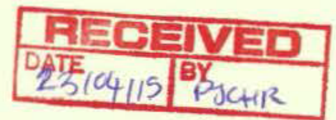
Appendix 1

Correspondence



The Hon Kevin Andrews MP
Minister for Defence

Reference: MC15-000826

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 18 March 2015 drawing to my attention the *Twentieth Report of the 44th Parliament* of the Parliamentary Joint Committee on Human Rights, concerning the Defence Trade Controls Amendment Bill 2015.

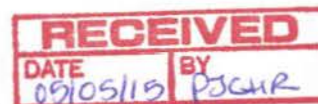
Noting that the Bill requires the defendant to carry an evidential burden of proof with regard to the new exceptions, the Report queries whether the Bill is consistent with Article 14(2) of the International Covenant on Civil and Political Rights which protects the right of the defendant to be presumed innocent. The Bill's explanatory memorandum justifies these reversals on the grounds that the evidence that would need to be raised would either be solely within the defendant's knowledge or it would be more reasonable, more practical and less burdensome for the defendant to establish the facts. Although the Committee agrees that this explanation holds true in some circumstances, it has asked for my further advice as to whether the limitation is reasonable and proportionate to achieve the Bill's stated objective.

While I acknowledge that the Bill does reverse the onus of proof for the introduced exceptions, these reversals are within reasonable limits, considering the importance of the Bill's objective, the lower standard of proof that the defendant bears, and that the defendant's right to a defence is maintained. The objective of the legislation, to stop proliferation-sensitive goods and technologies being used in conventional, chemical, biological or nuclear weapons programs, will be strengthened by exceptions that shift the onus to the defendant. To discharge the onus, a defendant need only produce evidence that suggests a reasonable possibility that the exception applies. Noting that a defendant who wishes to rely on an exception should have conducted compliance checks to satisfy themselves that their activity falls within the exception, it is reasonable to expect the defendant to produce evidence of these checks to discharge the onus.

Reversing the onus for the defences within the Bill does not erode the defendant's right to a defence, is within reasonable limits and, given the important counter-proliferation objective of the Bill, is a proportionate measure to achieve the Bill's stated objective.

Yours sincerely

KEVIN ANDREWS MP 21 APR 2015



SENATOR THE HON MATHIAS CORMANN

Minister for Finance

REF: MC15-000678

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 18 March 2015 drawing my attention to comments relating to *Appropriation Bill (No. 3) 2014-2015* and *Appropriation Bill (No. 4) 2014-2015* in the *Twentieth Report of the 44th Parliament* of the Parliamentary Joint Committee on Human Rights (the Committee). In particular I note the Committee considers that appropriation bills may engage rights according to Australia's obligations under international human rights law.

My view remains however, that given the extremely limited legal effect of the appropriation bills, they do not engage or otherwise affect the rights or freedoms relevant to the *Human Rights (Parliamentary Scrutiny) Act 2011*. This is consistent with the position I have previously expressed to the Committee on the adequacy of the statements of compatibility with human rights within the explanatory memoranda of appropriation bills.

I have noted and carefully considered the suggestions the Committee has made to assess whether the appropriation bills are compatible with human rights obligations. It is the government's view, however, that there are already extensive opportunities within the existing legislative process for the adequate scrutiny of these bills, and changes are not required.

As my predecessor, Senator the Hon Penny Wong, replied on 10 May 2013 the detail of proposed Government expenditure and the Budget generally, appears in the Budget Papers rather than appropriation Bills, with more specific detail provided in the Portfolio Budget Statements prepared for each portfolio and authorised by the relevant Minister. This detail allows the examination of proposed expenditure and budgetary processes through the Senate Estimates process.

The policy development process does however by its nature require an assessment of all factors that might relate to the relevant policies, including environmental, legal, economic, social and moral factors. The Attorney General's Department has developed an assessment tool and educational materials for use by policy officers to strengthen the capacity to develop policies, programs and legislation consistent with human rights.

Thank you for bringing the committee's comments to my attention.

Kind regards

Mathias Cormann
Minister for Finance

3 April 2015

The Hon Kevin Andrews MP
Minister for Defence

Reference: MC15-000613

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Mr Ruddock~~ Philip

I refer to the letter of 3 March 2015 from your predecessor, Senator Dean Smith, regarding the Defence Legislation Amendment (Military Justice Enhancements – Inspector-General ADF) Bill 2014 (the Bill).

The Department of Defence has long regarded ascertaining the true causes of significant events involving its personnel as being more important than possible prosecution of, or civil suit against, individuals. Such information enables actions to be undertaken to prevent the reoccurrence of adverse events – for example, you may recall that the Sea King Board of Inquiry led to major changes in the Navy's helicopter maintenance practices.

Experience suggests that individuals may be reluctant to provide evidence that could be used against them. This can make it difficult to investigate and ascertain the true causes of significant events, which are often systemic or cultural rather than solely the fault of individuals. Compelling individuals to provide information, even though it may implicate them in wrongdoing, and protecting the information from use in subsequent criminal or civil proceedings, will sometimes be the only way to determine the true causes of significant events. This is demonstrated in cases where witnesses have refused to cooperate with disciplinary investigations, but have provided information when compelled in an administrative inquiry.

