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

Ref No: MC20-042873

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

24 NOV 2020

Dear ~~Chair~~ Helen,

I am writing in response to a request from the Senate Scrutiny of Bills Committee (Committee) for advice in relation to issues raised in the Committee's Scrutiny Digest 15 of 2020 concerning the Aged Care Amendment (Aged Care Recipient Classification) Bill 2020. I have written separately regarding the Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Bill 2020.

The Committee has requested my advice in relation to a number of areas of this bill, which appears below.

Matters in delegated legislation
The Committee has requested my advice as to:

- why it is considered necessary and appropriate to leave to delegated legislation most of the elements by which a care recipient's care needs are assessed or classified
- why (at least high-level) rules or guidance about the exercise of the Secretary's power cannot be included in the primary legislation
- why the bill only provides that the Classification Principles 'may' specify the procedures that the Secretary must follow in making an assessment as to the level of care and the appropriate classification level for a care recipient, rather than requiring that the Classification Principles 'must' make provision to guide the exercise of these powers.

The broad context for the bill is that the Government considers reform to the residential care funding arrangements is necessary to put in place a better system for assessing resident care needs for the purposes of funding. The Australian Government is proposing a new classification system, the Australian National Aged Care Classification (AN-ACC) developed by the University of Wollongong (UOW) replace the outdated Aged Care Funding Instrument (ACFI) classification and funding system. Prior to commencement of the AN-ACC model it will be necessary to classify all residents under the AN-ACC model. This is what the legislation enables. During this classification period, which may take up to 12 months, funding would still be assessed and paid under the ACFI model. As a result both the ACFI and AN-ACC classification processes will apply in parallel during this time.

A legislative framework already exists and has been in place for some time, which enables classifications under ACFI. The structure of these provisions is that there is enabling legislation in Part 2.4 of the *Aged Care Act 1997* (Act) supported by more detailed provisions in the Classification Principles. The current bill simply continues and mirrors the same legislative approach and framework with enabling provisions for AN-ACC in the new Part 2.4A of the Act supported by more detailed provisions in the Classification Principles. This is the same legislative approach involving delegated legislation taken to the existing ACFI classification system with matters such as procedures to assess and classify care recipients in the delegated legislation.

As well as ensuring consistency between closely related Parts of the Act, this approach ensures the detail of assessment and classification procedures under both Part 2.4A and Part 2.4 will be published side-by-side in the Classification Principles.

For consistency between Part 2.4A and Part 2.4, Part 2.4A is drafted to mirror the language of Part 2.4 of the Act, that the Classification Principles 'may' specify procedures for assessment and classification of care recipients. I can advise that, consistent with how the current legislation operates, the Principles will specify these procedures for AN-ACC.

The broad procedures involve the use of the AN-ACC assessment tool developed by the UOW, which uses a collection of clinically validated assessment scales to assess and classify residents into one of 13 classes. Information on these procedures is already publicly available in the UOW's Resource Utilisation and Classification Study (RUCS) at: https://www.health.gov.au/resources/publications/resource-utilisation-and-classification-study-rucs-reports and in the Department's consultation paper at: https://www.health.gov.au/resources/publications/proposal-for-a-new-residential-aged-care-funding-model-consultation-paper.

Delegation of administrative power

The Committee has requested my advice as to:

- why it is considered necessary to allow for the delegation of the Secretary's function of assessing care recipients
- why the criteria to whom these powers will be delegated is left to be set out in delegated legislation
- whether the bill can be amended to provide some legislative guidance as to the categories of people to whom those powers might be delegated.

Given the need for clinical expertise to undertake the assessments, the UOW recommended assessments be undertaken by registered nurses, occupational therapists or physiotherapists with appropriate aged care experience and independent of providers. In this context it is appropriate that the Secretary's function of assessing care recipients is delegated to these experts. Use of delegated legislation is consistent with the existing legislative framework.

Under existing subsection 96–2(1) of the Act, the Secretary may, in writing, delegate all or any of the powers and functions of the Secretary under the Act, regulations or any Principles made under the Act to a person engaged (whether as an employee or otherwise) by an agency (within the meaning of the *Public Service Act 1999*) or by an authority of the Commonwealth.

Under new subsection 96–2(15) of the Act, the Secretary additionally may, in writing, delegate the Secretary's powers and functions to assess care recipients under AN-ACC to a person who satisfies criteria specified in the Classification Principles for the purposes of the subsection. Delegated legislation also allows flexibility in settling and adjusting criteria, for example to cater for any criteria that may be appropriate in developing COVID-19 situations (e.g. vaccinations) and completion of assessor training modules as they are developed.

Computerised decision-making

The Committee has requested my advice in relation to what factors are likely to be taken into account in classifying care recipients and how computer programs will be able to appropriately evaluate and weigh such factors.

The factors taken into account in assessing and classifying residents are those set out in the UOW's RUCS reports with the proposed tool also outlined in the Department's consultation papers. Based on detailed statistical regression analysis the RUCS produced a decision rule to place a care recipient into one of the 13 AN-ACC classes such that each class is mutually exclusive and contains people with like care needs. The recommended decision rule is in the form of a computerised algorithm that translates the results of an assessment completed using the AN-ACC Assessment Tool into recommended membership of a particular class for the Secretary to approve. Given the procedure does not involve subjective or purely discretionary judgements, but instead involves an objective assessment of a care recipient's needs based on clearly defined criteria and quantifiable factors and scores, it is reasonable that a computer could be programmed to apply the requirements and follow the procedures in the proposed instrument in a logical manner without the risk of introducing errors.

Privacy

The committee requests my advice as to why it is necessary to allow a delegate of the Secretary to make a record of, use, or disclose identifiable personal information about an aged care recipient for the purposes of monitoring, reporting on, or conducting research into the general quality or safety of aged care, or the level of need in the community.

The committee also requests my advice as to the appropriateness of amending the bill to ensure that only de-identifiable information about an aged care recipient is able to be recorded, used or disclosed for this broader purpose.

This comment relates to the proposed amendment through the bill of section 86–4 of the Act to extend this section to include assessments made under the new Part 2.4A, and to include the new subsection 86–4(d), allowing use of protected information for monitoring, reporting on, and conducting research into, the quality or safety of aged care.

Using the powers created by the bill to introduce the AN-ACC assessment and classification procedures will create a longitudinal data series recording progression in the state of health of recipients of residential aged care against each of eight clinically validated assessment scales included in the AN-ACC Assessment Tool. This will be an important data set to aid understanding of frailty issues in the population and policy settings such as comparison of how quickly or slowly the health status of people with like care needs decline.

However, I recognise the benefit of using the new care recipient data for monitoring and research purposes principally lies in pooling care recipient data at the level of a residential care service, or above. The Government is open to amending the existing subsection 86–4(c) and the new subsection 86–4(d) to apply to only de-identified data.

I thank the Committee for enabling me to respond to these questions.

Yours sincerely

Richard Colbeck

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

Ref No: MC20-042873

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
scrutiny.sen@aph.gov.au

24 NOV 2020

Dear Chair Helen,

I am writing in response to a request from the Senate Scrutiny of Bills Committee (Committee) for advice in relation to issues raised in the Committee's Scrutiny Digest 15 of 2020 concerning the Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Bill 2020 (Bill).

The Committee has sought my advice concerning:

- why it is considered necessary and appropriate to allow the rules made under item 16 to modify any Act or instrument;
- whether the Bill can be amended to ensure that any modifications to primary or delegated legislation made by the rules, and the retrospective application of the rules, cannot operate to disadvantage any person.

The purpose of the Bill is to improve the administration arrangements of paying home care subsidy to approved providers on behalf of older Australians.

