THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MS17-002503

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

Dear Senator Polley

I thank the Senate Scrutiny of Bills Committee (the Committee) for its consideration of the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017.

The Bill introduces important measures to further protect the community from the dangers of child sex offenders by targeting all aspects of the child sex offender cycle—from commission of the offence through to bail, sentencing and post –release options.

I am pleased to offer the response at **Attachment A** to the questions raised by the Committee in *Scrutiny Digest No. 12 of 2017*.

Should your office require any further information, the responsible adviser for this matter in my office is Talitha Try, who can be contacted on 02 6277 7290.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Response to a request from the Senate Scrutiny of Bills Committee for information in relation to the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017

Revocation of Parole

Advice on why it is necessary to provide the Attorney-General with power not to give notice before revoking a person's parole and why existing provisions in section 19AU of the *Crimes Act 1914* (*Crimes Act*) are insufficient.

Power not to give notice for revoking parole for matters of community safety and protection
Currently, unless certain circumstances apply, before the Attorney-General can revoke a person's parole order or licence, the person must be notified of the specific conditions they are alleged to have breached and given 14 days to respond. This time lag between when a person is notified of the intention to revoke and the actual revocation and subsequent imprisonment of the person is problematic if it is believed the person poses a danger to the community. In particular, it gives the person an opportunity to commit further offences or even to abscond.

To address this, the Bill introduces into the current list of exceptions to the requirement to provide notice of an intention to revoke, an ability to revoke parole where the Attorney-General is of the opinion that revocation without notice is necessary in the interests of ensuring the safety and protection of the community or of another person. Importantly, after parole has been revoked and the offender remanded in custody, that offender retains the opportunity to make a written submission to the Attorney-General as to why the parole order or licence should not be revoked. This has posed a particular problem with violent offenders. If the Attorney-General is satisfied of those reasons the offender would be immediately released from custody.

Existing provisions under section 19AU(3) of the Crimes Act
As currently drafted, it is unclear whether section 19AU(3) of the *Crimes Act*, which enables notification of revocation of parole not to be given in circumstances of urgency, includes matters of community safety and protection. Matters of community safety and protection may not necessarily meet the imminent time threshold required under section 19AU(3). Further, it is unclear whether section 19AU(3) permits the revocation of parole without notice where a person intends or attempts to commit further offences.

There have been instances where an offender has threatened to commit further violent offences and there has not been sufficient evidence to arrest the person for those offences. In these cases it has been necessary to give the offender 14 days' notice of the revocation of their parole, hence giving them ample time to reoffend. Giving notice of parole revocation can also give an offender an opportunity to abscond as they know that a parole revocation will result in them returning to custody.

This Bill clarifies that a person's parole can be revoked without notice if this is necessary to ensure the safety and protection of the community or of another person.

Reversal of legal burden of proof

Why it is proposed to reverse the legal burden of proof in this instance and how the reversal of the burden of proof interacts with the obligation on the prosecution to prove the defendant's belief about age.

Items 5 and 27 of Schedule 4 of the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 introduce new offences into the *Criminal Code Act 1995* (the Criminal Code) to criminalise the grooming of a third party. The offences require the prosecution to prove, beyond reasonable doubt:

- the defendant intended to use a carriage service or postal service to transmit a communication or article to a recipient
- the sender did so with the intention of making it easier to procure a child under 16 years of age to engage in sexual activity with:
    - the sender, or
    - a participant who is, or who the sender believes to be, at least 18 years of age; or
    - another person who is, or who the sender believes to be, under 18 years of age, in the presence of the sender or participant who is, or who the sender believes to be, over 18 years of age; and
- the child was under 16, or the sender believed the child was under 16.

Items 7, 8, 28 and 29 of Schedule 4 apply absolute liability to the elements of the offence relating to the age of the child and/or the participant (where relevant). This means that the prosecution will not be required to prove that the defendant knew these elements. Rather, the prosecution will have to demonstrate that the child and/or the participant were in fact under 16 years of age and over 18 years of age respectively when the communication or article was sent.

Items 9 and 30 provide that evidence of representations made to the defendant that a person was under or over a particular age will serve as proof, in absence of evidence to the contrary, that the defendant believed the person to be under or over that age (as the case requires). These provisions offer a potential safeguard for the defendant in leading contradictory evidence as to his or her belief of the age of the child or participant.

The effect of applying absolute liability to these elements is ameliorated by the introduction of specific defences based on the defendant's belief about the child and/or participant's age (items 16, 18, 37 and 39). Section 13.4 and 13.5 of the Criminal Code provide that in the case of a legal burden of proof placed on the defendant, a defendant must discharge the burden on the balance of probabilities. If the defendant does this, it will then be for the prosecution to refute the matter beyond reasonable doubt.

The application of absolute liability, together with the belief about age defences, is consistent with the other grooming offences in the Criminal Code and is appropriate given the intended deterrent effect of these offences. Placing a legal burden of proof on the defendant in relation to belief about age defences is appropriate for these new offences as the defendant is best placed to adduce evidence about his or her belief that the child and/or participant was over the age of 16 and under

the age of 18 respectively. The defendant's belief as to these circumstances at the relevant time is a matter peculiarly within his or her knowledge and not readily available to the prosecution.

It is important to note that an offence will still be committed where the defendant *believes* the child to be under the age of 16 years, regardless of the actual circumstances of the offending. This is necessary to accommodate a standard investigatory technique where a law enforcement officer assumes the identity of a fictitious child, interacting with a potential predatory adult and arresting the adult before they have the opportunity to sexually abuse a real child. A person who engages in conduct to procure a child to engage in sexual activity is not able to escape liability for an offence even if their conduct was not ultimately directed towards an actual child.

The application of absolute liability, together with the belief about age defences, is appropriate as the defendant is best placed to adduce evidence about his or her belief. The defences in the Bill are a reasonable and proportionate way to achieve the intended deterrent effect of these offences.

While it is true that a legal burden of proof places a higher burden on the defendant, it is justified in these circumstances given the defendant's belief as to the age of the child/participant is a matter peculiarly within his or her knowledge. A legal burden of proof in these circumstances also better achieves the intended deterrent effect of these offences noting the seriousness of the harm caused to children by sexual abuse. A legal burden of proof will provide consistency with existing belief about age defences in the Criminal Code. The Bill embodies the most significant reforms to the legal framework concerning child sex offenders since the establishment of the Criminal Code in 1995. The Australian Government is committed to protecting the community from the risks posed by child sex offenders by strengthening existing laws on child sexual abuse. The reforms will ensure that offenders are sufficiently punished and deterred from future offending. These measures support this policy objective.

Mandatory minimum sentences

The appropriateness of removing judicial discretion in sentencing certain child sex offenders, whether there are examples of analogous offences that carry a mandatory minimum penalty, and how mandatory minimum sentences would interact with existing sentencing principles regarding the setting of a non-parole period.

The introduction of mandatory minimum sentencing for the most serious Commonwealth child sex offences and for repeat child sex offenders is central to achieving the Bill's objectives of protecting the community, adequately reflecting the harm inflicted on victims and ensuring that sexual predators receive a sentence that is commensurate to the severity of their offences. Addressing the current disparity between the seriousness of child sex offending and lenient sentences handed down by courts is at the core of the Bill.

Appropriateness of Mandatory Minimum Sentencing

Ensuring that perpetrators are adequately punished not only acknowledges the significant trauma caused by the offending behaviour, but also recognises the impact on the community if the individual reoffends. The Bill mitigates this risk by ensuring serious child sex offenders serve a meaningful period of time in custody. This means offenders will be punished appropriately, reflecting the seriousness of their crimes. This also means that offenders will have access to targeted rehabilitation and treatment programs in prison, ultimately reducing the risks those offenders pose

to the community. Importantly, time that a sex offender spends in prison is time they cannot offend in the community.

Despite current Commonwealth child sex offences carrying significant maximum penalties, the courts are not handing down sentences that reflect the gravity of the offending, or the harm suffered by victims. Statistics on current Commonwealth child sex offences demonstrate the low rate of convictions resulting in a custodial sentence—meaning that a staggering number of convicted offenders are released into the community. Of the 652 Commonwealth child sex offences committed since 2012, only 58.7% of charges resulted in a custodial sentence. The most common length of imprisonment for an offence was 18 months and the most common period of actual imprisonment was just six months.

Current sentencing practice is inadequate and out of step with community expectations. These statistics demonstrate the clear need for legislation to guide the courts in applying more appropriate penalties for Commonwealth child sex offences.

Judicial Discretion

The mandatory minimum sentencing scheme introduced by the Bill limits judicial discretion, but does not remove it. A court is able to take into account a guilty plea or an offender's cooperation with law enforcement agencies and to discount the minimum penalty by up to 25% respectively. Courts will also retain the ability to impose a sentence of a severity appropriate in all the circumstances of the offence through exercising judicial discretion over the length of the non-parole period. The reforms do not impact the current requirement for the courts to consider all the circumstances, including the matters listed in section 16A of the *Crimes Act*, when fixing a non-parole period. This means that courts will be able to take into account individual circumstances and any mitigating factors in considering the most suitable non-parole period.

