THE HON MICHAEL SUKKAR MP
Assistant Treasurer
Minister for Housing
Minister for Homelessness, Social and Community Housing

Ref: MS21-001103

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

Dear Senator Polley Helen

Thank you for your correspondence of 13 May 2021 on behalf of the Senate Standing Committee for the Scrutiny of Bills regarding the Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021.

The Committee has requested an addendum to the explanatory memorandum to include examples of the types of personal information that it is intended may be prescribed in the rules. I have considered the existing explanatory memorandum and consider that the information you have requested to be tabled is already sufficiently explained in the existing explanatory memorandum.

Paragraph 1.141 of the explanatory memorandum explains that, for the purpose of assessing whether the person is a fit and proper person to access safety and security information, the types of personal information that may be prescribed by the scheme rules will take into consideration information that is already used for similar purposes in the motor vehicle industry and licensing regimes that exist in some states. This could include a criminal records check being required to access certain types of security information to help prevent vehicle theft and associated crime.

The explanatory memorandum further explains at paragraph 1.143 that the scheme's rules may set out the types of offences that are relevant to the fit and proper person assessment. The scheme rules may set out what qualifications or workplace standards are required to access certain types of safety and security information (paragraphs 1.137 and 1.139)

The scheme's rules may also set out the period for which any personal information provided remains valid before the data provider can ask for updated information. For example, the scheme's rules may only allow a criminal record check to be done every two years, with the person required to certify that no changes have occurred to information previously provided. If changes have occurred, the data provider may request updated information in order to reassess if the individual is a fit and proper person.

Paragraph 1.144 of the explanatory memorandum makes it clear that the rules cannot prescribe 'sensitive information' under the *Privacy Act 1988*, other than a criminal records check. 'Sensitive information' is defined in section 6(1) of the *Privacy Act 1988*.

Public consultation will be undertaken as part of the development of the scheme rules. This will include consultation on what personal information should be prescribed in the scheme's rules for the fit and proper person test. This consultation is expected to commence soon.

The Committee has also asked for further justification for the significant penalties that may be imposed upon individuals via infringement notices under section 57GB.

The majority of the infringement notices included in the Bill are consistent with the *Guide to Framing Commonwealth Offences* and with those for anti-competitive behaviour and failure to comply with consumer protections under the *Competition and Consumer Act 2010* (CCA). Infringement notices provide the ACCC with flexibility to use administrative action for alleged contravention of a civil penalty provision, as an alternative to court proceedings.

The Bill contains only one instance of an infringement notice with penalty units that are higher than those recommended by the *Guide to Framing Commonwealth Offences.* This relates to a key obligation in the Bill, failing to supply scheme information within the required timeframe, which if not complied with by data providers would seriously undermine the Scheme. It is expected that most data providers will be large multinational motor vehicle manufacturers. In line with the *Guide to Framing Commonwealth Offences*, if the amount payable under an infringement notice is too low it is unlikely to be an adequate deterrent and may simply be paid as a cost of doing business. Therefore, in these circumstances I consider that the high penalty amounts for body corporates are justified. In order prevent a potential avoidance mechanism, it is necessary to include proportionate penalties and infringement notices for individuals. Consistent with the *Guide to Framing Commonwealth Offences*, the level of penalties and infringement notices applied to individuals is set at one-fifth of the corresponding amounts set for corporations. As such, I consider that the proposed level of infringement notice for individuals is also appropriate.

If an infringement notice is issued, a person may elect not to pay the amount, in which case the ACCC may choose to pursue a civil penalty in court (see section 57GB of the Bill and section 51ACH of the CCA). The matter would then be heard by a court who could impose a penalty if they determine the person has contravened a civil penalty provision.

The penalties are aimed at preventing the frustration of the objectives of the scheme through non-compliance by data providers. They will deter data providers from undertaking anti-competitive conduct that prevents consumer's from using a mechanic of their choice to service their vehicle and deprive independent repairers of work opportunities.

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

Yours sincerely

The Hon Michael Sukkar MP

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

MC21-003702

12 MAY 2021

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

I refer to correspondence of 21 April 2021 from Mr Glenn Ryall, Committee Secretary, regarding the Senate Standing Committee for the Scrutiny of Bills (the Committee) request for information on matters identified in Scrutiny Digest No.6 of 2021 regarding the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2021 and the Sydney Harbour Federation Trust Amendment Bill 2021.

I have considered the Committee's requests and detailed my responses in the enclosed attachments:

- Attachment A: Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2021
- Attachment B: Sydney Harbour Federation Trust Amendment Bill 2021.

I thank the Committee for the opportunity to respond. I have copied this letter to the Assistant Minister for Waste Reduction and Environmental Management, the Hon Trevor Evans MP.

Yours sincerely

SUSSAN LEY

Enc

cc: The Hon Trevor Evans MP
Assistant Minister for Waste Reduction
and Environmental Management

ATTACHMENT A: RESPONSE TO SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS SCRUTINY DIGEST 6 OF 2021
HAZARDOUS WASTE (REGULATION OF EXPORTS AND IMPORTS) AMENDMENT BILL 2021

Significant matters in delegated legislation

Committee comments:

1.49 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:**
  - **the conduct of audits and the process to be followed after an audit has been completed;**
  - **record-keeping obligations, where a failure to comply with the obligations will be a strict liability offence;**
  - **matters that the minister must give notice of to export and transit countries; and**
  - **the grounds on which a permit may be revoked or varied; and**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

Response:

Conduct of audit and process to be followed after an audit has been completed

Proposed subsection 53(3) would allow the regulations to prescribe matters relating to the conduct of an audit and the process to be followed after an audit has been completed. Proposed subsection 53(4) would provide high-level guidance as to the matters that may be covered by the regulations, including information that must be provided to the relevant person for the audit before the audit, during the audit, or after the audit is completed, and requirements for reports, for example, including the auditor's name on reports.

Over time, the relevant conduct and processes of audits may need to change because of changes to the regulatory environment, changes in the content of Australia's international obligations, and changes in technology.

Allowing the regulations to prescribe such matters provides the necessary flexibility for the compliance framework in the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the Act) to respond to such changing circumstances, thereby minimising the impact of hazardous waste on human health and the environment, and ensuring that the regulatory burden to industry is minimised so far as possible. For these reasons, I consider it is both necessary and appropriate to leave these matters to the regulations.

Record keeping

Proposed subsection 41D(1) would allow the regulations to prescribe matters requiring records to be made and retained by a person who holds a permit under the Act, has been notified that a transit permit is not required for carrying out a transit proposal, or has been given an order under Part 3 of the Act. Proposed subsection 41D(2) will provide high level guidance as to the matters that may be covered by the regulations, including the kind of records that must be made and retained, the form in which the records must be retained and the period for which records must be retained. Matters such as these are detailed and technical in nature, for example, the types of matters prescribed may be as detailed as the required font size of certain records.