Under the new arrangements made possible by the Bill, the Inspector-General of the Australian Defence Force be responsible for inquiring into service-related deaths and other matters directed by the Minister or the Chief of the Defence Force, in addition to a military justice oversight role. These functions will frequently involve ascertaining the true causes of significant events in order to prevent reoccurrence, often in situations where individuals could be implicated and, accordingly, where they could be reluctant to provide all relevant information. In these circumstances, limiting the abrogation against self-incrimination to compel witnesses to provide information to the Inspector-General ADF that may incriminate them, while also protecting witnesses from having information they have provided used against them, supports the legitimate objective of ascertaining the true causes of significant events.

Under current arrangements, the privilege against self-incrimination is abrogated by the Defence (Inquiry) Regulations 1985 (the Regulations) which have been made under paragraph 124(1)(gc) of the *Defence Act 1903* (the Act). The abrogation is also governed by sub-sections 124(2A), (2B) and (2C) of the Act. The privilege is abrogated for all types of inquiry under the Regulations, including Chief of the Defence Force Commissions of Inquiry (Part 8 of the Regulations), Boards of Inquiry (Part 3), and to a lesser extent in Inquiry Officer inquiries (Part 6) and inquiries by the Inspector-General ADF (Part 7).

Currently, unless I direct otherwise, a Chief of the Defence Force Commission of Inquiry must be held into all service-related deaths. These Commissions have the ability to require witnesses to answer questions in abrogation of their right against self-incrimination. For consistency of approach and to ensure quality outcomes, it is proposed that similar powers should apply to the Inspector-General ADF, who will take over responsibility for inquiring into service-related deaths under the new arrangements.

In these circumstances, it is considered that allowing for the privilege against self-incrimination to be abrogated, while protecting information collected from subsequent use in criminal and civil proceedings, is a reasonable and proportionate measure to achieve the objective of ascertaining the true causes of significant events in Defence.

It should also be noted that the abrogation of the privilege against self-incrimination can only have an extremely limited scope due to the limitations imposed by the new sub-section 110C(4) of the Act on the functions of the Inspector-General ADF.

Finally, Defence regrets not including this information in the explanatory material, which may have alleviated the Committee's concerns on these matters. A replacement explanatory memorandum addressing these concerns was tabled in the Senate on 5 March 2015.

I trust this information is of assistance to the Committee.

Yours sincerely

KEVIN ANDREWS MP

2 6 MAR 2015

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

14 APR 2015

Dear Mr Ruddock Philip,

I refer to the letter of 3 March 2015 from Senator Dean Smith, on behalf of the Parliamentary Joint Committee on Human Rights, concerning the Fair Work Amendment (Bargaining Processes) Bill 2014.

The Bill seeks to deliver the Australian Government's election commitment to promote harmonious, sensible and productive enterprise bargaining. The Bill achieves this by providing that the independent Fair Work Commission must be satisfied that claims are not manifestly excessive or would have a significant adverse impact on productivity, before it approves an application to take protected industrial action and that there has been a discussion about productivity at some point in bargaining.

These changes were outlined in detail in *The Coalition's Policy to Improve the Fair Work Laws* that was released in May 2013. The Explanatory Memorandum to the Bill included a thorough Statement of Compatibility with Human Rights. The Statement confirms that the amendments contained in the Bill are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

To the extent that it is suggested the measures in the Bill limit human rights and freedoms, those limitations are reasonable, necessary and proportionate because they pursue the legitimate objectives of ensuring meaningful and genuine negotiations during enterprise bargaining and that the bargaining claims of applicants for protected action ballot orders are not unrealistic.

The Committee has requested further information on certain matters and those have been addressed and in the **enclosed** document.

Yours sincerely

ERIC ABETZ

Encl.

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MB15-000050

Fair Work Amendment (Bargaining Processes) Bill 2014

Please find below responses to each of the Committee's requests for further information.

The Committee has requested advice on whether the proposed amendment to subsection 443(2) of the Fair Work Act 2009 (Fair Work Act) is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for achievement of that objective.

The Government's clear position set out in *The Coalition's Policy to Improve the Fair Work Laws* (the Policy), released in May 2013, was that it would legislate to 'encourage meaningful, genuine negotiations during enterprise bargaining' and 'change the laws to ensure that protected industrial action can only happen after there have been genuine and meaningful talks'.[1]

As the Committee is no doubt aware, protected industrial action does not occur in a vacuum. Rather, protected industrial action is taken in support of *bargaining claims*. It is therefore wholly unexceptional to expect that parties have had, or at least attempted to have had, genuine and meaningful talks *in bargaining* before they resort to industrial action.

It is approaching the absurd to suggest that employees' right to take industrial action in support of a bargaining position is limited by an expectation that there has at least been an attempt to engage meaningfully on the bargaining position or that this requirement has human rights implications that warrant the attention of a Parliamentary Committee.