The Government understands that sentencing decisions involve careful analysis of numerous factors and circumstances. That is why the mandatory minimum sentencing regime includes mechanisms for courts to retain appropriate discretion to enable individual circumstances to be taken into account while still ensuring that sentences for child sex offenders reflect the serious and heinous nature of the crimes. Retaining this discretion allows for less restrictive approaches to be taken where necessary, within the framework of the mandatory minimum sentencing scheme.

Analogous offences

The Government considers that mandatory minimum sentences should be used sparingly and for the most serious offences. Mandatory minimums are already in place at the Commonwealth level for terrorist offenders and people smugglers, and the Government is firmly of the view that—with the safeguards set out in the Bill—the application of mandatory minimum sentences to offenders who commit serious or repeated sexual crimes against innocent children is reasonable, necessary and proportionate.

Queensland, South Australia and the Northern Territory have mandatory minimum sentencing for State child sex offences.

- Under section 161E of the *Penalties and Sentences Act 1992* (QLD), a repeat offender convicted of serious child sex offences is liable to a sentence of mandatory life imprisonment.
- Under section 20B of the *Criminal Law (Sentencing) Act 1988* (SA), the court may declare an offender a serious repeat offender if the person has committed at least two separate sexual offences against children under 14. Under this declaration, the court is not required to ensure that the sentence is proportional to the offence and any non-parole period fixed must be at least four fifths of the sentence.
- Under section 78F of the *Sentencing Act (NT)*, where a court finds an offender guilty of a sexual offence, the court must record a conviction and must order that the offender serve a term of actual imprisonment or a term of imprisonment that is suspended partly, but not wholly suspended. Where the offender is convicted of certain child sex offences (e.g. sexual intercourse or gross indecency with a child under 16, sexual intercourse or gross indecency by a provider of services to mentally ill or handicapped person) a mandatory minimum non-parole period of 75% of the head sentence applies.

Interaction with sentencing principles and setting the non-parole period

With the exception of a limited number of offences (such as terrorism, treason and espionage), the *Crimes Act* does not prescribe how a non-parole period should be determined. In sentencing Commonwealth offenders, there is no judicially determined norm or starting point, expressed as a percentage of the head sentence or otherwise, for setting the non-parole period. As such, judicial discretion is maintained in setting the non-parole period.

Presumption against bail

Justification as to the appropriateness of imposing a presumption against bail, including information as to why the current bail requirements are insufficient, and why it is necessary to create a presumption against bail rather than specifying the relevant matters a bail authority must have regard to in exercising their discretion whether to grant bail

Appropriateness of presumption against bail

The presumption against bail is designed to protect the community from child sex offenders while they await trial or sentencing. Not all child sex offences are subject to the presumption against bail. The measure only applies to offences that attract a mandatory minimum penalty, namely the most serious child sex offences and those persons who have previous convictions for child sex offences. The presumption against bail for this cohort of the most serious child sex predators is a necessary and effective crime prevention measure for a crime type that targets one of the most vulnerable groups in the community.

The measure does not remove the current balancing exercise undertaken by bail authorities and the courts. Rather, the measure puts the responsibility on a person charged with a child sex offence to demonstrate to the court that circumstances exist to grant bail. It is appropriate that child sex offenders take responsibility for explaining to the court why they do not pose a risk if released on bail. This is particularly the case for Commonwealth child sex offences, which often concern emerging technologies that are often difficult to detect.

The presumption is rebuttable and provides judicial discretion as to determining whether a persons' risk on bail can be mitigated through appropriate conditions which make the granting of bail appropriate in the circumstances. Flexibility is provided by the open nature of the presumption which is not limited to specific criteria.

Why current bail requirements are insufficient

The Bill includes matters that a bail authority must have regard to in determining whether circumstances exist to grant bail to a person charged with a serious child sex offence or who is a repeat child sex offender, including considerations relating to rehabilitation. However, this, on its own, has not been sufficient to protect the community.

Conditional Release

Justification on the appropriateness of limiting judicial discretion in sentencing Commonwealth child sex offenders, why the current sentencing options have proven ineffective in reflecting the gravity of the offences and protecting the community, and what type of matters would constitute 'exceptional circumstances' so as to justify the making of a recognizance order

The presumption in favour of Commonwealth child sex offenders serving an actual term of imprisonment is in line with community expectations that offenders serve a period of imprisonment for abusing children. The presumption ensures community protection and reduces risk of reoffending through imprisonment and will also allow greater time for rehabilitation programs to be undertaken while in custody.

The presumption will provide clear guidance to courts for custodial sentences to be applied to predators who abuse children.

Current sentencing options are insufficient

Currently, child sex offenders who are sentenced to three years or less imprisonment are sentenced to recognizance release orders. This allows them to be released into the community immediately or after serving a period of imprisonment. Many such offenders receive wholly suspended sentences, meaning that they are immediately released without serving any period of time in custody.

The issuing of wholly suspended sentences for child sex offenders has not resulted in sentences that adequately reflect the gravity of child sex offending. Introducing a presumption in favour of imprisonment still allows the court to consider all the circumstances when making a recognizance release order.

Judicial discretion

This measure provides the courts with enough discretion in setting the pre-release period under a recognizance order to enable individual circumstances to be taken into account while still ensuring that sentencing of child sex offenders is of a level that reflects the serious and heinous nature of the crimes.

Exceptional circumstances

'Exceptional circumstances' was deliberately not defined in the Bill. Given the variable circumstances which may mitigate against or support a sentence of imprisonment, it would impose practical constraints if 'exceptional circumstances' was defined. Firstly, the phrase is not easily subject to

general definition as circumstances may exist as a result of the interaction of a variety of factors which, of themselves, may not be special or exceptional, but taken cumulatively, may meet this threshold. Second, a list of factors said to constitute 'exceptional circumstances', even if stated in broad terms, will have the tendency to restrict, rather than expand, the factors which might satisfy the requirements for 'exceptional circumstances'.

Restriction of Information provided to offenders

Why it is necessary to empower the Attorney-General to refuse to provide any reasons as to why parole has been refused, and if the absence of this provision has caused difficulties when providing reasons for parole refusals

The Bill introduces a provision to protect the security of reports, documents and information obtained for the purposes of informing parole decisions and ensures that information that could prejudice national security is not disclosed as a result of the operation of Part 1B of the *Crimes Act*. It is in the public interest to restrict certain information used as part of the decision to release an offender from custody. In practice, the measures are likely to only apply to offenders with terrorist links. For example, information may be provided to the Attorney-General's Department which relates to ongoing intelligence matters or investigations. The release of that information to the offender could jeopardise not only ongoing law enforcement matters but put the community at risk where that information relates to the capabilities or methodology of law enforcement or intelligence agencies.

A person sentenced to imprisonment does not have a right to be granted parole. Parole decisions are made giving consideration to the protection of the community, the rehabilitation of the offender and their reintegration into the community. It would be a perverse outcome if one of the fundamental pillars of parole considerations—the protection of the community—could be undermined because national security information that informed a parole refusal had to be disclosed to the offender in the notice of refusal.

Why the Attorney-General's decision is based on the Attorney's subjective 'opinion' rather than on objective criteria

The agency that has provided the information—such as the AFP or ASIO—will advise the Attorney-General or a delegate as to whether information is likely to prejudice national security. The Attorney-General would make his assessment based on this advice and the circumstances of the case.

Why the relevant information could not, at least, be provided to the applicant's legal representative and the gist of the information provided to the offender

The reforms do not prevent the Attorney-General from providing a person with an overview of the information considered as part of making a parole decision. Such an overview could be given providing the information set out did not prejudice national security. All Commonwealth parole decisions are subject to judicial review in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977,* including those which are refused on national security grounds.

Why the Attorney-General's decision is not subject to merits review

Parole decisions under Part 1B of the *Crimes Act* are judicially reviewable under the *Administrative Decisions (Judicial Review) Act 1977* but are not subject to merits review. This is in line with the

approach taken by State and Territory parole authorities and reflects the fact that an offender has been convicted and sentenced through the judicial process, exhausted appeal avenues they may have wished to pursue, and that release on parole is not a right. The Attorney-General or his or her delegate must exercise discretion and consider whether to grant an offender release on parole by considering the protection of the community, rehabilitation of the offender and their reintegration into the community. This aspect is not altered by the Bill.

The Hon Dan Tehan MP
Minister for Veterans' Affairs
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MC17-000287

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

Thank you for your letter of 19 October 2017 seeking my advice about the *Defence Legislation Amendment (Instrument Making) Bill 2017* (the Bill), and in particular the inclusion of some matters in delegated legislation relating to Defence inquiries, and the use of force in a defence aviation area.

Significant matters in delegated legislation

I understand the Committee is seeking advice as to why details regarding the appointment, procedures and powers of a Defence Force commission of inquiry are left to delegated legislation rather than set out in primary legislation (Part 1 of Schedule 1 of the Bill).

