THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: MS19-002449

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

Dear Senator

Thank you for your correspondence of 25 July 2019 from the Senate Scrutiny of Bills Committee about the Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Bill 2019 (the Bill). I note that the Bill has passed both Houses of Parliament.

The Committee requested more detailed information about why it is considered necessary and appropriate to further extend the sunsetting of the Australian Security Intelligence Organisation's (ASIO) special powers relating to terrorism offences, noting that these powers could unduly trespass on personal rights and liberties.

The powers were recently reviewed by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) who acknowledged the ongoing terrorism threat and concluded that ASIO should continue to have a compulsory questioning power. The Australian Government accepts the findings of the PJCIS and is working towards introducing a reformed compulsory questioning framework for ASIO, accompanied by strong safeguards and oversight, as soon as possible.

The Government is developing these broader reforms in a considered, deliberate way, in close consultation with relevant stakeholders, including ASIO and the Office of the Inspector-General of Intelligence and Security.

The Government will ensure that the reformed framework keeps pace with the evolving threat environment and appropriately balances public safety with the need for strong safeguards and oversight. Particularly, an amended compulsory questioning framework must be necessary, appropriate and fit for purpose.

These powers continue to be necessary because they provide a critical means of collecting intelligence which may assist in the prevention of a terrorist attack. As a result, it is appropriate to extend the sunsetting of these special powers to ensure the powers continue to remain available while these broader reforms are developed and progressed through Parliament.

Since their introduction in 2003, the powers have been used sparingly. In this time, only 16 questioning warrants have been issued and ASIO has never requested a questioning and detention warrant. As these numbers demonstrate, ASIO is judicious in the use of these intrusive powers, and wherever possible uses the least intrusive techniques to obtain intelligence.

Extending the sunsetting of the provisions ensures the powers continue to remain available to ASIO while allowing the PJCIS sufficient time to consider the full reform package. This is consistent with the recent report into the operation, effectiveness and implications of ASIO's questioning and detention powers, where the PJCIS noted they would require at least three months to consider the reforms.

I acknowledge the Committee's comment about the extraordinary nature of these powers and advise that there are rigorous safeguards and oversight procedures in place for the use of these powers. In particular, the Inspector-General of Intelligence and Security may be present at questioning or the taking of a person into custody, a person may make a complaint to the Inspector-General of Intelligence and Security, a person may contact and seek advice from a lawyer and offences apply to officers who breach the safeguards that apply under the *Australian Security Intelligence Organisation Act 1979.*

I would like to take this opportunity to thank the Committee for their consideration of this Bill.

Yours sincerely

27/08/19

PETER DUTTON

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: SB19-001030

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

Dear Chair

I am writing in response to the Senate Scrutiny of Bills Committee's (the Committee's) request for further information in relation to the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (the Bill).

The Bill protects children from sexual abuse and exploitation by improving the Commonwealth framework of offences relating to child abuse material, overseas child sexual abuse, forced marriage, failing to report child sexual abuse and failing to protect children from such abuse.

The Bill implements a number of recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) by:

- creating an offence of failure to protect a child at risk of a child sexual abuse offence
- creating an offence of failure to report a child sexual abuse offence, and
- strengthening overseas persistent child sexual abuse laws.

The other measures in the Bill target child exploitation that occurs both overseas and in Australia, enhancing investigation and prosecution outcomes at the Commonwealth level. These measures:

- criminalise the possession or control of child abuse material in the form of data that has been obtained or accessed using a carriage service
- prevent certain dealings with child-like sex dolls
- criminalise the possession of child-like sex dolls
- improve the definition of forced marriage
- restrict the defence based on a valid and genuine marriage to overseas child sex offences, and
- remove references to 'child pornography material' in a number of Commonwealth Acts and replace with 'child abuse material'.

I welcome the opportunity to respond to the Committee's comments, and provide the following advice.

Privilege against self-incrimination and proposed section 273B.5

I note the Committee's concerns regarding the appropriateness of abrogating the privilege against self-incrimination in relation to the proposed failure to report offence (section 273B.5) in circumstances where a 'derivative use' immunity would not be available.

Proposed section 273B.5 introduces the offence of failure to report child sexual abuse. Under this offence, a Commonwealth officer, who exercises care or supervision over children, will be guilty of an offence if they know of information that would lead a reasonable person to believe or suspect that another person has or will engage in conduct in relation to a child that constitutes a child sexual abuse offence, and they fail to disclose that information as soon as practicable to a police force or service of a State or Territory or the Australian Federal Police.

Proposed subsection 273B.5(5) explicitly abrogates the privilege against self-incrimination. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that the abrogation of this privilege may be justified where its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence and where there is a public benefit in the removal of the common law principle against self-incrimination that outweighs the loss of the privilege (pages 95-96).

The abrogation of the privilege in subsection 273B.5(5) is necessary to ensure that all Commonwealth officers covered by the related offence provisions report abuse or take action to protect against abuse. A person should not be excused from these obligations if, for example, they were concerned that reporting that an employee was abusing a child would expose that they had not ensured that the employee held a valid working with children check card.

Information disclosed pursuant to this offence is subject to a 'use immunity' under subsection 273B.9(10), which prevents this information from being used in any 'relevant proceedings' against the discloser. This provides a constraint on the use of self-incriminating evidence and complies with the principles of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (pages 96-97).

A derivative use immunity is not expressly available to the information disclosed pursuant to the failure to report offence because it would open the immunity up to abuse by persons who are themselves involved in child sex offending. This could occur if such a person made a report for the putative purpose of complying with proposed section 273B.5. The report could lead authorities to discover evidence which showed that the person who had made the report was themselves involved in child sex offending. This evidence would not be able to be used against that person if a derivative use immunity were applied. The very purpose of proposed section 273B.5 is to ensure that child abuse offending is reported so that those involved in the offending can be subject to investigation and prosecution. As quoted in the Committee's report, the Royal Commission identified underreporting as a significant barrier to victims and survivors of child sexual abuse accessing justice.

A number of safeguards are in place to ensure the offence does not go beyond its stated purpose and unnecessarily infringe on the privilege against self-incrimination. A person will be compelled to make a disclosure only to police, who are bound by extensive obligations under State, Territory and Commonwealth privacy laws. Additionally, proceedings against a person cannot be commenced without the consent of the Attorney-General, providing an additional safeguard against the bringing of prosecutions in inappropriate circumstances. Further, the offence will not affect the powers of courts to manage criminal prosecutions that are brought before them where they find that those proceedings have been unfairly prejudiced or that there is a real risk of prejudice to the accused.

Penalties under proposed section 273A

I note the Committee's concerns regarding the application of a significant custodial penalty to the proposed offence of possession of certain dolls and other objects.

The Bill proposes to criminalise the possession of a child-like sex doll in the *Criminal Code Act 1995* (the Criminal Code) and, consequential to the expansion of the term 'child abuse material' in Schedule 7, expand the definition of 'child abuse material' to explicitly include child-like sex dolls. Amendments to the *Customs Act 1901* (Customs Act) will also ensure that the *Customs Regulation 2015* explicitly provides that child-like sex dolls are tier 2 goods and banned from import and export under the Customs Act and *Customs (Prohibited Imports) Regulations 1956* and the *Customs (Prohibited Exports) Regulations 1958*.

Proposed section 273A.1 criminalises the possession of a child-like sex doll or other object and carries a maximum penalty of 15 years imprisonment. The penalty is consistent with overseas possession offences for child pornography material (as currently defined) and child abuse material in Division 273 of the Criminal Code. It is also consistent with possession offences for child pornography and child abuse materials, such as for videos and images, obtained via a carriage or postal service under Divisions 471 and 474 respectively. This is necessary and appropriate given child-like sex dolls provide for simulated engagement and sexual intercourse with a child, as opposed to visual stimulus. Although this is an under-researched topic, the Australian Institute of Criminology identifies that the use of these materials may objectify children as sexual beings and escalate offender behaviour.[1] The penalty appropriately reflects this risk and the potential to increase danger to real children.