The Bill will not affect the eligibility of home care recipients for home care subsidy or the amount of home care subsidy that is payable for eligible home care recipients.

Sub-item 16(1) of the Bill permits rules to be made prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by the Bill. Any rules that may be made are therefore constrained to dealing with these matters.

Sub-item 16(3) of the Bill sets out that the rules may provide that, during or in relation to the first 12 months after the commencement of the item, the Act or any other Act or instrument has effect with any modifications prescribed by the rules.

Given the complexity of the home care payment administration system and the extent of the proposed changes introduced by the Bill, it is considered necessary and appropriate to include powers to permit legislative amendments to be made to address any unanticipated consequences as a result of the transition to the new payment administration arrangements.

As set out in the Explanatory Memorandum, sub-item 16(3) of the Bill is intended to deal expeditiously with matters which may unintentionally cause detriment to home care recipients, or home care providers, under the new home care payment administration arrangements.

The power in item 16 is considered necessary to respond to instances where detriment may result to home care recipients or home care providers and it is appropriate to address such detriment before primary legislative amendments to the *Aged Care Act 1997* can be undertaken.

Any rules made under item 16 of the Bill would be of a transitional nature only and relate to the amendments or repeals made by the Bill, or be otherwise relevant to home care subsidy. Further, such rules could only be made during the first 12 months after the commencement of the item.

Rules made under this item would not adversely affect any individuals because they would only be made in circumstances where it was necessary to address detrimental consequences of the Bill. As a result, any rules (if made) would not operate to disadvantage any person.

The absence of item 16 of the Bill may result in vulnerable older Australians being without adequate care for a significant period of time if there was an unintended detrimental consequence of the Bill.

Any subordinate legislation made under item 16 of the Bill would be disallowable under section 42 of the *Legislation Act 2003* and subject to review by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

After consideration of the concerns raised by the Committee, I am satisfied that the approach in item 16 of the Bill is reasonably necessary and appropriate, without any further legislative amendments, for the reasons set out above.

I thank the Committee for enabling me to respond to these questions.

Yours sincerely

Richard Colbeck

Senator the Hon Simon Birmingham

Minister for Finance
Leader of the Government in the Senate
Senator for South Australia

REF: MS20-001126

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

Dear Senator ~~Polley~~ Helen,

Thank you for your letter of 12 November 2020 requesting my advice as to whether the additional transparency measures applying in relation to Advance to the Finance Minister (AFM) determinations made under the 2020-21 Supply Acts will continue in relation to AFM determinations made under Appropriation Bills (Nos. 1 and 2) 2020-2021, once enacted, as set out in Scrutiny Digest 15 of 2020.

The AFM is a long-standing provision that has been included in annual Appropriation Acts to accommodate urgent and unforeseen expenditure where the passage of additional Appropriation Acts is either not possible or not practical.

In light of the extraordinary AFM provisions contained in the 2019-20 annual Appropriation Acts and in the 2020-21 Supply Acts, the Government implemented additional transparency measures to ensure the authority delegated by the Parliament to the Minister for Finance was exercised in as transparent a manner as possible. These included a weekly media release by the former Minister for Finance, Senator the Hon Mathias Cormann, on AFM allocation(s) made in 2019-20 and 2020-21, and consultation with the Shadow Minister for Finance, on behalf of the Opposition, for any proposed allocation of AFM of over $1 billion.

These additional transparency measures have worked well during the period of the extraordinary AFM provisions. It is my intention that they will continue to be applied for any AFM allocations made under Appropriation Bills (Nos. 1 and 2) 2020-2021, once enacted.

Adelaide
107 Sir Donald Bradman Drive, Hilton SA 5033
Ph 08 8354 1644

Canberra
Parliament House Canberra ACT 2600
Ph 02 6277 7400

These additional transparency measures complement the existing, well-established transparency and accountability arrangements. Under these arrangements, all AFM determinations are registered on the Federal Register of Legislation (FRL), tabled in Parliament and also listed on my department's website. Further, the Minister for Finance tables an Annual Report in Parliament on the use of the AFM during the prior financial year, which is subject to an assurance review by the Australian National Audit Office.

I trust the Committee finds this response helpful.

Yours sincerely

Simon Birmingham

27 November 2020

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002580

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

Dear Senator Polley

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020 (the Bill).

As this Bill has now been enacted, I provide this advice in relation to the *Economic Recovery Package (JobMaker Hiring Credit) Amendment Act 2020*.

In that letter, the Committee has sought my advice as to:

- why it is considered necessary and appropriate to leave virtually all of the details of the operation of this new scheme to delegated legislation; and
- whether the Bill could have been amended to prescribe at least broad guidance in relation to:
    - which employers will qualify for payment under the scheme;
    - which employees will be eligible employees for the purposes of the scheme;
    - the amount payable and timing of payments; and
    - the obligations for recipients of the payment.

Providing the details of the operation of the new scheme through delegated legislation

The amendments to the Act introduced by the *Economic Recovery Package (JobMaker Hiring Credit) Amendment Act 2020* extended the period over which certain payments can be authorised to 6 October 2022. Such payments must be for the primary purpose of improving employment prospects, or increasing workforce participation, in Australia.

Employment programs of this sort are ordinarily implemented through an appropriation provided to a responsible Department (such as the Department of Education, Skills and Employment). The responsible Department then develops a set of guidelines for providing payments and administers the program using those guidelines. However, as the JobMaker scheme was intended to leverage the ATO and their ability to roll out the program at a greater scale than can typically be done by other agencies, it was sensible to use the existing architecture of broad legislation authorising the payment with the payment conditions specified in the rules. In this sense, the proposed rules establishing the JobMaker scheme will operate in a very similar fashion to the guidelines that

typically underpin other employment programs (although in contrast to other programs, the rules and any future amendments will continue to be subject to Parliamentary scrutiny and potential disallowance).

In addition, as the Committee is aware, the *Coronavirus Economic Response Package (Payments and Benefits) 2020* (the Act) was enacted on the basis that the details of any payments authorised under the Act would be provided through a subordinate legislative instrument. This legislative framework means that incorporating the details of the proposed JobMaker scheme directly into the Act would require significant restructuring of both the Act and the provisions that have been drafted to establish the JobMaker scheme. The necessary redrafting exercise would have substantially delayed the time for implementing the amendments to the Act to facilitate the establishment of the JobMaker scheme.

As the first payments under the JobMaker scheme are calculated by reference to the three month period ending on 6 January 2020, it is critical that the rules implementing the scheme be made in a timely manner. This is necessary to provide employers with as much certainty as possible in making recruitment decisions that are covered by the scheme.

The need for timely implementation has also been balanced against the Government's commitment to undertaking public consultation on the new JobMaker scheme. The draft rules establishing the scheme are currently subject to an extensive public consultation process which opened on 30 October 2020 and will conclude on 27 November 2020. I also note that the scheme, in conjunction with other laws, implements Australia's obligations under the *International Labour Organisation - Convention concerning Employment Policy*. That Convention requires consultation with representatives of employers and workers.

Extensive restructuring of the Act to implement the rules would have caused significant delays in releasing the exposure draft provisions of the amending rules for public consultation. This would have limited the period over which public consultation could have been undertaken, or possibly prevented such consultation from being able to be undertaken at all.

Providing the details of the JobMaker scheme in subordinate legislation also allows the Government to respond quickly to address unforeseen issues that may arise over the course of the scheme. I note that in this regard, the Government's ability to amend the rules implementing the JobKeeper scheme has been fundamental to the success of that program. As the Committee is aware, the JobKeeper scheme has now been amended seven times after it was first implemented in April 2020. These changes have been critical in addressing unforeseen issues and ensuring that scheme has continued to operate as intended.