Matters relating to the appointment, procedures and powers of inquiries concerning the Defence Force have been dealt with under Regulations for many decades. Defence is not aware that any of the numerous reviews about military justice (including inquiry arrangements) recommended that delegated legislation relating to Defence inquiries be incorporated in primary legislation, or proposing a model which would maintain sufficient flexibility to meet the needs of the Defence Force in respect of such inquiries.

The *Defence Act 1903* (the Defence Act) has long permitted such regulations by expressly authorising provisions in regulations that, for example, create offences and compel individuals to provide evidence to Defence inquiries. When compared to current provisions in the Defence Act, this Bill does not propose changes that would permit increased powers concerning the appointment, procedures and powers of inquiries in Defence, including their capacity to affect personal rights and liabilities.

The current arrangements permit a necessary degree of flexibility for the Australian Government to determine forms of inquiry in the Defence Force, having regard to administrative, organisational and operational changes that occur from time to time. At the same time, appropriate Parliamentary oversight of the content of such regulations is maintained by the Senate Standing Committee on Regulations and Ordinances, as well as sunsetting arrangements under the *Legislation Act 2003*.

Further, it is noted that as recently as 2015, the regulation making powers in the Defence Act were modified to enable the creation of a separate regulation permitting the Inspector General Australian Defence Force (IGADF) to conduct inquiries into a range of matters concerning the Defence Force, including the procedures, powers and reporting requirements concerning such inquiries.

Lastly, it is noted that in its correspondence, the Committee referred to commissions of inquiry. This type of inquiry was generally used to inquire into Service-related deaths in the Defence Force. Following the recent amendments to the Defence Act in 2015, IGADF is now responsible for inquiring into Service-related deaths under the *Inspector-General of the Australian Defence Force Regulation 2016,* which means that commissions of inquiry have largely moved on from their original intended purpose.

Broad delegation of administrative power

I understand the Committee is also seeking a detailed justification as to why it is necessary and appropriate to confer monitoring powers on any 'other person' to assist an authorised person in a defence aviation area, and whether it would be appropriate to amend the Bill to require that any person assisting an authorised person have specified skills, training or experience.

Authorised persons for the purpose of the scheme are appointed by the Secretary or the Chief of the Defence Force, and must have the knowledge, training or experience necessary to properly exercise the powers of an authorised person in a defence aviation area.

In the majority of cases, Defence is able to reach agreements with landowners in relation to aviation hazards. However, there may be limited circumstances where it is necessary to engage an external expert to assist Defence in assessing the situation and determining what actions are appropriate and necessary. For example, Defence may require the assistance of:

- a qualified surveyor to provide Defence with specialist advice on a structure's height;
- an engineer to provide general advice on the site; and/or
- an arborist to provide advice in relation to tree lopping.

The intent of the proposed measure is allow Defence to use external experts with specialist skills that Defence may not have internally, in dealing with a particular situation. Further, it is intended that a person assisting an authorised person is only authorised to use force against 'things' (e.g. hazards and obstacles), not 'persons'.

The nature of defence aviation and the nature of hazards to aviation are rapidly changing. It is critical that the regulation of those hazards is flexible enough to address change as it happens. The current arrangements permit a necessary degree of flexibility for Defence to determine the specific skills, training or experience required to assist Defence in dealing with aviation hazards, particularly in emergency situations. Therefore, it would not be appropriate to amend the Bill to require that any person assisting an authorised person have specific skills, training or experience. This matter is best dealt with on a case by case basis, depending on the particular hazard, site or situation.

Use of force

I understand the Committee is also seeking detailed justification as to why it is necessary and appropriate to empower an authorised person to use force against persons in executing a monitoring warrant in a defence aviation area.

The proposed measures provide for authorised persons to enter land and premises for a range of purposes, including removing or marking hazardous objects. These powers are important aspects of the scheme ensuring that there is a mechanism to deal with hazardous objects if people are unwilling to comply with requirements.

In the vast majority of cases, Defence is able to reach agreement with landowners in relation to aviation hazards. However, there may be situations where an authorised person may be required to enter land to inspect or remove a hazard against the wishes of a landowner. For example:

- a crane operator under pressure from a client may not wish to have their crane lowered to a safe level;
- a landowner may refuse to move obstacles that have been erected without approval; and/or
- a landowner may try to stop an authorised officer investigating or dismantling an obstacle or lopping a hazardous tree.

It is critical that authorised persons are able to use necessary and reasonable force against persons or things, given the potential significant impact on aviation safety and Defence operation capability.

I have been advised that civilian authorities currently have similar powers in the *Civil Aviation (Buildings Control) Regulations 1988* which provides that *'the Authority may authorise any necessary action and the use of any reasonable force for the purpose of preventing a contravention of, or securing compliance with, these Regulations'* (see subsection 15(2)).

I have also been advised that the circumstances where the use of force against persons in executing a monitoring warrant in a defence aviation area will be limited to emergency situations or where a landowner/occupier objects to the authorised person's actions and agreement cannot be reached.

I trust this information clarifies these matters for you.

[redacted]

Dan Tehan

26 OCT 2017

The Hon Christian Porter MP
Minister for Social Services

MC17-011574

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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7 NOV 2017

Dear ~~Senator Polley~~ Helen

I am writing in response to a letter dated 19 October 2017 from the Senate Standing Committee for the Scrutiny of Bills, which noted an issue had been raised in the Committee's Scrutiny Digest No. 12 of 2017 on retrospective provisions in the Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2017.

Where retrospective provisions have been included in the Bill, these are necessary to ensure the consistent application of policy improvements to address anomalous outcomes that can occur under current legislation. A detailed response to the issue raised by the Committee is at **Attachment A**.

assistance.

Hon Christian Porter MP
Minister for Social Services

Encl. **Attachment A**

Attachment A

Amended tax assessments: Part 2, Schedule 1 of the Bill

Items 40 and 43 make amendments to sections 56 and 58A of the *Child Support (Assessment) Act 1989* (CSA Act), by providing for an amended tax assessment that is issued on or after 1 January 2018 to apply to a child support assessment retrospectively in certain circumstances.

Where the Australian Taxation Office (ATO) issues an amended tax assessment that is higher than the previous tax assessment (for the same financial year) on or after 1 January 2018, it will always be applied retrospectively to the relevant child support period, regardless of the financial year for which the amendment is made. This may result in a child support overpayment or underpayment debt being raised against the person with the higher amended tax assessment. This outcome supports the principle that parents take financial responsibility for the costs of raising their children in line with their financial capacity to do so, and aligns with existing rules governing the retrospective application of taxable income (see subsections 58A(2) and 58A(3) of the CSA Act, which are being retained).

Where the ATO issues a lower amended tax assessment on or after 1 January 2018, the lower income will only be applied retrospectively to a child support assessment if the person took action to amend the assessment:

- within the lodgement timeframe for the original assessment; or
- within 28 days of being notified of the original assessment; or
- within 28 days of becoming aware of the error in the previous assessment (if the reason for not applying for an amendment earlier was due to reasons beyond the person's knowledge or control), or where special circumstances apply.

This will result in a retrospective adjustment to the child support assessment, and may create an overpayment or underpayment debt being raised against the other party in the child support case. Where the parent with the lower amended taxable income has taken timely action to amend their tax assessment, any debt raised against the other parent will be minimal. This outcome supports the fairer treatment of child support parents who take timely action to correct any errors made in their tax assessment, particularly where the error was made by another party, such as a tax agent or the ATO. These provisions also provide fairer outcomes for parents who, due to circumstances beyond their knowledge or control, or special circumstances such as serious ill health or natural disaster, are unable to amend their tax assessment earlier.

Backdating of a lower amended taxable income is also limited by the timeliness of the lodgement of the person's original tax assessment. Under current provisions, where a parent has not lodged their tax return when a new child support period starts, a provisional income is used. If the parent's original tax assessment is lodged late and is lower than the provisional income, the taxable income will only apply prospectively. If the parent then meets the relevant criteria under Item 43 (proposed new subsections 58A(3C) or 58A(3D) of the CSA Act) for retrospectively applying a lower amended tax assessment, the lower amended tax assessment would only retrospectively replace the original tax assessment, and would not replace the higher provisional income.

Child support agreements: Part 3, Schedule 1 of the Bill

Item 51

Items 46 and 47 make amendments to sections 35C and 95 of the *Child Support (Assessment) Act 1989* (the CSA Act) to ensure that where a child support agreement contains provisions that are taken to be an order made by consent by a court under Division 4 of Part 7 of the CSA Act, section 142 of the CSA Act (which provides for when such an order would cease to be in force) would also have effect.

These amendments are consistent with current policy that certain provisions in child support agreements would cease to have effect when a child support terminating event occurs due to section 142, for example where a child leaves their parents' care to live independently or becomes a member of a couple. However, the Government has put forward amendments to place the current policy beyond doubt given differing judicial opinions in a recent case[1].

