The Hon Ken Wyatt AM MP

Minister for Indigenous Australians
Member for Hasluck

Reference: MS21-000540

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

Dear Senator Helen

I refer to correspondence of 17 September 2021 from Mr Glenn Ryall, Committee Secretary, regarding the Senate Standing Committee for the Scrutiny of Bills (the committee) request for additional information on the Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021 (the Bill), which was first considered in the committee's *Scrutiny Digest 15 of 2021*.

I welcome the opportunity to respond to the committee's comments. My responses to each of the committee's questions are set out below.

Why it is considered necessary and appropriate to include a no-invalidity clause in proposed subsections 65BH(3) and 12D(7) of the Bill?

Detail on the specific subsections is outlined below, however it is also important to note the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA) includes existing no-invalidity provisions to protect the rights of persons who have estates or interests granted to them under the ALRA.

Subsection 65BH(3)

A function of the NT Aboriginal Investment Corporation (NTAI Corporation) is to make investments for the purposes mentioned in paragraphs 65BA(a) and (b). The NTAI Corporation can also invest surplus money (see section 65BG). These investments may be in businesses, ventures or other activities of third parties. New subsection 65BH(3) ensures that commercial agreements that impact parties other than the NTAI Corporation are not invalidated where the NTAI Corporation fails to comply with subsections 65BH(1) and (2). The no-invalidity clause in subsection 65BH(3) is necessary and appropriate as it protects the rights of, and provides business certainty for, entities transacting with the NTAI Corporation.

Subsection 12D(7)

Proposed subsection 12D(4) of the Bill provides that a Northern Territory Land Council must not enter into the agreement in relation to land that is the subject of a deed of grant held in escrow unless it is satisfied that the required consultation has been undertaken and the terms and conditions on which the proposed grant of an estate or interest in the land is to be made are reasonable. The no-invalidity clause in proposed subsection 12D(7) confirms that a failure to comply with subsection (4) does not invalidate the agreement. Proposed section 12D will facilitate traditional Aboriginal owners (through their Land Council) entering into commercial arrangements in relation to land the subject of a deed of grant held in escrow by the Land Council. Currently, there is no express provision in the Act providing for such arrangements. The no-invalidity clause will further facilitate such arrangements by giving certainty to proponents entering into such arrangements with a Land Council.

Section 12D is modelled off existing section 11A of the ALRA, which permits the Land Councils to enter into agreements concerning land under claim. This section also has a no-invalidity clause to protect the rights and interests of persons who have entered into an agreement with the Land Council.

The no-invalidity clause is necessary and appropriate to ensure that a failure by the Land Council to comply with subsection 12D(4) does not affect the validity of the agreement. This is considered important to ensure the integrity and certainty of the agreement where compliance with subsection 12D(4) may be called into question at a later time.

Taken as a whole, the provisions in section 12D are reasonable and necessary to provide certainty for all stakeholders in terms of both the matters that a Land Council must be satisfied of before it enters into an agreement and the legally binding nature of the agreement.

<u>Why it is considered necessary and appropriate to leave key details regarding the operation of the NTAI Corporation to delegated legislation; and can the Bill be amended to include at least high-level guidance regarding these matters on the face of the primary legislation?</u>

In establishing the NTAI Corporation, the Bill provides for the purposes for which the NTAI Corporation may invest, its particular functions and powers to invest, and limits the types of instruments the NTAI Corporation may invest in. The Bill also places some limitations on how its investment powers may be exercised (for example, see paragraph 65BH(2)(a), subsection 65BK(1), and subsection 65BL(1)). The abovementioned subsections primarily relate to limitations on the NTAI Corporation's investment activities and use of specific financial instruments.

I note the committee's comments in relation to proposed new subsections 65BH(2), 65BI(1), 65BJ(2) and 65BK(3) of the Bill, which provide for rules in relation to the investment limit, loans, borrowing and guarantees that may further limit how particular investment-related functions and powers of the NTAI Corporation may be exercised or performed.

It is necessary and appropriate that these matters be prescribed by rules so that they can be adapted when necessary, for example, in addressing changes to the NTAI Corporation's risk profile, asset base, capital structure and organisational capability of the NTAI Corporation as it evolves. This flexibility will enable any risks associated with the NTAI Corporation's performance of its investment related functions to be addressed, adapted and limited when appropriate. Doing so by legislative instrument also allows changes to be quickly adopted to respond urgent circumstances. As such, rules made by legislative instrument is an appropriate mechanism to respond to evolving commercial requirements without further amendments to the Bill.

In accordance with the requirements for making legislative instruments under the *Legislation Act 2003*, the Minister for Indigenous Australians and the Finance Minister must be satisfied that appropriate consultation has been undertaken in relation to the proposed legislative instrument. In addition, the instrument is subject to Parliamentary scrutiny, disallowance and sunsetting requirements.

As such, I consider it appropriate that these details will be addressed in delegated legislation, ensuring the necessary level of flexibility and ability to evolve to ensure the NTAI Corporation is able to operate most effectively.

Why is a strategic investment plan made under proposed section 65C not a legislative instrument; and could the Bill be amended to provide that a strategic investment plan is a legislative instrument to ensure that they are subject to appropriate parliamentary oversight?

In considering whether the strategic investment plan would be a legislative instrument, the key tests for determining whether an instrument is legislative or administrative in nature were considered. These are set out in subsection 8(4) of the *Legislation Act 2003* (the Legislation Act). Specifically, subsection 8(4) provides that an instrument is a legislative instrument if:

a. the instrument is made under a power delegated by the Parliament;
b. the instrument determines or alters the law, rather than determining particular circumstances in which the law applies; and
c. the instrument has the effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

Instruments that do not fulfil the definition set out in subsection 8(4) of the Legislation Act are likely to be administrative in nature. The strategic investment plan is an administrative document setting out the NTAI Corporation's priorities and principle objectives in relation to performing its functions, developed in consultation with Aboriginal people and organisations in the NT. The NTAI Corporation must have regard to the strategic investment plan in performing its functions (see paragraph 65BC(b)) and an acquisition of a derivative must be consistent with the strategic investment plan (see subsection 65BL(2)). In this respect, it is not determining the law or altering its content, does not affect rights or interests and is clearly administrative in nature, acting to guide how the NTAI Corporation exercises its functions and powers in particular circumstances.

Part 2 of the *Legislation (Exemptions and Other Matters) Regulations 2015* sets out instruments that are not legislative instruments. I note that item 12 refers to "a report or review, including an annual or periodic report or review" and item 32 refers to "a corporate plan (however described)". The strategic investment plan is similar in character to these documents and therefore not suitable to be a legislative instrument.

Further, Paragraph 12 of the Statement of Compatibility with Human Rights in the Explanatory Memorandum identifies that the Bill's consultation processes for the development of a strategic investment plan advance the right to self-determination by providing a mechanism for Aboriginal peoples and organisations in the Northern Territory (NT) to shape how payments and investments are made. Defining the strategic investment plan as a legislative instrument subject to disallowance would reduce the opportunity for Aboriginal peoples and organisations in the NT to influence payments and would hamper progress toward the right to self-determination.

Consistent with advice received from the Attorney-General's Department, I am satisfied that the strategic investment plan is administrative in nature and it is not appropriate to amend the Bill to provide that the strategic investment plan is a legislative instrument.

Can the Bill be amended to provide that the Minister must arrange for a copy of any progress report on the strategic investment plan to be tabled in both Houses of the Parliament; and the Minister must publish any progress report on the strategic investment plan on the internet?

Together with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the Bill provides extensive transparency mechanisms for the new NTAI Corporation. In addition to the reporting and transparency requirements under the PGPA Act including corporate plans, annual reporting and annual performance statements, the proposed NTAI Corporation will be required to consult on its strategic investment plan with Aboriginal people and organisations in the NT (proposed new subsection 65C(6)) and will be required to publish its strategic investment plans and table them in parliament (proposed new subsections 65C(8) and (9)).

The progress reports under item 19 of Part 2 to the Bill are an additional transitional measure that can be invoked at the discretion of the Minister for Indigenous Australians to provide supplementary information to Government during the first 3 years of the NTAI Corporation's operation. The transitional reports are likely to be operational in nature and will be followed by published and tabled strategic investment plans.

A requirement to publish and table progress reports may not be appropriate if the reports contain commercially sensitive material or other sensitive information. This creates a need for discretion to publish in order to protect sensitive commercial information, particularly where third parties may be involved.

I consider the Bill's existing transparency mechanisms to provide strong accountability to Aboriginal peoples in the NT and the Parliament without need for further amendment.

Why it is considered necessary and appropriate to leave key details regarding the process for when a body will be an approved entity to hold a township lease to delegated legislation; and can the bill be amended to include at least high-level guidance regarding these matters on the face of the primary legislation?

In considering this question, it is important to draw attention to the details regarding the process that are set out in the primary legislation. Proposed section 3AA prescriptively details the core elements of the nomination and approval process for Aboriginal and Torres Strait Islander corporations to become approved entities. Broadly, a Land Council may nominate an Aboriginal and Torres Strait Islander corporation to be an approved entity for an area of land situated in the Land Council's area. The nomination must be given to the Minister for Indigenous Australians and contain the matters set out in subsection (5). Subsequently, the Minister for Indigenous Australians may approve an Aboriginal and Torres Strait Islander corporation as an approved entity if they are satisfied of certain matters set out in subsection (2). I note the proposed new process includes certain conditions that the Minister for Indigenous Australians must be satisfied with and comprehensive information that a nomination by a Land Council must include.

In addition to the abovementioned core elements set out in the Bill, the Minister for Indigenous Australians may determine, by legislative instrument, additional things in relation to the nomination and approval process:

- The nomination must contain information determined by the Minister for Indigenous Australians under subsection (9).
- In deciding whether to approve a body as an approved entity, the Minister for Indigenous Australians must have regard to matters determined under subsection (9) for the purposes of paragraph (6)(a) and may have regard to matters determined under subsection (9) for the purposes of subparagraph (6)(b)(i).
- The Minister for Indigenous Australians may approve an Aboriginal and Torres Strait Islander corporation as an approved entity for an area of land known by a particular name if the Minister for Indigenous Australians is satisfied of a number of matters, including conditions determined per subsection (9).

