THE HON MICHAEL SUKKAR MP

Minister for Housing and Assistant Treasurer

Ref: MS20-000332

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

Dear Senator

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 1 of 2020* regarding the Commonwealth Registers Bill 2019 and the Treasury Laws Amendment (Registries Modernisation and Other Measures Bill (the Bills).

The Committee sought advice regarding:

- why it was considered necessary and appropriate to leave the data standards and disclosure framework to delegated legislation;
- why it is considered appropriate to allow for the delegation of the Registrar's powers to any person that the Registrar, as a Commonwealth body, may delegate its functions to, or any person of a kind specified in the rules;
- whether the Bills can be amended to provide further legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated;
- why it is considered necessary and appropriate to permit the Registrar to arrange for computer assisted decision-making for any purpose for which the Registrar may make decisions in the performance or exercise of the Registrar's functions or powers, other than decisions reviewing other decisions;
- whether consideration has been given to how computer assisted decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power);
- whether consideration has been given to including guidance on the face of the Bill as to the types of administrative actions (for example, complex or discretionary decisions) that must be taken by a person rather than a computer;

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- more detailed justification as to the appropriateness of including the specified matters as offence-specific defences; and

- whether the offence-specific defences could instead framed as elements of the relevant defences.

Use of delegated legislation

In relation to the data standards and disclosure framework, the use of delegated legislation was considered appropriate because of the anticipated highly technical and specialised nature of the rules that will govern the collection and disclosure of information. The use of delegated legislation provides flexibility to ensure that the rules can keep up with developments in technology and maintain technological neutrality. Existing rules for the provision of information to registrars in the primary law have, on some occasions, proven incapable of keeping up with these developments, causing an unnecessary regulatory burden to be imposed on both suppliers of data and users of that data. Further, given the possibility of frequent revisions to the data standards, it would be inappropriate to designate the standards in primary legislation.

Importantly, in making the disclosure framework, the Registrar is appropriately empowered to place limits and controls on the disclosure of information. This includes the circumstances in which information must not be disclosed without consent of the person to whom it relates, and circumstances in which enforceable confidentiality agreements are required for the disclosure of information. As an additional safeguard, the new law also allows a person to apply to the registrar to prevent an inappropriate disclosure of registry information that relates to them.

Both the data standards and disclosure framework are disallowable instruments and will therefore be subject to proper Parliamentary oversight. In addition to Parliamentary oversight, the disclosure framework is subject to a privacy impact assessment under the *Privacy Act 1988* and the consultation requirements contained in the *Legislation Act 2003*.

Delegation of Registrar's powers

A key feature of the new regime is that the Registrar will be a Commonwealth body determined by the Minister. Following on from that, different Commonwealth bodies may be appointed for different registry functions. The delegation powers are designed to support this feature by adopting the existing delegation regimes applicable to the body or bodies appointed as Registrar. This is intended to ensure that the Registrar is able to maintain the existing delegation powers available under the various legislative regimes that the Registrar administers. Allowing the rules made by the Minister is to permit the Registrar to delegate its functions and powers as specified in the rules is to allow for situations where the designated body's delegation arrangements are not sufficient to allow for the effective and efficient administration of the regime. However, it is important to note that the Parliament will have the opportunity to assess the validity and appropriateness of the Ministerial rules, as the rules are disallowable instruments and will therefore be subject to proper Parliamentary oversight and the consultation requirements contained in the *Legislation Act 2003*.

Accordingly, I do not consider it necessary to amend the legislation to place additional limitations on the scope of the delegation of the Registrar's powers beyond what is already included in the Bill.

Assisted decision making

In recognition of the number of functions being conferred on the Registrar, the ability for the Registrar to arrange for processes to assist in decision making is designed to provide a technology neutral option for the Registrar to manage this workload. The nature of the Registrar's functions are such that automated decision-making is an appropriate approach for many of its decisions. As a Commonwealth body, the Registrar will be required to comply with all applicable laws, including administrative law requirements. The new regime also makes provision for merits review by the Administrative Appeals Tribunal.

The use of these processes, including computer-assisted decision making, will ensure that the Registrar is able to build efficient systems and processes. The Registrar retains control of these decisions and they are subject to any review provisions that exist in the law. In addition to these review provisions, should a situation arise where Registrar is satisfied that the decision from a process is wrong, the Registrar can change the decision without the need for a person to request a review.

The design of the ability of the Registrar to arrange for these processes is necessary and appropriate to ensure that decisions of the Registrar are efficient, timely and responsive. Any process is still limited by the Registrar's functions and powers, the existing review provisions and the need to comply with administrative and other laws. Any decision made by such processes must comply with all of the requirements of the legislative provisions under which the decision was made. Where it is beyond the capability of a process to comply with the broader legislative framework, the administration of the law would not solely rely on one of these processes.

Offence-specific defences – Director Identification Numbers

The reverse burden of proof is appropriate in the circumstances of these provisions. The requirement to have a Director Identification Number is fundamental to the new regulatory regime. Director Identification Numbers will ensure that the identity of directors can be confirmed and their directorships can be centrally recorded, without the risk of mis-identification. This will be used to assist regulators better detect, deter and disrupt phoenixing and improve the integrity of corporate data maintained by the Registrar.

The defences to the offence of failing to apply for a Director Identification Number are that the person applied for a Director Identification Number within the required period, or that the person was an eligible officer without their knowledge. Both of these defences require knowledge that is particularly within the knowledge of the defendant and it would be more difficult and costly for the prosecution to disprove than for the defendant to establish.

The second offence relates to applying for an additional Director Identification Number. A key role for Director Identification Numbers is to enable officers, regulators and others to keep track of an individual's directorships and identify where phoenix activities are occurring. The integrity of the Director Identification Number register is paramount to the effectiveness of this regulatory regime. The defences available reference information that is particularly within the knowledge of a defendant and would be more difficult for the prosecution to establish.

Directors would generally be expected to keep records of their compliance with applicable law and so the satisfying of the offence-specific defences, should not place a significant burden on them.

I consider that the current framing of these offences is appropriate given the importance of compliance with these particular aspects of the Director Identification Number requirements.

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

Yours sincerely

The Hon Michael Sukkar MP

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

MC20-009955

Senator Helen Polley
Chair
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Dear ~~Senator~~ Senator

Thank you for your email of 6 February 2020 and for the Scrutiny of Bills Committee's consideration of the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (the Bill). You have sought further information about why it is necessary and appropriate to amend the definition of dishonesty in the Criminal Code, the range of offences that will be affected and how the change may impact on defendants' personal rights and liberties.

The Bill amends the definition of dishonesty in the Criminal Code to align with the approach taken by High Court jurisprudence, provide consistency with 2019 amendments to dishonesty offences in the *Corporations Act 2001* (Corporations Act) and respond to operational agencies' concerns about the practical difficulties with the current test.

The current definition of dishonesty in the Criminal Code requires a defendant to have been dishonest according to the standards of ordinary people, and to have *known* that their conduct was dishonest according to the standards of ordinary people (see, for example, the definition in section 130.3 of the Criminal Code). This approach is drawn from the approach in the English case of *R v Ghosh* (1982) EWCA Crim 2 (Ghosh).

