Attorney-General

Reference: MC24-047194

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

By email: Scrutiny.Sen@aph.gov.au

Dear Chair

I am writing in response to correspondence received on 12 September 2024 on behalf of the Senate Standing Committee for the Scrutiny of Bills (Committee), regarding Scrutiny Digest 11 of 2024 in relation to the Family Law Amendment Bill 2024 (Bill). I thank the Committee for its consideration of the Bill.

I provide the following in response to the Committee's questions.

Immunity from civil liability (Schedule 2, Item 14, proposed section 10AA)

The remedies available to individuals whose rights to bring an action to enforce their legal rights are limited to situations where a lack of good faith is shown

In general, immunity provisions are necessary because they protect public officials and the Government from legal liability when performing their duties in good faith, without negligence or malicious intent. These sorts of provisions are necessary to protect the public interest and effective functioning of Government, protect officers from personal liability when they are acting in good faith and within the scope of their legal authority, deterring vexatious litigation against Government or officials based on general dissatisfaction with lawful decisions or actions, and to turn focus on actions that are grossly negligent or malicious in nature.

The detail regarding decisions which can be made in accordance with an accreditation scheme will be set out in Accreditation Rules. The government intends that any decisions affecting the rights of a party, to be made under the authority of the Accreditation Rules (once made), would be subject to the same (or similar) decision, merits, and judicial review pathways as other similar legislative instruments.

If a party is of the view that the conduct of the Commonwealth or its officers is particularly malfeasant and/or egregious, there are a range of other legal enforcement mechanisms that they can consider (as is the case in all similar statutes where 'bad faith' is being alleged) including common law tort claim for misfeasance in office, negligence or possibly a breach of statutory duty; complaints to the Australian Human Rights Commission (AHRC) if a bad faith action infringes upon a party's human rights; or Compensation for Detriment Caused by Defective Administration Scheme (CDDA).

When a Government or Government officer acts in bad faith, immunity provisions are typically lifted and the aforementioned avenues (among others) become available to the affected party. The remedies provide potential recourse for harm caused by unlawful or improper actions of public officials.

Why it is necessary and appropriate for the Commonwealth as a whole to be granted immunity in this context (rather than restricting the immunity to officers of the Commonwealth)

There are many reasons for a new statute to include the Commonwealth itself as an immune entity in addition to Commonwealth officers. First, there is the principle of vicarious liability. If the instrument did not include the Commonwealth, it is foreseeable that the Government could be held accountable for the action of its officers, even if those actions are done in good faith. Second, there is a need to shield taxpayer money from being used to settle claims or damages that arise from lawful, good-faith actions of Government officers. Third, there is the complexity and potential damage associated with legal challenges against Government programs. If the Commonwealth itself were subject to lawsuits for every decision or action taken in good faith by its officers, it could significantly hinder the operation of essential public services and lead to constant litigation.

There are a range of reasons for the inclusion of the Commonwealth as an immune entity in this context and there are precedents that support this position. In *Northern Territory v Mengel* (1995) 185 CLR 307, the HCA acknowledged and emphasised the importance of protecting both public officials and the Government from liability when acting in good faith within the scope of their authority. In *Commonwealth v Connell* (1988) 5 NSWLR 218, the court recognised that where public servants act in accordance with their duties, the Commonwealth can share in the protections afforded to the individuals in executing Government functions.

Privacy – protections for certain safety-related information
(Schedule 2, Item 15, proposed section 10KE)

Whether Children's Contact Services workers (including volunteers) would have the appropriate skills and experience to assess when protected information must be disclosed, and what training would they be provided with in order to be able to make a fully informed assessment of when it is appropriate to disclose personal information?

The intention of the proposed accreditation process would be to create a minimum level of assurance to the community that CCS services are safe. This would include options to specify the skills, training or other attributes that CCS workers (including volunteers) must maintain in order to supervise and/or interact with children. This level of detail would be included in the Accreditation Rules, to be established through Regulations.

