THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC21-002234

13 APR 2021

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
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Dear ~~Senator~~ Hele

I refer to the correspondence of 19 March 2021 from Mr Glenn Ryall, Committee Secretary, regarding the Senate Scrutiny of Bills Committee's (the Committee) request for information on matters identified in *Scrutiny Digest 5 of 2021*, regarding the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021.

I have considered the Committee's request and my responses are set out in the attached document.

Yours sincerely

SUSSAN LEY

Enc Response to Senate Scrutiny of Bills Committee *Scrutiny Digest 5 of 2021* regarding the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021

Response to Senate Scrutiny of Bills Committee
Scrutiny Digest 5 of 2021

Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021

1. National Environmental Standards

Significant matters in delegated legislation

Exemption from disallowance

The Committee has requested advice as to why it is considered necessary and appropriate to establish national environmental standards by legislative instrument

The Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (the Bill) establishes a framework to enable national environmental standards to be made and applied.

The ability to establish national environmental standards as a legislative instrument made under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is consistent with good regulatory practice. The Bill requires national environmental standards to undergo regular reviews; the first to be undertaken within 2 years of the commencement of a standard, and then at intervals of not more than 5 years. Over time as more information becomes available, it is intended that new standards will be made and existing standards will be varied to reflect the outcomes that need to be supported by decision-makers. Establishing national environmental standards as a legislative instrument provides the necessary flexibility for the standards to respond to new information and changing circumstances.

The Committee has requested advice as to why it is considered necessary and appropriate to exempt the first standards made under section 65C from disallowance, noting that instances of the disallowance procedure resulting in disallowance by the Parliament are very low, and that certainty may also be achieved by having delegated legislation come into effect after the disallowance period has expired

As stated in the Explanatory Memorandum, when a national environmental standard is first made, it will be treated as an 'interim' standard until it has undergone its first review. Proposed subsection 65G(2) requires the first review to be undertaken within 2 years of a standard commencing.

National Cabinet has committed to implement single touch environmental approvals under the EPBC Act. A single touch environmental approval system reduces duplication which speeds up projects, supports economic recovery and creates jobs while maintaining environmental protections. An efficient and effective single touch environmental approval system will be facilitated by the negotiation of approval bilateral agreements with each state and territory, underpinned by national environmental standards.

Exempting the first made 'interim' national environmental standards facilitates single touch environmental approvals by providing necessary certainty for the benchmarking of state and territory processes, the commitment states and territories must make to not act inconsistently

with the standards and agreement to the terms of approval bilateral agreements. The disallowance of a first standard made in relation to a particular matter would undermine the collaborative efforts of all jurisdictions to move to a single touch environmental approval system underpinned by national environmental standards.

As stated above, a standard will no longer be considered 'interim' after it has undergone its first review. Any variation to a standard will be subject to disallowance, ensuring appropriate scrutiny.

The Committee has requested advice as to whether the bill can be amended to include at least high-level guidance regarding the content of national environmental standards on the face of the primary legislation, particularly in light of the proposal to exempt first standards made under section 65C from disallowance, which would remove the primary means by which the parliament could exercise control over this delegated legislation

Subsection 65C(1) of the Bill enables national environmental standards to be made for the purposes of the EPBC Act. However, the initial suite of national environmental standards will only be developed after working through the full detail of the recommendations of the EPBC Act review with stakeholders. Furthermore, over time as new information becomes available and as circumstances change, it is expected that new standards will be required to reflect the outcomes that need to be supported by decision-makers. As such it is not possible to include high-level guidance in the Bill regarding their content.

Requirements for decisions or things under the Act

The Committee has requested advice as to why it is considered necessary and appropriate to leave the determination of decisions or things that must be consistent with a national environmental standard, or are exempt from requirements to be consistent with a national environmental standard, to delegated legislation

Enabling the Minister to determine which decisions or things under the EPBC Act must not be inconsistent with a national environmental standard, or are subject to the public interest exception, provides necessary flexibility to apply the standards to different decisions or things gradually as standards are developed and made over time. It also avoids the need to amend the EPBC Act each time a new decision or thing is determined to be subject to the national environmental standards or the public interest exception.

A determination that a decision or thing under the EPBC Act must not be inconsistent with a national environmental standard, and a determination that a decision or thing is subject to the public interest exception will be a legislative instruments for the purposes of the *Legislation Act 2003*. The determinations will be subject to parliamentary scrutiny and the disallowance regime of that Act.

The Committee has requested advice as to whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation

It is not considered appropriate to include guidance in the EPBC Act as to the decisions or things that must not be inconsistent with a national environmental standard or subject to the public interest exception. This is because the content of such a determination will be dependent on the nature and purpose of the standards to be made.

Incorporation of external materials existing from time to time

The Committee has requested advice as to why it is considered necessary and appropriate to incorporate document as in force or existing from time to time, noting that such an approach may mean that future changes to an incorporated document could operate to change important aspects of the national environmental standards without any involvement from Parliament

It is necessary and appropriate to enable national environmental standards to incorporate documents as in force or existing from time to time to ensure standards remain contemporary as those documents evolve over time.

As stated in the Explanatory Memorandum, a national environmental standard may make reference to Commonwealth instruments, such as conservation advices approved by the Minister under section 266B of the EPBC Act. Conservation advices provide guidance on immediate recovery and threat abatement activities that can be undertaken to ensure the conservation of a listed threatened species or ecological community. Conservation advices are required for each listed threatened species or listed threatened ecological community and can be updated regularly as new information becomes available. The ability to incorporate documents such as conservation advices as they exist from time to time ensures the protections in the national environmental standards reflect the latest scientific information. This is consistent with the current operation of the EPBC Act, which requires the Minister to have regard to any approved conservation advice for a listed threatened species before deciding whether to approve the taking of an action relating to the species. This requirement applies to all relevant approved conservation advices that exist at any the time the approval decision is being made.

Enabling national environmental standards to incorporate documents as in force or existing from time to time ensures the standards will remain commensurate with changing environmental management processes by allowing them to adapt with changing circumstances. Without this, the ability of the standards to achieve their stated environmental outcomes will be diminished over time.

Tabling of reports

The Committee has requested that proposed section 65G of the bill be amended to provide that the report of a review must be tabled in each House of the Parliament

The Committee has commented that not providing for the review report to be tabled in Parliament reduces the scope for parliamentary scrutiny, and that tabling provides opportunities for debate that are not available where documents are not made public or are only published online.

Proposed subsection 65G(5) of the Bill imposes an obligation on the Minister to cause the report of the review to be published on the Department's website as soon as practicable after the report is given to the Minister. Publication of the report on the Department's website ensures the widest possible access.