In *Peters v The Queen* (1998) 192 CLR 493 (Peters), the High Court endorsed a definition of dishonesty for the purposes of the common law that requires the defendant to have been dishonest according to the standards of ordinary, decent people, but does not require the defendant to have known that their conduct was dishonest according to the standards of ordinary people. The majority judgment observed that there is a degree of incongruity in requiring dishonesty to be determined by reference to whether the accused must have known that their conduct was dishonest according to the standards of ordinary, decent people. As part of the *Peters* decision, a majority of the High Court considered but did not follow the two-limb test in *Ghosh*. The *Peters* test was later affirmed by the High Court in *Macleod v The Queen* [2003] 214 CLR 230.

The Government considers the *Peters* test to be the preferred test for determining dishonesty under the Criminal Code and that it is no longer appropriate or desirable to apply the *Ghosh* test when determining whether conduct is dishonest under the Criminal Code. The question of whether a defendant subjectively knew their conduct was dishonest according to the standards of ordinary people is an irrelevant consideration in determining whether behaviour was dishonest or in establishing the relevant intention.

I am advised that law enforcement and prosecutorial experience has shown that it can be difficult to obtain sufficient admissible evidence to establish that the defendant was aware or knew that they were dishonest according to the standards of ordinary people. This means that even if a person was aware their conduct fell short of community standards, practical difficulties in finding and adducing evidence means a person may too readily escape liability.

While the new definition would define dishonesty by reference to a single objective standard, the application of the test by a court necessarily involves an assessment of the defendant's *subjective* state of mind against this standard. In other words, a prosecution would still need to prove a 'guilty mind'—that the defendant had the subjective knowledge, belief or intention that rendered the relevant conduct dishonest. A finder of fact, usually a jury, would then assess whether that knowledge, belief or intention was dishonest, against the standards of ordinary, decent people. It is also important to note the defence for mistake or ignorance of fact in section 9.1 of the Criminal Code will continue to apply to protect defendants who are under a mistaken belief about, or ignorant of, facts that would negate their culpability. For example, a person accused of dishonestly appropriating property from the Commonwealth under section 131.1 of the Criminal Code could avail themselves of this defence if they were under a genuine but mistaken belief that the property belonged to them.

The decision to revisit this issue has been taken in light of the 2019 amendments to the Corporations Act to apply the *Peters* test to all dishonesty offences under that Act. As the Criminal Code and the Corporations Act currently provide different definitions of dishonesty, I am concerned this has the potential to jeopardise prosecutions where offences under both the Corporations Act and the Criminal Code are brought together. There is a high risk of confusion where juries are required to apply two different tests of dishonesty, which can lead to severance of indictments or charges being dropped altogether. I consider this would be an unacceptable and unfortunate obstacle in holding white collar criminals to account. I am also advised that recent jurisprudence in the United Kingdom has seen a move away from the two-limb test in *Ghosh*.

I note the new definition to be inserted in the Criminal Code would apply not only to offences in the Criminal Code but also to Commonwealth offences that directly import the Criminal Code definition. There are currently 56 offences in the Criminal Code that rely on this definition of dishonesty (set out at **Attachment A**). These include the general dishonesty offences (sections 135.1 and 474.2), offences for the bribery of a Commonwealth public officials (section 141.1) and for dishonestly obtaining or dealing in personal financial information (section 480.4).

A transitional provision has also been included in the Bill to facilitate prosecution of cases involving ongoing criminal conduct that takes place before, or begins before and continues after, the commencement of the proposed amendments. This provision will ensure that defendants who are prosecuted for conduct pre-dating the commencement of Schedule 3 would be prosecuted by reference to the relevant test at the time of their offending.

Thank you for raising these matters with me. I trust this information has been of assistance to the Committee.

Yours sincerely

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

Encl. Attachment A - list of dishonesty offences in the Criminal Code

List of dishonesty offences in the Criminal Code

	Section	Offence
1.	73.9	**Providing or possessing a travel or identity document issued or altered dishonestly or as a result of threats** A person commits an offence if the first person provides or possesses a travel or identity document; and the first person knows that: the issue of the travel or identity document; or an alteration of the travel or identity document; has been obtained **dishonestly** or by threats; and the first person intends that the document will be used to facilitate the entry of another person (the other person) into a foreign country, where the entry of the other person into the foreign country would not comply with the requirements under that country's law for entry into the country; and the first person provided or possessed the document: having obtained (whether directly or indirectly) a benefit to do so; or with the intention of obtaining (whether directly or indirectly) a benefit.
2.	92A.1	**Theft of trade secrets involving foreign government principal** A person commits an offence if: the person **dishonestly** receives, obtains, takes, copies or duplicates, sells, buys or discloses information; and all of the following circumstances exist: the information is not generally known in trade or business, or in the particular trade or business concerned; the information has a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were communicated; the owner of the information has made reasonable efforts in the circumstances to prevent the information becoming generally known; and any of the following circumstances exists: the conduct is engaged in on behalf of, or in collaboration with, a foreign government principal or a person acting on behalf of a foreign government principal; the conduct is directed, funded or supervised by a foreign government principal or a person acting on behalf of a foreign government principal.
3.	131.1(1)	**Special rules about the meaning of dishonesty** For the purposes of this Division, a person's appropriation of property belonging to another is taken not to be dishonest if the person appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.
4.	132.1(1)	**Receiving** A person commits an offence if the person **dishonestly** receives stolen property, knowing or believing the property to be stolen
5.	132.6(1)	**Making off without payment** A person commits an offence if the person, knowing that immediate payment for any goods or services supplied by another person is required or expected from him or her, **dishonestly** makes off without having paid and with intent to avoid payment of the amount due; and the other person is a Commonwealth entity.
6.	132.7(1)	**Going equipped for theft or a property offence** A person commits an offence if the person, when not at home, has with him or her any article with intent to use it in the course of, or in connection with, theft or a property offence.
7.	132.8(1)	**Dishonest taking or retention of property** *Taking*