Externally, service providers have several options for upskilling their staff for various roles within a CCS. These include long-term tertiary qualifications in psychology and social work, as well as short, cost-effective training modules on essential topics such as mandatory reporting, vicarious trauma, and cultural sensitivity. Internally, staff training and induction programs, ongoing professional development, and participation in information-sharing networks, along with other informal educational opportunities, all contribute to enhancing staff competence in performing their roles effectively.

The onus will be on the service provider to ensure that 'entrusted persons' within the organisation have sufficient skills, experience and training to allow them to make informed decisions about what constitutes safety information, and whether particular circumstances require or permit disclosure.

What safeguards are in place to protect privacy and what oversight mechanisms would apply once the information was disclosed?

The proposed amendments in section 10KE reflect a deliberate effort to establish safeguards for safety-related information, ensuring the privacy and security of the involved parties. The exact operational measures to implement these provisions will be determined by service providers, in line with the guidelines specified in the forthcoming CCS accreditation regulations.

Regarding oversight, the comprehensive accreditation framework will be developed in consultation with the sector and key stakeholders. This framework will define the level and scope of government oversight. Meanwhile, in the absence of a specific oversight commitment, CCS providers will still be subject to the penalty provisions outlined in section 10KG.

Examples of to whom it is intended the information will be disclosed, including how the person or body to whom the information is disclosed will handle the information, and whether further detail could be provided on the face of the bill.

Information is primarily disclosed to police, courts, or court-appointed officials, such as Independent Children's Lawyers. In addition to these disclosures, there may be other legal obligations to notify child protection authorities, depending on the specific provisions in each jurisdiction. Beyond these instances, information may only be disclosed with the consent of the affected party or among authorised personnel within the organisation, as necessary to effectively deliver children's contact services.

It is also important to note that the provision does not oblige the sharing of information automatically. For example, if a party requested that information be shared in the absence of a lawful order, there is no obligation on the CCS in this instance, to release information. Information that is sought by subpoena will also be afforded the resultant protections under that process, along with the obligatory objection to produce/appear option.

Strict liability offences – (Schedule 2, Item 15, proposed subsections 10KH(1)-(9)

An addendum to the Explanatory Memorandum containing further information on the proposed strict liability and reverse burden provisions will be provided as soon as possible, in particular following consultation with the Parliamentary Joint Committee on Human Rights, should that Committee also wish to suggest additions to the document.

I trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
23/9/2024

THE HON MATT KEOGH MP
MINISTER FOR VETERANS' AFFAIRS
MINISTER FOR DEFENCE PERSONNEL

MB24-000204

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
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Dear Chair,

Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024

Thank you for your correspondence of 15 August 2024 seeking additional information in relation to the Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 (VETS Bill). I apologise for the delay in responding.

Standing appropriations

The Senate Standing Committee for the Scrutiny of Bills (the Committee) requested my advice as to the mechanisms which are in place to report to Parliament on any expenditure authorised by the standing appropriations (also known as special appropriations).

The annual financial statements of the Department of Veterans' Affairs (DVA) include information about the amount of special appropriation applied for the financial year, broken down by Act. As you would be aware, the financial statements are tabled in Parliament as part of the DVA's annual report.

Similarly, the Department of Finance publication *Budget Paper No. 4 – Agency Resourcing*, produced as part of the annual Budget process, contains the Table of Estimated Expenditure from Special Appropriations, which shows estimates of expenses for each special appropriation Act for each Commonwealth entity. DVA's Portfolio Budget Statement also includes details of actual and forecast expenditure broken down by program.

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Incorporation of external materials as existing from time to time

Proposed subsection 287B(3) mirrors the current drafting of subsection 88B(3) of the *Veterans' Entitlements Act 1986* (VEA). The *Veterans' Entitlements (Veteran Suicide Prevention Pilot) Determination 2018* (the current legislative instrument made under section 88B of the VEA) does not incorporate any documents by reference. Nonetheless, it is DVA's practice to publish freely any documents which are incorporated by reference into legislative instruments.

Section 88B was inserted into the VEA by the *Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 2) Act 2018*. The Explanatory Memorandum which accompanied the Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 2) Bill 2018 included the following justification for the inclusion of subsection 88B(3) in the VEA:

> The subsection would ensure that any document incorporated into an instrument made under subsection 88B(2) in relation to the Veteran Suicide Prevention pilot is automatically incorporated into and effective for this section.