It is not necessary for a report of a review into a national environmental standard to be tabled in Parliament in order to provide opportunities for parliamentary scrutiny of the findings of the report. Furthermore, if a standard is varied as a result of the review, then the instrument of variation will be subject to parliamentary scrutiny and the disallowance regime of the

Legislation Act 2003 (as the exemption from the disallowance process only applies to the first standard made in relation to a particular matter under proposed subsection 65C(3)) thereby ensuring parliamentary scrutiny of the more substantive matter.

2. Environment Assurance Commissioner

Privacy

Significant matters in delegated legislation

The Committee has requested advice as to why it is considered necessary and appropriate to leave additional persons and bodies to whom personal information may be disclosed or provided, and purposes for which the information may be disclosed or provided, to delegated legislation

Proposed section 501U sets out the persons or bodies to whom the Environment Assurance Commissioner may disclose information (including personal information) or provide a document (which may contain personal information) that the Commissioner obtains in the course of performing their functions. At the time of drafting the Bill, the persons or bodies listed in proposed paragraphs 501U(1)(a) – (e) were considered appropriate. However, once the Commissioner has been established and is exercising its functions, it was recognised that it may become necessary for the Commissioner to disclose information or provide a document to a person or body not listed in those paragraphs. The ability for the regulations to prescribe additional persons or bodies to whom information may be disclosed or documents provided ensures the necessary level of flexibility as additional persons or bodies are identified over time.

It should also be noted that any such regulations would be a legislative instruments for the purposes of the *Legislation Act 2003*, and therefore subject to parliamentary scrutiny and the disallowance regime of that Act.

The Committee has requested advice as to whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation

For the reasons specified above, it is not possible at this time to provide additional high-level guidance on the face of the primary legislation regarding the additional persons or bodies that may be prescribed in the regulations to whom the Environment Assurance Commissioner may disclose information or provide documents.

The Hon Keith Pitt MP

Minister for Resources, Water and Northern Australia

MC21-001953

Senator Helen Polley
Chair
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Dear Senator Polley

Thank you for your request on behalf of the Standing Committee for the Scrutiny of Bills regarding queries raised concerning the *Northern Australia Infrastructure Facility Amendment (Extension and Other Measures) Bill 2021* (the Bill) in Scrutiny Digest 5 of 2021.

The committee sought advice on:

- Parliamentary scrutiny of grants of financial assistance to the states under section 96 of the Constitution; and
- the addition of a discretionary power for the termination of members of the Northern Australia Infrastructure Facility (NAIF) Board.

Parliamentary scrutiny of s96 grants of financial assistance

Under s7(1) of the *Northern Australia Infrastructure Facility Act 2016* (NAIF Act), the NAIF is conferred the power to "grant financial assistance to the States and Territories for the construction of Northern Australia economic infrastructure" and determine the terms and conditions of the financial assistance. While the Bill adjusts the language of s7(1)(a) to allow the NAIF to consider a wider scope of economic infrastructure projects by substituting 'construction' for 'development', the provision of assistance under s96 is expected to continue as per current arrangements.

The terms and conditions attached to the provision of s96 assistance under s7(1)(b) are enshrined in Master Facility Agreements (MFAs) with each jurisdiction. These MFAs set out the key principles and arrangements agreed between the NAIF, the Commonwealth and the State or Territory to facilitate the delivery of financial assistance to projects.

The MFAs with the Queensland, Western Australian and Northern Territory Governments were tabled in the Senate on 5 February 2018. These agreements will remain in place following passage of the Bill. On the basis that the terms and conditions associated with grants of financial assistance are already in place and tabled in the Parliament, I do not consider it necessary to amend the Bill.

Discretionary power to terminate NAIF Board members

The power provided for in 21(1)(d) permits the Minister for Northern Australia the flexibility to adjust the skills mix of the NAIF Board. This power is necessary for effective governance of the NAIF. The NAIF's Investment Mandate closely affects the NAIF's organisational focus, and can be changed at the discretion of the Minister for Northern Australia and the Minister for Finance. In contrast, NAIF Board Members are appointed for terms of up to three years.

The power provided for in 21(1)(d) is necessary for the Minister to configure the Board for optimal delivery. For example, if the responsible Ministers were to materially change the Investment Mandate to deliver a specific policy objective, the power provided in 21(1)(d) ensures the Minister for Northern Australia also has the discretion to configure the Board for optimal implementation of the new Investment Mandate, rather than waiting long periods of time for Board terms to expire. This practice allows the collective skills of the Board to be closely matched to the specific requirements of the Investment Mandate, and maximise the effectiveness of the NAIF.

The current NAIF Act does not permit the responsible Minister to terminate Board members in these circumstances, and only allows for the termination of Board members for misbehaviour, impairment to perform duties, unsatisfactory performance, absenteeism, and bankruptcy considerations. The power in s21(1)(d) provides the responsible Minister with the flexibility to ensure the NAIF Board is well equipped to perform its functions as they change over time. As such I do not consider it necessary to amend the Bill.

I trust this information is of assistance to the Committee.

Yours sincerely

Keith Pitt 1 / 4 / 2021

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

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Minister for Communications,
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Dear Chair

Thank you for the letter from the secretary of the Senate Scrutiny of Bills Committee of 19 March 2021 seeking additional information to inform the deliberations of the committee about the Online Safety Bill 2021 (the Bill).

I have noted the comments of the committee in its *Scrutiny Digest 5 of 2021* (the Digest) and I provide the attached information about the Bill in response to the 11 matters raised at pages 11 to 26.

I trust this information will be of assistance to the committee in its deliberations.

Yours sincerely

Paul Fletcher

7/4/2021

Enc

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Online Safety Bill 2021 - Information provided in response to the Scrutiny of Bills Committee's request

1. Merits review

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

- **why it is considered necessary and appropriate to provide the Commissioner with a broad discretion to determine whether to investigate complaints and the manner in which investigations will be undertaken;**
- **whether the bill can be amended to include additional guidance on the exercise of this discretion on the face of the primary legislation or, at a minimum, in the explanatory memorandum; and**
- **why merits review will not be available in relation to decisions made by the Commissioner under clauses 31, 34, 37, 42 and 43.**

1.44 The committee's consideration of the appropriateness of excluding merits review will be assisted if the minister's response identifies established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What Decisions Should be Subject to Merit Review?*

Answer

The provisions relating to the Commissioner's power to conduct investigations are based on equivalent provisions in the *Enhancing Online Services Act 2015* and Schedules 5 and 7 of the *Broadcasting Services Act 1992* (the existing legislation). It is appropriate to provide the Commissioner, as an independent statutory officer, with discretion as to the manner of investigating complaints. This is intended to support the development of sound intelligence gathering techniques and assist in administering the complaints scheme efficiently. The Commissioner is expected to apply sound investigatory principles including procedural fairness in the conduct of investigations.

