The Hon Amanda Rishworth MP

Minister for Social Services

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
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Dear Senator Dean

I write in relation to the Senate Scrutiny of Bills Committee's (the Committee) request for information about issues identified in relation to the Disability Services and Inclusion Bill 2023 (the Bill).

The Bill is designed to help deliver the Australian Government's commitment to enable people with disability to participate fully in society, exercise choice and control over their lives and to improve job opportunities, job readiness and support in employment.

The Bill will establish a modern legislative framework for the funding and regulation of programs targeted for the benefit of people with disability, their families and carers. Arrangements and grants made under the proposed Bill will be supported by appropriate quality safeguards such as a mandatory Code of Conduct and certification standards where appropriate.

I have addressed each of your requests for information in turn below.

Why it is necessary for the secretary to have the power to specify further purposes in determinations under subclauses 29(3) and 29(7), given the purposes that relevant information can already be used or disclosed for under clause 29 of the Bill.

While the Bill does provide a number of specific grounds upon which relevant information can be used and disclosed, it does not cover all circumstances in which information may need to be disclosed. Unlike the current arrangements under the DSA, the Bill does not provide for the disclosure of information 'in the public interest', as this is a vague and unspecific term. Instead, the Bill only provides for information to be disclosed in clear and transparent circumstances, by requiring the Secretary to make a legislative instrument that will prescribe, ahead of time, specific purposes for which information may be used or disclosed.

As set out in the Explanatory Memorandum to the Bill, one example of a purpose that the Secretary may determine information may be used or disclosed under subclause 29(3) is to brief the Minister to allow for a response to an incident or complaint. Unless the person consents to the disclosure of the information, there is no other basis on which to disclose information to the Minister. While in most instances consent would be sought, there may be circumstances where it is not practicable to do so, for example, where it may impact upon an investigation.

Subclause 29(7) will allow the Secretary to prescribe 'State and Territory' purposes such as the enforcement of state and territory laws (where it does not relate to a threat to the life, health or safety of a person with disability). While disclosure for such purposes is likely to be rare, it is nevertheless critical that this option is available, and there is no other basis under the Bill to allow for such use or disclosure.

The above are specific examples of where the Secretary may need to be able to prescribe purposes for which information may be used or disclosed and is not intended to cover all circumstances. Critically, this Bill ensures that all potential purposes not expressly provided for in the Bill are set out in a legislative instrument that is not only transparent and disallowable, but must state the legislative power of the Parliament in respect of which the instrument is made.

Why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in subclause 28(2). The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.

Subclause 28(2) of the Bill provides that the use or disclosure of relevant information by an entrusted person is not an offence if it is authorised by the Bill or another law of the Commonwealth, or a law of a state or territory prescribed by the rules.

Subclause 28(2) notes that the entrusted person bears the evidential burden to demonstrate that the use or disclosure was permitted. Consistent with part 4.3.2 of *Guide to Framing Commonwealth Offences* (the Guide), this offence-specific defence requires only an evidential burden of proof, and does not impose any legal burden. An evidential burden is easier for a defendant to discharge, and does not completely displace the prosecutor's burden (only defers that burden).

The Guide notes that:

> the [Senate Scrutiny of Bills] Committee has indicated that it may be appropriate for the burden of proof to be placed on a defendant where the facts in relation to the defence might be said to be peculiarly within the knowledge of the defendant, or where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused.

An entrusted person will be peculiarly aware of the reasons for the use or disclosure of protected information. Where it may not be clear to other people why certain information was used and if the use or disclosure was authorised, the entrusted person should easily be able to point to records indicating why it was appropriate for them to use and/or disclose that information. This explanation could be readily provided by the entrusted person.

In addition, requiring the entrusted person to adduce evidence helps narrow the scope of the 'dispute'. The breadth of the exclusion (that is, the use or disclosure is authorised by the Act, another law of the Commonwealth or a prescribed state or territory law) is such that if the prosecution had to prove beyond a reasonable doubt that the use or disclosure was not authorised, it would undermine the ability to prosecute the offence.

The prosecution may have to go to significant lengths to identify the reasons for the use or disclosure of information, as it may be difficult to identify the actual reason that information was used or disclosed. It would then have to go to significant lengths to identify where there is any law, other than the Bill, that may have authorised the disclosure. In addition to the time and cost implications for the prosecution, it may also impose significant time and expense on the employers of entrusted persons. Further, undertaking such enquiries would require the review of personal and sensitive information about people with disability by additional parties, who otherwise may not need to access this information.

For the above reasons, it is appropriate to use an offence-specific defence in subclause 28(2).

Whether the exclusion of merits review from decisions made under clause 9 of the Bill is in line with Administrative Review Council's guidance document, *what decisions should be subject to merits review?* (ARC guidance)

In order to be eligible for an arrangement or grant relating to a regulated activity, a person must either hold a certificate of compliance, or be covered by a determination in force under subclause 9(2) of the Bill. Subclause 9(2) of the Bill allows the Secretary to make a determination specifying a day by which a person must obtain a certificate of compliance for a regulated activity if the person has given written notice to the Secretary stating their intention to seek and obtain a certification on or before that day. Subclause 9(4) empowers the Secretary to vary in writing the determination made under subclause 9(2) if the Minister has made an arrangement for the making of payments or made a grant of financial assistance to the person under clause 13.