As explained in the Explanatory Memorandum, the granting of a township lease to an Aboriginal and Torres Strait Islander corporation was first done in 2017. Given the growing interest in community-controlled township leasing, also known as community entity township leasing, there is a need to standardise and clarify the processes around, and the operation of, these entities in the ALRA.

It is necessary and appropriate to provide sufficient flexibility to determine, by legislative instrument, additional conditions, information, and matters that must or may be taken into account in the nomination and approval process for Aboriginal and Torres Strait Islander corporations as approved entities. It is not possible to predict all of the conditions, information and matters that will need to be the subject of ministerial determination in the future. This flexibility is a prudent mechanism that will ensure that the processes mature over time as more community entity township leases are granted.

In accordance with the requirements for making legislative instruments under the *Legislation Act 2003*, the Minister for Indigenous Australians must be satisfied that appropriate consultation has been undertaken in relation to the proposed legislative instrument. In addition, the instrument is subject to Parliamentary scrutiny, disallowance and sunsetting requirements.

For the above reasons, I do not consider it necessary to amend the Bill to provide further high-level guidance regarding the key details of what must be included in delegated legislation. The exercise of ministerial discretion should be done in accordance with the legislative intent of the Bill and the Australian Government's policies in relation to community entity township leasing.

Aboriginal people in the NT, through their Land Councils, have asked for the reforms set out in the Bill to modernise the ALRA and support contemporary Aboriginal economic, cultural and social aspirations. The reforms have been co-designed with Aboriginal people in the NT, through their Land Councils, for over three and half years and have their strong support. I am confident this extensive co-design process has produced robust legislation that provides the community and the Parliament with confidence in the governance of the proposed NTAI Corporation and Aboriginal peoples' rights in relation to land administration.

I thank you and the committee for your consideration of this important Bill.

Yours sincerely

The Hon KEN WYATT AM MP
Minister for Indigenous Australians

29 / 9 / 2021

Senator the Hon Simon Birmingham

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

REF: MC21-002939

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

Dear Senator

The Senate Scrutiny of Bills Committee recently sought my advice regarding items identified in Scrutiny Digest 13 of 2021 on the Appropriation Bills (Nos. 1 and 2) 2021-2022. My response to the Committee is attached.

I trust this advice will assist the Committee in its deliberations.

Yours sincerely

Simon Birmingham

September 2021

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Response from the Minister for Finance – Senator the Hon Simon Birmingham to matters raised in Scrutiny Digest 13 of 2021

Request for Advice from the Committee	Proposed Response to the Committee
Measures Published as 'nfp'	
Page 23 - Para 2.12 'The committee therefore requests the minister's further advice as to whether, in the future, Budget Paper No. 2 and the portfolio budget statements can contain: • more thorough explanations for why funding for measures are marked as 'not for publication'; and • where appropriate, at least a high-level indication of the amount of funding that is allocated to a measure (for example, 'not more than $50 million')'.	Under current arrangements, Budget Paper 2 and Portfolio Budget Statements disclose the rationale for measures being marked 'not for publication' ('nfp'). The Government considers that these arrangements achieve an appropriate balance between protecting the Commonwealth's commercial or national security interests, and the need for disclosure. When considering opportunities to provide further disclosure, a balance must be achieved between the risk of damaging the Commonwealth's interest and enhancing transparency. Providing a more extensive explanation of why a measure is 'nfp' and a high-level indication of allocated funding, could inadvertently imply the price the Commonwealth is prepared to pay. This may invite suppliers to tailor their bids, possibly diminishing the capacity of the Commonwealth to achieve a value for money outcome. Further, scrutiny arrangements such as the Senate Estimates process provide Senators with the opportunity to seek further information in regard to specific measures.
Debit limits	
Page 24 – Para 2.17 In order to clarify this matter, the committee requests the minister's further advice as to the circumstances, if any, in which the expected level of expenditure against debit limits will not be included in the explanatory memoranda to future Appropriation Bills.	The content of the explanatory memoranda will always remain a matter for the Government of the day. While current policy settings remain in place the Government anticipates providing details of the expected levels of expenditure in the explanatory memoranda to future Appropriation Bills.

The Hon David Littleproud MP

Minister for Agriculture and Northern Australia
Deputy Leader of the Nationals
Federal Member for Maranoa

Ref: MS21-900293
5 October 2021

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

Via email: scrutiny@aph.gov.au

Dear Senator

I write in response to the observations of the Senate Standing Committee for the Scrutiny of Bills (the Committee) on the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 (the Bill) in the *Scrutiny Digest 15 of 2021* (the Digest).

In Scrutiny Digest 15 of 2021, the Committee sought advice on matters identified during the Committee's assessment of the Bill. I provide the following advice on matters requested by the Committee. This advice has been prepared in consultation with officials from the Department of Health, noting that the Minister for Health and Aged Care also has responsibility for the *Biosecurity Act 2015* (the Biosecurity Act).

a) Whether the bill can be amended to include at least high-level guidance in relation to proposed sections 108N (requiring body examinations) and 108P (requiring body samples for diagnosis), including guidance in relation to:

- ***what examinations or sampling procedures may be included within a human biosecurity group direction;***

  The intent behind proposed sections 108N and 108P is to keep the provisions sufficiently broad to account for future listed human diseases which may have different testing and diagnosis methods. This flexibility remains of high importance to enable the Australian Government to combat listed human diseases in Australian territory. Therefore, it would not be appropriate to be specific in proposed sections 108N and 108P.

- ***in what circumstances it is appropriate to require an examination or body sample;***

  Proposed subsection 108B(6) provides that a chief human biosecurity officer or human biosecurity officer may only require an examination or body sample under a human biosecurity group direction if they are satisfied that biosecurity measure contributes to managing the risk of contagion of a listed human disease, or a listed human disease entering, emerging, establishing or spreading in Australian territory.

  Before making a decision in relation to a biosecurity measure that is included in the human biosecurity group direction, including in relation to requiring an examination or body sample, subsection 34(2) of the Biosecurity Act requires the chief human biosecurity officer or human biosecurity officer to be satisfied of a range of important considerations. These include that the measure is likely to be effective in managing such risks; that it is appropriate and adapted to manage such risks; that the circumstances are sufficiently serious to justify the measure; and that the manner in which the measure is to be imposed is no more restrictive or intrusive than is required in the circumstances.

  In the situation of a confirmed or suspected case of a listed human disease on a vessel or aircraft, the appropriate circumstance to request an examination or body samples, or both, would be when it has been identified that persons have signs or symptoms of, or have been exposed to, a listed human disease.

  Medically trained professionals who are assisting in the response will consider the individual circumstances of each case, when seeking to conduct an examination or obtaining body samples. Where a chief human biosecurity officer or human biosecurity officer decides that it is not appropriate for an individual to undergo a certain procedure, alternative measures may be considered.

- ***when consent must be given and how consent is to be given***

  The Bill provides guidance in relation to when consent must be given and how it is to be given for examinations and obtaining body samples for the purposes of determining the presence of listed human diseases. The decision of the chief human biosecurity officer or human biosecurity officer to impose such a biosecurity measure, and to determine how consent is to be given, will be informed by clinical knowledge and expertise. Such clinical decisions will be subject to the important safeguards in subsections 108B(6) and subsection 34(2), as outlined above. For example, the officer may decide that certain examinations would be inappropriate or too intrusive if there is no consent, in which case they can require that consent must be given before undergoing the examination, and also determine how consent can be given. Consent must also be given when the body sample is taken from the person.

Medically trained professionals who are assisting in the response will make an assessment as to whether or not a person has given consent. Section 40 of the Biosecurity Act provides an additional mechanism for an accompanying person (such as a family member and guardian) to provide consent on behalf of a child or incapable person, when the child or person cannot provide consent on their own behalf.

In the event the individual does not wish to provide consent for an examination, where required, then under proposed subsection 108N(3) that requirement would not apply to the individual. In addition, if the individual does not wish to consent to providing body samples, then that requirement would also not apply, as a result of proposed subsection 108P(2). In other situations where the chief human biosecurity officer or human biosecurity officer decides that it is not appropriate for an individual to undergo a certain examination, alternative measures may be considered.

In particular, a human biosecurity control order may be imposed on an individual to manage the risks posed to human health. The order could, for instance, provide for an alternative biosecurity measure, which could be tailored to suit the individual's circumstances, while also achieving the objective of managing human health risks. In this context, the existence of a human biosecurity group direction would not limit the imposition of a human biosecurity control order. Further, proposed subsection 108J(2) would apply so that if an individual in a class specified in the human biosecurity group direction is subject to a human biosecurity control order, the group direction would cease to be in force in relation to that individual.

Finally, proposed section 108S would ensure that there be no use of force against an individual to require the individual to comply with a biosecurity measure, including an examination under section 108N or for provision of body samples under section 108P.

Consequently, it is not considered necessary to include further specific legislative criteria in the Bill in relation to when consent must be given or how it is given.

- ***what medical and professional standards will, or may, apply when undertaking a procedure under proposed sections 108N or 108P***

The chief human biosecurity officer or human biosecurity officer will make the decision on what medical procedure needs to be undertaken in accordance with the human biosecurity group direction. However, it is not envisaged that the chief human biosecurity officer or human biosecurity officer will always personally undertake the medical procedure or examinations. It is likely they will instruct other medical professionals to undertake those tasks.

The training and qualification requirements for a person to be a chief human biosecurity officer for a state or territory are the following:

a) the person must have completed a training module for human biosecurity officials prepared by the Department of Health, and

b) the person must have completed any training required by the state or territory for the person to be authorised as a chief human biosecurity officer for the state or territory.