The committee's concern about the lack of merits review for decisions of the Commissioner under clauses 31, 34, 37, 42 and 43 to not investigate complaints is acknowledged. However this lack of review is proportionate and does not have the effect of making rights, liberties or obligations unduly dependent upon insufficiently defined administrative power. In addition, rights, liberties or obligations are not unduly dependent upon non-reviewable decisions. It is not considered necessary to amend the Bill in the way suggested by the Committee.

Clauses 31, 34, 42 and 43 are consistent with equivalent provisions in the existing legislation relating to cyber-bullying, image-based abuse and the online content scheme and clause 37 relates to the new adult cyber-abuse scheme. None of the existing schemes have review powers for not proceeding with an investigation. It should be noted that the Bill proposes to include an internal review scheme at clause 220A and merits based review of a decision of the Commissioner to refuse to issue removal notices at subclause 220(4). It is considered that these review processes are adequate to address the concern about the impact on complainants of the Commissioner not taking the requested action in relation to complaints. As noted in the Explanatory Memorandum, there are also opportunities to seek procedural review under the *Administrative Decisions (Judicial Review) Act 1977*.

We have reviewed the Administrative Review Council's guidance on *What Decisions Should be Subject to Merit Review?*[1] and consider that decisions for not proceeding with an investigation would fall into the category of preliminary or procedural decisions which in the Administrative Review Council's view are not suitable for review.

2. Broad discretionary power

1.53 The committee therefore requests the minister's advice as to:

- **why it is considered necessary and appropriate to provide the Commissioner with a broad discretionary power to determine that material which has not previously been classified will be 'class 1' or 'class 2' material; and**
- **whether the bill can be amended to include additional guidance on the exercise of the power on the face of the primary legislation; and**
- **why it is considered necessary and appropriate to provide that the Commissioner and their delegates are not liable for damages for acts done in good faith in the performance or exercise of powers or functions conferred by the bill.**

Answer

The Bill maintains the current consistency in standards between the classification regime and the online safety regime – the definitions of class 1 and class 2 rely on the categories in the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act). The Bill empowers the Commissioner to assess and act on content reported to it without referring material to the Classification Board. The Bill allows the Commissioner to seek advice from the Classification Board. Material captured by class 1 and class 2 material generally violates the community standards of most major social media services.

The rationale behind this approach is to streamline the process for removal of illegal or harmful material from the internet and to reduce unnecessary administrative costs; each routine application for the Classification Board to assess online content is charged at the rate of $550 and can take up to 28 days to complete (priority applications, which attract an additional $420 fee, are concluded in five days). The nature of the material the Commissioner deals with under the Bill differs to the material the Classification Board deals with under the Classification Act (i.e. produced films, publications or computer games). It also differs in the way it is created (particularly user-generated), the way it is distributed and the way it can go viral in an instant and therefore a rapid response is necessary.

Provisions in the Bill limiting the liability of the Commissioner and delegates of the Commissioner for any damage resulting from acts done in good faith in the performance or exercise of powers of functions conferred on the Commissioner by the Bill are similar to provisions in the *Broadcasting Services Act 1992* (BSA) and the *Enhancing Online Safety Act 2015* (EOSA). Under the BSA, the following persons are protected from criminal proceedings:

- the Commissioner
- a member of the staff of the ACMA
- a consultant engaged under section 69 of the EOSA
- an officer or employee whose services are made available to the ACMA under paragraph 55(1)(a) of the *Australian Communications and Media Authority Act 2005*

[1] What decisions should be subject to merit review? 1999 | Attorney-General's Department (ag.gov.au) available at https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999

- a member or temporary member of the Classification Board
- a member of staff assisting the Classification Board or
- a consultant engaged to assist in the performance of the functions of the Classification Board or the functions of the Classification Review Board
- an officer whose services are made available to the Classification Board under subsection 54(3) of the Classification Act
- a member of the Classification Review Board.

The BSA currently provider that criminal proceedings do not lie against a protected person above for or in relation to the collection, possession, distribution, delivery, copying of content or materials or the doing of any other thing in relation to content or material in connection with the exercise of a power, or the performance of a function, conferred on the Commissioner, the Classification Board or the Classification Review Board by schedule 5 or schedule 7 of the BSA.

Part 10 of the *Enhancing Online Safety Act 2015* similarly protects the Commissioner and delegates from liability for damages for, or in relation to, an act or matter in good faith done or omitted in the performance of functions and exercise of powers conferred on the Commissioner under that Act (section 90). It also protects the Commissioner, ACMA staff, consultants and delegates from criminal proceedings for or in relation to the handling of material in connection with the powers and functions conferred on the Commissioner under that Act (section 91).

3. Exclusion of liability

1.56 The committee therefore requests the minister's detailed advice as to:

- **the intended purpose and operation of subclause 235(1);**
- **examples of the types of liability that may be excluded; and**
- **what rights and obligations may be affected by the exclusion of liability in subclause 235(1).**

Answer

Clause 235 is based on the existing exclusion from State and Territory Law for internet content hosts and internet service providers in clause 91 of schedule 5 to the *Broadcasting Services Act 1992*. It has been updated to refer to definitions of service providers used in the Online Safety Bill to replace “content hosts” with “hosting service providers”. These types of services are not generally responsible for the provision of content on their services; rather content is provided by other parties. Internet service providers enable end-users to have access to the content and hosting services store the content.

This clause is intended to work in conjunction with clause 234 (about the concurrent operation of State and Territory laws) to give practical effect to the principle that in general the Commonwealth will provide a nationally consistent framework for the activities of hosting service providers and internet service providers without intruding on the power of the States in such areas as defamation or criminal law.

This is a fine-tuning mechanism intended to deal with a situation where a State or Territory law has the direct or indirect effect of regulating these service providers in a way that that is inconsistent with the principles that these types of service providers are not generally aware of the content on their services and do not monitor the content on their services.

An example of rights that may be excluded are the powers for an individual to seek damages from an internet service provider for defamatory comments posted on a designated internet service or a social media service.

4. Procedural fairness in relation to the ISP blocking powers in part 8

1.60 The committee also notes that the explanatory memorandum only appears to address the natural justice aspect of procedural fairness and does not provide any explanation why the other limb of the right to procedural fairness, the bias rule, has also been excluded.
1.61 In light of the above comments, the committee requests the minister's more detailed justification regarding why it is considered necessary and appropriate to remove the requirement to observe *any* requirements of procedural fairness in relation to issuing a blocking notice under subclause 99(1).

