The Hon Clare O'Neil MP
Minister for Home Affairs
Minister for Cyber Security

Ref No: MC23-004538

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
scrutiny.sen@aph.gov.au

Dear Senator Dean

Response to the Senate Scrutiny of Bills Committee - Scrutiny Digest 1/23 - Customs Legislation Amendment (Controlled Trials and Other Measures) Bill 2022

I refer to the matters raised by the Senate Scrutiny of Bills Committee (the Committee) in the Scrutiny Digest 1 of 2023 for advice in relation to the Customs Legislation Amendment (Controlled Trials and Other Measures) Bill 2022 (the Bill). I welcome the opportunity to respond to the Committee's comments, as outlined below.

Committee questions related to use of delegated legislation in the Bill
The Committee requested more detailed advice as to why it is considered necessary and appropriate to leave almost all of the information relating to the scope and operation of the new Customs time-limited trial scheme to delegated legislation; and whether the bill could be amended to include further guidance regarding these matters on the face of the primary legislation.

The Bill future proofs Customs legislation to be agile enough to respond to rapid developments in international trade. To support continued efforts under the Simplified Trade System (STS) agenda and ensure regulation is fit for purpose, the Australian Border Force (ABF) requires flexibility regarding scope and operation for controlled trials.

Placing the framework for establishment of trials in delegated legislation provides greater flexibility regarding scope and operation of trials within trial rules, so long as they are within scope of the controlled trial provisions. It also ensures that potential applicants are not accidentally or unreasonably excluded. The framework provisions set out in Part XB of the Bill provide necessary limits on the scope of how sandboxes are established and monitored. It would not be reasonably possible nor practical to anticipate every possible future sandbox in primary legislation. Nor would it be appropriate as these amendments contemplate future trials that necessarily involve technical system requirements or respond to business processes and innovations not currently in place.

If the Customs Act needed to be amended each time the scope or operation of a trial needed to be changed, it would likely cause crucial delay to the trial due to waiting for the amendments. This would undermine the policy intent of the Bill, frustrate trial participants and impact the ABF's ability to arrange and conduct trials.

Administering controlled trials in delegated legislation, rather than the Customs Act, enables trials to be managed with greater certainty and a timelier manner, which is essential given short trial timeframes of 12 months (plus up to 6 months).

As a safeguard, the scope of the Bill is intentionally contained to those areas in which Controlled Trials would be appropriate. For example, provisions that relate to prohibited imports and exports or international obligations have been specifically excluded, as any flexibility in the operation of these provisions may create unacceptable risk to the Australian community.

Moreover, every element of trial rules and controlled trial provisions, including scope and operation, will be set out in trial rules, and will still be subject to parliamentary oversight and potential disallowance. The Comptroller-General of Customs will approve these and cannot delegate this power and responsibility.

Disallowance of legislative instruments made under ss 273EA(1) of the Customs Act
The Committee requested more detailed advice as to whether the Bill could be amended to provide that legislative instruments made under subsection 273EA(1) of the Customs Act are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.

I note that previous *Notices of Intention to Propose a Customs Tariff Alterations* (the Notices) have not previously been subject to disallowance. These Notices are the first step in a process that is already subject to Parliamentary scrutiny. A Notice ceases unless the related Customs Tariff Proposal is tabled within seven sitting days of Parliament and, to be made permanent, Parliament must pass a bill within twelve months past the tabling of the related Customs Tariff Proposal. Parliamentary oversight occurs when the related bill is debated in both Houses of Parliament.

Disallowance would not add an extra level of scrutiny per se. The House of Representatives can already consider and debate the related Customs Tariff Proposal, the timing of which would overlap with disallowance timeframes. The Scrutiny of Delegated Legislation Committee could still ask questions about the Notice and these questions could certainly inform the House of Representatives' consideration of the related Customs Tariff Proposal.

If a Notice is disallowed before the equivalent Customs Tariff Proposal could be moved in Parliament, the measure would lapse and the Department of Home Affairs would be exposed to litigation against Customs officers collecting the duties provided for in the Notice. While the related Customs Tariff Proposal (and subsequent bill) could still be made, the legislative intention of the process would be undermined. Given that these legislative instruments can enable measures to commence retrospectively by up to six months in certain cases, this may have a substantial impact on businesses and impact on the Government's revenue collection processes. Importers would be required to change their processes with little forewarning, as there would be little capacity to provide greater certainty through communication or to mitigate the impact on businesses (as occurs when primary legislation is amended or repealed). Importers would be required to apply for refunds of customs duties paid since the commencement of the measure or to pay additional customs duties.

