections 66C and 66F to require providers to give to the Director certain information to assist with the tuition protection process;

   (c) the requirement for the Director (proposed section 66H) to notify the Secretary of the default and notify the provider of the re-credit amount and invite submissions. Critically, it is the Secretary that determines the actual re-credit amount – the role of the Director is to give the provider procedural fairness.

5. Fourthly, proposed subsection 114(4) ensures that any delegate when exercising powers or performing functions under the Act is required to comply with any directions of the VSL Tuition Protection Director – ensuring that the Director maintains overarching oversight of any exercise of his or her powers.

6. I also consider it unnecessary to specify that the delegates possess expertise particular to the delegated power or function. The powers and functions to be exercised by the Directors are general in nature and I consider it sufficient that the delegates, as officials under the *Public Governance, Performance and Accountability Act 2013* ('the PGPA Act'), will understand the nature and scope of the powers being delegated. Officials under the PGPA Act are required pursuant to sections 25 to 29 to exercise their powers with due care and diligence, honestly, in good faith and for proper purpose. The TPS Director is similarly an official for the purposes of the PGPA Act (per section 54N of the *Education Services for Overseas Students Act 2000* ('the ESOS Act')).

7. Importantly, under proposed subsection 89(1A), the powers and functions of the VSL Tuition Protection Director under the *Regulatory Powers Act 2014* (as an authorised applicant, infringement officer or relevant chief executive) are only able to be delegated to an SES employee or acting SES employee. The committee queries how this aligns with the Director's ability, in subsection 114(3), to delegate any or all of the Director's powers or functions under 'this Act' (with the exclusion of paragraph 66N(1)(e)) to APS Level 6 employees or above – this is in light of section 66N, which sets out the functions of the VSL Tuition Protection Director and include 'any other function conferred by this Act or any other law of the Commonwealth' (for example, the *Regulatory Powers Act 2014*).

8. As the VSL Tuition Protection Director is conferred functions and powers by different Acts (relevantly, the *VET Students Loans Act 2016* and the *Regulatory Powers Act 2014*), subsections 114(3) and 89(1A) separately provide for the Director's ability to delegate powers or functions conferred on him/her under those Acts.

9. To the extent that there might be any ambiguity as to whether subsection 114(3) might extend to the delegation of functions or powers conferred on the Director by the *Regulatory Powers Act 2014* (because of section 66N). This is resolved by the operation of subsection 89(1A) itself as it relates specifically to the delegation of such powers or functions.

Higher Education Support (HELP Tuition Protection Levy) Bill 2019

VET Student Loans (VSL Tuition Protection Levy) Bill 2019

Charges in delegated legislation

Concerns:

The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing the HELP Tuition Protection Director and the VSL Tuition Protection Director to determine core elements of the tuition protection levy by delegated legislation, with only limited guidance as to the amounts of levy that may be imposed.

Response:

1. I consider there are sufficient checks and balances and guidance provided within the respective levy Bills to ensure the core elements of the levy are appropriately determined. I explain this below for each of the three components to the tuition protection levy: administrative fee, risk rated premium component and the special tuition protection component. Again, I have explained this rationale in relation to the VSL Levy Bill but the same rationale, albeit different provisions, applies to the HELP Levy Bill.

2. The VSL Levy Bill provides for the administrative fee to be calculated having regard to the amounts determined in a legislative instrument made by the Minister. However, the Bill specifically provides for an upper limit beyond which the administrative fee cannot exceed. This upper limit was determined in consultation with the Australian Government Actuary.

3. The risk rated premium component of the levy is calculated according to a detailed methodology provided for in the Bill (see proposed section 11 of the VSL Levy Bill), which was developed by the Australian Government Actuary. This methodology takes into consideration the provider's level of exposure under the relevant loan scheme in terms of total student numbers and loan amounts as well as the provider's risk of default based on certain risk factors such as volatility in student numbers, course completion rates, length of operation, by way of example.