The exclusion of merits review from decisions made under clause 9 of the Bill does not fit precisely into any of the recommended exceptions in the ARC guidance. However, in practice, a decision by the Secretary to issue a determination is procedural in nature and the exclusion of merits review is therefore justifiable.

In practice, the Secretary will not make a determination under subsection 9(2) until a person has been found otherwise suitable through a grant round or other relevant process. The Secretary making a determination is a procedural step that must occur, where the person does not hold a certificate of compliance, before an agreement can be entered into. Given this, a decision by the Secretary not to make a determination under clause 9 does not result in hardship or a penalty to a person.

The ARC guidance provides that preliminary or procedural decisions are not suitable for merits review. These include decisions that facilitate, or that lead to, the making of a substantive decision. In this instance, that substantive decision is to enter into an arrangement with the person.

In addition to the above, article 16 of the *Convention on the Rights of Persons with Disability* (CRPD) provides that states parties shall take all appropriate measures to protect persons with disabilities from all forms of exploitation, violence and abuse and that to facilitate this, state parties must ensure that all facilities and programs designed to serve persons with disabilities are effectively monitored by independent authorities.

The requirement to hold a certificate of compliance is a key element of ensuring that people delivering regulated activities comply with suitable standards for the safe and ethical delivery of supports and services to people with disability. It only applies to persons delivering regulated activities, which are activities that could pose risk to people with disability.

The necessity of complying with the CRPD and protecting people with disability from exploitation, harm and abuse should therefore also be awarded appropriate significance in determining whether decisions under clause 9 should be subject to merits review.

In relation to clause 13, whether consideration could be given to methods of ensuring compliance with the Commonwealth Rules and Procurement Guidelines.

It is not necessary for the Bill to include new methods of ensuring compliance with the Commonwealth Rules and Procurement Guidelines as there are already established and legally binding enforcement mechanisms in place.

The Commonwealth Procurement Rules (CPRs) and Commonwealth Grants Rules and Guidelines 2017 (CGRGs) are issued under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and apply to all non-corporate Commonwealth entities such as the Department of Social Services (the department). Officials from non-corporate Commonwealth entities must comply with the CPRs and CGRGs.

Further, non-corporate Commonwealth entities must report non-compliance with the CPRs and CGRGs through the Commonwealth's compliance reporting process. Non-compliance with the requirements of the Resource Management Framework, which include the CPRs and CGRGs, may attract a range of criminal, civil or administrative remedies including under the *Public Service Act 1999* and *Crimes Act 1914*.

The Commonwealth Ombudsman (Ombudsman) and the Australian National Audit Office also play a critical role in overseeing compliance with the CPRs and CGRGs.

Finally, any person concerned with whether the CPRs or CGRGs have not been complied with may raise a complaint with the department directly through its complaint handling process (see www.dss.gov.au/contact/feedback-compliments-complaints-and-enquiries/complaints-page). If a person is not satisfied with a departmental response, they can make a compliant to the Ombudsman.

Given the layers of accountability outlined above that are already in existence, it is unnecessary to impose additional methods of ensuring compliance with the CPRs and CGRGs.

In relation to clause 13, whether consideration has been given to providing redress for individuals who are denied grants due to an allocation process that has not been based on merit (similar to the process in relation to government procurement under the *Government Procurement (Judicial Review) Act 2018*).

The provision of redress for people denied grants not based on merit under this Bill is not appropriate.

All funding decisions made by the department are merit based, although not all will be the result of a competitive process, consistent with the CPRs, CGRGs and Accountable Authority Instructions. Funding decisions may relate to range of financial arrangements including procurements, one-off ad hoc grants, competitive and non-competitive grant opportunities and sponsorships. All of these are decisions to allocate a finite resource.

There will be some funding decisions made under this Bill that are not based on a competitive process, such as where the Commonwealth decides to provide payments to certain service providers, over other service providers. For example, the Commonwealth may identify a need for services in a thin market – either based on geographical isolation or the specialist nature of the services sought – which can only be delivered by a single organisation. The Commonwealth may also be approached for one-off funding from certain service providers to address particular needs. For example, an Aboriginal Community Controlled Organisation may approach the Commonwealth with a funding proposal in relation to a planned expansion of a specialist, culturally safe service for First Nations people with disability. The decisions to grant funding in these circumstances will still be based on the merit of the outcome sought even though a competitive process has not occurred. The decision to provide funding would still be subject to the same scrutiny and oversight as any planned spending.

The ARC guidance '*What decisions should be subject to merit review?*' recognises that decisions allocating a finite resource between competing applicants are not suitable for merits review. In relation to this provision merits review would promote competition between community groups and provide no effective remedy, as a successful application for review by one service provider would require a reduction in funding to other service providers. This could also result in delays in channelling funds into service provision.

The requirement to provide redress in general would have a similar funding impact. That is, the provision of redress would require a reduction in funding or reallocation of resources away from service providers and the intended goals of an activity. Given this, it is not appropriate to provide for 'redress' under the Bill.

In relation to paragraph 14(6)(g), whether the grants and funding agreements made under this Act would enable a person to sue on the basis of the agreement, and whether a person who is affected but not party to an agreement would have grounds to sue.