Providing the details of record keeping in regulations rather than the bill would allow flexibility to prescribe specific record keeping requirements for all the regulations covered by the Act, in line with good regulatory practice. The ability to ensure that a variety of records can be kept in a variety of forms and for specific requirements to be updated with changes in technology, is important in ensuring compliance with the Act, as well as ensuring that the regulatory burden for industry is minimised so far as possible. Having records which are relevant and up to date ensures that those regulated under the Act are held accountable for their acts or omissions and that any non-compliance with the Act can be dealt with appropriately.

Both the Basel Convention and the Act also allow Australia to enter into agreements with other countries to control movements of hazardous waste (for example the OECD Decision). Agreements entered into under these arrangements may have different obligations to the Basel Convention and therefore it is important that requirements for record keeping are sufficiently flexible to adapt to such arrangements as they are agreed or varied.

For these reasons, I consider it is both necessary and appropriate to leave record-keeping obligations to the regulations.

Notification of relevant competent authorities

Item 26 of Schedule 5 would insert new section 16A. New section 16A would provide for the decision period for a permit application to be extended for export permits where the competent authority of the receiving country, or of a transit country, has not yet given or refused consent to an export proposal. New subsection 16A(1) would require the Minister, within 21 days after receiving an application for a Basel export permit, to notify the competent authority of the receiving country or a transit country of such information as is prescribed in the regulations.

Item 26 would not delegate any additional matters to delegated legislation than is currently the case under the Act. Existing subsection 15A(3) of the Act already allows the regulations to prescribe and allow the notification of such information. Item 26 does not seek to vary such matters but rather seeks to re-draft existing provisions to allow them to be more easily understood.

The regulations that are currently made under subsection 15A(3) will be taken to be made under new section 16A. The Bill makes no changes to the content of these regulations, and it is not anticipated that consequential regulation amendments will be made to change this content.

Furthermore, the ability to establish notification requirements in regulations made under the Act is consistent with good regulatory practice and ensures continued compliance with Australia's international obligations under the Basel Convention. The Basel Convention (and subsequently the Act) requires prior informed consent between parties on all transboundary movements of hazardous waste. Over time, information required for prior informed consent may change internationally (and, potentially, for particular countries on an individual basis) and domestic requirements will need to reflect this to support decision-makers and ensure minimal disruption to permit applicants. Continuing to allow the regulations to prescribe such matters provides the necessary flexibility to respond to changes in the international regulatory regime.

Grounds for revocation and variation

New sections 24 and 26H set out a number of grounds on which the Minister may revoke or vary a Basel permit respectively. This is an important safeguard to ensure that the holder of a Basel permit complies with the conditions of the permit and the requirements of the Act, and to ensure that a Basel permit has been granted on the basis of true and accurate information. Paragraphs 24(1)(e) and 26H(d) allow the regulations to prescribe addition grounds on which the Minister may decide to revoke, or vary, a permit respectively.

It is important to allow additional grounds to be able to be prescribed in the regulations, in order to ensure that the requirements to vary or revoke a permit can be adapted to quickly respond to:

- unexpected circumstances or potential harm that may damage Australia's international relations
- changes to Australia's international obligations concerning the import, export and transit of hazardous waste.

In addition, allowing the regulations to prescribe additional grounds on which a permit may be varied or revoked would provide the Minister with the ability to address a wide range of matters that relate to a permit and prescribe different grounds for different kinds of permit as necessary and appropriate.

While administrative flexibility is not generally considered by the Committee to be sufficient justification for including significant matters in delegated legislation, for the reasons set out above, flexibility in Australia's transboundary movement of hazardous waste regime is important. The ability to ensure sufficient grounds to revoke or vary permits quickly is necessary to effectively respond to and manage evolving environmental issues in order to protect Australia's environmental and human health, Australia's international relations, and to ensure continued compliance with Australia's international obligations.

Whether the bill can be amended to include at least high-level guidance

Over time, it is expected the regulations will be required to adapt to changing circumstances in the hazardous waste regulatory regime, both domestically and internationally. For the reasons outlined above, particularly the level of guidance already included in the Act and the need for flexibility to accommodate changing international obligations, I consider that it is not appropriate to include further high-level guidance in the bill regarding their content.

Retrospective application

Committee comments:

1.54 The committee requests the minister's advice as to why it is considered necessary and appropriate to apply the power to publish compliance related matters to offences committed, and orders given, before the commencement of the bill, and whether there may be any detrimental effect on individuals as a result of this retrospective application.

Response:

The purpose of the proposed amendments to allow the publication of compliance-related matters, including the affected person's name, is to provide an important deterrent to future contraventions and assist with ensuring the integrity of the regulatory regime. This is because, where hazardous waste is not properly dealt with and non-compliance occurs, the adverse effects can subsist in the physical environment long-term and can have long-lasting impacts on environmental and human health.

In order to achieve the intended deterrent effect, it is necessary and appropriate that the power to publish non-compliance be able to be used in respect of offences that were committed, or Ministerial orders that were given, before the commencement of the Bill. Such offences and orders may relate to ongoing investigations and environmental clean ups and, in the case of offences, convictions that are not secured until after the Bill has commenced due to the length of the criminal process. As such, confining the power to only allow the publication of non-compliance that itself occurs after the commencement of the Bill would reduce the effectiveness of the measure as a deterrent.

It is unlikely that there would be any detrimental effect on individuals due to the application of this item. Publishing a person's non-compliance with the Act would not, of itself, create any additional legal obligations or consequences on the person under the Act, or under any other Commonwealth legislation. In respect of convictions for offences, such information is already publicly available. It is also expected that most persons whose name would be published will be body corporates, for which the Privacy Act obligations do not apply.

In addition, the power for the Minister to publish non-compliance is discretionary; as such the Minister would retain the ability to decide not to publish any of the information set out above if they consider that, in the particular circumstances, the potential adverse consequences of publishing the information outweigh the intended deterrence effect. This includes the decision whether to publish non-compliance occurring before commencement of the Bill; in such cases, the Minister would be able to consider a broad range of factors prior to deciding whether to publish the information or not. This may include, but would not be limited to:

- the purpose and objects of the Privacy Act
- any potentially detrimental effect on the individual that may occur as a result of publication and whether it would outweigh the intended deterrence effect
- any potentially detrimental effect on environmental or human health, or Australia's continued compliance with international obligations, by not publishing the information
- the person's right to privacy and other relevant rights under international human rights law conventions to apply to Australia
- any other relevant public interest factors.

ATTACHMENT B:RESPONSE TO SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS SCRUTINY DIGEST 6 OF 2021
SYDNEY HARBOUR FEDERATION TRUST AMENDMENT BILL 2021

Significant matters in delegated legislation

Committee comments:

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

- **why it is considered necessary and appropriate to leave requirements relating to offences and penalties and requirements relating to the removal and disposal of objects and other matter 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.**

Response:

Retention of matters relating to offences and penalties and requirements relating to the removal and disposal of objects and other matters in regulations.

