



# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

Thirty-second report of the 44<sup>th</sup> Parliament

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## Membership of the committee

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Senator Carol Brown	Tasmania, ALP
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## Functions of the committee

The committee has the following functions under the *Human Rights (Parliamentary Scrutiny) Act 2011*:

- to examine bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue; and
- to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as those contained in following seven human rights treaties to which Australia is a party:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the Elimination of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

The establishment of the committee builds on the Parliament's established traditions of legislative scrutiny. Accordingly, the committee undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations. The committee does not consider the broader policy merits of legislation.

The committee's purpose is to enhance understanding of and respect for human rights in Australia and to ensure appropriate recognition of human rights issues in legislative and policy development.

The committee's engagement with proponents of legislation emphasises the importance of maintaining an effective dialogue that contributes to this broader respect for and recognition of human rights in Australia.

## Committee's analytical framework

Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

International human rights law recognises that reasonable limits may be placed on most rights and freedoms—there are very few absolute rights which can never be legitimately limited.<sup>1</sup> All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

More information on the limitation criteria and the committee's approach to its scrutiny of legislation task is set out in Guidance Note 1, which is included in this report at Appendix 2.

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1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.



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# Chapter 1

## New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 23 to 26 November 2015, legislative instruments received from 30 October to 12 November 2015, and legislation previously deferred by the committee.

1.2 The report also includes the committee's consideration of responses arising from previous reports.

1.3 The committee generally takes an exceptions based approach to its examination of legislation. The committee therefore comments on legislation where it considers the legislation raises human rights concerns, having regard to the information provided by the legislation proponent in the explanatory memorandum (EM) and statement of compatibility.

1.4 In such cases, the committee usually seeks further information from the proponent of the legislation. In other cases, the committee may draw matters to the attention of the relevant legislation proponent on an advice-only basis. Such matters do not generally require a formal response from the legislation proponent.

1.5 This chapter includes the committee's examination of new legislation, and continuing matters in relation to which the committee has received a response to matters raised in previous reports.

### **Bills not raising human rights concerns**

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns. The following categorisation is indicative of the committee's consideration of these bills.

1.7 The committee considers that the following bill does not require additional comment as it either does not engage human rights or engages rights (but does not promote or limit rights):

- Aged Care Amendment (Red Tape Reduction in Places Management) Bill 2015.

1.8 The committee considers that the following bill does not require additional comment as it either promotes human rights or contains justifiable limitations on human rights (and may contain both justifiable limitations on rights and promotion of human rights):

- Credit Repayment (Protecting Vulnerable Borrowers) Bill 2015.

## Instruments not raising human rights concerns

1.9 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.<sup>1</sup> Instruments raising human rights concerns are identified in this chapter.

1.10 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

## Deferred bills and instruments

1.11 The committee has deferred its consideration of the following bills:

- Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015;
- Family Law Amendment (Financial Agreements and Other Measures) Bill 2015;
- Interactive Gambling Amendment (Sports Betting Reform) Bill 2015; and
- Labor 2013-14 Budget Savings (Measures No. 2) Bill 2015.

1.12 The committee continues to defer its consideration of the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).<sup>2</sup>

1.13 The committee also continues to defer the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 1) [F2015L01422] pending a response from the Minister for Foreign Affairs regarding a number of related instruments.<sup>3</sup>

1.14 As previously noted, the committee continues to defer one bill and a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.<sup>4</sup>

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1 See Parliament of Australia website, 'Journals of the Senate', [http://www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/Journals\\_of\\_the\\_Senate](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate).

2 See Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (23 June 2015) 2.

3 See the entry 'Instruments made under the Autonomous Sanctions Act 2011 and the Charter of the United Nations Act 1945' in Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 15-38. The instrument was deferred by the committee in Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 2.

4 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); and Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015).

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## Response required

1.15 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

### **Counter-Terrorism Legislation Amendment Bill (No. 1) 2015**

*Portfolio: Attorney-General*

*Introduced: Senate, 12 November 2015*

#### **Purpose**

1.16 The Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 (the bill) seeks to make amendments to a number of Acts: the *Criminal Code Act 1995* (the Criminal Code), the *Crimes Act 1914* (the Crimes Act), the *Surveillance Devices Act 2004* (the SD Act), the *Telecommunications (Interception and Access) Act 1979* (TIA Act), the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act), the *Classification (Publication, Films and Computer Games) Act 1995*, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act), the *Taxation Administration Act 1953*, the *Administrative Appeals Tribunal Act 1975* and the *Public Interest Disclosure Act 2013*.

