The Hon Michelle Rowland MP

Minister for Communications
Federal Member for Greenway

MC24-004874

Senator Dean Smith
Senator for Western Australia
Parliament House
CANBERRA ACT 2600

scrutiny.sen@aph.gov.au

Dear Senator

Thank you for the Committee's email of 17 May 2024 regarding the Australian Postal Corporation and Other Legislation Amendment Bill 2024.

I appreciate the time the Committee has taken to review the Bill, and have enclosed my response to the Committee's questions for its consideration.

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

Yours sincerely

Michelle Rowland MP
5 / 6 /2024

Enc

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Response to the Senate Standing Committee for the Scrutiny of Bills

Scrutiny Digest 6 of 2024

The Senate Standing Committee for the Scrutiny of Bills has requested the Minister for Communications provide advice in relation to the Australian Postal Corporation and Other Legislation Amendment Bill 2024. The matters for advice are set out in the Scrutiny Digest 6 of 2024.

The following information is provided in response to the Committee's request for advice on the Bill to facilitate finalising its consideration of the Bill.

Why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed subsections 90N(2) and (3) of the Australian Postal Corporation Act 1989, noting that 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.

Currently, section 90N of the *Australian Postal Corporation Act 1989* (APC Act) provides a general prohibition on the opening and examination, and examination of the contents, of an article, unless permitted by a provision in the Act, and provides for an offence-specific defence.

This policy intention has not changed in the proposed use of offence-specific defences in proposed subsection 90N(2) and (3) of the APC Act. It is noted that offence-specific defences have been in place in the current section 90N, have applied for an extended period of time (approximately 30 years since assent to the *Australian Postal Corporation Amendment Act 1994)*, and continue to apply to persons acting in an official capacity as part of their employment with Australia Post or government agencies, including law enforcement organisations.

The *Guide to Framing Commonwealth Offences* (the Guide) states offence-specific defences should only be included in a defence in certain circumstances. An offence-specific defence is proposed to be retained at new subsections 90N(2) and 90N(3) due to the context of the circumstances in which the opening and examining of postal articles would be undertaken.

A person conducting the opening or examining of a postal article or its contents would be doing so in an official capacity performing their functions and duties as part of their employment. Accordingly, the person and their employer are expected to know under what legal basis they are permitted to carry out such conduct, in advance of carrying out the conduct. This would be informed by guidance materials, internal operating procedures, and relevant training made available by the person's employer. In some instances, a person opening or examining articles may also be required to keep records of their decision-making in exercising legislative powers, and performing of duties or functions that led to carrying out the conduct, and which would clearly demonstrate decision-making in this regard.

It is therefore considered that a matter involving the opening or examining of an article or its contents would be peculiarly within the knowledge of the defendant and/or their employer and significantly more difficult and costlier for the prosecution to disprove than for the defendant to establish the matter. As such, it is reasonable to cast such a matter as an offence-specific defence.

The Guide states that where it is intended to place the burden of proof on the defendant by creating an offence-specific defence, this should be clear on the face of the legislation. The proposed amendments

include clarifying notes at subsections 90N(2) and 90N(3) to make clear that if a person were to rely on any of the exceptions in the proposed subsections as a defence, they would bear an evidential burden.

Consistent with the Guide, a standard evidential burden of proof has been applied in accordance with section 13.3 of the *Criminal Code Act 1995*. This would require that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Noting the reason for placing the burden of proof on the defendant is not expressly stated in the Replacement Explanatory Memorandum, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) will undertake to prepare an addendum to the Replacement Explanatory Memorandum to address the Committee's concerns in this respect.

Why it is necessary and appropriate to provide for the classes of persons who may lawfully open and examine articles to be expanded by delegated rather than primary legislation.

Under the APC Act, persons who may open and examine postal articles are determined by Australia Post to be 'authorised examiners'. Proposed provisions in the Bill will change this requirement to remove the onus on Australia Post, and more appropriately provide for prescribing persons permitted to open and examine articles in delegated legislation.

The relevant proposed exception to this prohibited conduct would apply if the conduct itself is to be performed by an AFP appointee, or member of the police force or police service of a State and Territory, or a person prescribed by the Minister in a legislative instrument, is in the course of the person exercising powers, or performing functions or duties.

The intention of proposed paragraph 90N(3)(c), to permit a class of persons determined by the Minister to open and examine articles, is to enable government agencies and Australia Post to adapt and respond quickly in response to risks that may emerge and evolve in the postal system. Today's postal system is no longer just used to send and receive correspondence. It is fundamental to facilitating domestic and international commerce and trade, as well as the importation and exportation of goods to and from Australia, and is being driven by a growing eCommerce sector. The determination would occur by way of a legislative instrument, which is subject to parliamentary scrutiny and disallowance processes.

The changing nature of postal articles, and the potential for emerging and evolving risks, poses an increased risk of mail articles being exploited for unlawful activities in ways which are not currently known or anticipated. Therefore, it is necessary and appropriate for the legislative framework to provide the necessary flexibility and agility to ensure that postal articles remain secure and can be expeditiously managed and enforced in response to emerging and evolving threats.

Other classes of persons who may lawfully open and examine articles would be specified in disallowable instruments made by the Minister, which would ensure appropriate Parliamentary oversight.

The development of any legislative instrument would also carefully weigh the privacy impact of enabling an additional class of persons to open or examine mail, consistent with requirements under the Australian Privacy Principles (APPs). This would include a privacy impact threshold assessment and, if warranted, a privacy impact assessment.

This power would be reserved for situations that may arise in the future where it is necessary in response to changes in border policy and risks to postal articles. It could also be used, for example, in an emergency situation, to expedite intervention.

Noting that the reason for providing in delegated legislation for the classes of persons who may lawfully open and examine articles is not addressed in the Replacement Explanatory Memorandum, the Department will undertake to prepare an addendum to the Replacement Explanatory Memorandum to address the Committee's concerns in this respect.

Whether examples can be provided of the classes of persons who may be determined by the minister under subsection 90N(4) to not be subject to the subsection 90N(1) offence, including whether consideration could be given to restricting the classes of persons that could be so determined, for instance to those that hold relevant qualifications, training and experience; and

Subsection 90N(3) specifies the persons permitted to open and examine postal articles if the conduct itself is in the course of that person exercising powers, or performing functions or duties. Accordingly, any additional classes of persons are intended to be those that are acting in an official capacity. Any additional classes of persons which would be determined in the future by the Minister would be persons with relevant qualifications and experience necessary to perform their official role.

If the Bill is passed, the Department would develop regulatory guidelines to support the exercise of ministerial powers provided in Part 7B of the APC Act, in consultation with Australia Post and relevant government agencies. The guidelines would address the restrictions or parameters that should apply to the classes of persons to be covered by a determination under proposed subsections 90N(3) and 90N(4), including relevant skills, experience and training. The guidelines would also address the protections that should be in place relating to a person's right to privacy.

There are no known examples of persons or classes of persons that may need to be determined in a legislative instrument by the Minister at this time. As outlined above, the intent is to allow Australia Post and border agencies to adapt and respond quickly in response to risks that emerge or evolve in the postal system.

Noting that there is nothing in the Replacement Explanatory Memorandum detailing the intent, if the Bill is passed, to develop regulatory guidelines to support the exercise of ministerial powers provided in Part 7B of the APC Act, the Department will undertake to prepare an addendum to the Replacement Explanatory Memorandum to address this issue.

The types of privacy protections or considerations that will be relevant when articles are opened and examined under proposed subsections 90N(2) and (3), including the 'strict parameters' that will be imposed.

Proposed subsection 90N(2) provides an exception for the opening and examining of articles if permitted by: a provision of the APC Act, another law of the Commonwealth, or a law of a State or Territory.

Proposed subsection 90N(3) would permit the opening and examination of an article if undertaken in the course of a person exercising powers, or performing their functions or duties as: an Australian Federal Police (AFP) appointee, a member of the police force or police service of a State or Territory, or a person included in a class of persons determined in an instrument by the Minister.

In relation to proposed paragraph 90N(3)(a), it is also noted that the Australian Federal Police is subject to the *Privacy Act 1989*.

Is it noted that state and territory privacy legislation may apply to the extent mail was opened under the law of a State or Territory, or by the police force or police service of a State or Territory in the exercise of a statutory power or function.

There would necessarily be privacy safeguards built into operational systems and processes to ensure that the exceptions proposed in subsection 90N(2) and (3) are not exceeded.

These exceptions have been designed with regard to the relevant human rights conventions and permitted general situations provided under the APPs. In particular the exceptions are reasonable, appropriate and proportionate, and are necessary to:

- lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety;
- protect national security; and
- take appropriate action in relation to suspected unlawful activity or serious misconduct.

This strikes an appropriate balance between protecting a person's right to privacy and the public interest in preventing threats to security and unlawful conduct, which may have wider implications for the community.

The APC Act provides further limits on opening and examining mail articles, including procedural requirements for a range of circumstances, set out in the sections outlined below.

Section 90P – Examining without opening
Provides that permitted persons may examine the article or its contents by any means that does not involve unfastening or physically interfering with the cover of the article, such as X-ray technology.

Section 90Q – Undeliverable articles
Provides that permitted persons may open and examine articles in order to obtain sufficient information to deliver the article to the recipient, or otherwise return to sender.

Section – 90R Repair
Provides that a permitted person may open an article in order to repair it or its contents so that it may be made safe to deliver to the recipient.

Proposed section 90S – Articles on which duties or taxes are payable or that are carried in contravention of law (redrafted existing exception)
Provides that an article may be opened or examined if it is reasonably suspected to contain or consist or anything on which duties or taxes are payable, or which is being carried in contravention of law. It further limits the opening and examining in this circumstance to customs officers and Australia Post employees only.

Section 90U – Articles consisting of, or containing, quarantine material
Provides that an article may be opened or examined if it is reasonably suspected to contain or consist of any thing that is quarantine material of a prescribed State or Territory, currently Northern Australia, Tasmania and Western Australia, following the procedures currently prescribed in the *Australian Postal Corporation Regulations 2021*. It further limits the opening and examining in this circumstance to Australia Post employees only.

