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

MC20-031882

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

Dear ~~Senator Polley~~

I am writing in response to the Senate Scrutiny of Bills Committee's (the Committee) request for advice on the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (the Bill), as set out in its *Scrutiny Digest 14 of 2020.*

The Committee sought advice as to whether the standard of proof for making an extended supervision order (ESO) could be amended to a 'high degree of probability', rather than on the 'balance of probabilities'. The Committee also commented on other aspects of the Bill, including the information protection provisions in proposed sections 105A.14B-105A.14D, the proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), and the proposed expansion of the monitoring and surveillance powers.

I have enclosed additional information in response to the matters raised by the Committee, which I hope will be of assistance.

Yours sincerely

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

Encl. Response to the Senate Standing Committee for the Scrutiny of Bills *Scrutiny Digest 14 of 2020*

Response to the Senate Standing Committee for the Scrutiny of Bills
***Scrutiny Digest 14 of 2020* –Counter Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020**

Trespass on person rights and liberties—standard of proof

1.51 The committee therefore requests the Attorney-General's advice as to whether proposed paragraph 105A.7A(1)(b) can be amended to require the court be satisfied to a 'high degree of probability' (rather than on the 'balance of probabilities') that an offender poses an unacceptable risk of committing a serious Part 5.3 offence before the court may make an extended supervision order.

The civil standard of proof required for making of an ESO or interim supervision order (ISO) is appropriately set to the 'balance of probabilities' (which is the same standard of proof for making a control order) to reflect the fact that these orders impose restrictions on an individual's personal liberties that fall short of custody. As such, this standard of proof is lower than the current standard of proof required for making a continuing detention order (CDO), which is a high degree of probability. It is also consistent with the standard of proof that ordinarily applies in other civil proceedings.

As the Committee noted, the Independent National Security Legislation Monitor's (INSLM) 2017 report, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, examined the interaction between Divisions 104 and 105A and recommended that Division 105A of the *Criminal Code* be amended to allow State and Territory Supreme Courts to make a CDO or an ESO if satisfied to a high degree of probability that the offender poses an unacceptable risk. Since the INSLM's 2017 Report the Government has further developed the ESO scheme based on experience with the control order and CDO schemes, and the experience of states which have post-sentence orders, including New South Wales' scheme under the *Terrorism (High Risk Offenders) Act 2017* and Victoria's scheme under the *Serious Offenders Act 2018*.

General observations and comments made by the Committee

I note that the Committee also made additional comments about aspects of the Bill. While the Committee has not requested further advice in relation to these comments, I have provided additional information below to assist the Committee.

Trespass on personal rights and liberties—general comment

1.47 The committee acknowledges that the proposed extended supervision order scheme is less restrictive of liberty than the existing continuing detention order scheme. However, given the severity of conditions that may be imposed on a person subject to an extended supervision order, the committee considers that the extended supervision order scheme may still be characterised as fundamentally inverting basic assumptions of the criminal justice system, including that a person should only be punished for a crime which it has been proved beyond a reasonable doubt that they have committed, not the risk that they may in future commit a crime.

1.48 The committee draws its scrutiny concerns to the attention of senators and leaves the appropriateness of the proposed extended supervision order scheme to the consideration of the Senate as a whole.

The imposition of an ESO is not a penalty for criminal offending, as the purpose of an ESO is protective rather than punitive or retributive. While eligibility for a post-sentence order (ESO or CDO) depends on the person having been convicted of a specified terrorism offence, the decision of the court as to whether to impose an ESO is based on an assessment of future risk, rather than as punishment for past conduct. An order could only be made where the court is satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence once released in the community following their custodial sentence. Post-sentence orders are thus based on the risk posed by the offender as they are approaching completion of their custodial sentence, rather than at the time of conviction, consistent with their protective rather than punitive purpose. This is in line with similar state schemes which serve to protect the community from high risk violent and sexual offenders.

Procedural fairness—right to a fair hearing

1.61 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of:

- *proposed sections 105A.14B–105A.14D which provide that certain information (such as national security information) may be excluded from the copies of applications and materials provided to an offender and their legal representative; and*
- *the proposed amendments to the National Security Information (Criminal and Civil Proceedings) Act 2004 set out in items 189–210 of Schedule 1 which would allow the court to consider and rely on national security information which is not disclosed to the offender or their legal representative.*

1.62 The committee considers that these provisions may negatively impact an offender's ability to effectively contest an application for an extended supervision order that is made against them.

Proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004*

As the Committee noted, the Bill would amend the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) to extend existing court-only evidence provisions, which currently apply in control order proceedings to protect national security information, to ESO proceedings. These provisions allow the court make special orders to protect national security information in control order proceedings, including an order which would allow the court to consider information where that information has not been disclosed to the respondent or their legal representatives in the control order proceeding (also referred to as 'court-only evidence'). These are exceptional provisions and would only be used in exceptional circumstances, where it is absolutely necessary to present highly sensitive information to a court to support an application.