Subclause 14(6) prescribes actions that the Minister may take on behalf of the Commonwealth if the Minister is satisfied that a person that is a party to a grant or financial arrangement under clause 13 has failed to comply with a statutory funding condition. The statutory funding conditions include compliance with the code of conduct, holding a certificate of compliance (if required), maintaining a complaints management and resolution system and maintaining an incident management system.

Publication of information about a person's failure to comply with a statutory funding condition on the department's website is one of the actions that is available to the Minister (see paragraph 14(6)(g)) and is a key safeguarding measure, ensuring people are fully informed when they select a provider to access supports and services.

While there may be grounds for a person who is a party to an agreement to sue on the basis of the agreement in some circumstances, subclause 14(8) of the Bill provides that the Commonwealth, the Minister or a delegate of the Minister is not liable to any action, suit or other civil proceeding for or in relation to the publication, in good faith, of information under paragraph 14(6)(g). This means that person would not be able to sue if publication about a breach of a statutory funding condition is made in good faith. This applies to entities that are a party to the financial agreement and to any other person who may wish to sue on the basis of the publication.

In relation to paragraph 14(6)(g), why the exclusion of merits review is appropriate in relation to the established grounds set out in the Administrative Review Council's guidance document, *what decisions should be subject to merits review?*

Paragraph 14(6)(g) of the Bill allows the Minister to publish information about a breach of a statutory funding condition on the department's website. The exclusion of merits review from decisions made under paragraph 14(6)(g) of the Bill does not relate to a recognised ground under the ARC guidance. Despite this, in these particular circumstances, the exclusion of merits review is justified. The necessity to comply with the CRPD and protecting people with disability from exploitation harm and abuse should be balanced with the availability of merits review.

The Minister's decision to publish information about a provider's failure to comply with the terms and conditions on the department's website is an important safeguard where the Minister's ability to respond to potential incidents or complaints is otherwise largely contractual (that is the variation or cessation of an agreement) rather than regulatory.

In deciding to release information, the Minister would first consider whether this was the most effective way to achieve the desired safeguarding outcome. Nonconformities identified during audits or through departmental engagement with the provider will generally be addressed through voluntary compliance action agreed between the department or auditor and the person who is a party to the agreement, and will not lead to the publication of information. Departmental policies will guide when information may be disclosed so that such action is taken consistently.

The Minister's decision to publish information will be treated as a significant step which will only occur if the Minister is entirely satisfied that it is warranted as a safeguarding mechanism, having regard to the objects and principles of the Bill. This includes protecting the rights of people with disability to ensure the person who is a party to the funding agreement delivers safe and ethical supports and services to people with disability.

For example, if a service funded under the Bill allowed people with disability to choose among a number of similar providers, releasing information in relation to significant breaches of the code of conduct would assist people with disability to exercise informed choice and control in relation to the supports they receive.

This exclusion of merits review of a decision to publish information about non-compliance is also consistent with other safeguarding schemes, including under the *National Disability Insurance Scheme Act 2013* (NDIS Act). Specifically, the NDIS Quality and Safeguards Commission must maintain and NDIS provider register and publish (amongst other things) details about a provider's non-compliance with the conditions of a provider's registration under subsection 73ZS(7) of the NDIS Act. This action is required by law, and therefore not subject to merits review.

Further, it may be necessary in some circumstances to release information about the Commonwealth's response to breaches of statutory funding conditions, particularly breaches of the code of conduct by a service provider. Providing transparency about how the Commonwealth responds to the unethical and unsafe delivery of supports or services to a person with disability is critical to maintaining trust in programs delivered for the benefit of people with disability.

In relation to clause 21, whether the exclusion of merits review from decisions made under clause 21 of the bill is in line with Administrative Review Council's guidance document, *what decisions should be subject to merits review?*

Clause 21 of the Bill relates to the decision of an accredited certification body to grant a certificate of compliance to a person for meeting compliance standards. The decision of an accredited certification body under clause 21 is not subject to merits review. While the ARC guidance does not recognise this type of decision as a ground for excluding merits review, it is justifiable in this instance.

The certification process (including subsequent surveillance and re-certification audits) is undertaken collaboratively between an accredited certification body and a person who has requested a certificate of compliance. In practice, any nonconformities are identified and the person is given the opportunity to agree and take steps to remedy these before a certification body makes a decision on granting, varying or revoking a certificate of compliance under clause 21.

Given the collaborative certification process, and the ample opportunities that a person will have to rectify any non-conformities before a decision is made, it is appropriate to exclude merits review in this instance. Further, the process of auditing entities and proving certificates of compliance to people who will be undertaking a regulated activity is a critical aspect of the quality and safeguarding regime under the Bill. As noted above, the necessity to comply with the CRPD and protecting people with disability from exploitation harm and abuse should be balanced with the availability of merits review.

In relation to clause 21, whether an aggrieved party would be provided with reasons for a refusal or internal merits review by the relevant certification body.

In the event that an accredited certification body refuses to grant a certificate of compliance for a regulated activity on the basis that the certification body is not satisfied that the person complies with the compliance standards, the body must as soon as practical after refusing the request, give written notice of the refusal to the person under subclause 21(4). Similarly, a certification body must give written notice of a revocation or variation of a certificate of compliance to a person under sub-clauses 21(6) and 21(9) respectively.