4. The VSL Tuition Protection Director is responsible for determining in a legislative instrument certain amounts necessary to calculate a provider's risk rated premium. In making this instrument, the Director is required to have regard to the advice of the VSL Tuition Protection Fund Advisory Board as well as the sustainability of the VSL Tuition Protection Fund. Notably, members of the Advisory Board are required to include, amongst others, representatives from the Department of Finance, the Australian Prudential Regulatory Authority and the Australian Government Actuary (see section 55C ESOS Act). The Treasurer is also required to approve the legislative instrument before the Director makes the instrument, providing an extra measure of scrutiny to the legislative instrument.

5. The VSL Tuition Protection Director is similarly responsible for determining in the same legislative instrument (and so with the same checks and guidance) the percentage to multiple the providers' total loan amounts by in order to calculate the special tuition protection component. This component of the levy is intended to be imposed on providers to enable the VSL Tuition Protection Fund to grow.

6. Similar levy components apply under the *Education Services for Overseas Students (TPS Levy) Act 2012* with both the Minister and the TPS Director making the relevant legislative instruments. This approach towards the handling of the levy in respect to providers with international students has been operating successfully since 2012.

7. Consistent with other delegated legislation, the Minister and the Director will consult with the sector as part of the annual levy setting process and similarly both instruments will be subject to Parliamentary scrutiny through the disallowance process after tabling in both Houses of Parliament.

The Hon Dan Tehan MP
Minister for Education

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7350

Our Ref: MS-000922

6 NOV 2019

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

Dear Senator Helen,

I write in reference to the Senate Standing Committee for the Scrutiny of Bills' (the Committee) request for more detailed advice concerning two matters in relation to the Family Assistance Legislation Amendment (Building on the Child Care Package) Bill 2019.

Significant Matters in Delegated Legislation

The Committee's first query at 1.101 of the Scrutiny Digest 7 of 2019 refers to the amendment of section 85BA of the *A New Tax System (Family Assistance) Act 1999* (the Assistance Act), to incorporate the capacity for the Child Care Subsidy Minister's Rules to specify additional eligibility criteria for Child Care Subsidy for a prescribed child care service type.

The primary purpose of this amendment is to enable targeted eligibility criteria for Child Care Subsidy for In Home Care to be prescribed and clarified in the Child Care Subsidy Minister's Rules 2017, and to enable an assessment of whether individuals meet that eligibility criteria to occur, prior to such individuals accessing In Home Care. These eligibility criteria will broadly encompass the availability and suitability of access to other forms of appropriate care, geographic location, non-standard or variable working hours of parents, and whether families seeking to access In Home Care have complex and or extensive additional needs.

Section 85BA of the Assistance Act contains a high-level criteria for Child Care Subsidy eligibility. If a family is not eligible for Child Care Subsidy then they will not meet the first requirement for eligibility for In Home Care.

Given that the primary eligibility requirement for In Home Care is contained in the Assistance Act, incorporating targeted eligibility criteria for In Home Care in the Child Care Subsidy Minister's Rules 2017, is appropriate, as it enables the other criteria to be amended in response to changes in demand for the program.

I note further, that section 85BA of the Assistance Act has other similar certain eligibility criteria prescribed in the Child Care Subsidy Minister's Rules such as:

- subparagraph 85BA(1)(c)(iii) which refers to circumstances where no one is eligible for a session of care (Part 2, Division 1, 8)
- paragraph 85BA(2)(a) allows eligibility requirements for children aged over 13 or attending secondary school to be prescribed in Minister's rules (Part 2, Division 1A)
- subsection 85CA(4) which refers to circumstances in which a child is taken to be at risk of serious abuse or neglect – child at risk of suffering harm (Part 2, Division 2)
- subsection 85CG(2) which refers to circumstances in which an individual is taken to be experiencing temporary financial hardship (Part 2, Division 3, 12).

Merits Review

The Committee's second query at 1.105 of the Scrutiny Digest 7 of 2019 refers to the amendment of section 138 of the *A New Tax System (Family Assistance) Administration Act 1999* (Administration Act), so that a provider whose approval has been cancelled or varied under sections 197H or 197J, is not able to apply to the Administrative Appeals Tribunal (AAT) for external review of that decision.

Decisions made under subsection 202(4A), which was the equivalent provision to sections 197H and 197J in the Administration Act as it existed prior to amendments, which came into effect on 2 July 2018, were not reviewable by the AAT through operation of section 138 of the Administration Act as it existed at the time.