Answer
It is acknowledged that the Explanatory Memorandum does not address the issue of bias rule specifically. There is an expectation that the eSafety Commissioner would act in accordance with the rule of bias, that is, to act impartially, and in a way that can be objectively assessed as not having prejudged a decision.[2]

The exclusion of natural justice requirements is consistent with the complementary powers of the eSafety Commissioner under s474.35 and 474.36 of the *Criminal Code Act 1995* to issue notices to providers of content services and hosting services of the presence of Abhorrent Violent Material. The exclusion of natural justice requirements in these sections of the Criminal Code and in part 8 of the Online Safety Bill is necessary and proportionate in order to allow the eSafety Commissioner to issue notices as quickly as possible to protect the Australian community from seriously harmful material, such as the livestreaming of terrorist attacks.

5. Privacy Significant matters in delegated legislation

1.64 The committee's view is that significant matters, such as conditions for the disclosure of information that may include identifying personal information, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.
1.66 In light of the above, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave conditions to be complied with in relation to the disclosure of information to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding conditions which will be imposed on the face of the primary legislation.**

Answer
To ensure adequate protection of privacy, the Bill empowers the Commissioner to impose conditions to be complied with in relation to information disclosed under clause 211 (disclosure to a Royal Commission), clause 212 (certain authorities), clause 213 (schools or principals), and clause 214 (parents or guardians). Such conditions may include a requirement preventing secondary

[2]Consistent with the obligation identified by the Australian Law Reform Commission 2016 Procedural fairness: the duty and its content available at: https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/14-procedural-fairness-2/procedural-fairness-the-duty-and-its-content/

disclosures to third parties. An instrument made under subclause (2) of clause 211, 212, 213 and 214 is a legislative instrument unless it imposes conditions relating to one particular disclosure.

It is appropriate that any conditions imposed by the Commissioner on information, including sensitive personal information, disclosed to third parties under these clauses be specified in delegated legislation. The nature of complaints dealt with by the Commissioner under the Bill are varied and the Commissioner requires the flexibility and ability to use discretion in imposing any conditions. It would be impractical to list all conditions for every circumstance in the primary legislation. We do not consider it necessary to amend the Bill to include high-level guidance regarding conditions which will be imposed on the face of the primary legislation.

Part 15 of the Bill also authorises disclosure of information by the Commissioner to the Minister responsible for administration of the Bill (clause 208), the Secretary of the Department and APS employees in the Department who are authorised by the Secretary, for the purposes of advising the Minister (clause 209), members of the staff of the ACMA, etc. (clause 210). Disclosure under these provisions is not arbitrary and is a necessary aspect of the constitutional principle of responsible government and all parties are bound by the *Privacy Act 1988*.

Other provisions of Part 15 also ensure adequate protection of privacy. Clause 215 permits disclosure of information relating to the affairs of a person, so long as that person has consented to that disclosure, and clause 216 authorises the disclosure of information that is already publicly available. Clause 217 authorises the disclosure of summaries and statistics, but these are only authorised if they are summaries of, or statistics prepared from, "de-identified" information. This ensures that the right to privacy is preserved when information is disclosed under this provision.

6. Significant matters in delegated legislation – list of powers for the Minister to make legislative rules

1.71 In light of the above, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave each of the above matters to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

Answer

The legislative rule power as contained in the Online Safety Bill 2021 is based on the existing provision (section 108) in the current legislation, the *Enhancing Online Safety Act 2015*.

The power to make legislative rules provides flexibility to address new and emerging harms in a timely manner and deal quickly and efficiently with administrative matters crucial to the functioning of the Bill.

The Minister's ability to make legislative rules is limited to prescribing matters required or permitted by the Act, or necessary or convenient to give effect to the Act.

Subclause 240(2) of the Bill places further limits on the making of legislative rules by specifying that the rules may not be used to, among other things, create an offence, provide powers relating to arrest, search and seizure or impose a tax. Significantly, paragraph 240(2)(e) provides the final limitation that the legislative rule may not directly amend the text of the Act.

Any legislative rules will be made by way of legislative instrument and as such will also be subject to the requirements of making such an instrument.

Based on the limitations inherent in the legislative rule power it is not proposed to amend the Bill.

7. Significant matters in non-disallowable delegated legislation

1.81 In light of the above, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave the following matters to delegated legislation which is exempt from disallowance:**
- **directions about the exercise of powers or performance of functions of the Commissioner;**
- **directions about the provision by the ACMA of assistance to the Commissioner; and**
- **determinations of amounts to be credited to the online safety special account; and**
- **whether the bill can be amended to:**
    - **provide that these directions and determinations are subject to parliamentary disallowance; and**
    - **provide at least high-level guidance regarding what may be included in the directions on the face of the primary legislation.**

Answer

The Online Safety Bill retains the existing governance arrangements for the eSafety Commissioner drawn from the *Enhancing Online Safety Act 2015,* which have existed since the creation of the role. These include sections relating to the functions and powers of the Commissioner, assistance provided to the eSafety Commissioner by the ACMA and the operation of the special account.

It is acknowledged that these arrangements include the potential for delegated legislation which is exempt from disallowance. This is both necessary and appropriate due to the nature of the online environment which is characterised by rapid technological change, new online service offerings and the emergence of new ways in which these can be exploited to cause harm to Australians. In such an environment it is not possible to anticipate all the harms that may emerge so that they may be addressed in primary legislation. Providing for delegated legislation provides flexibility for the Government to direct the eSafety Commissioner and provides much-needed certainty and authority to take action in this environment.

Importantly, these powers do not allow the Minister to direct the eSafety Commissioner without limit. Directions by the Minister to the eSafety Commissioner about the performance of the Commissioner's functions or the exercise of the Commissioner's powers (Clause 188 (2)) 'must be of a general nature only'. Such a direction may be issued to authorise the eSafety Commissioner to commence work in response to a new online harm not addressed by the Commissioner's primary legislation. However it does not allow the Minister to direct the Commissioner to make a specific regulatory decision.

The Bill retains the power for the Minister to direct the ACMA (Clause 184 (5)). This directions power relates specifically to assistance provided by the ACMA to the Commissioner. This is a necessary and appropriate approach needed to ensure the eSafety Commissioner is appropriately resourced and enjoys the maximum level of autonomy to perform their functions and powers within the current organisational arrangement where the eSafety Commissioner is a statutory office holder supported by staff of the ACMA. This directions power would only be used as a matter

of last resort, in the event that the eSafety Commissioner and the ACMA could not reach agreement on assistance being or to be provided.

Clause 191 (2) allows the Minister to specify amounts to be debited from the appropriation for the ACMA, to be credited to the Online Safety Special Account. The explanatory memorandum for the Online Safety Bill explains that exclusion from disallowance is appropriate in this instance to provide certainty of funding for the eSafety Commissioner. Allowing for the possibility that a legislative instrument providing funding for the eSafety Commissioner may be disallowed would create sufficient uncertainty, and could undermine an urgent response to a newly emerged online harm.