The application provision for these amendments at item 51 provides that items 46 and 47 would apply to days in a child support period that occurs on or after commencement of item 51, but would apply regardless of whether the child support agreement was made before or after commencement of item 51. This is because the amendments affirm how the current policy has always been intended to operate and would therefore not result in detriment to any person.

Subitems 74(3) and (6)

Division 2 of Part 3, Schedule 1 of the Bill inserts new provisions which enable the termination or suspension of a child support agreement for a child where the payee under the agreement ceases to be an eligible carer for the child. It is contrary to the objectives of the CSA Act for a person who does not have care of a child to be receiving child support payments.

Subitem 74(3) provides that where a payee under the agreement ceased to be an eligible carer of a child before commencement of item 74, continues not to be an eligible carer immediately before commencement of item 74 and the agreement would have otherwise been terminated under the new provisions, the child support agreement would be terminated from commencement of item 74. This provision ensures the preservation of entitlements before commencement, while all child support assessment from commencement would reflect the new policy, regardless of when the child support agreement was entered into. This is important as it would remove the unfair outcome under the current policy where a parent may be required to continue paying child support to a parent who has ceased to be an eligible carer for a child. Subitem 74(4) provides that item 74 does not affect the operation of a child support agreement for any other purpose and therefore, for example, a parent who has ceased to be an eligible carer for a child may still have the option to privately enforce contractual obligations.

Subitem 74(6) ensures an outcome similar to subitem 74(3) for the suspension of child support agreements in cases of temporary care changes.

[1] In the judgement of *Masters & Cheyne* [2016] FamCAFC 225, one of the judges (Murphy J) expressed a view consistent with the current policy while one of the other judges (Alridge J) expressed a view inconsistent with the current policy.

Overpayments: Part 4, Schedule 1 of the Bill

Subitems 172(2) and (4)
Division 1 of Part 4, Schedule 1 of the Bill inserts new provisions which extend existing administrative and court recovery mechanisms for child support debts to carer liabilities, which occur where a parent has been overpaid child support. This is to ensure equitable and consistent treatment in the collection of payer and payee debts.

Subitem 172(2) allows the expanded recovery mechanisms to be used where a payee was overpaid an amount before commencement of item 172. To enable this, subitem 172(4) provides that a debt raised under section 79 of the *Child Support (Registration and Collection) Act 1988* before commencement is taken to be a carer debt for the purpose of the expanded recovery mechanism provisions under Part 4. In these cases, the Department of Human Services would first consider whether recovery of the overpayment could occur through a reduction in future child support entitlements or through cash repayment arrangements (that is, through mechanisms currently available to them). The expanded recovery mechanisms would only be used where recovery from future child support entitlements is not possible or where negotiation with the payee on cash repayment arrangements has not been successful. Currently, the only alternative for the payer is to pursue recovery through the courts, in contrast with the range of options available for the recovery of payer debts.

Item 174
This amendment aligns the tax return rules for pre-1 July 2008 periods with those that apply for post-1 July 2008 periods where a tax return was lodged outside the Australian Tax Office lodgement timeframe and a provisional income had been applied in the child support assessment. These amendments are necessary to ensure that child support arrears or overpayments are not raised against parents, where it is through no fault of their own and is due to the other parent not complying with their legal obligations.

Currently, where a parent lodges a tax return for a period before 1 July 2008, there is no limitation to retrospectively applying a taxable income to a child support assessment. For tax returns lodged in respect of periods from 1 July 2008, a lower taxable income would not be applied where that tax return was lodged outside the Australian Tax Office lodgement timeframe. This change was enacted so that a parent could not be disadvantaged in their child support assessment by the other parent not lodging a tax return in line with legal requirements.

The continuation of the pre-1 July 2008 rules has been raised by the Commonwealth Ombudsman as they have resulted in large overpayments being raised against payees who had received and spent the child support received in good faith (based on a provisional income)[2]. Generally where a taxable income has been applied retrospectively and was not reflective of the other parent's earning capacity, a parent could seek a review under departure provisions. However parents can no longer access the departure provisions in these cases given the time elapsed and the seven year limitation on backdating departure orders.

[2] Commonwealth Ombudsman's Annual Report 2012-13.

Items 176 and 183

At present, a new care percentage would only have effect from the date of notification where notification of the care change is delayed (more than 28 days after the care change). Item 176 amends the current rules so that a decreased care percentage would be reflected in the child support assessment from the date of event (an increased care percentage would continue to be reflected from the date of notification).

Item 183 provides that these new rules would apply in general for care changes that occur after item 183 commences. However, where a care change occurs before item 183 commences but notification is received more than 26 weeks after item 183 commences, the new care percentage date of effect rules would also apply to those care changes. This provides parents who have delayed in notifying of a care change with a transitional 'grace' period of 26 weeks from commencement to notify of the care change before they become subject to the new care percentage date of effect rules.

As a result, a parent who had reduced their care of a child before commencement but failed to notify of the change until more than 26 weeks later, would have that reduced care percentage reflected in their child support assessment from the date of the care change. This could lead to a child support overpayment or arrears debt being raised against that parent in some cases. However, this is appropriate given the reduced care percentage is an accurate measure of the lower care costs incurred by that parent since the date of the care change and the ability to notify within a timely manner was within the parent's control.

ATTORNEY-GENERAL

CANBERRA

MC17-011762

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

9 NOV 2017

Dear Chair

Thank you for the letter of 19 October 2017 from the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning the Investigation and Prosecution Measures Bill 2017 (the Bill).

The Committee requested my advice as to why it is necessary to validate with retrospective effect the *Director of Public Prosecutions Regulations 1984*, as amended by the *Director of Public Prosecutions Amendment (Norfolk Island) Regulations 2017* (amending Regulations). Additionally, the Committee sought my advice as to whether this measure may have a detrimental effect on any individual.

Part 3 of Schedule 2 of the Bill applies only if the amending Regulations were to be challenged and found to be invalid. Therefore, the retrospective application of that Part would only operate to validate anything done under the amending Regulations.

The Australian Government considers it appropriate to include a provision to this effect as a precaution to avoid any detrimental impact should the amending Regulations be found to be invalid. It is important to ensure the validity of any prosecutions conducted on Norfolk Island in reliance on the amending Regulations. To do otherwise would undermine the effective enforcement of the criminal law during this period. While the Australian Government considers the risk of invalidity to be small, the consequence would be significant for all concerned, not least of all the victims and defendants involved in any prosecutions.

It is important to note that the retrospective application of Part 3 of Schedule 2 of the Bill would not have any detrimental effect on an individual, or change the rights or liabilities of any person subject to prosecution during the period in which the amending Regulations were purportedly in force. The Bill does not in any way change the circumstances under which a person may be found to have committed a criminal act. The provision merely ensures the availability of an effective mechanism for prosecuting such acts.

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I trust this information is of assistance.

Thank you again for writing on this matter.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MC17-015948

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
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Dear Senator

I refer to the letter from the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 19 October 2017 in relation to the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017.

The Committee has identified a number of issues in relation to the Bill in its Digest 12 of 2017 and has requested that I provide further information in response to these concerns.

Please find my detailed response to the questions posed by the Committee below at **Attachment A**.

Thank you for bringing this matter to my attention.

Yours sincerely

PETER DUTTON 02/11/17

Attachment A

Question 1 – Undue trespass on personal rights and liberties

As the amendments in the bill would apply regardless of the level of risk posed by different detainees, the committee considers that the bill, in restricting individual privacy and autonomy by denying detainees the ability to possess things, such as mobile phones or computers, and the extensive search powers (without the need to obtain a warrant), unduly trespasses on personal rights and liberties.

The committee notes these scrutiny concerns are heightened by the broad power given to the Minister to prescribe any 'thing' as being prohibited so long as the Minister is satisfied that possession or use of the thing 'might' be a risk to the health, safety or security of persons in the facility or to the order of the facility.

Answer

Immigration detention facilities (IDFs) contain detainees who are in immigration detention for different reasons, including:

- illegal maritime arrivals (IMAs);
- people who have overstayed their visa; and
- people who have had their visas cancelled, including on character grounds.

These people are not lawfully permitted to remain in the Australian community unless or until they hold a visa.

Almost three quarters of the detainee population consists of high-risk individuals who do not hold a visa and includes individuals that have been transferred from a correctional facility, pending their removal from Australia. Members of this cohort have significant criminal histories, such as child sex offences or links to criminal gangs such as outlaw motorcycle gangs and other organised crime groups.

IMAs make up around 25 per cent of the detention population. This cohort is complex and includes people with criminal histories or other security concerns which present a risk to the Australian community.

The change to the demographics of the detention population is due to the Government's successful border protection policy and the increase in visa refusal or cancellation on character grounds.

As a result of the changing demographic of detainees, items such as mobile phones and food items being used to facilitate illegal activity within immigration detention facilities.

Activities facilitated or assisted by mobile phone usage include:

- drug distribution
- maintenance of criminal enterprises within and outside of immigration detention facilities
- as commodity of exchange or currency
- owners of mobile phones being subjected to intimidation tactics (including theft of the phone)
- facilitating threats and /or assaults between detainees including an attempted contract killing
- accessing child pornography.