The Policy also stated that 'it is important to ensure that claims made by parties when negotiating for an enterprise agreement are sensible and realistic'[2] and that the Government 'will change the laws so that the Fair Work Commission must be satisfied that claims are realistic and sensible before they approve an application to take industrial action'.[3] In support of the above statements, the Policy sets out examples where 'fanciful, exorbitant or excessive' enterprise bargaining claims were, in effect, undermining the operation of Australia's enterprise bargaining and industrial action framework.[4]

The Fair Work Amendment (Bargaining Processes) Bill 2014 (the Bill) seeks to implement these commitments and respond to these concerns by providing that the independent Fair Work Commission must not make a protected action ballot order if it is satisfied that the bargaining claims of an applicant are <u>manifestly</u> excessive, having regard to the conditions at the workplace and the industry in which the employer operates, or, if acceded to, would have a <u>significant adverse impact</u> on productivity at the workplace.

The Committee, at 1.33 of its report, refers to the permissible limitations on rights where a limitation is 'necessary...for the protection of the rights and freedoms of others'. It appears the Committee has inexplicably overlooked the potentially significant and disproportionate damage that protected industrial action can cause not only to an employer, but to other employees and workers not engaging in industrial action as well as on innocent third parties. Remembering also that those engaged in protected industrial action are provided with a statutory immunity over the loss or damage they cause to others by their industrial action, it is appropriate and entirely unexceptional that, for the protection of the rights of others, the powerful tool of protected industrial action is not used capriciously and in support of claims that are *manifestly* excessive or would have a *significant adverse impact* on productivity.

The Committee also comments that this same standard is not applied to claims by an employer. Whilst this is correct, the Committee's analysis embarrassingly ignores the reality that employers have no right to unilaterally commence protected industrial action in support of its bargaining claims. An employer's recourse to protected industrial action depends entirely on whether employees engage in industrial action first.

The critical points are that these amendments do not limit the right to form trade unions by limiting the right to strike and the Committee's assertion to the contrary would be quite laughable if it didn't

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[1] *The Coalition's Policy to Improve the Fair Work Laws*, page 32.
[2] Ibid, page 33.
[3] Ibid, page 34.
[4] Ibid, page 34.

trivialise genuine human rights issues. The Committee's bland assertion without supportive evidence undermines the credibility of the Committee.

The Committee has requested advice on whether the amendment to subsection 187(1) of the Fair Work Act 2009 is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for achievement of that objective.

The Government was very clear in the Policy that it intended to 'put productivity back on the agenda' by requiring that 'before an enterprise agreement is approved, the Fair Work Commission will have to be satisfied that the parties have at least discussed productivity as part of their negotiation process'.[5]

The Bill seeks to implement this commitment by requiring that before the Fair Work Commission approves an agreement, it must be satisfied that improvements to productivity at the workplace were discussed during bargaining for the agreement. That is all. All this amendment requires is that there has been a discussion about productivity at some point in bargaining.

The Government reiterates (as noted in the Explanatory Memorandum to the Bill) that this amendment is not intended to require the Fair Work Commission to consider the merit of the improvements to productivity that were discussed, the detail of the matters that were discussed, the outcome of those discussions or whether it would be reasonable for certain provisions to be included in an enterprise agreement. All that is required is that there is a discussion. This is hardly onerous on either the employer, employees or bargaining representatives.

It was ludicrous and unsustainable for the Committee to have concluded in its report, at 1.45, that a requirement to have a discussion about productivity at some point during bargaining "limits the right to organise and bargaining collectively". Many objective observers would disagree that the need to have a discussion 'limits' in any substantive way the right to freedom of association and the right to organise and bargaining collectively.

The Committee's approach to whether the requirement to have a discussion constitutes a substantive limitation is, with respect, narrow, impractical and ignores the realities of bargaining and again, regrettably, only trivialises the work of the Committee and genuine human rights issues.

The Government does not consider that the proposed amendment limits the right to freedom of association.

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[5] Ibid, page 33.

Senator the Hon Simon Birmingham

Assistant Minister for Education and Training
Senator for South Australia

Our Ref MC15-001260

The Hon Philip Ruddock MP
Chair
Parlimentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

20 MAY 2015

Dear ~~Chair~~ Philip,

Thank you for your letter of 18 March 2015 concerning the National Vocational Education and Training Regulator Amendment Bill 2015 (the Bill), which was passed by Parliament on 16 March 2015 and received the Royal Assent on 2 April 2015.

I note the Committee is concerned with the amendments to the definition of 'VET information' and the disclosure provisions, in particular in relation to the potential for disclosure of students' personal information held by the national training regulator, the Australian Skills Quality Authority (ASQA).

Under the provisions of the *National Vocational Education and Training Regulator Act 2011* (the Act), ASQA may, in the course of regulating registered training organisations (RTOs), collect vocational education and training (VET) information. After the amendments in the Bill commence, VET information will be defined to mean information that is held by ASQA and relates to the performance of ASQA's functions, including information and documents collected by ASQA in the course of administering the Act, or in the exercise or performance of a function under the Act.

I have been advised that ASQA does collect some personal information relating to individual students and I agree, this information will be VET information under the Act.

As the Committee notes, one of the purposes of amending the definition of VET information is to assist ASQA in removing dishonest providers from the VET sector. It is envisaged that this objective will be predominantly achieved by means of ASQA providing other (not personal) types of VET Information, such as marketing materials to the Australian Competition and Consumer Commission.

The amended provision allows for the possibility that there may be circumstances where it is necessary for ASQA to disclose personal information to another agency for the purposes of, among other things, identifying and removing unscrupulous providers from the VET sector.