The training and qualification requirements for a person to be a human biosecurity officer are the following:

a) the person must be a medical practitioner
b) the person must have completed a training module for human biosecurity officials prepared by the Department of Health
c) if the person is an officer or employee of the state or territory body responsible for the administration of health services in the State or Territory – the person must have completed any training required by the state or territory to be authorised as a human biosecurity officer.

Proposed section 108R provides that a biosecurity measure set out in section 108N or 108P must be carried out in a manner consistent with appropriate medical standards and other relevant professional standards.

The Medical Board of Australia sets out a code of conduct for doctors in Australia. Appropriate medical and professional standards would apply relating to the degree of care and skill of health care providers who practise in the provider's specialty, taking into account the medical knowledge that is available in the field, or the level at which the average, prudent provider in a given community would practise, or how similarly qualified practitioners would have managed the patient's care under the same or similar circumstances. In practice, this means the 'standard' is not static but evolves over time as further evidence emerges and practices change.

The required process must be carried out in accordance with the medical 'standard of the day.' It is important to note that some states and territories have their own legislation governing medical and professional standards. Given many different types of medical professionals may be required to conduct examinations and procedures under this framework in different states and territories, it would be inappropriate to attempt to list exactly what standards apply, for all possible specialities.

b) Whether the bill can be amended to include requirements that:

- ***human biosecurity group directions made under proposed section 108B must be published online***

The departments are committed to high standards of accountability in the exercise of the human biosecurity group directions, given effect through the clinical decision-making process. Accountability in the application of the human biosecurity group direction is considered in proposed section 108H, which provides that the Director of Human Biosecurity is notified, as soon as reasonably practicable of the making, variation or revocation of the direction. This allows for the Director of Human Biosecurity to maintain appropriate oversight over the circumstances in which a human biosecurity group direction is made.

An additional requirement to publish a group direction online would not be feasible in the practical implementation of the group direction for multiple reasons. There are many variables involved, such as timing, form, accessibility, privacy, logistics and departmental resourcing, noting that group directions may be required to respond to urgent human health risks at any hour of the day including over weekends. COVID-19 has highlighted the need for quick, efficient and effective mechanisms to manage the spread of a listed human disease in a pandemic environment. Publishing information in this way may compromise smooth implementation of biosecurity measures by the human biosecurity officers needed to respond to emerging public health situations.

As the directions are time limited, publication of the direction is, in practice, likely to occur sometime after the direction has ceased to be in effect. It is not clear what additional benefit online publishing would provide, noting these practical challenges and that the individuals affected by the direction will already be notified of the contents of the direction and how it applies.

Group directions may also include information that could be personally identifiable or that would risk the privacy of individuals subject to that direction, or that may indicate information about a person's health status. It is not appropriate for this information to be publicly available.

- ***information about human biosecurity group directions, such as the total number of directions made in a year and high-level details as to the nature and contents of each direction, must be set out in the department's annual report prepared under section 46 of the Public Governance, Performance and Accountability Act 2013.***

  The existing provisions of the Biosecurity Act in relation to human biosecurity control orders do not have an equivalent requirement to publish information in the annual report. To require such publication for the new human biosecurity group direction would be inconsistent with the existing provisions of the Biosecurity Act.

  Further, as discussed above, group directions may also include information that could be personally identifiable or that would risk the privacy of individuals subject to that direction, or that may indicate information about a person's health status, and it is not appropriate for this information to be publicly available.

c) Advice as to:

- ***why it is considered necessary and appropriate to leave notification requirements in relation to a human biosecurity group direction to delegated legislation, and whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation***

  The human health measures in this Bill will play an important part in supporting progress towards the safe reopening of Australia's borders by reducing the potential for the entry, emergence, establishment and spread of listed human diseases. It is urgently required to support safe resumption of international travel in line with government priorities, in short timeframes.

It is necessary and appropriate that the notification requirements for a human biosecurity group direction are set out in the regulations, and it is not proposed to amend the Bill to provide guidance regarding this matter in the primary legislation.

As set out in paragraph 68 of the Explanatory Memorandum to the Bill, the regulations provide flexibility, allowing for a range of different methods by which notification of the direction can be given, depending on what is most appropriate for the circumstances of each case and having regard to technological or operational requirements of the relevant conveyance. This avoids the creation of overly prescriptive legislation that is not fit for purpose to respond to changing circumstances, particularly in the context of managing the risk of contagion of a listed human disease.

The regulations would also allow for consistent application of the notification requirements to the class of individuals, as well as appropriate guidance and clarity about the notification processes.

Further, given that the notification requirements will be prescribed in regulation, these requirements will be subject to parliamentary scrutiny and disallowance processes.

- ***why it is considered necessary and appropriate to leave requirements relating to the taking, storing and use of body samples to delegated legislation, and whether the bill can be amended to include at least high-level guidance regarding the storage and use of body samples on the face of the primary legislation.***

  Under proposed section 108P, an individual who has undertaken an examination may be required to provide specified body samples for the purposes of determining the presence of certain listed human diseases. However, an individual is only required to provide a body sample if the individual consents to do so in the manner specified in the direction.

  Proposed subsection 108P(4) provides that the regulations must prescribe requirements for taking, storing, transporting, labelling and using body samples provided.

  It is considered necessary and appropriate for requirements relating to the taking, storing and use of body samples to be set out in the regulations. The current framework in subsection 108P(4) of the Bill to allow the requirements relating to body samples to be prescribed in the regulations offers suitable flexibility for the administrative and procedural nature of such matters, while still retaining suitable clarity and transparency. The prescription of such matters in the regulations is also consistent with the equivalent provisions in the Biosecurity Act for the requirements for body samples in relation to human biosecurity control orders (see subsection 91(3)).

Further, the provision of body samples is already subject to the safeguard in proposed section 108R that the biosecurity measures must be carried out in a manner consistent with appropriate medical standards and other relevant professional standards. Some States and Territories have their own legislation governing medical and professional standards, which extends to standards in relation to the storage and use of body samples. In light of the existing framework in the Bill and the relevant standards, it is not considered necessary to set out the circumstances in which body samples must be stored or used in the primary legislation, and in fact to do so would create the potential for duplicative or conflicting standards.

In addition, given that the requirements for the storage and use of body samples will be prescribed in regulation, these requirements will be subject to parliamentary scrutiny and disallowance processes.

d) Advice as to:

- ***why it is considered necessary and appropriate to confer on the Agriculture Minister and the Health Minister a broad power to make arrangements and grants in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised;***

Proposed subsection 614B(1) would provide that the Agriculture Minister or the Health Minister (the Ministers) may, on behalf of the Commonwealth, make, vary or administer an arrangement for the making of payments by the Commonwealth, or make, vary or administer a grant of financial assistance, in relation to one or more specified activities.

The ability of the Ministers to make arrangements or grants of financial assistance would be limited to the particular activities listed in proposed subsection 614B(1). This is an exhaustive list, and the specified activities are those that are directly referrable to identifying, preventing, preparing for and managing biosecurity risks. The power would be further limited by proposed subsection 614B(2) which outlines the types of risks posed by disease and pests that are intended to be covered by the activities set out in proposed subsection 614B(1). This limitation would ensure that arrangements or grants must have a direct link to addressing the likelihood of pests or diseases emerging, establishing or spreading and the potential for harm to human, animal and plant health, the environment, and the economy.

Allowing for the Ministers to make arrangements or grants of financial assistance is crucial in allowing the Australian Government to react and respond quickly to fast-changing circumstances where there is a pest or disease threatening human health, the environment or the agricultural sector. Pests and diseases often have the ability to spread quickly and cause widespread harm exponentially proportional to the time taken to respond.

One example of the cost effectiveness of early intervention is of the current response to Red Imported Fire Ants (RIFA) in Queensland. RIFA are considered one of the most serious invasive ant pests in the world due to their harmful effects on people, agriculture, flora and fauna, infrastructure and recreational activities. The National Red Imported Fire Ant Eradication Program (the program) was costed to continue for 10 years. In the absence of the program, the annual cost of managing RIFA would be estimated to exceed 380 per cent of the total cost of the 10 year program.

For these reasons, it is both necessary and appropriate to confer on the Ministers an ability to make arrangements and grants in the circumstances outlined in proposed subsection 614B(1). The Bill already contains sufficient guidance on the scope of how the power in proposed subsection 614B(1) is to be exercised.

- ***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***

I note the committee's concern that the Bill does not contain high-level guidance as to the terms and conditions on which financial assistance may be granted to the states and territories.

I will consider moving an amendment to the Bill to provide a framework for setting out high-level guidance in relation to the terms and conditions on which financial assistance may be granted to a state or territory. Consistent with the approach taken in other Commonwealth legislation, including other of my portfolio legislation, this may involve the regulations prescribing the terms and conditions, or the kinds of terms and conditions, that may be included in such an agreement.

I note that such an approach would have the benefit of providing clarity and transparency on the kinds of terms and conditions to be included in the agreement, while also retaining flexibility to ensure that the agreements are appropriate and tailored to the specific circumstances and financial need. If requirements are prescribed in the regulations, then this would be subject to the usual parliamentary scrutiny and disallowance processes.

- ***whether the bill can be amended to include a requirement that written agreements with the states and territories about grants of financial assistance made under proposed section 614C are:***
    - ***tabled in the Parliament within 15 sitting days after being made; and***
    - ***published on the internet within 30 days after being made.***

I note the Committee's concern that there is no requirement in the Bill to table the written agreements between the Commonwealth and the states and territories to provide an opportunity for any agreements made under proposed section 614C to be considered.

I will consider moving an amendment to the Bill to include a requirement that written agreements with the states and territories about grants of financial assistance that are made under proposed section 614C are tabled in each House of Parliament within 15 sitting days after the agreement is made. I will also consider moving an amendment to include a further requirement that such agreements will be published on the internet within 30 days after the agreement is made.

I note that such an approach would be in addition to the usual parliamentary scrutiny processes for annual appropriations made through the Federal Budget process. If such amendments are progressed, this would also supplement the reporting requirements under proposed section 614G for information on grants of financial assistance to be included in both the Department of Agriculture, Water and the Environment and the Department of Health's Annual Reports.

