The Hon Christian Porter MP
Attorney-General

MC18-004273

23 MAY 2018

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600
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Dear ~~Chair~~ John

I am writing in response to the letter from the Committee Secretary of the Standing Committee on Regulations and Ordinances, Ms Anita Coles, on 10 May 2018. The letter refers to the Committee's *Delegated legislation monitor 5 of 2018* (the monitor) and seeks my advice about matters raised concerning the *Archives Regulations 2018* (the Regulations) [F2018L00343].

The purpose of the Regulations was to remake the Archives Regulations (the former Regulations) with the same effect to ensure their continued operation. In the monitor, the Committee notes that the explanatory statement to the Regulations does not specify the basis on which the charges, which are payable under section 15 of the Regulations, have been calculated. The Committee also raised concerns about the delegation of administrative powers under section 10 of the Regulations, for the purposes of giving notices of approval for the disposal, destruction, transfer or alteration of Commonwealth records under the *Archives Act 1983*.

Unclear basis for determining fees

In remaking the Regulations, section 15 prescribes the charges payable for discretionary services for persons other than Commonwealth institutions in accordance with the charges prescribed in regulations 10 and 11 and Schedule 1 of the former Regulations.

The National Archives of Australia (the Archives) has advised that the charges for discretionary services were calculated on a partial cost-recovery basis in accordance with the Department of Finance's guidelines in 1990 when the charges were first introduced, in the *Archives Regulations (Amendment) 1990 No. 393.* There were adjustments made to the charges in 1991, 1995, and 1998 in accordance with relevant government financial guidelines, in the *Archives Regulations (Amendment) 1991 No. 159*, *Archives Regulations (Amendment) 1995 No. 260,* and *Archives Regulations (Amendment) 1998 No. 273.* There have been no further increases to the charges since 1998. As such, the fees continue to reflect a partial cost-recovery of the costs actually incurred by the Archives in providing the services.

Broad delegation of administrative powers

Section 10 of the Regulations prescribes the manner in which the Archives may give permission for dealings with Commonwealth records for the purposes of sections 24 and 26 of the Archives Act. It provides that this must be by written notice signed by the Director-General of the Archives or by a person authorised by the Director-General. Section 10 adopts the provisions for dealings with Commonwealth records, without substantive change, from the provisions in regulation 4 of the former Regulations.

Under section 8 of the Archives Act, the Director-General may delegate all or any of his powers to any person. The Director-General has authorised two members of staff of the Archives to give written notices of approval for the disposal, destruction, transfer and alteration of Commonwealth records under sections 24 and 26 of the Archives Act.

The staff members are the Assistant Director-General, Collection Management and the Director, Commonwealth Information Policy (who are both persons engaged under the *Public Service Act 1999* as staff members of the Archives). These individuals are the only persons who hold delegations from the Director-General to exercise the powers in sections 24(2)(b), 24(2)(c) and 26(2)(b) of the Archives Act in respect of Commonwealth records. In practice, the authorisation under section 10 of the Regulations enables the delegate to give effect to his or her exercise of these powers, by giving a written notice. A copy of the delegation instrument is enclosed for reference, with the relevant delegations listed from page 2 onwards.

However, responding to the Committee's concern in this matter, I propose to amend the Regulations at the next available opportunity in accordance with the Committee's suggestion to require that the Director-General be satisfied that persons authorised have the expertise appropriate to the power delegated.

Thank you for the Committee's correspondence on this matter.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl –Instrument of delegation under the Archives Act

Australian Government

NATIONAL ARCHIVES OF AUSTRALIA

Your story, our history

COMMONWEALTH OF AUSTRALIA

NATIONAL ARCHIVES OF AUSTRALIA

DELEGATIONS UNDER THE ARCHIVES ACT 1983

INSTRUMENT OF DELEGATION

I, DAVID BRIAN FRICKER, Director-General of the National Archives of Australia, pursuant to subsection 8(1) of the *Archives Act 1983* (Cth), delegate the powers specified in Schedule 1 to each person from time to time holding or performing the duties of the positions listed in Schedule 1.

All previous delegations issued pursuant to subsection 8(1) of the *Archives Act 1983* (Cth), are revoked.

David Brian Fricker
Director-General

16 October 2017

Part	Provision	Power or Function	Position Title and Office Location
1	Section 3C	**Determine archival resources of the Commonwealth:** To determine that records are part of the archival resources of the Commonwealth. * Delegation does not include the authorisation of disposal authorities specifically for the records of the Federal Executive Council, the Cabinet, the Office of the Official Secretary to the Governor-General or those agencies referred to in s 29(8) of the Archives Act.	Assistant Director-General, Collection Management* Director, Commonwealth Information Policy*
2	Paragraph 24(2)(b)	**Authorisation of disposal of records:** Where appropriate to authorise disposal authorities under s 24(2)(b) of the Archives Act for the disposal of records. * Delegation does not include the authorisation of disposal authorities specifically for the records of the Federal Executive Council, the Cabinet, the Office of the Governor-General or those agencies referred to in s 29(8) of the Archives Act.	Assistant Director-General, Collection Management* Director, Commonwealth Information Policy*
3	Paragraph 24(2)(c)	**Disapproval of a normal administrative practice:** To notify a department or authority that the National Archives of Australia disapproves of a normal administrative practice involving the disposal of Commonwealth records. * Delegation does not include the notification of disapproval of normal administrative practices specifically affecting the records of the Federal Executive Council, the Cabinet, the Office of the Governor-General or those agencies referred to in s 29(8) of the Archives Act.	Assistant Director-General, Collection Management* Director, Commonwealth Information Policy*
4	Paragraph 26(2)(b)	**Authorisation of additions or alterations to records more than 15 years old:** Where appropriate to authorise additions or alterations to Commonwealth records that have been in existence for more than 15years under s 26(2)(b) of the Archives Act. * Delegation does not include the authorisation of additions or alterations specifically for the records of the Federal Executive Council, the Cabinet, the Office of the Governor-General or those agencies referred to in s 29(8) of the Archives Act.	Assistant Director-General, Collection Management* Director, Commonwealth Information Policy*

Part	Provision	Power or Function	Position Title and Office Location
5	Subsection 31(4)	**Withholding records from public access pending examination:** To withhold records from public access, pending examination in accordance with s 35.	Director, Declassification Unit Regional Manager North Regional Manager South Regional Manager Central Director, Queensland Director, Western Australia Director, South Australia Assistant Director, Declassification Unit APS 6, Declassification Unit APS 5, Declassification Unit APS 4, Declassification Unit **All persons from time to time holding the following functional positions in the Australian War Memorial, Canberra (AWM):** Assistant Director, National Collection Senior Curator, Official and Private Records Curator, Official Records Assistant Curators, Official Records APS 4, Archives Officer, Official Records
6(A)	Subsection 35(1), (3) and (4) *(cont'd over)*	**Identification of exempt records:** To determine, in response to requests for access made under s 40 or to meet the Archives proactive disclosure requirements under s 31(1), which open period records of Commonwealth agencies subject to the Act (other than those for which alternative arrangements have been made under s 35) are to be treated as exempt records under s 33.	Assistant Director-General, Access and Public Engagement Assistant Director-General, Collection Management Director, Declassification Unit Regional Manager North Regional Manager South Regional Manager Central Director, Queensland Director, Western Australia Director, South Australia Director, Preservation Director, Collection Operations Director, Reference Services Assistant Director, Access and Public Engagement, Queensland Assistant Director, Access and Public Engagement, Victoria Assistant Director, Access and Public Engagement, Western Australia Assistant Director, Access and Public Engagement, NSW Assistant Director, Access and Public Engagement, Northern Territory Assistant Director, Declassification Unit

Part	Provision	Power or Function	Position Title and Office Location
6 (A)	Subsection 35(1), (3) and (4) *(cont'd)*	**Identification of exempt records:** To determine, in response to requests for access made under s 40 or to meet the Archives proactive disclosure requirements under s 31(1), which open period records of Commonwealth agencies subject to the Act (other than those for which alternative arrangements have been made under s 35) are to be treated as exempt records under s 33.	Assistant Director, Digitisation and Photographic Imaging APS 6, Access and Public Engagement, NSW APS 6, Declassification Unit APS 6, Manager, Indigenous Services APS 6, Manager, Digitisation Unit APS 5, Agency Digitisation Service APS 5, Access and Public Engagement, Queensland APS 5, Access, Victoria APS 5, Reference, Victoria APS 5, Access and Public Engagement, NSW APS 5, Declassification Unit APS 5, Photographic Imaging APS 4, Archives Officer, Queensland APS 4, Archival Officer, Tasmania APS 4, Victoria APS 4, Access and Public Engagement, NSW APS 4, Declassification Unit APS 4, Archival Officer, South Australia APS 4, Archival Officer, Northern Territory APS 4, Western Australia APS 3, Agency Digitisation Service
6 (B)	Subsection 35(1), (3) and (4)	**Identification of exempt records:** To determine, in response to requests for access made under s 40 or to meet the Archives proactive disclosure requirements under s 31(1), which open period records of Commonwealth agencies subject to the Act (other than those for which alternative arrangements have been made under s 35) are to be treated as exempt records under s 33.	**All persons from time to time holding the following functional positions in the Australian War Memorial, Canberra:** Assistant Director. National Collection Senior Curator, Official and Private Records Curator, Official Records Assistant Curators, Official Records APS 4, Archives Officer, Official Records
7 (A)	Subsection 35 (1), (4) *(Cont'd over)*	**Partial access to exempt records:** To determine, in response to requests for access made under s 40 or to meet the Archives proactive disclosure requirements under s 31(1), the extent to which access in part to Commonwealth records identified as exempt records (other than those for which alternative arrangements have been made under s 35) may be given.	Assistant Director-General, Access and Public Engagement Assistant Director-General, Collection Management Director, Declassification Unit Regional Manager North Regional Manager South Regional Manager Central Director, Queensland Director, South Australia

Part	Provision	Power or Function	Position Title and Office Location
7 (A)	Subsection 35 (1), (4) *(Cont'd)*	**Partial access to exempt records:** To determine, in response to requests for access made under s 40 or to meet the Archives proactive disclosure requirements under s 31(1), the extent to which access in part to Commonwealth records identified as exempt records (other than those for which alternative arrangements have been made under s 35) may be given.	Director, Western Australia Director, Preservation Director, Reference Services Director, Collection Operations Assistant Director, Access and Public Engagement, Queensland Assistant Director, Access and Public Engagement, Victoria Assistant Director, Access and Public Engagement, Western Australia Assistant Director, Access and Public Engagement, NSW Assistant Director, Access and Public Engagement, Northern Territory Assistant Director, Declassification Unit Assistant Director, Digitisation and Photographic Imaging Assistant Director, Reference Services APS 6, Access and Public Engagement, NSW APS 6, Declassification Unit APS 6, Manager, Indigenous Services APS 6, Manager, Digitisation Unit APS 6, Reference Policy and Support APS 5, Agency Digitisation Service APS 5, Access and Public Engagement, Queensland APS 5, Access, Victoria APS 5, Reference, Victoria APS 5, Access and Public Engagement, NSW APS 5, Declassification Unit APS 5, Reference Services APS 4, Declassification Unit APS 5, Photographic Imaging Manager APS 4, Declassification Unit APS 4, Archives Officer, Queensland APS 4, Archival Officer, Tasmania APS 4, Victoria APS 4, Access and Public Engagement, NSW APS 4, Declassification Unit APS 4, Archival Officer, South Australia APS 4, Archival Officer, Northern Territory APS 4, Western Australia APS 3, Agency Digitisation Service