The Sydney Harbour Federation Trust Amendment Bill 2021 (the Bill) will amend provisions in the *Sydney Harbour Federation Trust 2001* (the Act) that relate to regulations that may be made under the Act.

The *Sydney Harbour Federation Trust Regulations 2001* (the Regulations) contain a number of offences ranging from the damage or removal of things from land managed by the Sydney Harbour Federation Trust (Trust land), causing or allowing animals to enter onto Trust land, to compliance with vehicle parking requirements on Trust land.

The Regulations also prescribe powers to the Trust and to rangers appointed under the Regulations to remove and dispose of objects and other matter from Trust land. These powers enable the Trust to regulate the behaviour of visitors to Trust land and enforce commission of the offences.

The purpose of these offences and powers is to enable the Sydney Harbour Federation Trust (the Trust) to manage Trust land and regulate activities on it, in accordance with the objects of the Trust provided in section 6 of the Act. These objects include enhancing the amenity of the Sydney Harbour region, maximising public access to Trust land, the protection, conservation and interpretation of heritage values of Trust land and the management of suitable Trust land as a park on behalf of the Commonwealth government.

The offences in the Regulations are minor and have a single maximum penalty of either 5 or 10 penalty units. These penalties reflect the low seriousness of the offences, the low incentive of visitors to Trust land to commit them and the relatively minor consequences of the commission of the offences. The consequences of the offences are generally unlikely to cause serious danger or damage to Trust land or to visitors to it.

Given the minor and regulatory nature of the offences, their application in the context of the Trust's regulatory activities in accordance with the objects of the Trust under the Act, and the low penalties for the offences, it is appropriate that these offences are provided in the Regulations rather than in the Act. The powers of the Trust and rangers to remove and dispose of objects are concomitant with the offences in the Regulations. As such, it is appropriate that these are provided in the Regulations. In addition, it is expected that changes to the offences may be required to adapt to changing circumstances in the operations of the Trust in managing Trust land. Such changes are more easily and

quickly made to Regulations, ensuring the regulatory framework remains current and fit for purpose, while also allowing for ongoing Parliamentary oversight (through the disallowance process).

The Regulations are readily available to the public as they are published on the Federal Register of Legislation. They are a disallowable legislative instrument for the purposes of the *Legislation Act 2003.*

Whether the bill can be amended to include at least high-level guidance

The Act makes express provision for the creation of the offences, penalties for them and their enforcement in section 73, as amended by the Bill. In particular, subsection 73(2) of the Act, as amended by the Bill, provides a detailed and clearly defined list of regulation-making powers. This also provides high-level guidance as to matters that are prescribed in the Regulations.

It is not considered necessary to include further high-level guidance regarding these matters in the Regulations.

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

MC21-003713

Senator Helen Polley
Chair
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10 MAY 2021

scrutiny.sen@aph.gov.au

Dear ~~Chair~~ Helen

I refer to the correspondence of 21 April 2021 from Mr Glenn Ryall, Committee Secretary, regarding the Senate Scrutiny of Bills Committee's (the Committee) request for additional information on the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (the Bill) in the Committee's *Scrutiny Digest 6 of 2021*.

Exemption from disallowance

The Committee has requested advice as to whether the Bill could be amended to provide certainty to the first standards made under proposed section 65C by either, requiring the positive approval of each House of the Parliament before the first standards come into effect, or by providing that the first standards do not come into effect until a disallowance period of five sitting days has expired.

At the National Cabinet meeting of 11 December 2020, all leaders reaffirmed their commitment to implement single touch environmental approvals and agreed the immediate priority was the development of standards that reflect the current requirements of the EPBC Act. Requiring the positive approval of each House of the Parliament before the first standards come into effect, or providing for a shorter period of disallowance after which the standards commence would delay the transition to single touch environmental approvals. This is because it would reduce the certainty required 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 Committee has also requested advice as to whether, at a minimum, the Bill can be amended to provide for the automatic repeal of the first standards following the first review of a standard in accordance with proposed subsection 65G(2).

The automatic repeal of the first standards following a review would also create uncertainty and delay the transition to single touch environmental approvals. In addition, any instrument varying or remaking the first standards will be subject to disallowance as the exemption from disallowance only applies to the first standard made in relation to a particular matter (proposed subsection 65C(3)).

The Bill requires the first review of a standard to be undertaken within 2 years of the standard commencing. As I committed during my second reading speech, I intend to use the interim standards and the goodwill of all stakeholders to drive change, and that this process will continue immediately following the passage of the legislation.

Incorporation of external materials existing from time to time

Following my advice regarding why it is necessary and appropriate for national environmental standards to incorporate documents as in force or existing from time to time, the Committee has requested that an addendum to the explanatory memorandum be tabled in the Parliament.

In my view, an addendum to the explanatory memorandum is not required. I note my response to the Committee's questions in relation to the matter are publicly available in the *Scrutiny Digest 6 of 2021*.

Yours sincerely

SUSSAN LEY

THE HON ALEX HAWKE MP
MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Ref No: MS21-000978

Senator Helen Polley
Chair
Standing Committee for the Scrutiny of Bills
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Canberra ACT 2600

Dear Chair

Thank you for your correspondence of 21 April 2021 on behalf of the Senate Scrutiny of Bills Committee (the Committee), regarding the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (the Bill).

The Bill amends the *Migration Act 1958* to strengthen Australia's ability to uphold its *non-refoulement* obligations to not return individuals to a country where they face persecution or a real risk of torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the application of the death penalty.

In the Scrutiny Digest 6 of 2021, the Committee sought clarification on the following matters:

- safeguards regarding immigration detention, rights and liberties;
- alternative options to address concerns relating to the DMH16 and AJL20 court judgments;
- statistics regarding the use of Ministerial Intervention powers;
- advice on the regulation making power in relation to protection findings; and
- the impact of the Bill on those affected by interpretations in the AJL20 case.

I am pleased to provide the Committee with additional information in response to these questions. A copy of the detailed response is enclosed.

In addition to the enclosed response, I wish to advise the Committee that on 12 May 2021, I moved amendments to the Bill, which seek to provide further assurance and safeguards for the effective implementation and operation of proposed provisions. These amendments will:

- amend the the Migration Act to provide access to merits review for certain individuals who were previously determined to have engaged protection obligations but are subsequently found by the Minister to no longer engage those obligations;
- amend the Migration Act to ensure that an unlawful non-citizen will not be removed in accordance with section 198 of the Migration Act where the Minister has decided that the unlawful non-citizen no longer engages protection obligations before:

  - the period within which an application for merits review of that decision under Part 7 of the Migration Act could be made has ended without a valid application for review having been made; or
  - a valid application for merits review of that decision under Part 7 was made within the period but has been withdrawn; or
  - the Minister's decision is affirmed or taken to have been affirmed upon merits review;

- amend the *Intelligence Services Act 2001* to require the Parliamentary Joint Committee on Intelligence and Security to commence a review of the operation, effectiveness and implications of the provisions amended or inserted by Schedule 1 to the Bill, by the second anniversary of the commencement of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*.