Specific examples of mobile phones and other things being a risk to the health, safety or security of persons in the facility or to the order of the facility include:

- A detainee being held on Christmas Island used a mobile phone to arrange an attempted contract killing on another detainee being held at Maribyrnong Immigration Detention Centre. Another detainee used a mobile phone to successfully coordinate an escape from the Villawood Immigration Detention Centre by climbing a wall to a waiting car.
- Food items are also being used as a method for concealing contraband being brought into immigration detention facilities, this includes narcotic drugs and prescription medications.
- Recent screening procedures conducted on food being brought into detention facilities highlighted the lengths to which detainees will go to smuggle illicit substances into immigration detention facilities. Narcotic drugs were discovered concealed in food items such as bread and chocolate bars.
- Medications or health care supplements in specified circumstances are listed in a note at the end of proposed subsection 251A(2) of the Bill. This is intended to capture circumstances where a person in an immigration detention facility may be in possession of medication that has been prescribed for another person. There has been a significant increase of prescription medication such as Xanax and Suboxone being found in the possession of detainees who do not hold a prescription for these medications. The misuse of medications poses a serious risk to health and safety of detainees and they are also being used as a form of currency.

The examples set out above highlight the need for me to have the ability to determine things to be prohibited things where I am satisfied that possession or use of the thing might be a risk to the health, safety or security of persons in an IDF or to the order of an IDF.

The necessary corollary to the restriction of such items is the ability to search for, and take possession of, these items.

The measures in the Bill need to apply to all individuals accommodated within an IDF, as well as people visiting an IDF. The current two-tiered approach has resulted in abusive and aggressive altercations between detainees, stand-over tactics and threats and an increase in use of force incidents as a result of having to remove controlled items. The proposed amendments in the Bill provide a consistent single-tier policy that mitigates the risks associated with allowing only some

detainees access to items which may pose a risk to the health, safety and security of staff and detainees within IDFs, or to the order of the facilities.

For the reasons set out above, I do not consider that these amendments will unduly trespass on personal rights and liberties. Applying the new arrangements equally across the IDF is necessary and proportionate to maintain the health, safety and security of persons in an IDF and order of an IDF, and to manage the threat that things, including as mobile phones, pose to an IDF.

Question 2 – Significant matters in delegated legislation

The committee's scrutiny view is that significant matters, such as the type of things that are prohibited within an immigration detention facility, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's detailed advice as to:

- ***why it is considered necessary and appropriate to delegate to the Minister the decision as to what items are to be prohibited in immigration detention facilities, particularly where such prohibitions will apply to all detainees regardless of their risk level; and***
- ***the type of consultation that it is envisaged will be conducted prior to the making of the instrument and whether specific consultation obligations (beyond those in section 17 of the Legislation Act 2003) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).***

Answer

The list of lawful things which are prohibited things within the context of an IDF has not been included in the primary legislation. The things to be captured in the list are items which are not covered by the definition of 'prohibited thing' in proposed subsection 251A(1)(a)(i) and may be lawful in Australian community, but present a risk to the health, safety, security of detainees and visitors to IDFs or order of IDFs.

It is necessary and appropriate for the Minister to determine things to be prohibited things by legislative instrument, as this will enable the Minister to respond quickly and flexibly to emerging threats to the health, safety or security of all persons in an IDF or the order of these facilities. This will also allow the Minister to amend the list at short notice to remove things that are no longer considered to be a risk. If the list of prohibited things was included in the primary legislation this would undermine the ability of the Minister to quickly respond to emerging threats across IDFs.

Proposed subsection 251A(2) of the Bill includes a note which lists of the kind of things which are the most common things currently being used to facilitate violence and anti-social behaviour and to disrupt the order within IDFs. This note has been included in the Bill to provide guidance as to the type of things the Department is seeking to prevent in IDFs in addition to things which are prohibited because of a law of the Commonwealth, or a State or Territory in which the person is detained.

The legislative instrument containing the list of prohibited things will be tabled in both Houses of Parliament for scrutiny; however, as the instrument will fall within the exemptions under the Legislation (Exemptions and Other Matters) Regulation 2015, it will not be disallowable.

Ongoing assessment will be undertaken in order to update this list to remove things which are no longer considered to be a threat or to add things which have become a risk, based on changing operational requirements within IDFs.

I will consult with my Department in order to determine those items to be included in the list of prohibited things. Due to the nature of the subject matter, I do not consider that it is appropriate that specific consultation obligations be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Question 3 – Broad delegation of administrative power

The committee requests the Minister's advice as to:

- ***who it is intended will be authorised as an 'authorised officer' and an 'authorised officer's assistant' to carry out coercive searches in immigration detention facilities and whether these will include non-government employees;***
- ***why it is necessary to confer coercive powers on 'other persons' to assist an authorised person and how such a person is to be appointed; and***
- ***what training and qualifications will be required of persons conferred with these powers, and why the bill does not provide any legislative guidance about the appropriate training and qualifications required of authorized persons and assistants.***

Answer

As noted in the Explanatory Memorandum, authorised officers conducting searches will include departmental officers, and Serco officers who are non-government employees.

The term 'authorised officer's assistant' has been included in the Bill to cover people who are sometimes required to assist with a search under section 252BA or 252C or 252CA where assistance is necessary and reasonable. An example of such assistance would be if a locksmith is required on a one-off basis to unlock a door within an IDF in order to facilitate a search of that premises. The Bill does not require that "authorised officer's assistant" be appointed – they will be deployed as and when their skills are required in accordance with new section 252BB.

Officers authorised to carry out searches in IDFs will be subject to strict training and qualification requirements whether they are departmental officers or non-government employees.

Under the existing contractual arrangements with Serco (detailed in the Facilities and Detainee Services Provider (FDSP) contract) all Service Provider Personnel who, in the performance of their duties exercise a search or seizure power in relation to detainees and persons entering an IDF must, prior to undertaking those duties successfully complete a training course provided by a Registered Training Organisation and delivered by a level IV accredited trainer. This training covers the proper exercise of these duties and, upon successful completion, the person will be issued with a certificate that demonstrates that the person has the competencies required to perform the power.The FDSP contract also requires a biennial rolling program of refresher training to ensure staff maintain their qualifications in the use of reasonable force.

In addition, all authorised officers must attend regular refresher training on the use of reasonable force in an IDF, the curriculum of which includes:

- legal responsibilities;
- duty of care and human rights;
- cultural awareness;
- occupational health and safety;
- mental health awareness;
- managing conflict through negotiation; and
- de-escalation techniques.

Under Ministerial Direction No. 51 – Strip search of immigration detainees, any individual who is appointed as an authorised officer for the purposes of conducting a strip search under section 252A must satisfy the minimum training and qualification requirements, which include training in the following areas:

- civil rights and liberties;
- cultural awareness;
- the grounds for conducting a strip search;
- the pre-conditions for a strip search;
- the role of officers involved in conducting a strip search;
- the procedures for conducting a strip search;
- the procedures relating to items retained during a strip search;
- record keeping; and
- reporting.

As outlined in the Explanatory Memorandum to the Bill, officers authorised to use dogs for searches under section 252AA and 252A will also be required to undergo specific training in relation to handling dogs to ensure the dog is prevented from touching any person and is kept under control for the duration of the search.

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-018114

Senator Helen Polley
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Senate Scrutiny of Bills Committee
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01 NOV 2017

Dear Senator Helen

I refer to the request of the Senate Scrutiny of Bills Committee (the Committee) for further information regarding the Therapeutic Goods Amendment (2017 Measures No.1) Bill 2017 and the Therapeutic Goods (Charges) Amendment Bill 2017.

My advice in response to the matters raised by the Committee is set out in Attachment A.

Thank you for raising these matters and giving me the opportunity to provide additional information.

Minister for Health
Minister for Sport

ATTACHMENT A

Response to the Senate Standing Committee for the Scrutiny of Bills regarding the Therapeutic Goods Amendment (2017 Measures No. 1) Bill 2017 and the Therapeutic Goods (Charges) Amendment Bill 2017

Therapeutic Goods Amendment (2017 Measures No. 1) Bill 2017

Review Rights

The Committee has requested advice as to why review rights are limited to the applicant, in relation to seeking a provisional determination and the registration of provisionally registered goods; and for applicants for new permitted indications.

Provisional registration

The Bill establishes a system for the provisional registration of medicines. This system will allow medicines to be made available to patients with life-threatening or seriously debilitating conditions, and unmet clinical needs, significantly earlier than might otherwise be the case. The medicines will be evaluated by the Therapeutic Goods Administration (TGA) on the basis of promising early clinical data, and if the Secretary is satisfied that the safety and efficacy of the medicine have been established, the medicine will be provisionally registered for a period of two years (renewable two times) while further clinical studies are ongoing. The person in relation to whom the medicine is registered may then apply for full registration of the medicine.