The Bill also amends the NSI Act to ensure that special advocates, which are available where court-only evidence is considered in control order proceedings, will also be available where court-only evidence is considered in ESO proceedings. As noted in the Explanatory Memorandum to the Bill, a special advocate represents the offender's interests during the parts of a hearing from which the offender and their ordinary legal representative are excluded when the court agrees to consider highly sensitive court-only evidence. The special advocate is able to make arguments to the court querying the need to withhold information from the offender, and can challenge the relevance, reliability

and weight accorded to that information. The appointment of a special advocate ensures that the offender will have a reasonable opportunity to present their case and challenge the arguments adduced by the other party.

The appointment of a special advocate is at the discretion of the court, which is best placed to assess whether a special advocate is necessary to assist the court process and safeguard the rights of the offender in proceedings. In some instances, the court may consider itself sufficiently equipped to safeguard the rights of the offender without the appointment of a special advocate. It is appropriate that that decision be made on a case by case basis by the court.

As the Committee noted, before making an order to allow for court-only evidence, the court must be satisfied that the offender has been given sufficient information about the allegations on which the request for an order was based to enable effective instructions to be given in relation to those allegations. Whether the offender is provided the 'sufficient information' prior to the special advocate seeing the sensitive national security information will depend on the circumstances of the case. The offender will be given sufficient information about the allegations such that they can instruct their ordinary legal representative, and special advocate in relation to those allegations, prior to the special advocate having seen the sensitive national security information.

Proposed sections 105A.14B, 105A.14C and 105A.14D

Proposed sections 105A.14B, 105A.14C and 105A.14D would provide that the AFP Minister may exclude information from post-sentence order applications or materials where the information is national security information, subject to a claim of public interest immunity, or is terrorism material. These provisions are framed to ensure appropriate protections for information while ensuring the offender's right to a fair hearing.

Under section 105A.14B, the AFP Minister is not required to include any information in the application or material provided to the offender or their legal representative if a Minister is likely to take any actions in relation to the information under the NSI Act, or seek an order of a court preventing or limiting disclosure of the information. There are a number of actions that a Minister can take under the NSI Act to protect sensitive information contained within an application or materials for post-sentence order proceedings. For example, the Attorney-General may issue a civil non-disclosure certificate that provides whether sensitive information in an application may be disclosed, to whom and in what form. The NSI Act enables the Attorney-General to provide the document to the offender with the information redacted, and provide summaries of the information or statements of facts that it would be likely to prove.

In all cases, it will ultimately be a matter for the court to determine how information is to be protected in proceedings, balancing the need to protect sensitive information with the need to protect the offender's right to a fair hearing. Furthermore, as noted in the Explanatory Memorandum, except where court-only evidence is used (as discussed above), the material in the relevant application that is ultimately provided to the offender is the same material that the court may consider when determining whether to make or vary a post-sentence order in relation to the offender. For example, if a court orders that sensitive material be redacted or withheld and a summary or statement of facts be provided instead, then the summary or statement of facts will stand in place of the original sensitive material in the substantive proceedings. A court could then only have

regard to the summary or statement of facts during the substantive proceedings, and would have no further regard to the original sensitive material.

Section 105A.14C outlines the obligations of the AFP Minister where information has been excluded from an application on the basis of public interest immunity. If the court upholds the public interest immunity claim and information is excluded from the application on that basis, it cannot be relied upon by either party or the court for the purposes of the proceeding.

Section 105A.14D enables the Minister to apply to the court for an order in relation to the manner in which 'terrorism material' is to be dealt with as part of providing it as part of an application. 'Terrorism material' is material that advocates support for engaging in any terrorist acts or violent extremism, relates to planning or preparing for, or engaging in, any terrorist acts or violent extremism, or advocates joining or associating with a terrorist organisation. Under section 105A.14D, the court may make an order in relation to the manner in which such material is to be dealt with, including that it be provided to the offender's legal representative or be available for inspection by the offender at specified premises. This measure ensures that materials of this nature cannot be disseminated further or used in any way that would pose a risk to the community.

Trespass on personal rights and liberties—expansion of monitoring and surveillance powers

1.67 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of extending significant monitoring and surveillance powers under a number of Acts to persons subject to an extended supervision order, noting that these powers may trespass on a person's rights and liberties.

The Bill would amend the *Surveillance Devices Act 2004* (SD Act) and the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to extend the surveillance and monitoring powers which broadly apply to orders made under Division 104 of the *Criminal Code* to orders made under Division 105A. The purpose of these amendments is to enhance the ability of law enforcement to protect the community from serious Part 5.3 offences, including by monitoring a person's compliance with, or determining suitability for, a post-sentence order. The scope of these warrants is appropriately limited to offenders who are eligible for, or are subject to, orders made under Division 105A. This means these warrants are only available in relation to terrorist offenders who have been convicted of a specified terrorism offence.

The monitoring and surveillance powers set out in the existing legislation are subject to strict safeguards, limitations and protections, and these arrangements will be extended to post-sentence orders. This includes independent authorisation by eligible judges or nominated Administrative Appeals Tribunal (AAT) members, limits on the duration of surveillance, oversight by the Commonwealth Ombudsman, transparent public reporting and record keeping requirements. In addition, the matters a judge or AAT member must have regard to include the likely value of the information to be obtained under the warrant and the extent of interference with a person's privacy.

The Bill preserves long-standing practices regarding the appropriate decision-maker for intrusive surveillance powers under the TIA Act and SD Act. Under the Bill, these warrants will continue to be issued by independent decision-makers, including AAT

members nominated by the Attorney-General. These independent decision-makers play a critical authorisation role in both the TIA Act and SD Act.

