Attorney-General

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600

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

Dear Chair,

I refer to your correspondence of 24 November 2022 on behalf of the Standing Committee for the Scrutiny of Bills (the Committee) regarding the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (the Bill). I respond to issued raised in the Committee's commentary on the Bill in Scrutiny Digest 7/22 below.

Retrospective application of civil victimisation provisions

Recommendation 21 of the Respect@Work Report provided that the *Australian Human Rights Commission Act 1986* (AHRC Act) should be amended to explicitly clarify that any conduct that is an offence under section 94 of the *Sex Discrimination Act 1984* (that is, victimising conduct) can form the basis of a civil action for unlawful discrimination.

Section 47A of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (the 2021 Act) implemented this recommendation in relation to the Sex Discrimination Act, but not in relation to the other Commonwealth anti-discrimination Acts, despite the same issues identified in the Respect@Work Report affecting those Acts too.

Prior to passage of the 2021 Act, while the policy intention was that victimisation could form the basis for a civil unlawful discrimination action, a number of decisions by courts resulted in uncertainty as to whether a person could make a civil complaint about victimising conduct under any Commonwealth anti-discrimination laws, including the Sex Discrimination Act. As highlighted by the Respect@Work Report, between 2011 and 2020 there were three cases that questioned whether the then Federal Circuit Court or Federal Court had jurisdiction to hear a civil application of 'unlawful discrimination' under the AHRC Act that related to victimisation. Inserting section 47A into the Sex Discrimination Act addressed that uncertainty, and inserting civil victimisation provisions into the other anti-discrimination Acts (as the Respect at Work Bill 2022 would do) will address the same uncertainty in relation to those Acts.

Section 47A of the Sex Discrimination Act (as inserted by the 2021 Act), and sections 47A of the *Age Discrimination Act 2004*, 58A of the *Disability Discrimination Act 1992* and 18AA of the *Racial Discrimination Act 1975* (which would be inserted by the Respect at Work Bill 2022) have limited retrospective application. It is appropriate for these provisions to apply retrospectively because they merely confirm and clarify what was intended – and understood – to be the legal effect of the existing provisions.

As outlined in the Explanatory Memorandum, the application and transitional provisions mean that individuals with victimisation complaints on foot when the Bill commences, or individuals

that are yet to make a complaint in relation to conduct that occurred prior to the Bill commencing, would not be adversely affected. The provisions also enable the President of the Australian Human Rights Commission (the Commission) to deal with complaints of victimisation on foot at the time of the Bill's commencement as if they were made under the new civil victimisation provisions. This will ensure that individuals and the Commission can deal with these complaints effectively and without adverse consequences as a result of the amendments. These amendments will not substantively impact an individual's ability to make a complaint. These matters are addressed in the Explanatory Memorandum to the Bill at pages 98-106.

Broad delegation of administrative powers

Subsection 35A of the Bill provides the Commission with the functions of inquiring into a person's compliance with the positive duty (see new section 47C of the Bill). Subsections 35B-35E set out how the Commission is to perform its inquiry functions in relation to the positive duty. Under existing section 19 of the AHRC Act, which deals with delegation, the Commission may delegate to a member of the Commission, a member of the staff of the Commission or another person or body, all or any of the powers conferred on the Commission.

The delegation of Commission functions under section 19 of the AHRC Act is an established practice. The Commission has an extremely diverse and extensive range of functions which includes conducting inquiries into unlawful discrimination matters. Consequently, it is necessary for the efficient functioning of this administrative body for its diverse functions to be exercisable by a varied number of people. The Commission is experienced in ensuring that its delegable functions are performed by appropriately skilled and experienced staff and has oversight procedures in place. The mechanisms in the Bill regarding delegation are consistent with the existing procedures in the AHRC Act and the administrative practices of the Commission.

Sections 35F, 35G and 35J provide the President with powers to issue and reconsider compliance notices, and apply to the federal courts to have them enforced if, as a result of an inquiry into a person's compliance with the positive duty (see section 47C), the Commission finds that the person is not complying. Subsection 19(2C) would be inserted into the AHRC Act to provide that the President *cannot* delegate a power under section 35F, 35G or 35J to a person other than a member of staff of the Commission who is an SES employee (or acting) or classified as Executive Level 2 employee or equivalent (or acting). The expressions 'SES employee' and 'acting SES' employee are defined in the *Acts Interpretation Act 1901*.