The Committee has noted in its Scrutiny Digest that preventing commercial competitors from seeking review may be justified in this context, but has sought a response in relation to the inability of consumers or consumer groups to seek review of a decision not to register a medicine or grant a provisional determination.

There are a number of reasons why rights to merits review have been limited to applicants in these cases, which are as follows:

- Expediting processes to address significant unmet clinical needs;
- Technically complex decisions;
- Other measures to promote administrative accountability;
- Alternative means to obtain medicines;
- Lack of use of appeal pathways by consumers.

Expediting processes to address significant unmet clinical needs

The principal reason for limiting appeal rights to applicants is to expedite processes for these applications. Introducing a system of provisional registration is intended to enable promising new medicines to proceed to market more quickly. It is estimated that as a result of these measures, some new medicines may be able to be provisionally registered up to two years earlier than under the current framework providing clear benefits to very sick patients. Limiting appeal rights to applicants is intended to give greater certainty and finality to applicants, expedite decision-making, and ensure that resources are directed to considering new applications. A negative decision does not preclude future applications for provisional determination by the sponsor, nor further applications by the sponsor as further clinical data becomes available.

Technically complex decisions

As the Explanatory Memorandum for the Bill notes, in seeking a review, consumers would

not have access to the same information as the TGA, given the nature of the evidence available. The Secretary's decision to provisionally register a medicine requires that he or she be satisfied, on the basis of preliminary clinical data, that the safety and efficacy of the medicine have been satisfactorily established. This decision will be based on highly technical data, and will require a high degree of expertise, given that the safety and effectiveness of the medicine will only be able to be judged in relation to a limited number of patients and perhaps on surrogate endpoints. TGA has access, through its Committees, to medical experts who can provide advice to the Secretary to assist in making these decisions and may consult with other regulators.

Consumers may not be able to access all relevant information through the Freedom of Information process as some information may be commercial-in-confidence. Public information available to consumers or consumer groups about the merits of the medicine will be limited, as information about the product will be confined to the preliminary data obtained by the applicant. Consumers may not be able to access a comparable degree of medical expertise to successfully challenge such a decision. Further, as applicants will be best placed to advocate in respect of their products, the targeting of review and appeal rights to applicants is likely to benefit consumers where the exercise of such rights by applicants is successful.

Other measures to promote administrative accountability
TGA consulted consumer, patient and industry stakeholders concerning the provisional approval process during 2016-2017. Following this consultation, it was decided that in the interests of expediting provisional approval applications, appeals would be limited to the applicant in relation to certain decisions. This decision does not preclude consumers or consumer groups supporting a sponsor who is making an appeal.

This approach to appeal rights will be balanced by increased transparency of decision-making in relation to provisional registration, including publication of provisional approval determinations; rapid publication of TGA decisions relating to provisional registration; and full details of decisions relating to provisionally registered medicines in the Australian Public Assessment Reports (AusPARs) for prescription medicines. The criteria for the Secretary's decisions to grant or refuse to grant a provisional determination are intended to be set out in amendments to the *Therapeutic Goods Regulations 1990,* which will also be subject to Parliamentary scrutiny.

Information will be published on such matters as the automatic lapsing of provisional registration; the extension, suspension or cancellation of provisional registration; and the transition from provisional to full registration. It is intended that health professionals and consumers will have transparency of TGA decision-making processes to inform their treatment decisions and maintain confidence in the TGA's regulatory standards. Meetings with sponsors prior to submission of applications are intended to clearly set out the requirements of the application process, and to minimise the chance that an application will be refused by the Secretary.

Alternative means to obtain medicines
If the Secretary decides that a medicine is not suitable for provisional registration, but individual patients still wish to access the medicine, there are a number of other methods by which patients may obtain that medicine. The Special Access Schemes (Categories A and B) and the Authorised Prescriber Scheme provide ways for patients to access medicines which are not on the Australian Register of Therapeutic Goods, provided their medical practitioner believes that they are suitable for the patient. A product at this stage of its development may also be the subject of continuing clinical trials within Australia.

Lack of use of appeal pathways by consumers
Finally, under existing processes for registration, there have not been any AAT appeals by consumers or consumer groups against decisions not to register medicines in at least the last 10 years, so the lack of appeal rights would not appear to adversely impact on consumers. Drafting an exemption to enable consumers only to appeal these decisions could have broader implications for the interpretation of other review provisions in the Act and Regulations. Such an exemption would need to be considered in the context of review and appeal rights generally through the Act and Regulations, and would require further consultation with consumers and other relevant groups.

To assist in addressing the concerns of the Committee, the explanatory memorandum will be amended to clarify the intention behind restricting appeal rights in relation to these decisions concerning provisional registration to applicants only.

Permitted indications
The Bill represents the second stage of the legislative response to the Expert Panel Review of Medicines and Medical Devices Regulation (the Review).

The *Therapeutic Goods Amendment (2016 Measures No. 1) Act 2017* (which was assented to on 19 June 2017), implemented Review Recommendation 47, to provide rights of review and appeal for applicants for new ingredients to be added to the list of permitted ingredients. Subsection 60(2B) of the Act limits appeal rights to the applicant. This was consistent with the recommendations of the Review (at page 40), in which the Expert Panel noted that existing appeal mechanisms under section 60 were not appropriate for new ingredients, as:

> *"the range of 'interested parties' could potentially extend to a large number of people, and create significant uncertainty in the predictability of the application process. This could be overcome if the review and appeal rights are restricted to the person who made the application only. This approach would allow for appropriate review of such decisions whilst ensuring that the [TGA] was not exposed to review requests from a potentially large class of people, tying up [TGA] resources in responding to appeals."*

In the current Bill, a similar approach has been taken to the question of appeal rights for new permitted indications. Under Schedule 2, Item 15, new section 26BJ of the Bill, a person may apply to the Secretary for a recommendation that the Minister vary a determination under section 26BF. The Secretary must consider such applications, and then either make a recommendation that the Minister vary the instrument, or refuse to do so. Review and appeal rights are available to the applicant in respect of any refusal by the Secretary to make the requested variation.

Consistently with the approach taken in relation to applicants for permitted ingredients, and for the same reasons, review rights for new permitted indications are limited to the applicant (Schedule 2, Item 19, new subsection 60(2C)).

Third parties who might wish to object to a permitted indication will be able to do so once a product with that indication appears in the marketplace by lodging a complaint with the TGA. Although this is after the event it will provide a means for consumers to voice their concerns and potentially have a review undertaken.

To assist in addressing the concerns of the Committee, the explanatory memorandum will be amended to clarify the intention behind restricting appeal rights in relation to this decision to applicants only.

Therapeutic Goods (Charges) Amendment Bill 2017

Charges in delegated legislation

The Committee has requested advice on why there are no limits on the charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and/or a maximum charge can be specifically included in the bill.

The Australian Government Charging Framework requires cost recovery levies to be imposed as annual charges when a good, service or regulation is provided to a group of individuals or organisations rather than to a specific individual or organisation. Unlike general taxation, such levies are earmarked to fund activities provided to the group that pays the levy.

The annual charges relating to conformity assessment body determinations will be calculated after taking into account the total expected cost of the monitoring and compliance framework for conformity assessment bodies and will be set in accordance with the Australian Government Cost Recovery Guidelines.

Setting the amount, or the method for calculating the amount, of annual charges in the regulations, rather than the principal legislation, is designed to provide the appropriate level of flexibility to:

- impose different amounts of charges, or have different methods of calculation, depending on the scope of conformity assessment body determinations (that is, whether a determination is of general application or is limited to specified medical devices and/or specified conformity assessment procedures); and
- set the amount of annual charge, or its method of calculation, to accurately reflect the cost of regulation as the scheme evolves, and to adjust the amount over time to avoid over or under recovery.

Before prescribing the amount of annual charges in respect of conformity assessment body determinations, the Department of Health (through the TGA) will undertake detailed consultation with stakeholders, including medical device industry peak bodies through the TGA's Regulatory and Technical Consultative Forum (RegTech). A Cost Recovery Implementation Statement will be prepared and published on the TGA's website which will further facilitate transparency and accountability.

This approach, then, will prevent the need to amend primary legislation whenever there are changes to cost recovery arrangements, and is also consistent with the approach taken in relation to existing annual charges imposed on the registration, listing and inclusion of goods in the Australian Register of Therapeutic Goods, and the licensing of manufacturers of therapeutic goods in the *Therapeutic Goods (Charges) Act 1989*.

The Bill does not include a maximum amount of charge, as the charge will be set in accordance with the Australian Government Cost Recovery Guidelines and because any such limit prescribed would be arbitrary and would need to be substantially in excess of the amount proposed to be charged, which would likely result in confusion for, and criticism by, stakeholders.

As legislative instruments, the regulations will be subject to the requirements of the *Legislation Act 2003*, including requirements in relation to consultation and parliamentary scrutiny, which will assist in ensuring that charges are not excessive. In particular, the regulations will be tabled in Parliament, and are disallowable by either House. They will also

be subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances.