Prescribing certain details in the Act

As the Committee is aware, the Bill has now been enacted. Although it would have been technically possible to make amendments along the line described by the Committee, the Government's preferred approach was, and remains, to provide for such details in the implementing rules for the reasons stated above.

As noted above, the Government is currently undertaking extensive public consultation in relation to the proposed JobMaker scheme. Specifying details of the kind identified by the Committee would have had the effect of 'locking in' particular features of the scheme before feedback was received, and may have prevented important changes being made in response to such feedback. This approach would have undermined the genuine nature of the current consultation process and would have likely reduced the effectiveness of the scheme when it is ultimately implemented.

Similarly, the Government's ability to alter the JobMaker scheme as necessary and appropriate to address unforeseen issues would be significantly constrained by providing the details of the scheme in the Act. As noted above, the ability to respond to such issues has been critical to the ongoing success of the JobKeeper scheme.

Thank you for bringing your concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

24 / 11 / 2020

Senator the Hon Simon Birmingham

Minister for Trade, Tourism and Investment
Leader of the Government in the Senate
Senator for South Australia

Our Ref MS20-000202

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

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

Dear ~~Chair~~ Helen,

Thank you for your recent correspondence seeking advice in relation to the *Export Market Development Grants Legislation Amendment Bill 2020* (the Bill).

The Bill establishes the Export Market Development Grants (EMDG) program as an entitlement-based grants program. Commonwealth grants are managed through a variety of mechanisms, with many relying on the Commonwealth grants framework rather than legislation. The EMDG program is one of the few programs established through legislation.

The current *Export Market Development Grants Act 1997* (the EMDG Act) establishes a reimbursement scheme rather than a grants program (despite its title), and provides a significant amount of operational detail that is not considered necessary for primary legislation. In reorienting EMDG to a grants program, the Bill seeks to remove this material, allowing Parliament to properly focus on matters that impact a person's rights and responsibilities.

Broad delegation of administrative power

The Committee has requested advice on Item 3 of Schedule 1 of the Bill which revises section 90 of the *Australian Trade and Investment Commission Act 1985* (the Austrade Act), dealing with delegations by the Minister and CEO of the Australian Trade and Investment Commission (Austrade). In particular, the Committee has requested advice as to why it is considered necessary to allow for the delegation of any or all of the CEO of Austrade's functions or powers to officers at any level. The Committee also asks whether it would be appropriate to amend the Bill to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

Adelaide
107 Sir Donald Bradman Drive, Hilton SA 5033
Ph 08 8354 1644

Canberra
Parliament House Canberra ACT 2600
Ph 02 6277 7420

In relation to this delegation power, the revised section 90 updates the language, but does not change the substance of the existing power of the CEO in current subsection 90(2) to delegate his or her powers and functions under the Austrade Act to an Austrade staff member.

The substantive change made by the Bill is to add a new delegation power to allow the CEO to delegate any of his or her functions or powers under the EMDG Act to an APS employee in a non-corporate Commonwealth entity. The category of person to whom that power may be delegated is established at APS Executive Level 1 (EL1) or higher. Subsection 90(4) limits the scope of the delegation by requiring that, in performing any delegated power, the delegate must comply with any written directions of the CEO (subsection 90(4)). This change would allow a decision to be made by the Australian Government to use whole of government arrangements to manage EMDG grants. Regardless of where the program administration is undertaken, responsibility for EMDG policy will continue to rest with Austrade, and subsection 90(4) will enable Austrade to effectively exercise this policy responsibility.

I note the Committee's preference to limit delegation powers to Senior Executive Officers. In this instance, enabling delegations to be made to EL1 APS officials and above provides for decision-making at an appropriate level for a grants scheme, and continues current business practices. It ensures the program delegations will be exercised by experienced and qualified APS officers and it aligns with decision-making in other Commonwealth grants programs of similar value, most notably those managed by the Commonwealth's grants hubs, which operate in non-corporate Commonwealth entities.

Significant matters in delegated legislation

The Committee has requested advice as to why elements of the EMDG program will be contained in delegated legislation, and asks whether the Bill can be amended to include at least high-level guidance in relation to these matters.

Noting my initial comments that few grants programs are established through legislation, I also advise that the Bill details the core elements of the EMDG program, providing that guidance. For example, while section 15 of the Bill provides for eligible kinds of persons to be prescribed in the rules, this is only to ensure the Minister can include those eligible persons operating outside traditional exporting business structures, such as bodies that represent industry, as well as ensuring new business structures can be added if they arise. Section 15 lists the most of the eligible persons, and captures all of the different legal entities which are envisaged as current exporting businesses operating in Australia.

With the Bill establishing the core principles of the EMDG program, the Bill also provides for the Rules to prescribe a range of matters which operationalise those core principles, including:

(a) the definition of ready to export
(b) the terms and conditions of a grant
(c) requirements in relation to the payment of a grant or instalment
(d) eligible kinds of persons for a grant
(e) conditions for eligible persons
(f) eligible products for a grant
(g) eligible expenses of a person, and
(h) the methods for calculating the amount of a grant.

These matters are purely operational and are not appropriate to be included in primary legislation. Details of each are provided in the following paragraphs.

(a) Definition of ready to export

The term 'export' is defined in the Bill. Understanding a person's readiness to undertake the exporting is an operational matter relating to the grant application assessment processes. It will consider things like training undertaken or plans which will demonstrate an exporter's readiness.

(b) Terms and conditions of a grant

The ability to make Rules in relation to the terms and conditions for grants operationalises the grant agreement. As stated in the Bill's Explanatory Memorandum, the EMDG program will rely on other relevant Commonwealth legal requirements in relation to grant administration where possible, and not seek to duplicate them in the EMDG Act.

This includes the terms and conditions for grant agreements. The EMDG program will rely on the terms and conditions for all Commonwealth grants as provided by the Department of Finance and publicly available through the Department's website. Should the need arise to include a specific term or condition for the EMDG program in the Rules, the Bill provides the power for the Minister to do so.

(c) Requirements in relation to the payment of a grant or instalment

The method for calculating the amount of a grant, also an operational matter, enables the total appropriation for the EMDG program to be managed, along with the upper limits for the different types of grants. In ongoing Commonwealth grant programs the upper limit of a grant is an operational question which can change in response to a variety of factors such as inflation and the cost of doing business overseas. As well as not being appropriate to set out in primary legislation, these factors will vary and including them in primary legislation would require frequent amendments to the Act.

(d) Eligible kinds of persons for a grant

The conditions applicants must also satisfy to be eligible for a grant (section 16) are part of operational detail of the program that underpin program administration. As outlined in the Explanatory Memorandum these may include requirements like having an Australian Business Number, not being under insolvency administration, or not having received an EMDG grant for a total of eight or more years.

(e) Eligible products for a grant

The Bill appropriately outlines the core requirements for eligible products being:

- They must be products in the ordinary sense of the word, i.e. a thing to be sold; and
- They be substantially of Australian origin (subsection 17(3)).

The Rules will prescribe in detail what products are eligible including goods, services and intellectual property, providing a responsive mechanism to evolving products and different ways they can be sold.

(f) Eligible expenses of a person

The Bill appropriately outlines the core requirements for eligible expenses in subsection 18(2), which provides they must be:

(a) Expenses of the eligible person; and

(b) In respect of

  a. promotional activities or

  b. training activities; and

(c) Undertaken for the purpose of marketing

  a. eligible products

  b. in foreign countries.

The Rules will provide detail of those requirements, for example, that promotional activities can include activities such as website development, trips overseas by marketing teams, and market research. The Rules also provide a responsive mechanism to prescribe new tools for marketing and promotion as they arise

Merits Review

The Committee has requested detailed advice as to why merits review will not be available in relation to decision made by the CEO of Austrade under proposed subsections 102(3) and 102(6), with reference to the Administrative Review Council's (ARC) guidance document, "*What Decisions Should be Subject to Merit Review*?"