Yours sincerely

ALEX HAWKE

13/5/2021

Annex A

Scrutiny of Bills Committee, Scrutiny Digest 6 of 2021

Migration Amendment (Clarifying International Obligations for Removal) Bill 2021

Minister's Response

The committee requests the minister's detailed advice as to the effectiveness of safeguards and other measures contemplated by the bill to ensure that the immigration detention of persons affected by the bill will not trespass unduly on fundamental personal rights and liberties.

Detention remains a last resort

As the committee notes, detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. This includes individuals whose removal may not be practicable in the reasonably foreseeable future. The Government's preference is to manage non-citizens in the community wherever possible, subject to meeting relevant requirements, including not presenting an unacceptable risk to the safety and good order of the Australian community.

Amendments to section 197C of the *Migration Act 1958* (the Migration Act) made by this Bill would operate to protect unlawful non-citizens from removal in breach of *non-refoulement* obligations. Removal in such cases may become possible if, for example, the circumstances in the relevant country improve, such that the person no longer engages *non-refoulement* obligations, or if a safe third country is willing to accept the person. An unlawful non-citizen may also request in writing to be removed from Australia.

The Bill makes no change to the existing provisions of the Migration Act governing the detention of unlawful non-citizens. Under those provisions, Ministers have a personal discretionary power to intervene in an individual case and grant a visa, including a bridging visa, to a person in immigration detention, where it is in the public interest to do so. What is and what is not in the public interest is for the relevant Minister to decide.

As the Committee notes, Ministers also have a personal discretionary power to allow a detainee to reside outside of an immigration detention facility, at a specified address in the community (residence determination). While a residence determination permits an individual to be placed in the community subject to certain conditions, it continues to be an immigration detention placement.

These less restrictive community management options may be implemented for the person having regard to their circumstances, including *non-refoulement* obligations and potential risks to the Australian community.

Some unlawful non-citizens affected by the amendments made by the Bill may remain in an immigration detention centre while awaiting removal as any decision to not grant them a visa or place them under a residence determination will be made in consideration of their individual circumstances and the risk to the safety, security and good order of the Australian community. This helps to ensure that an immigration detention placement is reasonable, necessary and proportionate to individual circumstances and therefore it will not be arbitrary.

Conditions of immigration detention

The Governments takes the welfare of those in immigration detention very seriously. All people in immigration detention (detainees) are treated with respect, dignity and fairness. The Government is committed to ensuring detainees are provided with high quality services commensurate to Australian standards and that the conditions in immigration detention are humane and respect the inherent dignity of the person. The Government works closely with its service providers to ensure immigration detainees are provided with adequate accommodation, infrastructure, medical services, security services, catering services, programs, activities, support services and communication facilities.

Detainees are able to access legal representation in accordance with the Migration Act and the Government provides detainees with the means to contact family, friends and other support. The Government respects and caters for religious and cultural diversity. If a detainee requires an interpreter, the Australian Government will provide one.

Detainees who are unsatisfied with the conditions in immigration detention can raise concerns in person with Australian Border Force officers and service provider staff, or in writing or by telephone with the Department of Home Affairs or external scrutiny bodies.

Scrutiny and oversight

The length and conditions of immigration detention are subject to regular internal and external review. The Department and the Australian Border Force use internal assurance and external oversight processes to help care for and protect individuals and maintain the health, safety and wellbeing of all detainees.

The Department has a framework of regular reviews, escalation and referral points in place to ensure that people are detained in the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status. The Department also maintains review mechanisms that regularly consider the necessity of detention and where appropriate, identify alternate means of detention or the grant of a visa.

Each detainee's case is reviewed monthly by a Status Resolution Officer to ensure that emerging vulnerabilities or barriers to case progression are identified and referred for action. In addition, the Status Resolution Officer also considers whether ongoing detention remains appropriate and refers relevant cases for further action. Monthly detention review committees also provide formal executive level oversight of the placement and status resolution progress of each immigration detainee.

The Department proactively continues to identify and utilise alternatives to held detention. Status Resolution Officers use the Community Protection Assessment Tool to assess the most appropriate placement for an unlawful non-citizen while status resolution processes are being undertaken. Placement includes looking at alternatives to an immigration detention centre, such as in the community on a bridging visa or under a residence determination. The tool also assesses the types of support or conditions that may be appropriate and is generally reviewed every three to six months and/or when there is a significant change in an individual's circumstances.

Using the Community Protection Assessment Tool, Status Resolution Officers assess and determine whether the detainee meets the legislative requirements and criteria for a bridging visa to allow the non-citizen to temporarily reside lawfully in the community while they resolve their immigration status. Status Resolution Officers identify cases where only the Minister has the power to grant the non-citizen a visa or to make a residence determination in order to allow an unlawful non-citizen to reside in community detention. Where the case is determined to meet the Ministerial Intervention Guidelines, the case is referred to the Minister for consideration under section 195A of the Migration Act for grant of a visa or under section 197AB of the Migration Act for placement in the community under residence determination arrangements.

The Office of the Commonwealth Ombudsman (the Ombudsman) and the Australian Human Rights Commission have legislative oversight responsibilities. These bodies conduct oversight activities, publish reports and make recommendations in relation to immigration detention.

In addition to these activities, under the Migration Act, the Secretary of the Department of Home Affairs, the Ombudsman and the Minister have statutory obligations around the oversight of long-term immigration detainees. These provisions are intended to provide greater transparency in the management of long-term detainees through independent assessments by the Commonwealth Ombudsman.

The Secretary must provide reports to the Commonwealth Ombudsman on individuals who have completed a cumulative period of two years in immigration detention and then for every

six months that they remain in detention. The Ombudsman must then provide an assessment of these individuals' detention to the Minister, which the Minister then tables in Parliament, including any recommendations from the Ombudsman.

Once all domestic remedies are exhausted, individuals may also submit a complaint to relevant United Nation bodies such as the United Nations Committee against Torture or the UN Human Rights Committee.

The committee also requests the minister's detailed advice as to any other legislative or non-legislative options considered to address the government's concerns arising from the Federal Court's decisions in DMH16 v Minister for Immigration and Border Protection and AJL20 v Commonwealth, including any consideration by the minister of the extent to which an alternative option would impact personal rights and liberties.

The Commonwealth has appealed the judgment of the Federal Court in *AJL20* to the High Court. The High Court's judgment is reserved. The High Court's judgment may provide clarity on the interpretation of the current section 197C of the Migration Act.

The interpretation of section 197C is continuing to evolve as reflected in the recent decision of the Full Federal Court in *WKMZ v Minister for Immigration Citizenship Migrant Services and Multicultural Affairs* [2020] FCAFC 55 which held that section 197C and the removal power in 198 do not preclude detention for a period of time so that the executive can genuinely consider an alternative possibility for an unlawful non-citizen to remain in Australia, or other options such as admission to a safe third country, to avoid a breach of Australia's *non-refoulement* obligations.