In addition, to help address the concerns raised by the Committee, the Explanatory Memorandum to the Bill will be amended to provide further clarity in relation to the process by which the amount of charges will be set.

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

Ref: MS17-003598

- 6 NOV 2017

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Senator Helen

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 19 October 2017, drawing my attention to the Committee's *Scrutiny Digest No. 12 of 2017* which seeks further information about two Bills that are currently before the Senate.

Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017

The Committee has sought information about the following:

- The justification for the penalty for the strict liability offence contained in proposed section 29JCB of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).
- The justification for the penalty for the strict liability offence contained in proposed section 131DD of the SIS Act.
- Advice as to the appropriateness of the exceptions to the offences contained in Schedule 7 to the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017 (Superannuation Measures Bill).

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Penalty for proposed section 29JCB of the SIS Act

Proposed section 29JCB is contained in Schedule 4 to the Superannuation Measures Bill.

As noted by the Committee in its Digest, proposed section 29JCB makes it an offence of strict liability for a person to hold a controlling stake in an Registrable Superannuation Entity (RSE) licensee without approval to hold the stake under proposed section 29HD. The offence is subject to a maximum penalty of 400 penalty units for each day on which the person holds a controlling stake without approval.

The amount of this penalty exceeds the upper threshold for penalties for strict liability offences that is specified in the general principle set out in Chapter 2 of the Attorney-General's Department *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) (that is, that generally the penalty for an offence of strict liability should not exceed 60 penalty units for an individual or 300 for a body corporate).

However, the amount of the penalty is justified because the prohibition on persons holding unapproved controlling stakes in an RSE licence is specifically designed to prevent such controlling interests preventing a trustee from being able to fulfil its obligations in respect of the members of a superannuation fund. The amount of the penalty reflects the importance of protecting superannuation members' interests and is justified given the value of funds under management in the superannuation system, the number of members potentially adversely impacted by a single RSE licensee being unable to fulfil its obligations, and the compulsory nature of the superannuation system.

I also note that the amount of the penalty is consistent with existing penalties that apply to similar offences of strict liability under the *Corporations Act 2001* for contraventions of section 850C (acquiring shares in a widely held market body that results in an inappropriate control situation) and subsection 852B(2) (anti-avoidance provision in relation to increasing voting power) – see section 1311 and table items 258A and 258C of Schedule 3 to the *Corporations Act 2001*. Applying the same penalties to offences of similar types is consistent with principle 3.1.2 of the Guide (which discusses the relevance of considering penalties for existing offences of a similar kind or of a similar seriousness).

Penalty for proposed section 131DD of the SIS Act

Proposed section 131DD is contained in Schedule 5 to the Superannuation Measures Bill.

As noted by the Committee in its Digest, proposed section 131DD establishes various offences of strict liability for particular persons who fail to comply with a direction given by the Australian Prudential Regulation Authority (APRA) under Division 1 of proposed Part 16A of the SIS Act (which sets out the grounds for giving directions to RSE licensees and their connected entities, and the types of directions that can be given). The offence is subject to a maximum penalty of 100 penalty units.

The amount of this penalty exceeds the upper threshold for penalties for strict liability offences that is specified in the general principle set out in Chapter 2 of the Guide (that is, that generally the penalty for an offence of strict liability should not exceed 60 penalty units for an individual or 300 for a body corporate).

However, the amount of the penalty is justified because directions that are given under Division 1 of proposed Part 16A are specifically designed to protect the interests of the

members of a superannuation fund and the stability of Australia's financial system. As with the penalty for proposed section 29JCB, the amount of the penalty reflects the importance of protecting superannuation members' interests and is justified given the value of funds under management in the superannuation system, the number of members potentially adversely impacted by a failure to comply with a direction, and the compulsory nature of the superannuation system.

I also note that the amount of the penalty is consistent with existing penalties that apply to similar offences of strict liability under the SIS Act for failing to comply with other directions. See for example section 63 (failure to comply with a direction not to accept employer contributions made by an employer-sponsor) and section 141 (failure of an acting trustee to comply with a direction). As noted above in respect of the penalty for proposed section 29JCB, applying the same penalties to offences of similar types is consistent with principle 3.1.2 of the Guide.

Exceptions to offences contained in Schedule 7

Schedule 7 to the Superannuation Measures Bill contains proposed subsections 29PA(6), 29PB(3), 29PC(3), 29PD(3) and 29PE(3).

As noted by the Committee in its Digest, each of these subsections contain offence-specific defences to proposed offences of strict liability. In the case of subsection 29PA(6), the defence relates to the offence in proposed subsection 29PA(1) that applies to a director for not attending an annual members meeting (AMM) if they had been given prior notice of the AMM. Subsection 29PA(6) ensures that a director does not commit an offence for failing to attend an AMM if the other directors that attend would constitute a quorum of directors for a board of directors meeting.

Framing this exception as a defence is appropriate because a director who does not attend an AMM should have a positive obligation in ensuring that a quorum of directors is present in their absence, given the aim of the Schedule is to ensure accountability of directors. Placing this onus on absent directors also reflects that it would be significantly more difficult for the prosecution to establish whether or not a director had taken steps to ensure that a sufficient number of directors were in attendance at the AMM. As also noted by the Committee in its Digest, subsections 29PB(3), 29PC(3), 29 PD(3) and 29PE(3) contain defences where there is a failure by an RSE licensee, an individual trustee, an auditor or an actuary to answer certain questions raised at an AMM in certain circumstances. The related offences for not answering these questions are contained in proposed subsections 29PB(2), 29PC(2), 29PD(2) and 29PE(2). These circumstances include situations where a question is not relevant, where answering the question would breach the governing rules of the RSE or a law, and where answering a question would cause detriment to the members of the RSE taken as a whole.

A person who refuses to answer a question that is asked at an AMM should only do so where they have made a subjective and considered assessment that a particular circumstance applies. Framing these circumstances as offence-specific defences is appropriate because the person who refuses to answer a question is best placed to raise evidence about why the circumstances existed that justified them not answering the question. Requiring the prosecution to establish that a particular circumstance did not apply where a question was not answered would substantially undermine the efficacy of the requirement to answer questions as knowledge about things like the relevance of questions and potential determinant of members is far more likely to be established by the person who is asked a question at an AMM.

The Committee further noted that the proposed defences included provision to allow regulations to prescribe further defences to the offence relating to the obligation to answer questions. The proposed rules about AMMs establish the requirements for a new type of meeting. As there is currently no established practice in respect of these meetings, the regulation making power is intended to provide a mechanism for expanding the types of defences that are available in a timely manner if the need to do so becomes apparent.

Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017

The Committee has sought further information about five aspects of the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 (the Bill):

- Why authorisation of the external dispute resolution (EDR) scheme will not be subject to parliamentary disallowance.
- The justification for each proposed strict liability offence contained in the Bill.
- The exclusion of determinations made by the Australian Financial Complaints Authority (AFCA) from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).
- The protected information envisaged to be shared with AFCA, and safeguards put in place to protect the confidentiality of information disclosed to AFCA.
- The appropriateness of including requirements in delegated legislation where a breach of those requirements constitutes an offence.

Why the authorisation of the EDR scheme will not be subject to parliamentary disallowance

The Committee has sought further information about why the authorisation of the EDR scheme is not disallowable. The Ministerial power to authorise an EDR scheme does not involve the exercise of a power that is legislative in character because it does not determine or alter the content of a law (rather, the authorisation will merely determine the circumstances in which the relevant law will apply). Accordingly, the exercise of that power should not be disallowable.

We note that the authorisation is a notifiable instrument which will be listed on the Federal Register of Legislation and provide members of the public with appropriate access to a copy of the instrument.

The Committee also seeks further information about the types of conditions that it is envisaged may be specified under the authorisation. The ability to set conditions will allow the Government to ensure that AFCA is accountable to both consumers and member firms, for example by specifying the frequency of independent reviews of the scheme' s operations and procedures, or by requiring AFCA to report to the Government about changes AFCA makes to its membership fees.

Why the proposed strict liability offences are appropriate

The Committee has sought further information about the strict liability offences contained in the Bill.

General comments

The Bill has two strict liability offences. Under proposed section 1054A, AFCA may give written notice to a person which requires that person to give information or documents to AFCA. A person who fails to comply with AFCA's direction will commit a strict liability offence. In addition, under proposed section 1058, AFCA staff members will be required to comply with secrecy obligations. An AFCA staff member who fails to comply with these obligations will commit a strict liability offence. Both offences attract a maximum penalty of up to 30 penalty units for an individual and up to 150 penalty units for a body corporate.

We note that the penalties comply with the requirements of the Guide because:

- the offences are not punishable by imprisonment;
- the maximum penalties are below the maximum allowable for strict liability offences (the Guide provides that a strict liability offence should be punishable by a maximum of 60 penalty units for individuals and 300 penalty units for body corporates); and
- the offences are likely to significantly enhance the effectiveness of the enforcement regime by supporting AFCA's ability to effectively obtain information required to resolve a superannuation complaint, as well as deter conduct involving the inappropriate disclosure of confidential or personal information.