		A person commits an offence if the person: on a particular occasion, **dishonestly** takes one or more items of property belonging to a Commonwealth entity, where: the value or total value of the property is $500 or more; or the absence of the property from the possession, custody or control of the person who would otherwise have had possession, custody or control would be likely to cause substantial disruption to activities carried on by or on behalf of a Commonwealth entity; and does not have consent to do so from the person who has authority to give consent.
8.	132.8(2)	**Dishonest taking or retention of property** *Retention* A person commits an offence if the person: on a particular occasion, takes one or more items of property belonging to a Commonwealth entity; and dishonestly retains any or all of those items; and does not have consent to the retention from the person who has authority to give consent; and either: at the time of the taking of the property, the value or total value of the property was $500 or more; or the absence of the property from the possession, custody or control of the person who would otherwise have had possession, custody or control is likely to cause substantial disruption to activities carried on by or on behalf of a Commonwealth entity.
9.	134.1(1)	**Obtaining property by deception** A person commits an offence if: the person, by a deception, dishonestly obtains property belonging to another with the intention of permanently depriving the other of the property; and the property belongs to a Commonwealth entity.
10.	134.2(1)	**Obtaining a financial advantage by deception** A person commits an offence if: the person, by a deception, dishonestly obtains a financial advantage from another person; and the other person is a Commonwealth entity.
11.	135.1(1)	**General dishonesty** A person commits an offence if the person does anything with the intention of dishonestly obtaining a gain from another person; and the other person is a Commonwealth entity.
12.	135.1(3)	**General dishonesty** A person commits an offence the person does anything with the intention of dishonestly causing a loss to another person
13.	135.1(5)	**General dishonesty** A person commits an offence if the person dishonestly causes a loss, or dishonestly causes a risk of loss, to another person and the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring.
14.	135.1(7)	**General dishonesty** A person commits an offence if the person does anything with the intention of dishonestly influencing a public official in the exercise of the official's duties as a public official; and the public official is a Commonwealth public official; and the duties are duties as a Commonwealth public official.
15.	135.4(1)	**Conspiracy to defraud** A person commits an offence if the person conspires with another person with the intention of dishonestly obtaining a gain from a third person; and the third person is a Commonwealth entity.
16.	135.4(3)	**Conspiracy to defraud**

		A person commits an offence if the person conspires with another person with the intention of dishonestly causing a loss to a third person; and the third person is a Commonwealth entity.
17.	135.4(5)	**Conspiracy to defraud** A person commits an offence if the person conspires with another person to dishonestly cause a loss, or to dishonestly cause a risk of loss, to a third person; and the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring; and the third person is a Commonwealth entity.
18.	135.4(7)	**Conspiracy to defraud** A person commits an offence if the person conspires with another person with the intention of dishonestly influencing a public official in the exercise of the official's duties as a public official; and the public official is a Commonwealth public official; and the duties are duties as a Commonwealth public official.
19.	141.1(1)	**Bribery of a Commonwealth public official** A person commits an offence if: The person dishonestly: provides a benefit to another person; or causes a benefit to be provided to another person; or causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and the person does so with the intention of influencing a public official (who may be the other person) in the exercise of the official's duties as a public official; and the public official is a Commonwealth public official; and the duties are duties as a Commonwealth public official.
20.	141.1(3)	**Bribery of a Commonwealth public official** A Commonwealth public official commits an offence if the official dishonestly asks for a benefit for himself, herself or another person or receives or obtains a benefit for himself, herself or another person or agrees to receive or obtain a benefit for himself, herself or another person and the official does so with the intention: that the exercise of the official's duties as a Commonwealth public official will be influenced or of inducing, fostering or sustaining a belief that the exercise of the official's duties as a Commonwealth public official will be influenced.
21.	142.1(1)	**Corrupting benefits given to, or received by, a Commonwealth public official** A person commits an offence if the person dishonestly provides a benefit to another person or causes a benefit to be provided to another person or offers to provide, or promises to provide, a benefit to another person or causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person and the receipt, or expectation of the receipt, of the benefit would tend to influence a public official (who may be the other person) in the exercise of the official's duties as a public official; and the public official is a Commonwealth public official; and the duties are duties as a Commonwealth public official.
22.	142.1(3)	**Corrupting benefits given to, or received by, a Commonwealth public official** A Commonwealth public official commits an offence if the official dishonestly asks for a benefit for himself, herself or another person; or receives or obtains a benefit for himself, herself or another person; or agrees to receive or obtain a benefit for himself, herself or another person; and the receipt, or expectation of the receipt, of the benefit would tend to influence a Commonwealth public official (who may be the first-mentioned official) in the exercise of the official's duties as a Commonwealth public official.

23.	142.2(1)	**Abuse of public office** A Commonwealth public official commits an offence if the official exercises any influence that the official has in the official's capacity as a Commonwealth public official; or engages in any conduct in the exercise of the official's duties as a Commonwealth public official; or uses any information that the official has obtained in the official's capacity as a Commonwealth public official; and the official does so with the intention of dishonestly obtaining a benefit for himself or herself or for another person; or dishonestly causing a detriment to another person.
24.	142.2(2)	**Abuse of a public office** A person commits an offence if the person has ceased to be a Commonwealth public official in a particular capacity and the person uses any information that the person obtained in that capacity as a Commonwealth public official and the person does so with the intention of dishonestly obtaining a benefit for himself or herself or for another person; or dishonestly causing a detriment to another person.
25.	144.1(1)	**Forgery** A person commits an offence if the person makes a false document with the intention that the person or another will use it to dishonestly induce a third person in the third person's capacity as a public official to accept it as genuine; and if it is so accepted, to dishonestly influence the exercise of a public duty or function; and the capacity is as a Commonwealth public official.
26.	144.1(3)	**Forgery** A person commits an offence if the person makes a false document with the intention that the person or another will use it to dishonestly cause a computer, a machine or an electronic device to respond to the document as if the document were genuine; and if it is so responded to, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function; and the response is in connection with the operations of a Commonwealth entity.
27.	144.1(5)	**Forgery** A person commits an offence if the person makes a false document with the intention that the person or another will use it to dishonestly induce a third person to accept it as genuine; and if it is so accepted, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function; and the false document is a false Commonwealth document.
28.	144.1(7)	**Forgery** A person commits an offence if the person makes a false document with the intention that the person or another will use it to dishonestly cause a computer, a machine or an electronic device to respond to the document as if the document were genuine; and if it is so responded to, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function; and the false document is a false Commonwealth document.
29.	145.1(1)	**Using forged document** A person commits an offence if the person knows that a document is a false document and uses it with the intention of dishonestly inducing another person in the other person's capacity as a public official to accept it as a genuine; and if it is so accepted, dishonestly obtaining a gain, dishonestly causing a loss, or dishonestly influencing the exercise of a public duty or function; and the capacity is a capacity as a Commonwealth public official.