Part	Provision	Power or Function	Position Title and Office Location
7(B)	Section 35	**Partial access to exempt records:** To determine, in response to requests for access made under s 40 or to meet the Archives proactive disclosure requirements under s 31(1), the extent to which access in part to Commonwealth records identified as exempt records (other than those for which alternative arrangements have been made under s 35) may be given.	**All persons from time to time holding the following functional positions in the Australian War Memorial, Canberra:** Assistant Director, National Collection Senior Curator, Official and Private Records Curator, Official Records Assistant Curators, Official Records APS4, Archives Officer, Official Records
8	Subsection 35(1)	**Access examination arrangements:** To make, in consultation with Ministers or their delegates, arrangements for determining which Commonwealth records in the open access period are to be treated by the Archives as exempt and for reviewing such determinations.	Assistant Director-General, Access and Public Engagement Director, Declassification Unit
9	Subsection 35(1)	**Arrangements for granting partial access to exempt records:** To make, in consultation with Ministers or their delegates, arrangements for determining the extent to which partial access to exempt records may be given.	Assistant Director-General, Access and Public Engagement Director, Declassification Unit
10	Paragraphs 36(4)(a) and (d)	**Determination of form in which access may be granted where access to the original record interferes unreasonably with the operations of the Archives or another Commonwealth institution, or would involve an infringement of copyright vested in a non-Commonwealth entity:** To determine that access may not be granted in a particular form and to specify in which form access may be granted.	Assistant Director-General, Collection Management Assistant Director-General, Access and Public Engagement Director, Declassification Unit Regional Manager North Regional Manager South Regional Manager Central Director, Preservation Director, Reference Services **All persons from time to time holding the following functional positions in the Australian War Memorial, Canberra:** Assistant Director, National Collection Senior Curator, Official and Private Records Curator, Official Records Assistant Curators, Official Records APS 4, Archives Officer, Official Records

Part	Provision	Power or Function	Position Title and Office Location
11	Paragraphs 36(4)(b) and (c) *(Cont'd over)*	**Determination of the form in which access can be granted where access to the original record is not appropriate with regard to the physical nature of the record or detrimental to the preservation of the record:** To determine whether the giving of access in a particular form would not be appropriate with regard to the physical nature of the record, or would be detrimental to the preservation of the record, and to specify the form in which access may be granted. * Delegation is limited to determining that access in the form requested is not appropriate because the material or matter is vulnerable to theft or loss, and to specifying an alternative form of access.	Assistant Director-General, Collection Management Director, Declassification Unit* Director, Preservation Regional Manager North Regional Manager South Regional Manager Central Director, Queensland Director, South Australia Director, Western Australia Director, Collection Operations Director, Reference Services* Assistant Director, Access and Public Engagement, Queensland* Assistant Director, Access and Public Engagement, Perth* Assistant Director, Access and Public Engagement, Northern Territory Assistant Director, Declassification Unit* Assistant Director, Audiovisual Preservation Assistant Director, Collection Operations Assistant Director, Collection Management, Queensland Assistant Director, Collection Operations, Western Australia Assistant Director, Collection Operations, Victoria Assistant Director, Preservation and Digitisation, Victoria Assistant Director, Collection Operations, NSW Assistant Director, Access and Public Engagement, NSW Assistant Director, Access and Public Engagement, Victoria Assistant Director, Preservation Services and Projects, ACT Assistant Director, Preservation, NSW Assistant Director, Reference Services* APS 6 Declassification Unit* APS 6, Manager, Digital Audiovisual Preservation APS 6, Manager, Victoria APS 6, Collection Operations APS 6, Manager, Preservation, NSW APS 6, Senior Conservator, Projects and Exhibitions APS 6, Senior Conservator, Services and Preventative APS 5, Agency Digitisation Service APS 5 Declassification Unit*

Part	Provision	Power or Function	Position Title and Office Location
11	Paragraphs 36(4)(b) and (c) *(Cont'd)*	**Determination of the form in which access can be granted where access to the original record is not appropriate with regard to the physical nature of the record or detrimental to the preservation of the record:** To determine whether the giving of access in a particular form would not be appropriate with regard to the physical nature of the record, or would be detrimental to the preservation of the record, and to specify the form in which access may be granted. * Delegation is limited to determining that access in the form requested is not appropriate because the material or matter is vulnerable to theft or loss, and to specifying an alternative form of access.	**All persons from time to time holding the following functional positions in the Australian War Memorial, Canberra:** Assistant Director, National Collection Senior Curator, Official and Private Records Curator, Official Records Assistant Curators, Official Records APS 4, Archives Officer, Official Records
12	Subsection 37(1) and (2) *(Cont'd over)*	**Conditions in respect of proper care of records:** To determine, for the purpose of ensuring the safe custody and proper preservation of any record, reasonable conditions to which access is to be subject, or that it is to be withheld from access, and where a record is withheld to determine whether a copy may be provided without detriment to its proper preservation or safe custody.	Assistant Director-General, Collection Management Director, Preservation Regional Manager North Regional Manager South Regional Manager Central Director, Queensland Director, South Australia Director, Western Australia Director, Collection Operations Assistant Director, Audiovisual Preservation Assistant Director, Digital Preservation Program Assistant Director, Preservation and Digitisation, Victoria Assistant Director, Preservation Services and Projects, ACT Assistant Director, Preservation, NSW Assistant Director, Access and Public Engagement, Northern Territory APS 6, Manager, Digital Audiovisual Preservation APS 6, Manager, Victoria APS 6, Collection Operations APS 6, Manager, Preservation, NSW APS 6, Senior Conservator, Projects and Exhibitions APS 6, Senior Conservator, Services and Preventative

Part	Provision	Power or Function	Position Title and Office Location
12	Subsection 37(1) and (2) *(Cont'd)*	**Conditions in respect of proper care of records:** To determine, for the purpose of ensuring the safe custody and proper preservation of any record, reasonable conditions to which access is to be subject, or that it is to be withheld from access, and where a record is withheld to determine whether a copy may be provided without detriment to its proper preservation or safe custody.	**All persons from time to time holding the following functional positions in the Australian War Memorial, Canberra:** Assistant Director, National Collection Senior Curator, Official and Private Records Curator, Official Records Assistant Curators, Official Records APS 4, Archives Officer, Official Records
13	Subsection 39(2)	**Authority to give a notice that the Archives neither confirms nor denies the existence of a Commonwealth record:** Where appropriate to issue notices under s 39(2) of the Archives Act in relation to access applications made under s 40 of the Archives Act.	Assistant Director-General, Access and Public Engagement Director, Declassification Unit Assistant Director, Declassification Unit APS 6, Declassification Unit APS 5, Declassification Unit APS 4, Declassification Unit
14	Subsection 42(3)	**Internal reconsideration of decisions:** To reconsider a decision made under s 35 of the Archives Act, in response to requests for access made under s 40, which open period records of Commonwealth agencies subject to the Act (other than those for which alternative arrangements have been made under s 35) are exempt under s 33.	Assistant Director-General, Access and Public Engagement Assistant Director-General, Collection Management Director, Declassification Unit Regional Manager North Regional Manager South Regional Manager Central Director, Queensland Director, South Australia Director, Western Australia Director, Preservation Assistant Director, Access and Public Engagement, Queensland Assistant Director, Access and Public Engagement, Victoria Assistant Director, Access and Public Engagement, Western Australia Assistant Director, Access and Public Engagement, NSW Assistant Director, Access and Public Engagement, Northern Territory Assistant Director, Declassification Unit Assistant Director, Digitisation and Photographic Imaging APS 6, Declassification Unit

Part	Provision	Power or Function	Position Title and Office Location
15	Subsection 42(3)	**Internal reconsideration of decisions:** To reconsider a decision made under s 35 of the Archives Act, in response to requests for access made under s 40, the extent to which partial access to the exempt records of Commonwealth agencies subject to the Act (other than those for which alternative arrangements have been made under s 35) may be given.	Assistant Director General, Access and Public Engagement Assistant Director-General, Collection Management Director, Declassification Unit Regional Manager North Regional Manager South Regional Manager Central Director, Queensland Director, South Australia Director, Western Australia Assistant Director, Access and Public Engagement, Queensland Assistant Director, Access and Public Engagement, Victoria Assistant Director, Access and Public Engagement, Western Australia Assistant Director, Access and Public Engagement, NSW Assistant Director, Declassification Unit APS 6, Declassification Unit
16	Subsection 42(3)	**Internal reconsideration of decisions:** To reconsider a decision made under ss 36(4)(a) and (d) relating to a request for access made under s 40 of the Archives Act.	Assistant Director-General, Access and Public Engagement Assistant Director-General, Collection Management Director, Declassification Unit Regional Manager North Regional Manager South Regional Manager Central Director, Queensland Director, South Australia Director, Western Australia Director, Reference Services Assistant Director, Declassification Unit APS 6, Declassification Unit
17	Subsection 42(3)	**Internal reconsideration of decisions:** To reconsider a decision made under ss 36(4)(b) and (c), and ss 37(1) and (2) relating to a request for access made under s 40 of the Archives Act.	Assistant Director-General, Access and Public Engagement Assistant Director-General, Collection Management Director, Preservation Regional Manager North Regional Manager South Regional Manager Central Director, Queensland Director, South Australia Director, Western Australia Director, Collection Operations

Part	Provision	Power or Function	Position Title and Office Location
18	Subsection 42(3)	**Internal reconsideration of decisions involving the issue of a notice neither confirming nor denying the existence of a Commonwealth record:** To reconsider a decision to issue a notice under s 39(2) relating to a request for access made under s 40 of the Archives Act.	Assistant Director-General, Access and Public Engagement Director, Declassification Unit Assistant Director, Declassification Unit
19	Subsection 64(1)	**Authority to approve the transfer of material of the Archives into the custody of another person:** To sign an arrangement with a person for material of the Archives to be kept in the custody of that person under the conditions set out in s 64(1) and (2).	Assistant Director-General, Collection Management
20	Subsection 69(1) *(Cont'd over)*	**Certified copies of records:** To give a certificate that a record referred to in the certificate is a true copy of the record that is in the custody of the Archives.	Director, Preservation Regional Manager North Regional Manager South Regional Manager Central Director, Queensland Director, South Australia Director, Western Australia Director, Reference Services Director, Collection Operations Assistant Director, Access and Public Engagement, Victoria Assistant Director, Access and Public Engagement, NSW Assistant Director, Access and Public Engagement, Northern Territory Assistant Director, Audiovisual Preservation Assistant Director, Queensland Assistant Director, Collection Operations Assistant Director, Digitisation and Photographic Imaging Assistant Director, Western Australia Assistant Director, Preservation and Digitisation, Victoria Assistant Director, Preservation, NSW Assistant Director, Reference Services Assistant Director, Preservation Services and Projects, ACT APS 6, Access and Public Engagement, NSW APS 6, Manager, Environments, Control and Movement APS 6, Manager, Victoria APS 6, Manager, Digital Audiovisual Preservation