Further comment - section 1054A (offence relating to AFCA's information gathering power)

A strict liability offence removes the requirement for a fault element to be proven before a person can be found guilty of an offence. This is considered appropriate in this instance as failure to comply with AFCA's requests for information would undermine the integrity of the regulatory regime by impacting AFCA's ability to effectively obtain information required to resolve a superannuation complaint.

We note that the offence supports the efficacy of AFCA's powers.
Professor Ian Ramsay considered these powers in his 'Review of the Financial System External Dispute Resolution Framework' and determined that the powers were critical to support the investigation and resolution of superannuation complaints. We also note that the *Superannuation (Resolution of Complaints) Act 1993* (which will be repealed by this Bill) contains a comparable strict liability offence in relation to non-compliance with the Superannuation Complaint Tribunal's information gathering powers.

In addition to having access to the defence of honest and reasonable mistake, the offence will not apply to a person who has a reasonable excuse (see subsection 1054A(5)).

Further comment - section 1058 (offence relating to secrecy obligations of AFCA staff members)

A strict liability offence removes the requirement for a fault element to be proved before a person can be found guilty of an offence. This is considered appropriate in this instance as an AFCA staff member's failure to comply with secrecy obligations would undermine the integrity of the regulatory regime. People who are asked to provide information to resolve a superannuation complaint need to have confidence that confidential or personal information that they provide will be adequately protected by AFCA. If this kind of assurance cannot be provided, it would undermine AFCA's ability to effectively investigate and resolve superannuation complaints.

It is expected that AFCA will have appropriate safeguards in place to ensure that its staff members are aware of their secrecy obligations.

In addition to having access to the defence of honest and reasonable mistake, the offence will not apply in various circumstances where disclosures are appropriate (for example, see subsections 1058(3) to (5)).

The exclusion of determinations made by AFCA from judicial review under the ADJR Act

The Committee has sought further information about the exclusion of judicial review.

Specifically, the Committee sought further information about the type of decisions that are currently reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the rationale for proposing to exclude ADJR Act review of decisions made by AFCA.

Currently, decisions of the Superannuation Complaints Tribunal made under the *Superannuation (Resolution of Complaints) Act 1993* are subject to review under the ADJR Act. In practice, the most common examples of appeals under the ADJR Act are appeals of decisions by the Superannuation Complaints Tribunal to withdraw a complaint or that a complaint is outside the Superannuation Complaint Tribunal's jurisdiction.

This Bill inserts a new provision in the ADJR Act which excludes decisions relating to the making of a determination under the AFCA scheme.

Judicial review in the federal jurisdiction is generally available to administrative decisions made by officers of the Commonwealth (such as public servants), Ministers and their delegates. As the Superannuation Complaints Tribunal is a statutory authority established under the *Superannuation (Resolution of Complaints) Act 1993*, and as its decision-makers are considered 'officers of the Commonwealth', it is appropriate that these decisions are subject to judicial review.

By contrast, AFCA is a private review mechanism arising from private rights. Its decision-makers will not be 'officers of the Commonwealth', and as a result it is not appropriate for its decisions and conduct to be subject to judicial review. This is consistent with administrative law principles.

AFCA will have internal review mechanisms and an independent assessor to manage disputes relating to the processes and operations of AFCA. Further, a determination of AFCA in relation to superannuation complaint can be appealed to the Federal Court on a question of law.

Appeals on questions of law

The Committee sought further information about whether the grounds for bringing an appeal on a 'question of law' will be narrower than those that would currently be available in relation to a superannuation dispute under the ADJR Act.

Appeals on questions of law are generally limited to questions going to the legal correctness of a decision, whereas judicial review generally provides an opportunity to test the lawfulness of an administrative decision.

The types of questions of law that may be appealed in any particular situation would depend on the particular legal context in which the decision is made, which may be

broader than reviews provided by the ADJR Act as the grounds of review under the ADJR Act are expressly prescribed. Further, not all grounds of ADJR Act review would necessarily apply in the context of a particular AFCA determination which could be appealed on a question of law.

The exclusion of review under the ADJR Act is appropriate because AFCA is a private industry body, rather than a government body, and it would not be usual to allow judicial review under the ADJR Act in relation to an industry body.

The Bill recognises the importance of the judicial oversight of decision-making bodies by allowing the Federal Court to hear appeals on questions of law from determinations of AFCA in relation to superannuation complaints. This will ensure that an appropriate review process by the Federal Court will be available to parties to a superannuation complaint.

Non-superannuation financial disputes

The Committee sought further information about the appropriateness of providing a court of general jurisdiction with the jurisdiction to hear appeals in relation to non-superannuation complaints.

Currently, decisions in relation to a non-superannuation financial dispute cannot be appealed to a court (other than as a civil action for breach of contract). This position is the same under the AFCA scheme.

The Bill does not provide a mechanism for appeals in relation to non-superannuation complaints to be heard by a court. Currently, decisions in relation to a non-superannuation financial dispute cannot be appealed to a court (other than as a civil action for breach of contract). This position is the same under the AFCA scheme.

However, a member of the AFCA scheme (a financial services provider) may challenge a determination made by AFCA in court through a civil action for breach of contract if the determination is inconsistent with AFCA's terms of reference.

A consumer can challenge a decision of a financial services provider in a court through a civil action for breach of contract. Consumers are not required to comply with a determination of AFCA and may commence a civil action independent of any determination that is made by AFCA.

Currently, decisions in relation to a non-superannuation financial dispute cannot be appealed to a court (other than as a civil action for breach of contract). This position is the same under the AFCA scheme.

The protected information envisaged to be shared with AFCA and the safeguards put in place

The Committee has sought further information about the type of information that it is envisaged may be disclosed to AFCA.

The Bill allows officers and other staff members of APRA, the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO) to disclose confidential and protected information to AFCA to assist it to perform its functions.

The type of information that may be disclosed by the ATO to AFCA is limited to information that was obtained under or in relation to the *Superannuation (Unclaimed Money and Lost Members) Act 1999*. This is consistent with the type of information

that the ATO is permitted to disclose to the Superannuation Complaints Tribunal under the current law, which may include personal or confidential information.

The legislation enables ASIC to share information, at ASIC's discretion, that will assist AFCA to perform its functions or powers. This may potentially include information that relates to an individual complaint, a systemic issue or membership of AFCA. The information may be personal or confidential information. Under the current law, ASIC is permitted to disclose this type of information to the Superannuation Complaints Tribunal.

It is intended that AFCA's terms of reference will include an obligation for AFCA to keep confidential all information pertaining to a dispute that is provided to AFCA except to the extent reasonably necessary to carry out AFCA's responsibilities. This is a matter that will be considered as part of the EDR authorisation decision.

In addition, each of the relevant legislative frameworks authorising the disclosure of protected information contains mechanisms for safeguarding the confidentiality of information once disclosed by ASIC, APRA and the ATO. For example, subsection 127(4A) of the *Australian Securities and Investments Commission Act 2001* allows ASIC to impose conditions that AFCA must comply with in relation to information disclosed. Subsection 56(9) of the *Australian Prudential Regulation Authority Act 1998* provides a similar rule in relation to disclosures made by APRA. Section 355-155 of Schedule 1 of the *Tax Administration Act 1953* provides that it is an offence (punishable by up to two years' imprisonment) for an entity to on-disclose or record protected information acquired by the entity from taxation officers, except in certain limited circumstances.

The appropriateness of putting requirements in delegated legislation that, if breached, constitutes an offence

The Committee has sought further information about the appropriateness of setting out requirements in delegated legislation where breach of those requirements will constitute an offence.

This Bill includes a requirement for Retirement Savings Account providers and trustees of regulated superannuation funds and approved deposit funds to ensure that written reasons are given for decisions relating to complaints. Contravening this requirement will be an offence, subject to a penalty of up to 100 penalty units.

This Bill allows ASIC to set out the detail of this requirement by legislative instrument. The details that ASIC may specify are clearly circumscribed in the Act and the details will be readily obtainable, being available on the Federal Register of Legislation. ASIC will be required to consult, as appropriate, on the content of the legislative instrument.

This approach provides ASIC with the flexibility to develop and consult on the content of its legislative instrument so as to provide for greater consistency between the requirements around giving reasons for internal dispute resolution decisions made by these trustees and the requirements that will apply for other internal dispute resolution firms.

The requirements that apply for other internal dispute resolution firms will be set out under requirements approved by ASIC as mentioned in subparagraph 912A(2)(a)(i) of the *Corporations Act 2001*. This approach allows ASIC to ensure the new requirements begin for all internal dispute resolution firms from the same start date and that the enhanced internal dispute resolution framework achieves a consistent approach for consumers of financial services and products, including superannuation products. It

would also be expected that in the long term, harmonising the rules will result in reduced complexity for internal dispute resolution procedures for financial service providers.

I appreciate the Committee's consideration of these Bills, and I trust this information will be of assistance to the Committee.

Kelly O'Dwyer