Section 90UB – Opening and examining scam mail
Provides that an article may be opened or examined if it reasonably suspected to contain or consist of scam mail, and the relevant consumer protection agency has been notified of its removal from the course of post. It further limits the opening and examination to officers of the consumer protection agency.

Attorney-General

Reference: MC24-022300

Senator Dean Smith
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By email: Scrutiny.Sen@aph.gov.au

Dear Chair

Thank you for the Senate Standing Committee for the Scrutiny of Bills' (Committee) correspondence of 17 May 2024 regarding the Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024.

I appreciate the time the Committee has taken to review the Bill, and have enclosed my response to the Committee's request for advice for its consideration.

I trust my response is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
29/5/2024

Encl. *Response to the Committee's request for advice on the Bill*

Response to the Senate Standing Committee for the Scrutiny of Bills

Scrutiny Digest 6 of 2024

The Senate Standing Committee for the Scrutiny of Bills (Committee) has requested the Attorney-General's further advice in relation to the Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024 (the Bill). These matters are set out in the Scrutiny Digest 6 of 2024.

The following information is provided in response to the Committee's request for further advice.

1.27 The committee requests the Attorney-General's advice as to why it is necessary and appropriate for item 3 of Schedule 1 to the bill to repeal paragraph 29(1)(bbaa) of the Intelligence Services Act 2001 without reinstating the mandate for review specifically of the declared area offences framework by the Parliamentary Joint Committee on Intelligence and Security (PJCIS).

1.28 Noting the value to parliamentary scrutiny of the measures that would be provided by a mandated review, the committee's scrutiny of the Attorney-General's response would be assisted if it addressed how the proposed broad discretion for a review into any counter-terrorism or national security legislation by the PJCIS prior to sunsetting is a sufficient and equal safeguard.

1.29 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the proposed amendment to subsection 119.2(6) of the Criminal Code, which extends the operation of the offence in section 119.2 by a further three years.

The Bill would repeal paragraph 29(1)(bbaa) of the *Intelligence Services Act 2001* (IS Act), which provides that the PJCIS may, should it resolve to do so, review the operational effectiveness of the declared areas provisions before 7 January 2024. The PJCIS did not resolve to undertake such a review, and as this mandate is exhausted, it is appropriate that this provision is now repealed.

The Government intends for the PJCIS to have the ability to review the declared areas provisions prior to the proposed new sunsetting date, and wishes to draw the Committee's attention to Item 52 of the Intelligence Services Amendment Bill 2023 (the ISLA Bill), which is currently before the Parliament. This provision, should it become law, would give the PJCIS the same review option as was provided for previously in paragraph 29(1)(bbaa) of the IS Act.

Should the ISLA Bill not pass, the Government will consider options to ensure that the PJCIS has an appropriate mandate to consider the operation, effectiveness and implications of the legislation prior to the proposed new sunsetting date.

Attorney-General

Reference: MC24-022327

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Dear Chair

Thank you for the Senate Scrutiny of Bills Committee's correspondence of 17 May 2024 regarding the Committee's assessment of the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024.

I appreciate the time the Committee has taken to review the Bill, and have enclosed my response to the Committee's questions for its consideration.

I trust my response is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
3/6/2024

Encl. *Response to the Committee's questions on the Bill*

Response to the Senate Standing Committee on the Scrutiny of Bills

Scrutiny Digest 6 of 2024

The Senate Standing Committee on the Scrutiny of Bills (Committee) has requested the Attorney-General's further advice in relation to the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024 (Bill). These matters are set out in the Scrutiny Digest 6 of 2024.

The following information is provided in response to the Committee's request for further advice on the Bill, noting the Bill has been reported on by the Senate Standing Committee on Legal and Constitutional Affairs (SSCLCA) on 24 April 2024. The Government is considering any recommendations for proposed amendments to the Bill in conjunction with any recommendations from the SSCLCA.

Committee Comments - Reversal of the evidential burden of proof

2.120 The committee requests the Attorney-General's further advice as to:

a) examples of when the defences provided by proposed paragraphs 15YR(2)(a) and 15YR(2)(b) of the Crimes Act 1914 may be used,
b) how they are intended to operate and
c) how these examples illustrate the appropriateness of the matters being constructed as offence-specific defences, with reference to the *Guide to Framing Commonwealth Offences*.

As noted in my response to the Committee dated 23 March 2024, the defences in ss 15YR(2)(a) and 15YR(2)(b) are existing defences to the offence in s 15YR(1) of the *Crimes Act 1914* which recognise that a vulnerable person may need to be identified in documents either in that legal proceeding or in other legal proceedings. These measures were introduced by the *Measures to Combat Serious and Organised Crime Act 2001*. Paragraphs 15YR(2)(a) and (b) are being repealed and replaced to reflect the updated structure of s 15YR(2), however the Bill does not change their current operation under the *Crimes Act 1914* (Cth).

It is intended that ss 15YR(2)(a) and 15YR(2)(b) operate together to ensure that there is complete coverage for the court when making official publications, and for parties in conducting matters. I note my earlier comments to the Committee in relation to s 15YR(2)(a).

The defence in s 15YR(2)(a) has two components – firstly, that the publication must be an 'official publication', and secondly, that the official publication must be 'in the course of, and for the purpose of, the proceeding'. The two elements of the latter requirement are conjunctive.

While the term 'official publication' is not defined, it is intended to cover publications by the court, or parties to the matter, that are required as part of matter being heard but do not fall within the remit of the defence in s 15YR(2)(b). This term is deliberately flexible to ensure that official publications legitimately prepared within the parameters are captured by this defence.

Whether a document is an 'official document' will be a question of the particular facts of the matter, however, it is appropriate that this defence have a reversed burden on the basis of the second limb – that is, the purpose for which the publication was made.

Attorney-General

Reference: MC24-022301

Senator Dean Smith
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Dear Chair

I write to the Committee to provide advice on questions raised in Digest 6 of 2024, referred to me in correspondence from the Committee Secretary dated 17 May 2024, in relation to the Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024 (the Bill). Specifically, the Committee has requested further information about Schedules 1, 3 and 4 of the Bill.

Thank you for taking the time to review the Bill. I appreciate the importance of robust and well considered scrutiny of draft legislation. I am pleased to provide the enclosed information, prepared by the Attorney-General's Department, to assist the Committee in its scrutiny of the Bill.

I trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
3 / 6 /2024

Encl. Response to questions in Digest 6 of 2024

Response to questions in Digest 6 of 2024

Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024

Schedule 1

The committee requests the minister's advice as to:

- **the privacy protections that apply to account-based data that is accessed as a result of proposed subparagraph 3FA(5)(a)(v) of the Crimes Act 1914;**
- **why it is necessary and appropriate for the authority of existing search warrants to be expanded by proposed section 3FA of the Crimes Act 1914 to capture account-based data, including that of third parties;**
- **why it is necessary and appropriate to be able to obtain the account-based data of any person who has ever used the target computer;**
- **why it is necessary and appropriate that digital data accessed as a result of proposed section 3FA of the Crimes Act 1914 and proposed section 228A of the Proceeds of Crime Act 2002 can be altered, copied or deleted by executing officers; and**
- **whether any examples can be provided of scenarios in which it is envisaged that the expansive powers provided by the various aspects of these provisions would be necessary.**

Account-based data

As noted in the Explanatory Memorandum, the proposed amendments replicate existing *Crimes Act 1914* (Crimes Act) provisions, with modifications to ensure they are appropriately targeted at enabling the search and seizure of digital assets.

Subsection 3F(2B) of the Crimes Act already permits the AFP to access account-based data under warrant to determine whether the account-based data is evidential material of a kind specified in the warrant.

The definition of account-based data in section 3CAA of the Crimes Act is focused on a particular person. Generally, the account-based data is data associated with a person of interest's account for an electronic service. For example, this could be data associated with an email service, a social media account, subscription, or messaging services such as WhatsApp, Signal, and Telegram. The definition also applies to account-based data for an electronic service that is used or is likely to be used by the person of interest. This could include an account held by another person (such as a family member, friend or business associate) but also utilised by the person of interest.

Proposed subsection 3FA(5) would enable access to account-based data to determine whether it suggests the existence of a digital asset (e.g. cryptocurrency such as Bitcoin) that may be seized under the warrant. Digital assets may be held in, and/or transacted using, an account held with an electronic service provider such as a digital currency exchange. Access to account-based data may assist in determining the identity of the account holder, and whether the digital assets may be evidential material or tainted property.

Existing search warrant powers also enable the use of any computers found in the course of a search of a premises or a person, and data held on, or accessible from, those computers to be examined to determine whether it is evidential material. The proposed changes would assist in determining whether relevant data, including account-based data, suggests the existence of digital assets that may be subject to seizure under proposed subsection 3FA(1).

The AFP may need to review the data of each user of a computer to locate digital assets that are evidential material or proceeds of crime, and to determine which person has been using, or is in control of, the digital asset. It would be impractical to limit law enforcement's ability to examine data connected to a computer that is subject to a search warrant to only data that is connected to the current user. This would provide criminals with greater ability to hide evidential material and their proceeds of crime from police.

Privacy protections for account-based data

Australian Government agencies (including law enforcement agencies) are required to comply with the *Privacy Act 1988*, and the Australian Privacy Principles (APPs). Compliance with the APPs regulates the collection, use, disclosure and destruction of personal and sensitive information.

Section 60A of the *Australian Federal Police Act 1979* also establishes a general secrecy offence, preventing an AFP employee from making a record of, or divulging or communicating any prescribed information to any other person, except for the purposes of either the AFP Act, or for complying with various oversight purposes (such as purposes of the National Anti-Corruption Commission, the Inspector-General of Intelligence and Security, or the Parliamentary Joint Committee on Law Enforcement). "Prescribed information" is any information obtained by the AFP employee in the course of carrying out, performing or exercising any of the person's duties, functions or powers under the AFP Act.

Use of electronic equipment to access data

The power to "add, copy, alter or delete" data is included in subsections 3F(2A) and (2B) of the Crimes Act. These subsections acknowledge that, to access data, modifications may need to be made to data on the device or account, which could include:

- adding software and copying data from the device or account to enable it to be searched, or
- deleting or altering data such as a password to bypass electronic security on a device or online account.