1.17 Key amendments in the bill are set out below.

1.18 Schedule 1 seeks to amend the Criminal Code to ensure that the offence provision of receiving funds from a terrorist organisation does not apply to the provision of legal advice or legal representation in certain circumstances.

1.19 Schedule 2 seeks to amend the Criminal Code to enable control orders to be imposed on persons aged 14 and 15 years of age.

1.20 Schedule 3 seeks to amend the Criminal Code to impose an obligation on a person required to wear a tracking device, to maintain that device in good operational order.

1.21 Schedules 4 and 6 seek to amend the Criminal Code to remove the authority of the Family Court of Australia to issue control orders and preventative detention orders (PDOs).

1.22 Schedule 5 seeks to amend the Criminal Code to define the meaning of 'imminent' for the purposes of obtaining a PDO.

1.23 Schedule 7 seeks to amend the Criminal Code to specify the application of Schedules 2 and 3 in relation to current and ongoing investigations.

1.24 Schedule 8 seeks to amend the Crimes Act to establish regimes to monitor the compliance of individuals subject to a control order through search warrants, surveillance device warrants and telecommunications interception warrants.

1.25 Schedule 9 seeks to amend the TIA Act to grant agencies the power to obtain telecommunications interception warrants to monitor a person subject to a control

order, to monitor their compliance with that control order, and to permit the chief officer of a specified agency to defer public reporting on the use of that warrant in certain circumstances.

1.26 Schedule 10 seeks to amend the SD Act to allow law enforcement officers to apply to an issuing authority for a surveillance device warrant for the purposes of monitoring compliance with a control order.

1.27 Schedule 11 seeks to amend the Criminal Code to create a new offence prohibiting conduct advocating genocide.

1.28 Schedule 12 seeks to amend the ASIO Act to enable the Australian Security Intelligence Organisation (ASIO) to furnish security assessments directly to states and territories.

1.29 Schedule 13 seeks to amend the *Classification (Publications, Films and Computer Games) Act 1995* to broaden the range of conduct that may be considered as advocating the doing of a terrorist act, including if it 'promotes' or 'encourages' the doing of a terrorist act.

1.30 Schedule 14 seeks to amend the Crimes Act to clarify the threshold requirements for the issue of a delayed notification search warrant.

1.31 Schedule 15 seeks to amend the NSI Act to broaden protections for national security information in control order proceedings, and to allow an issuing court to consider information in these proceedings which is not disclosed to the subject of the control order or their legal representative.

1.32 Schedule 16 seeks to amend the NSI Act to enable a court to make an order that is inconsistent with regulations made under the Act if the Attorney-General has applied for the order, and the parties agree, and to enable the regulations to continue to apply to the extent they provide for ways of dealing with national security information in criminal and civil proceedings.

1.33 Schedule 17 seeks to amend the *Taxation Administration Act 1953* to enable the disclosure of certain information to government agencies.

1.34 Measures raising human rights concerns or issues are set out below.

## **Background**

1.35 The committee has previously considered three bills in relation to counter-terrorism and national security, namely the National Security Legislation Amendment Bill (No. 1) 2014,<sup>1</sup> the Counter-Terrorism Legislation Amendment

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1 See Parliamentary Joint Committee on Human Rights, *Thirteenth Report of the 44th Parliament* (1 October 2014) 6-13; and Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 33-60.

(Foreign Fighters) Bill 2014 (the Foreign Fighters Bill),<sup>2</sup> and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.<sup>3</sup>

### **National security and human rights**

1.36 As noted in its previous analysis of national security legislation, the committee recognises the importance of ensuring that national security and law enforcement agencies have the necessary powers to protect the security of all Australians. Moreover, the committee recognises the specific importance of protecting Australians from terrorism. The Australian government has the responsibility to ensure that laws and operational frameworks support the protection of life and security of the person. In addition, Australia has specific international obligations to detect, arrest and punish terrorists.