The ability for nominated AAT members to authorise the use of these powers is not new. AAT members have played an independent decision-maker role in relation to interception and stored communication warrants under the TIA Act since 1998 and surveillance device warrants in the SD Act since 2004. AAT members undertake this independent decision-maker role in their personal capacity. The skill and experience of AAT members make them ideal candidates to assess applications and make independent decisions which involve balancing of law enforcement or national security interests with affected individuals' privacy and other rights and liberties.

The use of AAT members as independent decision-makers under the TIA and SD Acts is appropriate, necessary and critical to the effective operation of those Acts. In particular, it ensures there is a sufficient pool of decision-makers available to issue warrants sought by law enforcement agencies across Australia.

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: MS20-002604

Senator Helen Polley
Chair
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Dear Senator

I refer to correspondence dated 8 October 2020 from Glenn Ryall, Committee Secretary, regarding the Senate Standing Committee for the Scrutiny of Bills' consideration of the Crimes Legislation Amendment (Economic Disruption) Bill 2020.

As set out in the Committee's *Scrutiny Digest No. 13 of 2020*, the Committee has requested additional information on the Bill. I have considered this request and my response is provided below at Attachment A.

I thank the Committee for the opportunity to clarify these matters, and for its important work in considering legislation before Parliament.

I have copied this letter to the Chair of the Senate Standing Committees on Legal and Constitutional Affairs' Legislation Committee, Senator Amanda Stoker.

I trust that the information provided will assist the Committee in its consideration of the Bill.

Yours sincerely

PETER DUTTON 02/11/20

Attachment A

Significant Penalties

The Committee has requested more detailed advice as to the justification for the maximum penalties imposed by each of the proposed money laundering offences at Schedule 1 to the Crimes Legislation Amendment (Economic Disruption) Bill 2020 (the **Bill**). The maximum penalties for these offences range from imprisonment for four years to imprisonment for life.

General justification

Part 3.1.1 of the *Guide to Framing Commonwealth Offences* (the **Guide**) provides that a high maximum penalty will be justified where there are strong incentives to commit the offence or where the consequences of the commission of the offence are particularly dangerous or damaging.

The high maximum penalties under the proposed offences are necessary to overcome the strong incentives that currently exist to commit money laundering.

Transnational serious and organised crime (**TSOC**) groups are primarily motivated by profit, and money laundering is an essential component of their criminal business model. These groups are no longer confined to a particular crime-type or association, but have instead evolved into sophisticated multinational businesses, constantly shifting their operations to create, maintain and disguise illicit financial flows. Money laundering enables these groups to disguise illicitly obtained funds behind a veil of legitimacy, allowing them to realise their profits from criminal activity, hide and accumulate wealth, avoid prosecution, evade taxes and fund further criminal activity.

In this profit-focused environment, demand for money laundering services has increased dramatically, creating financial incentives that have fueled the proliferation of global laundering networks. Money laundering remains extremely profitable within the illicit economy, and networks are able to charge high commissions to move money around the world in a manner that is incredibly difficult to trace. Australian law enforcement experience indicates that these commissions are generally five to ten per cent of the value of the money laundered. This is a considerable sum when one considers the total value of money laundered globally, which the United Nations estimates to be 2-5% of global GDP, or approximately $800 billion - $2 trillion in current US dollars.[1]

The high maximum penalties imposed under the proposed offences can also be justified as money laundering has a particularly dangerous and damaging impact on society.

Money laundering remains a fundamental enabler of almost all TSOC activity, allowing profits from crime to be realised, concealed and reinvested in further criminal activity, or used to fund corruption and lavish lifestyles. Money laundering systematically devastates the health, wealth and safety of Australia's citizens through the conduct it enables, such as illicit drug trafficking, terrorism, tax evasion, people smuggling, theft, fraud, corruption and child exploitation. The Australian Institute of Criminology estimates that overall TSOC activity costs Australia up to AUD47.4 billion per year.

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[1] See UNODC – Money Laundering and Globalisation, available on line at https://www.unodc.org/unodc/en/money-laundering/globalization.html

Money laundering also directly impacts on Australia's economic wellbeing, distorting markets, generating price instability and damaging the credibility of Australia's institutions and economy. These consequences can deter foreign investors and impede economic growth. Money laundering also diminishes the tax revenue collected by the Australian Government, causing indirect harm to millions of Australians that would otherwise benefit from Government programs funded through this revenue.

Penalty benchmarks

As the Committee points out, part 3.2.1 of the Guide states that a penalty 'should be consistent with penalties for existing offences of a similar kind or of a similar seriousness'. The maximum penalties of the proposed offences in Schedule 1 are consistent with those imposed under the existing money laundering offences in Division 400 of the Criminal Code.

Offences of a similar kind

As outlined in the table below, the maximum penalty of the existing offences (highlighted in blue) and proposed offences (highlighted in green) reflect: the level of awareness a defendant has as to the link between property (which includes money) and criminal activity; the seriousness of their conduct in relation to this property; and the value of the property.