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While such a circumstance may not be a common occurrence, it is important that ASQA is able to respond in a timely and efficient manner, and to ensure that the relevant receiving agency has the information necessary to perform its functions or exercise its powers. I note the Committee's concerns that this measure may limit an individual's right to privacy. There are a number of safeguards in place to ameliorate that risk.

ASQA will only be permitted to disclose an individual's personal information to a Commonwealth authority or state or territory authority if it is reasonably satisfied that disclosure is necessary to enable or assist the authority to perform or exercise any of its functions or powers. Under Part 9 Division 2 of the Act, which governs the disclosure and sharing of information (including any personal student information), it is an offence for a person to make an unauthorised disclosure of VET information, with a penalty of two years imprisonment. In addition, ASQA is bound by the *Privacy Act 1988* and the Australian Privacy Principles (APPs). The APPs include rules around the collection, use and disclosure of personal information. The Office of the Australian Information Commissioner can investigate potential breaches of the APPs.

The amended provision, when combined with the existing privacy safeguards, is an effective way of ensuring that the right to privacy is balanced with the need to protect the interests of VET students, as well as to protect and enhance Australia's reputation for VET nationally and internationally.

Thank you for bringing this matter to my attention. I trust the above clarification addresses the concerns raised by the Committee.

Yours sincerely

Simon Birmingham

PARLIAMENTARY SECRETARY
TO THE PRIME MINISTER

Reference: C15/27983

13 APR 2015

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear ~~Mr Ruddock~~ Philip

Thank you for your letter dated 24 March 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Omnibus Repeal Day (Autumn 2015) Bill 2015 (the Bill). I welcome this opportunity to address the Committee's questions on the Bill as presented in the *Twenty-First Report of the 44th Parliament.*

The Committee seeks advice as to whether existing federal legislation provides equivalent protection of the right to equality and non-discrimination as that contained in the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (the Queensland Discriminatory Laws Act) .

The *Racial Discrimination Act 1975* (the Racial Discrimination Act) will continue to provide protection of the rights of Aboriginal persons and Torres Strait Islanders to equality and non-discrimination.

Specifically, section 9 of the Racial Discrimination Act prohibits 'direct' race discrimination, while section 10 provides for a general right to equality before the law. Subsection 10(3) supersedes State or Territory laws that authorise the management of Aboriginal or Torres Strait Islander property without their consent. This subsection is essentially in the same terms as section 5 of the Queensland Discriminatory Laws Act.

The Committee also seeks advice as to whether there are any Queensland laws which continue to apply such that the Queensland Discriminatory Laws Act may not be redundant.

The Queensland Discriminatory Laws Act deals with the *Aborigines Act 1971* (Qld) and the *Torres Strait Islanders Act 1971* (Qld) and, where relevant, their successor Acts.

These Acts imposed a different legal regime on Aboriginal and Torres Strait Islander reserves in Queensland than that which applied to persons in other parts of Queensland.

The laws targeted by the Queensland Discriminatory Laws Act have since been repealed. While the Discriminatory Laws Act continues to have legal effect, it serves no practical purpose. Please refer to Attachment A which traces changes to targeted Queensland laws, including the removal of discriminatory aspects.

Yours sincerely

CHRISTIAN PORTER

Attachment A – Changes to Queensland laws to remove discriminatory aspects targeted by *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (the Discriminatory Laws Act).

Queensland Discriminatory Laws Act	Queensland law targeted	Queensland successor provisions (if any)	Removal of discriminatory aspects
Section 5 – Management of Property Section 5 superseded Queensland laws allowing for the management of Aboriginal and Torres Strait Islander property without consent. [NB. Section 5 is replicated in similar terms s 10(3) of the *Racial Discrimination Act 1975* (Cth)].	*Aborigines Act 1971,* ss 4(6), 37, 38 and 45. *Torres Strait Islanders Act 1971*, ss 4(8), 61, 62 and 69. Under these laws: • property managed without consent under previous laws would continue to be managed (ss 4(6) and 4(8)); and • although an application could be made to terminate management, termination was subject to the discretion of the Director (ss 45 and 69).		*Aborigines Act and Torres Strait Islanders Acts Amendment Act 1974*, ss 5 and 6, amended the *Aborigines Act 1971* and ss 11 and 12 amended the *Torres Strait Islanders Act 1971* to make provision for Aboriginal and Torres Strait Islander people: • to give consent to another person to manage their property; and • to terminate management of their property.
Section 6 – Residence etc on Reserves Section 6 superseded Queensland laws preventing Aboriginal or Torres Strait Islander persons from being on a reserve without a permit.	*Aborigines Act 1971*, Part III (particularly s 19) and *Torres Strait Islanders Act 1971,* Part III (particularly s 19). • Entitlement to be on a Reserve required a permit.	*Community Services (Aborigines) Act 1984*, Part IV. *Community Services (Torres Strait Islanders) Act 1984,* Part IV.	The *Community Services (Aborigines) Act 1984* repealed the *Aborigines Act 1971*. Part 4 of the new Act: • allowed any person to enter public parts of an area; and • allowed any person to be on an area that was not public as a guest or at the request of a resident. The *Community Services (Torres Strait Islanders) Act 1984* had the same effect.
Section 7 – Conduct on reserves Section 7 superseded Queensland laws allowing ejection from a Reserve, or penalisation, if the only reason was that conduct was unsatisfactory to the authorities.	*Aborigines Act 1971*, s 56 (Power to make regulations), *Aborigines Regulation 1972*, reg 14. Also: Regulations and by-laws creating a 'code of community conduct', eg: • *Aborigines Regulation 1972*, regs 11-15. • *Aboriginal Council By-Laws*, by-laws 4.1(h), 6.10, 8.3, 9.3, 10.1, 14.5, 24.3A.		The *Community Services (Aborigines) Regulations 1985* repealed the *Aborigines Regulation 1972* in full.