When amendments in the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* were being drafted, decisions under the new sections 197H and 197J were not intended to be reviewable by the AAT, that is, the existing exceptions would continue under the new Act, but these exemptions were omitted by oversight.

It is important for the Committee to note that a person affected by a decision made under sections 197H or 197J may still seek internal merits review of the decision under subsection 109A(1B) of the Administration Act. At this point, the Secretary of the Department of Education, or an authorised review officer appointed under section 109C of the Administration Act, must independently review the original decision and decide to affirm, vary or set aside the original decision based on the evidence before them.

When conducting this review, the Secretary or authorised review officer may relevantly consider whether there was a mistake of fact as to whether the relevant circumstances in sections 197H or 197J had arisen.

In conclusion, for the reasons outlined above, I therefore consider that the In Home Care eligibility criteria should be incorporated in the Child Care Subsidy Minister's Rules 2017, as proposed and external merits review no longer be available in relation to decisions made under sections 197H and 197J of the *A New Tax System (Family Assistance) (Administration) Act 1999.*

I trust this information is of assistance.

DAN TEHAN

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

Ref No: MC19-016737

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
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1 NOV 2019

Dear Senator

I am writing in response to a request from the Senate Standing Committee for the Scrutiny of Bills (Committee) on 17 October 2019, seeking further information on the Medical and Midwife Indemnity Legislation Amendment Bill 2019 (Bill).

I appreciate the time the Committee has taken to review the Bill and thank you for the opportunity to address the Committee's concerns.

My response to the questions outlined in the Committee's *Scrutiny Digest No.7 of 2019* (item 1.117, 1.124 and 1.130) is enclosed. I trust that the enclosed response satisfies the Committee's concerns.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Encl (1)

Response to scrutiny of the Medical and Midwife Indemnity Legislation Amendment Bill 2019 (Bill)

Issues identified and the Minister's response

Computerised decision-making

Schedule 3, item 15, proposed section 76A; item 26, proposed section 87A

The Senate Standing Committee for the Scrutiny of Bills (Committee) has drawn attention to items 15 and 26 of Schedule 3 to the Bill, respectively, which proposes to insert section 76A into the *Medical Indemnity Act 2002* (MI Act) and section 87A into the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (MPICCS Act).

These new provisions provide the Chief Executive Medicare (CEM) with a discretionary power to authorise the use of computer programs for any purpose for which the CEM may or must take administrative action if it is deemed necessary and appropriate to do so.

Consideration will be given to what decisions are suitable for automation in line with administrative law requirements. In general, they will be decisions where particular facts are reliably established without the need for complex assessment or the need to assess information so as to form a particular position. Decisions that involve assessment of information provided by applicants in order to make a decision and making findings on whether specified statutory criteria are met or not met will not form part of the automated decision making process. Complex administrative decisions that involve consideration of technical information from many sources would require that persons that are adversely affected by the decision be accorded procedural fairness. These are not the types of decisions that are proposed to be covered by automated decision making.

The reasoning for applying proposed sections 76A and 87A broadly across both the MI Act and MPICCS Act through these amendments, rather than limiting it to just section 37 of the MI Act, is to ensure that the CEM is lawfully permitted to move other aspects of its decision making to an automated system in the future where suitable.

The circumstances in which a computer program will be used to take or make an administrative action will be for indemnity insurance applications and claims submitted online for payments to eligible insurers. Services Australia is implementing online claiming and automation of payment and claims for a range of indemnity insurance fund schemes they administer.

At this stage, the only decisions which will be suitable for computerised decision making relate to section 37 whereby the CEM has the authority to make certain (Premium Support Scheme) payments following successful submission and manual assessment of claims data. It is not intended that all decisions will be automated.

My Department, in consultation with Services Australia, will be maintaining the current practice of conducting certain administrative actions (for example, assessing claim applications and making decisions on whether to accept or reject a claim) by a person rather than just by a computer system. We are developing extensive system requirements and eligibility rules along with ongoing manual complex claims interventions where a person will be required to make decisions not just a computer program. My Department will always maintain the pursuance of making administrative decisions that are robust, lawful and comply with administrative law.