The proposed section 3FA of the Crimes Act and section 228A of the *Proceeds of Crime Act 2002* (POCA) reflect this power. This power is required in the digital asset context to reflect that, when seizing a digital asset (for example, by moving it to an AFP controlled wallet), the data on the blockchain (which contains the transaction history for that digital asset) is being altered.

Practical examples

The proposed provisions ensure the Crimes Act and POCA warrant provisions are appropriately and proportionately adapted to ensuring the AFP can continue to seize digital assets with clarity and certainty, for example:

- Discovering an electronically-stored recovery phrase (seed phrase) while examining a suspect's mobile phone at a search warrant. The executing officer will then be able to follow this new line of inquiry to determine who controls the digital assets connected to the recovery phrase, the transaction history, and the amount of digital assets controlled. This will enable the executing officer to reach a determination whether the digital assets are evidential material or tainted property.

- Discovering a digital wallet application on a suspect's seized computer some days after the search warrant, while it is being examined at a law enforcement digital forensics facility. The amendment to section 3ZQV will enable law enforcement to operate that computer, to determine whether data that suggests the existence of a digital asset that may be seized under the warrant, is held or, or accessible from, the seized computer. This will then enable the executing officer to seize the digital asset, if it is determined to be evidential material or tainted property.

Schedule 3

The committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to increase the amount of a Commonwealth penalty unit by 5 per cent, noting the limited explanation provided in the explanatory materials for the increase and that the increase will apply in addition to the usual indexation process from 2026.

In particular, the committee's consideration of this issue will be assisted if the Attorney-General's response addresses:

- **how the amount of the increase was determined;**
- **why it was considered necessary to introduce an increase to the Commonwealth penalty unit of approximately 5 per cent in addition to the usual indexation process;**
- **any evidence that the previous amount of the penalty unit was not acting as an effective deterrent;**
- **any evidence that the new amount is likely to constitute an effective deterrent; and**
- **any evidence that the increase better reflects community expectations**

Determination of increase

Rises in average incomes was a factor in determining the new penalty unit amount. The value of the penalty unit has increased five times by legislative amendment and twice by automatic indexation since it was first instituted in 1992, increasing from $100 to $313. These increases represent an increase of 213%, while average incomes have increased by 282% during the

same period.[1] Increasing the penalty unit amount over time in order to broadly align it with income levels ensures that fines remain an effective deterrent.

Timing of increase and effective deterrence

Increasing the penalty unit by legislative amendment is necessary as the next increase under the indexation process will not occur for another two years. Absent a manual amendment, monetary penalties would lose effectiveness given rising average incomes.

Fines are the most common sentencing disposition imposed by courts in Commonwealth matters, occurring in 33% of sentencing matters in the 2022-23 financial year.[3] It is therefore important that the value of the penalty unit be maintained, so that courts have discretion to impose the most appropriate sanction.

In sentencing, it is open to the court to consider all the relevant circumstances, and impose an appropriate monetary penalty. The increase in penalty units does not curtail the court's discretion to impose what it deems to be an appropriate penalty, and does not compel the court to impose more severe financial penalties if it is not warranted.

Community expectations

This increase reflects community expectation that courts have appropriate punishments available to them when sentencing individuals and corporations. This is especially relevant given offences that attract financial penalties expressed in penalty units include serious Commonwealth criminal offences such as importation of drugs, people smuggling, theft or destruction of Commonwealth property, and social security fraud. Serious offences commonly include both a financial penalty and/or a term of imprisonment, expressed as maximums. A court may impose either, or a combination of these sanctions as appropriate.

Schedule 4

The committee requests the minister's advice as to:

- **why it is necessary and appropriate to allow the roles of Communications Access Coordinator and Communications Security Coordinator to be delegated to any APS employee at any level within either the Home Affairs or Attorney-General's Departments respectively and by delegated legislation;**
- **the scope of powers that might be delegated; and**
- **the categories of people to whom it is envisaged these roles will be delegated to, including whether any specific training, skills or experience will be a pre-requisite and, if so, whether consideration can be given to providing such a requirement on the face of the bill.**

The Communications Access Coordinator (CAC) provides advice and acts as a central point of coordination across enforcement agencies, telecommunications carriers and carriage service providers on telecommunications interception and mandatory data retention under the *Telecommunications (Interception and Access) Act 1979* (TIA Act). Its statutory roles include

[1] Australian Bureau of Statistics (December 2023) Characteristics of Employment, Australia, abs.gov.au, accessed 20 May, 2024.
[3] Australian Bureau of Statistics (May 2024) Federal Defendants, Australia, abs.gov.au, accessed 20 May, 2024.

approving Interception Capability Plans and considering and approving exemptions from interception capability and data retention obligations. The CAC also has security-related functions under the *Telecommunications Act 1997* (Tel Act), which are administered by the Department of Home Affairs.

In addition to making decisions that affect carriers' legal obligations, the CAC is required to perform certain routine and administrative tasks under the TIA Act. For example, under section 196 of the TIA Act, the CAC may agree a particular deadline for a carrier to submit an Interception Capability Plan to the CAC, and must advise the Australian Communications and Media Authority (ACMA) if a new deadline is imposed on a carrier. These are purely administrative functions that, if reserved for SES officers, would divert senior officers from more complex work priorities.

A full list of CAC functions is provided at **Attachment A**.

Given the mix of complex and sensitive functions required of the CAC, versus routine administrative functions that are high volume and low impact, it is necessary and appropriate to allow the roles of the CAC in the Attorney-General's Department and Communications Security Coordinator (CSC) in Home Affairs to be delegated to employees at lower levels within both departments. Such a delegation would be made by a legislative instrument subject to safeguards including:

- approval at Ministerial level
- scrutiny by Parliamentary committees, and
- possible disallowance by the Parliament.

Prior to 2018, a single SES-level officer in the Attorney-General's Department was specified as the CAC, and an internal authorisation supported the carrying out of CAC functions by Executive Level (EL) officers. From 2018 until machinery of government changes in 2022, the CAC function was administered entirely by Home Affairs.

In 2022, following the federal election, the CAC function was returned to the Attorney-General's Department, and the Attorney-General made a new instrument under section 6R(2) of the TIA Act, specifying certain bodies or persons to undertake CAC functions. That instrument was scrutinised by the Standing Committee for the Scrutiny of Delegated Legislation in November 2022, which raised some technical scrutiny concerns in relation to the delegation levels for powers under sections 187B(2), 187K, 192 and 203 of the TIA Act.

On 12 December 2022 the Attorney-General wrote to the Chair of the Standing Committee for the Scrutiny of Delegated Legislation in response to its concerns, indicating his agreement that it was appropriate for decisions under sections 187B(2), 187K and 203 to be made at the SES level and that he intended to make a new instrument to ensure those delegations are exercised at SES level. In regard to section 192, the Attorney-General considered there were appropriate mechanisms in place to refer decisions to SES level officers when required and, as such, that delegation would not be amended in the new instrument.

In the process of considering a new instrument, the Attorney-General determined it would be appropriate to amend the TIA Act (as provided in Schedule 4 of the Bill) before the new instrument was made. The amendments will ensure:

- the security-related CAC functions in Part 14 of the Telecommunications Act (Tel Act) would be undertaken by the Home Affairs Secretary and/or his/her delegate, to better reflect the changes to Administrative Arrangements Orders made in 2022, and
- the instrument delegating CAC powers would be confined to officers within the Attorney-General's Department, and CSC powers confined to officers within the Home Affairs Department.[4]

On 21 April 2023, the Attorney-General repealed the Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2023. Since that time, CAC functions have been carried out by the Secretary of the Attorney-General's Department, pursuant to paragraph 6R(1)(a) of the TIA Act. As the TIA Act does not provide an express delegation power for CAC functions, the Secretary has authorised certain SES, EL2 and EL1 officers in the department to undertake routine CAC functions based on the *Carltona* principle. The *Carltona* principle allows an implied power of authorisation to be read from the statutory context, taking into account factors such as the nature of the power, the frequency with which it is used and its potential implications.

In the absence of a legislative instrument by the Minister under section 6R(2), the Secretary currently exercises CAC functions that determine, vary or exempt a person's legal obligations, including under sections 187B(2), 187K and 203 of the TIA Act. The department considers that these functions could appropriately be exercised by an SES officer other than the Secretary, and proposes to recommend the Attorney-General make an instrument to that effect following passage of the Bill. This would be consistent with the Attorney-General's undertaking to the Standing Committee for the Scrutiny of Delegated Legislation in December 2022. A summary of proposed delegation levels to be sought for each CAC and CSC function is provided at **Attachment A**.

Certain administrative CAC functions (such as receiving and forwarding correspondence, and confirming due dates under section 196 of the TIA Act) do not require specialised training, skills or experience. In practice, these functions are undertaken by EL officers in the department (sometimes with the assistance of APS officers), pursuant to the Secretary's *Carltona* authorisation. These will continue to be undertaken by EL officers following passage of the Bill and the execution of a new instrument of authorisation by the Attorney-General.

It would be open to the Attorney-General, under the proposed amended section 6R of the TIA Act, to require training, skills, or experience in the instrument of delegation as a defining characteristic of a class of persons to perform CAC functions. However, given the broad scope of CAC functions across the TIA Act and Tel Act, it is not proposed for specific training, skills or experience to be established as a pre-requisite or a requirement on the face of the Bill. The department supports staff who have responsibility for performing CAC functions with on-the-job training and professional development opportunities relevant to the role, for example attendance at industry forums and technology symposiums. The department will continue its current practice of consulting partner law enforcement and security agencies that have specialist knowledge and expertise if and when their assistance is required to inform a decision being made by the CAC or his/her delegate. These same partner agencies also provide informal advice about telecommunications technology, including

[4] Section 6R(2) of the TIA Act currently enables the Attorney-General to specify *any person or body* to undertake CAC functions. As such, the amendment to section 6R at item 62 of the Bill has the effect of confining the scope of that provision.

updates on capabilities, to staff with the Office of the CAC, which assists them to effectively discharge their CAC-related duties.

