The Hon Mark Butler MP
Minister for Health and Aged Care

Ref No: MC22-017912

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600
scrutiny.sen@aph.gov.au

Dear Chair Dean

I refer to correspondence of 8 September 2022 on behalf of the Senate Standing Committee for the Scrutiny of Bills (Committee), concerning the Aged Care Amendment (Implementing Care Reform) Bill 2022 (Bill). I note you have also written to the Minister for Aged Care and Sport, the Hon Anika Wells MP.

I appreciate the time the Committee has taken to carefully consider the Bill. In relation to the Committee's commentary on the Bill in Scrutiny Digest 4 of 2022, the Committee has requested advice as to why it is considered necessary and appropriate to provide a broad power to make provision for, or in relation to, the granting of an exemption from proposed new section 51-1A in delegated legislation.

Proposed new section 54-1A, to be inserted by Item 2 to the Bill, introduces a responsibility for approved providers of residential aged care, or flexible care of a kind specified in the Quality of Care Principles, to ensure that at least one registered nurse is on site, and on duty at all times at each residential facility they operate from 1 July 2023. Proposed new subsection 54-1A(3) allows for the Quality of Care Principles to make provision for the granting of an exemption from the new responsibility.

The Australian Government considers it necessary and appropriate for these matters to be included in delegated legislation. As noted in the Bill's explanatory memorandum the inclusion of arrangements that allow for exemptions from the responsibility is consistent with the recommendations of the Royal Commission into Aged Care Quality and Safety. Allowing for these matters to be dealt with in delegated legislation will ensure flexibility. This flexibility will enable the Government to evaluate the impact of the measure and promptly respond to unforeseen risks, concerns or omissions, aligning with community expectations and the key aim of the measure: to ensure quality care for all older Australians in residential aged care.

Relevantly, allowing for these matters to be dealt with in delegated legislation provides for thorough consultation with experts and the residential aged care sector ahead of the commencement of the responsibility from 1 July 2023. This will ensure that any resulting framework appropriately protects the integrity of the measure without leading to perverse behaviours and outcomes.

In its correspondence, the Committee also questions whether the Bill can be amended to include at least high-level guidance on the face of the primary legislation as to the circumstances in which an exemption may be granted and general guidance in relation to the conditions which may apply to an exemption.

I am pleased to advise that the Government moved Parliamentary Amendments to the Bill that were agreed by the House of Representatives on 8 September 2022.

In response to matters raised through the Senate Community Affairs Legislation Committee inquiry into the Aged Care Amendment (Implementing Care Reform) Bill 2022 [Provisions], the Bill now provides greater clarity of the arrangements that the Quality of Care Principles may make provision for in relation to exemptions from the responsibility.

Firstly, the Bill now provides that the Secretary of the Department of Health and Aged Care (or a delegate) will be the specified decision-maker for the purposes of granting an exemption. The decision will likely relate to factors such as availability of workforce, the size of the facility and its location. The department will work with the Aged Care Quality and Safety Commission on any aspects of the process relating to quality and safe care.

Further, when granting an exemption, the Bill now provides that the decision-maker must be satisfied the provider has taken reasonable steps to ensure the clinical care needs of the care recipients in the facility will be met when making a decision to grant an exemption. This will ensure the intention of the legislation, that older Australians living in residential aged care have access to the nursing care they deserve, is at the centre of any decision made to grant an exemption.

The Bill also now provides that an exemption must not be in force for more than 12 months. This will ensure exemptions are regularly reviewed and will encourage approved providers to continue to strive to meet the new responsibility. More than one exemption can be granted to an approved provider, meaning that should an exemption be required for longer than 12 months in respect of a residential facility, an approved provider would be able to re-apply.

Finally, a new provision has been inserted to require that, where an exemption is provided, the Secretary must make information about the exemption publicly available. This will further incentivise providers to meet the requirement, rather than seek an exemption. It will also increase transparency, providing older people and their families with information so they can make more informed decisions.

I hope this information is of assistance to the Committee. Thank you for writing on this matter.

Yours sincerely

Mark Butler

28/09/22

cc: The Hon Anika Wells MP, Minister for Aged Care and Sport

Attorney-General

Reference: MC22-023149

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills

By email: Scrutiny.Sen@aph.gov.au

Dear Senator Smith

Thank you for your correspondence of 28 September 2022 requesting advice on why the Government considers it necessary and appropriate to extend, by a further 12 months, the operation of counter-terrorism powers in the *Crimes Act 1914* (Crimes Act) and the *Criminal Code Act 1995* (Criminal Code).

The Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022 would extend the sunsetting date from 7 December 2022 to 7 December 2023, for key counter-terrorism powers that ensure the safety and security of all Australians: the control order regime (Division 104 of the Criminal Code), the preventative detention order regime (Division 105 of the Criminal Code), and the emergency stop, search and seizure powers (Division 3A of Part IAA of the Crimes Act).

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) conducted a statutory review of these powers during the term of the last Parliament and presented its report in October 2021. The Committee unanimously supported the extension of the powers subject to certain amendments, including the introduction of additional safeguards.