Part	Provision	Power or Function	Position Title and Office Location
20	Subsection 69(1) *(Cont'd)*	**Certified copies of records:** To give a certificate that a record referred to in the certificate is a true copy of the record that is in the custody of the Archives.	APS 6, Manager, Preservation, NSW APS 6, Manager, Indigenous Services APS 6, Manager, Digitisation Unit APS 6, Reference Services APS 5, Access and Public Engagement, Queensland APS 5, Access, Victoria APS 5, Reference, Victoria APS 5, Access and Public Engagement, NSW APS 5, Manager, Photographic Imaging APS 5, Reference Services APS 5, Digitisation Team Leader, Victoria APS 5, Agency Digitisation Service APS 4, Archives Officer, Queensland APS 4, Access and Public Engagement, NSW APS 4, Victoria APS 4, Archival Officer, Tasmania APS 4, Archival Officer, South Australia APS 4, Archival Officer, Northern Territory APS 4, Western Australia APS 4, Reference Services APS 3, Access and Public Engagement, NSW APS 3, Reference Services APS 2, Reference Services **All persons from time to time holding the following functional positions in the Australian War Memorial, Canberra:** Assistant Director, National Collection Senior Curator, Official and Private Records Curator, Official Records Assistant Curators, Official Records APS 4, Archives Officer, Official Records

Part	Provision	Power or Function	Position Title and Office Location
21	Section 69A	**Determination of charges for discretionary services provided to Commonwealth institutions:** To determine the charges for discretionary services provided to Commonwealth institutions where the Act does not otherwise provide a charge for the service.	Assistant Director-General, Collection Management Assistant Director-General, Access and Public Engagement
22 (A)	Section 38 *(Cont'd over)*	**Access to part of exempt record:** In relation to an exempt record, the Archives may, where it is reasonably practicable to do so, make arrangements for part of, or a copy of part of, that record to which access could be given without disclosing information or matter relating to the reason the record is exempt, to be made available for public access.	Assistant Director-General, Access and Public Engagement Director, Declassification Unit Regional Manager North Regional Manager South Regional Manager Central Director, Queensland Director, South Australia Director, Western Australia Director, Preservation Director, Collection Operations Director, Reference Services Assistant Director, Access and Public Engagement, Queensland Assistant Director, Access and Public Engagement, Victoria Assistant Director, Access and Public Engagement, Western Australia Assistant Director, Access and Public Engagement, NSW Assistant Director, Access and Public Engagement, Northern Territory Assistant Director, Declassification Unit Assistant Director, Digitisation and Photographic Imaging Assistant Director, Reference Services APS 6, Access and Public Engagement, NSW APS 6, Declassification Unit APS 6, Manager, Indigenous Services APS 6, Manager, Digitisation Unit APS 5, Agency Digitisation Service APS 5, Declassification Unit APS 5, Access and Public Engagement, Queensland APS 5, Access, Victoria APS 5, Reference, Victoria APS 5, Access and Public Engagement, NSW APS 5, Manager, Photographic Imaging APS 4, Declassification Unit APS 4, Archives Officer, Queensland

Part	Provision	Power or Function	Position Title and Office Location
22 (A)	Section 38 *(Cont'd)*	**Access to part of exempt record:** In relation to an exempt record, the Archives may, where it is reasonably practicable to do so, make arrangements for part of, or a copy of part of, that record to which access could be given without disclosing information or matter relating to the reason the record is exempt, to be made available for public access.	APS 4, Archival Officer, Tasmania APS 4, Victoria APS 4, Access and Public Engagement, NSW APS 4, Archival Officer, South Australia APS 4, Archival Officer, Northern Territory APS 4, Western Australia
22 (B)	Section 38	**Access to part of exempt record:** In relation to an exempt record, the Australian War Memorial may, where it is reasonably practicable to do so, make arrangements for part of, or a copy of part of, that record to which access could be given without disclosing information or matter relating to the reason the record is exempt, to be made available for public access.	**All persons from time to time holding the following functional positions in the Australian War Memorial, Canberra:** Assistant Director, National Collection Senior Curator, Official and Private Records Curator, Official Records Assistant Curators, Official Records APS 4, Archives Officer, Official Records
23	Subsection 40(12) and section 43	**Responding to appeals lodged with the Administrative Appeals Tribunal (AAT) under Archives Act. The delegation will allow further time to deal with the application for access:** Under sub-section 40(12) and on behalf of the Director-General, to request an extension of time to deal with any application for access lodged under s 40 and subject to an appeal lodged with the AAT under s 43.	Assistant Director-General, Corporate Services Assistant Director-General, Access and Public Engagement Assistant Director-General, Collection Management Director, Declassification Unit Director, Corporate Governance External Legal advisor instructed to act by a Part 15 delegate for a particular matter.
24	Section 71 Regulations1 1(2),11 (3) and 11(6)	**Authority to waive or reduce payment of charges for discretionary services to non-Commonwealth entities:** To waive or reduce charges under Schedule 1 for the records of non-Commonwealth institutions and under the conditions set out in Archives Regulation s 11(6). * Delegation must be exercised in consultation with Assistant Director-General, Access and Public Engagement.	Assistant Director General, Collection Management* **All persons from time to time holding the following functional positions in the Australian War Memorial, Canberra:** Assistant Director, National Collection Senior Curator, Official and Private Records Curator, Official Records Assistant Curators, Official Records APS 4, Archives Officer, Official Records

Part	Provision	Power or Function	Position Title and Office Location
25	Paragraph 36(2)(b) Regulations 11(2) and 11(6)	**Authority to waive or reduce payment of charges for copies of records to be provided to a person:** To waive or reduce charges for copies of records to be provided to a person under the conditions set out in Archives Regulations ss 11(2) and 11(6). * Delegation must be exercised in consultation with Assistant Director-General, Access and Public Engagement.	Assistant Director General, Collection Management* **All persons from time to time holding the following functional positions in the Australian War Memorial, Canberra:** Assistant Director, National Collection Senior Curator, Official and Private Records Curator, Official Records Assistant Curators, Official Records APS 4, Archives Officer, Official Records

The Hon Dan Tehan MP
Minister for Social Services

Parliament House
CANBERRA ACT 2600

MC18-003627

23 MAY 2018

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair Wacka,

I refer to the letter of 10 May 2018 from Ms Anita Coles, Committee Secretary of the Standing Committee on Regulation and Ordinances regarding Child Support (Registration and Collection) Regulations 2018 [F2018L00313] and Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245]. I appreciate the time taken to bring these matters to my attention.

Child Support (Registration and Collection) Regulations 2018

The Committee requests the Minister's advice as to the justification for effectively shifting the burden of proof on to alleged debtors in actions for the recovery of debts payable to the Child Support Registrar.

Evidentiary certificates are used as evidence of the amount of debt owing to the Child Support Registrar (Registrar) by a person at a particular date. These certificates are used in actions under sections 113 and 113A of the *Child Support (Registration and Collection) Act 1988* (CSRC Act) for recovery of a child support debt by the Registrar or the payee, and provide prima facie evidence of amounts due and payable. Section 116 of the CSRC Act provides for evidentiary certificates that specify amounts due and payable in relation to registrable maintenance liabilities.

Section 28 of the *Child Support (Registration and Collection) Regulations 2018* (2018 Regulations) provides a broader power for evidentiary certificates to be issued in relation to matters arising under child support legislation, beyond the child support debt in the registrable maintenance liability, including the recovery of court costs or penalties imposed in relation to the child support debt.

Evidentiary certificates are only used in limited circumstances, after all administrative options for enforcement of the debt have been exhausted. Options for administrative enforcement include the ability to directly garnishee wages, recover funds from bank accounts, tax returns or certain income support payments, and the power to prevent child support defaulters from travelling overseas.

Where court action is necessary, an evidentiary certificate signed by the Registrar will be sufficient evidence of the facts stated in the certificate. This is because the information contained in the certificate is factual in nature and by the time court action occurs the facts are well established. If the Registrar was required to prove the amount of debt in question in every court proceeding, this would be administratively burdensome and an inappropriate use of judicial process. Prior to issuing a certificate of debt, the Department of Human Services (DHS) will review the debt to ensure its accuracy.

The debtor also has opportunities to appeal earlier decisions relating to the debt under the legislation, before enforcement action becomes necessary. There are a number of administrative avenues available to a debtor to contest the debt or the liability from which it arose, prior to enforcement proceedings. This may include lodging an objection, applying for a change of assessment, lodging outstanding tax returns or having direct payments credited towards a liability as non-agency payments. If unsatisfied with the outcome of an objection decision, a debtor may also appeal the matter to the Administrative Appeals Tribunal for independent merits review, and ultimately to court on a question of law. More information on objecting to a child support debt is contained in *Part 4 - Objecting, Seeking a Review, Appealing & Applying to Court* of the online Child Support Guide, available at guides.dss.gov.au.

Further, it is open to the debtor to dispute the accuracy of the debt in the enforcement proceedings, thereby offering the debtor another opportunity to contest the basis of the claimed debt.

I note that section 28 of the 2018 Regulations operates in equivalent manner to regulation 11 of the *Child Support (Registration and Collection) Regulations 1988* (1988 Regulations). The 1988 Regulations were repealed and replaced by the 2018 Regulations on 20 March 2018 as they were due to sunset on 1 April 2018.

The 1988 Regulations were amended in 1994 to include a new regulation 11 providing for the use of evidentiary certificates as evidence in debt recovery action (see Child Support (Registration and Collection) Regulations (Amendment) (F1996B00892)). The Explanatory Statement for the 1994 Amendment Regulations that updated the 1988 Regulations states that the "new Regulation 11 provides that in any proceedings against a person for the recovery of debts payable to the Registrar, a certificate signed by the Registrar will be evidence of the facts stated. Information that is to be included in the certificate is the name of the person liable to pay the debt and the debt specified in the certificate is at the date of the certificate, a debt payable to the Registrar".

Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018

The Committee requests the Minister's advice as to the manner in which the Police Districts Notice 2017 (Western Australia) is incorporated into the instrument; and how that document is or may be made readily and freely available to persons interested in or affected by the instrument. The Committee also requests that the instrument and/or its Explanatory Statement be updated to include this information.

In relation to the incorporation by reference of the Police Districts Notice 2017 (Western Australia) (the Notice) in section 6 of the Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 (the Determination), as the Committee notes, documents that are not Acts or disallowable legislative instruments may not be incorporated as in force from time to time unless authorised by the enabling legislation.

I can confirm that the Notice is incorporated as in force at the commencement of Part 1 of the Determination.

The Explanatory Statement for the Determination will be amended as at Attachment A to clearly specify that the Notice is incorporated in the Determination as in force at the commencement of Part 1 of the Determination and provide information about how the Notice may be found free of charge.

The Notice was made by the Governor of Western Australia in Executive Council under the *Police Act 1892* (Western Australia) and published in the Government Gazette of Western Australia on 20 January 2017. The Notice can be found at the State Law Publisher on the Department of Premier and Cabinet (WA) website (see Government Gazette No. 19 of 2017).

Thank you for raising this matter with me.