Queensland Discriminatory Laws Act	Queensland law targeted	Queensland successor provisions (if any)	Removal of discriminatory aspects
Section 7 – Continued	*Aborigines Regulation 1972*, reg 46(a) and (b) (vesting jurisdiction in Aboriginal courts to adjudicate complaints of offences against both Regulations and By-Laws).		
Section 8 – Entry on premises situated on reserves Section 8 superseded Queensland laws allowing authorities to enter occupied premises on a Reserve without consent, unless to do so would be lawful if the premises were not on a Reserve.	*Aborigines Act 1971*, s 56 (Power to make regulations), *Aborigines Regulation 1972*, reg 19-21 and Aboriginal Council By-Laws, Ch 8. By-law 8.6 provided: 'A householder shall allow an authorised person to enter his house for the purpose of inspection.'		The *Community Services (Aborigines) Regulations 1985* repealed the *Aborigines Regulation 1972* in full.
Section 9 – Legal proceedings Section 9 provided: • Entitlement to representation by a legal practitioner. • Equivalent rights of appeal against, or review of, a conviction.	*Aborigines Act 1971*, s 32 (Aboriginal courts) and *Aborigines Regulation 1972*, regs 45 and 46. • No right of appeal. • No right to representation. *Torres Strait Islander Act 1971*, Div 3 of Part III. • No right to representation.	*Community Services (Aborigines) Act 1984*, Div 3 of Part III. *Community Services (Aborigines) Act 1984*, Div 4 of Part III (renumbered under the *Reprints Act 1992*, s 43 as required by the *Community Services (Aborigines) Act 1984*, s 87). *Community Services (Torres Strait Islanders) Act 1984*, Div 3 of Part III.	*Aborigines and Islanders Acts Amendment Act 1979* amended the *Aborigines Act 1971* to introduce a formal right of appeal from decisions of Aboriginal courts. Item 13 of Sch 1 to the *Local Government (Community Government Areas) Act 2004* repealed Div 4 of Part III of the *Community Services (Aborigines) Act 1984* to abolish Aboriginal courts. *Local Government and Other Legislation (Indigenous Regional Councils) Amendment Act 2007* repealed the *Community Services (Torres Strait Islanders) Act 1984*, abolishing Island courts.
Section 10 – Directions to work Section 10 superseded any requirement in Queensland law to comply with any direction to perform work on a Reserve, subject to limited exceptions.	*Aborigines Act 1971*, s 56 (Power to make regulations), *Aborigines Regulation 1972*, reg 19-21 and the Aboriginal Council By-Laws, Ch 3. Chapter 3 reportedly contained a by-law that required all able-bodied persons over 15 years residing in a Reserve to perform work as directed.		The *Community Services (Aborigines) Regulations 1985* repealed the *Aborigines Regulation 1972* in full.

Queensland Discriminatory Laws Act	Queensland law targeted	Queensland successor provisions (if any)	Removal of discriminatory aspects
Section 11 – Terms and conditions of employment Section 11 provided that Aboriginals or Torres Strait Islanders in Queensland were to be employed on the same terms and conditions as anyone else.	*Aborigines Act 1971*, s 56 (power to make regulations) and *Aborigines Regulation 1972*, reg 68.* Reg 68 specified that Aboriginal workers, other than those on a Reserve, be employed in accordance with the provisions of the applicable award or industrial agreement, or where none existed, they were entitled to the basic wage.		The *Community Services (Aborigines) Regulations 1985* repealed the *Aborigines Regulation 1972* in full.

* Until 1979, the Queensland Government considered that reg 68 implicitly authorized employment of indigenous persons on reserves at wages less than those payable pursuant to relevant awards. However, on 29 May 1979, Matthews J, then the Supreme Court Judge serving as President of the Industrial Court, found that reg 68 did not displace the entitlement of an indigenous person employed on a reserve to receive wages payable pursuant to an applicable award. See discussion in *Baird v State of Queensland* [2005] FCA 495 at para [9].

The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

1 5 MAY 2015

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
Canberra ACT 2600

Communications portfolio response – Parliamentary Joint Committee on Human Rights' Eighteenth Report of the 44th Parliament

Dear ~~Chair~~ Dean

Thank you for your letter dated 13 February 2015 following the tabling of the Parliamentary Joint Committee on Human Rights' Eighteenth Report of the 44th Parliament.

Following the Committee's examination of the Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014, the Telecommunications (Industry Levy) Amendment Bill 2014, and the Telecommunications Legislation Amendment (Deregulation) Bill 2014, the Committee raised a number of specific questions for my response in November 2014.