Due to the complexity of a number of the Committee's proposed amendments, and the need to consult with states and territories in relation to any proposed amendments to Part 5.3 of the Criminal Code, there is not enough time before the end of the year for Government to:

- thoroughly consider all 19 detailed recommendations of the PJCIS
- finalise a response to the report
- draft legislation to implement the Government's response
- consult with, and obtain necessary agreements from, state and territory governments, and
- introduce and secure passage of the legislation through the Parliament.

This Bill would extend the relevant sunset dates by 12 months so that there is sufficient time to consult on, and then implement, the Government's response to the Committee's recommendations over the coming months.

In my view, the extension of 12 months strikes an appropriate balance between ensuring that agencies continue to have access to powers that are a critical part of Australia's existing counter-terrorism framework on the one hand, and responding in a considered and appropriate manner to the recommendations of the PJCIS for more robust safeguards on the other.

Thank you for your consideration of the Bill. I trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
12/10/2022

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MC22-003874

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Dean Chair

I am writing in response to the Senate Scrutiny of Bills Committee's (Committee) request of 29 September 2022, seeking further information on the Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022.

Responses to the questions outlined in the Committee's Scrutiny Digest 5 of 2022 are attached. I trust this additional information addresses the Committee's questions.

I have copied this letter to the Treasurer and the Minister for Emergency Management.

Yours sincerely

Katy Gallagher
7/10/22

Response to issues raised by the Senate Scrutiny of Bills Committee in relation to the Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022

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

- **why it is considered necessary and appropriate to permit the Treasurer and Finance Minister to adjust the maximum amount that may be debited from the Disaster Ready Fund Special Account by legislative instrument; and**
- **whether the bill could be amended to provide a cap on the amount that maybe determined by the ministers under proposed subsections 34(2) and (3) or, at a minimum, whether further criteria or considerations constraining the exercise of these powers could be included on the face of the bill.**

The Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022 (Bill) would amend the *Emergency Response Fund Act 2019* (Act) to make up to $200 million per year available from the Disaster Ready Fund from 2023-24 onwards for natural disaster resilience and risk-reduction initiatives.

The Bill would require the Treasurer and Minister for Finance, as jointly responsible Ministers, to review the maximum disbursement amount at least every 5 years (see proposed subsection 34(8) of the Act). This legislated review mechanism would allow the responsible Ministers to consider whether the maximum disbursement amount should be adjusted in response to investment market or policy considerations. As stated in the Explanatory Memorandum, the responsible Ministers would consult with the Minister for Emergency Management as part of the review process.

The Bill would allow the responsible Ministers to propose amendments to the maximum disbursement amount by way of legislative instrument. The legislative instrument would be disallowable by the Parliament. I consider this to be an appropriate use of delegated legislation. It would provide the responsible Ministers with a mechanism to implement appropriate changes to the maximum disbursement amount following a review under proposed subsection 34(8) of the Act. Legislative instruments made by the responsible Ministers would not amend the policy intent or purposes of spending from the fund. All spending from the fund would continue to be limited by the purposes specified in primary legislation, related to natural disaster resilience and risk reduction.

To help ensure that any changes to the maximum disbursement amount appropriately consider the possible impacts on the Future Fund Board of Guardians' (Board) ability to comply with its obligations under the Act and the investment mandate, the responsible Ministers would be required to consult the Board. The responsible Ministers would also be required by the Act to have regard to advice received from the Board when proposing any amendment to the maximum disbursement amount. The Minister for Emergency Management would also be consulted as part of this process.

Requiring the responsible Minsters to amend the maximum disbursement amount by way of legislative instrument, rather than through primary legislation, would allow for timely updates following a review process, while still providing for parliamentary oversight via the disallowance process. Noting that the sustainability of the fund is impacted by investment market volatilities, such reviews would likely include consideration of operational matters including the target rate of return, actual investment performance, tolerance for risk and the predictability and sustainability of disbursements.

Amending the primary legislation each time an amended maximum level of disbursement is proposed, would take additional time and involve a greater call on Commonwealth and parliamentary resources without fundamentally changing parliamentary oversight—given the Parliament could, in all instances, exercise its control and oversight by disallowing any proposed change.

I consider that the Bill provides an appropriate framework for reviewing and amending changes to the maximum disbursement amount. In particular, the requirements for consultation would help to ensure that any proposals to amend the maximum disbursement amount are well-considered before being proposed to the Parliament.

In view of the Parliament's broad disallowance power, I do not consider that a legislative cap on the maximum disbursement amount or additional criteria is necessary.

1.10 Noting the impact on parliamentary scrutiny of not requiring documents to be tabled in Parliament, the committee requests the minister's advice as to whether proposed section 34A of the bill can be amended to provide that the advice given by the Future Fund Board be tabled in the Parliament.

The Bill would require the responsible Ministers to consult the Board on its ability to comply with the Act and the investment mandate (and have regard to any advice received) before making a determination to amend the maximum disbursement amount. This is designed to ensure that the responsible Ministers are informed of any potential impacts on the Board and its ability to invest the funds in line with its obligations under the Act and investment mandate before proposing any amendments to the maximum disbursement amount.