These Notices are often used where the timing and requirements of drafting legislation and Parliamentary debate make the passage of legislation impractical, for example in response to a global pandemic or an international conflict. The medical and hygiene goods concession, which provided a 'Free' rate of customs duty for goods such as face masks and gloves during the COVID-19 pandemic, commenced through these instruments. Disallowance of this instrument or any of the subsequent instruments that extended this measure would have re-imposed barriers to the importation of these goods. Similarly, the commencement of the 'Free' rate of customs duty for Ukrainian goods occurred through these legislative instruments. Disallowance prior to the tabling of a Customs Tariff Proposal would have resulted in the collection of duties for Ukrainian goods that had been imported since the commencement of the measure, resulting in reputational risks for the Australian Government.

I thank the Committee for its consideration of this important Bill.

Yours sincerely

CLARE O'NEIL

30/3 /2023

The Hon Jason Clare MP
Minister for Education

Reference: MC23-001361

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
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By email: scrutiny.sen@aph.gov.au

Dear Chair

I am writing in response to correspondence of 23 March 2023 on behalf of the Senate Standing Committee for the Scrutiny of Bills, regarding Scrutiny Digest 3 of 2023 in relation to the Education Legislation Amendment (Startup Year and Other Measures) Bill 2023.

The Committee has requested advice as to why it is necessary and appropriate not to provide that independent merits review will be available in relation to a decision made under subsection 128B–30(6) and section 128E–30 of the Bill.

Subsection 128B-30(6) outlines that a student does not meet the citizenship or residency requirements in relation to an accelerator course if the higher education provider reasonably expects that the student will not undertake any of the accelerator course in Australia. Section 128E–30 relates to reversal of STARTUP-HELP assistance if the Secretary is satisfied that the person was not entitled to receive STARTUP-HELP assistance for a course with a provider.

Generally, the provisions in the Bill mirror the equivalent provisions relating to FEE-HELP and HECS-HELP in the *Higher Education Support Act 2003* (HESA) in so far as they are not reviewable decisions under section 206 of HESA.

Subsection 128B-30(6)

The Administrative Review Council guidance document *What decisions should be subject to merit review?* sets out some circumstances in which merits review is unsuitable (Chapter 3) and where it is reasonable to exclude decisions from merits review (Chapter 4). One of these circumstances is where the decision is procedural in nature, and where merits review would lead to a significant delay. Regarding STARTUP-HELP, students apply to undertake Accelerator Program Courses at higher education providers, which are bespoke and determined by the availability of particular educators. Noting this, decisions under subsection 128B–30(6) are not suitable for merits review as the time to undertake a particular Accelerator Program Course would very likely have passed by the time that such a decision was considered.

Another ground for excluding merits review relates to decisions involving the allocation of finite resources between competing applicants. As announced by the Australian Government, there will be up to 2000 STARTUP-HELP loans allocated each year and overturning a

decision under subsection 128B–30(6) that an individual is not eligible for STARTUP-HELP would result in a STARTUP-HELP loan being unavailable for another eligible student.

Further, while the higher education provider is responsible for assessing and determining a student's eligibility for HELP, the eligibility criteria is prescribed by HESA. Students are required to submit an electronic Commonwealth Assistance Form, which includes a declaration that they are intending to study at least one unit of study in Australia, this helps to ensure eligibility requirements are met and to facilitate transparent decision making.

Section 128E–30

The Administrative Review Council guidance document *What decisions should be subject to merit review?* sets out that automatic decisions, that is decisions that arise where there is a statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances, are unsuitable for merits review. Decisions under section 128E–30 are unsuitable for merits review, as the Secretary's power to reverse an amount of STARTUP-HELP assistance is a consequence of an individual being assessed as not entitled to receive such assistance. Whether or not a person is entitled is a matter of fact, and therefore is an automatic decision for the Secretary.

Finally, section 19–45 of HESA provides that higher education providers have student grievance and review procedures to deal with academic and non-academic matters which include formal arrangements with internal and external review mechanisms by an independent body, nominated by the provider or the State Ombudsman in the case of public universities. It is anticipated that where a student is dissatisfied with a decision, they would engage in a formal grievance process.