In relation to the Committee's concerns that the proposed section 273A.1 will make current lawful possession unlawful the day after the Bill receives Royal Assent, it is important to note that various dealings with child-like sex dolls are already prohibited under Commonwealth and State and Territory laws. The Criminal Code and Customs Act offences relating to 'child pornography material' (as currently defined)[2] and State and Territory offences for possessing child abuse material may currently apply to certain dealings with child-like sex dolls. For example, the Commonwealth's definition of 'child pornography material' is non-exhaustive and doesn't exclude objects such as child-like sex dolls. The New South Wales (NSW) District Court has found that a 'child sex doll' can fall within the definition of child abuse material in section 91FB of the *Crimes Act 1900 (NSW)*. As a result possession and dissemination of a child-like sex doll can be an offence under NSW law.[3]

Whilst existing Commonwealth laws relating to child sexual abuse material may apply to dealings with child-like sex dolls, this is not unequivocal. These offences were introduced largely to target printed and electronic material, not three-dimensional objects, and are not fit-for-purpose for combatting child-like sex dolls as a newer form of child abuse material. The Bill updates and clarifies Commonwealth laws to provide that child-like sex dolls are 'child abuse material' to which existing Criminal Code offences apply, such as for the use of a carriage service to make available, advertise or solicit child abuse material (section 474.19), the use a postal service for child pornography material (section 471.16) or the possession of child abuse material overseas (Division 273). Proposed section 273A.1 will complement these existing offences to criminalise the possession of child-like sex dolls.

---

[1] Brown, R. and Shelling, J. 2019. Exploring the implications of child sex dolls. Trends and Issues in Crime and Criminal Justice, No. 570, March 2019. Australian Institute of Criminology, Australian Government.

[2] Under section 473.1, the definition of 'child pornography material' includes: 'material the dominant characteristic of which is the depiction, for a sexual purpose, of: (1) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or (2) a representation of such a sexual organ or anal region; or (3) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age'.

[3] *R v Miao* [2016] NSWDC 181 (19 August 2016), see: https://www.cdpp.gov.au/news/man-possession-child-sex-doll-sentenced-imprisonment.

It is important that laws keep pace with new trends and technological developments. The Bill will help do so by ensuring the Commonwealth's legislative framework prohibits dealings with child-like sex dolls, as a new form of child abuse material, across the full spectrum of conduct, from manufacturing to procuring to importing and possession. This will provide certainty to border officials and police that child-like sex dolls are 'child abuse material' for the purposes of detecting and investigating these heinous materials.

Reversal of evidential standard of proof for proposed sections 273B.5 and 273A.2

I note the Committee's concerns regarding the reversal of the evidential burden of proof in proposed sections 273B.5 and 273A.2, noting that all relevant matters may not be peculiarly within the knowledge of the defendant.

Failure to report child sexual abuse offences

Section 273B.5 introduces the new offences of failure to report child sexual abuse. Subsection 273B.5(4) contains a range of defences for the failure to report offences if:

(a) the defendant reasonably believes that the information is already known to:
    (i) the police force or police service of a State or Territory, or
    (ii) the Australian Federal Police, or
    (iii) to a person or body to which disclosure of such information is required by a scheme established under, or for the purposes of, a law of a State or Territory, or of a foreign country, or
(b) the defendant has disclosed the information to a person or body for the purposes of a scheme mentioned above, or
(c) the defendant reasonably believes that the disclosure of the information would put at risk the safety of any person, other than the potential offender, or
(d) the information is in the public domain.

The defendant has an evidentiary burden in relation to making out a defence contained in subsection 273B.5(4). This is appropriate in this instance as the information to prove the existence of the elements of the defences would be peculiarly within the knowledge of the defendant and significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

The prosecution would face significant difficulties if the defences at subsection 273B.5(4) were recast as offence elements. This becomes apparent when one considers, for example, the defence at paragraph 273B.5(4)(b) that the defendant has disclosed the information to a person or body for the purposes of certain other schemes. Were this cast as an offence element and not as a defence, then the Crown would need to raise evidence negating the possibility that each and every such person or body had received a disclosure from the defendant. This would be a very onerous process. It is more sensible for a defence to require the defendant to raise evidence indicating a relevant disclosure has been made to a specific person or body, before the Crown would need to disprove the same beyond reasonable doubt.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* notes that an evidential burden does not completely displace the prosecutor's burden (it only defers that burden). The defendant must point to evidence establishing a reasonable possibility that these defences are made out. If this is done, the prosecution must refute the defence beyond reasonable doubt.

Child-like sex dolls

Proposed section 273A.1 introduces a new offence for possessing child-like sex dolls into the Criminal Code. Proposed section 273A.2 provides for a set of circumstances in which a person is not criminally responsible for an offence against section 273A.1. The defences are equivalent to the defences at section 471.18, which apply in relation to using a postal service for child abuse material and possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal service. The defences will protect people who have legitimate reasons for possessing child-like sex dolls or other similar objects.

Some of the defences in proposed section 273A.2 would be covered by the general defence of lawful authority in section 10.5 of the Criminal Code. However, that defence is not specific to the circumstances covered by these defences and does not sufficiently cover all the types of people that would be legitimately entitled to a defence for possession of child-like sex dolls, particularly as the lawful authority defence only applies to conduct justified or excused by or under Commonwealth law.

Subsection 273A.2(1) will provide a defence for persons who engage in particular conduct that is of public benefit and does not extend beyond what is of public benefit. The test is an objective one, meaning the motives or intentions of the person who engaged in the conduct are not relevant and would not be considered in determining whether the conduct is in fact of public benefit.

Subsection 273A.2(2) provides an exhaustive list of conduct that is of public benefit. If a person engages in conduct that meets one of the four criteria in subsection 273A.2(2) it will be considered to be 'of public benefit' for the purposes of subsection 273A.2(1). It will be a question of fact, to be determined by the court, as to whether the conduct meets one of the four criteria and therefore is of public benefit. It will also be a question of fact as to whether the conduct extends beyond what is of public benefit. The four criteria cover conduct that is necessary for, or of assistance in:

a) enforcing a law of the Commonwealth, a State or a Territory
b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory
c) the administration of justice, or
d) conducting scientific, medical or educational research.

Subsection 273A.2(3) provides a defence in relation to section 273A.1 for law enforcement officers, intelligence or security officers acting in the course of their duties where their conduct is reasonable in the circumstances for the purpose of performing that duty. 'Law enforcement officer' and 'intelligence or security officer' are defined in Part 10.6 of the Criminal Code.

The defendant bears an evidential burden in relation to the defences at subsections 273A.2(1) and 273A.2(3), replicating the existing defences for child abuse material and child pornography offences at sections 273.9, 471.18, 474.21 and 474.24 of the Criminal Code. This approach is consistent with criminal law policy as described in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The Guide refers to the principle that it is legitimate to cast a matter as a defence where a matter is peculiarly within the defendant's knowledge and is not available to the prosecution.

Under these defences, the defendant has the evidential burden of proving that their possession of the child-like sex doll was of public benefit or constituted the reasonable performance of their duty as a law enforcement, intelligence or security officer. This is appropriate as a person's reasons for possessing a doll are often peculiarly within the defendant's knowledge and proving that the doll was not held for one of the above reasons may be unduly difficult or expensive for the prosecution to prove.

As previously noted, the evidential burden does not completely displace the prosecutor's burden (it only defers the legal burden to the prosecution). The defendant must point to evidence establishing a reasonable possibility that these defences are made out. If this is done, the prosecution must refute the defence beyond reasonable doubt (section 13.3 Criminal Code).

Reversal of the legal burden of proof in proposed section 272.17

I note the Committee's concerns regarding the reversal of the legal burden of proof in proposed section 272.17.

Schedule 6 of the Bill repeals a defence at existing section 272.17 that currently allows an offender to escape culpability for sexual intercourse or sexual activity with a child under 16 years outside Australia if they can prove they were in a genuine marriage with the child at the time.

The Bill proposes to substitute section 272.17 with a new, narrower defence that is only applicable to offences under subsections 272.12(1) and 272.13(1). These offences relate to engaging in sexual intercourse or sexual activity with a young person who has attained the age of at least 16 years but under 18 years outside of Australia and where the person is in a position of trust or authority.

To establish the new defence, the defendant must prove that, at the time of the alleged offence, there existed a marriage that was valid and genuine, and the young person had attained the age of 16 years. This requirement is to ensure that a sham or fictitious marriage is not used as a defence. This requirement is also consistent with section 272.16, which provides a defence against section 272.8 (sexual intercourse) or section 272.9 (sexual activity) with a child outside of Australia if the defendant proves that at the time of the sexual intercourse or sexual activity the defendant believed the child was at least 16. It is also consistent with the minimum legal marriageable age under the *Marriage Act 1961* (Cth).