1.37 In this respect, the committee notes that the threat of terrorism in Australia has heightened in recent times, as the Attorney-General has explained:

Since 12 September 2014, when the National Terrorism Public Alert level was raised to High, 26 people have been charged as a result of 10 counter-terrorism operations around Australia. That's more than one third of all terrorism related arrests since 2001.<sup>4</sup>

1.38 In addition, there have been terrorist attacks in Sydney, Melbourne and Parramatta in recent times which suggest the heightened terrorism threat may require additional legislative responses.<sup>5</sup> For example, one of those attacks was by a 15 year old and the bill seeks to lower the age at which control orders may be applied to 15 year olds.

1.39 Legislative responses to issues of national security are likely to engage a range of human rights. For example, legislative schemes aimed at the prevention of terrorist acts may seek to achieve this through measures that limit a number of traditional freedoms and protections that are characteristic of Australian society and its system of government.

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2 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3-69; Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 56-100; and Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 82-101.

3 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 7-21; and Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 129-162.

4 The Hon. Senator George Brandis QC, Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, second reading speech, *Senate Hansard 12 November 2015*, 27.

5 The Hon. Senator George Brandis QC, Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, second reading speech, *Senate Hansard 12 November 2015*, 27.

1.40 Human rights principles and norms are not to be understood as inherently opposed to national security objectives or outcomes. Rather, international human rights law allows for the balancing of human rights considerations with responses to national security concerns.

1.41 International human rights law allows for reasonable limits to be placed on most rights and freedoms as long as the limitation is reasonable, necessary and proportionate to achieve a legitimate objective.<sup>6</sup> This is the analytical framework the committee applies when exercising its statutory function of examining bills for compatibility with human rights. The committee expects proponents of legislation, who bear the onus of justifying proposed limitations on human rights, to apply this framework in the statement of compatibility required for bills.

1.42 The bill contains 17 schedules of amendments. The analysis below relates to six of those schedules and, in the interests of timely reporting, focuses on the most serious human rights issues. Accordingly, the committee has concluded that 11 of the schedules in the bill do not require further explanation or are otherwise likely to be compatible with human rights.

1.43 In relation to the remaining six schedules, much of the analysis below is targeted at ensuring that, while law enforcement agencies and intelligence agencies have appropriate and effective powers, those powers are not broader than is necessary and are subject to appropriate safeguards. The procedural guarantees provided for by international human rights law recognises that human error and mistakes are possible, and such safeguards seek to minimise the harm caused by any such errors and provide redress where appropriate. Such safeguards are not intended to thwart legitimate efforts to ensure the safety of Australians.

1.44 The following analysis contains repeated requests for more information which are necessary because of pervasive shortcomings in the statement of compatibility for the bill. International human rights law requires evidence and reasoning to justify limitations on human rights, and broad references to terrorism and the current national security environment may not provide a sufficient basis to assess the human rights compatibility of proposed legislation. What is required is a succinct explanation of where there is a purported deficiency in the current legal framework and an explanation as to how the bill seeks to address that deficiency. Without this, it is difficult for the committee to assess whether a measure supports a legitimate objective and is rationally connected to that objective. Notwithstanding this, the committee notes that the Attorney-General's second reading speech on the bill explains:

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6 Although some absolute rights cannot be limited: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; and the right to recognition as a person before the law.

The measures introduced in this Bill reflect lessons learned from recent counter-terrorism investigations and operational activity.<sup>7</sup>

1.45 Statements of compatibility should provide a standalone analysis of the compatibility of a bill and should be easy to read and clear.<sup>8</sup> This is especially the case where significant limitations on rights are provided for in a bill. In this regard, the statement of compatibility for the bill has a number of deficiencies that are explained below.

### **Schedule 2—Extending control orders to 14 and 15 year olds**

1.46 The bill proposes to amend the control orders regime under Division 104 of the Criminal Code to allow for control orders to be imposed on children aged 14 or 15 years of age. Currently, control orders may only be imposed on adults and children aged 16 or 17 years of age.

1.47 The committee has previously considered the control orders regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014<sup>9</sup> and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.<sup>10</sup> The bill's expansion of the control orders regime to children aged 14 and 15 years of age raises the threshold question of whether the existing control orders regime is compatible with human rights.