Yours sincerely

DAN TEHAN

Attachment

Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2018

Response provided by the Minister for Communications

The Senate Standing Committee on Regulations and Ordinances requests the minister's advice regarding the characteristics of decisions by higher education providers and media organisations, in relation to the allocation of scholarships and cadetships under the programs authorised by the instrument, that would justify their exclusion from merits review.

The *Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2018* [F2018L00273] (the Regulations) establish legislative authority for Commonwealth expenditure on two activities administered by the Department of Communications and the Arts (the Department): the Regional Journalism Scholarships Program (Scholarships Program) and the Regional and Small Publishers Cadetships Program (Cadetships Program).

A distinction needs to be drawn between the decision making process for the award of grant funding by the Minister under both Programs and the decisions that would be made by the grant recipients as part of their performance of the grant activity (in accordance with the terms of the grant agreement entered into between the Commonwealth and the successful grant applicant under each Program).

The decision of the Minister to award funding to a higher education provider (in the case of the Scholarships Program) or a media organisation (in the case of the Cadetships Program) are decisions of the Minister under the respective Programs. Those funding award decisions are not subject to merits review for the reasons as set out in the Explanatory Statement accompanying the Regulations.

On the other hand, decisions made by those organisations will be governed by the terms of a legally binding grant agreement and form an integral part of each organisation's performance of the grant activity under their grant agreement. The grant activity is designed to achieve (or contribute towards the achievement of) the Program objectives.

Decisions made by a higher education provider to award a scholarship (in the case of the Scholarships Program) or a media organisation to engage a cadet (in the case of the Cadetships Program) are decisions made by non-government bodies in accordance with parameters and requirements governed by a contractual arrangement with the Commonwealth (i.e. the grant agreement). These kinds of decisions are made pursuant to a contractual arrangement, which will set out the terms and conditions for the award of grant funding. They are not discretionary in nature, given that decisions on who to award either a scholarship or a cadetship will be made against objective criteria as part of a robust, transparent, and merit based process.

The higher education providers and media organisations which are awarded funding under each respective Program would not act as agents for the Commonwealth, nor would they exercise any administrative decisions under the respective Program on behalf of the Minister.

Attachment

I note that in relation to the Cadetships Program successful grant recipients will be contractually required to provide a matching funding contribution to the cadetship.

I also note that, consistent with other Commonwealth grant programs, any aggrieved parties would be able to make a complaint in relation to any aspect of the Department's grant application assessment process or the Department's administration of the Programs, either to the Department or the Commonwealth Ombudsman.

Thank you for your consideration of these issues.

Senator the Hon. Anne Ruston

Assistant Minister for Agriculture and Water Resources
Senator for South Australia

Ref: MC18-001034

08 JUN 2018

Senator John Williams (Chair)
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to the Committee's letter of 10 May 2018 and associated *Delegated legislation monitor 5 of 2018*, in which the Committee has sought advice as to the period for which the *Fisheries Management (Small Pelagic Fishery) Fishing Method Determination 2018* (the instrument) will apply, and as to whether the instrument should be amended to specify the period, in accordance with paragraph 27(2)(b) of the *Small Pelagic Fishery Management Plan 2009*. I apologise that this advice has been slightly delayed.

The Committee is correct in identifying the omission of the specific period for which the instrument will apply. To address this omission and for clarity, the Australian Fisheries Management Authority (AFMA) will revoke the existing instrument and remake it to include specific reference to its period of effect.

In regard to this proposed period of effect, the instrument was intended to determine jigging and minor line fishing as ongoing approved methods in the Small Pelagic Fishery (SPF). Prior to the instrument's introduction, the *Small Pelagic Fishery Management Plan 2009* only permitted the use of the midwater trawl and purse seine fishing methods. Allowing jigging and minor line methods pursues AFMA's objectives of maximising economic returns and efficient and cost-effective fisheries management by providing flexibility to operators to use appropriate fishing gear for their specific circumstances.

The remaking process will involve consideration of the new draft instrument by the AFMA Commission. Accordingly, AFMA intends to prepare the new draft instrument with the period of application from the day after its registration with the Federal Register of Legislation until 30 April 2023. Although AFMA does not anticipate large amounts of catch using the jigging and minor line methods, and a previous trial of jigging resulted in very little catch, this end date will provide a period of five years in which to assess fishing operations.

I thank the Committee for its consideration of the instrument and its constructive suggestions, which will be reflected in drafting the remade instrument. I trust that the explanations I have provided clarify the points raised by the Committee.

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I have also reminded AFMA of the importance of reflecting on the Committee's feedback when preparing future instruments.

Yours sincerely

Anne Ruston

Attachment

Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 1) Regulations 2018

Response provided by the Minister for Jobs and Innovation

The Committee has sought further information as to why there is no merits review by a tribunal or body external to the Department of Jobs and Small Business (the Department), in connection with the New Enterprise Incentive Scheme (NEIS) and Transition Support Services (TSS) under the Stronger Transitions package.

The nature of the assistance provided to participants of both programs, and the eligibility criteria for both programs, are outlined at the end of this response.

Independence of the Department from NEIS and TSS providers

The Committee has questioned whether review by a Departmental official of a decision by NEIS and TSS service providers contracted by the Government constitutes sufficiently independent merits review.

Departmental officials are independent of NEIS and TSS providers. They must comply with their Australian Public Service Code of Conduct obligations at all times, including in relation to impartiality and conflicts of interest. In the unlikely event that a Departmental official had a connection to a provider, such as if a relative owned or worked at a provider, the official would need to declare that interest so it could be managed accordingly, in the same way that a member of an external review body would need to declare a connection, if any, to a provider.

The Department's involvement in reviewing provider decisions is not a matter which would substantially disadvantage a complainant compared to review by an external body. Rather than trying to minimise participation in NEIS or TSS, the Department promotes them to encourage eligible people and employers to participate. Such participation helps achieve the Australian Government objectives of creating jobs, reducing unemployment and reducing dependence on the social security system.

If the Department forms the view that a provider has made an incorrect or unreasonable decision regarding a person's eligibility for NEIS, the Department may require the provider to implement a different decision within a specified timeframe.

This is because the deeds the Department has entered with NEIS providers require a provider to immediately comply with all directions the Department issues to it.

Failure by the provider to comply with a reasonable Departmental direction would mean that it would be in breach of the deed and the Department could take action against it under the deed.

In practice, providers generally cooperate with the Department about a person's eligibility for NEIS without the need for formal correspondence under the deed. While the providers generally make sound initial decisions about eligibility, the Department has on occasion instructed a provider to treat a person as eligible either following amendments to the person's business idea, or where the provider originally proposed to terminate the person's participation in NEIS.

In the case of TSS under Stronger Transitions, the Department will determine which employers are eligible, determined by the policy parameters for eligibility outlined at the end of this response. Participation by employers is voluntary. For the pre-retrenchment phase, the Department will determine which workers are eligible, noting that all participation is voluntary. For the post-retrenchment phase, *jobactive* providers will determine which persons are eligible for the Stronger Transitions measures, according to program guidelines, and refer eligible persons to the TSS provider for a comprehensive skills assessment, where appropriate. This will be in accordance with relevant program guidelines. The policy parameters for eligibility are outlined later in this response.

The *jobactive* deeds also require providers to immediately comply with all directions the Department issues to them. The same provision will be included in the deeds for TSS, which has not yet commenced. However TSS providers will not determine eligibility; their role will be to provide the transition services, such as undertaking comprehensive skills assessment or resilience training. The Department will undertake program assurance activities to ensure that decisions on eligibility are made in line with the policy parameters set by Government.

Review by the Commonwealth Ombudsman

A person dissatisfied with a provider's decision, with the Department's response to any complaint about a provider, or with the Department's original decision about their eligibility for the pre-retrenchment phase of TSS, can raise the matter with the Commonwealth Ombudsman. The Ombudsman is independent of both the Department and providers.

The Ombudsman has the power to ask the Department to answer questions about the treatment of the person by the provider or Department, or to provide records about the person's dealings with the provider or the Department, or other relevant documents or information.

If the Ombudsman decides to investigate in response to a complaint, and makes any recommendations, the Department could require the provider to implement the recommendations. The Department gives weight to Ombudsman recommendations and is required to respond to the Ombudsman as to what it has done in response to any recommendations. Failure to adequately respond could lead to adverse public reporting by the Ombudsman.

The Committee has stated that it does not consider the fact that decisions by employment service providers are not made under an enactment to be an appropriate basis for excluding merits review.[1] The Department's primary reason for not enabling merits review by a body independent of the Department is not that the decisions are not made under an enactment. Rather, there is no need for such review given the availability of the

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[1] By way of background, the reason that administrative details of employment programs have not been placed in legislation is that this would reduce the flexibility of the programs. Very few employment programs have been embodied in legislation for this reason. To the extent that some employment providers make decisions which impact on a person's entitlement to their social security payment, those decisions are reviewable under the social security law including, following internal review, by the Administrative Appeals Tribunal.

above review mechanisms and taking into account the above factors and the additional factors telling against external merits review outlined below in this response.

As a secondary matter, the Department notes that for the programs in question there is no decision-making power under an enactment, which is required under the *Administrative Appeals Tribunal Act 1975* for that tribunal to have jurisdiction.

Other factors relevant to the question of external merits review

A decision that a person is ineligible for NEIS or TSS does not preclude a person from future eligibility. For example, a person who is denied NEIS assistance on the basis that their business proposal has not been assessed as commercially viable could modify their proposal to make it more viable and thereby achieve eligibility.

Similarly, where a person has been receiving NEIS assistance but their provider decides that they are no longer eligible because their business has lost commercial viability, the person could make changes to their business to maintain eligibility.

When the Department receives a complaint from a person in connection with their NEIS eligibility, the Department will take a practical and constructive approach and make suggestions to the person about which aspects of their proposal they might need to reconsider in order to demonstrate viability or eligibility, in order to help the person access NEIS assistance. The Department generally aims to respond to such complaints within about one week.

This approach is likely to enable the person to achieve faster NEIS assistance, and a more successful business, than pursuing external review in connection with a proposal of questionable viability, or which does not meet other NEIS eligibility criteria.

In the case of TSS, the Department will also take a practical and constructive approach and use its discretion to help achieve positive outcomes for persons wishing to receive assistance.

For example, as outlined below, to participate in TSS a person must have been a permanent employee of a participating employer, and not a contractor, unless the Department otherwise agrees. There is sometimes ambiguity about whether a person is an independent contractor or an employee. In addition, some employers incorrectly classify employees as contractors even where there is no ambiguity.

Where there is doubt about a person's employment status, the Department's approach will be to use its discretion to include a person in TSS for the pre-retrenchment phase rather than exclude them based upon a narrow view of the meaning of employment. Similarly, for the post-retrenchment phase, should there be doubt about a person's employment status and a *jobactive* provider exclude the person from eligibility, the Department could use its discretion to include the person.

The Department may also use its discretion to include a person even if they are a contractor, if it decides that to do so would be appropriate in the circumstances, having regard to factors such as the nature of their industry and employer.