The new defence retains the existing approach at section 272.17 by requiring that the defendant bears a legal burden in establishing the valid and genuine marriage defence (see section 13.4 and 13.5 of the Criminal Code). A legal burden is appropriate as the matters required to be positively proved would be peculiarly within the knowledge of the defendant, and also because the defendant would be best placed to adduce the evidence that would be required to establish them beyond reasonable doubt. These matters include the genuineness of the marriage and its validity under the relevant foreign country's laws. With respect to the genuineness of the marriage, the defendant could, for example, adduce evidence relating to the duration of the relationship and cohabitation arrangements. With respect to the validity of the marriage, the defendant could adduce evidence in the form of documents issued in the relevant foreign country (e.g. marriage certificate). Such matters would be significantly more difficult and costly for the prosecution to disprove beyond reasonable doubt than for the defendant to establish.

This approach is consistent with the guidance provided in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (page 50).

The amendment will bring Australia's overseas child sex offences into line with the Government's broader efforts to combat child sexual abuse and forced marriage.

Yours sincerely

27/08/19

PETER DUTTON

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: SB19-001025

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Chair

I am writing in response to the Senate Standing Committee for the Scrutiny of Bills' request for further information in relation to the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (the Bill). As you would be aware, the Parliament passed the Bill on 25 July 2019.

The *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (the Act) responds to the risk posed by Australian citizens of counter-terrorism interest who are overseas and are seeking to return to Australia. The Act establishes a Temporary Exclusion Order (TEO) scheme to enable authorities to delay and control the return of these persons to Australia. The TEO scheme ensures that if an Australian of counter-terrorism interest does seek to return to Australia, it is with adequate forewarning and into the hands of authorities.

Ministerial powers and the TEO scheme's operation

I note the Committee's concerns relating to the Minister's powers. Providing the Minister with these powers allows counter-terrorism authorities to respond rapidly to cases where information indicates a person of counter-terrorism interest is seeking to return to Australia. The TEO scheme does not permanently exclude a person from Australia, but rather can delay and regulate their return. The process for a person to apply for a return permit is not onerous. A third party, such as a legal representative or family member, can apply for a return permit on the person's behalf. Furthermore, the Minister has broad discretion to issue a return permit in other circumstances, including where the person is unable to apply.

Once in Australia under a return permit, the person may be subject to a number of notification requirements. These requirements are not onerous, and overwhelmingly are not a restriction on the person's activities. Notification requirements are necessary to allow security and law enforcement agencies to more easily identify

changes in behaviour that may be of security concern. The Minister must be satisfied that the imposition of the condition and (if more than one condition is imposed) the conditions taken together are reasonably necessary, and reasonably appropriate and adapted, for the purpose of preventing terrorism-related activities.

Oversight and review

In response to recommendations made by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in April 2019, the Bill establishing a TEO scheme was amended to provide additional independent oversight before being passed by the Parliament. The legislation appropriately balances independent oversight of the scheme with operational requirements. As noted by the Committee, the legislation provides that, except in urgent circumstances, a TEO does not come into force until a reviewing authority has reviewed the Minister's decision to make a TEO.
If a reviewing authority determines the Minister's decision was not lawful, the TEO is taken to have never been made.

I note the Committee's request for advice on why merits review is not provided for, and why the legislation is not subject to additional parliamentary oversight, such as a sunsetting provision. The purpose of a TEO is to prevent terrorism-related conduct by a person who might return to Australia. Allowing merits review would lengthen the decision-making process and could result in the person returning to Australia without adequate notice or security measures being in place. Further, the relevant person is entitled to seek judicial review in the High Court of Australia under section 75(v) of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*.

Similarly, the exclusion of *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) review is necessary to respond with speed and certainty in a dynamic threat environment. A reviewing authority already provides independent review of the Minister's decision to make a TEO against a person. Review under the ADJR Act would largely replicate existing forms of review undertaken by the reviewing authority. Additionally, review under the ADJR Act would create challenges for protecting sensitive information. Classes of decisions which are likely to rely on sensitive information are usually excluded from the ADJR Act to limit the possibility of that information being exposed. On balance, it is preferable that the TEO scheme have streamlined and efficient mechanisms for review but not where it results in duplication or risks to sensitive information.

While the Act does not contain a sunsetting provision, it contains provisions for parliamentary and other oversight. The Minister must prepare an annual report for Parliament about the operation of the Act. Consistent with the recommendations made by the PJCIS, the *Counter-Terrorism (Temporary Exclusion Orders) (Consequential Amendments) Act 2019* provides that the PJCIS will review the Minister's exercise of power under the Act. The PJCIS will also be required to conduct a review of the TEO scheme within three years of the scheme's

commencement. The Independent National Security Legislation Monitor also has a statutory function to review the operation, effectiveness and implications of the Act. These oversight mechanisms will assess whether the legislation continues to be necessary and fit for purpose.

Excluding procedural fairness and not providing for merits review are not matters the Government takes lightly. However, the extent to which this impacts a person's avenues for review is necessary to protect Australian communities. Providing procedural fairness in relation to the decision to make a TEO could allow the person to whom the TEO relates to return to Australia before the TEO is made. This would create an unacceptable risk to safety for Australian communities, thereby defeating the purpose of the Act.

There are also practical difficulties affording procedural fairness to a person offshore, who presents a security risk and may be located in a conflict zone. I note the Committee's views on the court's interpretation of procedural fairness taking into account the circumstances, as outlined in paragraph 1.49 of *Scrutiny Digest 3 of 2019*. However, the TEO scheme is designed to manage Australians who pose a threat to community safety and are likely located in conflict zones. The safety of Australians, including Australian officials overseas, remains paramount in the development and implementation of our counter-terrorism framework. The extent to which notification can be given to a person will often be extremely limited. Furthermore, a TEO will be informed by highly sensitive intelligence, a substantial proportion of which could not be disclosed to the person.

If the person considers that there are reasons a TEO should not have been made, that person can make submissions to the Minister to have the TEO revoked under section 11 of the Act. As a matter of administrative law, the Minister will be obliged to take into account any information provided by the person in support of an application for the revocation of a TEO, or the variation or revocation of a return permit.

Offences

I note the Committee's request for advice on the use of offence-specific defences in the legislation, which reverse the evidential burden of proof. The Guide to Framing Commonwealth Offences (the Guide) sets out some circumstances where creating an offence-specific defence is appropriate, relevantly:

- the matter in question is not central to the question of culpability for the offence; or
- the conduct proscribed by the offence poses a grave danger to public health or safety.

The offence-specific defences in the Act have been drafted consistent with the Guide and do not relate to matters that are central to the question of culpability for the offence. Rather, the inclusion of specific defences ensures that the offences do not capture persons who were otherwise acting lawfully. Furthermore, the intent of the TEO scheme is to protect the Australian community from terrorism, and any conduct which would seek to undermine or circumvent the scheme could pose grave danger to public safety. Finally, the Guide provides that where an offence-specific defence is created, it should be made clear on the face of the legislation. This guidance has been followed in the drafting of the relevant sections of the Act.

I thank the Committee for its thorough consideration of this important legislation, and trust that this information is of assistance.

Yours sincerely

PETER DUTTON 27/08/19

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC19-009388

7 AUG 2019

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

Dear ~~Senator~~ Helen

Thank you for your correspondence of 25 July 2019 regarding the Criminal Code Amendment (Agricultural Protection) Bill 2019 (the Bill). I appreciate the time the Senate Scrutiny of Bills Committee has taken to review the Bill, and thank you for the opportunity to address the Committee's concerns.

The Committee has requested that I provide detailed justification as to the appropriateness of the exemptions for journalists and whistleblowers being offence-specific defences in the Bill, and asks whether it would be appropriate for these defences to be redrafted as elements of the offences. The Committee has noted the two step test in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* for establishing whether it is appropriate that a circumstance be established as an offence-specific defence rather than an element of the offence, specifically that:

- it 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 (subsections 474.46(2) and (3) and subsections 474.47(2) and (3)) meet this threshold, for the reasons outlined in further detail below.

While any defendant would bear the evidential burden in relation to these exemptions, the legal burden of proof would remain with the prosecution. A defendant would merely need to raise evidence that suggests a reasonable possibility that the exemption would apply to their circumstances, before the prosecution would need to disprove the same beyond reasonable doubt.