Attachment A: Proposed delegation of functions of the Communications Access Coordinator and Communications Security Coordinator

Table 1: This table summarises CAC functions under the TIA Act, and the proposed delegations to be executed subject to passage of the Bill.

Section	Function and context	Proposed delegation level
183	The **CAC may determine** requirements for authorisations for agencies to access to certain telecommunications data from providers.	SES
187B	Under section 187B(2), the **CAC may declare** that mandatory data retention regime (MDRR) obligations under section 187A apply in relation to a service, even if they otherwise do not apply.	SES
187E, F, G, H and J	The **CAC may approve (and amend)** a data retention implementation plan (DRIP) and must consult with agencies and the Australian Communications and Media Authority. (Note: This is a dormant function. DRIPs were mostly relevant at the commencement of the MDRR as part of providers seeking government grants, and working towards compliance, with the new MDRR obligations.)	SES
187K(1)	The **CAC may exempt or vary** the obligations imposed on service providers in relation to the MDRR, for example, the requirement to keep certain telecommunications data for two years.	SES
187K(5)(a)(i) and (ii)	The **CAC must give** a copy of applications for exemption or variation to the MDRR obligations to interested law enforcement agencies and security authorities, and to ACMA.	EL
187KA	The **CAC must be given** a copy of applications for review of s 187K decisions.	EL
188	The **CAC must be informed** of the delivery points for lawfully intercepted information by each carrier, can **object to** the nominated location, and **must refer** ongoing disputes to ACMA.	EL
192, 196, 197 and 198	The **CAC must be given** an Interception Capability Plan (ICP) by each carrier/Nominated Carriage Service Provider by 1 July each year (requires the assessment of ICPs from approximately 345 Australian telecommunications carriers) and must consult relevant agencies prior to approving or seeking amendments within 60 days. The **CAC can approve** the plan, **request an amendment**, and also **exempt** a carrier from certain interception obligations.	EL
201(1)	The **CAC must be given** a new ICP by a carrier/Nominated Carriage Service Provider if there are significant business changes.	EL
202B(3)	The **CAC must be notified** by carriers and Nominated Carriage Service Providers about proposed business changes that would have a material adverse effect on compliance with the TIA Act or s 313 of the Telecommunications Act.	EL
202B(5) and (6)	The **CAC can prevent** the provider from making the change, and may consult with interested agencies.	SES
203(1)	The **CAC can specify** delivery capability parameters for lawfully intercepted information including format, location and ancillary information after consulting with ACMA. These can apply to a specific carrier.	SES

Section	Function and context	Proposed delegation level
203(3)	The **CAC must consult** ACMA before making a determination under s 203(1).	EL
Schedule 1, Cl. 126	The **CAC is an authorised applicant** for civil penalty provisions relating to International Production Orders.	SES

Table 2: This table summarises the CAC and CSC functions under the Tel Act, and the proposed delegations to be executed subject to passage of the Bill.

Section	Function and context	Proposed delegation level
53A	The **CAC must be given** a copy of each carrier licence application.	EL
56A(1)	ACMA must **consult the CAC** about the licence application.	EL
56A(2), (3), (4), and (5)	The **CAC may give notice** to ACMA not to grant the notice for 3 months. This notice can be renewed for up to 12 months, or revoked at any time by notice to ACMA.	SES
99	The ACMA may make a determination setting out rules for the supply of specified services. The *Telecommunications (Service Provider – Identity Checks for Prepaid Mobile Carriage Services) Determination 2017* is made under this section, and requires ACMA to consult the CAC on alternative ID check compliance plans.	SES
314A(2B)	The **CSC can remove** (by way of legislative instrument) the requirement for providers to notify the CSC of *specified changes* to their services.	SES
314A(3)	Providers must **notify the CSC** of changes to their services that are likely to have a material effect on their ability to comply with security-related obligations under the *Telecommunications Act 1997*.	SES
314A(4) and (5)	The **CSC can remove** (by way of notification in writing) the requirement for *particular providers* to notify the CSC of changes to their services.	SES
314B(1)	The **CSC can require** providers to provide additional information about proposed changes to their systems (following notification under subsection 314A(3)).	SES
314B(3) and (5)	The **CSC must** give written notice to providers advising of the outcome of the assessment of proposed changes (following notification under subsection 314A(3)).	SES
314C and 314D	**Providers** may provide the CSC with a 'Security Capability Plan' and the **CSC may determine** the requirements for such plans and **assess and request changes.**	SES
315J	**Secretary to give** an annual report on the number of notices given by the CSC under 314B, and capability plans approved under 314C and 314D.	SES

SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
MINISTER FOR EMERGENCY MANAGEMENT

MS24-000237

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

scrutiny.sen@aph.gov.au

Dear ~~Chair~~ Dean

Illegal Logging Prohibition Amendment (Strengthening Measures to Prevent Illegal Timber Trade) Bill 2024

I refer to email correspondence of 17 May 2024 from the Secretary of the Senate Scrutiny of Bills Committee about issues raised on the Bill in *Scrutiny Digest 6 of 2024*.

The Department of Agriculture, Fisheries and Forestry has considered these matters and a detailed response is attached.

Yours sincerely

MURRAY WATT 29 / 5 / 2024

Enc

ATTACHMENT

Response to Senate Standing Committee for the Scrutiny of Bills

Illegal Logging Prohibition Amendment (Strengthening Measures to Prevent Illegal Timber Trade) Bill 2024

Use of negligence as fault element for an offence
Significant matters in delegated legislation

Use of negligence as a fault element for an offence

The Government remains of the view that negligence is the appropriate fault element for the offence in proposed subsection 9(1) of the *Illegal Logging Prohibition Act 2012* (the Act), as is currently provided for in the Act. An addendum explanatory memorandum will be prepared as soon as practicable, outlining the reasoning below.

Item 10 of the Bill includes substitution of a new section 9 into the Act. Proposed subsection 9(1) of the Bill would remake the existing offence provision contained in section 9(1) of the Act. Proposed section 9 also includes two new alternative penalty provisions – a strict liability offence in subsection 9(3); and a civil penalty provision in subsection 9(4).

Proposed subsection 9(1) would remake the offence of negligently importing a regulated timber product which is made from or includes any illegally logged timber. ***Regulated timber products*** would be timber products prescribed by the rules as the *Illegal Logging Prohibition Regulation 2012* (the Regulation) would be repealed by proposed section 86 of the Bill.

The maximum penalty for an individual would be retained as five years imprisonment, 500 penalty units, or both. The maximum pecuniary penalty applied to the importing of illegally logged regulated timber products is aimed at providing a high-level deterrent to individuals and corporations. Proposed section 9 is supported by the requirements to undertake due diligence as provided for in proposed new section 13A and amendments to section 14 in the Bill. A penalty of 500 units would be prescribed to provide a financial deterrent that is equivalent to the profitability associated with importing illegally logged timber. Similarly, proposed subsection 9(2) of the Bill would retain the fault element of negligence in the Act.

The *Criminal Code Act 1995* provides that negligence requires such a great falling short of the standard of care that a reasonable person would exercise in the circumstances together with the likelihood that the physical elements exist, or may exist, that the conduct merits criminal punishment.

The Guide to Framing Commonwealth Offences states that only where it is necessary for a person to be criminally liable based in part on objective standards, rather than their subjective mental state, should negligence be specified as the fault element for an offence. The standard of care for criminal negligence is objective and based on the concept of a reasonable person in the same situation.

As noted, proposed section 13A in the Bill provides that a due diligence requirement for importing regulated timber products is that the person importing such products has a due diligence system for importing such products. Proposed subsection 14(1) provides that the rules may prescribe other due diligence requirements for importing regulated timber products.

The due diligence requirements prescribed in the Regulation and the due diligence requirements to be prescribed in the rules require or would require a reasonable person, as an importer of a regulated timber product, to be aware of the relevant risks and circumstances that may give rise to the risk of importing illegally logged timber products. As this is (and will continue to be) the standard of the industry, it is necessary that those in the industry are held to this objective standard and be subject to criminal prosecution if they fall seriously short of the requisite standard of care. This is consistent with section 2.2.5 of the Guide as such people will be required, by law, to maintain awareness of the relevant risks once the proposed legislation comes into effect.

The then Senate Standing Committee on Rural Affairs and Transport, in its report on the inquiry into the Illegal Logging Prohibition Bill 2011, recommended that Australia's approach be consistent with measures being taken in the United States and the European Union to combat illegal logging. The fault element for the offence of importing illegally logged timber in regulated timber products implements this recommendation as it is consistent with the standard of care required by importers of timber and timber products in the United States.

Significant matters in delegated legislation

As outlined in the explanatory memorandum to the Bill, I believe it is appropriate for the definition of ***regulated timber product*** to be specified in the rules. Regulated timber products are currently prescribed in the Regulation that will sunset on 1 April 2025. It is intended that the rules will be made to provide for matters required under the proposed amended Act, including many of the matters in the Regulation. It is appropriate that the Bill includes a power to make rules rather than regulations, consistent with Office of Parliamentary Counsel Drafting Direction 3.8, because the delegated legislation will no longer include a power to provide for civil penalties (due to the consolidation of those provisions in the Act by this Bill). Powers for civil penalties to be prescribed are generally only provided for in regulations.

The regulated timber products to be prescribed in the disallowable rules are intended to be consistent with regulated timber products prescribed in the Regulation. Prescribing the definition in rules is appropriate because it would continue to enable the definition to be updated to include emerging products and respond to changing operational circumstances. Maintaining the flexibility of the legislation would continue to support industries' needs and would support the efficient and effective administration of the illegal logging framework.

Further, the rules made under proposed section 86 would be legislative instruments that would be subject to disallowance under section 42 of the *Legislation Act 2003*. Parliament would therefore have the same level of oversight of the rules as it had over the Regulation.

Reversal of the evidential burden of proof
Significant matters in delegated legislation

The committee has sought further information about why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed subsections 12(4), 17(5), 18B(6), and 18C(5) and why it is appropriate for an offence-specific defence to include any circumstances prescribed by the rules.