Implementation of computerised decision making is expected to deliver a number of potential benefits. Automation is expected to streamline services, significantly reduce duplication of work for insurers and Services Australia and improve security of claims data.

Reversal of evidential burden of proof

Schedule 3, item 18, proposed subsections 77(2A) and (2B); item 29, proposed subsections 88(2A) and (2B)

I note the Committee's concerns regarding the reversal of evidential burden of proof in proposed subsections 77(2A) and (2B) of the MI Act and proposed subsections 88(2A) and (2B) of the MPICCS Act.

Subsection 77(2) of the MI Act and subsection 88(2) of the MPICCS Act provide that a person commits an offence if they copy, record, disclose or produce protected information or a protected document to another person, where the first person is not performing or exercising duties, powers or functions under specified legislation. The offence is punishable by two years' imprisonment.

The new provisions would provide that, despite subsections 77(2) and 88(2), certain listed persons may copy, record, or disclose protected information or a protected document, for the purposes of monitoring, assessing or reviewing the operation of the medical indemnity legislation. As pointed out by the Committee, the new provisions would create offence-specific defences to the offences in subsections 77(2) and 88(2). The defences reverse the evidential burden of proof.

The *Australian Government Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide) notes that placing the burden of proof on the defendant should be limited to where the matter is peculiarly within the knowledge of the defendant and where it is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[1]

An additional factor to consider is whether the offences only impose an evidential burden (as the prosecution must still disprove the matters beyond reasonable doubt if the defendant discharges the evidential burden).

The defendant bears the evidential burden with respect to the exceptions under subsection 77(2) of the MI Act and subsection 88(2) of the MPICCS Act. Whether someone has acted in the performance of his or her duties, or in the exercise of his or her powers or functions, under the medical indemnity legislation and relevant legislation, or had acquired the information in the performance of those duties, is something peculiarly within the knowledge of that person. It would be difficult for the prosecution to provide evidence that the person is not covered by an exemption when evidence relevant to whether an exemption applies can only be known by that person.

The Guide notes that an evidential burden does not completely displace the prosecutor's burden (it only defers that burden).[2] The defendant must point to evidence establishing a reasonable possibility that these defences are made out. If this is done, the prosecution must refute the defence beyond reasonable doubt.

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[1] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 51.

[2] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 52.

Broad delegation of legislative power

Schedule 6, item 3, proposed paragraphs 34ZZG(2)(b) and 34ZZZD(2)(b); proposed subsections 34ZZZF(1) and (2)

I note the Committee's concerns regarding the broad delegation of legislative power in proposed paragraphs 34ZZG(2)(b) and 34ZZZD(2)(b), and proposed subsections 34ZZZF(1) and (2) of the MI Act.

The proposed provisions that the Committee has drawn my attention to, are consistent with provisions across the indemnity schemes where the Commonwealth is making payments to compensate administrative costs incurred by medical indemnity insurers in respect of incidents notified to insurers that could give rise to claims in relation to which certain indemnities could be payable.

These new provisions would only allow for modification, rather than actual amendment, of the primary legislation. In addition, the proposed provisions include limitations on what can be modified (see, for example, subsection 34ZZZD(3) to the Bill, which provides that paragraph 34ZZD(2)(b) does not allow the regulations to modify a provision that creates an offence, or that imposes an obligation which, if contravened, constitutes an offence).

The modification is only in relation to particular subject matter, that is, certain liabilities associated with costs that have been paid by the Commonwealth for the benefit of the Commonwealth. Any regulations that would need to be made will be subject to Parliamentary scrutiny and disallowance.

The reliance on regulations to modify the application of the MI Act in relation to certain liabilities associated with costs which have been paid, is based on the principle that delegated legislation is necessary and justified. This is because it allows administrative and technical detail to be adjusted relatively quickly (compared to provisions of the primary legislation), in the event that shifting policy requirements give rise to the need to change policy at an administrative level. The use of delegated legislation such as legislative instruments allows policy departments, with appropriate parliamentary scrutiny, to work out the application of the law in greater detail within, but not exceeding, the principles that the Parliament has laid down by statute in the primary legislation.