As outlined in the Explanatory Memorandum, it may be necessary for another person within the Commission to exercise the functions relating to compliance notices on the President's behalf, as the President has limited time and resources to perform all the functions conferred on them under the AHRC Act.

The issuing, reconsideration and enforcement of compliance notices are significant and complex functions which have serious implications for employers, most notably, the potential to be subjected to an order from the federal court. The Commission's inquiry functions under subsections 35B-35E do not carry these same implications. It is also noted that the functions under sections 35F, 35G and 35J are new functions for the Commission, unlike those in subsections 35B-35E which are akin to its existing inquiry powers under section 11 of the AHRC Act. I consider that confining the limitation regarding delegation in new subsection 19(2A) to sections 35F, 35G and 35J is appropriate and justifiable as it achieves the necessary balance between practical considerations and the significance of these new functions.

Tabling of documents in Parliament

At the conclusion of a systemic unlawful discrimination inquiry, the Commission may report to

the Minister or publish a report in relation to the inquiry, or both (under section 35Q of the AHRC Act, as introduced by the Bill). The Commission's report may identify recommendations for a range of actors to implement. Providing the Commission, as an independent statutory body, with discretion to publish reports as it sees fit ensures it has flexibility to consider the contextual circumstances of an inquiry. The publication of these reports, where the Commission chooses to do so, may promote greater transparency and understanding of systemic discrimination, both for employers and the broader community.

I thank the Committee for raising these issues for my attention and trust this response is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
24/11/2022

Attorney-General

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

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

Dear Chair

I refer to correspondence of 28 October 2022 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee), concerning *Scrutiny Digest 6 of 2022* which contains comments on the National Anti-Corruption Commission Bill 2022 and the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (the Bills).

I appreciate the time the Committee has taken to consider the Bills.

I enclose the Government's response to each of the recommendations made by the Committee in in relation to the Bills.

Yours sincerely

THE HON MARK DREYFUS KC MP
21 / 11 /2022

Encl. *Government response to recommendations of the Committee*

Australian Government

Australian Government response to the Senate Scrutiny of Bills Committee recommendations in Digest 6 of 2022 on the National Anti-Corruption Commission Bill 2022 and the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022

November 2022

Australian Government response to the Senate Scrutiny of Bills Committee recommendations in Digest 6 of 2022

National Anti-Corruption Commission Bill 2022
National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022

The Government thanks the Committee for considering the National Anti-Corruption Commission Bill 2022 (the NACC Bill) and the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (the Consequential Bill).

The Government provides the following responses to the Committee's recommendations.

> **Recommendation 1** In relation to paragraph 8(1)(e), the committee recommends that the explanatory memorandum be updated to:
>
> 1) Explain why it is appropriate to allow the bill to have retrospective application, given that it appears that the bill is intended to cover investigations of 'emerging areas of corruption that may not currently be foreseen' in relation to the conduct of a public official; and
>
> 2) To provide a more detailed list of examples of the kinds of conduct of a public official that is likely to constitute 'corruption of any other kind', noting the importance of this definition for the overall operation of the bill.

Noted.

The Government intends to amend the NACC Bill to omit paragraph 8(1)(e), in response to recommendation 5 of the report of the Joint Select Committee on the National Anti-Corruption Commission Legislation.

It should be noted, however, that neither paragraph 8)(1)(e) nor the other elements of the definition of 'corrupt conduct' in the Bill create any retrospective standards. Whether or not conduct is 'corrupt' will be determined with regard to the laws or standards that applied to that conduct at the time it was engaged in.

> **Recommendation 2** The committee recommends that:
>
> 1) Where there is sufficient justification for providing that a matter is *peculiarly* within the knowledge of the defendant, the explanatory memorandum be updated to reflect this justification; and
>
> 2) Where there is not a sufficient justification, consideration be given to amending the bill so that the matters specified by the committee are included as elements of the relevant offence, rather than as offence-specific defences.
>
> In addition, in relation to subclauses 60(2) and 69(2), the committee recommends that:
>
> 1) Where there is sufficient justification for providing a general defence, the explanatory memorandum be updated to reflect this justification; and
>
> 2) Where there is not a sufficient justification, consideration be given to amending the bill so that more specific defences apply.