Alternatives to detention

As noted above, detention in an immigration detention centre is a measure of last resort. The Government's preference is to manage non-citizens in the community, where possible, on a visa or under residence determination arrangements.

To complement this Bill, the Government continues to explore ways to improve options for managing unlawful non-citizens in the community in a manner that would seek to protect the Australian community while addressing the risks associated with long-term detention. For example, on 16 April 2021, amendments were made to the *Migration Regulations 1994* (the Migration Regulations) by the *Migration Amendment (Bridging Visa Conditions) Regulations 2021* to allow additional existing visa conditions to be imposed on certain Bridging visas granted under Ministerial Intervention powers. These amendments strengthen the community placement options available for detainees who may pose a risk to public safety. They are an additional safeguard designed to complement this Bill. An explanation of how these changes impact human rights is available in the Statement of Compatibility with Human Rights for those changes.

Refoulement

The Government has a long-standing policy position in relation to *non-refoulement* obligations. After commencement, the new provisions in section 197C would apply to all unlawful non-citizens who are subject to involuntary removal but engage protection obligations that have been assessed and accepted during the Protection visa process. This means first and foremost that officers will not be authorised or required to remove a person in breach of *non-refoulement* obligations.

The Bill clarifies and confirms Australia's commitment to meet its *non-refoulement* obligations and not remove unlawful non-citizens (UNCs) to a country where they face persecution or a real risk of torture, cruel, inhuman and degrading treatment or punishment, arbitrary deprivation of life or the death penalty.

If this Bill is not passed, the Migration Act may require or authorise the removal of certain unlawful non-citizens in breach of *non-refoulement* obligations, as soon as reasonably practicable.

To assist the committee in considering the minister's response to the above questions, the committee also requests the minister's advice as to how often current and former ministers have exercised their personal discretionary powers under sections 195A (discretion to grant a detainee a visa) and 197AB (residence determination), and in particular, how many times these discretionary powers have been exercised in relation to persons in immigration detention to whom protection obligations are owed but are ineligible for grant of a visa on character or other grounds.

Historical statistics relating to section 195A for this cohort group are below.

Granted a visa under s 195A of the Migration Act - persons in immigration detention who were found to engage protection obligations but were ineligible for grant of a visa on character or other grounds

Financial Year	Number of persons
2015-16	0
2016-17	<5
2017-18	<5
2018-19	<5
2019-20	<5
2020-21 (as at 30 April 2021)	<5

Information on the number of persons in detention (who have previously been found to be owed protection obligations or who arrived in Australia as refugee) whom the Minister has made residence determination is not available in departmental systems in a reportable format.

The committee requests the minister's detailed advice as to why it is considered necessary and appropriate to provide for additional situations in which a 'protection finding' will be made in respect of a person in regulations.

The amendments to section 197C would include a power to prescribe additional circumstances that constitute a protection finding in the Migration Regulations.

A power to prescribe additional circumstances in the Migration Regulations is appropriate and necessary to preserve the Government's ability to meet its *non-refoulement* obligations in limited cases that may arise, which fall outside the circumstances enumerated in the Bill.

Without such a provision, the Government may be required by law to remove unlawful non-citizens in breach of Australia's *non-refoulement* obligations.

If Parliament passes the Bill, the Department will monitor the operation of the new framework and, if deemed desirable or necessary, extend the scope of 'protection finding' through amendments to the Migration Regulations. As amendments to these Regulations are disallowable, they will be accompanied by a Statement of Compatibility with Human Rights and subject to parliamentary scrutiny.

The committee therefore requests the minister's advice as to the impact of this bill on any persons involved in current litigation, or who have been unlawfully detained based on the interpretation of sections 197C and 198 of the *Migration Act 1958* in *AJL20 v Commonwealth.*

Section 197C was never intended to operate to require the removal of a person who has been found to engage Australia's *non-refoulement* obligations. The purpose of the Bill is to clarify that the duty to remove under the Migration Act should not be enlivened where to do so would breach *non-refoulement* obligations, as identified in a protection visa assessment process.

Subitem 4(3) relates closely to new subsections 197C(5) and (6). As explained in paragraphs 27 and 29 of the Explanatory Memorandum:

"27. The primary purpose of subsection 197C(5) is to ensure that protection findings are

defined to include findings made by the Minister (or delegates of the Minister) in relation to protection visa applications decided prior to the commencement of these amendments and which may not use the precise wording of the current protection visa criteria, or reflect the order of consideration in new section 36A. This is to ensure that persons currently in Australia, and who have a protection finding from an earlier decision in respect of an application for a protection visa, are also protected by the amended section 197C from involuntary removal in circumstances that reflect Australia's *non-refoulement* obligations.

...

29. The purpose of new subsection 197C(6) is to ensure that a protection finding is made for a non-citizen where a protection finding has been made in respect of a country within the meaning of subsection 197C(4) or (5) as well where *non-refoulement* obligations are identified as in respect of another country where the Minister was satisfied that subsection 36(4), (5) or (5A) applied to the non-citizen so that subsection 36(3) did not apply in relation to that country – that is to say that there is no other country in respect of which the non-citizen has taken all reasonable steps to enter or reside in because protection obligations are engaged with respect to that non-citizen in that country or because that country will return the non-citizen a country in contravention of Australia's *non-refoulement* obligations."

In order for new subsections 197C(5) and (6) to operate as intended, protection findings made in relation to applications decided before the commencement of the amendments must be able to be considered.

Impact on AJL20 litigant

As noted above, the Commonwealth has appealed the judgment in *AJL20* in the High Court and judgment is reserved. If the Court accepts the Commonwealth's arguments, the Migration Act will have validly authorised *AJL20*'s detention. In that case, the Bill will not have any effect on unlawful detention claims based on *AJL20.*

If *AJL20* is upheld, the Bill may *prospectively* validate a person's detention in analogous circumstances to *AJL20.* However, this will not have retrospective effect on any persons' unlawful detention claims.

It would not be appropriate to comment further on active litigation before the Courts.

The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MS21-000498

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

10 MAY 2021

Dear Chair

I refer to the correspondence of 21 April 2021 from Mr Glenn Ryall, Committee Secretary of the Senate Standing Committee for the Scrutiny of Bills (Committee), concerning the Committee's comments on the Mitochondrial Donation Law Reform (Maeve's Law) Bill 2021 (Bill).

The Committee has sought my advice on three issues relating to matters proposed, under the Bill, to be dealt with in delegated legislation. I have considered the issues raised by the Committee, and I provide the attached detailed advice in response to the Committee's scrutiny concerns.

I trust this information will address the Committee's concerns, and I thank the Committee for writing on this matter.