As highlighted by the Administration Law Branch of the Attorney General's Department, Henry VIII clauses are usually only appropriate if they are intended to allow modification to keep the legislation up to date by adopting changes made in other legislation or in international agreements.

Consultation

Extensive consultation formed part of the development of these reforms. My Department consulted with Services Australia, the Department of the Prime Minister and Cabinet, the Department of Treasury and the Department of Finance. Views and evidence from stakeholders, including the Australian Medical Association, the Insurance Council of Australia, other peak bodies and medical indemnity insurers were considered as part of the policy development process. My Department will continue to work collaboratively with other Government Departments and other affected stakeholders on the specific content of the legislative instruments.

The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure, Transport and Regional Development
Leader of The Nationals
Federal Member for Riverina

Ref: MC19-005162

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

Dear Senator

Thank you for your letter of 17 October 2019 requesting further information regarding the Protection of the Sea (Prevention of Pollution from Ships) Amendment (Air Pollution) Bill 2019 (the Bill).

The Senate Scrutiny of Bills Committee has requested in the *Scrutiny Digest 7 of 2019*, detailed justification as to:

1.138: '… why it is proposed to use the offence-specific defences (which reverse the evidential burden of proof) in this instance'

1.142-3: '…why it proposed to place a legal burden of proof on the defendant by including presumptions … [and] why it is not sufficient to reverse the evidential, rather than the legal burden proof'.

Each of these amendments in the Bill are necessary and appropriate for the reasons outlined in Attachment A.

Thank you for raising this matter and I trust this information is of assistance.

Yours sincerely

Michael McCormack

Enc

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Attachment A

Response to the Senate Standing Committee for the Scrutiny of Bills

Protection of the Sea (Prevention of Pollution from Ships) Amendment (Air Pollution) Bill 2019

The Senate Standing Committee for the Scrutiny of Bills (the Committee) has sought justification for the use of offence-specific defences that reverse the evidential burden of proof and the use of a legal burden of proof.

1.38 Reversal of evidential burden of proof

The reversal of evidential burden is applied to section 26FEGA *Using fuel oil – exceptions* through a Note amended to the end of subsection 26FEGA(7), stating that a defendant bears an evidential burden in relation to the section. The same reversal of evidential burden is applied to section 26FEHA *Australian ship in emission control area – exceptions* through a Note at the end of subsection 26FEHA(5).

The principle to consider an offence-specific defence that places the burden of proof on the defendant is that it should only be included when "it is peculiarly within the knowledge of the defendant; and, the defence would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter".

Section 13.3(3) of the *Criminal Code 1995* allows for an evidential burden to be placed on a defendant who wishes to rely on an exception. However, section 13.3(4) allows for the discharge of this burden if evidence is sufficiently adduced by the prosecution or the Court.

In order to access the exceptions to the offences provided for in subsections 26FEG and 26FEH, the defendant bears the evidential burden in sections 26FEGA and 26FEHA to establish the matter for the following defences:

- Subsections 26FEGA(1) and (2) *Exception for ships with Annex VI equivalents* provide exceptions to the ordinary and strict liability offence.

  A defendant, including the master and owner of a ship, would peculiarly have the ability to adduce or point to evidence that the ship has an Annex VI equivalent (such as exhaust gas cleaning systems) approved for use on board the ship and operating in accordance with the regulations. Defences would include compliance documentation issued by the country of administration and operational logs kept onboard the ship, as provided for by the IMO guidelines and regulations. The prosecution does not have ready access to this information outside its provision by the master of the ship, in particular for foreign-flagged ships, in where the government of the country where the ship is registered provides the approval. It would be more costly for the prosecution to disprove operation of an approved Annex VI equivalent than for a defendant to provide the evidence. The Australian regulator does not travel on the ship. However, where the Australian regulator has approved operation of an Annex VI equivalent, the prosecution or the court can discharge some or all of the evidential burden.

- Subsections 26FEGA(3) – (6) *Exceptions for emergencies* provide exceptions for the strict liability offence only.