I thank the Committee for raising these issues for my attention.

Yours sincerely

DAVID LITTLEPROUD MP

cc: The Hon Greg Hunt MP
Minister for Health and Aged Care

The Hon Ken Wyatt AM MP

Minister for Indigenous Australians
Member for Hasluck

Reference: MB21-000470

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

Dear Helen

I refer to Scrutiny Digest 14 of 2021 published by the Senate Standing Committee for the Scrutiny of Bills (the committee) on 1 September 2021. The Digest includes the committee's scrutiny comments in relation to the Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021.

I welcome the opportunity to respond to the committee's comments. My responses to each of the committee's comments are set out below.

Reverse evidential burden

Committee comment

1.11 The committee requests the minister's detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed subsections 453-2(6), 453-3(3), 453-4(3) and 201-150(5).
1.12 The committee also requests the minister's advice as to whether the bill can be amended to provide for more specific defences in proposed subsections 453-2(6), 454-3(3) and 453-4(3).

Response

I do not propose to amend the existing defences in proposed subsections 453-2(6), 453-3(3) and 453-4(3) for the reasons set out over the page.

Proposed subsections 453-2(6), 453-3(3) and 453-4(3) expand the Registrar's powers in relation to the production of books. Section 453-2 (Notice to produce books) is based on sections 30 and 63 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Section 453-3 (Registrar's power if books are not produced) is based on sections 38 and 63 of the ASIC Act. Section 453-4 (Registrar's power to require identification of property) is based on sections 39 and 63 of the ASIC Act.

Proposed subsections 453-2(5) and (6) provide that:

- it will be an offence if the Registrar gives a person a notice to produce specific books and the person does an act, or omits to do an act, with the result that the notice is not complied with; and
- the offence does not apply if the person has a reasonable excuse.

Proposed subsections 453-3(2) and (3) provide that:

- a person commits an offence if they are given an order under proposed subsection 453-3(1) [to state where the books may be found and who last had possession of the books] and the person does an act, or omits to do an act, with the result that the notice is not complied with;
- the offence does not apply if the person has stated the required matter to the best of the person's knowledge or belief or the person has a reasonable excuse.

Proposed subsection 453-4(2) provides that:

- a person will commit an offence if the person is given an order under proposed subsection 453-4(1) [to identify the property of the corporation and how the corporation has kept account of that property] and the person does an act, or omits to do an act, with the result that the notice is not complied with;
- the offence does not apply if the person has, to the extent the person is capable of doing so, performed the relevant acts in proposed subsection 453-4(1) or the person has a reasonable excuse.

As noted by the committee at 1.6 and 1.11, in relation to the offence-specific defences under subsections 453-2(6), 453-3(3) and 453-4(3), a defendant will bear the evidential burden of proof (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter). Evidential burden means, "…..adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist." (subsection 13.3(6) of the Criminal Code).

The offence-specific defences for these provisions do not change the fact that:

- The prosecution bears the legal burden of proving every element of the offence (13.1(1) of the Criminal Code);
- The prosecution also bears the legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant (13.1(2) of the Criminal Code).

The Attorney General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011 (Guide to Framing Commonwealth Offences) says a matter should only be included in an offence-specific defence (as opposed to being included as an element of the offence) where:

(i) the matter is peculiarly within the knowledge of the defendant; and

(ii) it would be significantly more difficult and costly for the prosecution to disprove, than for the defendant to establish the matter.

Matter is peculiarly within the knowledge of the defendant – reasonable excuse

Each of the offence-specific defences under subsections 453-2(6), 453-3(3) and 453-4(3) provide that the offence does not apply if the person has a reasonable excuse.

Whilst acknowledging that the defence of reasonable excuse places an evidentiary burden on the defendant, it is appropriate in this case because a person who has failed to comply with a notice to produce books for example, is best placed to explain why. The very nature of the offences, failure to produce specified books, failure to state where books may be found, failure to identify property of the corporation make them matters peculiarly with the knowledge of the person (eg officer of the corporation).

The provisions are compatible with the presumption of innocence in that they give the person best placed to do so an opportunity to put forward a reasonable excuse for a failure to comply and to adduce or point to evidence that suggests a reasonable possibility that the matter (reasonable excuse) exists. The defence of reasonable excuse ensures a person is not penalised where they may have legitimate reasons for being unable to produce a document due to reasons beyond their control, or where there is some other good and acceptable reason.

A defence of reasonable excuse does not affect the application of the specific defences of general application set out in Part 2.3 of the Criminal Code such as duress, mistake or ignorance of fact, intervening conduct or event, lawful authority.

Matter is peculiarly within the knowledge of the defendant – person has stated the required matter to the best of the person's knowledge or belief

The offence-specific defences under subsections 453-3(3) includes a defence that the person has stated the required matter to the best of the person's knowledge or belief.

A defendant, in these circumstances, is best placed to adduce evidence as to that person's knowledge or belief in relation to where the books may be found and who last had possession of the books. The provision is compatible with the presumption of innocence in that it gives the person best placed to do so, an opportunity to explain why the person has stated the required matter to the best of the person's knowledge or belief and to adduce or point to evidence that suggests a reasonable possibility that the matter exists.

Matter is peculiarly within the knowledge of the defendant – if the person has, to the extent the person is capable of doing so, performed the relevant acts

The offence-specific defences under subsections 453-4(3) includes a defence that the offence does not apply if the person has, to the extent the person is capable of doing so, performed the relevant acts.

A defendant, in these circumstances, is best placed to adduce evidence about the extent to which that person has performed the relevant acts – ie that extent to which the person is able to identify the property of the corporation and how the corporation has kept account of that property. The provision is compatible with the presumption of innocence in that it gives the person best placed to do so, an opportunity to explain any limitations on the extent to which the person is able to identify the property of the corporation and to adduce or point to evidence that suggests a reasonable possibility that the matter (limitation) exists.

It would be significantly more difficult and costly for the prosecution to disprove, than for the defendant to establish the matter

The proposed provisions are to be included in Part 10-3 (Enforcement) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). Division 450 of the CATSI Act provides that the Registrar exercises powers in this part for the purpose of ensuring compliance with the Act and the Registrar's powers can be exercised in relation to an alleged or suspected contravention of the Act. For a prosecution to proceed, the evidence must be sufficient to justify the institution of proceedings and the prosecutor must have regard to any lines of defence open to the alleged offender.

In my responses above I have explained why the matters included in the offence-specific defences (which reverse the evidential burden of proof) are peculiarly within the knowledge of the defendant. It follows from my responses that such matters would not be difficult for the defendant to establish. For example, an officer of a corporation who is unable to produce, state or identify something that the corporation has, is best placed to explain any limitations on their ability to do so. Officers of a corporation have an obligation to discharge their duties in good faith in the best interests of the corporation.

It is important that the Registrar is able to investigate alleged or suspected contraventions of the CATSI Act and that notices to produce books are complied with unless there is a reasonable excuse. There are currently 3384 Aboriginal and Torres Strait Islander corporations and the reasons why, for example, an officer is unable to comply with a notice may be many and varied. It would be significantly more difficult and costly for the prosecution to disprove, than for the defendant to establish these matters.

I note that the prosecution bears the legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant (13.1(2) of the Criminal Code).

As such, these provisions are reasonable, necessary and proportionate.

Consistency with the ASIC Act

As stated above, the proposed provisions are consistent with the ASIC Act – see section 63 of the ASIC Act. The ASIC Act provides the Commissioner with a suite of tools that allow a graduated and proportionate response to non-compliance. As a fellow regulator of corporations, the Registrar of Aboriginal and Torres Strait Islander Corporations should have access to a similar suite of tools.

While the CATSI Act differentiates itself from the Corporations Act as a special measure through requiring the Registrar to take account of tradition and circumstance in carrying out his or her regulatory functions, that does not mean that he or she should not be afforded the same tools to execute those functions.

Committee Comment

1.13 The committee further suggests that it may be appropriate for the bill to be amended to provide that the defences set out at proposed subsection 201-150(5) are instead specified as elements of the offence. The committee requests the minister's advice in relation to this matter.

Response

I have considered the implications of placing the evidential onus on the prosecution to prove those matters currently set out under proposed subsection 201-150(5) as elements of the offence. I agree with the committee that, in this instance, it would not be costly for the prosecution to obtain the relevant information for the purposes of proving those matters at proposed paragraphs 201-150(5)(a) to (d).

As per the committee's suggestion, the defences in subsection 201-150(5) will instead be specified as elements of the offence. A request has been made to the Office of the Parliamentary Counsel to draft the relevant amendments to the bill and a supplementary explanatory memorandum will be prepared.

Strict liability

Committee Comment

1.19 From a scrutiny perspective, the committee considers that the bill should be amended to remove the penalty of imprisonment from the strict liability offence in subsection 180-37(3), consistent with the principles set out in the Guide to Framing Commonwealth Offences. The committee requests the minister's advice in relation to this matter.

Response

Noting the explanatory memorandum for the bill, which states that the strict liability offences in the bill are necessary to ensure the integrity of the regulatory regime established by the Act, I agree with the committee's suggestion to remove the penalty of imprisonment from the strict liability offence in subsection 180-37(3). A request has been made to the Office of the Parliamentary Counsel to draft the relevant amendments to the bill and a supplementary explanatory memorandum will be prepared.

Conclusion

I would to take this opportunity to thank you and the committee for your consideration of this important Bill. The majority of Aboriginal and Torres Strait Islander corporations comply with their obligations under the CATSI Act and that compliance is an indicator of the governance standards within a corporation. CATSI corporations play a crucial role in delivering services and supporting economic development in Indigenous communities, particularly in remote Australia. As such, it is important for the community to have confidence in Aboriginal and Torres Strait Islander corporations and the ability of the Registrar to effectively administer the CATSI Act.