As outlined above, in practice audit findings are discussed with the service provider prior to finalisation, and prior a decision being made on whether to grant, revoke or vary a certificate of compliance. Service providers are given an opportunity to respond and work with the certification body to identify and undertake steps to rectify any non-compliance. This effectively negates the need for an internal merits review process. In addition, a person aggrieved by a decision of a certification body would also be able to raise complaints about the process with the certifying body.

The intent of a certification body assessing compliance with relevant standards is to ensure that the process is entirely independent of the Commonwealth. This means that individual decisions by the certification body are not, and should not, be subject to internal merits review by the department.

In relation to clause 26, whether an aggrieved party would be provided with reasons for a refusal or internal merits review by the relevant accrediting authority.

Certification bodies who are refused accreditation by the accrediting authority will be provided with reasons for the refusal by the accrediting authority and would have recourse through the accrediting authority's internal complaints process.

Paragraph 25(1)(b) requires the Secretary to be satisfied that an accredited authority will perform its functions in an independent and impartial way. Part of this decision making process will be ensuring that an accrediting authority has appropriate internal controls and complaints processes.

The intent of appointing an accrediting authority is to ensure that decision making process is independent of the Commonwealth. This means that individual decisions by the accrediting authority are not, and should not, be subject to internal merits review by the department.

In relation to clause 26, whether and on what basis the decisions made under clause 26 would be subject to judicial review.

Decisions made by an accrediting authority under section 26 of the Bill are administrative in nature and subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

A reviewable decision under section 3 of the ADJR Act includes a decision of an administrative character made, proposed to be made or required to be made under a Commonwealth Act or instrument. Paragraph 3(2)(b) of the ADJR Act provides that a reference to the making of a decision includes reference to, among other things, giving or refusing to give approval.

A decision under clause 26 of the Bill is a decision of administrative character as it requires a decision about whether a person will perform certain functions (set out in clause 21 of the Bill) competently and impartially. This is the application of law to particular circumstances. As the decision is made pursuant to the Bill, it is a decision made under a Commonwealth Act.

Decisions that would be subject to judicial review under clause 26 include a decision not to grant accreditation as an accredited certification body (subclause 26(3)) and to withdraw accreditation as an accredited certification body (subclause 26(4)).

I trust that the above will be of assistance in your consideration of the Bill.

Amanda Rishworth MP

2 / 11/ 2023

The Hon Mark Butler MP
Minister for Health and Aged Care

Senator Dean Smith
Chair
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Dear Chair Dean

I refer to the Senate Scrutiny of Bills Committee (Committee) request for further information on the Public Health Tobacco and Other Products Bill 2023 (Bill) in Scrutiny Digest 12 of 2023.

The Committee has requested my detailed advice on aspects of the Bill as they relate to immunity from civil liability, reversal of evidential and legal burden of proof and delegation of administrative powers.

I ask that the Committee consider my responses in concert with the objects of the Bill.

The objects of the Bill are to improve public health by discouraging smoking and the use of regulated tobacco items, encouraging people to give up smoking and to stop using regulated tobacco items. To give effect to certain obligations that Australia has as a party to the World Health Organisation Framework Convention on Tobacco Control and address public health risks posed by vaping and e-cigarette products.

In support of these objects, it has at times been necessary to include reverse evidential and legal burdens. These have been included while seeking to strike an appropriate balance between effective regulation and the presumption of innocence. Similarly, it has been necessary to provide for immunity for protected persons acting in good faith and to confer monitoring and investigation powers on any person to assist an authorised officer.

The specific approach in the Bill recognises that tobacco products are unlike any other legal consumer product. Tobacco use contributes to health burden in Australia more than any other risk factor. Use of tobacco products causes people to die earlier than they otherwise would and to endure poorer quality of life while they are alive. They harm the health of people who smoke and people who do not, including infants and unborn children. In 2018, tobacco use was estimated to kill almost 20,500 Australians.

I submit to the Committee that the provisions have been drafted with appropriate consideration, given the need to give effect to the objects of the Bill.

I trust that the enclosed information provides further context in relation to the matters of interest, and I thank the Committee for its consideration of this important legislation.

Thank for writing on this matter.

Yours sincerely

Mark Butler

09/11/2023

Encl (2)

ATTACHMENT A: Additional information

Response to Scrutiny of Bills Committee Digest 12 of 2023 – Public Health (Tobacco and Other Products) Bill 2023

Immunity from civil liability

The committee requests the Minister's more detailed advice as to why it is considered necessary and appropriate to confer immunity from liability on the minister, secretary, authorised officers and persons acting under authorised officers in clause 183 of the bill.

The overarching purpose of clause 183 is to protect the Minister, Secretary, authorised officers and persons acting under the direction or authority of authorised officers against personal civil liability where they are performing or exercising legislated requirements in good faith. As noted in the explanatory memorandum, the immunity from civil liability for acts or omissions done in good faith would support efficiency in decision making. Additionally, it would ensure that protected persons are free to perform their functions without concern that their personal interests would be at risk. The immunities relate to individuals and not the Commonwealth. It would remain open to an affected person to seek a remedy from the Commonwealth, even if they could not seek a remedy from a protected individual where they have acted in good faith.