Any legislative instruments that propose an amendment to the maximum disbursement amount would be accompanied by an explanatory statement, which would describe the reasons for the proposed amendment. This would include an overview of the Ministers' consultation with the Board and how the Board's advice was taken into consideration. The explanatory material would set out a broad range of relevant factors being considered, rather than being limited to the advice of the Board in respect of its investment functions and obligations.

The Parliament would retain oversight via the disallowance process and could choose to exercise its disallowance powers—for example, in circumstances where it does not believe that the responsible Minsters have appropriately described or justified a change to the maximum disbursement amount.

Further, the Bill would not preclude the Finance Minister from publishing the Board's advice, including under existing section 55 of the amended Act, providing the advice did not contain any commercial or sensitive information. There are also regular opportunities for parliamentary scrutiny and questioning during Senate estimates hearings, where the Minister for Finance, departmental officials and officials from the Future Fund Management Agency appear to answer questions and provide evidence.

For these reasons, I do not consider that the Bill would be improved by requiring the Board's advice to be tabled in the Parliament.

THE HON STEPHEN JONES MP
ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS22-002209

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in relation the Senate Standing Committee for the Scrutiny of Bill's comments in Scrutiny Monitor 5 of 2022.

I firstly want to thank you for your letter of 28 September 2022 to myself and fellow Treasury portfolio ministers. In turn, I would like to take this opportunity to congratulate you and your fellow members on your appointment to the Committee and I look forward to working with you over the course of the 47th Parliament. I am appreciative of the work of the Committee in assessing new bills, the benefits to parliamentary process, and the quality of legislation.

I have attached detailed responses to the Committee's enquiries about the following Bills:

- Financial Accountability Regime Bill 2022 at Attachment A;
- Financial Sector Reform Bill 2022 at Attachment B; and
- Treasury Laws Amendment (2022 Measures No. 3) Bill 2022 at Attachment C.

I would also welcome an opportunity to meet with the committee to further discuss these matters and the approach going forward.

Thank you again for your letter and the comments in the Scrutiny Monitor 5 of 2022. I trust that the information attached provides further context about the drafting of the bills and assists with the Committee's deliberations.

Yours sincerely

The Hon Stephen Jones MP

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Parliament House Canberra ACT 2600 Australia
Telephone: (02) 6277 7230

ATTACHMENT A

The Financial Accountability Regime Bill 2022 aims to improve accountability and transparency of prudential and conduct related matters in core sectors of the Australian economy. The bill achieves this by establishing an accountability framework that applies to certain entities in the banking, insurance and superannuation industries, and their most influential executives.

The Committee has requested advice on:

- the Minister's power to exempt entities from the regime;
- the regulators' arrangement for administering the regime;
- the reversal of the evidential burden of proof relating to secrecy offences; and
- the incorporation of documents by reference in setting the enhanced notification obligations.

MINISTER'S POWER TO EXEMPT ENTITIES

The Committee has requested advice as to:

- why it is considered necessary and appropriate to provide a broad power for the Minister to grant exemptions under clause 16, including within delegated legislation;
- whether the bill can be amended to provide that instruments made under subclause 16(2) are time-limited; and
- whether the bill can be amended to include at least high-level guidance on the face of the primary legislation as to the circumstances in which an exemption may be granted and general guidance in relation to the conditions which may apply to an exemption.

The power to exempt an accountable entity or a class of accountable entities from the Financial Accountability Regime under clause 16 of the bill ensures the regime applies appropriately to the regulated industries and avoids any potential unintended consequences from the application of the regime.

The Financial Accountability Regime is based on the existing Banking Executive Accountability Regime (BEAR), and it will apply to the banking, general insurance, life insurance, private health insurance and superannuation industries. The regime designed to improve the transparency and accountability of decision making by directors and senior executives in these industries due to the important role the industries play in the Australian economy.

Like the BEAR, the power to exempt entities from the Financial Accountability Regime ensures that the regime can operate flexibly and be appropriately targeted. There may be instances where the Financial Accountability Regime may act as a barrier to entry for some small new entrants and the ability to exempt entities or classes of entities from the regime under clause 16 of the bill may facilitate competition in the market.

An exemption for classes of accountable entities under subclause 16(2) is a legislative instrument and is therefore subject to Parliamentary scrutiny and disallowance. This level of scrutiny is warranted given the broader economic and prudential implications that exemption of a class of entities may have from a financial systems perspective. Further, as a legislative instrument, any exemption will sunset within ten years of making in accordance with section 50 of the *Legislation Act 2003*. In my view this is an appropriate period for duration of a class exemption as it provides system stability and certainty for the entities affected, and it means the sunset review will consider the operation of the exemption based on a substantive amount of time and practice. A shorter period would not provide those benefits. Where the making of an instrument occurs, the responsible Minister may also nominate a shorter period for an instrument to apply, if merited in the circumstances.

The framing of the exemption power is broad to avoid constraining the use of the power. This was the case with the provision introduced to the former Parliament and remains the case with the current, identical provision. I consider that the responsible Minister requires a broad exemption power due to the diversity of

industries regulated by the Financial Accountability Regime, and the complexity and unforeseen nature of the issues the exemption power seeks to address.

As such, I do not intend to amend the bill to provide time limits for instruments of exemption under clause 16(2), or to limit the circumstances or conditions attached to exercise of the exemption power.