Yours sincerely

The Hon KEN WYATT AM MP
Minister for Indigenous Australians

14 / 9 / 2021

Senator the Hon Michaelia Cash
Attorney-General
Minister for Industrial Relations
Deputy Leader of the Government in the Senate

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

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

Dear Senator Polley

I am writing in response to the Senate Scrutiny of Bills Committee's (the Committee) request in relation to the Counter Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (the Bill), as set out in paragraphs 2.29 to 2.31 of *Scrutiny Digest 1 of 2021*.

The Committee requested that the Bill be amended, or that an addendum to the Explanatory Memorandum to the Bill be tabled in the Parliament as soon as practicable, to provide guidance about the application of the court-only evidence provisions in items 189–210 of Schedule 1 of the Bill.

I have carefully considered the Committee's comments and have formed the view that it is not necessary to amend the Bill for the same reasons provided to the Committee by my predecessor. Firstly, an amendment to the Bill would not result in any change to the effect and operation of the court-only evidence provisions. Secondly, it is ultimately a matter for the court to determine if, and how, information is to be protected in these proceedings, balancing the need to protect highly sensitive national security information with the offender's right to a fair hearing.

In relation to the Committee's request to amend the Explanatory Memorandum, I am not proposing to amend the Explanatory Memorandum because doing so may affect the interpretation of other provisions in *the National Security Information (Criminal and Civil Proceedings) Act 2004* which are currently subject to consideration in court proceedings.

I thank the Committee for its consideration of the Bill.

Yours sincerely

Senator the Hon Michaelia Cash
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Reference: MC21-044835

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

Dear Senator Polley

Thank you for the Senate Scrutiny of Bills Committee's invitation dated 17 September 2021 to provide further information in relation to the Crimes Amendment (Remissions of Sentences) Bill 2021 (the Bill).

The current operation of section 19AA of the *Crimes Act 1914* means that emergency management days granted to federal offenders are automatically recognised in relation to a federal offender's sentence.

Some prisoners in Victoria are receiving substantial discounts off their sentences, which have not been anticipated or considered by the courts in sentencing. The granting of significant numbers of emergency management days is inappropriate, as it interferes with, and undermines, careful and considered sentencing decisions made by the court. Sentencing courts undertake a complex and detailed consideration of these individual circumstances in determining the appropriate sentence for offenders, informed by precedent and sentencing principles.

Significant sentence discounts applied to serious offenders undermines the seriousness of the conduct to which the sentences relate. In extreme cases, where a court has crafted a sentence to ensure a federal offender is able to access offence-specific rehabilitation programs in prison, such as sex offender treatment, the application of emergency management days may mean that the offender is unable to complete that program in custody. That offender would then be released into the community without the benefit of treatment designed to reduce the risk that they pose to community safety.

These sentence discounts also pose significant operational challenges for intelligence and law enforcement authorities, particularly for managing high risk terrorist offenders. Shifting and shortening sentence expiry dates is unpredictable, and can impact the post-sentence management options for offenders who are eligible for a continuing detention order (CDO) under Division 105A of the *Criminal Code Act 1995* (the Criminal Code) or a control order under Division 104 of the Criminal Code.

The removal of the ability to confer significant sentence discounts in this manner is appropriate. It does not impose any additional punishments on federal offenders, and does not interfere with the sentence fixed by the court. The measures in the Bill simply restore the sentence that was justly set down by the court. These principles have been upheld in other criminal justice contexts.

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For example, the High Court, in the matter of *Kevin Garry Crump v the State of New South Wales [2012] HCA 20*, determined that amendments made to NSW legislation to make it more difficult for the plaintiff to be released on parole did not interfere with the original sentence, or the order made in relation to the plaintiff declaring a minimum term he was required to serve before being eligible for release on parole. The majority considered that the relevant NSW law 'did not impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty.'[1]

The risks identified above apply to all federal offenders, including those who are currently serving their sentence and who have been granted emergency management days. Limiting the application of the amendments to remissions that may be granted in the future does not address the risks to community safety posed by the significant reductions in sentences for offenders currently in custody. For this reason, the provisions need to have limited retrospective application.

The measures are proportionate, in that they apply to all federal offenders and do not seek to remove remissions granted to offenders who have already been released from custody.

Thank you for providing the opportunity to respond to concerns raised about measures in the Bill. I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash
27/09/2021

[1] *Kevin Garry Crump v the State of New South Wales [2012] HCA 20*, para 60

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Dear Senator

Thank you for your letter of 26 August 2021 (received by my office on 15 September 2021) regarding the Senate Standing Committee for the Scrutiny of Bills (*Scrutiny Digest 13 of 2021*) - Defence Legislation Amendment (Discipline Reform) Bill 2021. I appreciate the time you have taken to bring this matter to my attention.

The following additional information, in support of my responses to the specific matters raised by the Committee's *Scrutiny Digest 13 of 2021*, may be of assistance.

The *Defence Force Discipline Act 1982* (DFDA)

The DFDA provides a system of military discipline that applies to members of the Defence Force at all times, whether they are deployed on operations or exercises within Australia or overseas, in times of peace, conflict and war. The purpose of the DFDA is to enable the Chief of the Defence Force, through delegated command authorities, to enforce and maintain discipline within the Defence Force. The legitimacy of legislation for the purposes of military discipline has been consistently upheld by the High Court of Australia.[1]

Disciplinary breaches under the DFDA. The DFDA regulates three kinds of disciplinary breaches:

a. **Disciplinary infringements:** examples include absence without leave, absence from duty, disobeying a lawful command. These are minor forms of disciplinary breaches.

b. **Service offences:** examples include assaulting a superior officer, theft of service property, alteration / falsification of service documents, conduct relating to operations against

[1] See *Private R v Cowen* [2020] HCA 31. The exception to this line of authority is *Lane v Morrison* (2009) 239 CLR 230 which unanimously found that the establishment of the Australian Military Court as a legislative court operated outside of the traditional system of military justice supported by s51(vi) of the Constitution.

an enemy force. Some service offences have elements that are the same or similar to a civilian offence.

c. **Territory offences:** these are service offences applicable by virtue of the incorporation of the law of the Australian Capital Territory and certain Commonwealth law into the DFDA through s.61. With some exceptions, generally only superior tribunals may deal with these offences.

The following responses address the specific matters identified by the Committee (with paragraph references).

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

- ***why it is considered necessary and appropriate to leave the significant elements of the operation of the disciplinary infringement scheme set out in proposed sections 9FA and 9J to delegated legislation; and***

- ***whether the bill can be amended to include at least high-level guidance regarding the operation of these elements on the face of the primary legislation.***

S.9FA (discipline officer procedure) and 9J (consequences of punishments) within Part IA of the Bill, are very similar in substance to existing provisions of the DFDA dealing with the same subject matter (see: ss.169G and 169FB respectively).

The key purpose and object of Part IA is to provide a means of dealing with minor service discipline matters which is fair and efficient; and meets the disciplinary needs of the Australian Defence Force.[2] The need to maintain and enforce service discipline applies at all times and all locations, and for which Part IA will deal with the majority of minor discipline breaches in the Australian Defence Force.

In particular, the disciplinary infringement scheme only applies where an infringed member elects to be dealt with under the scheme, and by so doing, acknowledges the discipline breach. The disciplinary infringement scheme does not deal with contested infringements – this can only occur before a service tribunal on a charge of a DFDA service offence. The discipline officer procedures are therefore limited in scope and are provided for on the face of the Bill (see: by s.9FA, and additionally by ss.9EB, 9F, 9FB and 9FC).

The procedural requirements for discipline officers under Part IA of the Bill are covered within the Part, and mirror those provisions within the existing DFDA Part IXA, which Part IA will replace. The procedural requirements are comprehensively detailed within Australian Defence Force discipline policy guidelines, as approved by the Chief of the Defence Force. The administrative guidelines are widely published and available within the Australian Defence Force. On commencement of Part IA, the procedural and policy guidelines for discipline officer procedures will be widely published by the authority of the Chief of the Defence Force.

[2] DFDA s.9B

Additionally, s.9E(4) prescribes that a disciplinary infringement notice must be in accordance with a form approved by the Chief of the Defence Force. The disciplinary infringement notice provides explanatory detail to the infringed member of matters including the discipline officer and senior discipline officer procedure, including the right of the member to call witnesses and present evidence in relation to the discipline officer's powers and punishment options.

Office of Parliamentary Counsel (OPC) drafting policy is to use legislative instruments rather than regulations for all matters that do not need to be prescribed by regulation (see: *OPC Drafting Direction 3.8 - subordinate legislation*). Consequently, procedural rules for the disciplinary infringement scheme within Part IA, are not matters that need to be done by regulation as reflected within s.9FA of the Bill.

S.9J(1) relates to the consequences of the punishments under the disciplinary infringement scheme (and service tribunals), and rules detailing the consequences that are to flow, as may be prescribed by the Chief of the Defence Force or a service chief. S.9J(1) is in the same terms as the current s.169FB(1). The Defence Force Discipline (Consequences of Punishment) Rules 2018 (see: s8-10) issued by the Chief of the Defence Force, detail the specific consequences that apply in respect of the respective punishments imposed by a discipline officer (and service tribunals). The Rules cover a wide range of command and administrative arrangements such as deferral of punishment commencement, access to bars etc.

The same consequences apply irrespective of whether the punishment is imposed by the authority of discipline officer or service tribunal. Following the passing of Part IA of the Bill, it is intended that the Consequences of Punishment Rules will be amended following authorisation by the Chief of the Defence Force, and include reference to senior discipline officer punishments – the amended rules will commence with effect the commencement of Part IA.

All instruments that may be made by the Chief of the Defence Force pursuant to the rule making power within s.9FA and 9J(1), will by the express terms of their respective provisions, be legislative instruments and subject to the *Legislation Act 2003* (including explanatory statement, tabling before Parliament, disallowance and sun-setting regimes) (see: *OPC Instruments Handbook*).