Following consideration of my initial response, the Committee sought further clarification on the Telecommunications Legislation Amendment (Deregulation) Bill 2014, specifically the proposed repeal of Part 9A of the *Telecommunications (Consumer Protection and Service Standards) Act* (TCPSS Act). Part 9A has now been repealed following passage of the Telecommunications Legislation Amendment (Deregulation) Bill 2014 through the Parliament on Wednesday 25 March 2015. However, I still welcome the opportunity to respond to the Committee's request for further clarification.

In my previous response, I outlined the protections within Schedule 7 of the *Broadcasting Services Act 1992* (BSA) that protect children from accessing R18+ content via a range of platforms, including telephone sex services. I note the Committee's request for further clarification on whether Schedule 7 of the BSA offers a comparable level in terms of protecting children from harm to that which was provided under Part 9A of the TCPSS Act.

It may be useful to outline the background to Part 9A, which was originally made as part of amendments to the Telecommunications Consumer Protection and Service Standards Bill 1998, before it was passed by the Parliament as the TCPSS Act in 1999. Part 9A originally provided a regulatory solution to address community concern that telephone sex services were too easily accessed by children of standard telephone service customers. At that time

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there had been a steady increase in complaints about telephone sex services since the introduction of premium rate services in 1990-91.

However, since the passage of the *Communications Legislation Amendment (Content Services) Act 2007*, provisions that ensure the protection of children from adult content, including that delivered via telephone sex services, have resided within Schedule 7 of the BSA. The *Communications Legislation Amendment (Content Services) Act 2007* also repealed most of the key provisions previously contained in Part 9A of the TCPSS Act.

The Committee has sought my advice that Schedule 7 of the BSA offers a comparable or equivalent level of protection for children from the harm of telephone sex services to that which was provided by Part 9A. This seems to be based on an assumption that both Part 9A of the TCPSS Act and Schedule 7 of the BSA worked in parallel to protect children from harm.

However, as I have previously advised the Committee, Schedule 7 of the BSA continues to be the primary regulatory instrument protecting children from accessing telephone sex services or other age restricted materials. I also note that at the time Schedule 7 of the BSA was introduced, Part 9A of the TCPSS Act was substantially amended. Since that time, Part 9A had not contained provisions specifically designed to protect children from harm, instead it only provided certain limited consumer protections by:

- regulating billing arrangements for telephone sex services; and
- prohibiting telephone sex services from being bundled with other goods and services.

Until its recent repeal, section 158B of Part 9A prohibited a carriage service provider from billing a customer in relation to the supply of a telephone sex service unless the telephone sex service was supplied using a specific number range (that is, the 1901 prefix, or another prefix determined by the Minister for Communications or the Australian Communications and Media Authority (ACMA)).

However, the former requirements in Part 9A around billing arrangements were clearly only relevant to the extent that a consumer had access to, and had used a telephone sex service. Fundamentally, Schedule 7 of the BSA has proven to be effective in requiring industry to have a range of mechanisms to prevent children from accessing telephone sex services in the first place. Therefore, I considered the repeal of the billing arrangements for telephone sex services in Part 9A of the TCPSS Act would clearly not in any way reduce the protection from harm already afforded to children.

Secondly, until its recent repeal, Section 158C of Part 9A limited how telephone sex services were marketed and supplied, by preventing telephone sex services from being tied to the supply of any other goods or services. The original Explanatory Memorandum[1] explained this was to:

> *"...prevent suppliers getting customers to 'opt-in' to telephone sex services by requiring them to 'opt-in' as a condition of purchasing certain services, or by giving discounts or special offers if they do 'opt-in'."*

[1] http://www.comlaw.gov.au/Details/C2004B00256/Supplementary Explanatory Memorandum/Text

There is no equivalent or directly comparable provision contained in Schedule 7 of the BSA. However, regardless of how telephone sex services are marketed now or into the future, Schedule 7 provides assurances that appropriate age verification requirements are in place to protect children from accessing these types of services in the first instance.

In conclusion, the recent repeal of Part 9A reflects rapid technological developments and consumer usage trends whereby online services and mobile apps have become the preferred means by which consumers access adult content. Further, during consultation on the proposed repeal of Part 9A, the ACMA confirmed it had not received any complaints in recent years about telephone sex services. Accordingly, the Government considered Part 9A of the TCPSS Act was obsolete and notes the repeal was supported by all stakeholders consulted, including the peak consumer and industry representative bodies, namely the Australian Communications Consumer Action Network and the Communications Alliance.

Thank you for the further opportunity to address the Committee's concerns. I trust this information is of assistance.

Yours sincerely

Malcolm Turnbull

Minister for Small Business

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
Canberra ACT 2600

Copy to: human.rights@aph.gov.au

Dear ~~Chair~~ Philip,

Thank you for Senator Smith's letter of 13 February 2015, addressed to the Treasurer, concerning the compatibility with human rights of the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* ("Franchising Code").

As the Minister for Small Business I have portfolio responsibility for the Franchising Code and as such your letter has been provided to me for response.