	$10 million or more	$1 million or more	$100,000 or more
Believes property is proceeds of indictable crime or intends that property will become an instrument of indictable crime	Life imprisonment and/or 2,000 penalty units (**pu**)	25 years' imprisonment and/or 1500 pu	20 years' imprisonment and/or 1200 pu
Believes property is proceeds of general crime and concealed or disguised it	Life imprisonment and/or 2,000 pu	25 years' imprisonment and/or 1500 pu	20 years' imprisonment and/or 1200 pu
Reckless as to whether property is proceeds of indictable crime or the risk that property will become an instrument of indictable crime	15 years' imprisonment and/or 900 pu	12 years' imprisonment and/or 720 pu	10 years' imprisonment and/or 600 pu
Reckless as to whether property is proceeds of general crime and concealed or disguised property	15 years' imprisonment and/or 900 pu	12 years' imprisonment and/or 720 pu	10 years' imprisonment and/or 600 pu
Negligent as to whether property is proceeds of indictable crime or the risk that property will become an instrument of indictable crime	6 years' imprisonment and/or 360 pu	5 years' imprisonment and/or 300 pu	4 years' imprisonment and/or 240 pu
Negligent as to whether property is proceeds of general crime and concealed or disguised property	6 years' imprisonment and/or 360 pu	5 years' imprisonment and/or 300 pu	4 years' imprisonment and/or 240 pu
Reasonable grounds to suspect that property is proceeds of indictable crime	5 years' imprisonment and/or 300 pu	4 years' imprisonment and/or 240 pu	3 years' imprisonment and/or 180 pu

By expanding on the existing penalty structure under Division 400, the proposed offences enable the legislature to be more precise in specifying the penalties it considers to be

appropriate for particular conduct. This provides a greater level of certainty, increasing the deterrent effect of these offences, while ensuring that penalties under the proposed offences can be justified by reference to existing offences.

Offences of a similar seriousness

The most serious of the proposed offences under subsections 400.2B(1)-(3) involve laundering property valued at $10,000,000 or more and are punishable by a maximum sentence of life imprisonment. This maximum penalty is the most serious that can be imposed under Commonwealth law, and is currently only applied to abhorrent offences such as people smuggling, espionage, large-scale illicit drug trafficking and terrorism.

The proposed offences under subsections 400.2B(1)-(3) are of similar seriousness to existing offences punishable by life imprisonment as the consequences of committing these offences is often just as damaging.

For example, if an offender commits an offence of dealing with an instrument of indictable crime under subsection 400.2B(1) by providing $10,000,000 directly to a drug syndicate, this would enable the syndicate to purchase approximately 33 to 110 kilograms of cocaine. Even on the most conservative estimates, the commission of the money laundering offence will have allowed the syndicate to possess and sell sixteen times the 'commercial quantity' of cocaine required to attract a maximum sentence of life imprisonment.[2]

If the drug syndicate provides $10,000,000 of proceeds from the sale of this cocaine to a person, who subsequently commits a proceeds offence under subsection 400.2B(2) or (3) in disguising the illicit origins of these proceeds, this may have concealed multiple offences punishable by life imprisonment from law enforcement. With the proceeds 'cleaned', the drug syndicate could use these proceeds to buy and resell further commercial quantities of cocaine, or to invest in a lavish lifestyle and thereby incentivise others to engage in drug offending, enabling the cycle of serious offending to continue.

The offences under subsections 400.2B(1)-(3) will only be triggered by the most serious forms of conduct. In order to commit an offence under subsections 400.2B(1)-(3), the property must be proceeds of indictable crime, proceeds of general crime, or the person must intend that the property will become an instrument of crime. A further requirement is that a person must have a high degree of awareness of the link between the property they are dealing with and criminal activity.

A person will only be liable in relation to property (including money) under the offences where they:

- deal with property that is 'proceeds of indictable crime' while believing it to be 'proceeds of indictable crime' (subsection 400.2B(1)) – for example, dealing with $10,000,000 while believing that it was derived from selling illicit drugs; or

- deal with property intending that it will become an instrument of crime (subsection 400.2B(1)) – for example, providing $10,000,000 to a drug syndicate while meaning to ensure that these funds are used to purchase drugs or aware that this will occur in

[2] See item 43 of table 1 of Schedule 2 to the Criminal Code Regulations 2019 and section 304.1 of the Criminal Code

the ordinary course of events; or

- engage in conduct in relation to property that is 'proceeds of general crime' while believing it to be 'proceeds of general crime' and concealing or disguising its origins (subsections 400.2B(2)-(3)) – for example, concealing the origins of $10,000,000 while believing that these funds to be derived from crime generally.

Reversal of the legal burden of proof

The Committee has requested advice as to why the defence at subsection 400.9(5) reverses a legal burden of proof and why it is not sufficient to reverse an evidential burden. Part 4.3.2 of Guide provides that the defendant should generally bear an evidential burden of proof for an offence-specific defence, unless there are good reasons to depart from this position.

Subsection 400.9(5) imposes a legal burden of proof on the defendant, requiring them to establish, on the balance of probabilities, that they had no reasonable grounds for suspecting that money or property was derived or realised, directly or indirectly, from some form of unlawful activity. A legal burden of proof is higher than an evidential burden, which requires a defendant to merely adduce or point to evidence that suggests a reasonable possibility that a particular matter exists or does not exist.