In response to the Committee's question as to whether the provision of *high level* guidance on the operation of ss.9FA and 9J should be included on the face of the Bill, I do not believe such guidance is necessary. Indeed, high level procedural requirements that give effect to the legislation are detailed on the face of the Bill by s.9FA, and additionally by ss.9EB, 9F, 9FB and 9FC. I consider the high level guidance as detailed within Part IA of the Bill to be appropriate and that detailed procedural issues are most appropriately addressed within any legislative instrument that may be issued by the Chief of the Defence Force. I also consider the additional procedural and policy guidance published by the Australian Defence Force, together with notes for the infringed member within the Disciplinary Infringement Notice (as approved by the Chief of the Defence Force) to be sufficient and appropriate.

Furthermore, for s.9J, I do not consider higher level guidance within the DFDA is required, additional to the detail within s9J(1), and I am satisfied that subordinate legislation within the Defence Force Discipline (Consequences of Punishment) Rules 2018 will give effect to the legislative requirements.

The discipline officer procedures and the consequences of punishments that may flow, I believe are best addressed within subordinate legislation as expressed within the Bill.

1.20 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed sections 35A and 48B. 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.

1.21 The committee also requests the minister's advice as to whether the bill can be amended to provide for a more specific defence in proposed subsection 35A(3).

S.35A of the Bill creates an offence of failure to perform duty or carry out an activity. S.35A(3) provides a *reasonable excuse* defence. This will mean all *Criminal Code* defences will be available for the charged member, including the defence of mistake of fact under s.9.2 of the *Code* in relation to that physical element (s35A(2)). Additionally, an offence specific defence of *reasonable excuse* for the relevant conduct will be available, with the charged member bearing an evidential burden for the defence that is consistent with the *Criminal Code* s.13.3(3).

The Guide provides that the defence of reasonable excuse should generally be avoided, unless it is not possible to rely on the general defences in the *Criminal Code* or to design more specific defences. The Guide further provides this is because the defence of reasonable excuse is too open-ended. This makes it difficult for the defendant to rely on, as it is unclear what needs to be established. Equally, it may be difficult for the prosecution to respond to the defence, if raised.

The Guide nevertheless provides generally, that if the *Criminal Code* defences are insufficient, offence-specific defences adapted to the particular circumstances should be applied. S.35A(3) of the Bill provides an offence-specific defence, as opposed to being specified as an element of the offence, because circumstances that a charged member would likely raise for failing to perform a duty or carry out an activity contrary to s.35A, would in most cases, be peculiarly within the knowledge of the charged member.

Equally, it would be more difficult for the prosecution to disprove than for the charged member to establish the matter. For example, circumstances peculiarly within the knowledge of the charged member might include the non-performance of duty or carrying out of an activity where the member claimed not being confident to perform the duty etc. as the reason for non-performance. This explanation would be peculiarly within the knowledge of the charged member and does not directly fit within any of the *Criminal Code* defences.

Additionally, a reasonable excuse defence is not central to the question of culpability for the service offence.

A reasonable excuse defence provides an additional protection for a charged member in addition to, and not as a substitute for the *Criminal Code* defences. DFDA discipline tribunals are presided over by military personnel comprising military officers who invariably are not legally trained. The application of a reasonable excuse defence where it arises, will be considered by the service tribunal having regard to the circumstances of the alleged offence and the military context of the conduct. A service tribunal is well able to have regard to an excuse raised, and to determine the reasonableness of that excuse, having regard to the military context. Recognising also the availability of a reasonable excuse statutory defence, applies to a substantial number of offences already within the DFDA and will extend to disciplinary infringements; it is a concept well understood by the lay commanders and non-commissioned officers who must apply the DFDA.[3]

The evidential burden on the charged member is clear on the face of the Bill (see: Note to s.35A(3)) and s.48B(2) (see: Note 1).

Additional factors that support the inclusion of a reasonable excuse defence include: the wide variety of duties and activities that defence members may be called upon to perform with the correlating exculpatory circumstances or explanation for non-performance which can be raised and considered with a reasonable excuse defence, supplementary to *Criminal Code* defences.

Evidential burden

The Guide also provides that an evidential, rather than legal, burden of proof should usually apply to a defence, and that placing a legal burden of proof on a defendant (charged member) should be kept to a minimum. The Bill at s.35A(3), provides an evidential burden on the charged member, consistent with the *Criminal Code* (ss.13.3(3)) together with the note to the section, which is consistent with the Guide.

Where the law imposes a burden of proof on the defendant (charged member), it is an evidential burden, unless the law expresses otherwise (see *Criminal Code* ss.13.3 and 13.4).

a. An evidential burden of proof requires the defendant (charged member) to adduce or point to evidence that suggests a reasonable possibility that a matter exists or does not exist (*Criminal Code* s.13.3).

b. A legal burden of proof on the defendant must be discharged on the balance of probabilities (*Criminal Code* s.13.5).

An evidential burden is easier for a defendant (charged member) to discharge, and does not completely displace the prosecutor's burden (*Criminal Code* ss.13.1 and 13.2) and only defers that burden. Accordingly, as a general rule, the default position in s.13.3 of the *Criminal Code* (as outlined above), should apply and the defendant (charged member)

[3] See: DFDA ss.15; 15A-G; 16; 16A; 17; 23;28; 32; 40C; 43; 45; 46; 48; 50; 53; 54A; 60; and 100QA

should bear an evidential burden of proof for an offence-specific defence, unless there are good reasons to depart from this position. I am satisfied there are no good reasons to depart from the position.

In addition to the detail above and in respect of the s.48B offence – failure to comply with removal order – an offence specific defence is provided for within the Bill at s.48(2). The defence provides that s.48(2) does not apply if it is not reasonably practicable for the (charged member) to comply (with the removal order). The defence is offence-specific and is not addressed or covered by the *Criminal Code* defences. The defendant (charged member) will bear an evidential burden in relation to the defence, for the same reasons as detailed in the discussion dealing with the s.35A defence above. A defence of 'not reasonably practicable to comply' would for example, in a circumstance where a defence member takes reasonable steps to comply with the removal order by requesting a social media service provider to remove or delete the offending social media or relevant electronic service material, and the service provider is unable or unwilling to comply with the member's request to remove or delete the social media etc. material.

The Bill, I believe, correctly and fairly casts the evidential burden on the charged member in respect of the offence specific defences at ss.35A and 48B, and I do not believe there are good reasons to depart from this position. I am satisfied that the offence-specific defences within s.35A(3) and s.48(2) of the Bill are appropriate and are consistent with the broad range of discipline matters similarly provided for in the DFDA.

1.25 The committee therefore requests the minister's advice as to whether the bill can be amended to include further guidance or examples as to what conduct might constitute using a social media service or relevant electronic service 'in a way that a reasonable person would regard as offensive'.

The purpose of the proposed s.48A cyber-bullying offence is to prevent defence members from using a social media service or relevant electronic service (as defined within s.48A(2)), in a way that a reasonable person would regard as offensive or as threatening, intimidating harassing or humiliating another person. As presently drafted, there is no explanatory provision within the Bill or the DFDA regarding the meaning of 'offensive' generally, or specifically in aid of s.48A.

I consider that the Full Court of the Federal Court decision in *Chief of the Defence Force v Gaynor* (2017) 344 ALR 317 suggests that the courts recognise that reasonable restrictions can be placed on a Defence member's use of social media where that use would compromise their capacity to be a member of, undermine the reputation of, the Australian Defence Force.

Furthermore the decision of *Comcare v Banerji* (2019) 372 ALR 42 suggests that the High Court itself is not unsympathetic to constraints on social media communications where that is reasonably necessary to protect the integrity and good reputation of public institutions such as the Australian Defence Force.

I recognise that one of the benefits of the proposed s.48A cyber-bullying offence is that there are many and varied circumstances of social media etc. use that s.48A will deal with. On one level, s.48A as drafted, does not require further detail or explanation.

But overall, on balance and having regard to the questions raised by the Committee, I believe all Defence members should be fully aware of what is to be considered 'offensive' social media use, contrary to s.48A.

In response to the Committee's questions, I consider that the Bill would benefit by including interpretive guidance of the use of a social media service etc. in a way that a reasonable person would regard as "offensive". The 'reasonable person' should be I believe be guided in the legislation in making this assessment. This guidance, I believe, would be achieved by including within the Bill an interpretive provision along similar lines to s.8 of the *Online Safety Act 2021* and s.473.4 of the *Criminal Code* (which deals with 'offensive' use of social media and telecommunication services respectively), and which could be suitability modified for inclusion within the DFDA to address the meaning of 'offensive' social media etc. use for the purpose of s.48A. This will require further drafting instructions to the OPC, a revised Explanatory Memorandum and Additional Legislative Approval process.

I have instructed Defence to proceed with instructions to OPC for an interpretive clause for inclusion within s.48A as follows:

> **48A (xx) Determining whether social media etc. use is offensive**
>
> (1) The matters to be taken into account in deciding for the purposes of this Part whether a reasonable person would regard a particular use of a social media service or relevant electronic service, as being, in all the circumstances, offensive, include:
>
> (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
>
> (b) the literary, artistic or educational merit (if any) of the material; and
>
> (c) the general character of the material (including whether it is of a medical, legal or scientific character).

I have enclosed a copy of the proposed Supplementary Memorandum addressing the issues raised in the Committee's Report.

I have informed Senator Abetz, Chair Foreign Affairs Defence and Trade Legislation Committee regarding amendment of the Bill to include an interpretive clause for 'offensive' within s.48A.

The Hon Andrew Gee MP
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Thank you again for raising the issues identified by the Committee for my attention. I trust the information I have provided both generally and in response to the Committee's specific questions is of assistance.

Yours sincerely

ANDREW GEE

7/10/2021

The Hon Andrew Gee MP
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SENATOR THE HON SIMON BIRMINGHAM
Minister for Finance
Leader of the Government in the Senate

REF: MC21-003030

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

Dear ~~Senator~~ Helen,

I am writing in response to the Senate Scrutiny of Bills Committee's (Committee) request of 2 September 2021, seeking further information on the Investment Funds Legislation Amendment Bill 2021.