Yours sincerely

Greg Hunt

Encl (1)

Response to the Senate Scrutiny of Bills Committee
Scrutiny Digest 6 of 2021

Mitochondrial Donation Law Reform (Maeve's Law) Bill 2021

Significant matters in delegated legislation – fees

The Committee has referred to proposed s 28H(7)(d) of the *Research Involving Human Embryos Act 2002* (the RIHE Act), to be inserted by item 17 of Sch 1 to the Bill. This provision would require an application for a mitochondrial donation licence to be accompanied by the fee (if any) prescribed in the regulations.

The Committee has raised the following scrutiny concerns:

- With this amendment, there would be no cap on the maximum fee amount, or any information or guidance as to how a fee will be calculated.
- The explanatory memorandum contains no information as to how the fee will be calculated or how it will be ensured that a fee charged to a person will be both necessary and appropriate.
- At a minimum, a provision stating that the fee must not be such as to amount to taxation should be included on the face of the Bill.

In relation to this final point, the Committee referred to paragraph 24 of the Office of Parliamentary Counsel's *Drafting Direction No. 3.1 Constitutional Law Issues*, September 2020 (the drafting direction).

The Committee has requested detailed advice as to:

- how the amount of any fee charged will be calculated and how it will be ensured that a fee charged to a person will be necessary and appropriate, and
- whether the Bill can be amended to provide at least high-level guidance regarding how fees will be calculated, including, at a minimum, a provision stating that the fee must not be such as to amount to taxation.

Calculation of the fee and ensuring it is necessary and appropriate

The ability to make regulations prescribing fees for licences under existing provisions of the RIHE Act (namely, s 20(2)(b)) is a long-standing feature of the Act. Since the commencement of the RIHE Act, a fee has never been prescribed for licence applications. The RIHE Act currently makes no provision for how any fee that might be prescribed is to be calculated, nor did the explanatory memorandum that accompanied the corresponding Bill indicate how this would be done. The existing provisions of the RIHE Act have generally operated successfully for many years, and have served as the basis for many of the amendments proposed by the Bill to legalise and regulate mitochondrial donation. Accordingly, the Bill has not proposed to deal expressly with how the amount of any fee charged will be calculated.

Section 28H(7)(d) of the RIHE Act would only allow 'fees' to be prescribed. The ordinary meaning of a 'fee' is a sum of money paid for services. That is to say, the reference to 'fee' in this provision implicitly restricts the level of any amount that might be prescribed, to a sum paid for services.

There is no plan to prescribe a fee for licence applications under this provision in the foreseeable future. However, decisions as to whether a fee should be prescribed, and if so, the amount of the fee, would be made in accordance with applicable policies such as the *Australian Government Charging Framework (RMG 302)* and the *Australian Government Cost Recovery Guidelines (RMG 304)* (the CRGs). The CRGs apply to all non-corporate Commonwealth entities, such as the Department of Health. Consistently with the CRGs, cost recovery fees can apply to regulatory activities such as licences. Under the CRGs, the amount of cost recovery fees is aligned with expenses incurred in providing the activity (such as processing applications for licences). That is to say, fees would be set at a cost-recovery level.

There is also a body of case law that would be applied in setting the level of any fee that might be prescribed, in order to ensure that it could properly be characterised as a fee for services. This body of case law would limit the amount of any fee that could be charged under this provision, and would ensure that any fee charged did not amount to a tax.

Taken together, there is an implicit limit on the level of a fee that could be prescribed for the purposes of existing s 20(2)(b) of the RIHE Act, or for the purposes of proposed s 28H(7)(d). This implicit limit stems from a mixture of government policy and law, and would serve to ensure that any fees that might be prescribed would be necessary and appropriate.

Amendment to the Bill regarding how fee will be calculated and stating that it must not amount to taxation

In light of the above comments, I consider that it is not necessary for the Bill to be amended to provide further guidance regarding how fees will be calculated.

The Committee has drawn my attention to paragraph 24 of the drafting direction, which refers to provisions that state that a fee must not be such as to amount to taxation. This drafting direction states that:

- there is no legal need for a provision of this kind, but
- a statement such as this can avoid confusion and emphasise that the provision is dealing with fees and not taxes, and warn administrators that there is some limit to the level and type of fee which may be imposed.

My understanding is that, because of the lack of legal necessity for provisions of this kind, they are not routinely included in Commonwealth legislation. I further understand that ordinary constitutional law principles would preclude the prescription of a fee that amounts to taxation under a provision such as proposed s 28H(7)(d) of the RIHE Act, even without the inclusion of such a provision.

Because of this, I do not consider it necessary for the Bill to be amended to deal with how fees will be calculated, nor do I consider it necessary for the Bill to be amended to state that prescribed fees must not be such as to amount to taxation.

However, in view of the Committee's comments, I propose updating the explanatory memorandum to reflect my response.

Significant matters in delegated legislation – incorporation of external material into the law

The Committee has noted proposed s 24(9), and ss 28N(8) and (9), of the RIHE Act.

Sections 24(9) and 28N(8) of the RIHE Act would define 'proper consent' for the purposes of general and mitochondrial donation licences. They would provide that 'proper consent' means consent obtained in accordance with guidelines issued by the CEO of the National Health and Medical Research Council (the NHMRC) and prescribed by regulation.

The prescribed guidelines would be the *Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research*, as existing from time to time (the 'ART Guidelines'). Additionally, for mitochondrial donation licences, 'proper consent' would require satisfaction of any requirements prescribed by regulation. Such requirements could relate to withdrawal of consent, and could provide that consent cannot be withdrawn in specified circumstances. (See items 17, 20, 71, 107 and 112 of Sch 1 to the Bill.)

The Committee has raised the following scrutiny concerns:

- Significant matters, such as provisions defining the scope of key terms as well as requirements relating to the withdrawal of consent, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.
- These provisions refer to guidelines issued by the CEO of the NHMRC as in force from time to time. Any member of the public should be able to freely and readily access the terms of the law, and material incorporated by reference into law should be freely and readily available. Incorporating material by reference, particularly when material is incorporated as available from time to time:
  - raises the prospect of changes being made to the law (via the incorporated material) without proper parliamentary scrutiny
  - could create uncertainty in the law, and
  - means that those obliged to obey the law may have inadequate access to its terms, particularly if the incorporated material is not publicly available, or is available only if a fee is paid.

The Committee has requested detailed advice as to:

- why it is considered necessary and appropriate to leave provisions defining the scope of the term 'proper consent' and requirements relating to the withdrawal of consent 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.

The Committee has also requested advice as to:

- why it is considered necessary and appropriate to apply the ART Guidelines as in force or existing from time to time (noting that this means that future changes to the guidelines and therefore the definition of 'proper consent' will be incorporated into the law without any parliamentary scrutiny), and
- whether the Bill could be amended to provide for the meaning of 'proper consent' on the face of the Bill, rather than relying on the incorporation of the ART Guidelines.