Proposed section 102 provides a power to the CEO to require grantees to provide information or statements within specified timeframes, but not less than 14 days. The failure to respond within those timeframes requires the CEO to decide not to pay the grant or an instalment. There is no provision for merits review of the timeframe decision in proposed section 102.

At Chapter 3 of the ARC's guidance document, the ARC sets out decisions that are generally unsuitable for merits review. At paragraphs 3.8 to 3.12, the ARC discusses automatic or mandatory decisions. The decisions contained in subsections 102(3) and 102(6) of the Bill are mandatory decisions. They require the CEO not to pay the grant or instalment if the grantee has failed to provide information or statements requested within a specified timeframe. There is therefore a statutory obligation for the CEO to act in a certain way. Effectively, there are no merits to consider with respect to the decision.

This mandatory decision follows other decisions that have an element of discretion. They include the decision of the CEO to issue a notice requiring the provision of information or statements (subsections 102(1) and 102(4)), and then a decision whether to agree to a later date (paragraph 102(3)(b)) or agree to other arrangements for the provision of the statement (paragraph 102(6)(b)). However, these types of decisions should be regarded as preliminary or procedural decisions, as referred to at paragraphs 4.3 to 4.7 of the ARC's document. They lead to, or facilitate, the making of a substantive decision. The substantive decision is to not pay the grant or an instalment, and if the grantee has provided information or statements within the requested timeframes, the decision not to pay does not automatically follow.

Paragraphs 4.6 and 4.7 of the ARC's document refers to refusals to grant extensions of time. However, this is with reference to statutory deadlines. Proposed section 102 of the Bill does not contain any statutory deadlines. Rather, any deadlines are set by the CEO at the time of issuing the notice. The issue of the notice is a preliminary or procedural step which may or may not lead to the substantive decision.

As referred to by the ARC at paragraph 4.7, a refusal to grant an extension of time (putting aside that the deadlines in proposed section 102 are not statutory), would likely affect a grantee's rights. However, decisions allocating finite resources between competing applicants are also considered unsuitable for merits review (see paragraphs 4.11 to 4.19 of the ARC's document). Although the decisions in proposed section 102 may relate to the ongoing management of a grant to the extent it may result in the non-payment of an instalment, they also relate to decisions to require further information or statements to inform the decision to pay the grant. In circumstances where there may be a number of entities competing for, or accessing, the same finite pool of funding, it would not be suitable to have a decision not to pay the grant to an applicant who has failed to provide requested information or statements subject to merits review. Other applicants who have complied with requests may have already received the grant, and any latter review decision overturning a refusal decision may not be able to be implemented if the funding resources are already allocated to other applicants.

Release of the Rules for public consultation

I note that in considering framework Bills, the Committee has consistently expressed concern that the detail of the delegated legislation is not available when the Parliament is considering the Bill. I propose that the draft Rules will be publicly released for consultation before the Bill is debated which will assist Parliament when considering the Bill.

I trust this information provides clarification and assists the Committee. Given this advice, I do not consider the Bill requires amendment.

Yours sincerely

Simon Birmingham

25 NOV 2020

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MB20-001403

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

Dear ~~Senator~~ Helen

RESPONSE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Thank you for the opportunity to respond to the Senate Standing Committee for the Scrutiny of Bills' queries on the National Redress Scheme for Institutional Child Sexual Abuse Amendment (Technical Amendments) Bill 2020 (the Bill).

The committee sought advice on a number of issues in relation to the Bill. I have enclosed information in response to these matters.

Yours sincerely

Anne Ruston

25/11/2020

Enc. Response to the Senate Standing Committee for the Scrutiny of Bills

Suite MG.60, Parliament House, Canberra ACT 2600 Tel: 02 6277 7560 Email: minister@dss.gov.au

RESPONSE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

On 12 November 2020, the Senate Standing Committee for the Scrutiny of Bills (the Committee) requested additional information in regards to Parts 4 and 7 of the National Redress Scheme for Institutional Child Sexual Abuse Amendment (Technical Amendments) Bill 2020 (the Bill). Parts 4 of the Bill relate to the amendments for protected names and symbols. Part 7 relates to the disclosure of protected information to encourage institutions to participate in the Scheme. Responses to the Committee's specific questions are below.

Reversal of evidential burden of proof

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

The Bill would insert new section 185A into the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act) to establish an offence of strict liability for using or applying protected names or protected symbols. Offence-specific defences are used in subsections 185A(3), (4) and (5), such that the evidential burden of those defences is borne by the defendant.

Subsection 185A(3) would provide that the offence provision does not apply to the use of a name or symbol by a participating State or participating Territory. Subsection 185A(4) would provide that the offence provision does not apply to certain registered trade marks and designs. Subsection 185A(5) would provide that the offence provision does not apply to uses of protected names or protected symbols in good faith at the time the relevant provisions commence, or use by a person who would have been entitled to prevent another person from passing off goods or services as those of the first person, at the time the relevant provisions commence.

Offence-specific defences have been used in the Bill as the matters to be proven in relying on those defences are matters that are peculiarly within the knowledge of the defendant. For example, the National Redress Scheme Operator (Operator) may not know whether certain trademarks or designs are registered, but this is something that a defendant could easily prove. Similarly, whether or not the use of a protected name or symbol was in good faith, or whether the defendant could have taken action against a third party to prevent passing off of goods or services as their own, are not matters that the Operator could ascertain without further investigation. These matters go to the defendant's motivations for using the relevant names or symbols, which would be significantly more difficult for the Operator to disprove than for the defendant to establish.

In line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide), the matters set out in the offence-specific defences are not central to the culpability for the offence, and the offence carries a relatively low penalty of 30 penalty units. The Guide recommends a maximum of 60 penalty units for strict liability offences. Further, the offence-specific defences used in the Bill impose an evidential burden on the defendant, which is much easier for a defendant to prove than a legal burden.

Significant matters in delegated legislation

1.90 -The committee requests the minister's detailed advice as to why it is considered necessary and appropriate to allow other protected names and protected symbols relevant to the commission of a strict liability offence to be set out in delegated legislation.

Proposed new subsection 185A(6) sets out three names protected by the new offence provisions: "National Redress Scheme"; "National Redress Scheme for Institutional Child Sexual Abuse"; and "National Redress Scheme for people who have experienced child sexual abuse". It would also provide that other names may be prescribed by the rules. Similarly, it would provide for the design of any protected symbols to be set out in the rules. The rules, made by the Minister under section 179 of the Act, are a legislative instrument and therefore subject to parliamentary scrutiny and disallowance.

The Bill provides for protected names and protected symbols to be included in delegated legislation in order to provide some flexibility over the life of the Scheme, such that primary legislation amendments would not be required if the government sought to amend the Scheme's logo and branding, or if the Scheme were to become commonly known by another name. The offence itself would remain in the primary legislation, and there is no intention to use the rules to establish new offences.

Privacy

1.95 - As the explanatory materials do not adequately address this matter, the committee requests the minister's detailed advice as to:

- **the type of protected information that is likely to be disclosed under proposed subsection 95(1A);**
- **who the protected information is likely to be disclosed to; and**
- **any additional safeguards in place to protect individuals' privacy.**

The expression "protected information" is defined in section 92 of the Act to include information about individuals and institutions held by the Department of Social Services or Services Australia for the purposes of the Scheme. The Act sets out limited authorisations to use and disclose protected information, with the main authorisation at section 93 being that a person may obtain, make a record of, disclose or use protected information for the purposes of the Scheme, with the express or implied consent of the person or institution to which the information relates, or where the person believes on reasonable grounds that doing so is necessary to prevent or lessen a serious threat to an individual's life, health or safety. Additional authorisations are set out at section 94 to 98 for specific purposes, such as child safety or wellbeing, disclosure of an applicant's information to the applicant's nominee, disclosure to certain agency heads and officeholders, and disclosure where it is necessary in the public interest.