My response to the questions outlined in the Committee's *Scrutiny Digest 14 of 2021* is at Attachment A. The response was prepared in consultation with the Future Fund Management Agency, the Department of Health and the Australian Public Service Commission.

I trust this information supports the Committee's consideration of the Bill.

I have copied this letter to the Treasurer, as a jointly responsible Minister for the Australian Government investment funds, as well as the Minister for Health, who is responsible for administering grants programs from the Medical Research Future Fund.

Kind regards

Simon Birmingham

14 September 2021

Response to issues raised by the Senate Scrutiny of Bills Committee in relation to the Investment Funds Legislation Amendment Bill 2021

1.32 The committee therefore requests the minister's more detailed advice regarding:

- **why it is considered necessary and appropriate that the Code of Conduct and Agency Values made under proposed sections 79B and 79C are not legislative instruments; and**
- **whether the bill could be amended to provide that these determinations are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

The Investment Funds Legislation Amendment Bill 2021 (the Bill) would amend the *Future Fund Act 2006* to provide a new employment framework for staff of the Future Fund Management Agency (the Agency). Under the new framework, Agency staff would no longer be employed under the *Public Service Act 1999*. Instead, Agency staff would be engaged as Commonwealth employees by the Chair of the Future Fund Board of Guardians (Future Fund Chair) under the *Future Fund Act 2006*.

Removal of Agency staff from employment under the *Public Service Act 1999* would mean that the APS Code of Conduct and APS Values would no longer apply to Agency staff (the APS Code of Conduct and APS Values are not legislative instruments – they are contained in primary legislation[1]).

However, the Bill requires the Future Fund Chair to, as soon as practicable after commencement, determine a Code of Conduct and Values for the Agency that are consistent with the APS Code of Conduct and Values, as far as practicable. The Code of Conduct and Values would apply to all Agency staff as well as the Future Fund Chair. The Chair would also be required to promote the Agency Values.

The Future Fund Chair would not be permitted to delegate any functions in relation to the Agency Code of Conduct or Values. This would ensure that the Future Fund Chair, as the accountable authority of the Agency, is personally responsible for determining the Code of Conduct and determining and promoting the Values. To ensure public visibility and promote transparency, the Future Fund Chair would be required to publish the Agency Code of Conduct and Values on the Agency's website. The Bill allows the Future Fund Chair to amend the Code of Conduct and Values when necessary, which provides flexibility to update the documents over time.

The Agency Code of Conduct and Values have an administrative rather than a legislative character. With the Agency's unique operating environment in global financial and investment markets, it is appropriate for the Future Fund Chair, as the accountable authority of the Agency, to determine the Agency Code of Conduct and Values within the parameters of the primary legislation. This includes the legislated requirement that the Agency Code of Conduct and Values are consistent with the APS Code of Conduct and Values that are set out in the *Public Service Act 1999*, as far as practicable. This legislative requirement would ensure that Agency staff are subject to broadly similar expectations of conduct as APS employees, given their status as Commonwealth employees. It would also provide a degree of flexibility for the Future Fund Chair to tailor the Agency Code of Conduct and Values to suit the specialised and commercial operating environment in which the

[1] See sections 10 and 13 of the *Public Service Act 1999*

Agency operates compared to the broader APS. Agency staff would remain subject to the PGPA duties[2] that apply to Commonwealth officials.

The requirements outlined in the Bill, with respect to the Code of Conduct and Values, are more detailed and compare favourably with the requirements for other Commonwealth entities with employment frameworks outside of the *Public Service Act 1999*. For example:

- There is no legislated requirement in relation to a Code of Conduct or Values for the Australian Signals Directorate or the Reserve Bank of Australia. Both entities have a Code of Conduct and Values, however these documents are handled administratively within the entities, without any requirements or guidance specified in legislation.
- The Chairperson of the Australian Securities and Investment Commission (ASIC) must determine a Code of Conduct and Values for ASIC staff, however there is no legislated requirement for those documents to be consistent with the APS Code of Conduct and Values, or for the documents to be published online. ASIC moved to an employment framework outside of the *Public Service Act 1999* in 2018[3].
- The Chair of the Australian Prudential Regulation Authority (APRA) must determine a Code of Conduct and Values for APRA staff, however there is no legislated requirement for those documents to be consistent with the APS Code of Conduct and Values or for the documents to be published online[4].

None of the above documents are legislative instruments. For ASIC and APRA, the enabling legislation specifically provides that the Code and Conduct and Values for those entities are not legislative instruments[5], which is consistent with the approach under the Bill[6].

The Code of Conduct and Values are administrative and operational in nature and for the reasons outlined above, I do not consider an amendment is necessary or that it would add to the effective administration of the new employment framework for staff of the Agency.

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[2] See sections 15 to 19 of the *Public Governance, Performance and Accountability Act 2013*

[3] See the *Treasury Laws Amendment (Enhancing ASIC's Capabilities) Act 2018*

[4] See sections 48AB and 48AC of the *Australian Prudential Regulation Authority Act 2018*

[5] See subsection 126AB(3) and 126AC(4) of the *Australian Securities and Investment Commission Act 2001* and subsections 48AB(4) and 48AC(3) of the *Australian Prudential Regulation Authority Act 1998*

[6] See subsections 79B(5) and 79C(6) of the amended *Future Fund Act 2006*

1.36 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 medical research made under section 27 of the Act are:**
    - **tabled in the Parliament within 15 sitting days after being made; and published on the internet within 30 days after being made.**

The *Medical Research Future Fund Act 2015* (MRFF Act) provides a robust, transparent, and effective framework for ensuring that funding for medical research and medical innovation from the MRFF is targeted to benefit all Australians. The MRFF Act includes high-level guidance on the terms and conditions under which financial assistance might be granted to the States and Territories, as well as other grant recipients.

Financial assistance is granted through legislated decision-making processes which promotes informed decision-making. The MRFF Act establishes an independent body, the Australian Medical Research Advisory Board (AMRAB), to provide technical and expert advice to the Minister for Health on prioritising spending from the Medical Research Future Fund (MRFF). The legislation requires the AMRAB to determine and publish the Australian Medical Research and Innovation Strategy (Strategy)[7] and the Australian Medical Research and Innovation Priorities (Priorities). In determining the Strategy and Priorities the AMRAB consult the Australian public, organisations with expertise in health and medical research and innovation, consumer representatives, clinicians and health services managers, to ensure that the Strategy and Priorities provide a framework for decision-making regarding expenditure from the MRFF.

- The Strategy sets out the vision, aims and objectives for the MRFF. It identifies a series of strategic platforms that, if funded, have potential for greatest impact. These platforms serve as a framework for the identification of the Priorities.

- The Priorities must be consistent with the Strategy and the MRFF Act requires the AMRAB to take into account the following when determining the Priorities:
    - the burden of disease on the Australian community;
    - how to deliver practical benefits from medical research and medical innovation to as many Australians as possible;
    - how to ensure that financial assistance provided under the MRFF complements and enhances other financial assistance provided for medical research and innovation; and
    - any other relevant matters.

- The Bill would require that the Strategy be updated every 6 years and the Priorities be updated every 3 years.

In accordance with the MRFF Act, the Minister for Health must take into account the Priorities in making decisions about whether to request the Finance Minister to debit the MRFF special account in order to provide financial assistance from the MRFF.

[7] See sections 32 D and 32E of the *Medical Research Future Fund Act 2015*

All decisions of the Government to debit funds from the MRFF in order to make grants of financial assistance for medical research or medical innovation are reflected in the Budget or Mid-Year Economic and Fiscal Outlook (MYEFO). Following a Government decision, the Minister for Health may make grants or arrangements subject to the legislated object of the MRFF and the processes for disbursements.

The MRFF Act provides a transparent, coherent, and consistent approach for making arrangements for grants in relation to medical research or medical innovation, or entering agreements in relation to such grants.

The Commonwealth Grant Guidelines and the Procurement Rules provide further assurance. Grant programs under the MRFF are developed in accordance with the Commonwealth Grant Rules and Guidelines 2017 (CGRG) and the requirements of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). Grant guidelines are developed for all new grant opportunities and approved grants are reported on the GrantConnect website no later than 21 days after the grant agreement takes effect. The terms and conditions of grants or arrangements are set out in a written agreement between the Commonwealth and the relevant funding recipient. This approach is consistent with the CGRGs, which state that grant agreements should provide for:

- a clear understanding between the parties on required outcomes, prior to commencing payment of the grant;
- appropriate accountability for spending relevant money, which is informed by risk analysis;
- agreed terms and conditions in regards to the use of the grant, including any access requirements; and
- the performance information and other data that the grantee may be required to collect as well as the criteria that will be used to evaluate the grant, the grantee's compliance and performance.

The MRFF Act also requires the Minister for Health to publish detailed and up-to-date information about grants made under the MRFF on the Department of Health's website[8]. This information, includes amounts paid and payable to recipients as well as the names of recipients and any other relevant matter.

In addition to publishing details of each grant that is provided from the MRFF, the Minister for Health must also report on the financial assistance provided from the MRFF and table the report in each House of Parliament[9]. This report is required as soon as practicable after the Priorities cease to be in force and must cover the grants of financial assistance provided while the Priorities were in force. The Minister for Health is required to include information on:

- how the financial assistance was consistent with the Priorities,
- the process for determining grants; and
- any other financial assistance provided the Government for medical research and medical innovation.

Terms and conditions that apply to grant opportunities are typically included in grant opportunity guidelines and funding agreements for each activity, rather than within the primary legislation. Grant opportunity guidelines for MRFF funding programs are published on GrantConnect to support the principles that applicants have access to the same information and that funding recipients will be selected based on merit in addressing each program's objectives.