Why it is necessary and appropriate to rely on delegated legislation

Prescribing guidelines by regulation

Relying on guidelines issued by the CEO of the NHMRC to deal with the meaning of 'proper consent' is a long-standing feature of regulations made under the RIHE Act. The existing provisions of the RIHE Act have operated successfully for many years, and have served as the basis for many of the amendments proposed by the Bill to legalise and regulate mitochondrial donation. Accordingly, for provisions relating to mitochondrial donation, the Bill has similarly proposed to deal with the meaning of 'proper consent' through guidelines issued by the CEO of the NHMRC. As I understand it, the Committee has not raised concerns with this aspect of the Bill.

Under the *National Health and Medical Research Council Act 1992* (the NHMRC Act), the CEO of the NHMRC issues a range of guidelines. As the Committee notes, s 24(9) of the RIHE Act would (as s 8 currently does) define 'proper consent' for general licences in terms of guidelines that are prescribed by regulation. Paragraph (a) of the definition of 'proper consent' in s 28N(8) would provide similarly for mitochondrial donation licences. In each case, the regulation would make it clear which, out of the range of guidelines that may be issued by the CEO of the NHMRC, is relevant. Without this power, there might be doubt about this, and so this aspect of the regulation-making power simply operates to put this issue beyond doubt.

Delegated legislation provisions that deal with withdrawals of consent

With regard to withdrawal of consent, this has traditionally been dealt with fully by guidelines issued by the CEO of the NHMRC, and it is likely that such guidelines would continue to deal with this matter. That is to say, there is no current proposal to make regulations that deal with the matter referred to in paragraph (b) of the definition of 'proper consent' in proposed s 28N(9) of the RIHE Act in the foreseeable future.

However, in view of the importance of 'proper consent', and withdrawals of consent, under the legislative scheme, this regulation-making power would ensure that the government would be able to legislate quickly to ensure that this issue is addressed fully, in the event that it was not dealt with adequately in guidelines issued by the CEO of the NHMRC.

Further, the Bill would amend the RIHE Act to enable new mitochondrial donation techniques to be prescribed, by amendments to regulations made under the RIHE Act, in the future (although none are currently proposed). For such new techniques, it is conceivable that there would be a need for new rules around when consent is withdrawn, which could hinge on technical details of the mitochondrial donation technique. Accordingly, this regulation-making power is thought to be a necessary incident of the power to prescribe, through regulations made under the RIHE Act, additional mitochondrial donation techniques.

Whether the Bill can be amended to include high-level guidance

In view of the above comments, I am of the view that it would not be appropriate for the Bill to be amended to include high-level guidance as to these matters. These regulation-making powers are primarily included to ensure that appropriate guidelines are referenced, and to ensure that the legislative scheme can respond appropriately to unforeseen technological advances, and to new mitochondrial donation techniques that might be developed and prescribed in regulations made under the RIHE Act in the future. It is necessary for there to be a reasonable degree of flexibility in order to ensure that this can properly be done.

Why it is necessary and appropriate to apply the ART Guidelines as in force or existing from time to time

I fully understand the basis of the Committee's concerns with regard to reliance on documents as existing from time to time, and generally speaking, I share the same concerns. However, for the purposes of the RIHE Act, it is necessary and appropriate for the ART Guidelines to be incorporated as existing from time to time, due to:

- the new and developing nature of mitochondrial donation, particularly as applied for human reproductive purposes, and
- the importance and centrality of the notion of 'proper consent' to the regulatory scheme, and the need to ensure that it reflects the most up-to-date guidelines and current best practice.

The Bill's explanatory memorandum already outlines general reasons for the appropriateness of the RIHE Act being able to rely on documents as in force or existing from time to time (paragraph 295, final bullet point, and paragraphs 306 to 314). Further to that, I note that, under the NHMRC Act, it is possible for the CEO of the NHMRC Act to issue guidelines, and to vary and revoke them, from time to time. In addition, the CEO of the NHMRC can issue interim guidelines, in urgent circumstances. Such guidelines can then be confirmed, varied or revoked, following a public consultation process, and can automatically be revoked after a period of time. Urgent interim guidelines can be issued, and varied or revoked, in relatively short timeframes.

If there was a matter relating to 'proper consent' that the CEO of the NHMRC thought important enough to deal with in variations to the ART Guidelines, or in urgent interim ART Guidelines, it would be important that this be reflected in the ART Guidelines as applied under the RIHE Act. Further, if interim guidelines were to be varied or revoked, it would be important that the varied guidelines be applied under the RIHE Act, or that the revoked guidelines not be applied.

However, given the normal timeframes for amending Acts of Parliament or regulations, if the ART Guidelines were not applied as existing from time to time, there would be a significant risk that appropriate legislative amendments could not be implemented in time to reflect such changes to the ART Guidelines. As a result, guidelines would potentially be applied that were not up-to-date, or that did not reflect best practice. The proposed drafting would avoid this unwelcome outcome.

Whether the Bill could be amended to provide for the meaning of 'proper consent', rather than relying on delegated legislation

In view of the above comments, I am not of the opinion that the Bill could be amended to fully and comprehensively deal with the meaning of 'proper consent'. Rather, I consider that the currently proposed use of delegated legislation provides for an appropriate way of dealing with this important ethical issue.

However, in view of the Committee's comments, I propose updating the explanatory memorandum to reflect my response.

Significant matters in delegated legislation – privacy

The Committee has noted proposed ss 28R(1)(e) and (3)(d) of the RIHE Act. Broadly stated, these provisions would require holders of clinical trial and clinical practice licences to collect information prescribed by regulation about mitochondrial donors, and about children born alive as a result of licensed mitochondrial donation. This would be in addition to information to be collected as specified in proposed ss 28R(1)(a) to (d) and (3)(a) to (c) of the RIHE Act.

The licence holder would be required to retain this information (s 28R(4)), and give it to the Secretary of the Department of Health if the licence holder becomes aware that a child has been born alive as a result of mitochondrial donation (s 28R(5)(b)). The Secretary would include the information on the Mitochondrial Donation Donor Register (the Register) (s 29A(1)), and make the information available to mitochondrial donors or persons born as a result of mitochondrial donation, if those persons apply in accordance with the RIHE Act (ss 29A(4) and (5)). The information would not be disclosed to any other person or in any other circumstances.

The Committee has raised the following scrutiny concerns:

- Significant matters, such as requirements relating to the collection of personal information, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided.

- The explanatory memorandum pointed out that this regulation-making power was needed:
  - for consistency with similar State laws, and
  - in order to ensure flexibility as to the sort of information collected for storage on the Register for eventual provision to persons born of the procedures.

However, the Committee does not consider administrative flexibility or alignment with existing provisions to be sufficient justifications for leaving significant matters to delegated legislation. The Committee indicated that its scrutiny concerns are heightened by the potential impact on the privacy of donors and persons born as a result of mitochondrial donation.