The Bill would insert new subsection 95(1A) into the Act to provide express authorisation for the Operator to disclose protected information about an institution not currently participating in the Scheme for the purpose of encouraging the institution to agree to participate in the Scheme.

In some circumstances a person other than the Operator may have relationship with an institution and/or be able to influence the decision of a particular institution to participate in the Scheme. The new provision would provide greater flexibility for the Operator to engage with other parties, such as Commonwealth Ministers, other Commonwealth departments, States and Territories and peak and governing bodies (for example national sporting organisations) to encourage an institution to participate in the Scheme. While such information can be disclosed for this purpose already, the provision allows the process to be more timely and efficient as Public Interest Certificates will no longer be required.

While participation in the Scheme is voluntary, the Australian Government urges all institutions to make amends for past wrong doings and the join the Scheme. The Government expects any institutions that were named in the Royal Commission into Institutional Responses to Child Sexual Abuse, or named in an application for redress, to agree to participate in the Scheme as a matter of priority. Being able to disclose protected information about non-participating institutions is an important step to encouraging those institutions participation in the Scheme.

The types of protected information that might be disclosed under the new provision include the following:

(a) the number of applications identifying the institution or a related defunct institution;
(b) the extent of any contact between the institution and the Department of Social Services (or Services Australia, which processed applications for redress until February 2020) about the Scheme and, if so, information the institution provided about whether it intends to participate in the Scheme;
(c) whether the institution has commenced the administrative process to be declared a participating institution and, if so, how this is progressing;
(d) information about the institution that may preclude or delay its participation in the Scheme;
(e) any timeframe within which the institution has indicated it intends to agree to participate in the Scheme; and
(f) any research conducted by the Department of Social Services or Services Australia in relation to an institution, including in relation to a related defunct institution, that is relevant to encouraging the institution to participate in the scheme.

The information disclosed would be limited, as required by the new provision, to information about the institution. While this disclosure could include incidental personal information (within the meaning of the *Privacy Act 1988*), for example, where it is necessary to provide the contact details of a person in an institution to another person in order to facilitate contact with the institution, there is no intention or capacity to disclose personal information about any individual redress applicant under the new section 95(1A).

If protected information is disclosed under the new section 95(1A), the recipient is subject to the statutory confidentiality regime in relation to the information that is disclosed. Section 95(2) would permit the recipient to use the information to encourage the relevant institution to participate in the Scheme and the recipient would also be able to use the information within the bounds of the statutory confidentiality framework mentioned above. However, any use or disclosure of the protected information by the recipient in a manner not authorised by the statutory confidentiality framework would engage the offence provisions in sections 99, 100 and 101 of the Act.

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MB20-001402

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

Dear ~~Chair~~ Helen

I am writing in response to the email of 12 November 2020 from the Senate Standing Committee on the Scrutiny of Bills on the Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020 (the Bill).

The Bill establishes the Cashless Debit Card (CDC) as an ongoing program in existing sites, transitions Income Management in the Northern Territory and the Cape York region to the CDC as an ongoing program, and makes CDC program improvements.

In response to the matters raised by the Committee, I can provide the following advice.

Insufficiently defined administrative power
Item 32 of the Bill provides that an officer or employee of a State or Territory, or an agency or body of a State or Territory may request that a CDC wellbeing exemption is revoked if it is necessary for the person to be a program participant due to medical or safety reasons that relate to the person or their dependents. However, it does not provide administrative powers to all of this class of persons. Item 32 in fact provides that the power to revoke the CDC wellbeing exemption is provided to the Secretary of the Department of Social Services.

It is necessary to not limit the categories of State or Territory officers who may make such a request to ensure all qualified persons deemed appropriate to request a reconsideration are able to do so. Limiting the category of persons may cause unintended consequences that a report on the safety or wellbeing of a participant cannot be made. It recognises that where a state or territory officer or employee makes an assessment that not being on the CDC presents a risk to the person, or their dependant, it is important that the Secretary can consider this information in assessing whether being a program participant poses a serious risk to the person.

Significant matters in delegated legislation
The Bill provides for decision-making principles relating to whether a person can demonstrate reasonable and responsible management of their affairs to exit the program, to be determined in delegated legislation. Any of these decision-making principles determined will be made under the confines of and be consistent with the primary legislation, that is, they will effectively be limited by the operation of subsection 124PHB(3), which sets out the factors that the Secretary should take into account. These decision-making principles would not introduce new criteria and are intended to provide participants with greater clarity by outlining the factors relating to the considerations that underpin the determination of exit applications. Flexibility in the ability to respond to changing functions and feedback provided will be compromised if these decision-making principles are incorporated in primary legislation. When moving these amendments, consistent with the approach taken for Income Management purposes (for example, refer to *Social Security (Administration) (Exempt Welfare Payment Recipients – Principal Carers of a Child) (Indications of Financial Vulnerability) Principles 2020*), it was not considered appropriate to specify these principles in the legislation itself. It would also not be appropriate to provide the Minister 'must' determine decision-making principles for these purposes, rather than 'may' determine decision-making principles for these purposes, since these powers may not be exercised.

Significant matters in non-disallowable instrument – program area determination
The Bill allows the Minister to determine the definition of the 'Cape York area' by the making of a notifiable instrument. This approach seeks to reflect and recognise the jurisdiction of the Family Responsibilities Commission and to ensure consistency with geographical boundaries set out under Queensland legislation.

The Bill also allows the Minister to exclude any part of the Northern Territory from the program area by the making of a notifiable instrument, consistent with the pre-existing power under subsection 124PD(2). The exclusion of communities within CDC program areas would only occur following intensive consultation with the communities affected. Such an exclusion would not directly affect any individual's rights or alter the content of the law. Any change to an individual's circumstances will result from the factors determining whether any particular person is a program participant, of which residence in a program area is only one factor.

Significant matters in non-disallowable instruments
The Bill grants the Minister the power to vary the portion of restrictable and non-restrictable payments under new subsections 124PJ(2A), 124PJ(2B) and 124PJ(2C). This ability to vary rates for participants ensures the effective operation of the CDC and allows for response to the particular needs of individual communities.

As outlined in the Explanatory Memorandum, the Minister will only consider exercising this power in response to a request from a community. When introducing these amendments, consistent with the ability to vary restricted portions for the purpose of Income Management measures, it was not considered appropriate to specify the requirements for exercising this power in the legislation itself. This decision was made to ensure the format of community requests and the nature of any necessary engagement with the community following a request, is flexible to respond to the specific circumstances of that community.

Given that this power will only be used in response to a community request, making the determination by notifiable instrument is appropriate to respect the autonomy of the community making the request.

Privacy
Powers to obtain and share information about participants are necessary to facilitate the effective administration of the CDC and enable participants and their communities to be appropriately supported, including in times of crisis.

The Bill proposes new sections 124POB, 124POC and 124POD to authorise certain information disclosures to the Queensland Commission (currently the Family Responsibilities Commission (FRC)), a child protection officer of the Northern Territory or recognised State/Territory authority of the Northern Territory. These entities are responsible for referring participants to the CDC under section 124PGD (FRC) and 124PGE(2) (a child protection officer of the Northern Territory or recognised State/Territory authority of the Northern Territory).