1.48 The control orders regime is necessarily coercive in nature. The former Independent National Security Legislation Monitor (INSLM) noted:

They [control orders] are striking because of their provision for restraints on personal liberty without there being any criminal conviction or even charge.<sup>11</sup>

1.49 The control orders regime grants the courts power to impose a control order on a person at the request of the Australian Federal Police (AFP), with the Attorney-General's consent. The terms of a control order may impose a number of obligations, prohibitions and restrictions on the person subject to the order. These include:

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7 The Hon. Senator George Brandis QC, Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, second reading speech, *Senate Hansard 12 November 2015*, 27.

8 See Appendix 2; Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) [http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights\\_ctte/guidance\\_notes/guidance\\_note\\_1/guidance\\_note\\_1.pdf](http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf).

9 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) 3.

10 See Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (November 2014) 7.

11 Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 6.

- requiring a person to stay in a certain place at certain times;
- preventing a person from going to certain places;
- preventing a person from talking to or associating with certain people;
- preventing a person from leaving Australia;
- requiring a person to wear a tracking device;
- prohibiting access or use of specified types of telecommunications, including the internet and telephones;
- preventing a person from possessing or using specified articles or substances; and
- preventing a person from carrying out specified activities, including in relation to their work or occupation.

1.50 The steps for the issue of a control order are:

- a senior AFP member must obtain the Attorney-General's written consent to seek a control order on prescribed grounds;
- once consent is granted, the AFP member must seek an interim control order from an issuing court, which must be satisfied on the balance of probabilities:
  - (i) that making the order would substantially assist in preventing a terrorist act; or
  - (ii) that the person has provided training to, received training from or participated in training with a listed terrorist organisation; or
  - (iii) that the person has engaged in a hostile activity in a foreign country; or
  - (iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or
  - (v) that the person has been convicted in a foreign country for an equivalent offence; or
  - (vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or
  - (vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country; and
- the court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of:
  - (i) protecting the public from a terrorist act; or



- (ii) preventing the provision of support for or the facilitation of a terrorist act; or
- (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country; and
- the AFP must subsequently seek the court's confirmation of the order, with a confirmed order able to last up to 12 months.

1.51 The control orders regime clearly imposes a range of limitations on personal liberty and engages and limits multiple human rights.

1.52 Schedule 2 also provides for an issuing court to appoint a lawyer as an advocate to act on behalf of a child between the ages of 14 and 17 who is subject to an interim control order. This measure engages and limits article 12 of the Convention on the Rights of the Child (CRC). This issue deals with a discrete part of the control orders regime and will be dealt with separately below.

### ***Multiple rights***

1.53 The control orders regime, and the amendments to that regime proposed by the bill, engage and limit a number of human rights, including:

- right to equality and non-discrimination;<sup>12</sup>
- right to liberty;<sup>13</sup>
- right to freedom of movement;<sup>14</sup>
- right to a fair trial and the presumption of innocence;<sup>15</sup>
- right to privacy;<sup>16</sup>
- right to freedom of expression;<sup>17</sup>
- right to freedom of association;<sup>18</sup>
- right to the protection of the family;<sup>19</sup>

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12 Articles 2, 16 and 26, International Covenant on Civil and Political Rights (ICCPR). Related provisions are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child (CRC) and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

13 Article 9, ICCPR.

14 Article 12, ICCPR.

15 Article 14, ICCPR.

16 Article 17, ICCPR, and article 16, CRC.

17 Article 19, ICCPR and articles 13 and 14, CRC.

18 Article 22, ICCPR.

- prohibition on torture and cruel, inhuman or degrading treatment;<sup>20</sup>
- right to work;<sup>21</sup> and
- right to social security and an adequate standard of living.<sup>22</sup>

1.54 The proposed expansion of the control orders regime to children aged 14 and 15 years of age also engages the obligation to consider the best interests of the child and a range of rights set out in the CRC which are consistent with the rights outlined above.<sup>23</sup>

*Compatibility of the measure with multiple rights*

*Threshold assessment of control orders—legitimate objective*

1.55 The statement of compatibility focuses primarily on the proposed change to the age threshold for control orders rather than dealing more broadly with the human rights implications of the control orders regime. Any measure that limits human rights must be demonstrated to seek to achieve a legitimate objective and be rationally connected to, and a proportionate way to achieve, the objective in order to be justifiable in international human rights law.