The committee's request that high-level guidance be included in primary legislation is noted. It is not intended to amend the Bill, due to the need to retain maximum flexibility and certainly in responding to the rapidly evolving nature of online harms. Proving high-level guidance as to the matters to be included in the directions would risk the new Online Safety Bill falling quickly out of date.

8. Parliamentary scrutiny—section 96 grants to the states

1.85 The committee therefore requests the minister's 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**
- **include a requirement that written agreements with the states and territories about grants of financial assistance relating to online safety for Australians made under clause 27 are:**
  - **tabled in the Parliament within 15 sitting days after being made; and**
  - **published on the internet within 30 days of being made.**

Answer

The Committee's concern about the delegation of grant-making power to the Commissioner and the limited opportunity for Parliamentary scrutiny of the agreements with States and Territories establishing the grants is acknowledged.

The provisions at clause 27 are identical to the provisions in section 15 of the *Enhancing Online Safety Act 2015* and it is considered appropriate for these provisions to continue. It is not considered necessary to specify in detail the purpose of all grants programs in the future as this might constrain the ability of the Commissioner to provide grants to assist in response to emerging online harms for all Australians.

The Commissioner would be provided with funding for grants through the Budget process and the Senate has the ability to scrutinise this expenditure, including during Estimates hearings. The 2019-20 Budget included funding for a $10 million online safety grant program over four years. The eSafety Commissioner currently administering this program in accordance with the Commonwealth's grants guidelines. Information about the guidelines, the standard grants agreement and the grant recipients is published on the Commissioner's website[3] and will also be included in future annual reports.

[3] Online Safety Grants Program | eSafety Commissioner https://www.esafety.gov.au/about-us/what-we-do/our-programs/online-safety-grants-program

The grants-making power in clause 27 is general and includes States, Territories and persons other than States or Territories. The current grants program is limited to applications from non-government organisations. However for future grants programs it may be appropriate for State and Territory government agencies to be eligible to apply.

It is therefore not considered necessary to amend the Bill as suggested by the Committee.

9. Reversal of evidential burden of proof

***1.94 As the explanatory materials do not address this issue, the committee requests the* minister's advice as to the appropriateness of reversing the evidential burden of proof in offence-specific defences in clause 205 and exceptions in clause 75.**
1.95 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*

Answer
Subclause 205(1) makes it an offence for a person required to answer questions, give evidence or produce documents under this Part, to refuse or fail to take the oath or make the affirmation when required; refuse or fail to answer a question that the person is required to answer; or refuse or fail to produce a document that the person is required to produce. Subclause 205(3) provides that subclauses 205(1) and 205(2) do not apply if the person has a reasonable excuse for non-compliance.

The defendant bears an evidential burden in relation to these matters, which is consistent with the provisions of the *Regulatory Powers (Standard Provisions) Act 2014* and subsection 13.3(3) of the *Criminal Code* in respect of matters in which a defendant seeks to rely on an exemption or excuse provision.

It is appropriate to reverse the evidential burden of proof in the offence-specific defence in clause 205, with reference to the relevant principles set out in the *Guide to Framing Commonwealth Offences*[4], because the matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Clause 75 of the Bill prohibits of the non-consensual sharing of intimate images.
Subclause 75(2) provides that the prohibition does not apply if the person depicted in the intimate image consented to the sharing of the image. If the person consented to the sharing of the intimate image, the prohibition would not be contravened. The person claiming the prohibition did not apply would be required to provide evidence that consent for the sharing of the image was given.

Subclause 75(3) states the prohibition does not apply in relation to an intimate image of a person without attire of religious or cultural significance where the person who shared the image did not know that the person who is depicted in the image consistently wore that attire whenever the

[4] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 50-52.

person is in public. The person who posted or threatened to post the image bears an evidential burden in relation to showing that they were not aware that the person depicted in the image consistently wore attire of religious or cultural significance in public.
Subclause 75(4) provides that the prohibition does not apply if the posting or threat to post of the intimate image is, or would be, an exempt provision of the intimate image. The person who posted or threatened to post the image bears an evidential burden in relation to showing that the sharing of an image was an exempt provision.

The defendant bears an evidential burden in relation to these matters, which is consistent with the provisions of the *Regulatory Powers (Standard Provisions) Act 2014*. It is appropriate to reverse the evidential burden of proof in the offence-specific defence in clause 75, with reference to the relevant principles set out in the *Guide to Framing Commonwealth Offences*, because the matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

The reversal of the evidential burden of proof on the defendant by creating an offence-specific defence is clear on the face of the legislation, in clauses 75 and 205 of the Bill. The reversal also exists in current legislation. Clause 75 of the Online Safety Bill 2021 is based on the existing section 44B of the *Enhancing Online Safety Act 2015* and clause 205 is based on the existing section 202 of the *Broadcasting Services Act 1992*.

10. Incorporation of external materials existing from time to time

1.100 Noting the above comments, the committee requests the minister's advice as to whether material that may be applied, adopted or incorporated by reference under subclause 230(2) will be made freely available to all persons interested in the law and why it is necessary to apply this material as in force or existing from time to time, rather than when the instrument is first made.

The ability to incorporate material as in force or existing from time to time is necessary to allow the Minister to reference in instruments certain technical and industry standards that may be updated frequently due to rapid technological change or the evolution of online services, and capture these updates without the need to update the instrument itself.

The flexibility provided by clause 230 of the Bill is intended to reduce the administrative burden, so that it would not be required to amend a relevant determination every time instruments or writings referred to in that determination change. It is also important to be able to incorporate other instruments by reference (including international technical standards and relevant Australian industry standards) as in force or existing from time to time. Similar flexibility is provided in the *Telecommunications Act 1997* (section 589).

Guidance on material that may be incorporated as in force or existing from time to time is provided in subclause 230(3), which lists examples such as regulations made under an Act, a Territory law or State Act or an international technical standard.

Material incorporated by reference into the law will be freely and readily available.

11. Broad delegation of administrative powers

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

• why it is considered necessary and appropriate to allow any or all of the Commissioner's functions and powers to be delegated to members of the staff of the ACMA or persons whose services are made available to the ACMA who hold Executive Level 1 or 2, or APS 6 level positions;

• why it is considered necessary and appropriate to allow the Commissioner's functions and powers that are not listed in subclause 182(4) to be delegated to a contractor; and

• whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated to members of the staff of the ACMA or persons whose services are made available to the ACMA.

Clause 181 of the Online Safety Bill mirrors the existing provision in the *Enhancing Online Safety Act 2015* allowing the Commissioner to delegate functions and powers to members of staff of the ACMA. This provision is retained as the Commissioner is a statutory appointee that is supported by staff of the ACMA. It is necessary and appropriate that the Commissioner be able to delegate functions and powers to appropriately qualified staff to provide necessary flexibility while reducing the administrative burden on the Commissioner. The Commissioner's legislative functions and powers are quite broad ranging from conducting research and promoting online safety for Australians, to administering complaints schemes and issuing take down notices. While noting the committee's concern, the delegation to members of staff that are SES or acting SES employees or APS employees that hold Executive Level 1 or 2 or APS 6 level positions, is appropriate. This is because it is expected that in delegating relevant functions and powers the Commissioner will have regard to the required accountability, skills, expertise and experience required to exercise the particular function or power.