The measures replicate existing provisions in Part 3B of the Act and are necessary to ensure that the personal circumstances of participants can be disclosed to ensure that participants are correctly placed onto the CDC and correctly authorised to cease to be participants. For example, information about a potential participant's address will be necessary to determine if the individual is a resident of a program area.

In addition, the Bill amends section 192 of the Act to include the operation of Part 3D in this section to facilitate collection of information relevant to program participation. This replicates arrangements under Part 3B of the Act for the Income Management regime and will support the operation of the CDC, including with respect to exit and wellbeing exemptions. Information that may be obtained pursuant to this provision includes participant residential addresses, payment types and mental and social wellbeing. This information will support the administration of the program including the identification of participants and the management of wellbeing exemption and exit processes.

As you have noted, the Bill addresses disclosure of information to community bodies and the Queensland Commission and officers and employees of certain state or territory authorities (including child protection officers). As explained in the Explanatory Memorandum, sections 124POA, 124POB 124POC and 124POD replicate the current information sharing provisions in Part 3B of the Act.

The information to be shared under the proposed 124POA, 124POB 124POC and 124POD is protected information for the purposes of the Act and relates to participation in, and exit from, the CDC. The information that may be disclosed is limited in scope according to the body involved. For example, section 124POA specifies that the Secretary may only disclose to a relevant community body the fact that the person has ceased to be a participant or a voluntary participant, the day the person ceased to be a participant and the fact that participation ceased due to a determination under subsection 124PHA(l) or 124PHB(3). In other contexts, the information required will be material to whether a person is a participant and may relate, for example, to the person's place of residence.

Commonwealth agencies administering social security law are subject to a range of legal obligations relating to privacy, which are supplemented by policies and practices to ensure that individual's privacy is protected in relation to protected (personal) information obtained under the Act. Personal information collected in connection with the CDC is held securely and is not disclosed otherwise than for the administration of Part 3D of the Act or in connection with possible breaches of the law.

Importantly, the Act contains confidentiality provisions, including offence provisions, to ensure that participant information is stringently protected. Protected information can only be disclosed in specified circumstances. Division 3 of Part 5 of the Act creates a series of strict liability offences, which are punishable, upon conviction, by a term of imprisonment not exceeding two years.

In addition, the *Privacy Act 1988* applies to the collection, use, storage and disclosure of personal information by relevant agencies and certain other entities.

People with access to protected data will:

- be required to comply with, among other things, the Australian Public Service Code of Conduct and Conflict of Interest Disclosure policy
- hold a Australian Government Security Vetting Agency (AGSVA) Baseline Security Clearance as a minimum
- be trained in handling protected Information before given access to protected information, and
- be appropriately supervised.

I trust this information is of assistance to the Committee.

Yours sincerely

Anne Ruston

26 / 11 / 2020

The Hon Nola Marino MP

Assistant Minister for Regional Development and Territories
Federal Member for Forrest

Ref: MS20-001859

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

Dear Senator

Thank you for the email of 12 November 2020 from the Senate Standing Committee for the Scrutiny of Bills (the Committee). The Committee is seeking advice in relation to the Territories Legislation Amendment Bill 2020 (the Bill).

The Bill seeks to amend various Acts to improve the legal frameworks applying to the territories of Norfolk Island, Christmas Island, the Cocos (Keeling) Islands and the Jervis Bay Territory.

In relation to the concerns raised by the Committee about some aspects of the Bill, I offer the following response outlined in the enclosure to this correspondence.

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

Yours sincerely

Nola Marino

Enc

The Hon Nola Marino MP
Parliament House Canberra | (02) 6277 4293 | minister.marino@infrastructure.gov.au
PO Box 2028 BUNBURY WA 6231

Enclosure

Response to the Senate Standing Committee for the Scrutiny of Bills – Digest 15/20
Territories Legislation Amendment Bill 2020

Broad delegation of administrative powers

Proposed subsection 8G(5) of the *Christmas Island Act 1958* (the CI Act) provides that a person or authority in whom a power is vested by a direction under paragraph 8G(3)(a) of the CI Act may delegate in writing that power to another person or authority. The delegation must be authorised by the direction (proposed subsection 8G(5)(a)) or by the minister if the direction is a deemed direction under proposed subsection 8G(5A) or (5B). The committee notes that the same issues arise in relation to item 40, proposed subsection 8G(5) of the *Cocos (Keeling) Islands Act 1955* (the CKI Act) and item 66, proposed subsection 18B(5) of the *Norfolk Island Act 1979* (the NI Act).

The Committee has requested advice as to:

- *why it is considered necessary and appropriate to allow for such a broad delegation of a person or authority's powers under these provisions;*
- *whether the Bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated; and*
- *whether the Bill can be amended to require that the minister or the relevant person or authority be satisfied that persons exercising delegated powers have the appropriate expertise and qualifications to exercise those delegated powers.*

Response

As discussed in the explanatory memorandum of the Bill, proposed subsections 8G(5) of the CI Act and the CKI Act, as well as proposed subsection 18B(5) of the NI Act, are based on existing provisions of these Acts, which deal with the delegation of powers vested in the minister under applied state or territory laws. These applied laws arrangements have been in place in the Indian Ocean Territories since 1992 and Norfolk Island since 2016.

The laws of Western Australia, as in force from time to time in that State, are applied in the Indian Ocean Territories, while presently, the laws of New South Wales, as in force from time in that State, are applied in Norfolk Island. These applied laws regimes provide that non-judicial powers and duties under these applied laws are vested in the minister, who has a capacity to delegate the powers, or direct that they be delegated, to some other person or authority.

Considering the potential breadth and scope of the powers and duties conferred by these applied laws upon the minister, which could, in practice, extend to *all* the non-judicial powers and duties contained in the laws of a state or territory, it is necessary and appropriate for the minister to have a broad delegation power to ensure that these powers are exercised effectively at an appropriate level. If the minister was constrained in his or her ability to delegate these powers there is a risk that these applied laws may not be properly or effectively administered in the external territories.

Similarly, it would not be appropriate to amend the Bill to provide some legislative guidance as to the delegation of these powers or that the minister or relevant person or authority be expressly satisfied that the persons exercising delegated powers have the appropriate expertise and qualification to exercise those delegated powers. Again, considering the potential breadth and scope of these powers and duties under these applied laws, it is desirable to allow significant discretion with respect to this delegation power. This is because the circumstances for which it may be appropriate to delegate these powers are not certain and cannot necessarily be foreseen. Similarly, it is impractical and restrictive to anticipate the factors with respect to these applied laws that the minister or relevant person or authority may consider when determining whether persons exercising delegated powers have the appropriate expertise and qualification to exercise those delegate powers.

Finally, it should be noted that in circumstances where there is an arrangement between the Commonwealth and a state or territory to administer the laws in force in the external territory, that the state or territory official, with the corresponding power in the relevant state or territory, will ordinarily exercise the delegated powers of the minister (see proposed subsections 8G(5A) of the CI Act and the CKI Act and proposed subsection 18B(5A) of the NI Act). This is the case in the Indian Ocean Territories, where under service delivery arrangements between the Commonwealth and Western Australia, Western Australian officials routinely exercise a range of functions and powers under applied Western Australian laws as in force in these territories in the same way that they would in Western Australia.

Significant matters in delegated legislation

Item 57 of Schedule 1 to the Bill seeks to add proposed section 5 at the end of Part I of the NI Act). Proposed subsection 5(2) provides that regulations may provide for a state or territory other than Norfolk Island to be an 'applied law jurisdiction', and for a state or territory to cease being an 'applied law jurisdiction'. This provision has the effect that the law in force in Norfolk Island may be prescribed by regulations.

In addition, item 81 of Schedule 1 to the Bill seeks to insert proposed section 60AA into the NI Act. This would provide that a state or territory, other than Norfolk Island, may be prescribed by regulations as having both original and appellate jurisdiction to hear and determine matters arising under laws in force in Norfolk Island.