1.56 The committee has previously concluded that the control orders regime pursues the legitimate objective of providing law enforcement agencies with the necessary tools to respond proactively to the evolving nature of the threat presented by those wishing to undertake terrorist acts in Australia.<sup>24</sup>

*Threshold assessment of control orders—rational connection*

1.57 In addition to seeking to achieve a legitimate objective, a measure that limits rights must be rationally connected to that objective (that is, it must be likely to achieve its objective). There may be doubt as to whether control orders are rationally connected to that objective as they may not necessarily be the most effective tool to prevent terrorist acts. For example, the former INSLM has stated:

The effectiveness, appropriateness and necessity of COs [control orders] are all reduced or made less likely if it is feasible that comparatively early in the course of offending a person may be charged with a terrorism offence. Australia's inchoate or precursor terrorism offences under the

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19 Articles 23 and 24, ICCPR.

20 Article 7, ICCPR, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

21 Article 6, International Covenant on Economic, Social and Cultural Rights (ICESCR).

22 Article 9 and 11, ICESCR.

23 Article 3, CRC.

24 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) 3.

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[Criminal] Code are striking in that they criminalise conduct at a much earlier point than has traditionally been the case.<sup>25</sup>

1.58 The particular character of terrorism laws has also been recognised in Australian domestic courts which have noted, for example:

Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge.<sup>26</sup>

1.59 In terms of the evidence required for a control order, the former INSLM has also noted:

...the kind and cogency of evidence in support of an application for a CO [control order] converges very closely to the kind and cogency of evidence to justify the laying of charges so as to commence a prosecution...Nothing was obtained in private hearings [primarily with law enforcement and intelligence agencies investigating these issues] suggesting to the contrary.<sup>27</sup>

1.60 Notwithstanding this, the committee notes the government's advice as set out above at paragraph [1.37] that the terrorism threat has subsequently evolved and that control orders have now been used four times since the committee last considered counter-terrorism legislation in late 2014. In addition, the current INSLM is currently conducting an inquiry into control orders and was originally due to report in February 2016.

1.61 Accordingly, while there may be some doubt that control orders are an effective tool to respond to terrorism, above and beyond Australia's traditional criminal justice response of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt, there have been significant recent developments in the counter-terrorism space in recent times.

#### Threshold assessment of control orders—proportionality

1.62 In terms of proportionality there may be questions as to whether control orders are the least rights restrictive response to terrorist threats, and whether

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25 Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 30.

26 *Lodhi v R* [2006] NSWCCA 121 per Spigelman CJ at [66].

27 Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 30.

control orders contain sufficient safeguards to appropriately protect Australia's human rights obligations.

1.63 For example, amendments introduced by the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 allow control orders to be sought in circumstances where there is not necessarily an imminent threat to personal safety.<sup>28</sup> The protection from imminent threats has been a critical rationale relied on for the introduction and use of control orders rather than ordinary criminal processes. In the absence of an imminent threat it is difficult to justify as proportionate the imposition of a significant limitation on personal liberty without criminal charge.

1.64 In addition, the issuing criteria for a control order set out in section 104.4 of the Criminal Code requires that each proposed condition of a control order must be reasonably necessary, and reasonably appropriate and adapted, to the purpose of protecting the public from the threat of a terrorist act. However, there is no requirement that the conditions be the least rights restrictive measures to protect the public.

1.65 In 2013, a review of counter-terrorism legislation prepared for the Council of Australian Governments (COAG) recommended:

...section 104.5 [of the criminal code] should be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person's liberty, privacy or freedom of movement that is necessary in all the circumstances.<sup>29</sup>

1.66 This was rejected by COAG and separately by the Australian government.<sup>30</sup> This appears to be based on a view that a least rights restrictive approach may be 'less than what is reasonably necessary for public protection'.<sup>31</sup> However, a least rights restrictive approach would not mean that public protection would become a secondary consideration in the issuance of a control order. It would simply require a decision-maker to take into account any possible less invasive means of achieving public protection. In the absence of such requirements it is difficult to characterise

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28 For example, in its submission to the Parliamentary Joint Committee on Intelligence and Security (PJCS) inquiry into the bill the Law Council of Australia warned that control orders could be sought against persons to prevent online banking, online media or community and/or religious meetings. See, Law Council of Australia, *Submission 16*, Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2014.