The defences relating to exceptions in proposed subsections 12(4), 17(5) 18B(6) and 18C(5) that a circumstance prescribed by the rules applies

Proposed subsections 12(4) and 17(5) enable circumstances to be prescribed by the rules in which a fault-based offence, a strict liability offence or a civil penalty provision for importing a regulated timber product or processing a raw log without complying with one or more due diligence requirements would not apply.

It is envisaged that the circumstances prescribed for the purposes of subsection 12(4) would include:

- the importation of consignments of regulated timber products that do not exceed $1,000;
- the importation of certain regulated timber products that are made from recycled materials;

These offence specific defences are intended to be similar to those in section 6 of the Regulation. Maintaining these exceptions in a disallowable legislative instrument would continue to enable adjustment in response to changing policy settings and industry needs. For example, it may be considered appropriate in future to exempt an importer of regulated timber products from conducting due diligence in relation to a consignment of regulated timber products in circumstances where the value of the regulated timber products in the consignment does not exceed a sum that is greater than $5,000 or $10,000.

Continuing to provide the offence-specific defences to subsections 17(1), (2) and (3) of the Bill in a disallowable legislative instrument would enable these matters to be adjusted, with Parliamentary oversight, in response to changing practices in the logging industry. Currently, it is envisaged that the circumstances prescribed by the rules for the purposes of subsection 17(5) would include circumstances in which the processor of the raw log has also harvested the raw log.

Continuing to provide offence-specific defences for this section in a disallowable legislative instrument would continue to permit the defences to be adjusted in response to industry developments and needs.

The circumstances relevant to the defence would be peculiarly within the knowledge of the defendant, and it would be significantly more time consuming and costly for the prosecution to disprove than for the defendant to establish the matters. For example, it would be relatively straightforward for a defendant to establish that they harvested the raw log before processing.

Subsection 18B(6) provides for an exception to be prescribed to the requirement to give notice of regulated timber products to be unloaded in Australia. It is envisaged that the circumstances prescribed by the rules for the purposes of this provision would relate to a regulated timber products worth less than $1,000 that is or is intended to be brought into Australia and unloaded at a landing place or port in Australia as covered by subsection (1).

Subsection 18C(5) provides for an exception to be prescribed to the requirement to give notice to the Secretary of the processing of a raw log into something other than a raw log. For the reasons explained above, it would be relatively straightforward for the defendant to establish these matters but time consuming and costly for the prosecution to do so.

The reversal of the evidential burden of proof in relation to the matters contained in proposed section 12, 17, 18B and 18C of the Bill are appropriate, justified and consistent with the principles in the *Guide to Framing Commonwealth Offences* in the circumstances.

Consistent with Part 4.3.2 of the Guide, the provisions would only impose an evidential (rather than legal) burden of proof. This would ensure that the defendant need only adduce or point to evidence that would suggest a reasonable possibility that the matter exists, or does not exist, thus making the evidential burden of proof easier for the defendant to discharge. If the defendant discharges the evidential burden, the prosecution would still need to disprove those matters beyond reasonable doubt.

Abrogation of privilege against self-incrimination

I confirm that consideration was given to including a derivative use immunity in the Bill to ensure information or evidence indirectly obtained from a person could not be used in evidence against them and that section 82 of the Bill has been drafted accordingly.

Proposed subsection 82(1) of the of the Bill states that an individual is not excused from making a declaration under section 13, giving a notice under section 18B or 18C, giving information or producing a document under section 18E, 18F or 31 or answering a question under section 31 on the ground that making the declaration, giving the notice or information, producing the document or answering the question might tend to incriminate the individual in relation to the offence.

As the Committee has pointed out, proposed paragraphs 82(2)(a) and (b) of the Bill (when read with paragraphs 82(2)(d) and (e)) provides a limited use immunity. That is, the declaration made, notice or information given, document produced or answer given, and the making of the declaration, the giving of the notice or information, the production of the document or the answering of the question are not admissible in evidence against the individual in criminal proceedings, other than proceedings for an offence against section 13, 18B, 18C, 18E, 18F or 31 or proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to this Act or the rules.

Paragraph 82(2)(c) of the Bill, when read with paragraph 82(2)(d) and (e), provides for the derivative use immunity. That is, any information, document or thing obtained as a direct or indirect consequence of making of the declaration under section 13, the giving of the notice under section 18B or 18C, giving information or producing a document under section 18E, 18F or 31 or answering a question under section 31 are not admissible in evidence against the individual in criminal proceedings, other than proceedings for an offence against section 13, 18B, 18C, 18E, 18F or 31, or proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to the Act or the rules.

For completeness, I note that less coercive avenues to obtain the information are likely to be ineffective in light of the overall lack of responsiveness to requests from the Department for information and documents relevant to compliance with the current illegal logging prohibition legislation.

Immunity from civil liability

The conferral of immunity from civil proceedings in proposed section 85D is necessary to protect certain officials from the legal risk arising in the course of conducting their duties in good faith. As the Committee has noted, the immunity is limited and only applies:

- to the things done in good faith by a protected person (the Minister, the Secretary, an inspector, an auditor and an APS employee in the Department; and
- in the performance or purported performance of a function, or the exercise or purported exercise of a power by that person, conferred by the Act or rules.

The immunity provision is consistent with other portfolio legislation, such as section 644 of the *Biosecurity Act 2015*.

As noted in the explanatory memorandum, it is necessary and appropriate to confer immunity from civil proceedings on specific people who exercise, or would exercise, the specific powers and functions to provide appropriate support for the performance of these functions and the exercise of these powers in good faith. For example, the power in proposed section 84A is designed to encourage compliance with the illegal logging prohibition legislation. If there were no immunity from civil liability for protected persons who publish information about a person under that power in good faith, this would act as a deterrent to the use of the power, thereby undermining the policy objectives of the provision.

Powers and functions under the Act as proposed are generally exercised, or are to be exercised, by the Secretary personally or by appropriately qualified persons whom the Secretary has appointed as inspectors and auditors under the Act. In practice the immunity will only apply to a small number of persons given that few officers are appointed inspectors under the Act and this is likely to continue in the event that the Bill is passed.

Further, the immunity is limited in its scope as it does not protect offices from civil action for conduct that was not performed in good faith or conduct that the officer was not conducted in the exercise of a power or function conferred by the Act or the rules. Moreover, the immunity does not protect the conduct of officers acting in good faith in the course of their duties from oversight by the Ombudsman or similar scrutiny bodies, nor affect access by individuals to the Commonwealth Scheme for Compensation for Detriment caused by Defective Administration.

The conferral of immunity from civil proceedings in proposed section 85D is necessary and appropriate and sufficiently limited in its application and vital to ensure officials can effectively exercise powers and functions under the Act.

Incorporation of external materials as existing from time to time

The Committee has sought further information about whether material incorporated from time to time in the context of proposed section 86 will be made freely and readily available to all persons interested in the law.

I confirm that where the rules would incorporate such documents, the explanatory statement would, in accordance with paragraph 15J(2)(c) of the *Legislation Act 2003*, contain a description of the relevant incorporated material and indicate how it may be obtained.

The materials incorporated from time to time will be made freely available to all persons interested in the law. The explanatory statements would include website details on where the documents could be obtained, specify the Australian public libraries where the material would be available; or include relevant extracts, in full, from the incorporated documents (as appropriate).

The Hon Bill Shorten MP

Minister for the National Disability Insurance Scheme
Minister for Government Services

Ref: MC24-005921

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

Dear Dean

Dear Chair,

I refer to correspondence of 17 May 2024 from the Secretary of the Senate Scrutiny of Bills Committee (the Committee) in relation to the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill (the Bill) 2024.

I note that the Committee has requested further information in relation to certain aspects of the Bill that raise scrutiny concerns. My response to that request is **enclosed**.

I will update the explanatory memorandum to include relevant additional information by way of addendum.

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

Yours sincerely,

Bill Shorten MP

30/5/2024

Enc.

Response to Senate Standing Committee on the Scrutiny of Bills

National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024

Exemption from sunsetting and significant matters in delegated legislation

> *Why it is considered appropriate to provide for a blanket exemption from sunsetting for the NDIS rules and all instruments made under the National Disability Insurance Scheme Act 2013, with particular consideration to the implications this will have on parliamentary rather than executive oversight?*

The National Disability Insurance Scheme (NDIS, Scheme) is an intergovernmental scheme. The *National Disability Insurance Scheme Act 2013* (the Act) requires "*governments to work together to develop and implement the National Disability Insurance Scheme*" (see paragraph 3(2)(a) of the Act).

All legislative instruments made under the Act operationalise the NDIS. As a result, the instruments form an integral part of an intergovernmental scheme and are made under an Act that facilitates the establishment and operation of an intergovernmental scheme. Because of this, it is likely that these instruments are already exempt from sunsetting as a result of subsection 54(1) of the *Legislation Act 2003* (Legislation Act). The *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024* (the Bill) proposes to include the exemption in the *Legislation (Exemptions and Other Matters) Regulation 2015* to remove any residual uncertainty and put this beyond doubt.

Additionally, as noted in the explanatory memorandum, it is not appropriate for the Commonwealth to unilaterally repeal instruments that required agreement from state and territory governments to be made. While the Committee notes that the making of rules is an exercise of Commonwealth executive power delegated by the Commonwealth Parliament, in the context of the NDIS Act, the power can only be exercised subject to consultation and/or agreement with states and territory governments. In these circumstances, it is not considered appropriate for the Commonwealth to unilaterally repeal the relevant instrument by way of sunsetting. Some further detail is provided below about the role of state and territory governments is provided below to assist the Committee.

Section 12 of the Act provides that the Ministerial Council (made up of Commonwealth, state and territory Disability Ministers) is to consider policy matters that relate to the NDIS or arise under the Act, advise the Minister about such matters and make recommendations to National Cabinet about such matters. Section 12 also provides that the relevant Commonwealth minister must consult the Ministerial Council about policy matters that relate to the NDIS or arise under the Act.

Importantly, most legislative instruments made under the Act require consultation with state and territory governments at a minimum, with many requiring agreement by a majority or all jurisdictions. Section 209 of the Act provides for the role of states and territories in the making of NDIS rules. There are four categories of rules requiring different levels of consultation or agreement with jurisdictions before the Minister may make rules.