I am satisfied that this justification remains relevant for proposed subsection 287B(3).

Offence provisions relating to the Veterans' Review Board

Your correspondence raises the following two categories of issues:

1. Undue trespass on rights and liberties, broad scope of offence provisions and significant penalties (proposed section 353L); and

2. Reversal of the evidential burden of proof and strict liability offences (proposed sections 353H and 353J).

In relation to section 353L, the Parliamentary Joint Committee on Human Rights (PJCHR) suggested amendments to the offence provisions in the Bill which relate to the operations of the Veterans' Review Board (VRB). The PJCHR considered the Bill as drafted may lead to persons receiving convictions and penalties for behaviour that would otherwise be protected under international human rights law.

Separately, I will be advising the PJCHR that the Government intends to consider its suggested amendments at the same time as any recommendations that may be outcomes of the inquiry currently being undertaken by the Senate Standing Committee on Foreign Affairs, Defence and Trade.

In relation to sections 353H and 353J, the provisions are modelled on existing sections 168 and 169 of the VEA. Part of the Government's objective with the VETS Bill is to transfer the provisions which govern the operation of the VRB into the MRCA, as the single ongoing Act. Retaining the substance of these provisions provides certainty for both the VRB and its users. Further changes to these provisions would be outside the scope of the current reform process. Nonetheless, the Committee's proposals may be considered in the future.

Broad delegation of administrative powers

I note the Committee's preference that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. For context, as at 31 July 2024, the Department had 77,992 claims on hand, and made decisions on over 100,000 claims in 2023-24. To meet service delivery expectations, and in keeping with arrangements in other portfolios with high volumes of individual decision making, it is necessary for the Repatriation Commission and the Minister to have the flexibility to delegate their respective functions and powers broadly to more junior officials.

It would not be practical, and would materially delay claims decision making, for these powers to be delegated only to nominated offices or to members of the Senior Executive Service.

I will be providing a copy of our correspondence to the Chair of the Senate Standing Committee on Foreign Affairs, Defence and Trade to assist with its Inquiry into the VETS Bill.

Thank you, and the Committee, for your work and for bringing these matters to my attention. I trust this information is of assistance.

Yours faithfully,

HON MATT KEOGH MP

20 September 2024

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MS24-124646

Senator Dean Smith
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Dear Chair

I refer to correspondence of 12 September 2024 to the Assistant Minister to the Prime Minister, the Hon Patrick Gorman MP, regarding the Senate Standing Committee for the Scrutiny of Bills' consideration of the Parliamentary Workplace Support Service Amendment (Independent Parliamentary Standards Commission) Bill 2024 (the Bill). That correspondence was referred to me, as the Minister responsible for the Bill.

I note that the Bill has now received the Royal Assent having passed both Houses of the Parliament on 12 September 2024. I nevertheless respond to the Committee's request for advice on the following matter raised in Scrutiny Digest 11/24:

> *[W]hat recourse is available for an individual (other than by demonstrating a lack of good faith) affected by actions taken by a PWSS [Parliamentary Workplace Support Service] or IPSC [Independent Parliamentary Standards Commission] official or consultants. In particular, would action be available against the Commonwealth for negligence or defamation for the actions taken by such persons, and if not, why is this appropriate?*

The request relates to new section 40C, which gives PWSS and IPSC officials immunity from civil liability for actions or omissions done in good faith in the performance of their functions, or exercise of their powers, under the legislation. The Committee accepted the explanation in the Explanatory Memorandum on why officials may require immunity from civil liability.

In response to the Committee's question, the immunity provision applies to individuals and not the Commonwealth. As such, 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.

As the Committee observes, the immunity would not apply where an official has not acted in good faith. Individuals may also seek judicial review of relevant decisions under the

legislation. For completeness, I also note that complaints about administrative actions of the PWSS and IPSC can be made to the Commonwealth Ombudsman.

I thank the Committee for taking the time to consider the Bill. I trust this information assists.

Yours sincerely

Katy Gallagher

26/09/2024