There is a well-established body of evidence that demonstrates that the tobacco industry has operated for decades with the intention of subverting the role of governments in developing and implementing public health policies to combat the tobacco epidemic. These operations include a history of litigious activity. In this context, conferral of immunity from civil liability when performing functions and powers in good faith prevents the ability for civil proceedings to be utilised to undermine or put at risk actions undertaken by protected persons.

Remedies are also available under the Scheme for Compensation for Detriment caused by Defective Administration (known as the CDDA Scheme) which provides a mechanism for a Non-Corporate Commonwealth Entity (NCE) to compensate people who have experienced detriment as a result of the NCE's defective administration. Nothing in the Bill would prevent the pursuit of a remedy under this scheme.

Reversal of the evidential burden of proof

As the explanatory materials do not adequately address this issue, the committee requests the Minister's further detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) for the defences listed in subclauses 19(3) and 42(3) under Chapter 2 of the bill.

The approach adopted for subclauses 19(3) and 42(3), of treating these as offence-specific defences which reverse the evidential burden, continues the approach for permitted publications that applies under the *Tobacco Advertising Prohibition Act 1992*. However, a more modern drafting approach is adopted such that the provisions are differently presented and the appropriateness of ongoing specific defences has been considered and reflected in the Bill. The drafting reflects a shift in the approach regarding what constitutes advertising and publishing to provide additional clarity. This results in more areas being treated as permitted publication offence-specific defences rather than outside of the definition of advertising or publishing. In relation to permitted publications under clauses 19 and 42, consideration has been given to the need to adopt a simplified and accessible drafting approach such that some, but not all, matters for which there is a reverse evidential burden

are peculiar to the knowledge of the defendant. These provisions reflect that it would be overly onerous for the prosecution to need to discount the possibility of a permitted publication exception. Therefore, the provisions have been drafted with appropriate consideration given to balancing the needs of effective law enforcement and the presumption of innocence.

The exception for permitted publications reflects that the matter, or relevant facts and evidence, may be peculiar to the knowledge of the defendant. In addition, as a matter of practicality, it would be readily accessible for the defendant to provide evidence in relation to an applicable permitted publication exception. For example, in relation to the permitted publications exception for trade communications it would be peculiar to a defendant's knowledge who they had provided, and intended to provide, such communications to. They could provide evidence of mailing receipts/sent items/address lists (either electronic or physical) to show that trade communications were only sent to entities involved in tobacco distribution and not to members of the public.

It would be overly onerous and costly for the prosecution to consider the possibility of each exception. The streamlined provisions will likely improve access to the law rather than treating the different permitted publications in varying ways.

The committee also requests the Minister's justification as to the requirement to reverse the evidential burden of proof in relation to the other categories of defences under Chapter 3 of the bill.

The provisions in Chapter 3 which reverse the evidential burden have been drafted in careful consideration and taking a consistent approach to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide to Framing Offences). These provisions adopt a similar approach of reversing the evidential burden of proof for certain categories of defences as is applied under the *Tobacco Plain Packaging Act 2011*. In particular, where the evidential burden was reversed consideration was given to the following circumstances:

- the matter is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Each of the proposed provisions that reverses the evidential burden makes this clear on the face of the provision in a legislative note. It is appropriate that the evidential burden for showing each exception rests with the defendant. The exceptions represent a balanced compromise between the needs of effective law enforcement and the presumption of innocence.

Further detail regarding how the relevant matters are peculiarly within the knowledge of the defendant and more difficult for the prosecution to disprove than for the defendant to establish is outlined below for the common exceptions which occur across clauses 93, 94, 95, 96, 99, 100, 103, 104, 107, 108, 109, 110, 113, 114, 117 and 118. Clause 120 is also specifically addressed below.

Explanation for common exceptions across Chapter 3

Where the defendant seeks to rely on the **exception for sale, supply, possession or purchase of cigars in non-compliant retail packaging for individual resale**, it is peculiarly within the knowledge of the defendant as to whether they had a 'reasonable belief' that the retailer intends to correctly package each cigar individually for retail sale as a single cigar. It would be significantly more difficult for the prosecution to adduce evidence as to the state of mind of the defendant and much more efficient and less costly for the defendant to establish the relevant matters for the exception.

Where an individual **purchases or is in possession of a tobacco product for personal use** this purpose will be peculiar to the knowledge of the defendant. It would be significantly more onerous for the prosecution to adduce evidence on this point than it would be for the defendant to establish this matter.

Where the defendant seeks to rely on the exception that the **manufacturer has taken all reasonable steps to ensure that retail packaging complies** with tobacco product requirements it will be peculiarly within the knowledge of the defendant what these reasonable steps were. Such steps will be likely specific to manufacturing processes and it would be significantly more difficult for the prosecution to adduce evidence as to the steps that were taken and the reasonableness of those steps and much more efficient and less costly for the defendant to establish the relevant matters for the exception.

Where the defendant seeks to rely on the exception for **possession in the course of repackaging or intention to repackage the products into compliant packaging** this will be a defence. It will be peculiar to their knowledge what their actions or intentions were while in possession of the products. The defendant's processes for repackaging tobacco products would also be peculiar to the knowledge of the defendant. There may be consideration of any steps they had individually taken to do this and reference to the timing of actions taken. The facts and matters going towards this exception would be readily available to the defendant but would not be easily accessible to the prosecution. It would be significantly more onerous for the prosecution to adduce evidence on this point than it would be for the defendant to establish this matter.