I trust this information is of assistance.

Yours sincerely

JASON CLARE

6 / 9 / 2023

The Hon Anika Wells MP
Minister for Aged Care
Minister for Sport
Member for Lilley

Ref No: MS23-900147

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Scrutiny.Sen@aph.gov.au

Dear ~~Chair~~ Dean,

I refer to correspondence of 31 March 2023 on behalf of the Senate Standing Committee for the Scrutiny of Bills (Committee), regarding the Inspector-General of Aged Care Bill 2023 (Bill).

I thank the Committee for its consideration of the Bill in Scrutiny Digest 4 of 2023, and note your request for advice regarding why the Bill would:

- Reverse the evidential burden of proof in subclauses 23(2) and 63(2).
- Provide a coercive power to enter non-Commonwealth premises in clause 50.
- Provide immunity to persons assisting the Inspector-General in clause 58, and impose an evidential burden on any person claiming this immunity in paragraph 61(1)(a).

I also note the Committee's comment regarding clause 70, which would provide immunity to certain persons when performing functions or duties, or exercising powers under the Bill in good faith. I address each of these four matters below.

Reversal of evidential burden in subclauses 23(2) and 63(2)
The Committee has requested advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in regard to subclauses 23(2) and 63(2) of the Bill.

It is appropriate to use offence-specific defences in subclauses 23(2) and 63(2) because it aligns with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Guide), and it ensures consistency with secrecy offences in other aged care laws.

The Guide states that offence-specific defences must only be used where:

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

The circumstances of a defendant's use or disclosure of information, and consequently whether they have been reckless as to its authorisation, is peculiarly within their knowledge, as only the defendant would be aware of the information they disclosed, the recipient, and the manner and purpose of its disclosure. To adduce evidence in circumstances where the Bill and Australian law authorises use and disclosure for a wide range of purposes would impose significant cost and difficulty upon the prosecution to disprove that the conduct was not authorised under any circumstances. Conversely, there is substantially less impost upon the defendant to establish their conduct was authorised as they may draw upon the knowledge peculiar to them and relevant evidence for this purpose.

The use of offence-specific defences also ensures consistency with other aged care laws, and this is likely to result in enhanced clarity and compliance. This is particularly relevant for subclause 23(2), which is likely to apply to persons who are subject to the secrecy provisions in the Aged Care Act 1997 (AC Act) and the Aged Care Quality and Safety Commission Act 2018 (ACQSC Act).

Coercive power to enter premises of non-Commonwealth premises in clause 50

The Committee has requested advice as to why it is necessary and appropriate for clause 50 of the Bill to provide entry to non-Commonwealth premises in the manner proposed, without applying the framework in Part 3 of the Regulatory Powers (Standard Provisions) Act 2014 (RP Act).

The scope of the entry power, and its alignment to a comparable oversight framework, are necessary and appropriate for the Inspector-General's functions and context.

Scope of premises

The scope of the coercive power to enter premises is necessary and appropriate to enable the Inspector-General to perform their functions in clause 10, which relate to oversight of the Commonwealth's administration of aged care laws, systems, and funding agreements.

The Inspector-General could not properly fulfil these functions without access to non-Commonwealth premises involved in the operation of aged care laws and programs.

It is envisaged that non-Commonwealth premises could include:

- 'quality assessors' under the ACQSC Act, who conduct site audits on behalf of the Aged Care Quality and Safety Commission
- recipients of advocacy grants made under part 5.5 of the AC Act.

The scope is similar to section 33 of the Auditor-General Act 1997 (A-G Act), which provides access to the non-Commonwealth premises of a 'Commonwealth partner' for the purpose of oversight.

The definition of Commonwealth partner in section 18B of the A-G Act includes a person or body who receives money from the Commonwealth and agrees to use that money for a Commonwealth purpose. The explanatory memorandum for the Auditor-General Amendment Bill 2011, which inserted section 18B into the A-G Act, explicitly refers to state and territory governments and private contractors as falling within the definition.

Comparable framework

Part 3 of the RP Act is not an appropriate framework for the Bill because it cannot be used to perform the necessary oversight functions. Accordingly, the entry power in the Bill is aligned to the A-G Act, which establishes a comparable oversight framework.