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[8] See section 58 of the *Medical Research Future Fund Act 2015*

[9] See section 57A of the *Medical Research Future Fund Act 2015*

Funding agreements are available to the public and are standard across grant opportunities administered by grant hubs. For the Business Grants Hub, a sample grant agreement is published when the grant opportunity is published. An example can be accessed here: https://business.gov.au/grants-and-programs/mrff-2020-rapid-applied-research-translation-grant-opportunity. Funding agreements for grants administered through the National Health and Medical Research Council can be accessed here: https://www.nhmrc.gov.au/sites/default/files/documents/attachments/final_mrff_funding_agreement_-_22.2.19_clean.pdf.

The terms and conditions in the grant opportunity guidelines and funding agreements are transparent and applicable to all applicants.

In consideration of the full range of legislative requirements and the framework applying to MRFF grants and arrangements, including those relating to the states and territories, I do not consider that an amendment the MRFF Act to include more detail on the terms and conditions on which financial assistance may be granted is necessary or would add to the effective administration of the MRFF. I also consider that tabling the written agreements with the states and territories in relation to grants of financial assistance is unnecessary. There are sufficient reporting obligations in the MRFF Act that, when combined with the existing requirements in existing Commonwealth legislation and frameworks, ensure that detailed information on grants and arrangements is transparently available to the general public.

As outlined above, financial assistance is granted through a well-informed decision-making process. The process includes expert advice on where the Government should focus its expenditure from the MRFF from an independent Board, consideration through the Government's Budget process and a consistent approach for making grants for medical research and medical innovation. Where appropriate, terms and conditions are included in grant guidelines and funding agreements with recipients. The existing public and Parliamentary reporting provides appropriate transparency on expenditure from the MRFF.

The Hon Ken Wyatt AM MP

Minister for Indigenous Australians
Member for Hasluck

Reference: MB21-000489

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

Dear Senator Helen

I refer to correspondence of 17 September 2021 from Mr Glenn Ryall, Committee Secretary, regarding the Senate Standing Committee for the Scrutiny of Bills' (the committee) request for additional information on the Social Security Legislation Amendment (Remote Engagement Program) Bill 2021 (the Bill), which was first considered in *Scrutiny Digest 15 of 2021*. My responses to the committee's questions are set out below.

Why it is considered necessary and appropriate to leave matters relating to when a person will be eligible or ineligible for the remote engagement program payment to delegated legislation

I note the committee's comments in relation to proposed paragraph 661A(2)(c) and subsection 661C(2) including the committee's view that it "has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation."

As part of the 2021-22 Budget the Government announced the Community Development Program would be replaced with a Remote Engagement Program in 2023, with the new program to be co-designed and piloted in a number of regions across remote Australia from late 2021. The pilots will be co-designed locally with the learnings from the pilots to inform the co-design of a national program in 2023.

This Bill is one building block communities can draw on when co-designing their pilot Remote Engagement Program. The Bill provides an option for communities to pilot a new supplementary payment in the social security system for job seekers to participate in a Remote Engagement Placement in a local community service, such as a school, to build their skills and experience and provide a pathway to employment in the open labour market.

The Bill has been specifically designed to facilitate co-design and the legislative instruments are an important feature of the co-design process in the pilot sites. Through the co-design process, the community in partnership with Government will set the amount of the Remote Engagement Program payment and the hours of engagement in the pilot sites. Communities will set rules about participation. For example, they might choose to set a three strikes and you are out policy for participating in a Remote Engagement Placement. That is, if the job seeker has an unexplained absence or misbehaves when participating in the Remote Engagement Placement, they will be asked to leave the Remote Engagement Placement and the position will be offered to another eligible job seeker. The National Indigenous Australians Agency intends to publish outcomes of the co-design process for full transparency.

This approach is not purely a matter of administrative flexibility. Rather, it is an approach consistent with the commitment to build and strengthen "structures that empower Aboriginal and Torres Strait Islander people to share decision-making authority with governments to accelerate policy and place-based progress against Closing the Gap" (Priority Reform One of the Closing the Gap Agreement).

Accordingly, the matters that may be included in delegated legislation under proposed paragraph 661A(2)(c) and subsection 661C(2) are necessary to ensure sufficient consultation, transparency and flexibility for outcomes that may arise following the outcomes of the co-design process with community. Including such matters in primary legislation before the outcomes of the co-design process are known would signal the Government is pre-empting the outcomes of the co-design process.

Whether the Bill can be amended to include at least high-level guidance in relation to matters that may be determined under proposed paragraph 661A(2)(c) or specified under proposed subsection 661C(2)

In order to avoid pre-empting the outcomes of the co-design process and for the above reasons, I do not consider it necessary to amend the Bill to provide further high-level guidance in relation to the matters that may be determined under proposed paragraph 661A(2)(c) or specified under proposed subsection 661C(2). The exercise of ministerial discretion should occur in accordance with the legislative intent of the Bill and the Australian Government's policies in relation to the Remote Engagement Program.

Finally, I note that in accordance with the requirements for making legislative instruments under the *Legislation Act 2003*, the Minister must be satisfied that appropriate consultation has been undertaken in relation to the delegated legislation under proposed paragraph 661A(2)(c) and subsection 661C(2). In addition, any delegated legislation made under these proposed provisions would be subject to Parliamentary scrutiny, disallowance and sunsetting requirements.

I thank you and the committee for your consideration of this important Bill.

Yours sincerely

The Hon KEN WYATT AM MP
Minister for Indigenous Australians

/ / 10 / 2021

THE HON MICHAEL SUKKAR MP

Assistant Treasurer
Minister for Housing
Minister for Homelessness, Social and Community Housing

Ref: MS21-002079

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

Dear Senator Helen

I refer to the Scrutiny Digest 13 of 2021 from the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Treasury Laws Amendment (2021 Measures No. 6) Bill 2021 (the Bill). The Bill has since passed the Senate on 2 September 2021.

The Committee's questions concern Schedule 4 to the Bill which amends the regulation-making power in Part IVB the *Competition and Consumer Act 2010* (CCA).

The Committee has sought my advice as to:

- why it is considered necessary and appropriate to leave the matters set out at proposed subsection 51AE(1A) to delegated legislation;
- whether the bill can be amended to include further guidance regarding those matters on the face of the primary legislation, particularly in relation to the conferral of functions and powers relating to monitoring compliance with industry codes, conducting investigations, granting exemptions, and reviewing the operation of industry codes;
- why it is considered necessary and appropriate to retrospectively validate industry codes made, or purportedly made, under Part IVB of the CCA; and
- whether any persons are likely to be adversely affected by the retrospective validation of the industry codes, and the extent to which their interests are likely to be affected, noting that individuals and entities should not be required to comply with laws that were invalidly made.

Issue 1: Significant matters in delegated legislation

The Committee has asked why it is considered necessary and appropriate to leave the matters set out at proposed subsection 51AE(1A) in item 4 of Schedule 4 to the Bill to delegated legislation. It is appropriate that an industry code may confer certain functions and powers on persons or bodies, including, among other things, the power to monitor compliance with a code, to conduct investigations in relation to a code and to provide exemptions from a code.

- This is because the prescription of these powers and functions by regulations allows the Government to respond efficiently and effectively to issues as they arise within relevant industries. This helps to ensure that markets are well-functioning and serve consumers and industry participants. There are currently, nine industry codes made under the regulation making power of the CCA.

The Committee has asked whether the Bill can be amended to include further guidance regarding those matters on the face of the primary legislation, particularly in relation to the conferral of functions and powers relating to monitoring and compliance with industry codes (51AE(1A)(a)), conducting investigations (51AE(1A)(d)), granting exemption (51AE(1A)(e)), and reviewing the operation of industry codes (51AE(1A)(f)). The Committee suggested including examples of when it may be appropriate to exercise investigation powers or by including high-level guidance in relation to the circumstances in which an exemption may be granted.

- The *Legislation Act 2003* (the Act) requires legislative instrument to be registered with an explanatory statement ((section 15G) – instruments are not enforceable unless they are registered (section 15K(1)).

- Given the bespoke arrangement for separate industry codes, placing the guidance and any examples in the explanatory statement for the regulations, as opposed to the primary law, allows for the examples to be tailored to the specific industry context in which they are expected to be exercised. This is likely to be more helpful to the regulated community.

- Existing industry codes that confer such functions and powers, and the accompanying explanatory statements, already provide examples of when it may be appropriate to exercise the powers and functions provided for by the amendments.

- The amendments are designed to complement the existing regulatory framework under the CCA. Relevantly, the CCA provides for the ACCC's powers, and limitations on the exercise of those powers, including those related to monitoring and compliance and investigation. Under the amendments the existing common law privilege against self-incrimination will continue to apply as the amendments do not expressly abrogate that right.

- The explanatory memorandum to the Bill explains constraints on the exercise of the exemptions power. This includes that the exemptions power is to be conferred on a more limited group of third parties (being the ACCC, Australian Energy Regulator (AER), and a Minister that is responsible for administering an industry code). It also provides that the exemption power is expected to be exercised reasonably and in accordance with criteria specified in the industry code.

Issue 2: Retrospective validation

Item 10 of Schedule 4 to the bill seeks to validate earlier regulations prescribing industry codes that were made, prior to the commencement of the Bill. The Bill also seeks to retrospectively validate acts or things done, or purportedly done, under the earlier regulations.

- It is considered necessary and appropriate to validate existing industry codes made, or purportedly made, under Part IVB of the CCA, as the amendments are not meant to change how the law was intended and been understood to govern the relationships between participants and consumers and other third parties.

- Given that these amendments to the CCA are aimed at clarifying the law as it was intended and has been understood to operate, we would not expect any individual to be adversely affected by the validation of existing determinations or exemptions purportedly made under section 51AE.

- However, a reading down provision has been included to provide that the amendments do not have effect to the extent that they give rise to an acquisition of property risk (within the meaning of paragraph 51(xxxi) of the Constitution). As the Commonwealth is not privy to the agreements between private entities it is difficult to assess the scale of this risk. The reading down provision is aimed at reducing the likelihood that the Commonwealth, or others, are exposed to liability for an unknown quantum, following these amendments.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Michael Sukkar MP