Individuals who purchase or are in possession of non-compliant products **in the course of compliance and enforcement activities**, or exercising powers under or in relation to, this Bill, would readily be able to produce the information indicating that they were in that role engaging in the activity for that purpose. While it is the case that the prosecution could ascertain the status of a person, this information is intrinsically associated with the person in their role and accordingly they could readily provide, for example, evidence they are an authorised officer. Along with establishing that they were in the relevant role they would also be able to provide evidence that in relation to the particular conduct they were acting within that role. It would be significantly more difficult for the prosecution to do this than for the defendant to readily discount it.

In regard to the export exception in **clause 120**, a number of the facts and matters relating to the satisfaction of the export conditions are likely to be peculiar to the knowledge of the defendant. For example, the export condition in paragraph 3(f) which relates to contracts or arrangements entered into, will potentially reflect confidential international business dealings that the prosecution could not readily gain evidence of. This may occur if an Australian based company holds a contract to supply tobacco products to a foreign jurisdiction that does not have the same packaging requirements. It is more appropriate that the defendant provide this evidence which they would have easy access to. It would be significantly more difficult for the prosecution to adduce this than for the defendant to establish the matter. Therefore, it is an appropriate compromise between the needs of effective law enforcement and the presumption of innocence.

Reversal of the legal burden of proof

As the explanatory materials do not sufficiently justify this matter, the committee requests the minister's advice as to why it is proposed to reverse the legal, rather than evidential, burden of proof in relation to clause 17 and subclauses 19(9), 20(4), 42(9) and 43(4).

The objects of the Bill are to improve public health by discouraging smoking and the use of regulated tobacco items; encouraging people to give up smoking, and to stop using regulated tobacco items; to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control (as defined); and to address the public health risks posed by vaping and the use of e-cigarette products.

The approach recognises that tobacco products are unlike any other legal consumer product. Tobacco use contributes to health burden in Australia more than any other risk factor. Use of tobacco products causes people to die earlier than they otherwise would and to endure poorer quality of life while they are alive. They harm the health of people who smoke and people who do not (including infants and unborn children). In 2018, tobacco use was estimated to kill almost 20,500 Australians.

Accordingly, in a small number of areas it has been considered appropriate to reverse the legal burden of proof to support the effectiveness of the overarching regulatory approach adopted. This reflects a balanced compromise between the needs of effective law enforcement and the presumption of innocence.

The Guide to Framing Offences highlights that the reversal of the legal burden should be pursued only with strong reasons and should be kept to a minimum. Offences in the Bill where the reversal of legal burden has been applied have been kept to a minimum and applied only to one element of the offence. It will remain necessary for the prosecution to prove the remainder of the elements of each offence.

The reverse onus provisions are appropriate because they relate to elements which would be extremely difficult for the prosecution to prove and it would likely be more straightforward for the accused to prove a fact than for the prosecution to disprove it. The nature of the regulatory regime in this area is such that its effectiveness will at times be dependent on the operation of rebuttable presumptions. The matters are peculiar to the knowledge of the defendant and would be more onerous for the prosecution to prove, but beyond that the reversal of the legal burden is in support of the objects of the Bill and the effective administration of the regulatory regime.

Clause 17

The defendant bears a legal burden in clause 17 to prove that tobacco products are not intended to be offered for retail sale. However, the circumstances in which the reverse burden of proof applies are narrow. Unless the contrary is proved, a tobacco product is presumed to be offered for retail sale if an amount of the tobacco product is on physical premises from which regulated tobacco items are sold by way of retail sale or supplied to fulfil a retail sale; and the amount exceeds the amount prescribed by regulations made for the purposes of this paragraph.

The offences in relation to tobacco product requirements are directed to ensuring that tobacco products that do not meet the requirements such as those for plain packaging, are not sold to the consumer. The rebuttable presumption facilitates prosecutions in circumstances where it is reasonable to presume that the tobacco products are for retail sale i.e. they are in a shop or wholesale facility that sells or supplies tobacco. The presumption is limited to only one element of

the offence and it would continue to be the case that the offence as a whole would need to be proven by the prosecution. In addition, the prescribed amount of personal use (to be set in the regulations) will make it even less feasible that the tobacco products are not for retail sale. This is because it is unlikely that the tobacco products will be for personal use rather than retail sale in circumstances where the amount of the product exceeds the prescribed amount.

This is a proportionate and reasonable approach given the objectives of the Bill and the potential ability for the defendant to otherwise raise doubt by asserting merely that the product is not for retail sale in circumstances where this would seem highly improbable. It may be that prosecutions would be erroneously held up if it was necessary to establish that there was an intention to sell the goods for retail purposes when it is a reasonable inference that is the intended purpose.

In the event that the defendant needs to discharge the burden because the product is not for retail sale, they would need to prove this on the balance of probabilities. For example, if a person who smokes cigarettes is operating a retail store, they could claim that the detected product is for their own personal use where the amount exceeds the prescribed amount if they could provide evidence that they were a very heavy smoker.