Clause 182 was included in the Bill to mitigate any risk in the *Enhancing Online Safety Act 2015* that the Commissioner cannot explicitly engage contract staff in support of their functions and powers. It is the intent to use APS staff where possible. However at times the Commissioner must use contract staff in specialist positions for discrete time periods due to the specialist and at times sensitive nature of the Commissioner's work, in order to fulfil their statutory functions and powers. Clause 182 provides clarity and certainty regarding the use of contract staff, while subclause 182(4) appropriately limits the delegation to those functions and powers that do not carry civil penalty provisions.

While the Bill does not contain legislative guidance as to the scope of powers that might be delegated, it is expected that eSafety will develop clear guidelines and procedures for decision making processes carried out by all staff (including contract staff) having regard to appropriate administrative decisions and processes. It is also expected, as noted above, that the Commissioner will use discretion when delegating functions and powers, and the delegate must comply with written directions from the Commissioner (subclauses 181(2) and 182(2) refer). It is not considered necessary to amend the Bill in the way suggested by the Committee.

The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-008701
11 APR 2021

Senator Helen Polley
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Dear Chair Helen

I refer to your correspondence of 19 March 2021 on behalf of the Senate Scrutiny of Bills Committee (Committee) concerning its comments on the Private Health Insurance Amendment (Age of Dependants) Bill 2021 (Bill).

The Committee has requested my advice on the following matters:

- why it is considered necessary and appropriate to leave the definition of 'person with a disability' to delegated legislation
- whether the bill can be amended to include on the face of the primary legislation:
  - at least high-level guidance regarding this definition
  - the requirement that private health insurer rules may not apply a narrower definition of 'person with a disability' than that in the rules
- why it is considered necessary and appropriate to apply definitions set out in rules of a private health insurer to the definitions of 'person with a disability', 'dependent non-student' and 'dependent student'.

Definition of Person with a Disability

This Bill does not require any of the over 35 private health insurers in Australia to cover dependent people with a disability. Instead, the Bill allows a private health insurer to offer this type of coverage by exempting this type of coverage from the community rating requirements of private health insurance legislation. Without this exemption it would be illegal for insurers to offer coverage specific to dependent people with a disability.

In order to encourage insurers to offer cover for dependent people with a disability while still providing affordable insurance to their current policyholders, it is important the definition of people with a disability is set at a level that does not expose them to prudential risks that they cannot mitigate. If the definition of dependent people with a disability is too broad, private health insurers have advised they will not offer coverage for dependents with a disability as it would not be financially viable. If the definition of dependent people with a disability is too narrow, only a small number of people with a disability would be able to be covered.

The Bill addresses these issues in two ways:

- by establishing a minimum standard for the definition of people with a disability, to be specified in the Private Health Insurance (Complying Product) Rules (Rules), that must be used if a private health insurer chooses to offer coverage for dependent people with a disability

- by allowing a private health insurer to offer coverage beyond the minimum standard. This allows an insurer to offer broader coverage for dependent people with a disability if it chooses to offer coverage for dependent people with a disability, and it decides it is prudent to offer coverage beyond the minimum standard. An insurer may decide to offer coverage beyond the minimum standard when it first chooses to offer this type of coverage, or more likely after it has assessed the viability of offering coverage for dependent people with a disability at the minimum standard.

Accordingly, it is necessary to have the minimum standard defined in delegated legislation in order to allow for adjustments in a timely manner, particularly should there be an opportunity to expand the minimum standard as insurers offer increased coverage as financial viability concerns are quantified. Without this flexibility people with a disability would be disadvantaged.

Private Health Insurer Rules May Not Narrow the Definition

The Bill defines a dependent person with a disability as:

- dependent person with a disability means a person:
  (a) who is aged 18 or over; and
  (b) who is:
    (i) a person with a disability within the meaning of the expression person with a disability as defined by the Rules; or
    (ii) a person with a disability within the meaning of the expression person with a disability as defined by the rules of the private health insurer that insures the person.

The definition of a dependent person with a disability in the Bill is already structured in such a way as to prevent private health insurers from narrowing the definition of a person with a disability as defined by the Rules. It only allows insurers to broaden the definition of a person with a disability as defined by the Rules.

Definition of Dependent Non-students and Dependent Students in Insurer's Rules

The current categories of dependent child are listed in the table below and include:

- dependent children who are 0-17 years
- dependent children who are students and aged 0-24 years
- dependent child non-students who are aged 18-24 years.

'Dependent child non-student' is the only category of dependent child specifically named in the *Private Health Insurance Act 2007*.

Existing Dependent Child Categories

Dependent Child Categories names	Age Range	Defined by Insurer Rules	*Private Health Insurance Act 2007* Reference
defined but not named in the *Private Health Insurance Act 2007*	0 - 17	not allowed	Schedule 1 –Dictionary, Dependent child (a)(i)
defined but not named in the *Private Health Insurance Act 2007*	0 - 24	allowed	Schedule 1 –Dictionary, Dependent child (a)(ii), (b) and subsection 63-5(5)
Dependent child non-student	18 - 24	allowed	Subsection 63-5(5)

Insurers already have flexibility under the *Private Health Insurance Act 2007* to define the age range and other characteristics of dependent children who are students and dependent child non-students they will cover. For example, an insurer may decide to only cover dependent child non-students that live with their parents up to the age of 21.

The Bill does not alter in substance the ability for insurers to define dependent child non-students and dependent child students in their rules as this is already permitted under the *Private Health Insurance Act 2007*. The Bill only uses newer and clearer terminology for these categories of dependent child.

This is explained in the first three paragraphs in the notes on clauses for items 18, 19 and 20 in the explanatory statement for the Bill:

- Schedule 1 forms the dictionary of definitions used in the *Private Health Insurance Act 2007*. These items unify, name and define, and expand the current categories of 'dependent child'.

- They replace the term of 'dependent child' which covered three categories of 'dependent child' with 'dependent person' which covers four categories of 'dependent persons'.

- The new category of 'dependent person' is a 'dependent person with a disability'. Two of the current categories of 'dependent child' which were not individually defined have been named 'dependent child' and 'dependent student' and are individually defined. The current categories of 'dependent child' which was individually defined has had its name changed from to 'dependent child non-student' to 'dependent non-student'.

I trust this addresses the Committee's comments and thank you for writing on this matter.