Section 38 of the RP Act provides that the Part 3 powers only apply to investigating offence and civil penalty provisions that the triggering Act prescribes as 'subject to investigation.' The only offence and civil penalty provisions in the Bill which could be prescribed are facilitative in nature. They ensure the necessary information is obtained, persons assisting the Inspector General are protected, and information is not disclosed to support the oversight functions.

In contrast, the intended purpose of the entry power in clause 50 is to conduct oversight of the Commonwealth's administration of aged care. Rather than investigate individual compliance with an offence or civil penalty provision, this oversight would focus on the overall effectiveness of aged care legislation, funding agreements, and administrative systems.

The distinct oversight purpose of Inspector-General makes the A-G Act the relevant comparator for the entry power in clause 50. Unlike the RP Act, the safeguard of entry by consent or warrant is unnecessary in an oversight context where the information gathered from a person or body is not being collected for the purpose of prosecuting that person or body. Likewise, the ability to take photos or video of the premises are unnecessary in an oversight context.

Bodies that operate in a similar oversight context, such as the Commonwealth Ombudsman, six Inspectors-General, Auditor-General and the National Anti-Corruption Commission, similarly do not use the framework in Part 3 of the RP Act.

Immunity for persons assisting the Inspector-General in clause 58

Protection from civil, criminal and administrative liability

The Committee has requested advice as to why it is necessary and appropriate for clause 58 of the Bill to limit a person's right to bring a legal action by providing immunity from liability to an individual making a qualifying disclosure.

Clause 58 of the Bill provides that a person is not subject to any civil, criminal or administrative liability, or subject to a contractual or other remedy, for making a disclosure that qualifies for protection under clause 57. Clause 57 provides that only a disclosure made to an official of the Office of the Inspector-General in response to a request or coercive notice from the Inspector-General can enliven the immunity – that is, where the Inspector-General is actively seeking information.

The provision of comprehensive information to the Inspector-General is critical to effective oversight of the aged care system, addressing systemic issues, and ultimately achieving improved outcomes for older Australians receiving aged care.

The immunity is necessary to enable an individual to provide assistance to the Inspector-General without fear of being subject to civil, criminal or administrative liability. In the absence of strong protections for individuals who provide assistance, there is a substantial risk that the Inspector-General's performance of their functions would be hampered due to an individual deciding to withhold important information.

The scope of the immunity preserves a person's right to bring a legal action in circumstances where disclosures are made with malicious intent or are false or misleading as provided for in clause 59. This immunity applies only to the act of disclosure itself, with any actions disclosed by the person and their liability for those actions remaining unaffected by the immunity as outlined in clause 60. Finally, the immunity does not extend to unsolicited disclosure because an individual cannot claim the immunity unless the Inspector-General has actively sought information from them.

In light of the above considerations, the immunity is necessary and appropriate to support the performance of the Inspector-General's functions.

Reversal of the evidential burden of proof

The Committee has requested advice on why it is necessary and appropriate for paragraph 61(1)(a) to reverse the evidential burden of proof by requiring a person to adduce evidence suggesting a reasonable possibility that the clause 58 immunity applies to them. I note the Committee also referred to the principles in the Guide regarding when it is appropriate to reverse the burden.

The principles in the Guide regarding the reversal of the evidential burden of proof apply in the context of offence-specific defences. The option of providing an offence-specific defence is contrasted with the option of including the matter as an element of an offence.

Clause 58 is not an offence-specific defence. It provides a broad immunity to persons who have made a qualifying disclosure from civil, criminal or administrative liability, or being subject to a contractual or other remedy.

Given the breadth of possible criminal and civil matters in which a person could be involved, it is not reasonable to assume that a prosecutor or plaintiff would know that an immunity may apply.

Conversely, it would be peculiarly within the knowledge of a defendant seeking to assert an immunity in the broad circumstances contemplated under the Bill that they had made disclosure qualifying for protection.

Immunity for protected persons performing functions or exercising powers in clause 70

The Committee has drawn senators' attention to its concerns regarding the limitation of a person's right to bring a legal action by clause 70 of the Bill, which would provide 'protected persons' with civil immunity.

The purpose of the immunity is to enable protected persons to confidently perform their functions and duties, and exercise their powers, without fear of personal liability for actions done in good faith.

As an independent statutory oversight body, the Inspector-General and persons assisting the Inspector-General would take a range of actions which could attract personal liability. Civil actions could arise from adverse comments in a report, or the manner in which coercive information gathering powers were exercised.