Subclauses 19(9) and 42(9)

With regard to subclauses 19(9) and 42(9), the legal burden is imposed on the individual as a proportionate and reasonable approach to achieve practicality for the prosecution. It means that an individual has a right of publication open to them but they will have the burden to prove that that publication is 'individual publication'. This approach is adopted in consideration of the difficulty that would be involved in proving an individual has received a direct or indirect benefit for publishing a tobacco advertisement. As a matter of effective administration of this provision it is more appropriate that the burden be on the individual to show that no direct or indirect benefit was received by the individual. It would be more open to the defendant to provide that the defence of individual publication was substantiated and this is therefore considered a reasonable and proportionate approach.

Subclauses 20(4) and 43(4)

The rebuttable presumptions in subclauses 20(4) and 43(4) are considered a reasonable and proportionate approach in recognition of the objects of the Bill and the need to prohibit tobacco advertisements and e-cigarette advertisements as an important public health measure. The rebuttable presumption applies only to this one element of the offence and the prosecution would still need to prove the offence as a whole. The presumption facilitates prosecutions in circumstances where it would otherwise be overly technical for the prosecution to prove that an item, such as a trademark, was promoting tobacco or e-cigarettes. It is considered an appropriate balance between enforcement to uphold the regulatory scheme and the presumption of innocence.

The intention to deter such tobacco and e-cigarette advertising further justifies the approach adopted. It would be unproductive for the prosecution to be required to establish that such things as a logo which is evocative of a trade mark associated with regulated tobacco items or e-cigarette products is promotional and therefore tobacco advertising or e-cigarette advertising. It would also be contrary to the wider premises adopted in the legislation as to what constitutes product promotion.

The committee requests the minister's detailed advice as to the types of material expected to be captured by subclauses 20(4)(c) and 43(4)(c). The committee also requests the minister's advice as to how it is anticipated a defendant would be able to rebut a presumption as to whether material is a tobacco or e-cigarette advertisement where the presumption has arisen due to the operation of subclauses 20(4)(c) or 43(4)(c).

Subclauses 20(4)(c) and 43(4)(c) are included with the intention of addressing attempts to subvert advertising prohibitions in circumstances such as those described. These attempts have been made by entities utilising such things as logos which look like, and are therefore recognisable as, tobacco product trade marks but depart from the specific trade mark.

An example of the types of material expected to be covered by subclauses 20(4)(c) and 43(4)(c), which is one that has occurred in practice, is that of a race car at a racing event displaying a logo or design insignia which is evocative of a trade mark that is or has been associated with regulated tobacco items. Despite no longer being able to display the Marlboro logo on Ferrari cars, Philip Morris's sponsorship of Ferrari was seen visually on the Ferraris at the 2018 Japanese Grand Prix, through the use of the cigarette company's "Mission Winnow" branding. This branding has been alleged to be being used as an attempt to flout laws and rules banning tobacco advertising by utilising logos that are evocative of tobacco trade marks, in this case a logo that is similar to the widely recognisable logo of Marlboro.

In Australia, the Mission Winnow logos were removed by Ferrari for the 2019 Australian Grand Prix after an investigation was launched. This investigation was ultimately effective under the Victorian legislation but highlighted an area that could be more clearly addressed by Commonwealth legislation. The subclauses provide that a logo that is evocative of a trade mark associated with a regulated tobacco item, or has been such a trade mark, should not be able to be utilised to subvert prohibitions on tobacco promotion and advertising. The effect of the presumption is that the logo on the car in the example outlined above would be taken to be tobacco advertising or e-cigarette advertising, because it is an item which promotes tobacco or e-cigarettes by being evocative of a tobacco or e-cigarette trade mark, without the prosecution needing to prove it to be such.

It is likely that the approach to rebut the presumption would be equivalent to how evidence is adduced in an intellectual property or copyright case, such that there may need to be evidence from focus groups or consumers as to the perceived 'promotional' nature of the item. One such example could include a product which is intended as satire that uses a trade mark. A focus group survey could support the view that the use of the trade mark on that product was not having the effect of promoting tobacco or e-cigarettes and rather that it might be being utilised with the opposite effect. Alternatively, there may be a scenario where a design or insignia appearing on goods resembles tobacco or e-cigarette logos or trade marks at face value. A person might seek to rebut the presumption that the logo or trade mark is promoting a tobacco product by providing information about the development of the design or insignia used.

The requirement for a defendant to need to rebut the presumption is balanced against the consideration that it would be unproductive for the prosecution to need to establish that such things as trade marks that are clearly evocative of tobacco insignia are promoting tobacco. This kind of material is generally recognised as advertising for the purposes of the Bill as these are the kinds of items that are already restricted or prohibited from being included on tobacco packaging. The rebuttable presumption reflects the inherently promotional nature of these items and supports the objectives of the regulatory scheme by providing that the prosecution need not prove this aspect of

the offence. Accordingly, the inclusion of the presumption appropriately balances the right to the presumption of innocence and the effective administration of the regulatory scheme.

Broad delegation of administrative power

The committee therefore requests the Minister's advice as to why it is necessary to confer monitoring and investigation powers on any person to assist an authorised officer and what qualifications, training or experience a person assisting will be required to have in order to be appointed.

Subclauses 154(11) and 156(10) are consistent with the standardised regulatory framework for government investigation provided under the *Regulatory Powers (Standard Provisions) Act 2014*. The approach is also consistent with that taken in the *Tobacco Plain Packaging Act 2011* and *Tobacco Advertising Prohibition Act 1992*.