ADMINISTRATIVE ARRANGEMENT BETWEEN APRA AND ASIC

Clause 37 of the Financial Accountability Regime Bill 2022 requires the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) to enter an arrangement for joint administration of the regime. The arrangement must include provisions relating to any matters specified for the purpose in the Minister rules and publication must occur online.

The Committee has requested advice as to:

- whether the bill can be amended to provide that an arrangement entered into under clause 37 of the bill is required to be tabled in each House of the Parliament; and
- why it is considered necessary and appropriate to leave details relating to provisions that must be included within a clause 37 arrangement to delegated legislation.

The bill does not require the tabling in Parliament of the arrangement between APRA and ASIC, as it is of an administrative and operational nature, and the existing arrangements in the legislation ensure appropriate levels of public and Parliamentary oversight of significant aspects of the regime. This was the case with the provision introduced to the former Parliament and it remains the case with the current, identical provision.

The publication requirement in clause 37(3) requires APRA and ASIC to publish the arrangement publicly on their websites. Further, any Minister rules made in relation to matters for inclusion in the arrangement, or determining the arrangement, must be tabled in Parliament to bring an added layer of scrutiny associated with executive involvement. The regulators are also each required to report on the operation of the regime and their regulatory activities in their annual reports, which are tabled in Parliament to provide oversight of any significant matters therein (see item 20 of Schedule 1 to the Financial Sector Reform Bill 2022 for ASIC's annual report and item 32 of Schedule 2 to that bill for APRA's annual report). These provisions provide public and Parliamentary scrutiny of the arrangement.

I consider it is necessary and appropriate to provide capacity for the relevant Minister to specify matters that must be in the arrangement in rules. At first instance the content of the arrangement is left to the regulators, as they are best placed to determine the matters and procedures to put in place to administer the regime. However, it may become apparent as the regime operates that there is a need to include particular matters in the arrangement to ensure effective administration. As such, I consider that the Minister rules made for the purpose of clause 37(2) are an appropriate method of requiring the inclusion of such matters.

REVERSAL OF THE EVIDENTIAL BURDEN OF PROOF

The Committee considers it is not appropriate to reverse the evidential burden of proof in relation to matters that are not peculiarly within the knowledge of the defendant, and requests advice as to:

- whether proposed clauses 68 and 72 can be amended to include the matters set out in subclauses 68(3) and 72(2) as elements of the offence;
- why it is necessary and appropriate to set out a defence to the offences in clause 68 of the bill and subsection 56(2) of the *Australian Prudential Regulation Authority Act 1998* within delegated legislation; and
- whether clause 74 can be amended to include at least high-level guidance in relation to the matters that may be set out within the Minister rules.

Clause 68 of the bill contains an offence for disclosure of information that reveals a direction covered by a secrecy determination given by the Regulator, except where the disclosure was authorised by specified clauses of the bill or is required by a court or tribunal. As noted in the explanatory memorandum at

paragraph 1.208, the offence does not apply where the information was already lawfully in the public domain or disclosed to a legal representative in order to seek advice or to another person who is also subject to relevant secrecy arrangements for the purpose of another exception (clauses 69, 71, and 75). It is also not an offence where the disclosure was in accordance with the *Australian Prudential Regulation Authority Act 1998*, the *Australian Securities and Investments Commission Act 2001*, a determination of the Regulator, or the Minister rules of the Financial Accountability Regime (clause 70 and 72 to 74).

Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification, or justification bears an evidential burden in relation to that matter. Accordingly, the defendant bears an evidential burden of proof to establish the offence-specific defence in subclause 68(3) of the bill.

This approach is justified as relevant information for matters in subclause 68(3) would be peculiarly within the person's own knowledge and control as the person would be aware of the information they disclosed, the recipient, and the manner and purpose for which it was disclosed. If the prosecution were required to eliminate all possible exemptions beyond reasonable doubt it would likely be difficult, costly and resource-intensive. As such, consistent with the *Guide to framing Commonwealth Offences*, the defendant bears an evidential burden to establish matters within subclause 68(3).

I am also satisfied that these measures align with the approach taken in similar frameworks. For example, information collected under Part IIAA of the *Banking Act 1959* (see section 56 of the *Australian Prudential Regulation Authority Act 1998*) as part of the BEAR and the evidential burden of proof in relation to the other prudential frameworks that interact with the regime including a matter raised under section 11CI of the *Banking Act 1959,* section 109A of the *Insurance Act 1973* and section 231A of the *Life Insurance Act 1995*. Consistency of approach across the broader legal framework is important to support understanding and application of the law.

INCORPORATION OF DOCUMENTS AS IN FORCE FROM TIME TO TIME

The Committee has requested the minister's advice as to whether:

- the documents incorporated under subclause 31(5) will be freely and readily available to all persons interested in the law; and
- the explanatory memorandum can be amended to provide guidance in relation to this matter.

Clause 31 sets out core and enhanced notification obligations under the regime, where the threshold for an entity having enhanced obligations is set in Minister rules and the clause is identical in form to a clause previously introduced into Parliament. Subclause 31(5) provides an incorporation by reference power, so Minister rules that prescribe how to determine when an entity meets the enhanced notification threshold can apply, incorporate, or adapt contents of non-legislative material. Importantly, the power is limited to incorporation of material published on a website maintained by the regulator to ensure the incorporation of credible and relevant material only. The incorporation power allows the Minister rules to align with existing standards or guidance.