In light of the above, the committee requests detailed advice as to why it is considered necessary and appropriate to allow regulations to determine:

- *which state or territory laws will be in force on Norfolk Island; and*
- *which state and territory courts will have jurisdiction to hear and determine matters in relation to Norfolk Island.*

Response

New South Wales (NSW) has announced that the existing arrangements in Norfolk Island, under which it provides some state-type education and health support services, will cease by the end of 2021. In light of this, the Australian Government is considering its options with respect to the future provision of state-type services in Norfolk Island and is currently involved in confidential government-to-government negotiations with a number of jurisdictions about possible future state-type service delivery options in Norfolk Island.

Accordingly, the applied laws amendments are intended to provide a flexible legal mechanism under which the laws of a state or territory may be applied as Commonwealth law in Norfolk Island and will enable state-type service arrangements to be entered into with a state or territory. These applied laws arrangements are intended to operate in a similar way to the existing applied NSW laws arrangements. An 'applied law jurisdiction', being NSW or another state or territory, may be prescribed by regulations made under the Act. The laws of a jurisdiction would only be applied when there is an agreement in place between the relevant state or territory and the Government.

Amendments in relation to the jurisdiction of Norfolk Island courts complement the proposed amendments to the NI Act which allow state or territory laws to be applied in Norfolk Island. The provisions to permit the courts of a prescribed state or territory to have jurisdiction in relation to Norfolk Island would only be utilised if the Australian Government entered into an agreement with a state or territory government for the delivery of state-type services and it was considered appropriate for the courts of that jurisdiction to also operate in Norfolk Island. Where a state or territory government was delivering most or all state-type services in Norfolk Island under the laws of that state or territory, it may be appropriate for the courts of that state or territory to adjudicate on matters arising under those laws.

In light of the present circumstances regarding the provision of state-type services in Norfolk Island, it is considered necessary and appropriate to allow regulations to determine which state or territory laws will be in force in Norfolk Island. Prescribing these matters in regulations will allow these arrangements to be implemented in a timely manner if agreement is achieved between the relevant state or territory and the Government. If provision for these matters were to be included in primary legislation there is risk of a delay in implementing state-type arrangements which would have an adverse effect on the provision of state-type services to the community in Norfolk Island.

Further, any regulations prescribing these matters are disallowable by a single House of Parliament acting alone, and are subject to the usual parliamentary scrutiny, including the Senate Scrutiny of Delegated Legislation Committee. As legislative instruments, section 17 of the *Legislation Act 2003* requires that the instrument-maker be satisfied that appropriate consultation has occurred. For instance, should a decision be made in the future to transfer the jurisdiction of the Norfolk Island courts to the courts of another Australian state and territory, then there would be consultation with all relevant parties to inform development of a comprehensive transition plan, with justice system administrators being a key part of that process.

Instruments not subject to parliamentary disallowance

Items 67 and 72 of Schedule 1 to the Bill seek to insert proposed subsections 18B(13) and 18D(13) into the NI Act. Proposed subsections 18B(13) and 18D(13) respectively provide that an instrument made under proposed section 18B or 18D is not a legislative instrument. Proposed sections 18B and 18D deal with a range of matters relating to the vesting of powers under applied state and territory laws.

The committee requests more detailed advice regarding:

- *why it is appropriate to specify that instruments made under proposed sections 18B and 18D are not legislative instruments; and*

- *whether the Bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.*

Response

The instruments made under section 18B, as amended, and proposed section 18D, deal with a range of matters relating to the vesting and delegation of powers under applied state and territory laws in Norfolk Island. Proposed subsections 18B(13) and 18D(13) respectively provide that an instrument made under section 18B or 18D is not a legislative instrument. These provisions are based on existing subsection 18B(11) of the NI Act which similarly provides that an instrument made under this section is not a legislative instrument.

I note that subsections 8(1) and (4) of the *Legislation Act 2003* have the combined effect that an instrument that is made under a power delegated by Parliament and has one or more provisions that have legislative character (rather than administrative character) will be a legislative instrument: unless the relevant Act expressly exempts the instrument from being a legislative instrument.

In *Visa International Services Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 424 (Visa International), the Federal Court identified a number of factors that are likely to have bearing on whether a decision is to be characterised as being of administrative or legislative character. The list included (at paragraph 592):

- whether the decision determined rules of general application, or whether there was an application of rules to particular cases;
- whether there was Parliamentary control of the decision;
- whether there was public notification of the making of the decision;
- whether there was public consultation;
- whether there were broad policy considerations imposed;
- whether the regulations (or other instrument) could be varied;
- whether there was power of executive variation or control;
- whether there was provision for merits review; and
- whether there was binding effect.

The case law makes it clear that not one of these factors will determine whether the decision is of an administrative or legislative character. Rather, it is necessary to consider the decision in light of all these factors.

Legislative and administrative decisions can also be broadly distinguished between legislative decisions which determine the content of the law and administrative decisions which apply the law in particular cases (*Roche Products Pty Limited v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451 per Branson J).

Applying these factors to the instruments made under sections 18B and 18D, I am satisfied that none of these instruments determine the content of the law. Notably, these instruments deal with the vesting, delegating or directing of powers otherwise vested in the minister and other persons under applied state or territory laws. In this respect, the instruments are of an administrative character, dealing with the application or carrying out of these powers, and do not determine or alter the content of these delegated, vested or otherwise directed powers.

Furthermore, there is no public consultation required for making the instrument, nor is there any requirement to notify the public when the instrument is made. The policy considerations imposed are narrow, being confined to the administration of these applied laws, and do not otherwise generally affect the public.

In any case, I also note that an instrument of delegation, including any directions to the delegate, as well as an instrument that is a direction to a delegate are classes of instruments that are not legislative instruments for the purposes of the *Legislation Act 2003*: see *Legislation (Exemptions and Other Matters) Regulation 2015* (the Regulation), items 1 and 2 of the table in subsection 6(1). The explanatory statement to the Regulation explains that delegations, including directions to the delegate, 'are administrative in character, as they facilitate the carrying out of powers and functions but do not alter the scope or effect of those powers and functions.'

In light of this, I consider that the instruments made under section 18B and 18D will be instruments of an administrative character, rather than a legislative character. The statements in proposed subsections 18B(13) and 18D(13), that the relevant instruments are not legislative instruments, are declarations of the law and do not provide an exemption from the *Legislation Act 2003*.

However, because the legislative versus administrative character test is complex, the declaratory statement is intended to assist readers of the Bill to understand that the instruments are not legislative instruments.

Procedural fairness
Fair trial rights

Item 112 of Schedule 1 to the Bill seeks to repeal and substitute section 60C of NI Act. Proposed subsection 60C(2) provides that the court of a prescribed state or territory may order that any criminal trial be held or continued in the prescribed state or territory, rather than in Norfolk Island. However, the court may only make such an order, if it is satisfied that the interests of justice require it. If the court is sitting in the prescribed state or territory and the accused is not present, the accused must be represented and the court must be satisfied that the accused understands the effect of the order. Proposed paragraph 60C(5)(a) provides that the court may order that the accused be removed to a specified place and held there for the purposes of the trial and any related proceedings, and proposed paragraph 60C(5)(b) provides that the court may order that all persons required to attend to give evidence in the trial or proceedings attend at a specified time and place.

The committee requests the minister's advice as to whether the Bill can be amended to include additional protections to protect the rights of an accused person whose trial is held in a prescribed state or territory, rather than in Norfolk Island.