Policy parameters for eligibility for and the nature of assistance provided by TSS under the Stronger Transitions package

The Committee commented on the absence of information about the eligibility criteria for TSS. Those criteria are now available. Participation is voluntary for both employers and workers. To be eligible, employers must:

- be retrenching permanent employees
- be located in one of the Stronger Transitions Regions (unless otherwise approved by the Department of Jobs and Small Business)
  - Adelaide (South Australia)
  - Mandurah (Western Australia)
  - North Queensland (Queensland)
  - Melbourne North/West (Victoria)
  - North/North-West Tasmania (Tasmania)
- be in a position to co-contribute to the transition services for their workers
- have a valid Australian Business Number (ABN)
- not be a Commonwealth entity or company under the *Public Governance, Performance and Accountability Act 2013*
- not be a State/Territory or local Government department or agency
- be trading still (not insolvent)
- have a record of sound corporate practices

To be eligible, participants in the pre-retrenchment phase must:

- be in the process of being retrenched from a Participating Employer that has partnered with the Department to participate in Stronger Transitions
- be permanent employee of the Participating Employer, not a contractor or sub-contractor (unless otherwise agreed by the Department)

To be eligible, participants in the post-retrenchment phase must:

- be able to produce a *letter of retrenchment*, which includes their date of retrenchment and details of their retrenching Employer
- be retrenched and register with a *jobactive* provider within nine months of their retrenchment date. Note: if the Participant has a *Stronger Transitions Support Statement* they can also register up to three months prior to their retrenchment date
- reside in, or the Employer their position is to be retrenched from is located in, one of the following identified Stronger Transitions Regions:
  - Adelaide (South Australia)
  - Mandurah (Western Australia)
  - North Queensland (Queensland)
  - Melbourne North/West (Victoria)
  - North/North-West Tasmania (Tasmania)
- not be participating in *jobactive* under an existing Structural Adjustment Program, or eligible for an existing Structural Adjustment Program.

The Department will identify eligible employers and participation by employers is voluntary, as noted above. A person's access to TSS prior to retrenchment will depend on their employer agreeing to participate. The transition services will be provided by a panel of providers selected by the Department. The transition services may include advice on future career options and skills in demand; resilience, health and wellbeing support; access to language, literacy and numeracy training; support towards recognition of prior learning; financial education, and digital literacy and online job search training.

Eligibility criteria for and the nature of assistance provided by NEIS

NEIS is longstanding employment program which assists up to 8,600 participants each financial year to start their own business. NEIS is currently delivered by a network of 21 contracted providers in metropolitan and regional areas. NEIS provides accredited small business training, assistance to develop a business plan, and business mentoring and support during the first year of the participant's new business.

NEIS providers are responsible for assessing participant eligibility and managing their participation in the program, in accordance with their deeds with the Department.

To be eligible for NEIS a person must:

- be at least 18 years old when they start NEIS;
- be available to participate in NEIS Training (if relevant) and work full-time in the proposed NEIS business;
- not be prohibited by law from working in Australia;
- not be an overseas visitor on a working holiday visa or an overseas student studying in Australia;
- not have participated in NEIS in the past year; and
- not be an undischarged bankrupt.

If a person is eligible, NEIS providers will assess the business idea to make sure it meets the business eligibility criteria. This means the proposed NEIS business:

- is not currently operating on a commercial basis;
- has an independent business structure;
- is lawful and capable of withstanding public scrutiny;
- has been assessed as commercially viable by a NEIS provider;
- will be established, located and operated solely within Australia; and
- will be structured so that the person has and will maintain a controlling interest over the NEIS business for the duration of the person's time in NEIS.

THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

MS18-000581

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
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Dear Senator Williams

I refer to the email from the Senate Standing Committee on Regulations and Ordinances concerning the Committee's scrutiny of five Australian Marine Park management Plans and the List of Specimens Taken to be Suitable for Live Import.

In relation to the five Australian Marine Park Management Plans and the Committee's request for clarification on provisions for the International Convention for the Prevention of Pollution from Ships (MARPOL), I provide the following advice:

- *Re the manner in which the International Convention for the Prevention of Pollution from Ships is incorporated into the instruments* - The management plans incorporate MARPOL as in force from their commencement on 1 July 2018. The specific provisions for MARPOL are contained in Part 4 Managing Activities (Section 4.2.1 General use access, and waste management). Reference is made to MARPOL in Section 4.2 Commercial shipping; the Glossary; and Schedule 1 Summary of Legislative and Policy Contexts (S1.3 International Agreements).
- *Re how the Convention is or may be made readily and freely available to persons interested in or affected by the instruments* - The text of MARPOL is freely and readily available to persons interested in or affected by the Management Plan from the United Nations Treaty Collection.
- *Re the instruments and/or their explanatory statements be updated to include this information* - Supplementary Explanatory Statements have been prepared for the five management plans setting out the above information and will be registered on the Federal Register of Legislation.

In relation to the List of Specimens Taken to be Suitable for Live Import, I provide the following advice:

- *Re whether the minister considered a 'relevant report' before making the instrument, as required by subsection 303EC(5) of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act); or if not, the power relied on to make the instrument* - Prior to making a decision to amend the List of Specimens Taken to be Suitable for Live Import (29/11/2001) (the live import list) to include the Clarion Angelfish in Part 2 of the live import list, I considered a risk assessment prepared by the Department of the Environment and Energy. This risk assessment is the relevant report for the purposes of pargraph 303EC(5)(a) of the EPBC Act and was made under section 303EE(3) in accordance with section 303EF.

To provide clarity, the Department has advised that it will provide this information in the explanatory statements of future amending instruments that include an item in the live import list in accordance with paragraph 303EC(1)(a) of the EPBC Act.

For completeness, I note that the Hon Melissa Price MP, Assistant Minister for the Environment, made two instruments including the yellow anaconda (*Eunectes notaeus*) and six species of oysters in Part 2 of the live import list. The relevant legislative instruments have been registered and were tabled on 8 May 2018. I am advised that in making these decisions, Assistant Minister Price considered risk assessments which were prepared by the Department for the purposes of paragraph 303EC(5)(a) and section 303EE of the EPBC Act.

- *Re the circumstances that led to an incorrect version of the instrument being registered; and the appropriateness of using an administrative process to make changes to a tabled legislative instrument, and the impact on parliamentary scrutiny* - I now refer to the Committee's comments in relation to the incorrect version of the instrument being registered on the Federal Register of Legislation (the Register). The Department has advised that an administrative error led to an incorrect version of the legislative instrument being registered on the Register and tabled in Parliament.

  In the Delegated Legislation Monitor No. 5 of 2018, the Committee expressed its concerns that an administrative process was being used to make substantive changes to a tabled legislative instrument. In this respect, I note that the section providing 'Part 1 of the list must not contain a CITES specimen' which was included in the correct version of the instrument replicates subsection 303EB(5) of the EPBC Act. It was therefore already a requirement under the EPBC Act, rather than a new requirement or obligation. As such, the correction of the error on the Register did not result in a substantive change to the effect of the instrument.

- *Re the correction of the error on the Register* - I am advised by the Department that the version that was first registered on the Register was not the version of the instrument that I signed. As the instrument on the Register was not the instrument made by me, it should not have been lodged for registration on the Register under section 15G of the Legislation Act 2003 (the Legislation Act).

  The Department became aware of the error the day after registration. Under paragraph 15L(1)(e) of the Legislation Act, a responsible person (being the rule-maker for the instrument) is required to give notice to the First Parliamentary Counsel that there is an error in the Register. In accordance with these obligations, the Department notified the Office of Parliamentary Counsel (OPC) on my behalf. I understand the Department was liaising with OPC to resolve the issue on the day the incorrect version was tabled in the Senate.

  I am advised by the Department that the correct version of the instrument was tabled in the Senate on 8 May 2018, one sitting day after the incorrect version of the instrument was tabled. As noted by the Committee, the impact on Parliamentary oversight of the instrument was minimal due to the Department's prompt actions to correct the error. Nonetheless, I note the Committee's concerns and the Department has advised it has amended the procedures used when submitting live import list instruments for tabling in future to avoid errors of this nature.

Thank you again for bringing your concerns to the Government's attention.

Yours sincerely

JOSH FRYDENBERG

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-010629

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

21 MAY 2018

Dear Chair John

I refer to letter of 10 May 2018 concerning several issues raised by the Senate Regulations and Ordinances Committee in *Delegated legislation monitor 5 of 2018* with respect to the *Health Insurance (Quality Assurance Activity) Declaration 2018 (No. 1)* [F2018L00226] and the *Health Insurance (Quality Assurance Activity) Declaration 2018 (No. 2)* [F2018L00227] (the Declarations).

The Committee requested further advice relating to the safeguards in place with respect to the collection, storage, use, disclosure and retention of personal patient information for the purposes of the quality assurance activities. I thank the Committee for raising its concerns with me.

The following response to the Committee's concerns relates to both Declarations. Each of the two registries: the Australian Otolaryngology Head and Neck Quality Assurance Network (AOQAN) (declared a quality assurance activity by Declaration No. 1), and the Tonsil, Grommet and Nasal Septum Surgery Registry (TGNSR) (declared a quality assurance activity by Declaration No. 2), collect a combination of administrative patient data, clinical information about specific surgical procedures, surgeon details and post-operative patient outcomes. The organisation undertaking both activities is the Australian Society of Otolaryngology Head and Neck Surgery Limited (ASOHNS). As such, the manner of collection, storage, and use of the information collected, and the safeguards in place to protect personal privacy is identical for each of the registers.

More generally, the ASOHNS, as an Australian Privacy Principles (APP) Entity for the purposes of the *Privacy Act 1988*, must comply with the APP. To this end, the ASOHNS has advised my Department that it consulted extensively with the Office of the Australian Information Commissioner to ensure that users of each registry are fully informed about how ASOHNS will handle, use and manage any personal information to ensure the privacy of individuals participating is protected.

The ASOHNS also applied for ethics approvals in relation to both activities to the Ethics Committee of the Royal Australasian College of Surgeons (RACS). On 20 October 2016, the RACS assessed the activities to be low risk within the terms of the National Health and Medical Research Council National Statement on Ethical Conduct in Human Research and endorsed the activity to proceed without the need for further referral or advice.

The manner in which information will be collected, stored and used for the purposes of the quality assurance activities declared by the instruments, and how long such information will be retained.

In terms of collecting the data, patients and surgeons use a unique login and password to respond to questions in a questionnaire relevant to a specific procedure for that patient. Each user has secure access to their own information using their login and password. Patients are emailed their unique login and password by their surgeon.

Regarding the TGNSR, an email address is recorded and available for the surgeon to send a post-operative follow up questionnaire. Patients who use the questionnaire will be able to advise whether their symptoms have improved since the operation, or whether there were post-operative complications such as bleeding, re-admission to hospital or if they needed additional pain relief. In relation to the AOQAN, the patient's initials and date of birth are visible to the surgeon. Individual surgeons can review their own cases and assess their patients' results through the outcomes reported following surgery. The system does not allow a surgeon to view the responses of other patients.