Yours sincerely

Greg Hunt

Senator the Hon Anne Ruston

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

Ref: MC21-001321

Senator Helen Polley
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Dear Senator Polley

Thank you for your email dated 18 February 2021, concerning the Scrutiny of Bills Committee's (the Committee) request for further information regarding the definition of social security law in the Social Services and Other Legislation Amendment (Student Assistance and Other Measures) Bill 2021.

The response to the questions raised in the Committee's scrutiny digest 3 of 2021 is at **Attachment A**.

Thank you again for raising this matter with me. I trust the information provided will be of assistance to the Committee.

Yours sincerely

Anne Ruston

12/3/2021

Enc. Attachment A – Further information on the definition of social security law

Further information on the definition of social security law

Responses to the questions raised in Committee's scrutiny digest 3 of 2021 for the Social Services and Other Legislation Amendment (Student Assistance and Other Measures) Bill 2021 are as follows:

Why it is considered necessary and appropriate for legislative instruments made under Acts expressed to form part of the 'social security law' to be included in the new definition of 'social security law' in proposed subsection 23(17); and

As noted by the Committee, the current definition of 'social security law' under subsections 23(17) and (18) of the *Social Security Act 1991* (the Act) provides that 'a reference in the [Act] to the social security law is a reference to a provision of this Act, the Administration Act or any other Act that is expressed to form part of the social security law'. However, the definition of 'social security law' does not expressly include legislative instruments made under an Act or a provision referred to in any of those Acts.

The Act and the *Social Security (Administration) Act 1999* include frequent references to the 'social security law' in a variety of contexts, including but not limited to review of decisions, delegation of powers, obligations, offences and confidentiality provisions. Legislative instruments, such as the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 also include references to the 'social security law'. While it may be that an instrument made under the power in any of these Acts is, in effect, part of the 'social security law', there is some doubt that it may not fall within the definition, or it may not do so in some legislative contexts.

The amendments are intended to clarify and achieve certainty that the references to 'social security law' include legislative instruments made under the authority of the Acts referenced in the new subsection 23(17). It also provides clarity to tribunals and courts when deliberating on appeals before them that involve decisions made under legislative instruments.

The practical impact of this change.

The practical impact of this change is negligible. The measure clarifies current practice.

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000571

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Dear Senator Polley

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (Committee) regarding the Treasury Laws Amendment (Your Future, Your Super) Bill 2021 (Bill).

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

- why it is necessary and appropriate to leave various matters, including basic requirements, definitions, prohibitions and standards to delegated legislation;
- whether the Bill can be amended to include these matters or provide guidance about these matters;
- whether elements of the Bill operate retrospectively and, if so, its effect; and
- whether specific consultation obligations beyond the *Legislation Act 2003* could be included in the Bill.

Given the number of matters to be covered, I have set out my response in the Annexure to this letter.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP
25 / 3 /2021

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Annexure 1

Schedule 1 to the Bill

The committee has requested my detailed advice as to:

- why it is considered necessary and appropriate to leave basic requirements for a fund to be a stapled fund for an employee to delegated legislation; and

- whether the Bill can be amended to include at least high-level guidance regarding these basic requirements on the face of the primary legislation, such as the requirement that the fund is an existing fund of the employee.

Advice

Schedule 1 to the Treasury Laws Amendment (Your Future, Your Super) Bill 2021 (the Bill) sets out the new choice of fund rules relating to stapled funds. As stapled funds are a new concept in the *Superannuation Guarantee (Administration) Act 1992*, flexibility about the definition of a 'stapled fund', including in relation to the basic requirements, is needed to ensure the definition can remain responsive to changing practices, particularly as the reforms are implemented by industry.

The explanatory memorandum to the Bill provides that the regulations prescribing the requirements for a fund to be a stapled fund for an employee will cover basic requirements. This will include the requirement that the fund is an existing fund of the employee.

I note that although this requirement could also be explicitly included in the primary law, it is already implicit through the various references in Schedule 1 to the Bill that refer to a stapled fund being a 'stapled fund *for* an employee' (as this indicates there must be an existing connection between the stapled fund and the employee). It should also be noted that in practice, an employer will only ever be able to make contributions to a fund that is an existing fund of an employee.

It is also envisaged that the regulations will also include other requirements to ensure that the rules are appropriately targeted. In particular, I am proposing that an existing fund will not be a stapled fund for an employee if the employee's only interest in that existing fund is a defined benefit interest. This approach reflects that if the employee only has a defined benefit interest in an existing fund, a new employer is unlikely to be able to make contributions to that fund.

The regulations are also expected to include tie-breaker rules for determining which fund is to be an employee's stapled fund where they have multiple existing funds. I note that a similar approach to tie-breaker rules is included in subregulation 14(2) of the *Superannuation (Unclaimed Money and Lost Members) Regulations 2019*, which applies for the purposes of identifying an 'active account' where a person has more than one eligible fund for receiving payments of lost and unclaimed money from the Commissioner under the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

Prescriptive detail of this kind is consistent with the legislative framework established by the Bill. In my view, it is entirely appropriate that detail of this kind be included in subordinate legislation such as regulations. In line with usual government processes, the regulations prescribing the requirements that need to be met for a fund to be a stapled fund for an employee will be open to stakeholder input during consultations and remain subject to parliamentary scrutiny through the usual tabling and disallowance process.

Schedule 2 to the Bill

The Committee has requested my advice as to:

- why it is considered necessary and appropriate to leave the following matters to delegated legislation: definition of Part 6A product; the requirements for the annual performance test; and the requirements for lifting a prohibition on accepting new beneficiaries into superannuation funds that have received two consecutive failure assessments;
- whether the proposed scheme for annual performance assessments may have a retrospective application and, if so, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected; and
- whether the Bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.

The Committee has also requested that the explanatory memorandum be amended to include specific information about the intended operation of the annual performance testing scheme, as set out in Budget documents published by the Treasury.

Advice

The legislation introduces an annual performance test that initially only applies for Part 6A products that are MySuper products. The legislation allows regulations to define additional Part 6A products which will be subject to the annual performance test. This regulation making power allows the test to be expanded, where appropriate, to existing products (other than MySuper products), as well as new superannuation products that may emerge in the future.

In contrast to MySuper products (which are prescriptively defined in primary legislation), such products may vary significantly in their structure and form, and new products are regularly being offered to the market. As such, the flexibility to capture these is best achieved by placing the definition in the regulations. Regulations are considered appropriate to deal with more technical details and can be amended more quickly than legislation to respond to a changing marketplace and keep closer pace with progressive product innovation. This approach is designed to allow timely future refinements to the definitions to ensure that the scope of additional products are defined correctly, providing certainty for industry on which products are in scope, over time.

The legislation ensures that products specified in the regulations cannot be subject to the annual performance test until 1 July 2022 at the earliest.