The Franchising Code has recently been amended such that certain breaches of the Franchising Code may result in a court imposing a civil penalty. The Committee has expressed concern about the potential for penalties to apply to franchisees, who may be individuals or small businesses. The relevant provisions which apply to franchisees and may attract a penalty are clause 6 (obligation to act in good faith), and clauses 39 and 41 (obligation to participate in mediation). The Committee is concerned that, in this context, penalties may be considered to be criminal, attracting rights under the International Covenant on Civil and Political Rights. The Committee has sought my advice on these matters.

As noted by the Committee in its Guidance Note 2, the term 'criminal' has an autonomous meaning in international human rights law: a penalty may be considered 'criminal' for the purposes of human rights law even if it is considered to be 'civil' under Australian domestic law.

Having regard to the matters outlined below, I believe it is reasonable for the Committee to conclude that the civil penalties regime set out in the Franchising Code is not a 'criminal' penalty regime for the purposes of international human rights law.

- Penalties under the Franchising Code do not apply to the public in general. Rather, they apply only in relation to persons in a particular business relationship, in a specific regulatory context, and are directed towards promoting openness and transparency between the parties to that relationship. This is inconsistent with characterising the penalties as criminal.

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- I note that the penalties are moderate having regard to other civil penalties that are imposed under the *Competition and Consumer Act 2010* (CCA). The amount of the penalty is also mitigated by the fact that the penalties are only imposed on persons in a particular business relationship.

- It is also important to appreciate that 300 penalty units is the maximum penalty; the Court has full discretion to determine the appropriate level of penalty having regard to all relevant matters, including the nature and extent of the relevant conduct, any loss or damaged suffered as a result of that conduct, the circumstances in which the conduct took place, and whether the person has previously engaged in similar conduct (see section 76(1) of the CCA).

I would also like to draw the Committee's attention to the following matters, which may be relevant to its deliberations.

- The civil penalties imposed under the Franchising Code slot into the existing pecuniary penalty regime established by the CCA. This regime is long-standing and well litigated. It has not previously been thought that the failure to apply the criminal standard of proof in these type of proceedings has resulted in injustice. Indeed, the courts have indicated on numerous occasions that the gravity of the allegations being tested in the court will be taken into account, and that the graver the allegation, the greater the strictness of proof that will be required (see, for example, *Australian Competition and Consumer Commission v TF Woolam & Sons Pty Ltd* (2011) 196 FCR 212 at [8]).

- The penalties imposed in respect of clauses 6, 39 and 41 of the Code are imposed in respect of conduct engaged in by persons in a particular relationship. The relevant provisions are intended to encourage both parties to that relationship to act openly towards each other. Given this, if it is accepted that it is unnecessary to apply the criminal standard of proof to one party to that relationship (the franchisor), it would be inappropriate to apply a different standard of proof to the other.

- The civil penalties imposed under the Code are but one of a number of enforcement provisions provided for in the CCA, which include infringement notices (Part IVB, Division 2A) and public warning notices (Part 1VB, Division 3). Given this, even if it is possible that a civil penalty could be imposed on an individual, it is unlikely that this would occur, save in exceptional circumstances.

Industry codes prescribed under the provisions of the CCA are co-regulatory measures designed to encourage best practice among an industry and improve transparency and conduct in business to business relationships.

The introduction of civil penalties for serious breaches of the Franchising Code is an important development in ensuring that the franchising sector is effectively regulated. The introduction of penalties followed extensive public consultation and engagement with the franchising sector. There was significant industry consensus that penalties were an appropriate mechanism for responding to instances of inappropriate conduct in the sector.

I trust the Committee will take some comfort from this response that there are no adverse human rights implications arising from recent amendments to the Franchising Code.

Yours sincerely

BRUCE BILLSON

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS15-001027

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear ~~Mr~~ Philip, Ruddock

Response to questions received from the Parliamentary Joint Committee on Human Rights in its Eighteenth Report of the 44th Parliament

Thank you for your letters of 13 February 2015 in which information was requested on the *Australian Citizenship and Other Legislation Amendment Bill 2014* and the *Migration Amendment (Partner Visas) Regulation 2014*.

My response to your request is attached. I have also included a response to the committee's further questions regarding the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* which were raised in the Committee's 14th report.

I trust the information provided is helpful.

Yours sincerely

8/4/15

PETER DUTTON

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Migration Amendment (Partner Visas) Regulation 2014 [F2014L01747]

1.356 The committee considers that the increase to visa application charges limits the right to protection of the family. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the increases to certain visa application charges are compatible with the right to protection of the family, and particularly:

- **whether the changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

This regulation does not impact the ability of individuals to form a family. The right to protection of the family in Articles 17 and 23 does not amount to a right to enter or remain in Australia where there is no other right to do so. Requiring a visa applicant to pay a higher application charge has no impact upon the ability of the Australian citizen, permanent resident or eligible New Zealand citizen sponsor from travelling, visiting or residing with their partner or prospective partner in other countries. In order to demonstrate eligibility for the visa, the applicant must show that the couple has been living together or has not been living separately and apart on a permanent basis. This requirement has been provides for in migration legislation since 1994. For offshore applicants, this means that the relationship will have been established in a country other than Australia and any separation of the couple in order to save for the VAC would be voluntary.