Response

As discussed in the explanatory memorandum, these provisions dealing with the criminal jurisdiction of the courts of a prescribed state or territory with respect to Norfolk Island are modelled on 2018 amendments to the NI Act, contained in the *Investigation and Prosecution Measures Act 2018*, which similarly authorise the Supreme Court of Norfolk Island to hear

criminal trials outside Norfolk Island in its criminal jurisdiction if the court is satisfied that the interests of justice require it.

The Committee expresses concern that these measures may, over time, have the effect of reducing the number of criminal trials held in Norfolk Island and have the potential of limiting access to justice in Norfolk Island for accused persons, including by creating barriers to accessing legal representation, evidence and trial support. In light of this, the Committee requests whether the Bill can be amended to include additional protections to protect the rights of an accused person whose trial is held in a prescribed state or territory, rather than in Norfolk Island.

It should be noted that the proposed provisions to permit the courts of a prescribed state or territory to have jurisdiction in relation to Norfolk Island would only be utilised if the Government entered into an agreement with a state or territory government for the delivery of state-type services and it was considered appropriate for the courts of that jurisdiction to also operate in Norfolk Island. Where a state or territory government was delivering most or all state-type services in Norfolk Island under the laws of that state or territory, it may be appropriate for the courts of that state or territory to adjudicate on matters arising under those laws.

This is the same as the situation in Christmas Island and the Cocos (Keeling) Islands where the courts of Western Australia have jurisdiction as if these external territories were part of Western Australia. Similar to the proposed provisions of the NI Act, provisions in the CI Act and the CKI Act provide that the Supreme Court of Western Australia may, when exercising its criminal jurisdiction with respect to these external territories, conduct criminal trials in Western Australia if the court is satisfied that the interests of justice require it.

If these provisions were ever utilised in the future, I do not consider that they would substantially change the manner in which the courts presently exercise their criminal jurisdiction in Norfolk Island or limit access to justice in Norfolk Island for accused persons. As is presently the case, serious criminal trials would only take place outside Norfolk Island in circumstances where the interests of justice require it, for instance where there are concerns about the ability to empanel an impartial local jury. Many of the existing services of the Norfolk Island courts are already delivered remotely by judicial officers sitting on the mainland and it is expected that these arrangements would continue.

In response to the Committee's concerns about access, I note that courts serving remote communities, like Norfolk Island, adopt a range of practices to ensure appropriate access to justice, including circuit visits and the use of technology such as telephone and video conferencing. In practice, if these provisions were ever utilised in the future, the experience of defendants and practitioners would be very similar to the present administration of the Norfolk Island courts. Legal aid would continue to be available

Also consistent with present arrangements, an accused required to be remanded for significant periods would be transferred to the mainland. This is because Norfolk Island has very limited remand facilities and this would not change under any future criminal justice arrangements.

I also do not think it is appropriate to further restrict the discretion of judicial officers when considering whether the hearing of a criminal trial in a prescribed state or territory, rather than Norfolk Island, is in the interests of justice. The judiciary is best placed to consider these

factors on a case by case basis and case law indicates that these factors will include the court considering any potential hardship on the accused, including potential reduced access to witnesses or evidence. Under the proposed provisions, the accused can make submissions to the court on whether a trial should be heard in a prescribed state or territory, rather than Norfolk Island, including making submissions on access to legal representation, evidence and trial support in their specific circumstances. It is impractical and restrictive to anticipate the factors that a court may legitimately consider when determining this matter in practice, on a case by case basis. Accordingly, if further provision for these matters were to be expressly included in primary legislation there is the risk that such factors may, in restricting judicial discretion, lead to inadvertent or perverse outcomes and may actually work against the interests of justice.

In light of these circumstances, I do not consider it necessary to amend the Bill to include additional protections to protect the rights of an accused person whose trial is held in a prescribed state or territory, rather than in Norfolk Island.

Significant matters in delegated legislation
Privacy

Item 60 of Schedule 3 to the Bill proposes to insert subsection 6(5A) into section 6 of the *Privacy Act 1988* (the Privacy Act). Proposed subsection 6(5A) provides that the minister may, by legislative instrument, exempt a body, office or appointment for the purposes of proposed paragraphs 6(1)(ca) or 6(1)(ea) of the definition of 'agency'.

The committee requests advice as to:

- *why it is necessary and appropriate to leave significant matters, such as exemptions from the requirements of the Privacy Act, to delegated legislation, noting the potential impact on the privacy of individuals;*
- *whether the Bill can be amended to include at least high-level guidance in relation to when the exemption power may be used; and*
- *how the minister will assess whether the relevant state or territory jurisdiction has equivalent or substantially similar privacy protections as provided for under the Privacy Act.*

Response

Proposed subsection 6(5A) of the Privacy Act will potentially allow the minister, by legislative instrument, to exempt a body, office or appointment, established by or under a law of a state or territory as in force in an external territory, from the definition of 'agency' (see proposed paragraphs 6(1)(ca) or 6(1)(ea) of the definition of 'agency'). The effect of any such instrument would be to exclude these entities from the requirements of the Privacy Act which operate with respect to a range of Commonwealth entities and officials, such as Commonwealth ministers and their departments.

The amendments made to the Privacy Act by the Bill will clarify its application with respect to this very small category of public entities established under applied laws in the external territories. In this context, the minister's power to exempt any of these bodies from the definition of 'agency' is expected to be rarely used. As discussed in the explanatory memorandum, the minister would only exempt where the relevant body, office or appointment would be subject to an applied state or territory law which provides equivalent,

or substantially similar, requirements regarding the use of personal information by public bodies, for instance, the *Privacy and Personal Information Protection Act 1998* (NSW) which regulates the use of personal information with respect to local government councils in NSW.

These amendments ensure that these public entities and officials are subject to the operation of appropriate privacy legislation but recognise that in certain circumstances, it may be more appropriate for the relevant entity or official to be subject to the privacy law requirements of the applied state or territory law instead of the Privacy Act. This is consistent with Government policy that public bodies in the external territories, such as local government bodies, which are established and regulated by an applied state and territory should be subject to the same regulatory environment as equivalent bodies in the relevant state or territory. These arrangements are important for ensuring that with respect to any state-type service delivery arrangements agreed by the Commonwealth with a state or territory, that the relevant state or territory official may administer these applied laws consistently with the operation of these laws in their home jurisdiction.

The applied laws regimes which apply in the external territories are dynamic and subject to change, because laws apply in the external territories as they are in force from time to time in their original jurisdiction. The administration of applied laws is dependent on state-type service delivery arrangements entered into with state or territory governments which are also subject to change over time. Accordingly, the use of delegated legislation to exempt bodies established and regulated by these applied laws is appropriate in this context as it allows these arrangements to be adjusted relatively quickly as circumstances change. If provision for these matters were to be included in primary legislation there is the risk that such exemptions may quickly become redundant or inappropriate as circumstances change.

Further, any legislative instrument made by the minister pursuant to proposed subsection 6(5A) of the Privacy Act is disallowable by a single House of Parliament acting alone, and subject to the usual parliamentary scrutiny, including the Senate Scrutiny of Delegated Legislation Committee. The minister will be obliged in any explanatory statement to justify the making of the instrument, including any reasoning that the relevant entity will be subject to an applied state or territory law which provides equivalent, or substantially similar, requirements regarding the use of personal information as the Privacy Act, as well as recording any relevant consultation undertaken. In making this assessment, the minister would consult relevant stakeholders, including the Office of the Australian Information Commissioner.

Given the special context of the applied laws regimes in the external territories, and noting the oversight mechanisms available to Parliament, the use of delegated legislation here remains appropriate. Accordingly, I do not consider it necessary to amend the Bill to include additional high-level guidance in relation to when this exemption power may be used. However, acknowledging the views of the Committee, my Department will carefully monitor these arrangements.