The explanatory memorandum at paragraph 1.132 explains the power is to incorporate material that ASIC and APRA publish on their websites.

ATTACHMENT B

The Financial Sector Reform Bill 2022 contains provisions that support reforms to establish or support various schemes relating to financial sector reforms including the Financial Accountability Regime, the Compensation Scheme of Last Resort and the small amount credit contract and consumer lease reforms. This includes:

- Schedules 1 and 2, which make consequential amendments and transitional arrangements to support the Financial Accountability Regime Bill 2022;
- Schedule 3, which amends existing legislation to establish the Compensation Scheme of Last Resort; and
- Schedule 4, which amends the Credit Act to enhance the consumer protection framework for small amount credit contracts and consumer leases.

The Committee has requested advice in relation to several matters in the Financial Sector Reform Bill 2022:

- reversal of the evidential burden of proof – in relation to items 10 and 17 of Schedule 1;
- broad discretionary power – in relation to proposed sections 323A and 323D of Schedule 3; and
- reversal of the evidential burden of proof – in relation to proposed section 160CB(2) of Schedule 4.

REVERSAL OF THE EVIDENTIAL BURDEN OF PROOF (SCHEDULE 1)

Schedules 1 and 2 to the Financial Sector Reform Bill 2022 make consequential amendments and transitional arrangements to support the establishment of the Financial Accountability Regime by the Financial Accountability Regime Bill 2022. The amendments are identical to the amendments previously introduced in Parliament in Schedules 1 and 2 to the Financial Sector Reform (Hayne Royal Commission Response No. 3) Bill 2021, which lapsed at the dissolution of the 46th Parliament.

The Committee has requested advice on amending items 10 and 17 in Schedule 1 so that matters set out in proposed subsections 56(7G), (7H), (7J), (7K), (7L) and 127(7A) are elements of the offence.

The Financial Sector Reform Bill 2022 amends the secrecy regime contained in the *Australian Prudential Regulation Authority Act 1998* and the *Australian Securities and Investments Commission Act 2001* to include information collected under the Financial Accountability Regime. Both Acts contain pre-existing secrecy regimes, which make it a breach of the statute or a criminal offence for an individual employed by the Australian Securities and Investments Commission (ASIC) or the Australian Prudential Regulation Authority (APRA) to disclose information they received in the course of their duties, unless certain exemptions apply.

Items 10 and 17 insert relevant exemptions for the Financial Accountability Regime into section 56 of the *Australian Prudential Regulation Authority Act 1998* and section 127 of the *Australian Securities and Investments Commission Act 2001*. These exemptions are where:

- the disclosure is of information on the register to an accountable entity under proposed subsection 56(7G);
- the disclosure is of personal information on the register to the person to whom the information relates under proposed subsection 56(7H);
- the disclosure relates to whether a regulator has disqualified an individual under the regime under proposed subsection 56(7J);
- the disclosure is the sharing of information between APRA and ASIC under proposed subsection 56(7K) or proposed subsection 56(7L); and
- the disclosure constitutes authorised disclosure of protected information for the purpose of ASIC carrying out its functions, per proposed subsection 127(7A).

The Financial Sector Reform Bill 2022 places an evidential burden on the defendant seeking to rely on one of these exceptions consistent with the *Criminal Code Act 1995* and with other prudential frameworks that interact with the regime.

Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification, or justification bears an evidential burden in relation to that matter. Accordingly, the defendant bears an evidential burden of proof to establish an offence-specific defence in the proposed subsections 56(7G) to (7L) of the *Australian Prudential Regulation Authority Act 1998* and subsection 127(7A) of the *Australian Securities and Investments Commission Act 2001*.

This approach is justified, as an individual employed by APRA and ASIC who discloses information obtained under the Financial Accountability Regime, in a situation that may result in a breach of their secrecy obligations, is in the best position to assess the application of exemptions to their conduct. The relevant information for matters relevant to those exemptions would be peculiarly within the person's own knowledge and control as the person would be aware of the information they disclosed, the recipient, and the manner and purpose for which it was disclosed. If the prosecution were required to eliminate all possible exemptions beyond reasonable doubt it would likely be difficult, costly and resource-intensive. As such, consistent with the *Guide to framing Commonwealth Offences*, the defendant bears an evidential burden to establish matters within the proposed subsections 56(7G) to (7L) of the *Australian Prudential Regulation Authority Act 1998* and subsection 127(7A) of the *Australian Securities and Investments Commission Act 2001*.

The reversal of the evidential burden also aligns with the approach taken in other similar frameworks, including the BEAR. Consistency of approach across the broader legal framework is important to support understanding and application of the law.

As such, I do not propose to amend the bill to take an alternate approach of incorporating the exemptions within the elements of the offence.

BROAD DISCRETIONARY POWER (SCHEDULE 3)

As noted by the Committee, ASIC has the power to, by legislative instrument, exempt a scheme or class of schemes from all or specified parts of the prohibitions set out in section 323A. ASIC may impose any conditions on such an exemption.