Regarding the storage of the data, each registry collects information from patients and surgeons using secure web-based questionnaires specifically designed to support the confidential collection and analysis of de-identified information from surgeries performed in Australia. The information is collected and stored in a secure database hosted in a secure Microsoft Azure environment. Microsoft Azure is a "Platform as a Service" cloud computing service that is certified by the Australian Signals Directorate.[1] The Windows Azure cloud-based model enables ASOHNS to use web applications and proprietary software that are purpose built to securely host each of the two registries.[2]

Analysis of the de-identified outcome data held in the databases for each registry will be undertaken by a specifically-formed Data Sub-Committee of ASOHNS. The Data Sub-Committee comprises of otolaryngology head and neck surgeons and one member would have expertise in statistics and data analysis.

Any data collected by each of the registries for the purpose of the quality assurance activities will be held only while the Declaration is in force, and thereafter destroyed.

Whether consent is required to collect and use patients' information for the quality assurance activities, and if not, why consent is not required.

Patients are asked to provide their consent if they wish to participate in either of the surgical registries. In agreeing to participate patients are advised that their data will be recorded in the registry and will be de-identified for research purposes. Prior to accessing the data collection questionnaire the patient is provided a link to the consent form and a copy of the ASOHNS Privacy Policy. If a patient agrees they then click the 'Patient Consent' check box to proceed.

[1] https://www.asd.gov.au/infosec/irap/certified_clouds.htm updated April 2018 (accessed 14 May 2018)
[2] https://www.asd.gov.au/publications/protect/cloud_computing_security_considerations.htm (accessed 14 May 2018)

What safeguards are in place to protect individuals' privacy in relation to such information, including constraints on its use, storage and retention.

There are minimal risks to individual's privacy in relation to using data collected, stored or subsequently analysed from either of the registries. Only system administrators employed by ASOHNS will have access to information about individual surgeons and patients relating to the information provided through the activity. As discussed above, the database is hosted in a secure cloud computing service that is certified by the Australian Signals Directorate.

To access the data for analysis, the Data Sub-Committee must request a report of the data within specific parameters, such as data related to certain medical procedures or data fields. The system administrator then accesses the database using a secure login and extracts the data into a report according to the request. As part of this process any information that may identify, expressly or by implication a particular individual, or particular individuals is removed prior to analysis.

The data held in each registry will not be used for any purpose other than for research in a de-identified, aggregated manner in accordance with the descriptions set out in the Declarations. In line with the legal requirements of qualified privilege, any information that may identify an individual patient surgeon, either expressly or by deduction will not be publicly disclosed.

To reflect these safeguards to privacy, I have instructed my Department to lodge replacement explanatory statements for each of the Declarations which will include:

- a description of how the data is collected, including the method of obtaining patient consent to use their personal data for research purposes;
- a description of how the information is stored, used, and retained by ASOHNS for the purposes of the quality assurance activity; and
- an analysis of the impact of the quality assurance activity on the individual right to privacy in the Statement of Compatibility with Human Rights

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure and Transport
Leader of The Nationals
Federal Member for Riverina

Ref: MS18-001526

12 JUN 2018

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
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John

Dear Senator Williams

I refer to the letter of 10 May 2018 from Ms Anita Coles, Committee Secretary, Senate Regulations and Ordinances Committee (the Committee) about the International Air Services Commission Policy Statement 2018 (Policy Statement) [F2018L00410].

Due to an oversight in drafting the Explanatory Statement that accompanies the Policy Statement, a 'Statement of Compatibility with Human Rights' was unfortunately not included.

I can advise the Committee that I have since taken steps to amend the Explanatory Statement in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003*. The revised Explanatory Statement will be lodged shortly with the Australian Government Federal Register of Legislation.

I trust this advice is of assistance to the Committee.

Yours sincerely

Michael McCormack

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The Hon Alan Tudge MP

Minister for Citizenship and Multicultural Affairs

Ref No: MS18-001847

Senator John Williams (Chair)
Senate Standing Committee on Regulations and Ordinances
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CANBERRA ACT 2600

Dear Chair John

Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 [F2018L00262]

Migration (IMMI 18/038: Sponsorship Applications and Nominations for Subclasses 407, 457 and 482 visas) Instrument 2018 [F2018L00290]

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 10 May 2018, in which the Committee requested further information about the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (the Amending Regulations). My comments in relation to the concerns raised by the Committee are below.

Calculation of visa application charges under item 135 of the Amending Regulations

The Committee has requested advice as to the basis on which the relevant visa application charges were calculated. As noted at pages 62-3 of the Consolidated Financial Statements for the Australian Government for the financial year ended 30 June 2016, a review of the classification of visa application charges (VACs) determined that the revenue for these charges had increased over a number of years without a commensurate increase in costs. As a result, VACs were reclassified from non-taxation to taxation revenue to reflect the sustained change in the nature of the revenue. This reclassification took effect from the 2015-16 Mid-Year Economic and Fiscal Outlook (MYEFO).

In particular, the reclassification is consistent with the principle that fees from regulatory services are designed to cover all or part of the cost of providing a regulatory function. If the revenue collected is clearly out of proportion to the costs of providing the regulatory service, then the fee is classified as taxation revenue.

The VAC amount for individual visa subclasses is set by Government as part of the Budget process. The *Migration Act 1958* provides that the amount of the VAC is to be prescribed in the Regulations and must not exceed the limit determined under the *Migration (Visa Application) Charge Act 1997*.

The VAC amounts set out at item 135 of the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (the Amending Regulations) are consistent with the above principles, and I consider them appropriate.

Calculation of fees under item 132 of the Amending Regulations and under the Migration (IMMI 18/038: Sponsorship Applications and Nominations for Subclasses 407, 457 and 482 visas) Instrument 2018

Item 132 of the Amending Regulations made changes to subregulations 5.37(2), (3) and (4) of the Regulations. These provisions prescribe a fee of $540 for nomination applications for the purpose of the Subclass 186 (Employer Nomination Scheme) visa (Subclass 186 visa) and the Subclass 187 (Regional Sponsored Migration Scheme) visa (Subclass 187 visa) where the nominated position is not in regional Australia. Where the nomination relates to a position in regional Australia, the nomination application does not attract a fee.

The amendments to regulation 5.37 maintain the previously existing fee structure for the Temporary Residence Transition stream and apply this fee structure to the Direct Entry stream. The amendments also apply this fee structure for nominations to the new Labour Agreement stream of the Subclass 186 visa. In practice, this means that nominations for the purpose of the Subclass 186 visa may be $540, but no fee is payable for nominations for the purpose of the Subclass 187 visa. I consider that these changes are appropriate to reflect the intended policy settings of these visa, including in relation to supporting nomination applications relating to positions in regional Australia. The amount of the nomination fees prescribed by regulation 5.37 was last varied on 1 July 2012, when it was raised from $520 to $540.

In relation to the fees specified by *Migration (IMMI 18/038: Sponsorship Applications and Nominations for Subclasses 407, 457 and 482 visas) Instrument 2018*, these remain consistent with the fees specified in revoked instrument *Forms, Fees, Circumstances and Different Way of Making an Application - IMMI 13/036*. Those fees were last varied on 1 July 2012 when the fees were increased in line with the Consumer Price Index.

At the time the amount of the fees in question were set, they were calculated on the basis of cost recovery, using departmental data for direct and indirect costs incurred in undertaking the activity or function. This includes staffing and relevant oncosts, suppliers, IT, property, contractors/consultants and corporate overhead where appropriate. The fees were last increased on 1 July 2012, on an indexation basis.

In summary, I consider the amounts of the fees specified by *Migration (IMMI 18/038: Sponsorship Applications and Nominations for Subclasses 407, 457 and 482 visas) Instrument 2018* and prescribed by subregulations 5.37(2), (3) and (4) are appropriate.

Characteristics of decisions relating to sponsorship and nominations made in relation to overseas businesses

The Committee requested advice as to the characteristics of decisions relating to sponsorship and nominations for Subclass 482 (Temporary Skilled) (Subclass 482) visas, or of overseas businesses affected by such decisions, that would justify excluding such businesses from access to independent merits review of those decisions.

As noted by the Committee, the Explanatory Statement refers to the long-standing policy in relation to access to merits review by overseas businesses. This policy is part of the merits review arrangements introduced almost 25 years ago. The policy distinguishes between persons and

organisations with a connection to Australia, and those who lack a connection. The policy is implemented in section 338 of the *Migration Act 1958* (the Act) and regulation 4.02 of the *Migration Regulations 1994* (the Regulations). For example, sponsorship by "a company that operates in the migration zone" can give rise to an entitlement to merits review of a visa decision (subparagraph 338(5)(b)(ii) of the Act). An overseas company is excluded.

The provision of access to merits review by persons and business with no connection to Australia would have significant implications for the workload of the Administrative Appeals Tribunal and the Department of Home Affairs, and would be a significant departure from long-standing policy. In my view, it was appropriate for the Amending Regulations to maintain the status quo in relation to merits review.

Matters appropriate for delegated legislation

The Committee has also drawn to the attention of the Senate the circumstance that the detailed reforms to the employer sponsored work visas have been made by regulation amendment rather than by an Act of Parliament. I note that it has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Regulations rather than the Act, and for the amendments to be made by regulation rather than by an Act (although amendments to the Regulations have been made by an Act on rare occasions). This legislative structure has been in place since 1994.

The Committee has expressed concerns that the amendments are not subject to parliamentary oversight. However, the Amending Regulations are subject to the disallowance framework set out by the *Legislation Act 2003* (the Legislation Act), and could be disallowed by either House of Parliament if Parliament considered they were not appropriate.

The fact that the Regulations are exempt from sunsetting does not interfere with these standard scrutiny processes. The amendments will also be subject to the new review requirement under regulation 5.44A of the Regulations, which requires that the Secretary must ensure that the operation of the Regulations is reviewed. This provision requires that the first review of the Regulations must be completed by no later than 30 June 2020.

Given the frequency and extent of the legislative amendments that are required to maintain a dynamic and responsive immigration system, and given that oversight of the amendments is available to Parliament under the Legislation Act, I remain of the view that the use of delegated legislation is appropriate.

I trust this information is of assistance to the Committee.

Yours sincerely

Alan Tudge

12/ 6/2018

The Hon Darren Chester MP

Minister for Veterans' Affairs
Minister for Defence Personnel
Minister Assisting the Prime Minister for the Centenary of ANZAC

MC18-001156

Senator John Williams
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Dear Senator Williams

Thank you for the correspondence of 10 May 2018 from Ms Anita Coles, Committee Secretary, Senate Standing Committee on Regulations and Ordinances, requesting information about scrutiny issues identified in relation to: *Defence Amendment (Defence Aviation Areas) Regulations 2018*, *Defence Force Discipline Regulations 2018*, *Defence (Inquiry) Regulations 2018*, and *Defence (Public Areas) By-laws 2018*.

Defence Amendment (Defence Aviation Areas) Regulations 2018

I understand the Committee is concerned about the delegation provision that these regulations have inserted at subsection 82(1A) of the *Defence Regulaton 2016* (the principal regulations). The provision enables the Minister to delegate the various powers in the new Part 11A of the principal regulations to Australian Defence Force (ADF) officers no lower than Lieutenant Commander, Major or Squadron Leader rank, and to Australian Public Servant (APS) employees in the Department no lower than APS6 level. As outlined in the explanatory statement, this level of delegation was considered appropriate given the nature of the powers in question, and the practical requirement that some of the powers will need to be exercised at a local level in order to effectively administer the scheme for defence aviation areas. The Committee is seeking my advice as to the appropriateness of amending the delegation provision to include a requirement that the Minister be satisfied that persons authorised have the expertise appropriate to the power delegated.