I note that the defences will only be engaged in rare cases where there is a question as to whether the defendant is a bona fide journalist or whistleblower. In practice, the Prosecution Policy of the Commonwealth would likely exclude bona fide journalists and whistleblowers before proceedings were even commenced where this defence would clearly be available.

I also note that in some circumstances the evidential burden may be discharged through evidence adduced by the prosecution or the court, as provided by subsection 13.3(4) of the Criminal Code. In such cases, the defendant would not need to adduce additional evidence that the exemption would apply to the their circumstances, and the application of the exemption would be a matter solely for the prosecution to disprove beyond reasonable doubt.

Subsections 474.46(2) and 474.47(2)—Journalism

Subsections 474.46(2) and 474.47(2) provide exemptions to their associated offences (which are found in subsections 474.46(1) and 474.47(1) respectively) where the material relates to a news report, or a current affairs report, that is in the public interest and is made by a person working in a professional capacity as a journalist.

These offences will not capture the legitimate activities of a journalist or media organisation. It would be difficult to conceive of circumstances where a legitimate news article or similar report would evince an actual intention that readers, viewers, or listeners trespass, cause damage or steal on agricultural land. Intention is an inherently high threshold and would require significantly more than an inadvertent, accidental or even negligent suggestion in a news report.

However, as highlighted in the explanatory memorandum to the Bill, this exemption puts beyond doubt that bona fide journalism is not captured by the offences. It is intended that persons involved at any stage of bona fide journalism, from research to publication, are not captured by the offence.

The inclusion of exemptions is also appropriate to ensure that the offences do not criminalise public interest journalism, given that the general defences in the Criminal Code may not apply to all circumstances.

Matters are peculiarly within the knowledge of the defendant

The defendant would be best placed to raise evidence that they are working in a professional capacity as a journalist and that the conduct in question relates to this employment. For example, details of an individual's employment situation and the work they undertake in this capacity would be peculiarly within their knowledge, as would their reasons as to publication (including planned publication) and therefore why the material is in the public interest.

Matters would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish

As already noted, it would be difficult to envisage the legitimate activities of journalists being capable of falling within the terms of the primary offence. This said, were the exemption achieved through an element in the primary offence, essentially requiring the prosecution to disprove the matter in every case, this would add unnecessary complexity to all prosecutions.

I acknowledge there may be circumstances where it would be just as easy for the prosecution to disprove as it is for the defendant to establish that the material related to bona fide journalism. This may be the case where material involves a well-known journalist or is published in a well-known journalistic publication. However, in such cases it would be usual practice for the prosecution to take this information into account

before deciding to proceed with any prosecution in the first place, consistent with the Commonwealth's prosecution policy.

However, there are a range of circumstances where it will be substantially more difficult for the prosecution to disprove the existence of the exemption were they to bear the burden.

For example, where a freelance journalist is working for multiple companies on a commission basis, it could be more difficult for the prosecution to establish whether any particular conduct is a result of the person acting in their role as a journalist, or in a personal capacity. Comparatively, for a defendant to establish that the material related to bona fide journalism, they could simply have their employer or publisher provide evidence confirming their role, the professional nature of the conduct or to otherwise demonstrate the links to a particular publication.

Similarly, where a journalist is self-publishing, it would be far easier for the journalist to point to evidence of bona fide journalism, than it would be for the prosecution to disprove that the person was acting as a journalist.

In most—if not all—cases of bona fide journalism, relevant evidence to establish the exemption will likely be in the possession of the defendant, whereas only in some cases will the prosecution be in possession of similar evidence.

For these reasons, it is appropriate that the defendant bear an evidential burden in relation to this defence.

Subsections 474.46(3) and 474.47(3)—Whistleblowers

Subsections 474.46(3) and 474.47(3) provide exemptions to their associated offences (which are found in subsections 474.46(1) and 474.47(1) respectively) where, as a result of the operation of a law of the Commonwealth, a State or a Territory, the person is not subject to any civil or criminal liability for that conduct. As discussed in the explanatory memorandum to the Bill, this is primarily intended to ensure that a person making a disclosure under a statutory whistleblower or lawful disclosure scheme is not subject to the offence.

As with journalists, these offences will not capture the legitimate activities of whistleblowers. In particular, it would be difficult to conceive of circumstances where a person is making a lawful disclosure with the actual intention to incite trespass, cause damage or steal on agricultural land. As noted above, where the legitimate activities of whistleblowers are in question, it would be usual practice for the prosecution to take this information into account before deciding to proceed with any prosecution in the first place, consistent with the Commonwealth's prosecution policy.

While the defence of lawful authority (section 10.5 of the Criminal Code) may already apply to any whistleblowers in relation to disclosures permitted under Commonwealth law, it does not provide protection for people whose disclosures might be permitted or justified under relevant State or Territory laws. There are no general defences in the Criminal Code that would provide protection where State or Territory laws might exclude criminal liability. As such it is necessary to include a broader exemption to ensure that the offence does not criminalise lawfully protected disclosures under state and territory whistleblowing laws.

The existing defence of lawful authority in section 10.5 of the Criminal Code places the evidential burden on the defendant. For consistency with this provision and the reasons discussed below, it is appropriate that the evidential burden be placed on the defendant in relation to this exemption as well.

Matters are peculiarly within the knowledge of the defendant

Whistleblowing regimes exist in Commonwealth, State and Territory jurisdictions. These regimes will often include protections for the discloser's identity, including from a court or tribunal. For example, section 20 of the *Public Interest Disclosure Act 2013* makes it an offence for a person to disclose identifying information about a second person who made a Public Interest Disclosure. Furthermore, section 21 of that Act provides that a person is not to be required to disclose (or produce) to a court or tribunal identifying information (or a document containing such information). As such, knowledge of whether a person has taken the necessary steps for their disclosure to be covered by a whistleblowing regime are peculiarly within the knowledge of the defendant.

Matters would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish

Similarly, the secrecy provisions of the various whistleblowing regimes would make it very difficult and costly for the prosecution to establish whether or not a defendant had complied with the requirements of the regime. This is particularly true in cases where multiple regimes may be applicable. In most cases the relevant documentation about the applicable regimes and the necessary steps to disclose appropriately would be in the possession of the whistleblower. Therefore it would be easier for the defendant to lead evidence of a reasonable possibility that they had engaged with the requirements of the whistleblowing regime.

Thank you again for bringing the Committee's concerns to my attention. I trust this information is of assistance to the Committee.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC19-003692

7 AUG 2019

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600
scrutiny.sen@aph.gov.au

Dear ~~Senator~~ Helen

This letter is in response to the email of 25 July 2019 from the Senate Standing Committee for the Scrutiny of Bills concerning offences of strict liability raised in the Committee's *Scrutiny Digest No. 3 of 2019* regarding the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019.

The Australian Government has committed to adopting the majority of recommendations made in the Final Report of the Royal Commission into Trade Union Governance and Corruption, led by Commissioner Heydon. The Bill responds to Recommendations 36, 37 and 38 of the Royal Commission relating to the disqualification of officers.

The Royal Commission described the current disqualification regime for officers of registered organisations as 'limited' and identified a number of gaps in the existing law, including the lack of consequences for persons who continue to act as officials when disqualified (Final Report, Volume 5, p 225). The Bill seeks to improve standards of behaviour and accountability for registered organisations and their officers. As stated by Commissioner Heydon, 'officials who deliberately flout the law should not be in charge of registered organisations' (Final Report, Volume 5, p 234).

The Bill also responds to additional Government commitments to ensure fairness and transparency in the workplace, including by giving the Federal Court greater scope to effectively deal with registered organisations that are dysfunctional or not serving the interests of their members.

The Royal Commission identified a 'deep-seated' and 'widespread' culture of lawlessness across the registered organisations it examined (Final Report, Volume 1, p 12). The amendments in the Bill will combat this culture and improve the governance and democratic functioning of registered organisations for the benefits of their members.

A detailed response to the issues raised by the Committee concerning strict liability offences in the Bill is attached. I trust that the Committee will find this information of assistance.

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

Detailed response to issues raised in *Scrutiny Digest No. 3 of 2019* in relation to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

Strict liability offences

The Committee has sought a more detailed justification for the application of strict liability to offences attracting penalties of either 100 penalty units and 2 years imprisonment or 120 penalty units under the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the Bill).

As identified by the Committee, strict liability applies to proposed sections 226, 323G and 323H of the Bill. Strict liability offences remove the requirement to prove fault, that is, no mental element is required.