The instrument making power ensures that ASIC is able to promptly provide clarity and certainty to industry and consumers where;

- the scheme does not provide consumers with credit or financial accommodation in a manner that is more costly or complex than a small amount credit contract would have been; and
- the means of enabling a consumer to have the use of goods is not more complex or more costly than the equivalent alternative.

The consumer credit industry is complex and dynamic. The use of delegated legislation is critical to ensuring the legislative framework can respond promptly to changing circumstances so that it continues to achieve its policy intent.

I consider it appropriate that ASIC has the instrument making power because as the administrator of the consumer credit legislation, ASIC has first-hand knowledge of the operation of the legislation and how it affects the consumer credit industry.

Any instrument that ASIC make would be subject to Parliamentary scrutiny and disallowance.

Time Limitation

I consider that amending the bill to time limit instruments made under the proposed clause for a period of 3 years would have limited benefit. The purpose of these powers is to provide certainty and clarity to industry and consumers in circumstances where the primary law does not operate as intended. If the instruments were to cease within a short period, then it would not provide sufficient certainty to industry participants in an already complex industry. Additionally, as instruments made under this section would be relatively technical and have narrow application, time limiting them would require ASIC to routinely remake the instruments without necessarily improving policy outcomes.

Amendments to include high-level guidance

The consumer credit industry is complex and dynamic and it is not possible to predict that specific circumstances that might require ASIC to use the instrument-making power. However, as noted in the explanatory memorandum, the intention of the power is to ensure that ASIC can respond promptly and provide certainty to industry and consumers where:

- a scheme does not provide consumers with credit or financial accommodation in a manner that is more costly or complex than a small amount credit contract would have been; and
- the means of enabling a consumer to have the use of goods is not more complex or more costly than the equivalent alternative.

The inclusion of high-level guidance on the face of the primary legislation may unnecessarily diminish ASIC's ability to respond in such circumstances.

However, I note section 323B provides some guidance on the use of section 323A. Section 323B requires ASIC to have regard to certain matters in determining whether it would be reasonable to conclude that a purpose of a person entering into or carrying out a scheme was avoidance, including:

- the complexity and cost of how the scheme or contract provides the consumer with credit or goods, relative to ordinary small amount credit contracts and consumer leases; and
- whether the scheme or contract is held out to be equivalent to an ordinary small amount credit contract or consumer lease.

REVERSAL OF THE EVIDENTIAL BURDEN OF PROOF (SCHEDULE 4)

As noted by the Committee, a person must not use or disclose 'account information' unless the use or disclosure is:

- to the person about whom the information relates;
- necessary for the person to comply with the person's obligations under the Credit Act;
- required or authorised by or under a law of the Commonwealth, or of a State or Territory, or a court or tribunal order;
- for the purposes of considering a hardship notice;
- for the purposes of assisting ASIC to perform its functions or exercise its powers; or
- for the purposes of allowing the Australian Financial Complaints Authority to perform its functions or exercise its powers.

Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification, or justification bears an evidential burden in relation to that matter. Accordingly, the defendant bears an evidential burden of proof to establish the offence-specific defences listed above.

This approach is justified, as the relevant information for matters relevant to those exemptions would be peculiarly within the person's own knowledge and control as the person would be aware of the information they disclosed, the recipient, and the manner and purpose for which it was disclosed. If the prosecution were

required to eliminate all possible exemptions beyond reasonable doubt it would likely be difficult, costly and resource-intensive. As such, consistent with the *Guide to framing Commonwealth Offences*, the defendant bears an evidential burden for such matters.

ATTACHMENT C

The Treasury Laws Amendment (2022 Measures No. 3) Bill 2022 proposes legislative amendments across several Acts, including the *National Emergency Declaration Act 2020*, *Taxation Administration Act 1953* and the *Superannuation Industry (Supervision) Act 1993.*

The Committee has requested advice in relation to Schedule 2 and Schedule 5 of the bill, including:

- reversal of the evidential burden of proof – in relation to Schedule 2;
- significant matters in delegated legislation – in relation to Schedule 5; and
- availability of merits review– in relation to decisions made under proposed subsection 60L(4) and proposed subsection 60N(1).

REVERSAL OF THE EVIDENTIAL BURDEN OF PROOF (SCHEDULE 2)

Section 355-25 in Schedule 1 to the *Tax Administration Act 1953* provides that it is an offence for a taxation officer to disclose or record information that is protected information acquired as a taxation officer.

Section 355-50 provides an exception to the offence if a taxation officer discloses or records information in performing duties as a taxation officer. Section 355-65 also provides an exception to the offence for disclosures made for other government purposes, which includes situations listed in table 7 in subsection 355-65(8).

Schedule 2 to the bill inserts a new exception to the offence. Under the proposed amendment, a taxation officer may disclose protected information if the record is made for, or the disclosure is to, an Australian government agency and the record or disclosure is for the purpose of administering a program declared under section 355-66 to be a major disaster support program.

Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification, or justification bears an evidential burden in relation to that matter. Accordingly, the defendant bears an evidential burden of proof to establish the offence-specific defences listed above.