The explanatory memorandum to the National Disability Insurance Scheme Bill 2012 provides that:

- Category A rules are considered to be those that relate to significant policy matters with financial implications for the Commonwealth and states and territories, or which interact closely with relevant state and territory laws, and so the agreement of all jurisdictions is required for the making of these rules.

- Category B rules only require the agreement of a particular jurisdiction as they related to the roll out of the NDIS into that jurisdictions or otherwise only affect a particular jurisdiction.

- Category C rules require the agreement of the Commonwealth and a majority of states and territories as they still relate to policy issues but are not expected to have a financial impact.

- Category D rules are considered to be more administrative than policy in character, and so the Minister need only consult host jurisdictions before making these rules.

These requirements create a unique operating environment for the NDIS in terms of legislative instruments, when compared to other Commonwealth legislative schemes, and is the reason why exemption from sunsetting is appropriate in this particular statutory context.

In addition, legislative instruments made under the Act are all subject to consultation and co-design with the disability community. It could be considered disempowering for the disability community for them to sunset as a result of Commonwealth legislation.

It is in the best interests of people with disability that instruments that have been agreed, and with which they have become familiar, remain in force for as long as they continue to be fit-for-purpose. The intergovernmental arrangements for the Scheme ensure issues concerning legislative instruments can be raised, examined and actioned including in timeframes which may be longer or shorter than the standard sunsetting arrangements. Exempting these instruments from sunsetting ensures that the intent of the Scheme and its underlying cooperative inter-governmental basis is maintained.

Why it is appropriate to include such extensive rule-making powers?

Including detail in legislative instruments rather than the Act will enable deeper engagement on operational matters through consultation and co-design, particularly with the disability community, which are both central to the operation of the NDIS. This ensures the detail of how the Scheme will operate is not decided by the Commonwealth in isolation, but is co-designed with Scheme participants, as required by subsection 4(9A) of the Act and is consistent with the intergovernmental nature of the Scheme.

The Government is committed to co-designing the future of the NDIS with the disability community and relevant experts in addition to state and territory governments. Including detail in legislative instruments will allow time and space for this occur and is consistent with the approach taken throughout the Act.

In addition, the expanded rule-making powers will allow for the elevation of National Disability Insurance Agency (NDIA) Operational Guidelines into legislative instruments and having these in rules rather than primary legislation will enable greater flexibility in making necessary operational changes to respond to changing circumstances.

For example, the reframing of section 27 of the Act will allow the Agency to lift Operational Guidance around decision making in relation to whether a person meets the disability requirements or early intervention requirements into legislative instruments. This will provide greater transparency and parliamentary oversight than currently exists as well as providing greater clarity and certainty for participants as to the basis of their eligibility for access to the Scheme.

> *Whether more specific consultation requirements with people impacted by the NDIS rules can be included in the bill, namely the disability community.*

Paragraph 209(3)(a) of the Act requires the Minister to have regard to the objects and principles of the Act when making NDIS rules. This is important, because subsection 4(9A) (which is a guiding principle for all actions taken under the Act, including the making of NDIS rules and other legislative instruments) provides that:

> People with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity.

In addition to this express requirement in the Act, in making any legislative instrument, the Minister must comply with section 17 of the Legislation Act which requires a rule-maker to undertake appropriate consultation before an instrument is made. This expressly includes consultation with organisations representative of persons who are likely to be affected by the proposed instrument (see subsection 17(3) of the Legislation Act).

Consistent with the guiding principle of co-design and legislative consultation requirements, the Government is committed to co-designing the future of the NDIS with the disability community.

Including any additional reference to consultation with the disability community beyond what already appears in the Act and applies by force of law through the Legislation Act is unnecessary and may result in unintended consequences. For example, there is no broadly accepted process for 'co-design' and no existing statutory definition. Including an express reference to 'co-design' could lead to legal uncertainty about whether an instrument is validly made, significantly impacting the operation of the Scheme.

Broad delegation of administrative powers or functions and availability of independent merits review

> *Why it is considered necessary and appropriate to expand the scope of the [Chief Executive Officer (CEO) of the NDIA's] powers, noting that these powers may be delegated to any Agency officer under subsection 202(1) of the National Disability Insurance Scheme Act 2013.*

The Bill does not expand the scope of the CEO's powers but rather confers necessary and appropriate powers that will ensure the operation and implementation of new measures included in the Bill. The powers conferred are comparable to the existing powers available under the Act and in that sense, they are consistent with the CEO's existing statutory responsibilities for Scheme operation.

For example, a central purpose of the Bill is to introduce a new planning framework, in line with recommendations made by the NDIS Review. This new framework has necessarily created new decision-making powers for the CEO. These are administrative decisions that are operational in nature and consistent with decisions currently made by the CEO.

For example, the CEO already has the power to revoke a participant's status as a participant if they no longer meet certain criteria (existing section 30; proposed new section 30A) or to decide to approve a statement of participant supports (existing subsection 33(2); proposed new subsection 32D(2)). The Bill replicates these powers for the new budget model.

> *Whether consideration has been given to whether the breadth of the delegation power should be legislatively constrained with respect to any of the new powers or functions and if not, why not*
>
> *Whether those exercising the delegated powers or functions will possess the appropriate training, qualifications, skills or experience*

As noted above, the CEO's powers introduced in the Bill are administrative in nature and consistent with existing powers and functions under the Act. As such, it is appropriate for the delegation structure to remain consistent with that already in operation.

There are over 650,000 participants in the NDIS, and this number is projected to continue to grow. Tens of thousands of decisions are made every day by delegates of the CEO about matters such as access to the Scheme and supports in a participant's plan. Restricting delegation of the CEO's decision-making powers would not be feasible for a scheme of this size and nature. It is also not necessary as the decisions are guided heavily by criteria and considerations set out in the Act, legislative instruments and policy guidance.

This is consistent with the Attorney-General's Department's *Australian Administrative Law Policy Guide*, which provides the following (at 4.1.3):

> Where a decision involves a limited exercise of discretion, it may be appropriate for more junior officers to make the decision. Where a provision will give rise to a high volume of decisions, it is not usually appropriate for senior officers to take on the workload. It may be more efficient for a larger number of junior officers to make primary decisions.

Operationally, decisions that require a particular level of training, qualification, skills or experience are managed by delegates with appropriate training in administrative decision-making in line with current operational practice. This is an operational matter and does not require any specific change to the delegation structure in the Act.

> *Whether independent merits review is available for decisions under proposed subsections 32F(6), 43(2A) and 73(3A), paragraph 74(4)(b) and subsection 74(4A) and, if not, whether an explanation can be provided of the characteristics of the decisions which justify the omission of merits review, by reference to the Administrative Review Council's guidance document, What decisions should be subject to merit review?*

Under the existing planning framework, the only reviewable decision about the contents of a participant's plan is the decision to approve the statement of participant supports under subsection 33(2) (see table item 4, subsection 99(1)).

The criteria in subsection 33(2) encompass decisions about all matters that inform the statement of participant supports, including the reasonable and necessary supports that will be funded and general supports that will be provided in relation to the participant, as well as management of funding for supports under the plan and the plan's reassessment date.

For example, in approving a participant's statement of participant supports under subsection 33(2), the CEO must consider and be satisfied of the matters in section 34 in relation to reasonable and necessary supports and general supports. The CEO must also apply sections 43 and 44 to determine the management of funding for supports under the plan (or section 74 for a participant who is a child).

These are not separate reviewable decisions, but rather considerations as part of a single reviewable decision to approve the participant's statement of participant supports.

The same approach will apply under the new planning framework to ensure consistency of operation across the Scheme. As with the current planning framework, under the new planning framework there will be one overarching reviewable decision, which is the decision to approve the statement of participant supports.

Even if each of these considerations could be properly characterised as an administrative decision, they are all preliminary decisions that lead to the making of the substantive final decision, which is the decision to approve a statement of participant supports. The Administrative Review Council (ARC) considers that such decisions are unsuitable for review (see 4.3 of *What decisions should be subject to merit review?*)

The ARC states that such preliminary decisions are unsuitable for merits review as preliminary decisions may lead to the proper operation of the administrative decision-making process being unnecessarily frustrated or delayed. Substantive consequences do not flow for a Scheme participant until a decision has been made to approve the statement of participant supports.

If each step along the way to the statement of participant supports was a separately reviewable decision, this would mean up to 10 or more separately reviewable decisions in the process to prepare a participant's plan. This would lead to unacceptable delays for participants as well as a significant adverse impact on Scheme operations and service delivery.

The provisions identified by the Committee (subsections 32F(6), 43(2A) and 73(3A), paragraph 74(4)(b) and subsection 74(4A)) are not appropriate for separate review. However, to the extent that they are relevant for a particular participant, each of the identified provisions forms part of the required considerations in approving the participant's statement of participant supports. This means that all identified provisions are capable of being reviewed as part of a review of the decision to approve the participant's statement of participant supports. A review at this final point means the participant can have the final decision and all of its component parts reviewed holistically as is appropriate for merits review.

Incorporation of external materials as existing from time to time

> *Whether it remains the case that reference material will be available and individuals directly affected by any changes will be notified by letter or equivalent*
>
> *If so, whether an addendum to the explanatory memorandum containing this information can be tabled in the Parliament as soon as practicable*

It is fundamental to the operation of the Act that legislative instruments can incorporate external materials as existing from time to time. This is important to ensure that decisions under the Act are being made on the basis of the most current document without requiring a new legislative instrument to be made. It also ensures any intergovernmental agreements that may be updated over time are captured so that the Scheme is operating as intended.

As noted in the Explanatory Memorandum, the NDIA publishes a document known as the 'NDIS Pricing Arrangements and Price Limits' which is updated at least annually, if not more frequently to take into account issues such as inflation and changes in the market. If this document could not be incorporated as in force from time to time, participants may be left with inadequate funding to purchase supports due to their funding being calculated on the basis of a rate that is no longer current. This example may have relevance to each of the specific provisions identified by the Committee.

It is possible the new needs assessment (proposed section 32L) will incorporate existing evidence-based assessment tools. If this occurs, it is critical that updated versions of the relevant assessment tool are incorporated without needing to re-make the instrument, to ensure the most up to date and evidence-based assessment tool is being used to assess participants' disability support needs without the delay that would be occasioned by making a new instrument.