It is necessary to impose a legal rather than evidential burden on the defendant to ensure that the offences can pierce the 'veil of legitimacy' that money laundering networks frequently use to disguise their activities.

These networks often exploit seemingly legitimate banking products; remittance services; front companies; complex financial, legal and administrative arrangements; real estate and other high-value assets; gambling activities; and a range of formal and informal nominee arrangements to conceal proceeds of crime and obscure beneficial ownership. This layering activity generates a paper trail that can be used to establish a 'reasonable possibility' of legitimacy that, in many cases, would be sufficient to meet an evidential burden under subsection 400.9(5) and thereby allow these networks to avoid criminal liability.

An evidential burden may be met by pointing to evidence, even slender evidence, adduced as part of the prosecution case. Hence a defendant could discharge an evidential burden by pointing to an answer provided in a police record of interview which suggested that the money or other property was derived from a legitimate business activity. By imposing a legal burden of proof on the defendant, subsection 400.9(5) ensures that courts look beyond this 'reasonable possibility' to properly examine the genesis and operation of structures used to legitimise transactions, reducing the effectiveness of layering activity.

Parliamentary scrutiny—section 96 grants to the states

The Committee has requested advice as to whether the Bill can be amended to include:

- at least high-level guidance as to the terms and conditions on which financial assistance may be granted, and
- a requirement that written agreements with states and territories about grants of financial assistance relating to crime prevention made under proposed Division 4 of Part 4-3 are tabled in Parliament within 15 sitting days of being made and on the internet within 30 days after being made.

The advice relates to proposed Division 4 of Part 4-3 (the **new funding mechanism**) of the *Proceeds of Crime Act 2002* (the **POC Act**), which would allow the Minister for Home Affairs to provide financial assistance to a State or Territory through the COAG Reform Fund.

The Committee's proposed amendments would be duplicative

The amendments suggested by the Committee would duplicate existing limitations imposed by Parliament, existing oversight mechanisms and the existing mechanisms through which the terms and conditions on which financial assistance will be provided are made public in appropriate circumstances.

Under proposed subsection 298A(1) of the POC Act, Parliament limits the Minister to only making a grant of financial assistance to a State or Territory for a narrow range of purposes, including crime prevention, law enforcement, drug treatment and/or drug diversion measures. Where the Minister decides that a grant of financial assistance should be made to a State or Territory, proposed sections 298E and 298F of the POC Act further require the relevant amount to be debited from the Confiscated Assets Account and sent through the COAG Reform Fund to the State or Territory recipient. The new funding mechanism would not circumvent any existing approval processes required to make payments to States, and large programs of expenditure would still be subject to the budget approval process.

It is also important to note that the new funding mechanism operates as an alternative to the existing mechanism under section 298 of the POC Act, which allows the Minister to approve expenditure to organisations for the same purposes. In practice, the new funding mechanism is only likely to be used in a narrow range of circumstances, usually where a State or Territory is best placed to deliver a particular measure. For example, if the Commonwealth wishes to provide financial assistance to an established State program to deliver grants to schools to improve security infrastructure, the Commonwealth could authorise payments to the State via the COAG Reform Fund.

The new funding mechanism, like the existing mechanisms under section 298, is also limited by the balance of the Confiscated Assets Account pursuant to subsection 80(1) of the *Public Governance Performance and Accountability Act 2013*.

The conditions by which financial assistance is provided will be outlined under National Partnership Agreements with the States, which are subject to well-established transparency and oversight mechanisms. National Partnership Agreements are typically published on the Federal Financial Relations website, although this is not a statutory requirement, and Agreements may also be outlined through an exchange of letters between Ministers.

To effect payment under an Agreement, the relevant State must provide evidence to the Department of Home Affairs that a key milestone has been met. If the Department is satisfied, it will submit a payment request to Treasury, which will then authorise the payment if the payment request complies with the Agreement. This authorisation is formalised in a determination by a Treasury portfolio minister that is subsequently lodged on the Federal Register of Legislation.

Once payment is made to the relevant State or Territory, it will be required to abide by any applicable oversight and transparency mechanisms when delivering the funded program. These mechanisms differ from State to State.

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Our Ref: MC20-025736

26 OCT 2020

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Dear Senator Helen,

Thank you for your email of 8 October 2020 from your office regarding the Scrutiny of Bills Committee's consideration of the Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Bill 2020. I am pleased to provide the following response to the matters raised in Scrutiny Digest 13 of 2020.

As the committee notes, the Bill supports amendments to the Higher Education Standards Framework (Threshold Standards) made under Section 58 of the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act), which were recommended by the independent Review of the Higher Education Provider Category Standards (PCS Review) undertaken in 2019 by Emeritus Professor Peter Coaldrake AO. At my request, the review's recommendations were considered by the Higher Education Standards Panel (the Panel), which further consulted stakeholders on draft amendments to the Threshold Standards before providing the Australian Government with a recommended approach. I am consulting state and territory Education Ministers and the Tertiary Education Quality and Standards Agency (TEQSA) on this proposal as required by section 58(3) of the TEQSA Act.

The three questions posed by the committee relate to:

1. Should the Threshold Standards remain as a standalone legislative instrument or be incorporated into the TEQSA Act?
2. Should updated research requirements for Australian University category providers proposed by the PCS Review be included in the Threshold Standards or written into the TEQSA Act?
3. If the Threshold Standards and research requirements remain in a legislative instrument, should the TEQSA Act contain high level guidance on their content?