Agreed.

The Government will update the Explanatory Memorandum to the NACC Bill.

Recommendation 3

The committee recommends that consideration be given to amending the bill:

1) so that the privilege against self-incrimination and legal professional privilege are only abrogated to the extent that both use and derivative use immunity are available;

2) or, at a minimum, to provide that the NACC must consider whether less coercive avenues are available to obtain the information prior to compelling a person to give information in circumstances which would abrogate the privilege against self-incrimination or legal professional privilege.

Noted.

Corruption investigations are inherently concerned with determining how and why allegedly corrupt decisions, or decisions affected by allegedly corrupt conduct, have been made. The Bill provides the Commission with strong powers to investigate serious or systemic corruption and, in particular, powers that would enable the Commission to obtain evidence about how and why particular decisions have been made—including powers to obtain information in abrogation of the privilege against self-incrimination and information that is subject to legal professional privilege.

Subclause 113(2) of the Bill provides use immunity for information obtained in abrogation of the privilege against self-incrimination.

Subclause 114(5) of the Bill provides that the requirement for a person to disclose legally privileged information or documents to the Commission does not otherwise affect the privilege in that information or document. This would enable a person to claim legal professional privilege to prevent, in particular, the admission of the material in a subsequent prosecution or other proceeding against that or any other person—which would provide both a *de facto* use immunity as well as a broader protection against the use of that information in other proceedings.

The ability for the Commission to use and disclose information derived from information obtained in abrogation of the privilege against self-incrimination or legal professional privilege derivative material is necessary to achieve the legitimate objective of facilitating the investigation and prevention of serious or systemic corruption, including through the prosecution of corruption-related criminal offences. The measures would support this objective by ensuring that material obtained through the Commission's investigations—including testimony and advice that demonstrates how and why allegedly corrupt decisions have been made—can be used to disrupt and prevent serious harm to the community, including by prosecuting persons who have been witnesses and who may have also engaged in criminal conduct.

The effective prosecution of people who have been subject to the Commission's investigations or witnesses in Commission investigations is crucial to enabling the Commission to fulfil its statutory functions and ensure public confidence in its effectiveness.

The measures would ensure that prosecutors of witnesses in Commission investigations are given access to all the necessary information to conduct an effective criminal trial. Similarly, the disclosure of these materials to an agency like the Australian Federal Police would assist in the investigation and prosecution of criminal offences. Without the use of these materials, the success of these investigations and prosecutions would be significantly hindered.

The Bill contains strong safeguards to protect the right to a fair trial of witnesses and persons issued with notices to produce. In particular:

- Clause 77 of the Bill requires the Commissioner to issue a non-disclosure direction under clause 100, to restrict the use or disclosure of investigation material (which includes compulsorily obtained information) where it would reasonably be expected to prejudice a witness's fair trial. A non-disclosure direction also has the effect of restricting the use or disclosure of that material for the purpose of obtaining derivative material (clause 104).
- Clause 106 of the Bill preserves the powers of a court to make any and all orders necessary to ensure the fair trial of a witness, including to limit or remove any prejudice from the prosecution's lawful possession or use of investigation material or derivative material.

Accordingly, the Government does not consider it necessary to introduce a derivative use immunity of the kind recommended by the Committee.

The Government also does not consider it necessary or appropriate to require the Commissioner to consider whether less coercive measures to obtain self-incriminatory or legally privileged information are available. Introducing a 'last resort' requirement of this nature would not limit the ability for the Commissioner to obtain self-incriminating or legally privileged information. It would, however, have the practical effect of requiring the Commissioner to consider—or to use—less effective, efficient or proportionate powers to obtain that same information, such as by requiring the Commissioner to consider obtaining a warrant to intercept the entirety of a person's communications to obtain a particular piece of information.

Recommendation 4 The committee recommends that:

1) unless sufficient justification can be provided as to why it is necessary and appropriate to make it both an offence, and a contempt of court, to disrupt a hearing or obstruct or hinder a staff member of the Commission, consideration be given to amending the bill to remove clause 72; and

2) if clause 72 is not removed, that consideration be given to amending the bill to better clarify what conduct is intended to be covered by this clause or, at a minimum, that the explanatory memorandum to the bill be updated to included specific examples of the kinds of conduct that the provisions are intended to cover.