30.	145.1(3)	**Using forged document** A person commits an offence if the person knows that a document is a false document and uses it with the intention of dishonestly causing a computer, a machine or an electronic device to respond to the document as if the document were genuine; and if it is so responded to, dishonestly obtaining a gain, dishonestly causing a loss, or dishonestly influencing the exercise of a public duty or function; and the response is in connection with the operations of a Commonwealth entity.
31.	145.1(5)	A person commits an offence if the person knows that a document is a false document and uses it with the intention of dishonestly inducing another person to accept it as genuine; and if it is so accepted, dishonestly obtaining a gain, dishonestly causing a loss, or dishonestly influencing the exercise of a public duty or function; and the false document is a false Commonwealth document.
32.	145.1(7)	A person commits an offence if the person knows that a document is a false document and uses it with the intention of dishonestly causing a computer, a machine or an electronic device to respond to the document as if the document were genuine; and if it is so responded to, dishonestly obtaining a gain, dishonestly causing a loss, or dishonestly influencing the exercise of a public duty or function; and the false document is a false Commonwealth document.
33.	145.2(1)	**Possession of forged document** A person commits an offence if the person knows that a document is a false document and has it in his or her possession with the intention that the person or another will use it to dishonestly induce a third person in the third person's capacity as a public official to accept it as genuine; and if it is so accepted, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function; and the capacity is a capacity as a Commonwealth public official.
34.	145.2(3)	**Possession of forged document** A person commits an offence if the person knows that a document is a false document and has it in his or her possession with the intention that the person or another will use it to dishonestly cause a computer, a machine or an electronic device to respond to the document as if the document was genuine; and if it is so responded to, to dishonestly obtain a gain, cause a loss, or dishonestly influence the exercise of a public duty or function; and the response is in connection with the operations of a Commonwealth entity.
35.	145.2(5)	**Possession of forged document** A person commits an offence if the person knows that a document is a false document and has it in his or her possession with the intention that the person or another will use it: to dishonestly induce a third person to accept it as genuine; and if it is so accepted, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function; and the false document is a false Commonwealth document.
36.	145.2(7)	**Possession of forged document** A person commits an offence if the person knows that a document is a false document and has it in his or her possession with the intention that the person or another will use it: to dishonestly cause a computer, a machine or an electronic device to respond to the document as if the document were genuine; and if it is so responded to, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function; and the false document is a false Commonwealth document,
37.	145.3(1)	**Possession, making or adaptation of devices etc. for making forgeries**

		A person commits an offence if: the person knows that a device, material or other thing is designed or adapted for the making of a false document (whether or not the device, material or thing is designed or adapted for another purpose); and the person has the device, material or thing in his or her possession with the intention that the person or another person will use it to commit an offence against section 144.1.
38.	145.3(2)	**Possession, making or adaptation of devices etc. for making forgeries** A person commits an offence if: the person makes or adapts a device, material or other thing; and the person knows that the device, material or other thing is designed or adapted for the making of a false document (whether or not the device, material or thing is designed or adapted for another purpose); and the person makes or adapts the device, material or thing with the intention that the person or another person will use it to commit an offence against section 144.1.
39.	145.4(1)	**Falsification of documents etc.** A person commits an offence if the person dishonestly damages, destroys, alters, conceals or falsifies a document and the document is: kept, retrained or reissued for the purposes of a law of the Commonwealth; or made by a Commonwealth entity or a person in the capacity of a Commonwealth public official; or held by a Commonwealth entity or a person in the capacity of a Commonwealth public official; and the first-mentioned person does so with the intention of: obtaining a gain; or causing a loss.
40.	145.4(2)	**Falsification of documents etc.** A person commits an offence if: the person dishonestly damages, destroys, alters, conceals or falsifies a document; and the person does so with the intention of: obtaining a gain from another person; or causing a loss to another person; and the other person is a Commonwealth entity.
41.	145.5(1)	**Giving information derived from false or misleading documents** A person commits an offence if the person dishonestly gives information to another person; and the information was derived, directly or indirectly, from a document that, to the knowledge of the first-mentioned person, is false or misleading in a material particular; and the document is: kept, retained or issued for the purposes of a law of the Commonwealth; or made by a Commonwealth entity or a person in the capacity of a Commonwealth public official; or held by a Commonwealth entity or a person in the capacity of a Commonwealth public official; and the first-mentioned person does so with the intention of: obtaining a gain; or causing a loss.
42.	145.5(2)	**Giving information derived from false or misleading documents** A person commits an offence if: the person dishonestly gives information to another person; and the information was derived, directly or indirectly, from a document that, to the knowledge of the first-mentioned person, is false or misleading in a material particular; and the first-mentioned person does so with the intention of: obtaining a gain from another person; or causing a loss to another person; and the other person is a Commonwealth entity.
43.	471.1(1)	**Theft of mail-receptacles, articles or postal messages** A person commits an offence if: the person dishonestly appropriates: a mail-receptacle; or an article in the course of post (including an article that appears to have been lost or wrongly delivered by or on behalf of Australia Post or lost in the course of delivery to Australia Post); or a postal message; and the person does so with the intention of permanently depriving another person of the mail-receptacle, article or postal message. *Dishonesty*

		For the purposes of this section, a person's appropriation of a mail-receptacle, article or postal message may be dishonest even if the person or another person is willing to pay for the mail-receptacle, article or postal message.
44.	471.2(1)	**Receiving stolen mail-receptacles, articles or postal messages** A person commits an offence if the person dishonestly receives stolen property, knowing or believing the property to be stolen.
45.	471.3(1)	**Taking or concealing of mail-receptacles, articles or postal messages** A person commits an offence if the person dishonestly takes or conceals: a mail-receptacle; or an article in the course of post (including an article that appears to have been lost or wrongly delivered by or on behalf of Australia Post or lost in the course of delivery to Australia Post); or a postal message.
46.	471.4	**Dishonest removal of postage stamps or postmarks** A person commits an offence if the person dishonestly: (a) removes any postage stamp affixed to, or printed on, an article; or (b) removes any postmark from a postage stamp that has previously been used for postal services.
47.	471.5	**Dishonest use of previously used, defaced or obliterated stamps** A person commits an offence if the person dishonestly uses for postal services a postage stamp: that has previously been used for postal services; or that has been obliterated; or that has been defaced.
48.	471.7(1)	**Tampering with mail-receptacles** A person commits an offence if the person dishonestly: opens a mail-receptacle; or tampers with a mail-receptacle.
49.	471.8	**Dishonestly obtaining delivery of articles** A person commits an offence if the person dishonestly obtains delivery of, or receipt of, an article in the course of post that is not directed to the person.
50.	474.2(1)	**General dishonesty with respect to a carriage service provider** *Obtaining a gain* A person commits an offence if the person does anything with the intention of dishonestly obtaining a gain from a carriage service provider by way of the supply of a carriage service.
51.	474.2(2)	**General dishonesty with respect to a carriage service provider** *Causing a loss* A person commits an offence if the person does anything with the intention of dishonestly causing a loss to a carriage service provider in connection with the supply of a carriage service.
52.	474.2(3)	**General dishonesty with respect to a carriage service provider** *Causing a loss* A person commits an offence if: the person dishonestly causes a loss, or dishonestly causes a risk of loss, to a carriage service provider in connection with the supply of a carriage service; and the person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring.
53.	474.47(1)	**Using a carriage service for inciting property damage, or theft, on agricultural land** A person (the offender) commits an offence if: the offender transmits, makes available, publishes or otherwise distributes material; and the offender does so using a carriage service; and the offender does so with the intention of inciting another

		person to: unlawfully damage property on agricultural land; or unlawfully destroy property on agricultural land; or commit theft of property on agricultural land.
54.	480.4	**Dishonestly obtaining or dealing in personal financial information** A person commits an offence if the person: **dishonestly** obtains, or deals in, personal financial information; and obtains, or deals in, that information without the consent of the person to whom the information relates.
55.	480.5(1)	**Possession or control of thing with intent to dishonestly obtain or deal in personal financial information** A person commits an offence if: the person has possession or control of anything; and the person has that possession or control with the intention that the thing be used: by the person; or by another person; to commit an offence against section 480.4 (dishonestly obtaining or dealing in personal financial information) or to facilitate the commission of that offence.
56.	480.6	**Importation of thing with intent to dishonestly obtain or deal in personal financial information** A person commits an offence if the person: imports a thing into Australia; and does so with the intention that the thing be used: by the person; or by another person; in committing an offence against section 480.4 (dishonestly obtaining or dealing in personal financial information) or to facilitate the commission of that offence.