The specific requirements for the annual performance test involve setting out various technical matters including specifying complex mathematical formula and assumptions that are to be applied in performing the calculations. It is considered that regulations are the appropriate mechanism for setting out such technical details. Regulations provide flexibility to refine the technical details and formula to ensure the test operates as intended both initially and over time, as regulations may be amended more quickly than primary legislation. Regulations will enable the Government to be more responsive to update relevant assumptions to be used in the calculations, where there is a change in the investment environment that makes updates appropriate or necessary.

If a Part 6A product does not meet the requirements of the performance test in two consecutive financial years, the trustee cannot accept any new members into that product. The legislation seeks to introduce a provision whereby APRA may make a determination to lift this prohibition (that is, re-open the Part 6A product to new members).

Regulations will provide for requirements that need to be met for APRA to make such a determination. It is anticipated that the requirements would be of a technical nature, similar to the requirements for the annual performance test. That is, the requirements would likely involve specifying complex mathematical formula and assumptions to be used in the calculations. As outlined above, it is considered that details of this nature are most appropriately dealt with in regulations.

Any regulations dealing with the matters outlined above would, in line with usual government processes, be open to stakeholder input during consultations and remain subject to parliamentary scrutiny through the usual tabling and disallowance process.

The annual performance test is designed to assess performance against a tailored benchmark for each Part 6A product. In order to carry out the calculation, it is necessary to look back at a product's performance in past years, which could be viewed as having retrospective application. The intent is that the performance test is to be calculated over a time period that allows funds to target long-term returns, rather than having one or two years of poor performance result in a failure of the test.

To begin looking at long-term product performance in a timely manner, it is necessary and appropriate to take into account a product's performance prior to the making of the regulations prescribing the formula for the test. Not doing so would mean that the first performance tests could not be conducted until many years after the regulations are made.

It is unlikely that any individual will be adversely affected by this approach. This approach ensures the annual performance test can begin to apply in a timely manner after the regulations are made. This is likely to promote the interests of superannuation members, as members will be notified if they are in an underperforming product sooner, and not wait many years into the future, which could have an adverse effect on their retirement outcomes. The approach of assessing long-term returns seeks to prevent trustees being adversely affected by having one or two years of poor performance.

I believe the Bill provides guidance on the core framework for the new annual performance test, setting out matters such as the consequences that flow for trustees when a product they offer is considered to be underperforming.

The matters raised by the Committee are best provided for in regulations as they relate to matters that may change or are very technical in nature. Having these matters prescribed in regulations allows for quicker reactions to these changes in the superannuation sector than would be available if these matters were prescribed in the primary law.

Guidance on the intended operation of the annual performance testing scheme will be provided in the explanatory statement to the regulations. It is appropriate that this guidance accompany the regulations, which will set out the detailed requirements for the annual performance test.

Schedule 3 to the Bill

The Committee has requested my advice as to:

- why it is considered necessary and appropriate to leave the following significant matters to delegated legislation:
  - record keeping standards that must be complied with by trustees of superannuation entities;
  - additional requirements in relation to the 'best financial interests' duty that must be complied with by trustees and directors of trustee companies; and
  - prohibited payments or investments;
- whether the Bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation; and
- whether specific consultation obligations (beyond those in the Legislation Act 2003) could be included in the Bill (with compliance with such obligations a condition of the validity of regulations made under paragraphs 52(2)(c) and 52A(2)(c) and proposed subsection 117A(1)).

Advice

Schedule 3 to the Bill does not delegate the specification of record keeping standards to delegated legislation. This is already a feature of the existing law. Existing sections 31, 32 and 33 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) expressly authorise regulations to prescribe record keeping standards that must be compiled with by trustees and directors of trustee companies. This allows the regulations to establish record keeping obligations that trustees must already comply with under the existing law. This is part of a broader framework already set out in the SIS Act outlining which matters can be prescribed in operating standards made via regulations (see paragraphs 31(2)(a) to (u), 32(2)(a) to (n) and 33(aa) to (k) of the SIS Act).

The Bill does not seek to vary those matters (record keeping or otherwise) that can be prescribed via operating standards. The Bill only creates a strict liability offence for these record keeping requirements to enhance and expand the enforcement and compliance options available to the regulators. The strict liability offence is designed to apply to any offence of this kind that may arise under the existing law. The explanatory memorandum explains why it is considered appropriate to apply strict liability to this kind of offence.

Schedule 3 to the Bill seeks to ensure that trustee actions are in the best financial interests of members. Regulating superannuation entities and their actions is important to protect the retirement savings of Australians.

The record keeping standards, additional requirements in relation to the 'best financial interests' duty, and the prohibition of certain payments or investments target the application of the legislative regime so that it focuses on the kinds of trustee actions where risks are likely to arise while minimising impact for areas of lower risk. As industry practices may change over time, the record keeping standards, additional requirements and the kinds of prohibited payments or investments may also need to change to reflect this.

Allowing the regulations to prescribe additional requirements in relation to the 'best financial interests' duty and to prohibit certain payments or investments will provide the Government with the necessary flexibility to make timely amendments. This essential flexibility to adapt to changing risks is best achieved by placing the detail in the regulations which may be amended more quickly

than primary legislation. In line with usual government processes, the regulations regarding these matters will be open to stakeholder input during consultations and remain subject to parliamentary scrutiny through the usual tabling and disallowance process.

It is unlikely that any person will be adversely affected by this approach. The regulations cannot apply retrospectively to disadvantage a person. The intention is to address circumstances where there is a heightened risk of trustees avoiding their obligations under the best financial interests duty. This approach ensures the additional requirements and the prohibition on particular kinds of payments or investments can be designed to target circumstances where trustee behaviour that is not in members' best financial interests has been identified, and can begin to apply in a timely manner after the regulations are made. This approach is designed to allow timely future refinements to ensure that the circumstances that trigger additional requirements and the scope of prohibited payments and investments are defined correctly, providing certainty for industry over time.

The high level guidance is provided in the explanatory memorandum to the Bill and further guidance will be provided in the explanatory statement to any regulations made. For the same reason that these matters need to be included in the regulations (flexibility to be promptly amended in response to evolving industry practices), the primary legislation should not excessively constrain the scope of these matters that may be prescribed by the regulations.

The *Legislation Act 2003* includes a requirement to consult before making any legislative instruments to ensure that proposed instruments are appropriate and reasonably practicable to undertake. Consultation should ensure that persons likely to be affected by the proposed instrument have an adequate opportunity to comment, and that persons with expertise in the relevant field or representative bodies of persons likely affected by the proposed instrument are invited to make submissions. In line with such usual government processes, any proposed regulations regarding the matters outlined above will be open to stakeholder input during consultations and remain subject to parliamentary scrutiny through the usual tabling and disallowance process.