Proposed section 226

Proposed section 226 of the Bill would provide for a number of new offences including standing for or continuing to hold office, or effectively acting as a shadow officer, whilst disqualified.

As stated in the Explanatory Memorandum to the Bill, strict liability will only apply to the physical element of the offences, being that the person is disqualified from holding office by an order of the Federal Court. Strict liability is justified and appropriate in these circumstances because a person would be aware that the Federal Court has made such an order. The defence of honest and reasonable mistake of fact is also available and strict liability will not apply where a person is automatically disqualified.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) published by my Department, states that elements of offences that provide for strict liability can be justified where they are necessary to provide the required deterrent effect.

In the Final Report of the Royal Commission into Trade Union Governance and Corruption (the Final Report), Commissioner Heydon noted what he termed an 'obvious lacuna' in the current provisions in the Fair Work (Registered Organisations) Act 2009 (Cth) (the FW(RO) Act) being that there is no consequence for a person who continues in an office after disqualification.

In contrast, Commissioner Heydon noted that s 206A(1) of the *Corporations Act 2001* (Cth) (Corporations Act) specifies that a person who is disqualified from managing corporations and continues to act in that manner commits a criminal offence of strict liability. Commissioner Heydon specifically recommended, that the FW(RO) Act be amended to make it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold office. Further, he explicitly stated that the offence should be an offence of strict liability with a maximum penalty of 100 penalty units or imprisonment for two years, or both. It is notable that the equivalent Corporations Act offence carries a maximum penalty of 600 penalty units or imprisonment for five years, or both.

In light of Commissioner Heydon's findings, having considered the extensive evidence and testimony before him, it is my view that applying a fault element, whether intention,

knowledge, recklessness or negligence, would unnecessarily weaken the deterrent effect of disqualification orders under new section 226. Further, departing from the Commissioner's considered view of the appropriate elements and penalty of the offence would also weaken the legitimate policy imperative of ensuring that disqualified officers do not hold, or act as if they hold, office in an organisation.

Proposed section 323

Section 323 of the Bill provides a scheme for dysfunctional organisations to be placed into administration. Specifically, proposed sections 323G and 323H respectively make it a criminal offence for failure to assist an administrator or provide an organisation's books on request.

The use of strict liability for these offences is consistent with the principles relating to strict liability at 2.2.6 of the Guide insofar as strict liability is required to ensure the integrity of the regulatory regime related to registered organisations. In addition, the penalty unit amount, while exceeding the maximum recommended penalty units, does not include a term of imprisonment.

As the explanatory memorandum notes, the defence of honest and reasonable mistake of fact will be available. In addition, I also note that these strict liability offences, including the level of penalty units, are modelled on similar offences in the Corporations Act.

SENATOR THE HON MARISE PAYNE
ACTING MINISTER FOR HOME AFFAIRS

Ref No: SB19-001026

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

Dear Chair

I write in relation to the request of the Senate Standing Committee for the Scrutiny of Bills (the Committee) for further information in relation to the *Migration Amendment (Repairing Medical Transfers) Bill 2019* (the Bill).

The purpose of this Bill is twofold: firstly, to repeal the medical transfer provisions introduced by Schedule 6 of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (the Miscellaneous Measures Act); and secondly, to introduce return and removal mechanisms for persons brought to Australia for a temporary purpose under section 198C of the *Migration Act 1958* (the Migration Act).

The Committee has requested I provide more detailed information as to why it is necessary and appropriate to include sub-item 15(1) of Schedule 1 to the Bill and whether its inclusion will trespass on the rights and liberties of any person (Senate Scrutiny of Bills Committee Digest No. 3 of 2019, dated 24 July 2019 refers).

Sub-item 15(1) of the Bill provides that subsection 7(2) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act) does not apply in relation to the repeal of the medical transfer provisions inserted into the Migration Act by Schedule 6 of the Miscellaneous Measures Act. Subsection 7(2) of the Acts Interpretation Act would, if applicable, preserve, amongst other things, any right, privilege, obligation or liability acquired, accrued or incurred under the medical transfer provisions.

By expressly excluding the applicability of subsection 7(2) of the Acts Interpretation Act, any right, privilege, obligation or liability acquired, accrued or incurred under the medical transfer provisions, including those acquired, accrued or incurred by a relevant transitory person, will be extinguished on commencement of the Bill other than those rights preserved by sub-item 15(2), which is addressed below.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

This position was taken because the existing power in section 198B of the Migration Act can still be exercised to effect the temporary transfer of a transitory person to Australia, including for the delivery of medical care to that person. This power continues to operate in parallel to the medical transfer provisions introduced in March 2019. These existing transfer mechanisms mean that those persons in need of medical attention in Australia or a third country will receive that attention. As such, it is an unnecessary duplication to preserve any rights accrued under the medical transfer provisions, other than those preserved in sub-item 15(2).

Significant medical support and services are available in Nauru and Papua New Guinea, delivered by experienced and professional health contractors. This support is supplemented by tele-medicine and visiting health specialists. Medical transfer options outside Australia are in place with Papua New Guinea and Taiwan for transitory persons in Nauru. These options cannot be explored and used under the medical transfer provisions introduced by Schedule 6 of the Miscellaneous Measures Act.

It is also important to note the operation of sub-item 15(2). This provides that, despite sub-item 15(1), the repeal of the medical transfer provisions does not affect rights or liabilities arising between parties to proceedings in which judgment is reserved by a court or has been delivered by a court as at the commencement of this item, and the judgment sets aside, or declares invalid, a decision made under a medical transfer provision. The purpose of this sub-item is to confirm that the repeal of a medical transfer provision will not affect cases where judgment has been reserved or delivered by a court before the commencement of this item. The effect of this is to preserve any such decision (or pending decision) of a court prior to the commencement of this item where that decision sets aside, or declares invalid, a decision made under the medical transfer provisions.

Noting the above, I do not consider that sub-item 15(1) does trespass on the rights of any person.

I thank the Committee for its consideration of the Bill, and trust that this information is of assistance. I note the Legal and Constitutional Affairs Legislation Committee is also inquiring into this Bill.

Yours sincerely

MARISE PAYNE

SENATOR THE HON RICHARD COLBECK
Minister for Aged Care and Senior Australians
Minister for Youth and Sport

Ref No: MC19-012146

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

15 AUG 2019

Dear Senator, Helen,

I write regarding correspondence received from the Acting Secretary of the Senate Standing Committee for the Scrutiny of Bills (Committee) on 1 August 2019 requesting I provide the Committee with further information about the reversal of the evidential burden of proof in clause 72 of the National Sports Tribunal Bill 2019 (the Bill), as identified in Scrutiny Digest 4/19 of 31 July 2019.

Operation of clause 72

Under subclause 72(1) of the Bill, an entrusted person (or person who has been an entrusted person) commits an offence if they disclose or otherwise use protected information. The offence carries a maximum penalty of two years imprisonment. An entrusted person means the Chief Executive Officer (CEO) of the National Sports Tribunal (Tribunal), a Tribunal member, a person assisting the CEO in accordance with clause 66 or 67, a person engaged as a consultant, or an expert witness under clause 68. Protected information is information obtained by a person in the person's capacity as an entrusted person, which relates to the affairs of another person (except a person in the person's capacity as an entrusted person) and identifies, or is reasonably capable of being used to identify, the other person.

Subclauses 72(2) to (4) provide a number of exceptions (offence-specific defences) to the offence set out in subclause 72(1). The evidential burden of proof would be reversed by the inclusion of these defences, so that the defendant would be required to raise evidence suggesting a reasonable possibility one or more of the exceptions applied before the prosecution is required to disprove that matter beyond reasonable doubt.

Concerns raised by the Committee

At paragraph 1.79 of Scrutiny Digest 4/19, the committee requested:

> the Minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee considers it may be appropriate if these clauses were amended

> to provide that these matters form elements of the relevant offence, and requests the minister's advice in relation to this matter.

In particular, the committee noted the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers[1] (the Guide) indicates a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it 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.

The committee stated specifically at paragraph 1.78 of Scrutiny Digest 4/19 that:

> it is not apparent from the explanatory materials that matters such as whether the disclosure was for the purpose of the Act or in accordance with obligations under yet-to-be-made rules, or whether the information has already been lawfully made public, are matters that would be peculiarly within the defendant's knowledge, and difficult or costly for the prosecution to establish.