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

Reference: MS20-000081

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

Thank you for the Committee Secretary's email of 6 February 2020 to my office concerning the Senate Standing Committee for the Scrutiny of Bills' (the Committee) consideration of the National Vocational Education and Training Regulator Amendment Bill 2019 (the Bill). I appreciate the time taken to review the Bill and thank you for the opportunity to address the important issues raised by the Committee.

Significant matters in delegated legislation

The Committee sought advice about leaving the content and publication requirements for audit reports to delegated legislation. In particular the Committee asked:

- why it is considered necessary and appropriate to leave significant matters, such as the content and publication requirements for audit reports, to delegated legislation
- the appropriateness of amending the Bill to include at least high-level guidance regarding the content and publication of audit reports on the face of the primary legislation.

Under new section 17A, where an audit is conducted under section 17 of the *National Vocational Education and Training Regulator Act 2011* (NVETR Act), the National VET Regulator will be required to prepare an audit report. The report will need to be in a form (if any) approved by the Minister and must also comply with the audit report rules (if any are made – see item 81, Schedule 1). A similar provision is made in new subsection 35(1B) in relation to the preparation of a compliance audit.

The legislation does circumscribe and provide high-level guidance on the possible content of the audit reports.

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First, the audit report will be about audits authorised under section 17 or section 35 of the NVETR Act. Under section 17, the National VET Regulator may conduct an audit of any matter relating to an application for registration under the NVETR Act. Under section 35, the National VET Regulator may conduct an audit to assess whether an NVR registered training organisation's (NVR RTO) operations continue to comply with the NVETR Act or the VET Quality Framework. Audits, and therefore audit reports, are not able to go beyond the parameters of those two sections.

Second, the Bill makes clear that an audit report must not contain personal information unless it is the name of the applicant for registration or the NVR RTO to which the report relates (for example where the organisation is a sole trader).

The Bill does not provide any more detail about the content of the audit reports as the Government intends to consult, in coming months, with the National VET Regulator, and other stakeholders on what content would be of greatest assistance to stakeholders and vocational education and training (VET) students. The Government also intends to avoid publication of reports which are unfair to NVR RTOs and which might damage their businesses. Consultations with stakeholders (including NVR RTOs) will provide guidance on this. Including any more detail on the content of the audit reports in the Bill may unnecessarily constrain this consultation process and its outcomes.

It is vital that the content of the audit reports be capable of rapid change in the event that the published audit reports are not meeting their objectives. Best practice requires that the Government respond quickly to the evolving needs of industry and of the VET sector generally. Including content requirements in the audit report rules allows the Government to make changes to the content of audit reports in a timely fashion.

In relation to publication requirements, it is proposed that they be included in the audit report rules to allow for necessary flexibility. The date that the National VET Regulator will be required to start publishing audit reports will be a key publication requirement that will be set out in the audit report rules. It is proposed to include this requirement in the audit report rules rather than in the Bill so that the start date for this requirement is flexible and can be aligned to other key VET sector governance reforms currently being developed by Government. Aligning these different measures will ensure that officers within the National VET Regulator who are responsible for writing the audit reports will have time to receive adequate training in drafting audit reports for publication.

Reversal of the evidential burden of proof

The Committee sought advice about the reversal of the evidential burden of proof made under subsections 116(1A) and 116(2). In particular the Committee:

- requests the Minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The Committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.

The NVETR Act currently provides, under subsections 116(1) and 116(2) that it is an offence to provide or offer to provide all or part of a VET course unless a person is an NVR RTO. Under section 3 of the NVETR Act, an NVR RTO is a training organisation that is registered by the National VET Regulator under the Act. The onus is on the prosecution to prove the elements in subsections 116(1) and 116(2).

New subsection 116(1A) and (3) of the NVETR Act establish a defence against action under subsections 116(1) and (2) for a person who is not an NVR RTO who provides or offers to provide all or part of a VET course. If that person has a written agreement in place with an NVR RTO which permits them to provide or offer to provide a VET course on behalf of the NVR RTO, they will not be in breach of subsections 116(1) or (2).

As noted, the defendant (that is the unregistered person) has the evidentiary burden in relation to new subsections 116(1A) and 116(3) of the NVETR Act. However, the evidentiary burden is merely to produce a copy of the written agreement with the NVR RTO for the provision of all or part of a VET course. It is reasonable to expect that an unregistered person that enters into an arrangement with an NVR RTO to provide or offer to provide a VET course will retain a copy of that agreement in their business records. It should neither be difficult nor costly for the unregistered person to locate a copy of this written agreement for the purposes of meeting the evidentiary burden, particularly in comparison to the difficulty the prosecution would face in proving that such a written agreement does not exist.

Exemption from disallowance

The Committee sought advice regarding the exemption of ministerial directions made under subsection 160(1) from disallowance, given it appears the scope of directions that may be given to the National VET Regulator are being expanded. In particular the Committee asked:

- why it is considered necessary and appropriate to continue to exempt ministerial directions made under subsection 160(1) from disallowance in circumstances where it appears the scope of directions that may be given to the National VET Regulator is being expanded
- the appropriateness of amending the Bill to provide that the directions be subject to disallowance to ensure appropriate parliamentary oversight.

The Minister's power to issue a direction to the Australian Skills Quality Authority (ASQA) under section 160 of the NVETR Act is amended to remove the uncertainty and lack of clarity surrounding the existing requirement that the Minister may issue a direction if 'the Minister considers that the direction is necessary to protect the integrity of the VET sector'.

Under the proposed amendments, the Minister may issue a direction to ASQA in regard to the performance of its functions and the exercise of its powers. This power will align with similar powers of the responsible Minister under the *Tertiary Education Quality and Standards Agency Act 2011*. ASQA's independence will be maintained, as subsection 160(2) of the NVETR Act prevents the Minister directing ASQA with regard to a regulatory decision in respect of individual cases, specifically the registration of a person or body as an NVR RTO, the accreditation of a particular course as a VET accredited course, a particular NVR RTO, or a person in respect of whom a particular VET accredited course is accredited.

Directions by a Minister fall under exemptions found under section 9 of *Legislation (Exceptions and Other Matters) Regulation 2015* – Classes of legislative instruments that are not subject to disallowance. Item 2 of section 9 states that a legislative instrument that is a direction by a Minister to any person of body is not subject to disallowance.

I also draw the Committee's attention to section 44(1) of the *Legislation Act 2003* which states that a legislative instrument is not subject to disallowance if the enabling legislation for the instrument facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more states or territories. ASQA was established pursuant to the Intergovernmental Agreement for Regulatory Reform in Vocational Education and Training. It is not therefore appropriate for the Bill to be amended.