If the immunity was narrowed or not provided at all, protected persons could improperly limit their conduct to protect their personal interests. This would threaten the effective and independent oversight of the Commonwealth's administration of aged care. Such immunities are commonplace amongst independent statutory oversight bodies for this reason.

Given the scope of actions which 'purported' performance of functions or exercise of powers encompasses, the good faith qualifier is an important limiting factor and protection. It strikes an appropriate balance between protecting the exercise of functions or duties, and ensuring that malicious actions are not subject to protections.

The scope of protected persons to whom the immunity applies is appropriate because it is limited to the persons who may perform functions or duties, or exercise powers under the Bill, or assist in the performance of those functions or exercise of those powers. This scope precisely addresses the range of persons at risk of improperly cautious conduct raised above.

In light of the above considerations, this immunity does not unduly limit a person's right to bring a legal action as it is adapted and appropriate to the performance of the Inspector-General's functions and exercise of its powers.

I thank the Committee for raising these issues, and trust that my response will be of assistance.

Yours sincerely

Anika Wells

17 April 2023

cc: The Hon Mark Butler MP, Minister for Health and Aged Care
The Hon Ged Kearney MP, Assistant Minister for Health and Aged Care

The Hon Amanda Rishworth MP

Minister for Social Services

Ref: MB23-000230

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

Dear Mr ~~Smith~~ Dean

Thank you for your email dated 23 March 2023, concerning the Senate Scrutiny of Bills Committee Scrutiny Digest 3 of 2023 (the Digest) in relation to the Social Security (Administration) Amendment (Income Management Reform) Bill 2023 (the Bill).

I have had an opportunity to review the Digest and would like to address the Committee's concerns by answering the questions raised by the Committee as set out below.

(a) whether the criteria for the entry of participants to the Enhanced Income Management Regime set out at proposed section 123SDA is new compared to the criteria set out for the Income Management Regime; and if this is the case, why additional criteria are necessary

Proposed section 123SDA does not introduce new eligibility criteria or confer any additional discretionary powers on the Minister or Secretary for the enhanced Income Management (IM) regime compared to equivalent measures in the IM regime.

The eligibility criteria set out at proposed section 123SDA mirrors sections 123UCB and 123UCC in Part 3B of the *Social Security (Administration) Act 1999* (the Administration Act) which respectively establish the Disengaged Youth and Long term Welfare Payment recipient measures in IM.

The sections require, among other criteria, that a person's usual place of residence be within a specified state, territory, or area. Subsections 123UCB(4) and 123UCC(4) provide that the Minister may, by legislative instrument, specify these locations. The *Social Security (Administration) (Specified income management Territory – Northern Territory) Specification 2012* specifies the Northern Territory as the location in which these measures currently operate.

While section 123SD implements the Disengaged Youth and Long-term Welfare Payment Recipient measures of enhanced IM in the Northern Territory, proposed section 123SDA would allow these measures to operate in other areas. Those other areas would need to be specified in a legislative instrument.

This is consistent with the requirement to specify, by legislative instrument, areas in which these measures would apply for the purposes of IM. Proposed subsection 123SDA(2) is equivalent to subsection 123UCB(4) of the Administration Act, while proposed subsection 123SDA(6) is equivalent to subsection 123UCC(4).

(b) why it is necessary and appropriate to provide delegated legislation making powers at proposed subsections 123SDA(2) and 123SDA(6)

The Government is committed to consulting with and listening to a wide range of stakeholders, including First Nations leaders, women's groups, service providers, communities, people receiving welfare payments, and our state and territory government counterparts before making any reform to IM. This consultation will include further discussion on eligibility criteria.

Pending the outcome of that consultation, the Bill essentially recreates the same measures and powers for enhanced IM in Part 3AA of the Administration Act as are available for IM under Part 3B.

Providing consistency across IM and enhanced IM ensures we are able to facilitate an effective and efficient transition to enhanced IM whilst we consult on the long-term future of IM and enhanced IM. It also allows the flexibility to respond to the needs of communities identified throughout that consultation.

Any legislative instruments made under the proposed subsections must be consistent with best practice and the requirements of the *Legislation Act 2003*, and will not be made by this Government without robust consultation with affected groups and individuals.

I trust the above answers your concerns, and am pleased to have been of assistance to you on this occasion.

Yours sincerely,

Amanda Rishworth MP

5 / 4 / 2023