29 Recommendation 37, Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013).

30 See Attorney General's Department, *Submission 1*, INSLM, Inquiry into Control Order Safeguards (November 2015) 2.

31 See Attorney General's Department, *Submission 1*, INSLM, Inquiry into Control Order Safeguards (November 2015) 2.

the control orders regime as the least rights restrictive approach for protecting national security, and to assess the proposed measures as a proportionate way to achieve their stated objective.

*Applying control orders to 14 and 15 year olds—legitimate objective*

1.67 Turning to the specific amendments in Schedule 2, which would allow the AFP to seek a control order for children aged 14 or 15 years of age, the statement of compatibility does not explicitly set out the legitimate objective of these measures. However, the explanatory memorandum explains:

These amendments respond to incidents in Australia and overseas that demonstrate children as young as 14 years of age are organising and participating in terrorism related conduct. With school-age students being radicalised and engaging in radicalising others and capable of participating in activity which poses a threat to national security, the age limit of 16 years is no longer sufficient for control orders to prevent terrorist activity.<sup>32</sup>

1.68 However, to be capable of justifying a proposed limitation of human rights, a legislation proponent must provide a reasoned and evidence-based explanation as to how the measures address a pressing or substantial concern. Neither the statement of compatibility nor the explanatory memorandum explain in detail how the current criminal law does not adequately provide for the protection against terrorist acts by 14 and 15 year olds.

*Applying control orders to 14 and 15 year olds—rational connection*

1.69 In addition, as outlined above, it is not clear from the statement of compatibility how the measures are rationally connected to a legitimate objective.

*Applying control orders to 14 and 15 year olds—proportionality and safeguards*

1.70 In terms of proportionality, the bill makes a number of significant legislative changes to control orders applying to children aged 14 to 17 years of age, including:

- the AFP must give information as to the person's age to the Attorney-General in the application for consent to a control order;
- in determining each of the obligations, prohibitions and restrictions under the control order, the court must consider whether they are reasonably necessary and reasonably appropriate and adapted and also whether they are in the best interest of the child. In determining a child's best interests, the court must consider: the age, maturity, sex and background of the person, their physical and mental health, maintenance of family relationships, the right to education, their right to practise their religion and any other matter the court considers relevant;

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32 Explanatory Memorandum (EM) 42.

- that control orders for 14 to 17 year olds are limited to a three month duration instead of the 12 months which applies to adults; and
- after imposing an interim control order on a child, a court must appoint an independent advocate in relation to the interim control order, any confirmation, variation or revocation of that control order and any other orders.

1.71 The committee considers that many of these provisions provide safeguards for the purposes of international human rights law (and relative to the control orders regime that applies to adults).

1.72 However, for the reasons set out below, it has not been fully explained in the statement of compatibility whether these safeguards will fully ensure that the control orders regime will impose only proportionate limitations on the multiple human rights identified above.

*Applying control orders to 14 and 15 year olds—proportionality and best interests of the child considerations*

1.73 In relation to the requirement for a court to consider the best interests of the child when assessing each of the proposed obligations, prohibitions and restrictions under a control order, the statement of compatibility explains:

...the issuing court will be required to consider the child's best interests as a primary consideration. New subsection 104.4(2A) treats the child's best interests as "a primary" consideration.<sup>33</sup>

1.74 However, the court is not required to consider the child's best interests when initially considering whether, on the balance of probabilities, a control order is necessary in accordance with the legislative criteria. In the case of an imminent threat to life it would appear entirely appropriate that the legislative criteria focus primarily on national security issues. However, as explained above at paragraph [1.63], control orders may now be obtained in circumstances removed from imminent threats and in circumstances where it may be more appropriate to lay charges for a precursor offence. Accordingly, it has not been fully explained in the statement of compatibility why the best interests of the child test does not apply to this initial step of the control order application process.