My view is that such an amendment is unnecessary for several reasons:

- ADF members will have undergone careful selection and significant training in order to be promoted to the relevant ranks. These officers will have significant responsibility in their chain of command and will often be second-in-command or

even in command of a regional base. APS6 employees in Defence are promoted or employed following a merit selection process, in which they must demonstrate high levels of skill and expertise. APS employees at this level will often have significant responsibilities with limited supervision, and may lead large teams, especially in the regions. The delegable powers in Part 11A include matters such as receiving applications for approval to construct or use hazardous objects, seeking further information in relation to applications, making decisions on whether to grant or refuse applications, and making decisions to direct the removal of hazardous objects. I am satisfied that, having gone through the relevant recruitment, promotion and selection processes, ADF officers and APS employees at the relevant ranks and levels will have the skills and expertise to understand and fulfil their responsibilities, including to obtain additional technical information on aviation hazards from experts where necessary.

- The powers in Part 11A can only be exercised within declared defence aviation areas. This imposes a practical limitation on who can effectively exercise a delegation, even without a provision of the sort described by the Committee. Even if a Minister were to delegate powers to all APS6 employees within Defence for example (which is unlikely), only a limited number of APS6 employees would be able to exercise the powers consistently with the duties of their position. Further, ADF members and APS employees in Defence are officials under the *Public Governance, Performance and Accountability Act 2013*, and are subject to the general duties of officials under that Act. This includes exercising powers, performing functions and discharging duties with the degree of care and diligence that a reasonable person would exercise if they occupied the position and had the same responsibilities as the official. It is unlikely that an official whose duties do not include some responsibility for defence aviation areas could reasonably exercise any of the powers in Part 11A, even if there were a blanket delegation of those powers in place.

I note the Committee drawing to my attention the omission of reference in the explanatory statement to section 4 of the *Acts Interpretation Act 1901*. I am satisified section 4 allows the making of a legislative instrument in anticipation of the commencement of the empowering provision that authorises the instrument to be made.

Defence Force Discipline Regulations 2018

Personal rights and liberties: privacy

The Committee has expressed concerns about the justification for the limitations on privacy of Defence detainees in sections 22 to 25 of the Regulations, and about how personal information collected under subsection 53(1) of the Regulations is to be managed.

Sections 22 to 25

The limitation placed on Defence detainees' privacy by sections 22 to 25 is justified by the need to maintain security and safety in detention. Reasonable and proportional disciplinary rules are required to maintain a well ordered environment in a detention setting, while having procedures that safeguard a detainee's dignity and rights in the circumstances.

Detention centres may be located in war or warlike operations indicating the potential for a higher level of vigilance against external threats to security, or internal threats to security where detainees may be undergoing detention for serious offences against the safety of others (e.g. assault), the discipline of the Defence Force, or relating to the security of the nation.

The power to open letters and parcels is analogous to similar powers in civilian corrective services. The authority under subsection 22(2) does not have blanket operation. It is expressed to be subject to the provisions of Part 2 Division 3 of the instrument, which includes subsection 24(1). Subsection 24(1) requires the relevant detention centre officer or staff member to reasonably believe that the dispatch or delivery of a letter or parcel may adversely affect the security, discipline, or good order of the detention centre. Only with this reasonable belief may a detention centre operator open and read or inspect letters and parcels.

Reasonable belief is intended to be the procedural test by which a detainee's dignity and rights are safeguarded to the extent that detention centre operators have due cause to be concerned for the security, discipline, or good order of the detention centre.

Subsection 53(1)

There are safeguards in place to protect the privacy of individuals in relation to personal information collected under subsection 53(1).

The ADF maintains a record of the convictions of a member for Service offences, civil offences, and overseas offences. This information is collected for the purpose of maintaining the discipline and good order of the Defence Force. The information is necessary for decision makers who manage the careers of ADF members and determine the suitability of members for particular roles. The information is also relevant to recruiting decisions, and Defence also has obligations to ensure members' court commitments are not prevented by their Defence Force commitments.

Information collected under subsection 53(1) is managed openly and transparently, in accordance with Defence Instruction (General) PERS 55-4 *Reporting, recording and dealing with Civil Offences, Service and Civil Convictions and Diversionary Programs*.

The information is classified as 'sensitive and personal information'. It is stored on a PD103 file and is recorded on the Conduct Reporting and Tracking System, which is a limited access system. Where a civilian conviction is spent or is subsequently quashed, that conviction must be struck through and annotated on the PD103, the record archived or disposed of as appropriate, and the Conduct Reporting and Tracking System updated. The PD103 is kept at the member's unit and upon discharge is retained by the Service records retention office. Consideration of external requests for disclosure is the responsibility of specified offices within Defence. For instance, policy requires that where a third party (e.g. an employer or prospective employer of a former member) requests information about a member's Service convictions, the request is to be forwarded to Service Police Central Records Office for resolution.

Incorporation of documents

The Committee has requested advice as to how documents incorporated under subsection 30(2) are or may be made readily and freely available to persons interested in, or affected by, the Regulations.

Subsection 30(2) incorporates two documents (by reference) as in force when the instrument commenced:

- Australian Standard AS 4691.1-2003 Laser based speed detection device part 1: Definitions and device requirements; and
- Australian Standard AS 4691.1-2003 Laser based speed detection device part 2: Operational procedures.

Defence holds an ongoing licence from SAI Global through its Defence Library Service which provides online access to the two documents for Defence members. The versions as at 1 April 2018 have been made readily and freely available to all Defence members via the Defence Force Discipline Instruments Register which is searchable and accessible on the Defence Restricted Network.

The explanatory statement has been updated to include this information, and is currently in the process of being published on the Federal Register.

Defence (Inquiry) Regulations 2018

Personal rights and liberties: privacy

The Committee has expressed concern about the authorisation in these Regulations for Commonwealth employees and Defence members to use, copy and disclose inquiry information. The Committee is seeking advice about the justification for this authorisation, safeguards in place to protect privacy of individuals, and how the imposition of conditions by a minister under sections 27 and 59 would interact with the authorisation in sections 26 and 58.

Sections 26 and 58 do not operate to allow any employee of the Commonwealth to make any information in inquiry records publicly available. Disclosure of inquiry records to the public would only be permitted if the disclosure was within the course of the person's duties or authorised by the Minister.

Performance of duties – justification for inclusion in the instrument

Whether disclosure is within the scope of a person's duties will depend on the nature of the person's position and the role of the individual seeking to disclose the information. Guidance contained in Chief of the Defence Force Directive 08/2014 states that disclosure to the public or wide disclosure within Defence is unlikely to be part of, or incidental to, a person's duties. The Directive provides general examples of different roles and functions within the ADF. A commanding officer in the ADF has functions assocaiated with the

welfare of his or her subordinates, so their performance of duties includes matters incidential to maintaining the welfare of his or her subordinates. A legal officer in the ADF has functions associated with giving legal advice to command, so their performance of duties includes matters incidential to giving the legal advice. The Directive also provides common examples of disclosures internally within and externally to Defence that may fall within the performance of a persons duties. These include internal disclosures of inquiry records to other Defence staff for the purpose of implementing inquiry outcomes, dealing with complaints, designing training, policy, procedures, instructions and orders; and affording procedural fairness. The Directive states that external disclosures would usually be within the duties of a dedicated liaison officer of the relevant external Department or agency.

Safeguards

Unauthorised disclosures may constitute an offence for any person under section 37 or 66 of the *Defence (Inquiry) Regulations 2018* , as well as an unauthorised disclosure for the purposes of the *Privacy Act 1988* and section 70 of the *Crimes Act 1914*. In addition, the current guidance in Chief of the Defence Force Directive 08/2014 constitutes a general order to ADF members for the purposes of the *Defence Force Discipline Act 1982*, meaning that unauthorised public disclosure of inquiry records by ADF members, who for the most part will be handling such records, may result in internal administrative or disciplinary action. I am advised by the Department that the intention is that a new joint Secretary and CDF Directive will being updated and issued which would be enforceable as a lawful order for ADF members, and would also constitute a direction to APS employees for the purposes of subsection 15(5) of the *Public Service Act 1999*. These Directives are and will be widely available throughout Defence, and the relevant parts can be made publicly available including to non-Defence staff that are provided access to inquiry records.

In the event that Commonwealth employees outside the Department of Defence are provided with access to inquiry records, they will similarly be bound by the law in relation to their use and disclosure of those records. Again, disclosure of records publicly by a non-Defence Commonwealth employee is unlikely to be within the scope of their duties.

The reference in the explanatory statement that sections 26 and 58 'overcome privacy and other restrictions on disclosure that might apply' reflects the requirement to transmit information quickly across the Defence Force, the Department, and sometimes to other Government departments and agencies which enables necessary steps to be quickly taken, such as to mitigate risks to individuals where a report contains safety critical information which needs to be actioned quickly to prevent further safety incidents from occurring. In such instances, while steps will be taken to protect the privacy of individuals referred to in the records where practicable, where time or other factors do not permit this action, the risk to safety will outweigh any risks associated with breach of a person's privacy (noting that the *Administrative Inquiries Manual* requires inquiry documents to be redacted to protect personal information where appropriate).

Given that the purpose of inquiries under the *Defence (Inquiry) Regulations 2018* is to facilitate the making of decisions relating to the Defence Force (section 6), few inquiry

records would need to be made available to employees in other Government departments and agencies. The most likely scenario is where inquiry records concerning a safety incident are provided to the Department of Veterans' Affairs to enable that Department to consider an ADF member's compensation claim. In the event that an APS employee outside the Department is provided with inquiry records under section 26 or 58, then that APS employee will be also bound by the legislative restrictions. That is, they will equally not be permitted to use, disclose or copy inquiry records unless it is within the course of their employment.

Sections 27 and 59, and sections 26 and 58, serve different purposes. As discussed above, the latter provide for the limited use, disclose or copying of inquiry records where such is within the scope of their employment. By contrast, the former provide a broader mechanism for inquiry records to be used, disclosed or copied in any circumstances. The purpose of sections 27 and 59 is to allow use, disclosure or copying of inquiry records in circumstances where it is appropriate to do so but which would not ordinarily be within the course of an APS employee or ADF member's employment. For example, it may be appropriate to disclose an inquiry report to the family of a deceased ADF member, but doing so would not ordinarily be within the scope of a person's duties. In this instance, the Minister could authorise the Chief of the Defence Force to disclose a copy of an inquiry report to the family, and could impose conditions, such as that the personal information of other individuals be redacted prior to it being disclosed. Since sections 27 and 59 allow, in theory, the use, disclosure or copying of inquiry records in any circumstances, the requirement for ministerial authorisation and oversight provides an important safeguard. Proposals to disclose inquiry records publicly require Ministerial Advice to be provided. Furthermore delegatation of functions under sections 27 and 59 is limited to a small number of senior ADF officers and when exercised by such delegates is to be used supplementary to sections 26 and 58.