The Committee has requested detailed advice as to:

- why it is considered necessary and appropriate to leave the scope of sensitive information-collection powers to delegated legislation, and
- whether the bill can be amended to include further guidance regarding these matters on the face of the primary legislation.

Why it is necessary and appropriate to leave this matter to delegated legislation

Comments on proposed s 28R(1)(e) of the RIHE Act

In relation to proposed s 28R(1)(e) of the RIHE Act, questions about whether and what information about a mitochondrial donor should be made available to a person born of mitochondrial donation is a controversial ethical area.

- Some consider that mitochondrial donors should be entirely anonymous, that is, that no information about mitochondrial donors should be made available to persons born of mitochondrial donation. This is sometimes said to be on the basis that mitochondrial donation is akin to organ donation, and sometimes on the basis of a view that donated mitochondrial DNA makes a relatively small contribution to the identity of persons born as a result of mitochondrial donation.
- Others view mitochondrial donors as akin to ordinary gamete donors. For that reason, they consider that the same information about mitochondrial donors should be made available as is made available about ordinary gamete donors.

The Bill seeks to balance these competing views by adopting a ‘middle ground’, by ensuring that mitochondrial donation is not anonymous, but by limiting the kinds of information that can be obtained about a mitochondrial donor to an appropriate amount. However, the balance sought to be struck by proposed s 28R(1)(e) is novel. It is possible that the way in which these competing ethical contentions should best be balanced might require fine-tuning over time, in view of matters such as developments in mitochondrial donation technologies, developments in community attitudes to mitochondrial donation, and any new mitochondrial donation techniques that might be prescribed in the future in regulations made under the RIHE Act. This reflects the notion that mitochondrial donation is a relatively new technology, and its use in human reproduction even newer.

It is also important to bear in mind 2 additional factors.

The first is the serious manner in which the Bill would treat the privacy of mitochondrial donors:

- The Register would not be publicly available (s 29A(3)).
- There would be criminal penalties for disclosing the information of the Register other than in accordance with the amended provisions of the RIHE Act (proposed s 29A(7)).

- Amendments to the *Freedom of Information Act 1982* would ensure that information on the Register could not be obtained under that Act.

That is to say, while the Bill would provide this regulation-making power which would enable collection of additional personal information about mitochondrial donors, the Bill would also contain a range of provisions that would ensure that this information is treated very carefully, and not disclosed other than to its intended recipient.

The second is that mitochondrial donors would be voluntarily participating in this scheme, and would be fully aware of these arrangements (s 28J(5)(f) of the RIHE Act). No question of compulsory collection of personal information would arise.

Comments on proposed s 28R(3)(d) of the RIHE Act

However, an important countervailing privacy concern is that information included on the Register about a mitochondrial donor should be released to a person born using that mitochondrial donor's donated human eggs, and to no other person.

The principal reason for requiring this personal information about persons born of mitochondrial donation to be collected under s 28R(3) is to ensure that, if a person were to make an application under s 29A(4), they could be reliably matched with an entry in the Register. That is to say, the information collected under s 28R(3) would be important in protecting the privacy of mitochondrial donors, and ensuring that information about them is not disclosed inappropriately.

It is currently anticipated that the information specified in ss 28R(3)(a), (b) and (c) would be enough to enable this matching to be undertaken with confidence. Because of that, there is no plan to prescribe further information for the purposes of s 28R(3)(d) in the foreseeable future. However, the possibility cannot be ruled out that, in the future, it might become necessary to collect additional personal information about persons born as a result of mitochondrial donation, in order to ensure that persons making an application under s 29A(4) can be matched reliably with an entry in the Register. This regulation-making power would ensure that swift regulatory action could be taken if necessary so as to properly protect the privacy of mitochondrial donors.

Whether the Bill can be amended to include further guidance regarding these matters

Having regard to the above comments, I do not consider it possible at this stage for the Bill to include further guidance regarding what matters might be prescribed under these provisions. There is no current plan for additional matters to be prescribed, and anything that might be prescribed in the future would be in response to circumstances that are currently unforeseeable.

However, in view of the Committee's comments, I propose updating the explanatory memorandum to reflect my response.

THE HON BEN MORTON MP
ASSISTANT MINISTER TO THE PRIME MINISTER AND CABINET
ASSISTANT MINISTER TO THE MINISTER FOR THE PUBLIC SERVICE
ASSISTANT MINISTER FOR ELECTORAL MATTERS

Reference: MC21-051276

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

Dear Senator

I refer to correspondence of 13 May 2021 from Mr Glenn Ryall, Committee Secretary, regarding the request from the Senate Standing Committee for the Scrutiny of Bills for further information on matters identified in *Scrutiny Digest 7 of 2021*, concerning the Mutual Recognition Amendment Bill 2021.

The Bill facilitates the operation of the Intergovernmental Agreement on Automatic Mutual Recognition of Occupational Registration (IGA), which was signed by all jurisdictions with the exception of the Australian Capital Territory in December 2020. The Bill passed the Senate on 13 May 2021 with minor and technical Government amendments, and will return to the House of Representatives for consideration.

The Committee has requested further advice following my initial reply dated 4 May 2021 as to what safeguards are in place to ensure that the exercise of an instrument-making power by a state Minister is subject to appropriate accountability or oversight at the state level.

The Bill, the IGA and the Commonwealth *Legislation Act 2003* provide measures to maintain accountability and oversight of the instrument-making power by state Ministers.

State Ministers must conduct appropriate consultation as required by the *Legislation Act 2003* before the making of a legislative instrument that imposes notification requirements or excludes certain occupational registrations from the automatic mutual recognition scheme. The explanatory statement published with the legislative instrument must also provide a description of either the consultation process and outcomes, or the reasons for not consulting prior to making the instrument.

The Bill requires that state Ministers must be satisfied that the making of an instrument to exclude an occupational registration is necessary because of a significant risk, arising from circumstances or conditions in the declaration State, to consumer protection, the environment, animal welfare or the health or safety of workers or the public. An explanation of the risk must be included in the instrument, while further detail on the risks will be described in the accompanying explanatory statement. The IGA also commits jurisdictions to only applying exemptions where the exemption is the most appropriate policy instrument to protect the community.

Finally, the Bill contains limited sunsetting periods for instruments that exclude an occupational registration. Instead of the usual ten year period under the *Legislation Act 2003*, the Bill provides that temporary exclusions can last for a maximum of 12 months from commencement of the proposed Part 3A to support the transition to the new scheme. Exclusions because of a significant risk will cease to operate five years after they are registered, unless revoked earlier. Limited sunsetting periods will improve oversight as state Ministers are required under the *Legislation Act 2003* to review legislative instruments prior to renewal to ensure they remain fit-for-purpose.

I trust the measures outlined above to provide accountability and oversight of legislative instruments made by a state Minister address the Committee's comments.

Thank you again for writing on this matter.

Yours sincerely

BEN MORTON

29/5 /2021