There may be a number of reasons where it is appropriate for an authorised person to seek assistance from another person within certain circumstances. For example, this may be for workplace health and safety reasons, administrative or operational assistance to provide increased efficiencies, or other technical specialist skills that are relevant and necessary for conducting monitoring or investigation. When a person provides assistance to an authorised officer, the assisting person is required to act under the direction of the authorised officer at all times. The training, experience and qualifications of the authorised officer will allow them to manage and direct assisting persons to ensure that the assistance is provided in a manner that is consistent with the intent of the legislation, and without impinging on the rights of the owner of the premises or other persons present in the premises.

It would not be appropriate to require authorisation, or specific training or qualifications of a person providing assistance, as there may be times when the function of the assisting person is not directly related to the analysis of products for compliance with the tobacco product requirements, but critical nonetheless. For example, the use of a locksmith, data forensics analyst, police, or other law enforcement officers would be dependent on their technical skills and capability but would not require qualifications or training related to the provisions in the Bill. These persons when required can provide important functions in assisting an authorised officer in the execution of the powers provided for under the Bill.

THE HON DR ANDREW LEIGH MP

ASSISTANT MINISTER FOR COMPETITION, CHARITIES AND TREASURY
ASSISTANT MINISTER FOR EMPLOYMENT

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

Dear Senator

I am writing in response. I am writing in response to the Senate Standing Committee for the Scrutiny of Bills' comments in Scrutiny Digest 12 of 2023 in relation to the Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023.

I acknowledge the important role of the Committee in assessing legislation against its scrutiny principles, and I appreciate the time the Committee has taken to review and Bill, and I thank the Committee for providing its comments.

I enclose my response to the Committee's enquiries about the Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023 (the Bill) for its consideration (please refer to Attachment A).

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

Thank you again for your letter.

Yours sincerely

Andrew Leigh

ATTACHMENT A

Schedule 3 to the Bill

New class of deductible gift recipients

In your letter, you sought my advice as to:

- the penalty amounts that are anticipated to be set out in delegated legislation in relation to the specified provisions; and
- any further guidance as to how these penalties will be formulated, including whether the Bill can be amended to include guidance, factors to be considered, or a cap on the amounts that can be set out in delegated legislation.

Penalty amounts to be set out in legislative guidelines

By way of context, currently section 426-120 in Schedule 1 to the *Taxation Administration Act 1953* (the Act) interacts with the administrative penalty provisions in the *Taxation Administration (Private Ancillary Fund) Guidelines 2019* and the *Taxation Administration (Public Ancillary Fund) Guidelines 2022* (the ancillary fund guidelines) in the following way. Section 426-120 creates liability on the part of an ancillary fund's trustees for holding out the fund as endorsed, or entitled to be endorsed, as a deductible gift recipient, if that is not the case. The ancillary fund guidelines impose specific obligations on trustees of ancillary funds. Each breached obligation constitutes a holding out for the purposes of the Act. This is because the criteria for entitlement to endorsement, set out in the *Income Tax Assessment Act 1997*, include compliance by an ancillary fund and its trustees with the guidelines. Hence, the Act and guidelines are designed to work in tandem as an integrated mechanism to maintain the integrity of the deductible gift recipient scheme. As you have inferred, the Bill would extend the operation of section 426-120 to community charity trusts in the same way as ancillary funds, and would insert a mirror provision relating to community charity corporations.

The penalty amounts in the ancillary fund guidelines were formulated in accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* published by the Attorney-General's Department. They are comparable to administrative penalty amounts set by other schemes in respect of similar infractions. Additionally, I note that administrative penalties are imposed by law and collected by the Commissioner of Taxation, as opposed to civil penalties which may only be imposed by courts. Affected entities can seek both internal and external review of a decision by the Commissioner to collect an administrative penalty (or not remit an administrative penalty), including through the Administrative Appeals Tribunal.

As indicated in the explanatory material relating to this measure, the *Taxation Administration (Community Charity) Guidelines 2023* (community charity guidelines) will be very closely modelled on the ancillary fund guidelines. The two existing sets of ancillary fund guidelines set out identical penalty amounts for contraventions of the same, or very similar, administrative penalty provisions. The administrative penalty provisions in the draft community charity guidelines, in turn, will be either identical or very similar to those in the ancillary fund guidelines. Penalty amounts will be exactly replicated. They are all in the low range, from 10 to 30 penalty units.

Because the regulatory regimes for ancillary funds and community charities are intended to operate in the same manner, it is appropriate to adopt the existing administrative penalty framework for this new class of deductible gift recipients, including by setting identical penalty amounts. Further, I understand that a number of the community charities either were formerly ancillary funds, or are part of umbrella organisations that include ancillary funds. This supports the approach of maintaining consistency of treatment wherever possible.

Guidance as to how penalties will be formulated

As indicated above, the penalty amounts in the draft community charity guidelines are identical to those in the existing ancillary fund guidelines. For this reason, I do not consider it necessary to amend the Bill to include guidance, factors to be considered, or a cap on penalty amounts, given the intention is to largely extend the existing regulatory framework applying to ancillary funds to community charities, a system now in place for nearly two decades and operating effectively as evidenced by sunsetting reviews undertaken into each of the ancillary fund guidelines.