I thank the Committee for its interest and I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash
11 /02/2020

The Hon Dan Tehan MP
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Our Ref: MS20 000084

20 FEB 2020

Senator Helen Polley
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Dear Senator Helen,

I write in response to the scrutiny comments of the Senate Standing Committee for the Scrutiny of Bills (Committee) in relation to the Student Identifiers Amendment (Higher Education) Bill 2019 (Bill), as outlined in the Committee's *Scrutiny Digest 1 of 2020*.
I appreciate the time taken to review the Bill and thank you for the opportunity to address the important issues raised by the Committee.

Significant matters in delegated legislation – disclosure of personal information

The Committee requested advice as to why it is considered necessary and appropriate to leave the requirements for when personal information can be disclosed under proposed subsections 18(3) and 25(3) to delegated legislation, and the appropriateness of amending the bill to set out these requirements on the face of the primary legislation.

Proposed subsections 18(3) and 25(3) provide that the disclosure of a student identifier or other personal information of a student by the Student Identifiers Registrar (Registrar) may be authorised if the use or disclosure of said information is for the purposes of research that relates, directly or indirectly, to the provision of higher education and meets the requirements I will specify in a legislative instrument made under proposed subsection 18(4) or 25(4).

The amendments proposed in the Bill mirror the current requirements of subsection 18(2) of the *Student Identifiers Act 2014* (Act). This subsection allows the Registrar to use or disclose a student identifier of an individual for the purposes of research that relates (directly or indirectly) to education or training, or requires the use of student identifiers or information about education or training, and that meets the requirements specified by the Ministerial Council.

The Ministerial Council does not deal with higher education matters, and so the requirements they set out regarding the use and/or disclosure of a student identifier for research purposes are not appropriate for higher education students. In place of the Ministerial Council, new subsections 18(4) and 25(4) allow the Minister for Education to specify, by legislative instrument, requirements that must be met for the Registrar to disclose a student identifier (or other personal information) for purposes relating to research.

It is considered necessary and appropriate to include these requirements in delegated legislation to be consistent with existing practice in relation to the disclosure of student identifiers for research purposes, and to ensure sufficient flexibility in the development of these requirements.

It is important to note that the legislative instruments I make under these proposed provisions are legislative instruments for the purposes of the *Legislation Act 2003* and, as such, are subject to the Parliamentary disallowance process. The disallowance process provides Parliamentary oversight and scrutiny over any legislative instrument made. I will also undertake appropriate consultation in making any legislative instrument.

Further, the Registrar cannot use or disclose student identifiers, or other personal information of students, under new subsections 18(3) and 25(3) unless I have made legislative instruments under new subsections 18(4) and 25(4). These legislative instruments will provide safeguards for students to ensure the use and disclosure of their student identifiers and other personal information for research purposes does not unnecessarily or unreasonably limit their right to privacy.

Significant matters in delegated legislation – exemptions

The Committee requested further detailed advice on why it is considered necessary and appropriate to leave the following significant matters to delegated legislation, and the appropriateness of amending the Bill to set out at least high-level guidance in relation to the these matters on the face of the primary legislation:

- the ability of the Minister for Education under proposed subsection 53A(3) to exempt providers, awards and individuals from the requirement that an individual must have a student identifier
- the matters that must be considered by the Registrar when exempting individuals from the requirement to have a student identifier under proposed subsection 53A(9).

Under the current law, section 53 of the Act provides that a registered training organisation must not issue a vocational education and training (VET) qualification or VET statement of attainment to an individual if the individual has not been assigned a student identifier, unless an "issue" applies. Currently, the Minister for Employment, Skills, Small and Family Business has the power to, with the agreement of the Ministerial Council, make a legislative instrument that specifies such "issues". The effect of this existing provision is to allow a legislative instrument to outline cases where an exemption to the requirement to hold a student identifier applies.

The Minister for Employment, Skills, Small and Family Business has made the *Student Identifiers (Exemptions) Instrument 2018* (Exemptions Instrument) which sets out the circumstances in which an exemption may currently apply.

However, I note that section 53 of the Act, and any exemptions set out in the Exemptions Instrument, applies to the VET sector, and, as such, is not relevant to higher education students. It is proposed that the Act be amended to include new section 53A which will set out the exemptions application procedure for students in higher education. This provision will largely mirror the current arrangements for VET and the new arrangements being proposed in the Student Identifiers Amendment (Enhanced Student Permissions) Bill 2019. It is necessary and appropriate to include these matters in delegated legislation to be consistent with existing practice.

Further, allowing the matters that the Registrar must take into account when making an exemption decision to be included in a legislative instrument will ensure that the development and progression of the student identifier is adaptable to the evolving needs of students. This is important as new and genuine reasons justifying a student's exemption may emerge over time. As the cohort of students applying for student identifiers expands, it is essential that the reasons an exemption may be applied are adaptable and I have flexibility to respond to changing circumstances.

It is also important to note that in 2019, less than 20 students applied for an exemption to the requirement to hold a student identifier. As the subset of students who request an exemption is so small, the matters considered by the Registrar in granting an exemption have been varied and unique. In order to respond to the changing needs of students, it is not practical to broadly govern these matters in primary legislation.

Merits review

The Committee has also asked for more detailed advice on why merits review will not be available in relation to determinations made by the Registrar under proposed subsection 53(A)6. Those determinations relate to applications from students for an exemption from the requirement to have a student identifier. There are a number of reasons why it is not considered appropriate for merits review to be available for students seeking an exemption.

Firstly, section 53A will operate primarily as a restriction imposed on higher education providers in respect of when they can and cannot issue a higher education award. Importantly, the ultimate determinative issue from a provider's or student's point of view is whether or not the award can be issued. If a student seeking an exemption is not granted one, rather than seeking a review of the decision through the Administrative Appeals Tribunal (AAT), the student can simply apply for a student identifier in order to receive their award. In this context, an exemption from the requirement to hold a student identifier is simply a procedural step along the way to an ultimate outcome of receiving an award.

It is notable, in this context, that one of the factors in the Administrative Review Council's guidance document helpfully referred to by the Committee (*What decisions should be subject to merit review?*) for when merits review may not be suitable is where the decision involves a preliminary or procedural decision (as discussed at paragraph 4.3-4.7 of the guidance document). As a step along the way to receiving a qualification or statement of attainment, an exemption decision under section 53A is in substance a preliminary or procedural step.

Secondly, it is important to ensure that the limited resources of the AAT are reserved for matters where genuine issues that turn on merits are in dispute. This is consistent with another factor referred to in the Administrative Review Council's guidance document, concerning decisions which have such limited impact that the costs of review cannot be justified. It is anticipated that the matters that will be included in the legislative instrument will be matters that will not lend themselves to factual dispute.