The government offers a wide range of visa options to potential applicants and it is open to affected individuals to seek other visa options where they meet the specific application requirements for the visa. Applicants who are affected by the VAC increase have been encouraged to consider applying for a skilled visa, and visitor visas are available for short term stays. As the committee points out, it is legitimate for the Australian government to charge visa processing fees. Given the availability of alternative visas pathways with lower associated costs and that there is nothing preventing the couple from residing together in the applicant's country of residence, I am of the view that this regulation does not limit the right to protection of the family or any other applicable rights or freedoms.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-001898

The Hon. Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
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Parliament House
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Dear ~~Mr Ruddock~~ Philip,

I refer to your letter of 24 March 2015 concerning the remarks of the Parliamentary Joint Committee on Human Rights (the committee) in relation to the *Migration Amendment (2014 Measures No.2) Regulation 2014*, and the *Migration Amendment (Subclass 050 Visas) Regulation 2014*.

The committee's remarks are contained in its *Twenty-first Report of the 44th Parliament*. My response addressing the remarks is attached.

Thank you for bringing the committee's views to my attention. I trust the attached information is of assistance.

Yours sincerely

PETER DUTTON 01/05/15

Migration Amendment (Subclass 050 Visas) Regulation 2014 [F2014L01460]

Right to work and right to an adequate standard of living

1.94 The committee considers that the regulation engages and limits the right to work. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective (that is, the least rights restrictive alternative to achieve this result). The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the right to work.

1.104 The committee considers that the regulation engages and limits the right to an adequate standard of living. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective (that is, the least rights restrictive alternative to achieve this result). The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the right to an adequate standard of living.

I respectfully advise the committee that the regulation applies only to Subclass 050 BVEs granted by me personally under section 195A of the Migration Act. The regulation does not apply to BVEs granted by me under other provisions of the Migration Act, including where an individual makes a valid application for a BVE.

Section 195A provides me with a non-compellable, non-delegable power to grant visas to persons who are in immigration detention under section 189 of the Migration Act, if I think that it is in the public interest to do so. Section 189 relates to the immigration detention of unlawful non-citizens.

As a result, the regulation only applies to individuals who are:

- unlawful non-citizens; and
- detained under section 189 of the Migration Act; and

- granted a BVE by me using my personal, non-compellable power under section 195A of the Migration Act.

Section 196(1) of the Migration Act provides that:

'An unlawful non-citizen detained under section 189 must be kept in immigration detention until:
(a) he or she is removed from Australia under section 198 or 199; or
(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or
(b) he or she is deported under section 200; or
(c) he or she is granted a visa.'

Granting a BVE under section 195A is, therefore, a mechanism by which I can decide that an individual will be released from immigration detention.

Section 195A of the Migration Act provides that I may grant a person who is in immigration detention a visa of a particular class, whether or not the person has applied for the visa. When exercising my personal power under section 195A, I am not bound by Subdivision AA (Applications for visas), Subdivision AC (Grant of visas) or Subdivision AF (Bridging visas) of Division 3 of Part 2 of the Migration Act, or by the Migration Regulations. As a result, I am not required to consider whether or not an individual is able to meet the eligibility requirements of the visa I grant. I do not have a duty to consider whether to exercise this power, but must think that it is in the public interest to grant the detainee a visa.

In practice, where I grant a BVE under section 195A, it is to people who are otherwise ineligible for the grant of a visa (for example, because the Migration Act prevents them from making a valid visa application). Individuals who make a valid application for a visa will have that application assessed under the Migration Act and Migration Regulations, and visa conditions will be imposed accordingly.

I consider that the discretion to impose a 'no work' condition on certain BVE holders is appropriately limited, and is a least rights restrictive approach. As outlined above, the discretion to grant or withhold permission to work under this regulation will only exist in the context of the exercise of my personal power under section 195A of the Migration Act to grant a BVE to a non-citizen who has become unlawful and been taken into immigration detention. Further, the fact that the regulation only permits (rather than requires) me to impose the condition does not mean that the 'no work' condition will be imposed on all individuals to whom I grant a BVE under section 195A.

It is not feasible or appropriate to codify the range of circumstances in which I may exercise my power under section 195A of the Migration Act to grant a BVE to an immigration detainee. It is, however, appropriate for permission to work to be granted on a discretionary basis to individuals who are granted BVEs by me using this power. This allows me to consider an individual's personal circumstances against the integrity of the migration programme, which is a proportionate limitation on the right to work and on the right to an adequate standard of living. As outlined in the Statement of Compatibility for this Regulation, this discretion also allows me to give permission to work in circumstances where this was previously prevented by the Migration Regulations.

<u>Obligation to consider the best interests of the child</u>

1.110 The committee considers that the regulation engages and limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility for the bill does not provide sufficient information to establish that the regulation may be regarded as proportionate to its stated objective. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the regulation imposes a proportionate limitation on the obligations to consider the best interests of the child.

As the committee has pointed out, the Statement of Compatibility explained that I may consider the best interests of the child (for example, the child of a non-citizen to whom I grant a BVE under section 195A of the Migration Act) when deciding whether or not to impose condition 8101 on a BVE granted by me under section 195A. Clearly, however, there will be circumstances in which it will not be necessary to consider the best interests of the child, for example, where there are no children involved.

It is my view that the regulation does not in fact limit consideration of the best interests of the child.