Any reference material incorporated will be clearly identified in the explanatory statement for the relevant instrument and available on the NDIA's website in an accessible format. If reference material is updated, this will be reflected on the website.

An addendum can be tabled including the above information before the Bill is introduced into the Senate.

> *Whether the bill can be amended to include a requirement that any changes to reference material will be widely publicised and affected individuals will be directly notified*

As the Committee has noted, it is a general and fundamental principle of the rule of the law that any member of the public should be able to readily and freely access the terms of the law. The Bill does not override this principle and should be read as subject to its general operation.

Any provision that enables documents to be incorporated as in force from time-to-time should be read as subject to this fundamental principle. All incorporated documents will be readily and freely available to affected persons, and the public more generally, including on the NDIA's website.

ASSISTANT MINISTER TO THE PRIME MINISTER
ASSISTANT MINISTER FOR THE PUBLIC SERVICE
MEMBER FOR PERTH
The Hon Patrick Gorman MP

Reference: MS24-000460

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

Dear ~~Chair~~ Dean

I refer to the Senate Standing Committee for the Scrutiny of Bills' (Committee) request for further information on matters in the Net Zero Economy Authority Bill 2024 (Bill) in *Scrutiny Digest 6 of 2024*.

I appreciate the time the Committee has taken to consider the Bill. I thank the Committee for the opportunity to address the comments raised in its initial scrutiny. My detailed responses to the questions raised by the Committee are enclosed.

I trust this information will be of assistance to the Committee. I have provided a copy of this correspondence to the Hon Anthony Albanese MP, the Prime Minister.

Yours sincerely

PATRICK GORMAN

30 /05 / 2024

Encl. Response to the Committee's Questions

Response to Senate Standing Committee for Scrutiny of Bills

Net Zero Economy Authority Bill 2024

Exemption from Disallowance

Committee Question 1.134: In light of the above, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate for directions made under clause 20 not to be subject to disallowance;**
- **how the possibility of disallowance could be seen to be a 'barrier to the Authority functioning effectively and efficiently'; and**
- **whether the bill could be amended to provide that these directions are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.**

Why is it necessary and appropriate for directions made under clause 20 not to be subject to disallowance?

Ministerial directions are administrative in nature and do not determine or alter the law, or affect the rights and obligations and of indidviduals. This is consistent with table item 2 in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015, which sets out that ministerial directions are not subject to disallowance.

The intention of clause 20 of the proposed Net Zero Economy Authority Bill 2024 (Bill), is to provide the Minister with the ability to give written directions, of a general nature, to the Board about the performance of the Board's or Authority's functions or the exercise of their powers.

The explanatory memorandum to the Bill highlights that the provision seeks to strike a balance between empowering the Authority to act independently, while giving the Government of the day the opportunity to set broad policy direction.

The practical effect of clause 20 is to ensure that, where appropriate, the Minister has the capacity to reaffirm the intent of Government policy to the Board to ensure that the Board is mindful of this direction in carrying out its work, and in overseeing the operation of the Authority. The Bill does not, for example, empower the Minister to intervene in relation to specific decisions or to direct the exercise of a power or function in a particular manner, which would be more appropriately dealt with through specific legislative provisions.

How could the possibility of disallowance be seen to be a 'barrier to the Authority functioning effectively and efficiently'?

If clause 20 of the proposed Bill was subject to disallowance, it would unnecessarily impact upon the certainty of the policy environment within which the Board would be operating, and the Authority would be engaging – potentially impacting upon the Authority's standing and its ability to effectively engage with potential investors and other government bodies. This would constitute a significant barrier to the Authority functioning effectively and efficiently.

The intention of clause 20 is for the Minister to have the ability to issue general directions to clarify Government policy and to help ensure the Authority acts consistently with Government policy. In an environment where stakeholders at all levels are seeking consistency around investment settings, transition supports and cohesion between state actors, the ability for the Minister to relay Government policy in a broad sense to the Board is likely to mitigate any potential difficulties arising from the Board interpreting Government policy and policy direction in a way not intended by the Government.

Furthermore, while consistency in the application of Government policy will be important across all of the potential functions of the Authority, it will be vital to the actions of the Authority with regards to the investment facilitation role envisaged under paragraph 16(1)(b) of the Bill. The possibility of disallowance for directions made under clause 20 could result in reduced confidence in circumstances where the Authority was engaging with, or seeking to engage with, commercial entities as part of long term net zero transformational initiatives. This, in turn, may reduce the credibility of the Authority over time, limiting its ability to effectively engage with commercial entities and perform this key part of its proposed functions.

Could the bill be amended to provide that these directions are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight?

The Committee has outlined that exempting an instrument from disallowance has 'significant implications for parliamentary scrutiny'. While disallowance is an important avenue for ensuring democratic accountability, there are a number of alternative mechanisms contained within the Bill that seek to provide opportunities for public transparency and accountability.

Under clause 24 of the Bill, the annual report of the Authority must include the particulars of any directions given to the Board by the Minister under clause 20. In line with requirements under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the annual report must be tabled in the Parliament. Furthermore, a Ministerial direction to the Board has the status of a legislative instrument under clause 20(1) of the Bill. This means that any direction must be tabled in the Parliament and incorporated into the Federal Register of Legislative Instruments. Both mechanisms seek to ensure that there are appropriate processes for public and Parliamentary scrutiny for any directions issued under clause 20.

In the context of examining the appropriateness of clause 20, it is worth noting that this clause provides similar ministerial powers to those already in existence in other statutes. For example, section 57 of the *Climate Change Authority Act 2011* provides the Minister for Climate Change with a similar ability to give directions to the Climate Change Authority in relation to the performance of its functions and the exercise of its powers. The directions given to the Climate Change Authority by the Minister are not subject to disallowance. A similar approach is adopted in section 11 of the *High Speed Rail Authority Act 2022*.

While I note the concerns raised by the Committee, given the nature of the directions provided by the Minister under clause 20 and the alternatives for public and Parliamentary scrutiny, the Government does not intend to amend clause 20 to allow directions made under that clause to be subject to disallowance.

Documents Not Required to be Tabled in Parliament

Committee Question 1.139: The committee therefore requests the minister's advice as to whether the following provisions of the bill can be amended to require the tabling of the relevant reports in both Houses of the Parliament:

- **clause 68, concerning reports of reviews of Part 5 of the bill;**
- **clause 72, concerning any reports requested by the Minister concerning the functions, powers or duties of the Net Zero Economy Authority or the CEO of the Authority; and**
- **clause 75, concerning reports given to the minister or the Finance Minister under paragraph 19(1)(b) of the *Public Governance, Performance and Accountability Act 2013*.**

Clause 68

The review under clause 68 is intended to focus on the operation of Part 5 of the Bill, including consideration of whether any legislative amendments are desirable. The review may also consider internal policies, procedures and operating protocols, and is intended to provide an early indication to the Minister of the effectiveness of Part 5 of the Bill. The Government recognises the review is likely to receive significant interest from key stakeholders across Government, the Parliament, unions and employer groups and will consider the matters raised by the Scrutiny of Bills Committee as the Bill progresses through the Parliament.

Clause 72

Clause 72, not unlike section 13 of the *Australian Renewable Energy Agency Act 2011*, would provide the Minister with the ability to request that the CEO and Board provide reports or advice on any matter relating to the CEO, Board or Authority's functions, powers or duties – the potential range of reports and advice that can be sought by the Minister is broad.

The purpose of this clause is to better allow the Minister to understand the subject matters the Authority is actively engaged with or potentially considering. The clause would also allow the Minister to request reports and advice on the internal operation of the Authority. Such information would allow the Minister to appropriately inform themselves regarding any operational concerns, noting the Minister is responsible for the appointment of the Chair, Board, and CEO of the Authority.

A requirement for the Minister to table all advice or reports requested from the CEO or Board under clause 72 would result in a significant amount of administrative advice having to be tabled in Parliament. Such a requirement would place an unwarranted burden on both the Minister and Parliament. In circumstances where advice related to issues with the internal operation of the Authority, it is appropriate that the Minister has an opportunity to resolve such matters without having to table such advice, which may be adverse with respect to particular individuals or office holders.

Where the Minister considered advice or a report received from the Authority was relevant to, or would add to Parliament's understanding of the work of the Authority, the Minister retains the flexibility to consider a report's content and table in appropriate circumstances in accordance with usual Parliamentary processes under clause 75 of the Bill.

Given the different circumstances under which reports and advice may be requested from the Authority, the Government does not intend to require such reports or advice be tabled in both Houses of Parliament.

Clause 75

Clause 75, not unlike section 83 of the *National Reconstruction Fund Corporation Act 2023*, would allow for the Minister to publish on the internet or in any other way the Minister considers appropriate a report, document of information given to the Minister, or the Finance Minister under paragraph 19(1)(b) of the PGPA Act.

As the information received by the Minister or the Minister for Finance under section 19(1)(b) of the PGPA Act will be publicly available on the internet or published in another appropriate way, it is not considered necessary to table this information.

The Minister however retains the ability to table these reports in the Parliament where they consider that appropriate.

As there are existing arrangements in the Bill to ensure appropriate levels of public and Parliamentary oversight of the Authority's activities, specifically, that the Authority will be required to prepare and table annual reports and corporate plans in the Parliament, the Government does not intend to require the Minister to table reports, documents or other information to be published under clause 75 in both Houses of Parliament.

The Hon Amanda Rishworth MP

Minister for Social Services
Acting Minister for Trade and Tourism
Acting Special Minister of State

REF: MS24-000458

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

6 JUN 2024

Dear Chair Dean

I refer to your letter dated 17 May 2024 (reference APH:0199073) in relation to the Senate Scrutiny of Bills Committee's comments in the *Scrutiny Digest 6 of 2024* on the Parliamentary Business Resources Legislation Amendment (Review Implementation and Other Measures) Bill 2024 (Bill).

The Bill passed both Houses of Parliament on Thursday 16 May 2024.