For instance, if, as currently exists for VET, the legislative instrument specifies circumstances where a person has expressed a genuine personal objection as a case where an exemption would apply, the facts in respect of that objection are not likely to be meaningfully in dispute before a merits review tribunal. Of course, judicial review, including under the *Administrative Decisions (Judicial Review) Act 1977*, will remain available to students or affected providers where the exemption decision has been made involving an error of law.

A merits review process also appears disproportionate to the nature of the decision and the instances of exemption requests. The number of individuals seeking an exemption in the VET sector under the Act is negligible in comparison to the number of student identifiers issued by the Registrar. The number of student identifiers issued in 2018 was 1,464,862 whilst only 24 applications for exemptions were received in the same year. No applications for exemptions were denied. Making decisions of the Registrar subject to merits review would not be an efficient use of Commonwealth resources as the cost of administering a merits review process would be greatly disproportionate to the number of individuals requesting an exemption.

Further, external merits review at the AAT may delay the outcome of the request for an individual by a number of years, delaying their award conferral and impacting their prospects of obtaining meaningful employment and greater career aspirations.

As the Registrar is obliged to make decisions based on fair and accountable reasoning, the decision to deny or allow an exemption would be carefully considered and denied only on appropriate grounds. As such, it would be time-consuming and costly to engage in *de novo* review of these decisions, and not highly beneficial or protective for the individual/s requesting an exemption.

The unique student identifiers application is a product and system designed solely to support the user's education journey, helping to maintain lifelong learning and pursue meaningful careers. An exemption to the requirement to have a student identifier would limit the individual's interaction and engagement with their tertiary study, and hinder their admissions processes to VET and higher education courses.

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

Yours sincerely

[redacted]

DAN TEHAN

[redacted]

The Hon Dan Tehan MP
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20 FEB 2020

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

Thank you for your email of 6 February 2019 regarding the *Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019*. Below are responses to the questions posed by the Committee with regard to this Bill.

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

- why it is considered necessary and appropriate to provide the minister with the power to exempt online search engine providers from applications for an injunction under proposed section 127A
- why it is considered necessary and appropriate for the exemptions to be contained in delegated legislation
- the appropriateness of amending the Bill to provide at least high level guidance as to when the minister can grant exemptions under proposed subsection 127A(11).

Response

Considering the serious and prohibitory nature of this remedy, it is necessary and appropriate that certain online search engine providers are exempted from the application of injunctions for the following reasons. The intent of injunctions is to target major online search engine providers that index search results on the World Wide Web and are likely conduits to online locations that host information about cheating services. It is not intended to capture: smaller search engines providers that do not have the same reach; entities that offer third-party internal (e.g. intranet) search functions; entities that provide search services to employees, members or clients that are confined to discrete sites (such as educational and cultural institutions, not for-profit organisations); or entities that provide search functionality that is limited to their own sites or to particular content or material (such as real estate or employment websites or the National Library of Australia's Trove search). As such, exemptions, where necessary, will provide a 'safety net' to ensure that applications for injunctions do not unfairly target smaller search engine providers that do not have the same reach or entities that provide only internal (intranet) or limited search functions.

It is unlikely that the power to grant exemptions will be used. This is because proposed subsection 127A(7) states that in determining whether to grant an injunction, the Court may take into account a range of factors, including whether an injunction is an appropriate response in the circumstances or in the public interest.

These factors, set out in proposed subsection 127A(7), reduce the likelihood of an injunction being granted against smaller search engine providers, or providers of services that include search functionality as a peripheral activity. Therefore, the power under proposed subsection 127A(11) will be a remedy of last resort.

The Committee also queried why exemptions need to be made by the Minister in delegated legislation without at least high guidance in the primary legislation about when the Minister can grant exemptions. The online search engine market is rapidly developing where, to varying degrees, search functionality is now in-built into virtually all websites and applications. Given the rapid changes underway in the market and the development of products and services that employ search functionality in some form, statutory guidance would run the risk of failing to accurately target intended parties. The proposed approach of a reserve declaratory power for the Minister provides a more flexible way of dealing with the small potential that an injunction is brought against a party to which these provisions were not intended to apply. Given the rapidly evolving nature of the online environment, it could also be difficult to provide meaningful high level guidance about the circumstances when exemptions will be granted, especially since the decision to grant an exemption is highly circumstance-specific. As such, the Bill does not seek to provide guidance in the primary legislation about when the Minister can grant exemptions.

Having the exemptions contained in delegated legislation enables the Minister to flexibly respond to an evolving online environment and ensure exemptions are appropriately targeted. In summary, the instrument-making power in proposed subsection 127A(11) is intended to provide a 'safety-net'. Although it is highly unlikely that this power would ever be exercised, any declaration made under the new subsection 127A(11) would be a legislative instrument and therefore subject to Parliamentary scrutiny and disallowance.

1.97 The committee requests the minister's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of each provision which reverses the burden of proof is assisted if it explicitly addresses the relevant principles as set out in the Guide to Framing Commonwealth Offences.

Response

The reversal of the evidential burden of proof is proposed in section 197A in order to ensure consistency with other sections of the Tertiary Education Quality and Standards Agency Act 2011 (TEQSA Act), namely, section 188(2) which makes it an offence for an entrusted person to disclose or use higher education information for purposes not set out in relevant legislation, and also reverses the evidential burden of proof. It is appropriate to reverse the evidential burden of proof for the offence in proposed section 197A because it meets the criteria set out in 4.3.1 of the Guide to Framing Commonwealth Offences. More specifically, it is peculiarly within the knowledge of the defendant whether they disclosed or used academic cheating services information obtained in their capacity as an entrusted person that was not for the purposes of the TEQSA Act or the Education Services for Overseas Students Act 2000. As the defendant peculiarly knows how they obtained the information, what they disclosed or used the information for and how this related to the purposes of the relevant Acts, it is significantly easier and less costly for the defendant to establish that an offence has not occurred than for the prosecution to prove it has. As the reversal of the evidential burden of proof in proposed section 197A meets the two criteria set out in the Guide to Framing Commonwealth Offences, it is appropriate to use an offence-specific defence in this instance.

In accordance with the Guide to Framing Commonwealth Offences, my department will include the reasons for placing the burden of proof on the defendant for each provision where the evidential burden is reversed in the Bill's explanatory material.

Thank you for the opportunity to respond to these matters and I trust the information provided is helpful.

Yours sincerely

[redacted]

DAN TEHAN

[redacted]

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: IS20-000004

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

Dear Chair

Transport Security Amendment (Testing and Training) Bill 2019

I thank the Scrutiny of Bills Committee (the Committee) for its consideration of the Transport Security Amendment (Testing and Training) Bill 2019 (the Testing and Training Bill), and note that the Committee seeks further information about the Testing and Training Bill as outlined in Scrutiny Digest No 1 of 2020 (pages 34-36).

As the Committee is aware, the Testing and Training Bill makes amendments to the *Aviation Transport Security Act 2004* (Aviation Act) to provide an explicit legislative basis for aviation security inspectors to conduct covert tests of the security systems used by aviation industry participants using 'test pieces' to ensure industry compliance with the Aviation Act.