These are important questions that I will answer in sequence.

1. **Should the Threshold Standards remain as a standalone legislative instrument or be incorporated into the TEQSA Act?**

The Higher Education Standards Framework should remain in delegated legislation rather than be incorporated into the TEQSA Act.

As I have outlined above, the process that is mandated by the TEQSA Act to make or amend the Threshold Standards is multi-layered. Section 58 of the TEQSA Act requires that the Minister must not make a standard unless:

- a draft of the standard has been developed by the Panel
- the Minister has consulted with each of the following about the draft:
    - the Council consisting of the Ministers for the Commonwealth and each State and Territory responsible for higher education (i.e. the Education Council)
    - if the Minister is not also the Research Minister (i.e. the Minister responsible for the Australian Research Council Act 2001)—the Research Minister
    - TEQSA.
- the Minister has had regard to the draft developed by the Panel, and any advice or recommendations received from the Panel or those other parties.

This process is time consuming but delivers a very important outcome—engagement with and ownership of the standards by higher education stakeholders, including the providers that are subject to regulation against the standards, and by all jurisdictions in the Federation, which have tacitly but not formally delegated administration of higher education policy and funding arrangements to the Commonwealth.

In addition to these process constraints, the requirements for appointing members of the Panel, set out in Subsection 167(2) of the TEQSA Act ensure that, collectively, the Panel's membership has broad knowledge and expertise in both university and non-university higher education delivery and standards development and has regard to the perspectives of different states and territories, students and provider staff. Subsection 168(2) of the TEQSA Act also specifies that 'the Panel must consult interested parties when performing its functions'. This means that the expert advisory body with responsibility for developing any draft new or amended standards is itself broadly representative of sector perspectives and must directly engage with those impacted by its work before providing advice to government. This ensures the Panel can give the Government of the day unvarnished independent advice on the best approach. Indeed, the Panel's advice has been relied on repeatedly by the Government not just to guide proposed changes to the Threshold Standards but other matters critical to assuring the quality of Australian higher education.

The primary function for the Threshold Standards is to provide a basis for TEQSA as the independent national regulator, to assure the quality of higher education delivery. These are not the funding rules, which are set out in the *Higher Education Support Act 2003*, but, rather, reflect the shared understanding and agreement of higher education providers and other relevant stakeholders as to what 'quality' means in higher education delivery.

The process and stakeholder input required to amend or create new standards is set out in the TEQSA Act. But while primary legislation can appropriately constrain a delegated legislation-making process, it would be unusual to similarly constrain the power of Parliament to make changes if the Threshold Standards were incorporated directly within the TEQSA Act. This could put at risk the acceptance, ownership and effective consent of those being regulated to the terms on which their operation is permitted.

Quality standards in any field of endeavour are inevitably dynamic and need constant monitoring, review and occasional updating to reflect new learnings, shared experience and evolving good practice. The committee noted that the Threshold Standards have only been amended twice since their creation in 2011. The context and nature of these amendments needs to be acknowledged, however. As noted in Bills Digest No. 14, 2020–21, the initial (2011) Threshold Standards were created out of the National Protocols for Higher Education Approval Processes, agreed by the Commonwealth and state and territory higher education ministers in 2000 and revised in 2007. The changes made since their creation involved minor technical amendments to fix some anomalies in 2013 and a complete rewrite of the entire instrument in 2015, apart from the Provider Category Standards—consideration of which were deferred to a subsequent separate review.

The 2015 Threshold Standards instrument delivered a more streamlined and integrated standards framework that removed a significant amount of duplication and reflected current practice of higher education delivery. It followed an intensive review by the Panel over nearly three years, that involved wide consultation with the higher education sector and other stakeholders, including state and territory governments, including 230 written submissions over the entire period. This review set a high benchmark for future Panel activity. The instrument came into effect from January 2017 and involved significant adjustment by the higher education sector to understand the different approach, and by TEQSA to completely revise its guidance and support materials. The last three years has seen the new standards bedded down. This includes through providers gradually adopting them as a framework for their internal management and governance which, if pursued in this way, offers the promise of significant reductions in administrative burden associated with regulatory assessments.

Now the Provider Category Standards and criteria for awarding self-accrediting authority have also been comprehensively reviewed by an independent reviewer, with further scrutiny and consultation by the Panel—both of which engaged widely with stakeholders. Professor Coaldrake held a large number of both open and targeted stakeholder meetings and received 67 written submissions to his review. In developing its advice, the Panel held a stakeholder forum with around 250 attendees in November 2019, a webcast and various other stakeholder meetings, received over 40 written responses to a February 2020 consultation paper and consulted extensively with TEQSA. In a very real sense, the PCS Review is the final part of the initial strategic review.

It is not the case that the Standards lack dynamism or change. Far from it. The combination of the initial Panel and subsequent PCS reviews will have seen the Threshold Standards comprehensively analysed and rewritten to reflect contemporary best practice. The capacity for that level of sector input to, ownership and acceptance of the content of the standards would, I feel, be compromised were they to be set in stone by incorporation into primary legislation.