Response to the Committee's comments

Context of secrecy provision

Clause 72 plays a key role in protection of highly sensitive information

Clause 72 plays a key role in the Bill because it is critical, in circumstances where information about a person that identifies a person, or is reasonably capable of identifying a person, is disclosed to the Tribunal (or persons assisting the Tribunal), that this information is kept confidential. Much of the information with which the Tribunal and the persons assisting it will be dealing will be information obtained in circumstances giving rise to a statutory or equitable obligation of confidence.

Examples of personal information that may be disclosed to the Tribunal, or persons assisting the Tribunal, include information obtained in confidence during doping control processes (for example, sensitive medical information on doping control forms) or evidence provided by an athlete in compliance with either a disclosure notice issued by the CEO of the Australian Sports Anti-Doping Authority (ASADA), or under a contractual obligation imposed by their sport.

In the General Division, it is envisaged the Tribunal will deal with disputes arising under the member protection policies of sports. Such disputes will potentially involve allegations of bullying, discrimination, or other unfair or inappropriate conduct.

An example of other information that might be disclosed to the Tribunal or the persons assisting it is personal information a witness has provided after being compelled to appear at the Tribunal under Division 8 of Part 3 of the Bill. More generally, disputes relating to sport tend to generate significant public interest and so, accordingly, there is likely to be significant interest, particularly from media organisations, in obtaining protected information. However, public disclosure of the categories of information described above could have catastrophic consequences for relevant individuals.

At a broader level, without confidence successful prosecutions can follow the unauthorised use or disclosure of protected information, sporting bodies are unlikely to refer disputes to

---

1 Attorney-General's Department, September 2011, pp 50-52.

the Tribunal for consideration. In consultations, sports have expressed the need for Tribunal hearings to remain confidential.

In summary, it is vital clause 72 of the Bill be drafted so as to provide the highest possible level of protection to the personal information of those interacting with the Tribunal.

Clause 72 applies to a limited class of persons who will be acutely aware of their responsibilities

It is also important to note clause 72 is not a provision of general application. Rather, it applies only to disclosures of protected information by entrusted persons. Because entrusted persons will have privileged access to highly sensitive information, it is reasonable to expect they understand and comply with a provision such as clause 72 and they place themselves in a position to be able to discharge an evidential burden in relation to the matters set out in subclauses 72(2)-(4).

It is appropriate for the application of clause 72 to be consistent with the application of the ASADA Act secrecy provision

It is also important to note protected information for the purposes of the Bill will often also be protected information for the purposes of the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act) (for example, medical information on doping control forms or evidence provided by an athlete in compliance with a disclosure notice issued by the ASADA CEO).

Section 67 of the ASADA Act makes it an offence (punishable with imprisonment for up to 2 years) for an entrusted person to disclose protected information to another person where they have obtained the protected information in their capacity as an entrusted person.

Subsection 67(2) recognises that a disclosure is not unlawful if it is authorised by a provision of Part 8, or if it is required to be made under a law of the Commonwealth, or under state or territory law, which is prescribed for these purposes. Consistent with subsection 13(3) of the Criminal Code, the defendant bears an evidential burden in establishing the offence in subsection 67(1) does not apply because one of the circumstances in subsection 67(2) exists. Separate provisions authorise the disclosure of protected information by an entrusted person for particular purposes, including, relevantly:

- for the purposes of the ASADA Act or legislative instruments made under it (section 68(a)), or
- for the purposes of the performance of the functions or duties, or the exercise of the powers, of the CEO (section 68(c)), or
- in accordance with the consent of the person to whom the protected information relates (section 68A), or
- of protected information that has already been lawfully made available to the public (section 68C).

Given the Tribunal will be dealing with ASADA protected information, it is appropriate for clause 72 of the Bill to operate consistently with the provisions of the ASADA Act. This will ensure the highly sensitive personal information of athletes and others is not afforded a lower level of protection when handled by the Tribunal than when it is handled by ASADA.

Burden of proof is evidential and not legal

It is relevant to note the burden of proof imposed by the proposed offence-specific defences is an evidential burden of proof (under which a defendant bears the burden of adducing or pointing to evidence suggesting a reasonable possibility a matter exists or does not exist), and is not a legal burden of proof (under which a defendant bears the burden of proving a matter).

Peculiarly within the knowledge of the defendant

As a general proposition, at the time of a potential prosecution, within the prosecutor/defendant paradigm, the knowledge of whether the defendant used or disclosed protected information in reliance on one or more exemptions in clause 72 is peculiar to the person. The prosecution can only prove whether or not the use or disclosure has occurred, but it will often be impossible to prove the reasons for it. It cannot disprove every conceivable circumstance that might fall within an exemption. It needs notice of the circumstance the defendant says he or she relied on. It would then be up to the prosecution to prove beyond reasonable doubt the circumstance did not apply.

Importantly, the prosecution cannot know whether relevant records of witnesses exist unless the defendant tells them. The Bill would not require records to be kept. Without an evidentiary onus on the defendant, the only way a prosecution could be successful would be for the prosecutor to somehow interview every conceivable witness to, in effect, try to find any evidence of innocence to prove beyond reasonable doubt there could not have been a lawful purpose for the disclosure. Some of the exemptions, such as 'for the purposes of the Act or rules', could give rise to countless types of legitimate and permissible disclosures. An example is in the context of the Tribunal's day-to-day operations, including interactions between staff of the Tribunal. If an evidentiary burden was not placed on the defendant, it would likely render prosecution of an offence – and protection of the information – all but impossible except in the cases where there could be no legitimate purpose for a particular disclosure. This risks bypassing the intent of the provisions, with far-reaching effects on the willingness of sports to engage with the Tribunal.

Subclause 72(2)

The first set of offence-specific defences is set out in subclause 72(2). These apply where an entrusted person discloses or uses information:

- for the purposes of the Act or the rules, or
- for the purposes of the performance of the functions or powers of the CEO or the exercise of the CEO's powers, or
- for the purposes of, or in connection with, the performance or exercise of the person's functions, duties or powers in the person's capacity as an entrusted person, or
- in accordance with the rules prescribed for the purposes of paragraph 72(2)(d).

The Bill does not impose an obligation on an entrusted person who discloses or uses protected information to make a record of the purpose of their disclosure or use. This is with good reason – legitimate uses and disclosures of protected information will occur frequently in the course of day-to-day Tribunal operations (for example, discussions between Tribunal members, or between the CEO and employees of the Tribunal, or consultants discussing their work with third parties to inform the advice they give to the CEO). Even if such records were required to be kept, the absence of a record in a given case

would not prove the absence of a proper basis for the disclosure. It would only prove the failure to find a record.

If a defendant has not made a record of the purpose for which they, as an entrusted person, have used or disclosed information, the consequence will generally be that the purpose remains peculiarly within the knowledge of that person. For example, the purposes of the Act are broad, as are the functions and powers of the CEO and other entrusted persons. Without the defendant being required to provide some indication of the purpose for which they had disclosed protected information, it would in many circumstances be impossible for the prosecution to otherwise prove beyond reasonable doubt the use or disclosure was not for any conceivable purpose falling within subclause 72(2).

Turning to paragraph 72(2)(d), it is relevant to note the proposed rules are currently being drafted to be made once the Bill is enacted. The proposed rule for the purposes of paragraph 72(2)(d) provides as follows:

> For the purposes of paragraph 72(2)(d) of the Act, subsection 72(1) of the Act does not apply in relation to a disclosure or use of protected information if the disclosure or use is made by the CEO in circumstances where the CEO considers it necessary to prevent or lessen a serious risk to the safety, health or well-being of a person.

Again, for reasons analogous to those discussed above, whether the CEO considered that a use or disclosure was necessary to prevent or lessen a serious risk to the safety, health or well-being of a person is something that may be peculiarly within the knowledge of the CEO.

Subclause 72(3)

The second offence-specific defence is set out in subclause 72(3) and applies where the person to whom the protected information relates has consented to the disclosure or use, and the disclosure or use is in accordance with that consent. In every investigation, it would be necessary to seek a statement from the person(s) to whom the information relates to prove that there was no consent.

Whether the relevant person consented, and the terms of that consent, are matters that may be peculiarly within the knowledge of the defendant. For example, if the consent was given verbally, no record was made of the consent and the person to whom the protected information relates refused to provide any information or had subsequently died, the prosecution would not have access to any information as to whether consent had been given. This would also be the case if consent had not been given and the person to whom the protected information relates refused to provide any information or had subsequently died. The Bill does not provide any powers to enable the prosecution to coercively obtain information from a person to whom protected information relates.