Agreed.

The Government will update the Explanatory Memorandum to the NACC Bill.

Recommendation 5 The committee recommends that unless sufficient justification can be provided as to why it is necessary and appropriate to provide that a certificate given under subclause 83(3) is an evidentiary certificate, noting that such certificates are generally only considered appropriate when they cover formal or technical matters, consideration be given to amending the bill to remove subclause 84(4).

Agreed.

The Government will update the Explanatory Memorandum to the NACC Bill to provide further justification.

Recommendation 6 The committee recommends that:

1) the explanatory memorandum be updated to explain why it is necessary and appropriate to confer immunity from civil proceedings on a potentially broad range of persons, so that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown; and

2) where there is not a sufficient justification, consideration be given to amending the bill so that a more limited immunity is conferred.

Agreed.

The Government will update the Explanatory Memorandum to the NACC Bill.

Recommendation 7 The committee recommends that:

1) Consideration be given to amending the bill to include a list of considerations that an authorised discloser must have regard to in order to be satisfied that disclosure of information would unreasonably disclose a person's personal affairs; or

2) At a minimum, that the explanatory memorandum be updated to include such a list of considerations and to provide specific examples of circumstances in which this threshold is likely to be met.

Agreed.

The Government will update the Explanatory Memorandum to the NACC Consequential Bill.

Recommendation 8 The committee recommends that:

1) The explanatory memorandum be updated to explain why it is necessary and appropriate to delegate:

a) all of the Commissioner's functions, powers or duties to Executive Level 2 staff members of the NACC; and

b) the Commissioner's powers under subclause 41(6) to any staff member; and

c) the Commissioner's functions, powers or duties to an individual who is concerned in, or takes part in, the management of the agency; and

2) That consideration be given to amending the bill to limit these broad delegations by, at a minimum, providing that only delegates in possession of the appropriate training, qualifications, skills or experience are able to exercise decision-making powers or carry out administrative functions.

Agreed.

The Government will update the Explanatory Memorandum to the NACC Consequential Bill.

Recommendation 9 The committee recommends that:

1) The explanatory memorandum be updated to explain why the court's ruling in relation to the ADJR Act's review jurisdiction is not sufficient to ensure administrative efficiency, and to justify the breadth of the exclusion at Item 2, Schedule 1 to the Consequential Bill; and

2) That consideration be given to amending the Consequential Bill to provide that ADJR Act review is available for decisions made under jurisdiction-conferring provisions, such as clause 40, and for significant intermediate decisions, such as a decision under clause 73.

Agreed.

The Government will update the Explanatory Memorandum to the NACC Consequential Bill.

THE HON STEPHEN JONES MP

ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS22-002451

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

Dear Senator

I am writing in relation the Senate Standing Committee for the Scrutiny of Bill's comments in Scrutiny Digest 6 of 2022.

I have attached a detailed response to the Committee's enquiries about the Treasury Laws Amendment (2022 Measures No. 3) Bill 2022.

I trust that the information attached provides further context about the drafting of the bill and assists with the Committee's deliberations.

Yours sincerely

The Hon Stephen Jones MP

Enc
Attachment A

ATTACHMENT A

In your letter, you sought my advice as to:

- whether additional information could be added to the explanatory memorandum of Schedule 5 to the Treasury Laws Amendment (2022 Measures No. 3) Bill (the bill) to provide the key information provided in my response of 19 October 2022, namely:
    - to explain why certain matters are left to regulations to specify; and
    - to clarify that determinations and revocations of faith-based status by APRA are not legislative instruments;
- where in the bill or other legislation it is stated that APRA has limited discretion to refuse to determine a product is faith-based;
- whether the bill can be amended to explicitly state this limitation; and
- whether the bill can be amended to provide that decisions made under proposed subsections 60N(1) and 60L(4) be subject to merits review.

For the reasons outlined below, I consider the current drafting of the explanatory memorandum and the bill to be appropriate.

Addendum to the explanatory memorandum
Further explanatory material for the use of delegated legislation
The explanatory memorandum does not explicitly state the information provided in my earlier response to the Committee. However, I do not propose to amend the explanatory memorandum, as I consider that when read in conjunction with the explanatory memorandum to the bill that introduced the annual performance test, it adequately explains the use of delegated legislation for the performance test framework.