2. **Should updated research requirements for Australian University category providers proposed by the PCS Review be included in the Threshold Standards or written into the TEQSA Act?**

It is appropriate that the updated research requirements for the Australian University provider category recommended by the PCS Review remain part of the Threshold Standards and not be separately written into the TEQSA Act.

Recommendation 5 of the PCS Review report states:

> 'Along with teaching, the undertaking of research is, and should remain, a defining feature of what it means to be a university in Australia; a threshold benchmark of quality and quantity of research should be included in the Higher Education Provider Category Standards. This threshold benchmark for research quality should be augmented over time.'

Professor Coaldrake proposed that by 2030, universities should be expected to undertake research 'at or above world standard' in at least three or 50 per cent of the broad fields of education it delivers, whichever is greater. Until that level of performance is required, there should be a lower benchmark of at least three or 30 per cent of the broad fields of education the university delivers, whichever is greater.

The Australian Government's response to the review, while recognising that research benchmarks are ideally set at a world-class standard, notes that such benchmarks 'must also recognise work of national standing in Australia-specific fields such as Australian studies and Australian literature'.

While the specific measures for research quality recommended by the PCS Review and Australian Government response are newly defined, the issue they address is not new and has been a core element of the Threshold Standards from their creation in 2011. Both the 2011 and 2015 Threshold Standards instruments specified that the undertaking of research is a fundamental requirement for university status. They outline that an Australian University category provider must, among other things undertake:

> 'research that leads to the creation of new knowledge and original creative endeavour at least in those (at least three) broad fields of study in which Masters Degrees (Research) and Doctoral Degrees (Research) are offered.'

Similar research requirements apply in both the Australian University College and Australian University of Specialisation categories but with progressively lower numbers of fields of study specified.

Over several years, however, TEQSA has identified that the lack of an explicit indication as to the quality of research activity required for registration as a university makes the assessment of whether new applicants or existing providers meet these standards difficult. Currently these judgments are left to TEQSA with no formal guidance as to the approach it should take.

In effect, TEQSA has had to develop its own policy on this, which is outlined in some detail in its application guide for registration in a university category, including:

> 'whether the quality and quantity of research being undertaken meets the expectations of the national and international academic community for an Australian university. In assessing the quality of research, TEQSA will have regard to the assessment model used by the Australian Research Council (ARC) for the most current Excellence in Research for Australia evaluation, including for the quality of research outputs.'

In its submission to the PCS Review, TEQSA recommended that:

> 'Requirements for research included in any future university category should include indications of the quantity and quality of research required, and provide support for TEQSA to undertake benchmarking against comparable providers registered in university categories.'

The new benchmarks seek to clarify this measurement by setting principles-based thresholds that can be judged using readily available metrics such as the Excellence in Research for Australia assessments conducted by the ARC. This approach is not dissimilar from the approach TEQSA has articulated in its application guide. If a provider is not currently included in such an assessment framework—e.g. a new applicant for university status—they would need to offer other evidence of a robust and quality research program, exactly as occurs now, drawing on measures such as published and peer-reviewed research papers, etc. Providers will have the added benefit, though, of a clearly articulated benchmark to work towards.

Rather than imposing a new requirement, the research benchmarks clarify the existing requirement. Professor Coaldrake is explicit about this in his final report of the PCS Review, noting:

> 'The research criteria have been revised to provide more guidance and scope for TEQSA regulation including setting requirements for quality and quantity of research.'

The benchmarks proposed by Professor Coaldrake are relatively modest, especially in the first 10 years of operation. On the basis of publicly available Excellence in Research for Australia assessments alone, it is not anticipated that any public university would have difficulty achieving the initial benchmark of research in at least three or 30 per cent of the broad fields of education the university delivers, whichever is greater. No university has indicated that it fears it will not meet the proposed benchmarks. In its advice to the Minister on implementing the PCS Review recommendations, the Higher Education Standards Panel suggested giving effect to Professor Coaldrake's '2030' timeframe for the higher threshold as 'within 10 years after entry to the 'Australian University' category', which would apply a full 10 year transition period to existing providers moving to assessment under the revised Threshold Standards as well as to providers entering the category for the first time in the future.

It should also be noted these benchmarks are about quality rather than quantity or volume. There is nothing inherent in the benchmarks that would disadvantage a smaller institution.

The 'research of national standing' benchmark ensures that smaller research programs that focus on issues that respond to important community and national needs but may not be able to be compared with world standard will also be acknowledge, respected and valued.

As a threshold of quality to be achieved, these benchmarks belong most appropriately in the Threshold Standards along with the other defined threshold quality measures across the full range of institutional activity necessary to deliver higher education. It would also be inappropriate to specify this one threshold in the TEQSA Act, while leaving other threshold measures in a legislative instrument—especially considering the related measure in the current Threshold Standards is contained in the legislative instrument. The same arguments articulated above about the need for sector-engaged development and implementation apply here too. Moving this threshold into the TEQSA Act would reduce the sector's 'ownership' and capacity to influence should it be the subject of future reconsideration.

3. If the Threshold Standards and research requirements remain in a legislative instrument, should the TEQSA Act contain high level guidance on their content?