Again, if a person used or disclosed protected information in reliance on the exception in subclause 72(3), it would expected a record of the relevant consent and its terms would exist. In such circumstances the defendant should readily be able to discharge the evidential burden.

Subclause 72(4)

The third offence-specific defence applies in relation to a disclosure of protected information if the information has already been lawfully made available to the public. Circumstances in which information might already have been lawfully made available to the public would include where a participant to a dispute before the Tribunal has already disclosed the information, or where the information has previously been publicly disclosed in another context, for example, under a different statutory scheme permitting the

disclosure of that information, such as under section 68E of the ASADA Act, which permits the ASADA CEO to disclose protected information for the purposes of the ASADA Act to respond to certain public comments attributed to an athlete or support person or their representative.

Where a defendant has used or disclosed protected information in reliance on the information having already made available to the public, the lawful disclosure will be within the knowledge of the defendant. However, whether particular information has or has not been made available to the public may not be within the knowledge of the prosecution. Information can be made available to the public by many means, such as at a public lecture or on a radio program, where there is no enduring record of the disclosure. Consequently, unless the defendant first raised evidence of a lawful public disclosure, the best a prosecution could do is seek evidence from any person who might conceivably have lawfully made the information public.

Significantly more difficult and costly for the prosecution to disprove

As discussed in the explanatory memorandum to the Bill, in the event of a prosecution, it would be significantly more difficult and costly for the prosecution to disprove any of the circumstances set out in subclauses 72(2) – (4) than it would be for a defendant to establish the existence of those circumstances. Specifically, it would be significantly more difficult and costly for the prosecution to disprove the defendant's state of mind (that is, the defendant had a particular purpose for using or disclosing the information) than it would be for the defendant to provide evidence about their state of mind. It would generally be significantly more difficult and costly for the prosecution to disprove that a disclosure or use was in accordance with consent of the person to whom the protected information relates than it would be for the defendant to provide evidence that it was, and it would generally be significantly more difficult and costly for the prosecution to disprove that the relevant information had already been lawfully made available to the public than it would be for the defendant to provide evidence that it had.

Thank you for raising this matter.

Yours sincerely

Richard Colbeck

THE HON MICHAEL SUKKAR MP

Minister for Housing and Assistant Treasurer

Ref: MS19-001746

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

Dear Senator Polley

I am writing in relation to issues raised by the Senate Scrutiny of Bills Committee (the Committee) in *Scrutiny Digest 4 of 2019* regarding Schedules 1 and 2 to the *Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019* (the Bill).

The Committee sought advice as to how many individuals may be detrimentally affected by the retrospective application of Schedules 1 and 2 to the Bill, the extent of any possible detriment and whether the Schedules, as introduced, are consistent with the measures announced on 8 May 2018.

Schedule 1 to the Bill does not directly impact any individual as it only affects tax exempt entities that hold concessional loans and that are privatised and become taxable entities.

Whilst the exact number of individuals affected by Schedule 2 to the Bill is not known, it is expected to be very small as it only applies to a subset of taxpayers (partners of partnerships), who have entered into an artificial arrangement to alienate future income from the partnership, and very few of whom are likely to have entered into such arrangements in the period between the announcement of the measure and the date of passage.

Both Schedules are consistent with the measures announced on 8 May 2018.

Schedule 1 – Tax treatment of concessional loans involving tax exempt entities

Schedule 1 to the Bill preserves the integrity of the corporate tax base by preventing unintended deductions from arising in respect of concessional loans provided in the past and that may be provided in the future by Commonwealth, State and Territory governments. This Schedule protects the revenue base, as it is inappropriate for deductions to be available for the repayment of loan principal.

The Schedule applies from the date of announcement to ensure taxpayers cannot take advantage of the unintended tax deductions. Bidders for the limited number of privatising entities are likely to have factored in the non-availability of the deduction into bid prices following the Budget 2018-19 announcement, so any change to the commencement date would otherwise result in a windfall gain

to those bidders at the expense of government owners of privatising entities and Commonwealth tax revenue.

The Schedule does not directly impact on any individual. It affects previously tax exempt entities (such as government owned entities) that hold concessional loans and that are subsequently privatised and become taxable entities. Schedule 1 to the Bill as introduced is consistent with the measure as announced on 8 May 2018.

Schedule 2 – Enhancing the integrity of the small business CGT concessions in relation to partnerships

Schedule 2 to the Bill ensures that partners in partnerships cannot access the small business capital gains tax concessions when they seek to alienate future income from the partnership. The Schedule applies from the date of announcement to ensure taxpayers do not seek to further access the concessions outside of the original policy intent and prior to Parliament acting to close the tax loophole.

This retrospective application may disadvantage some taxpayers if they have sought to access the small business CGT concessions between announcement and the date of passage of the legislation but are no longer eligible as a result of the amendments.

The number of taxpayers affected and the extent of the consequences for those taxpayers is not known as this information is not collected in tax returns. However, the number affected is expected to be very small, as the amendments only affect a specific type of artificial arrangement that can only be entered by a small number of sophisticated taxpayers (partners of certain partnerships). Further, only an even smaller proportion of those taxpayers are likely to have established new arrangements and sought to access the CGT concessions in the period between the announcement of the measure and the date of passage.

Retrospective application is necessary as the amendments are an important integrity measure to prevent inappropriate access to the CGT small business concessions for arrangements undertaken to reduce partner's tax liabilities. If the amendments did not apply from announcement, partners would be able to enter into such arrangements during the period between announcement and the passage of legislation and avoid the operation of the measure. Schedule 2 to the Bill as introduced is consistent with the measure as announced on 8 May 2018.

I trust this information will be of assistance to you.

The Hon Michael Sukkar MP

SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION, FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS19-001671

- 8 AUG 2019

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

Dear Senator Helen Polley

I am writing in response to a letter from the Senate Scrutiny of Bills Committee (the Committee) requesting information in relation to issues raised in the Committee's *Scrutiny Digest 3 of 2019* regarding the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019.

The Committee has requested further information about the imposition of a fine equal to 120 penalty units for the contravention of the strict liability offence in proposed subsection 203AA(6) of the *Corporations Act 2001*.

Proposed section 203AA ensures directors are held accountable for misconduct by preventing company directors from improperly backdating resignations. If the resignation of a director is reported to ASIC more than 28 days after the purported resignation, the resignation takes effect from the day it is reported to ASIC. However, a company or a director may apply to ASIC, or the Court, to give effect to the resignation notwithstanding the delay in reporting the change to ASIC. If the Court makes an order to backdate the effective date of a director's resignation, proposed subsection 203AA(6) provides that the applicant must provide a copy of the order to ASIC within two business days.

The obligation to inform ASIC of a Court order is necessary to ensure the company register maintained by ASIC is accurate. A failure by an applicant to inform ASIC of an order fixing a director's date of resignation would cause the company register to be inaccurate and the register could not then be relied on by consumers and other members of the community dealing with the relevant company or director. An offence of strict liability is necessary to ensure compliance with this simple but important obligation. The obligation to inform ASIC of the order would be known to the applicant that sought the order under proposed subsection 203AA(2).

The *Guide to Framing Commonwealth Offences* suggests an appropriate penalty for a strict liability offence is 60 penalty units for an individual. While the amendments depart from the Guide, the fine

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 3123 | Facsimile: 61 2 6277 5782

imposed is justified by the important nature of the obligation, the significant consequences on the community of non-compliance and the need for a strong and appropriate deterrent.

The fine also aligns with other comparable strict liability offences in the *Corporations Act 2001* (as amended by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*). Specifically and appropriately, the fine aligns with the related strict liability offence for failing to notify ASIC of the resignation under subsection 205B(5) of the Act, which gives rise to the same community detriment.

I trust this information will be of assistance to you.

Yours sincerely

Senator the Hon Jane Hume

THE HON JOSH FRYDENBERG MP
TREASURER
DEPUTY LEADER OF THE LIBERAL PARTY

Ref: MS19-001745

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

Dear Senator Polley

I am writing in response to a letter from the Senate Scrutiny of Bills Committee (the Committee) requesting information in relation to issues raised in the Committee's *Scrutiny Digest 4 of 2019* regarding the Treasury Laws Amendment (Consumer Data Right) Bill 2019 (the Bill).