This approach is justified, as the relevant information for matters relevant to those exemptions would be peculiarly within the person's own knowledge and control as the person would be aware of the information they disclosed, the recipient, and the manner and purpose for which it was disclosed. If the prosecution were required to eliminate all possible exemptions beyond reasonable doubt it would likely be difficult, costly and resource-intensive. As such, consistent with the *Guide to framing Commonwealth Offences*, the defendant bears an evidential burden for such matters.

In addition, consistency of approach within the framework of the existing offence and exceptions to the prohibition against disclosing or recording protected information is important to support understanding and application of the law.

SIGNIFICANT MATTERS IN DELEGATED LEGISLATION (SCHEDULE 5)

The Committee has requested advice as to:

- why it is considered necessary and appropriate to leave almost all of the information relating to the scope and operation of the new supplementary performance test for faith-based superannuation products to delegated legislation and non-legislative instruments; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.

The legislation introduces a supplementary performance test that applies for superannuation products subject to the annual performance test that have failed that test and have applied for testing as a faith-based product. The legislation defines part of the scope and the operation of the new supplementary performance test by providing that a pass result of the supplementary performance test is taken to be a pass result of the annual performance test. It also provides that Australian Prudential Regulation Authority (APRA) undertake the supplementary test noting that APRA also undertakes the original performance.

The specific requirements for the original and supplementary test involve setting out various technical matters including specifying complex mathematical formula and assumptions that apply in performing the calculations. Accordingly, the framework for the supplementary test mirrors the framework approach already taken by the original test introduced by Schedule 2 to the *Treasury Laws Amendment (Your Future, Your Super) Act 2021*. The supplementary test will use the same complex mathematical formulas and assumptions, making modifications to allow the input of tailored faith-based indices into the calculations. Like the original test framework, I consider that regulations are the appropriate mechanism for setting out such technical details. Regulations will enable the Government to be more responsive in updating relevant assumptions for use in the calculations where there is a change in the investment environment that makes updates appropriate or necessary.

I also consider that regulations are the appropriate mechanism for dealing with administrative details relating to the operation of the supplementary test, such as the timing of APRA conducting the test and the timing of any notifications APRA must give to trustees. This mirrors the original test providing consistency and certainty.

The legislation also provides that a faith-based product application must contain a particular declaration by the trustee. The legislation allows regulations to prescribe further information for inclusion in an application before APRA decides on faith-based status. This regulation-making power ensures the information supporting an application remains relevant and fit-for-purpose taking into account for example changes in the marketplace.

Schedule 5 does not include provisions allowing the Minister to set out certain matters within the determinations. Proposed subsections 60L(4) and 60N(1) respectively allow APRA to make a determination that a product is a faith-based product and to revoke that determination. Such determinations are non-legislative in nature, as they do not set out an element of the scheme rather, they set out the application of the scheme to a specific product.

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

As such, I do not propose to amend the bill to incorporate further guidance regarding these matters.

INDEPENDENT MERITS REVIEW (SCHEDULE 5)

The Committee has requested advice as to whether the bill can be amended to provide that independent merits review will be available in relation to a decision made under proposed subsection 60L(4) and proposed subsection 60N(1) of the bill.

Schedule 5 outlines that a superannuation product is a faith-based product if it is a Part 6A product that APRA has determined to be a faith-based product. Proposed section 60L of the bill provides the power for APRA to make such determinations, and decisions made under proposed subsection 60L(4) will not be subject to independent merits review. In accordance with the Administrative Review Council's guide, *What decisions should be subject to merits review?*, decisions that automatically follow from the happening of certain circumstances are unsuitable for merits review. APRA's decision under proposed section 60L is an automatic decision, following from the submission of an application that contains the required information.

We have drafted proposed subsections 60L(4) and 60N(1) permissively, as APRA may not make a determination or revoke a determination where it reasonably considers that the declarations are false.

The discretion is very limited, allowing APRA to consider the truth of the declaration and supporting evidence. For example, APRA may through its compliance action, become aware that the trustee has provided false or misleading information. As such, the decision is not appropriate for merits review.

The Hon Mark Butler MP
Minister for Health and Aged Care

Ref No: MC22-017511

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Chair
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Dear Senator Dean

I refer to correspondence of 8 September 2022 on behalf of the Standing Committee for the Scrutiny of Bills (Scrutiny Committee) concerning the Health Legislation Amendment (Compliance and Other Measures) Bill 2022.

The Scrutiny Committee has requested my advice as to whether the proposed section 105AA can be amended to include the matters set out in paragraph 104(5)(a) of the *Health Insurance Act 1973* as an element of the offence, noting that the Scrutiny Committee considers it is not appropriate to reverse the evidential burden of proof in relation to matters that are not peculiarly within the knowledge of the defendant.

The proposed section 105AA(1) provides that it is a strict liability offence for an individual under review to fail to appear at a hearing, or to appear at a hearing but refuse or fail to give evidence or to answer questions. Paragraph 104(5)(a) provides that: "before the hearing takes place, the person notifies the [Professional Services Review] Committee that he or she has a medical condition preventing him or her from appearing or from giving evidence or answering questions".