I have noted the comments in relation to exemption from disallowance (paragraphs 1.152 to 1.163) and the Henry VII clauses – modification of primary legislation by delegated legislation (paragraphs 1.172 to 1.179).

In relation to the Committee's requests for further information, I have outlined my advice below.

Exemption from disallowance – instruments not subject to an appropriate level of parliamentary oversight.

- Whether the intention is for determinations made under proposed subsection 16(1) of the *Parliamentary Business Resources Act 2017* to be legislative instruments or non-legislative?

A future determination made under subsection 16(1) of the *Parliamentary Business Resources Act 2017* (PBR Act) is not a legislative instrument.

- If the determinations are to be non-legislative, why is this the case, in light of the history of such determinations being legislative instruments?

  A determination made under subsection 16(1) of the PBR Act is administrative (rather than legislative) in character, and therefore does not meet the criteria of a legislative instrument under sub-paragraph s 8(4)(b)(i) of the *Legislation Act 2003*.

- If the intention is for the determinations to be legislative instruments exempt from disallowance, the justification and legislative basis for this exemption.

  Not applicable.

Standing appropriations

In relation to the Committee's request for detailed advice on the standing appropriation in relation to the *National Anti-Corruption Commission Act 2022* (NACC Act), I provide the following information. My department has worked closely with the Attorney-General's Department in relation to this advice.

Section 280 of the NACC Act enables the Governor-General to make regulations prescribing arrangements for the Commonwealth to provide financial assistance in relation to certain matters arising under the NACC Act.

Part 5 of the *National Anti-Corruption Commission Regulations 2023* (NACC Regulations) prescribe, for the purposes of paragraph 280(2)(a) of the NACC Act, arrangements for the Commonwealth to provide financial assistance to current and former parliamentarians in relation to certain NACC matters (section 17 of the NACC Regulations). These matters, while related to matters arising under, or in relation to, the NACC Act, also arise as a result of their position or duties as a parliamentarian.

Subsection 280(3) provides that the Consolidated Revenue Fund is appropriated for payments made under the scheme for the benefit of parliamentarians. It is a constitutional requirement that legal financial assistance for current parliamentarians be provided as a statutory entitlement rather than an agreement between a parliamentarian and the Commonwealth.

As the legal financial assistance is a statutory entitlement and is driven by demand, it would not be possible to predict annual requirements or appropriate to limit funding available once a current or former parliamentarian meets the requirements for financial assistance prescribed in Part 5 of the NACC Regulations. A standing appropriation is appropriate in these circumstances.

This arrangement is consistent with the approach in the PBR Act. Under the PBR Act, section 42 provides that regulations may provide for a scheme in relation to assistance provided by the Commonwealth in relation to legal proceedings involving a current or

former Minister. Division 2 of Part 5 of the Parliamentary Business Resources Regulations 2017 provides the arrangements for that scheme. Section 59 of the PBR Act provides that the Consolidated Revenue Fund is appropriated for payments to parliamentarians, including legal assistance to current and former Ministers under Division 2 of Part 5 of the PBR Regulations.

Eligibility and conditions for financial assistance

Part 5 of the NACC Regulations prescribes the parameters within which financial assistance can be provided including eligibility for parliamentarians under Part 5 of the NACC Regulations. Assistance is limited to eligible NACC matters arising while they are (or were) a parliamentarian, or in relation to their duties as a parliamentarian, other than a prosecution for an offence against the Act.

If eligible, the NACC Regulations also provide that the approving official is able to impose additional conditions on the provision of any financial assistance at any time and the costs of an applicant's legal representation and disbursements will be paid only so far as they are certified to be reasonable (section 21 of the NACC Regulations). These arrangements provide appropriate safeguards in relation to expenditure under Part 5 of the NACC Regulations.

Review and sunsetting

There is no sunsetting clause in the NACC Act in relation to the financial assistance scheme. As outlined above, it would not be appropriate to limit funding for financial assistance, which is a statutory entitlement once a parliamentarian has met the eligibility criteria and other conditions within Part 5 of the NACC Regulations.

Section 278 of the NACC Act sets out the requirement for a statutory review after five years of the operation. This provides the opportunity to review the overall operation of the NACC Act.

Further, the NACC Regulations, which prescribe the arrangements for providing legal financial assistance including to current and former parliamentarians, are subject to sunsetting in accordance with the default sunsetting rules under Chapter 3, Part 4 of the *Legislation Act 2003*.

Reporting to the Parliament

Section 25 of the NACC Regulations establishes a process for reporting to the Parliament in respect of assistance provided under Part 5 of the NACC Regulations. This provision requires the Attorney-General to:

- inform each House of the Parliament of each decision to pay assistance under this Part, including reasons for the decision and any limits on expenditure, as soon as possible; and
- within three months after the end of each financial year, table in each House of the Parliament a consolidated statement of expenditure under this Part for that year, specifying the expenditure for each matter.

The provision also prescribes a requirement for the Attorney-General to consult with the NACC Commissioner and the NACC Inspector before disclosing information to the Parliament, and to exclude any information that these officials advise may compromise a NACC Act process.

If any information is excluded, the Attorney-General is required to disclose it once the relevant official advises that disclosure would no longer compromise a NACC Act process. These requirements preserve the integrity of the Commissioner and the Inspector's activities.

The contact officer in my department is Kylie Bryant, First Assistant Secretary, Ministerial and Parliamentary Services, Department of Finance, who can be contacted at kylie.bryant@finance.gov.au or 02 6215 2564.

Yours sincerely

Amanda Rishworth

The Hon Mark Butler MP
Minister for Health and Aged Care

Ref No: MC24-007728

Senator Dean Smith
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Dear Chair ~~Dean~~ Dean

I refer to the Senate Scrutiny of Bills Committee (Committee) correspondence of 17 May 2024 in response to my letter of 9 April 2024 regarding the Therapeutic Goods and Other Legislation Amendment Vaping Reforms Bill 2024 (Bill).

I appreciate the time that the Committee has taken to consider the Bill further and thank the Committee for accepting my earlier advice, and otherwise making no further comment, in relation to the strict liability offences, the reversal of the evidential burden of proof and the seizure of assets.

I acknowledge and accept the Committee's request to include additional information on the prescribing of a unit and commercial quantity of vaping goods, and the delegation of powers and functions to state and territory officers, in an addendum to the explanatory memorandum. I will arrange for the addendum to be prepared and tabled in Parliament as soon as practicable.

In relation to the remaining matters, I note that the Committee has requested my further advice on the broad discretionary power under the proposed section 41RC consent, and the exclusion of independent merits review of enforceable directions made under the proposed section 42YT. I provide that advice in the following annexure and trust that my comments assist the Senate's consideration of the Bill.

Thank you for writing on this matter.

Yours sincerely

Mark Butler

04/06/2024

Encl (1)

ANNEXURE

Broad discretionary powers

The Minister thanks the Committee for its request for further advice in relation to the application of broad discretionary powers in proposed section 41RC of the Bill. The Minister has further reflected on the Committee's comments and is now agreeable to facilitating amendments to the Bill that would require the Secretary to have regard to specified criteria determined by the Minister in a legislative instrument when granting consents.

The amendments are proposed to be moved in the Senate to support the Bill's consideration and passage. The primary consideration in most cases would be to grant consent in situations where potential legitimate actors in the pharmaceutical supply chain are not covered by a pre-existing licence, approval, authority or permit under the *Customs Act 1901*, the *Therapeutic Goods Act 1989* or relevant state and territory legislation.

As previously advised, criteria to be considered when deciding to grant consent, and impose conditions, are likely to relate to resourcing, technical expertise, capacity to comply with safety requirements, and character considerations such as fitness and propriety to minimise risks of the misuse and diversion of vaping goods.

Enforceable directions

The Minister thanks the Committee for its request for further advice as to the justification for exclusion from merits review of decisions made under proposed subsection 42YT(2) with reference to the principles set out in the *Administrative Review Council's guidelines, What decisions should be subject to merit review?*[1]

The proposed section 42YT would allow the Secretary to give directions requiring a person to do certain things, at the person's own cost in relation to certain goods. The proposed power may be exercised if the Secretary believes, on reasonable grounds that the person is not complying with the Act or an instrument made under the Act, and it is necessary to exercise the power to protect the health and safety of humans.

The proposed section is not confined to vaping goods and applies to therapeutic goods generally. It is anticipated that the proposed power is exercised in situations not dissimilar to the circumstances outlined in the *Agricultural and Veterinary Chemicals Code Act 1994* and the *Great Barrier Reef Marine Park Act 1975*.[2] In those cases, enforceable directions may be given in the absence of independent merits review.

The Bill had proposed that the power be excluded from independent merits review. However, on reflection and considering the Committee's comments, the Minister is now inclined to progress amendments to the Bill to require the power to be subject to both reconsideration and independent merits review by the Administrative Appeals Tribunal (however described).

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[1] What decisions should be subject to merit review? 1999 | Attorney-General's Department (ag.gov.au)

[2] Section 145H of the Schedule to the *Agricultural and Veterinary Chemicals Code Act 1994* and section 61ADA of the *Great Barrier Reef Marine Park Act 1975*.

It is proposed that these amendments are moved in the Senate to specify the proposed section 42YT as an initial decision within the meaning of subsection 60(1) of the *Therapeutic Goods Act 1989*. Where specified as an initial decision, the decision becomes subject to both reconsideration of the decision by the Minister for Health and Aged Care, and subsequent external review by the Administrative Appeals Tribunal. The Department would monitor the extent to which the objects of the proposed power to protect the health and safety of humans is impacted by the requirement to provide independent merits review.

THE HON MADELEINE KING MP
MINISTER FOR RESOURCES
MINISTER FOR NORTHERN AUSTRALIA

MS24-000745

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Dear Senator Smith

I refer to the Senate Scrutiny of Bills Committee's email of 17 May 2024 the Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024 (the Bill).

I appreciate the time the Committee has taken to consider the Bill. The Committee's questions relate to provisions in Part 2 of Schedule 2 of the Bill. On 16 May 2024, the Government moved an amendment to remove Part 2 of Schedule 2 from the Bill. The Bill, as amended, passed the Senate on the same day.

I trust this information assists the Committee.

Yours sincerely

Madeleine King MP

30/5/2024