Sections 28 and 60 provide a broad power for the Minister to use, disclose and copy inquiry records for purposes relating to the Defence Force. As the Minister for Defence has general control and administration of the Defence Force under the *Defence Act 1903*, and the purpose of inquiries under the *Defence (Inquiry) Regulations 2018* is to facilitate the making of decisions relating to the Defence Force, it is essential that the Minister retains this broad power. As with the exercise of other statutory powers, the Minister will remain accountable to Parliament.

Offences: evidential proof on the defendant

The *Defence (Inquiry) Regulations 2018* contain a number of offences associated with failing to comply with a notice or order to appear or provide documents or answer questions, and disclosing inquiry records without permission or authorisation. The offences under the *Defence (Inquiry) Regulations 2018* also provide express matters that could be considered excuses for complying with notices or orders. This means that a defendant who wishes to rely on the relevant matter bears an evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists.

This requires them to adduce or point to evidence that they held the relevant belief, that the circumstances made compliance unduly onerous for them, or that they had the relevant permission or authorisation. Once they have done this, the prosecution would need to disprove the existence of the belief, circumstances, permission or authorisation in order to prove the offence. This amounts to a reversal of the burden of proof.

For example, a prosecution for disclosure of inquiry records without authorisation would require a reasonable belief that there was no authorisation or permission, which would be difficult for a prosecutor to establish. Additionally, the belief of the person that compliance is likely to cause damage to defence, or that the circumstances made compliance unduly onerous, requires consideration of factors which are peculiarly within the knowledge of the defendant. For example, in relation to whether compliance is unduly burdensome, the volume of information to be provided and the personal circumstances of the person vis a vis the requirements of the order or notice would only be known by the person.

The penalties for these offences are relatively low, and reversal of the burden of proof in relation to the existence of a belief, circumstance, authorisation or permission is reasonable in order to ensure the effectiveness of these provisions.

The explanatory statement has been amended to reflect the above, and is currently in the process of being published on the Federal Register.

Subdelegation

The Committee has sought advice on the appropriateness of amending these Regulations to require that the CDF be satisfied that officers to whom powers are delegated under subsection 72(1) have the expertise appropriate to the power delegated. In my view, such an amendment is unnecessary, for several reasons.

23. The purpose of inquiries under the *Defence (Inquiry) Regulations 2018* is to facilitate the making of decisions relating to the Defence Force (section 6). In relation to inquiry officer inquiries undertaken under Part 3, only ADF members are compellable to give evidence (section 53). Inquiry officer inquiries are therefore an information-gathering tool to assist commanders in the Defence Force.

Section 72 allows CDF to delegate his or her powers under Part 3 to an officer at or above the rank of Lieutenant in the Navy, Captain in the Army or Flight Lieutenant in the Air Force. While this rank is treated for some purposes as the equivalent to an APS5 classification in the Australian Public Service, the Committee should not be misled by such a comparison in this context.

Officer recruitment and selection is a robust process, and comprises cognitive as well as physical testing. If successful, officer cadets receive years of general officer training, followed by trade-specific training. They must then demonstrate their aptitude 'on the job' at the most junior officer levels before being eligible for promotion to the Lieutenant/Captain/Flight Lieutenant level where they may take on command responsibility. All officers in command are selected as fit and proper and provided with the necessary

training and experience they require in order to take on the responsibilities demanded by their position. In order to achieve the ranks referred to in subsection 72, an ADF officer will have undergone careful selection and training, and they will have a significant level of responsibility within the chain of command, especially in operational environments.

It is not necessary or desirable for section 72 to impose additional qualifications or attributes on officers in order for them to be delegated power under Part 3. The inclusion of specific requirements would represent a unique attempt to define one central aspect of the responsibilities of ADF officers. This would risk either distorting the selection of officers for positions of command, or it would seek to separate the authority to direct the gathering of evidence from the authority to command.

Personal rights and liberties: privilege against self-incrimination

The Committee has expressed some concerns about the abrogation of the privilege against self-incrimination as it applies to inquiry witnesses under these Regulations.

The concerns of the Committee are noted. Nevertheless, it is considered that the benefits in abrogating the privilege against self-incrimination, coupled with the use immunity in subsection 124(2C) of the *Defence Act 1903,* outweighs any potential harm to personal liberty in this instance. The purpose of inquiries under the *Defence (Inquiry) Regulations 2018* are to determine the facts and circumstances surrounding an incident so that informed decisions can be made about what actions are required to address the immediate danger or issue, or to avoid repetition of the incident in the future. These inquiries are intended to protect the organisaton and not to punish individuals.

In addition the use immunity, the requirement that inquiries be held in private, and the prohibitions against the use and disclosure of certain information and documents are additional levels of protection in respect of the abrogation of the privilege against self-incrimination. Thus, if a person gives evidence that may intend to incriminate the person, subsequent use or publication of that evidence can be prohibited. This reduces the risk that the evidence could be used for other purposes, such as by Commonwealth prosecutors and law enforcement personnel.

Defence (Public Areas) By-laws 2018

I understand the Committee is concerned about the reversal of the burden of proof in the offence provisions in sections 10 to 16 of the By-laws. These sections set out a range of offence relating to prohibited conduct in Defence public areas. Each offence does not apply if the person has a written permit from an authorised officer or ranger for the relevant conduct. As this is an exception to the offence, it imposes an evidential burden of proof on the defendant. If a defendant wishes to rely on this exception, they will need to adduce or point to evidence that a written permit exists. Once they have done so, the prosecution would bear the legal burden of disproving the existence of the written permit if the charge was to be pursued.

For these offences, the existence of a specific written permit could be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of such a permit beyond reasonable doubt as a matter of course (noting that, once the defendant has met the evidential burden, the prosecution would be required to meet this legal burden). In the case of a ranger issuing an infringement notice for a contravention of an offence provision, this would require a reasonable belief that there was no written permit, which would be difficult for a ranger in the field to establish without having access to information of all written permits issued by all rangers and authorised officers. This would not be feasible in many cases. The penalties for these offences are relatively low (especially when enforced by way of an infringement notice), and reversal of the burden of proof in relation to the existence of a written permit is reasonable in order to ensure the effectiveness of these provisions.

The explanatory statement for the By-laws has been amended to include this information, and is currently in the process of being published on the Federal Register.

Conclusion

I trust that this response addresses the Committee's concerns about these instruments. The explanatory statements have been amended as outlined above to include the information in this response.

Yours sincerely

DARREN CHESTER

24 MAY 2018

The Hon Dr John McVeigh MP

Minister for Regional Development, Territories and Local Government
Federal Member for Groom

Ref: MC18-004215

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

24 MAY 2018

Dear Senator Williams

I refer to the letter from the Committee Secretary, dated 10 May 2018, concerning the Norfolk Island Continued Laws Amendment (Community Title) Ordinance 2018 (Community Title Ordinance) and the Norfolk Island Legislation Amendment (Public Health) Ordinance 2018.

The Committee sought advice on the basis on which fee amounts were set in the Community Title Ordinance. The fees were calculated on a cost recovery basis to reflect the administrative costs to the Norfolk Island Regional Council (NIRC). These costs include staff time and materials associated with managing community title. The NIRC was consulted on the Community Title Ordinance as it was developed, including the quantum of the fees.

The Committee also requested clarification on the expanded application of section 24 of the *Public Health Act 2010* (NSW) (NI). The Commonwealth, the relevant Minister, the NIRC and the Norfolk Island Health and Residential Aged Care Service have powers, functions and duties in respect of public health on Norfolk Island. Section 24 of the *Public Health Act 2010* (NSW) (NI) was amended to provide protection from liability for these entities. This protection is to ensure that public safety is the paramount consideration in providing information and advice about drinking water. The protection from liability reduces the risk of an overly cautious or restrictive approach to providing public safety information.

Thank you again for raising these matters with me.

Yours sincerely

Dr John McVeigh MP

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Senator the Hon Michaelia Cash
Minister for Jobs and Innovation

Reference: MS18-000470

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Dear Chair

Social Security (Parenting Payment Participation Requirements – Classes of Persons) Instrument 2018 (No. 1)

Thank you for your letter of 10 May 2018 concerning the *Social Security (Parenting payment participation requirements – classes of persons) Instrument 2018 (No. 1)* (the Instrument).

The Committee has requested:

- my advice as to the manner in which the Job Seeker Classification Instrument (JSCI) is incorporated (that is, either in force at a particular time or in force from time to time)
- that the Instrument and/or its explanatory statement be updated to include a more comprehensive description of the document, the manner of its incorporation and where it may be obtained free of charge.

Manner in which the JSCI is incorporated – as in force at the commencement of the Instrument

The JSCI is defined in the Instrument to mean 'the tool used by the Human Services Department to measure a job seeker's relative level of disadvantage based on the expected difficulty in finding the job seeker employment because of the job seeker's personal circumstances and labour market skills'. The JSCI identifies the job seeker's level of disadvantage using a series of questions that cover 18 factors identified as having a significant relationship with the likelihood of a job seeker remaining unemployed for another year.

A similar reference to the JSCI was made in the *Social Security (Parenting payment participation requirements – classes of persons) Specification 2016*. The relevant explanatory statement did not specify that the JSCI was incorporated by reference, and the Committee did not question whether it was incorporated by reference.

However, given the broad language in paragraph 14(1)(b) of the *Legislation Act 2003*, I agree it is appropriate to move forward on the basis that the JSCI is incorporated in the Instrument.

As such, the JSCI is incorporated as in force at the commencement of the Instrument (that is, as in force on 1 July 2018). The manner of incorporation will be clarified in the explanatory statement to the Instrument. It is not possible for the JSCI to be incorporated as in force from time to time as there is no specific provision in the *Social Security Act 1991* that allows this (see section 14 of the *Legislation Act 2003*).

Updating the explanatory statement
I will update the explanatory statement to the Instrument to include the following information in relation to the JSCI:

> The Job Seeker Classification Instrument (JSCI) is defined in the Instrument to mean 'the tool used by the Human Services Department to measure a job seeker's relative level of disadvantage based on the expected difficulty in finding the job seeker employment because of the job seeker's personal circumstances and labour market skills'. The JSCI identifies the job seeker's level of disadvantage using a series of questions that cover 18 factors identified as having a significant relationship with the likelihood of a job seeker remaining unemployed for another year. The JSCI factors and sub-factors reflect different aspects of labour market disadvantage, such as work experience, living circumstances, work capacity and educational qualification. Each JSCI factor is given a numerical 'weight' or points which indicate the average contribution that factor makes to the job seeker's difficulty in finding and maintaining employment. The points are added together to calculate the JSCI score which reflects a job seeker's relative level of disadvantage in the labour market. A higher score indicates a higher likelihood of the job seeker remaining unemployed for at least another year.
>
> The JSCI is incorporated as in force at the time of the commencement of the Instrument (that is, as in force on 1 July 2018).
>
> The JSCI questions (which are used to identify a job seeker's level of disadvantage) are at:
> https://docs.jobs.gov.au/documents/job-seeker-classification-instrument-jsci-assessment-guideline.
>
> The JSCI factors and other information on how the JSCI's various components interact to provide a score that reflects a job seeker's relative level of disadvantage are at:
> www.jobs.gov.au/components-and-results-job-seeker-classification-instrument.

I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash
27 / 6 / 2018