The intention of introducing the offence in section 105AA(1) is to encourage persons under review to cooperate with the Professional Services Review Committee (PSR Committee) process by attending a hearing and answering questions. If subsection 105AA(1) were amended, paragraph 104(5)(a) would need to be redrafted in the negative, that is, the person would be liable if they had not notified the PSR Committee of a medical condition preventing their attendance prior to the hearing.

This means that as long as the defendant notified the PSR Committee, they would effectively be able to claim illness without the need for any assessment or evidence. Accordingly, it would not be possible to include paragraph 104(5)(a) by itself as an element of the offence without rendering the offence ineffective and undermining the purpose of the offence.

If the proposed section 105AA is amended to include a variant of paragraph 104(5)(a), it would also be necessary to include paragraphs 104(5)(b) and (c), requiring the prosecution to prove that the defendant did not comply with reasonable requirements to undergo a medical examination or the results of the examination did not indicate a medical condition preventing appearance.

I note the Scrutiny Committee's comment that is it not apparent that it would be significantly more difficult or costly for the prosecution to establish the matters in paragraph 104(5)(a) than it would be for the defendant to disprove them. However, if paragraphs 104(5)(b) and 104(5)(c) are incorporated in addition to paragraph 104(5)(a), the onus would be on the prosecution to prove that a medical examination did not occur or that a medical certificate does not exist.

Knowledge of whether a medical examination is conducted and if medical evidence is provided is *peculiarly within the knowledge of the defendant*. There is significant additional burden on the prosecution to verify that no medical examination or results exist, for example, contacting all medical practices in a region that the defendant might reasonably have visited. It may not be possible for the prosecution to prove these elements at all.

Due to the difficulty inherent in adducing evidence to disprove something, where the prosecution is required to prove a negative, the defendant may be subjected to a longer and more demanding process having to provide information to the courts. In addition, the effect of the amendment suggested by the Scrutiny Committee would likely be to increase the duration of Professional Services Review process, potentially resulting in additional costs and stress for defendants.

In summary, my advice is to retain the existing proposal, including maintaining the evidentiary burden on defendants, which is consistent with the intention of the Bill to strengthen the PSR Committee's ability to require defendants to attend hearings and respond to questions, while enabling defendants to provide evidence and be protected from conviction if they fail to attend a hearing due to a valid medical reason.

I trust this addresses the Scrutiny Committee's concerns in relation to this issue.

I appreciate your consideration of this matter.

Yours sincerely

Mark Butler

26/ 09/ 2022

The Hon Catherine King MP

Minister for Infrastructure, Transport, Regional Development and Local Government
Member for Ballarat

Ref: MC22-008984

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Dear ~~Chair~~ Dean,

Thank you for your email of 29 September 2022 regarding the request for further information on the High Speed Rail Authority Bill 2022 from the Senate Standing Committee for the Scrutiny of Bills (the Committee).

The Committee has sought my advice as to:

- the exceptional circumstances which make it necessary to exempt the ministerial directions from the usual Parliamentary disallowance process;
- what criteria or considerations may limit the Minister's broad discretionary power to give directions;
- whether these criteria or considerations are contained in law or policy; and
- whether the Bill could be amended to provide that these directions are subject to disallowance to ensure that they receive appropriate Parliamentary oversight.

I acknowledge the Committee's concerns, and intend to provide an addendum to the Explanatory Memorandum of the Bill to address the matters raised. This addendum will explain the criteria and considerations associated with clause 11 of the Bill.

In particular, I consider it necessary for the ministerial directions to be exempt from the usual disallowance process because the high-speed rail network will likely be Australia's largest cross-border transport infrastructure project for generations. The project will take decades to construct and it is necessary to minimise barriers to the Authority functioning effectively and efficiently

I also note that ministerial directions to corporate Commonwealth entities are not usually legislative instruments and do not need to be tabled or published on the Federal Register of Legislation. Ministerial directions that are not legislative instruments are also not subject to

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disallowance or sunsetting under the *Legislation Act 2003*. Clause 11 of the Bill differs by providing that ministerial directions to the Authority will be non-disallowable legislative instruments that must be tabled in Parliament and registered on the Federal Register of Legislation. I consider that by having the ministerial directions tabled in Parliament and on the public record, this will enable the public and the Parliament to hold the Government appropriately accountable for directions made to the Authority. This is similar to ministerial directions powers for a number of other corporate Commonwealth entities, such as the Northern Australian Infrastructure Facility, Regional Investment Corporation and the National Housing Finance and Investment Corporation.

A key concern of the Committee regarding clause 11, was that new functions could be added without disallowance. Directions under clause 11 cannot add or expand the functions of the Authority. As the Committee noted, rules made under clause 50 could add functions to the Authority, however any such rules would be legislative instruments subject to disallowance, as well as the important subject matter limitations in clause 50(2).

I do not propose to amend the Bill as I consider the ministerial directions power in clause 11 of the Bill to be appropriate.

Given the range of functions of the Authority, and the complex legal and stakeholder environment in which the Authority will operate, it is difficult to anticipate the kind of matters in which it may be desirable to provide general directions to the Authority.

I note the concerns you have raised and I will ensure my Department has due regard to them when drafting explanatory material for future bills.

Thank you for taking the time to write to me on this matter.

Yours sincerely

Catherine King MP

17 / 10 / 2022