The explanatory memorandum explains that the bill introduces a supplementary test that operates within the framework of the existing annual performance test. The explanatory memorandum for the Treasury Laws Amendment (Your Future Your Super) Bill 2021 (the YFYS Bill), which introduced the performance test, explains that the regulation-making power provides discretion to deal with the technical matters for the performance test so that the test can apply in a range of situations.

The reasons for the use of delegated legislation for the supplementary test are in the explanatory memorandum for the YFYS Bill. The explanatory memorandum for the current bill focuses on explaining how the supplementary test interacts with the original test. This is the key information for stakeholders most affected by the amendments – superannuation trustees and members.

Further explanatory material to clarify that subsections 60L(4) and 60N(1) are non-legislative in nature
The explanatory memorandum explains that Schedule 5 introduces a supplementary test which a specific product can access if it meets certain requirements. The explanatory memorandum further details that APRA determines the faith-based status of a product based on an application by that product's trustee, and that having that status will then determine whether that specific product has access to a supplementary test. I am satisfied that it is sufficiently clear that subsections 60L(4) and 60N(1) are non-legislative in nature, as they set out the application of the scheme to a specific product. I do not propose to amend the explanatory memorandum to incorporate further guidance regarding these matters.

Limited discretion – determination of faith-based status
The bill does not explicitly state that APRA may only refuse to determine that a product is a faith-based product where APRA reasonably considers that information in the application is false. In practice, this is generally the only circumstance where APRA will refuse to make such a determination, but I do not propose to amend the bill to explicitly provide this limitation.

I am mindful that such an amendment would introduce a special case to a relatively new regime. Integrity issues may arise separate to concerns around false information, and APRA should be able to respond to these as appropriate.

It is therefore appropriate that the legislation not explicitly prescribe circumstances in which APRA may decline to make a determination.

Limited discretion – revocation of faith-based status
Proposed subsection 60N(1) provides that APRA may revoke a determination if it reasonably considers that the product does not invest according to faith-based principles, the investment strategy has not been disclosed to beneficiaries or in marketing materials, or the trustees have not complied with section 60R.

Proposed paragraph 60L(2)(b) provides that, in an application for faith-based status, trustees must declare the product has a faith-based investment strategy with disclosure to beneficiaries and in marketing materials. Proposed section 60R requires trustees to provide APRA with any new information, which relates to the extent to which any of those declarations remain true.

Therefore, proposed subsection 60N(1) of bill operates such that APRA may only revoke a determination due to declarations being or becoming untrue, or trustees not providing APRA with updated information.

Decisions are of a procedural nature
The limited discretion means that a decision under proposed subsections 60N(1) or 60L(4) is not automatic. However, it is still appropriate to exclude such decisions from merits review because these decisions are of a procedural nature and allowing merits review could frustrate APRA's ability to make the substantive decision of whether a product has passed the performance test under the Act.

APRA's decision to determine that a product is a faith-based product, or to revoke such a determination, is a procedural step taken before determining whether the product has passed or failed the performance test. This is the substantive determination from which consequences flow.

APRA must make the original determination (of whether a product has passed the original performance test) by 31 August each year. The deadline for the supplementary performance test will also be 31 August, as it is important that the timing for these determinations coincide so all consequences occur at the same time.

Under proposed subsection 60L(4), APRA must determine a product to be a faith-based product by 31 March of a financial year, and under subsection 60N(3) it may revoke such a determination up until 31 August of the following financial year. If merits review were available and initiated regarding one of these decisions, it is unlikely that resolution would occur before the 31 August performance test deadline. With merits review ongoing, if a product failed the original performance test, APRA would not know whether to assess it against the supplementary performance test. Without a result for the annual performance test, trustees will not be able to meet the requirements of their annual outcomes assessment.

Taking into account the limitations on APRA's discretion when making decisions under proposed subsections 60N(1) and 60L(4), as well as the need to avoid frustrating APRA's ability to make the substantive decision of whether a product has passed the performance test under the Act, I do not consider it appropriate for merits review to apply to decisions under proposed subsections 60N(1) and 60L(4). I therefore do not propose to amend the bill in this regard.