The Testing and Training Bill also makes amendments to the Aviation Act and the *Maritime Transport and Offshore Facilities Security Act 2003* (Maritime Act) to provide the Secretary of the Department of Home Affairs (Department) with the power to determine the qualification and training requirements for screening officers across Australia in a legislative instrument, and to exempt a class of screening officers from compliance with one or more of the requirements, where satisfied exceptional circumstances exist.

The questions raised by the Committee concern:

(1) why it is necessary and appropriate to leave the requirements for aviation security tests to delegated legislation;

(2) whether it is necessary to amend the bill to specify that 'test pieces' used by aviation security inspectors must be inert; and

(3) the appropriateness of amending proposed section 94B of the Aviation Act and proposed section 165B of the Maritime Act to require that the number of exemptions issued by the Secretary be reported in the Department's annual report.

Requirements for aviation security tests

The Committee sought advice on the appropriateness of leaving the requirements for aviation security tests in delegated legislation.

To be effective, testing of the security systems would follow the threat types used by people - here and overseas - who have attempted, and in some cases have been successful, taking weapons into a passenger cabin or having unauthorised explosives loaded into an aircraft's cargo hold. To test security systems, aviation security inspectors use examples derived from old and new types of threats and novel methods used by terrorists around the world.

The requirements referred to in paragraphs 79(2)(h) and 80(2)(f) of the Aviation Act set out in Schedule 1 to the Testing and Training Bill are intended to prescribe relevant administrative or procedural matters in relation to testing aviation industry participants' security systems without exposing operational methods that might be subject to exploitation.

Testing requirements must be flexible enough to cater for modifications needed to respond to emerging threat types and risk levels. As a consequence, requirements must also be rapidly amendable to enable the adoption of new methods for thwarting attacks on aviation assets and infrastructure. Establishing the requirements in the primary legislation may place an unintended fetter on Australia's ability to rapidly respond to unanticipated changes in the security threat or risk environments.

While I thank the Committee for raising this matter, in developing the Testing and Training Bill, careful consideration was given to the most appropriate, flexible, and adaptable place to set out the administrative or procedural requirements for testing security systems. I concluded that it is necessary and appropriate to leave the requirements to delegated legislation.

Specifying that 'test pieces' are inert

The Committee also sought advice on the 'test pieces' used by aviation security inspectors to conduct security systems tests.

As indicated in the Explanatory Memorandum to the Testing and Training Bill, the proposed use of 'test pieces' is intended to ensure that the tests of security systems

are as realistic as possible.

Aviation security inspectors are issued with test pieces for conducting systems testing in the course of their duties. The test pieces issued to aviation security inspectors are items provided by the Department that resemble or mimic weapons, for example handguns that cannot fire (because they are replicas or because they have had the firing pin removed), knife shaped implements that have no sharp edges (that cannot cut or stab) and simulated improvised explosive device or SIED (non-functional and unable to detonate). The training which aviation security inspectors receive, in combination with the test items issued by my Department, remove any risk of a 'real' weapon being used to conduct authorised systems testing. The Department does not issue functional or live weapons to aviation security inspectors.

If an aviation security inspector were to source and use an item that was a functional weapon to test a security system, they would face disciplinary action or be charged with an offence under another law of the Commonwealth, the States or Territories. The Testing and Training Bill provides aviation security inspectors with an immunity from prosecution in certain circumstances. That immunity would not be available to that officer if the good faith element of the defence was absent.

I thank the Committee for bringing this question to my attention. My Department will amend the Bill following legal and technical advice. The Committee may wish to note that the Department would treat the use of non-authorised test items as a serious disciplinary issue.

Adequacy of parliamentary oversight

The Committee has sought my advice in relation to Parliamentary oversight of the use of the proposed Secretarial power to exempt a class of screening officers from one or more training or qualification requirements set out in section 94B of the Aviation Act and 165B of the Maritime Act. I appreciate the Committee's acknowledgement of the need for operational security.

The power to exempt a person from training or qualification requirements is intended to meet unanticipated and unavoidable needs, for example, where a training course cannot be offered in a particular locality for a short period of time, or in an emergency situation so that a port can continue to operate. The exemptions are explicitly not intended for use in any circumstance other than the exceptional.

As the powers are only to be exercised in exceptional circumstances, I do not anticipate large numbers of exemptions to be made.

The Committee suggested that Parliament should have some oversight of the exercise of the exemption, and suggested that the number of exemptions issued by the Secretary for these purposes might be included in the Department of Home Affairs' Annual Report.

After consideration of the concerns raised by the Committee, I have asked my Department to amend the Bill to legislate the information on the exercising of the screening exemption powers through the Department's Annual Report or other appropriate mechanism.

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

Yours sincerely

PETER DUTTON 24/02/20

SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION, FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS20-000369

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24 FEB 2020

Dear Senator Polley,

I write in response to your letter of 6 February 2020 requesting information in relation to the Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020 (the Bill).

The Committee sought advice as to whether review rights should be afforded to a person in the proposed new Part 3C, similar to those available in the existing section 20P of *the Superannuation (Unclaimed Money and Lost Members) Act 1999* (the Act).

Part 3C of the Act, inserted by the Bill, provides that where an eligible rollover fund account is below $6,000 the superannuation provider must transfer the money to the Commissioner of Taxation by 30 June 2020. All remaining eligible rollover fund accounts must be transferred to the Commissioner of Taxation by 30 June 2021. As the Committee has identified, the decision from the superannuation provider to transfer the funds is not subject to a merits review.

In addition to the proposed Part 3C, the Act already sets out a number of requirements, where, when certain conditions are met, a person's superannuation balance must be transferred to the Commissioner of Taxation. This includes where a member has been uncontactable, has a balance below a certain amount, or has sustained a continued period of inactivity. It also includes when a temporary resident has departed Australia. It is only this later case where review rights are afforded. In this case the right of review applies to the determination notice from the Commissioner of Taxation that the person is a departed temporary resident. This decision is reviewable under Part IVC of the *Taxation Administration Act 1953* as a decision of the Commissioner of Taxation (and not of the superannuation provider).

Unlike those provisions which deal with departed temporary residents, proposed Part 3C does not involve any administrative decision making. Therefore, it is not appropriate to afford the same review rights to an account holder of an eligible rollover fund. The proposed Part 3C is instead drafted consistently with other parts of the Act where the decision that a person has met certain criteria is made exclusively by the superannuation provider, and not the Commissioner of Taxation.

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In addition to this, the requirement to transfer the money to the Commissioner of Taxation under the proposed Part 3C is a statutory requirement, and the decision to transfer the money will not be reliant on a government body or public official exercising a discretion. Therefore, a merits review arrangement would not be appropriate.

Instead, if there has been any wrongdoing or administrative error by the superannuation provider, the member may be able to take action under the best interest obligations contained in the *Superannuation Industry (Supervision) Act 1993*. The Australian Financial Complaints Authority can also consider a complaint from a person about a superannuation provider.

I trust this information will be of assistance to you.

Yours sincerely

Senator the Hon Jane Hume