  The master and owner of the ship would peculiarly be able to adduce or point to evidence that the ship was operating to secure the safety of the ship, saving a life at sea or where unintentional damage has occurred. This information is carried on board the vessel, through

routine operational record keeping. The Australian regulator is not aboard the ship during these occurrences and would have no knowledge of the event and actions taken until the ship arrives at an Australian port and this information is then provided to the regulator for scrutiny. It would be significantly more costly for the prosecution to disprove a claimed action than for the defendant to provide the onboard evidence.

- Subsections 26FEHA(1) – (4) *Exceptions for emergencies* provide exceptions to the strict liability offence only for an Australian ship within an emission control area.

  These subsections are similar in operation as those provided in section 26FEGA for emergencies outside the emission control area.

- Subsection 26FEGA(7) *Exception for the unavailability of fuel oil with a sulphur content of not more than the prescribed limit* provides an exception to the ordinary and strict liability offence.

  The defendant could peculiarly adduce or point to evidence that compliant fuel was not available at the last port of call through the required IMO notification and reporting mechanisms. The IMO *2019 Guidelines for consistent implementation of the 0.50% sulphur limit under MARPOL Annex VI* include a standard format for a fuel non-availability report. Under the IMO Guidelines, it is an obligation on the master of the ship to obtain a [certified] report for presentation at the next port of call in circumstances where the ship was not able to obtain compliant fuel. It would be significantly more costly for the prosecution to disprove the non-availability claim than for the defendant to provide a completed non-availability report, which is internationally accepted evidence. However, where the regulator has received prior notification of fuel non-availability at the preceding port, the prosecution or the Court can discharge the evidential burden.

- Subsection 26FEHA(5) *Unavailability of fuel oil with a sulphur content of not more than the prescribed limit* provides an exception to the ordinary and strict liability offence for an Australian ship within an emission control area.

  This subsection is similar in operation to that in section 26FEGA for unavailability of fuel oil outside the emission control area.

It should also be noted that these reversals of evidential burden are consistent with similar exception provisions contained within Part IIID – *Prevention of air pollution* of the *Protection of the Sea (Prevention of Pollution of Ships) Act 1983*, specifically subsections 26FEG(5), (6) and 26FEH(6), (9).

1.142 – 3 Reversal of legal burden of proof

Subsections 26FEG(4) - (6) and 26FEH(6) provide "presumption[s] that the matter exists unless the contrary is proved" and notes are included outlining that the defendant bears a legal burden of proof as allowed for in Section 13.4(c) of the *Criminal Code 1995*).

- Regulation 2, Annex VI, MARPOL defines fuel oil as fuel "intended for combustion purposes for propulsion or operation on board a ship".

  Subsection 26FEG(4) provides a presumption for sections 26FEG and 26FEGA that fuel oil carried on board a ship is carried for use as fuel. A defendant to the strict and ordinary

offences (26FEG) and to exceptions to these offences (26FEGA) would be able to demonstrate that the fuel is not cargo or ballast.

A defendant can establish whether or not the fuel oil is carried in bunker tanks connected to the engine and is being used for combustion purposes for the propulsion or operation on board a ship. For example, a defendant would be uniquely able to prove that there was a permanent disconnect or barrier to the connection between the bunker fuel oil storage tanks and engine. It would be significantly more costly for the prosecution to disprove that this is the case than for a defendant to establish proof.

- Subsection 26FEH(6) provides the same presumption for sections 26FEH and 26FEHA for ships operating within an emission control area.

- Subsections 26FEG(5) and 26FEG(6) provide presumptions for subsections 26FEG(1) and (2) for the ordinary and strict liability offences, which presume the conduct of the offence was located within the Australian maritime jurisdiction as specified in subsection 26FEG(1)(d).

  A defendant to an offence would have peculiar knowledge as to the location of the ship at the time of the offence. This is information carried on board the vessel through routine operational record keeping. The Australian regulator is not aboard the ship during these occurrences and would have no knowledge of the event and actions taken until the ship arrives at an Australian port and the records are provided for scrutiny. It would be significantly more costly for the prosecution to disprove that this is the case than for defendant to establish proof.

It should also be noted that a reversal of legal burden of proof are consistent with similar presumptions for fuel oil currently contained in the *Protection of the Sea (Prevention of Pollution of Ships) Act 1983* in subsections 26FEG(4) and 26FEN(3).