The Committee sought advice as to:

- the rationale for including a number of no-invalidity clauses in the Bill;
- the rationale for allowing the inclusion of potentially significant matters in data standards and instruments not subject to parliamentary scrutiny;
- the appropriateness of reversing the evidential burden of proof for certain offences;
- whether relevant International Organisation for Standardisation (IOS) standards will be made freely available; and
- the rationale for allowing the Australian Competition and Consumer Commission (ACCC) and the Governor-General by regulations to provide exemptions from the operation of the scheme.

Issue 1: no-invalidity clauses in relation to consultation requirements

No-invalidity clauses in relation to the consultation requirements were included in the Bill to provide certainty on the validity of the instruments for the benefit of users and consumers of the Consumer Data Right (CDR).

The no-invalidity clauses in the Bill reflect the general position as set out in section 19 of the *Legislation Act 2003*, that the validity or enforceability of a legislative instrument is not affected by a failure to consult. Recognising the importance of consultation given the broad rule-making power, the Bill creates considerably stricter consultation requirements than those set out in the *Legislation Act 2003*. This sets significantly higher expectations in respect of the CDR than standard legislative processes.

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

However, the importance of thorough consultation was balanced against the need for certainty and consumer protection once the rules have been made. Without a no-invalidity clause, the designation instrument or rules may be challenged on the issue of whether consultation undertaken was adequate and whether submissions were properly considered and acted or not acted upon.

The lack of a no-invalidity clause would also create perceived and actual risk for the validity of the rules, even where consultation in accordance with in the requirments in the Bill have been undertaken. The rules create rights for consumers and inform how the privacy safeguards will be applied once data has been shared under the rules. As a result, it is not desirable from a consumer protection perspective for the rules or designation instrument to be subject to challenge on the basis of the quality of the consultation.

As noted by the Committee, both the designation by the Minister of a sector to which the regime applies and the consumer data rules made by the ACCC are instruments subject to Parliamentary scrutiny and disallowance. The latter can only be made with the Minister's consent, unless they are emergency rules, which the minister can direct to be revoked. It is expected that the extent and quality of the ACCC's consultation would be a consideration when providing this consent.

Issue 2: allowing potentially significant matters to be included in instruments or standards that would not be subject to any Parliamentary control or scrutiny

The Committee raised concerns about the potential for significant matters to be included in two classes of instruments, the data standards and an instrument recognising an external dispute resolution scheme, which are not subject to Parliamentary control or scrutiny.

Data standards

In relation to the data standards, the use of non-statutory standards was appropriate because of the highly technical and specialised nature of the data standards. Further, given the expected frequency and volume of revisions, it would be inappropriate to designate the standards as legislative instruments.

As technical adviser to the interim data standards body, Data61 prepared large volumes of draft data standards, much of which are comprised of, or closely resemble, computer programming code. Data61's log of changes identified almost 40 revisions to the draft standards between December 2018 and July 2019.

Importantly, in making consumer data rules, the ACCC is appropriately empowered to place limits and controls on the content and scope of the data standards where necessary. The data standards must not be inconsistent with the consumer data rules, and are not binding unless the consumer data rules so require.

External dispute resolution scheme

The ability to recognise an external dispute resolution scheme by notifiable instrument was appropriate as it is a mechanical matter appropriately within the administrative control of the ACCC as a CDR regulator.

The use of a notifiable instrument is consistent with arrangements under section 35A of the *Privacy Act 1988*, which provides the Australian Information Commissioner the ability to recognise an external dispute resolution scheme by written notice. Similarly, section 1050 of the *Corporations Act 2001* provided for the authorisation of the Australian Financial Complaints Authority scheme by notifiable instrument.

Issue 3: the appropriateness of reversing the evidential burden of proof for certain offences

Section 56BN of the *Competition and Consumer Act 2010* (the CCA) regulates misleading or deceptive conduct in a wide range of circumstances relating to the disclosure of CDR data, both in terms of the actors (e.g., data holders, accredited data recipients and CDR consumers) and the provisions of the CCA, and consumer data rules in relation to which an offence may occur.

Subsection 56BN(2) includes an offence-specific defence where the misleading particular is not material, and as noted by the Committee, this mechanism places the evidentiary burden on the defendant. This was appropriate because the mitigating circumstance will often rely on information that is peculiarly within the knowledge of the defendant and therefore it was included an exception, rather than as an element of the offence.

For example, an accredited person is required when seeking consent to collect CDR data to be specific as to the purpose for which the CDR data may be collected. Where proceedings for an offence arises relating to whether particular conduct fell within that purpose, the accredited person may argue that any differences in interpretation of that purpose were not misleading in a material particular. However, the evidence about the materiality would likely be peculiarly within the knowledge of the defendant, relating to the manner in which the accredited person's business provides services with the use of CDR data.

It would be unduly onerous in this case to require the plaintiff to prove the materiality in the absence of evidence having first been raised by the defendant and, by comparison, relatively straightforward for the defendant to raise this evidence.

The offence in section 56BN was designed to be similar to equivalent offence provisions in the *Criminal Code* (sections 136.1 and 137.1). These *Criminal Code* provisions also contain offence-specific defences for circumstances where the misleading particular was not material. The consistency between section 56BN and the *Criminal Code* provisions is appropriate as they are enacted to regulate similar kinds of circumstances.

Further, given the prosecution is also required to establish that the conduct leads to the result that a person is, or is likely to be, misled or deceived about the use or disclosure of CDR data under the regime (paragraph 56BN(1)(c)), the circumstances in which the defence may actually arise are likely to be limited.

Issue 4: the public availability of the relevant IOS standards

The Committee requested advice on the accessibility of relevant International Organisation for Standardisation (IOS) standards and it is acknowledged that the Bill allows the incorporation by reference of external material, such as a number of IOS standards, which may attract a fee for access.

The costs to the affected businesses of accessing any such materials is relatively moderate and would be far outweighed by the costs to those businesses of having to comply with bespoke standards, rather than broadly adopted existing widely used ones. In addition to reducing implementation and operational costs for participants, the use of widely accepted standards may also be required to support the broader interoperability of the system.

However, data standards which are developed by the data standards body itself will be made publicly available at no cost, and be published under creative commons licenses – see section 56FC of the CCA. The introduction of any standards, or similar documents, are done in consultation with stakeholders primarily through GitHub, and the Data Standards Body Advisory Committee.

Issue 5: the appropriateness of allowing the ACCC and the Governor-General by way of regulations to provide exemptions from the operation of the new consumer data right scheme

The exemption and modification regulation-making powers in section 56GE of the CCA and the ACCC's power in section 56GD of the CCA to exempt individuals are necessary and appropriate as the matters covered are of a highly specific nature, apply to a limited number of entities and are only intended to be used in exceptional circumstances.

The CDR regime will apply to broad sectors of the economy, likely resulting in circumstances for particular participants, or classes of participants, where the generally applicable rules will lead to an unintended result. Exemptions of these kinds are generally not appropriate for inclusion in the primary law, as they would increase the complexity of the primary law while addressing matters relevant only to a limited number of entities.

These exemption powers are intended to be used in exceptional circumstances. An example of exceptional circumstances which might justify granting an exemption or modification in regulations for section 56GE is where compliance by a class of entities with the CDR regime might conflict with the laws of another jurisdiction. The ACCC's power in section 56GD is narrower, applying only to individuals. An example of where an individual exemption from the ACCC might be necessary under section 56GD is where a particular data holder may not be in a position to comply with requests in accordance with the regime at the time it begins to apply to the entity.

As the Committee notes, there is no criteria for making a decision whether to exempt a person set out in section 56GD. As the regime will eventually apply to many sectors of the economy, it would not be possible to foresee where exceptional circumstances will arise for each sector that may necessitate an exemption. This is because those circumstances usually arise on a sector or participant-specific basis and it would not be possible to develop meaningful criteria for the exercise of exemption and modification powers. However, the ACCC would be required to consider the object of Part IVD of the CCA when making a decision.

The Committee's concerns about the lack of a specific consultation requirement before making regulations for the purposes of new section 56GE are noted. Consistent with usual practice, it is expected that consultation would occur before making regulations for the purposes of this section, especially where this would impact businesses and consumers as required under section 17 of the *Legislation Act 2003*.

Thank you for bringing your concerns to my attention.

THE HON JOSH FRYDENBERG MP

22 / 8 /2019