I do not consider it is necessary to incorporate specific guidance on the content of the Threshold Standards in the TEQSA Act. The process mandated by the TEQSA Act to amend the Threshold Standards means that they cannot change without significant scrutiny by higher education stakeholders, the expert advice of the Higher Education Standards Panel and TEQSA, input from state and territory governments and finally the opportunity for Parliamentary review. As ably demonstrated by the change process currently underway, this means that precedence and consensus play a very significant role in guiding the evolution or replacement of content within the Threshold Standards, to the point that any guidance overlayed by provisions of the TEQSA Act could be seen as stifling the opportunity for reform and innovation. Indeed, amendments in the Bill respond to advice from the Panel and independent review findings that even the very high level guidance previously embedded in the TEQSA Act was unhelpful and should be removed.

The 2011 TEQSA Act effectively included high level guidance on the content of both the 'threshold' and 'other' standards by naming four different types of threshold standards and three types of additional standards. These were:

<u>Threshold standards</u>

- the Provider Registration Standards
- the Provider Category Standards
- the Provider Course Accreditation Standards
- the Qualification Standards.

<u>Other standards</u>

- the Teaching and Learning Standards
- the Information Standards
- the Research Standards.

Even this broad guidance as to the content of the standards proved unhelpful, however. A significant problem found with this approach was that the initial Threshold Standards, being transaction focused and based around different types of regulatory assessments, inevitably led to a great deal of duplication of content within the different types of threshold standards. Many quality issues relevant to provider registration, for example, are also relevant to course accreditation but were restated in those original standards.

Only the Threshold Standards were ever made. No effort was made to create Teaching and Learning Standards, Information Standards or Research Standards. In fact, the initial Threshold Standards included their own content relating to teaching and learning, information and research. So much so, that specialised standards in those areas were unnecessary and would only have increased the level of duplication across statutes.

Perceptions change over time and the 2012–14 review by the inaugural Higher Education Standards Panel proposed moving to a more integrated standards framework against seven activity domains that largely removed duplication. This new approach is reflected in the 2015 legislative instrument and represented a significant change in approach.

The 2017 Review of the Impact of the TEQSA Act on the Higher Education Sector, undertaken by Deloitte Access Economics, agreed that the different types of standards should be removed from the TEQSA Act to better facilitate adoption of the integrated standards framework recommended by the Panel. Three types of non-threshold standards —Teaching and Learning Standards, Information Standards and Research Standards—were removed in 2019 through the *Tertiary Education Quality and Standards Agency Amendment Act* 2019. The current Bill will remove the four types of Threshold Standards specified—Provider Registration Standards, Provider Category Standards, Provider Course Accreditation Standards and Qualification Standards, leaving just one overarching category of 'Threshold Standards'. Provision for a minister to make 'other standards against which the quality of higher education can be assessed' if desired, at Section 58(1)(h), is retained, however. This could include, for example, where the Government wished to describe aspirational standards that recognised quality delivery in a particular area that are above the minimum threshold required for registration.

The experience, so far, with the Higher Education Standards Framework suggests that—at least for these standards—even high level guidance on content can present a barrier to innovation. It would not be useful to include guidance specifying the content of either the Threshold Standards or specific elements within those standards—such as the research benchmarks—in primary legislation, given the evolving nature of stakeholder perspectives and objectives. For the Higher Education Standards Framework, the protections built into the process to amend or create new standards provides adequate protection to ensure the outcome is well considered and sector-appropriate.

I thank the Committee again for raising these matters with me.

Yours sincerely

DAN TEHAN

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
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MC20-000800

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

Thank you for the correspondence from your Committee Secretary dated 16 October 2020, requesting further information about issues identified by the Senate Standing Committee for the Scrutiny of Bills (the Committee) in relation to the Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020 (the Bill) as set out in the *Scrutiny Digest 14 of 2020*.

As outlined in my letter of 2 October 2020, the Bill will amend the *Radiocommunications Act 1992* (the Act) to implement recommendations of the 2015 Spectrum Review (the Spectrum Review) and fulfil the Australian Government's commitment to modernise the legislative framework for spectrum management.

The Committee has requested that an Addendum to the Explanatory Memorandum be tabled, including the key points from the information from my letter of 2 October 2020 concerning interim bans and amnesties, computerised decision making, and the delegation of administrative power to accredited persons. I thank the Committee for its review of these matters and an Addendum to the Explanatory Memorandum will be tabled in the Parliament as soon as possible addressing these matters.

The Committee has also requested further advice concerning the computerised decision making provisions of the Bill, on whether I propose to bring forward amendments to the bill to:

- limit the types of decisions that can be made and powers that may be exercised by computers on the face of the primary legislation;
- provide that only decisions and powers prescribed in a legislative instrument may be made or exercised by computers; and/or
- provide that the ACMA must, before determining that a type of decision can be made or power may be exercised by computers, be satisfied by reference to general principles articulated in the legislation that it is appropriate for the type of decision to be made or power to be exercised by a computer rather than a person.

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I have given careful consideration to the additional matters raised by the Committee. Noting the matters I raised in my letter of 2 October explaining the rationale for the provision as presented in the Bill, which will be included in the Addendum to the Explanatory Memorandum, I do not intend to bring forward amendments of this kind at this time.

I trust that the above information is of assistance to the Committee in its further consideration of the Bill.

Yours sincerely

Paul Fletcher

29/10/2020