1.75 In addition, while the court must consider the best interests of the child in determining each of the proposed obligations, prohibitions and restrictions under the control order, the word 'primary' (as in a 'primary consideration') is not included in the proposed provision or referred to in the explanatory memorandum to the bill. A court applying these provisions would presumably interpret the intention of the parliament to be that the best interests of the child should not be the primary consideration. However, the CRC requires that the best interests of the child be 'a

primary consideration' and not just 'a consideration'. Accordingly, it is unclear how this provision is consistent with Australia's obligations under the CRC.

Applying control orders to 14 and 15 year olds—proportionality and the right to liberty

1.76 The statement of compatibility states:

A control order does not authorise detention. A child will not be separated from family and will be able to attend school.<sup>34</sup>

1.77 However, there is nothing in the legislation that would prevent a child being separated from their family or being denied access to school. All the bill requires is that a court must consider the benefit of a child having a meaningful relation with their family and their right to receive an education when determining the conditions of a control order. It does not prevent an order being made that separates a child from their family or requires them not to attend a particular school.

1.78 In addition, a control order may include a requirement that a person be confined to a particular place and subject to a curfew of up to 12 hours in a 24 hour period. This would appear to meet the definition of detention (or deprivation of liberty) under international human rights law, which is much broader than being placed in prison. The United Nations Human Rights Committee has explained:

Examples of deprivation of liberty include police custody, arraigo, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport as well as being involuntarily transported.<sup>35</sup>

1.79 In terms of the proportionality of such detention, the UK courts have found that curfews of 18 hours per day amount to disproportionate deprivations of liberty, and that curfews of 12 to 14 hours may not be disproportionate.<sup>36</sup>

1.80 The European Court of Human Rights and the UK House of Lords have held that control order conditions must be considered cumulatively, such that a nine hour curfew combined with other stringent measures may effectively amount to a deprivation of liberty.<sup>37</sup>

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34 EM 15.

35 United Nations Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and Security of person)*, UN Doc CCPR/C/GC/35, 1-2 [Footnotes omitted].

36 *Secretary of State for the Home Department v JJ & Others* [2007] UKHL 45; *Secretary of State for the Home Department v E & Another* [2007] UKHL 47; *Secretary of State for the Home Department v MB & AF* [2007] UKHL 46; *Guzzardi v Italy*, Application 7367/76, Decision of 11 June 1980.

37 *AP v Secretary of State for the Home Department* [2010] UKSC 24. See also *Guzzardi v Italy*, Application 7367/76, Decision of 11 June 1980.

1.81 In assessing what constitutes a deprivation of liberty, the issue is the length of the period for which the individual is confined to their residence. Other restrictions imposed under a control order, which contribute to the controlee's social isolation, may also be taken into account along with the period of the curfew.<sup>38</sup> Accordingly, the statement of compatibility has not fully explained whether the detention that may be imposed as part of a control order under this bill is proportionate.

*Applying control orders to 14 and 15 year olds—proportionality and limited use of control orders*

1.82 The statement of compatibility also notes that control orders are not intended to be used often:

A control order would only be issued against a child, especially one as young as 14, in the rare circumstance that it was required to prevent a child from being involved in a terrorist act. This includes protecting a child who may be acting under the direction or influence of an extremist group or individual. In these circumstances, the wellbeing and best interests of a child may be adversely affected if a control order is not issued in relation to that child. For example, the issuing of a control order in relation to a child may prevent the child's contacting the group or individual who may be encouraging the child to engage in terrorist-related conduct.<sup>39</sup>

1.83 However, in this example, it is unclear why it is not possible to target the individuals that are encouraging the child to be involved in a terrorist act rather than the child. If it is because those individuals are outside of Australia's jurisdiction, it would be possible to limit the imposition of a control order on a child to circumstances where it was not possible to control the individuals seeking to influence the child. It would be useful if the statement of compatibility explained whether these provisions impose a proportionate limitation on the rights of children.

1.84 The statement of compatibility also states:

Control orders are used infrequently, with only six ever issued as at November 2015 (with none having been issued for people aged under 18 years of age). This reflects the policy intent that these orders do not act as a substitute for criminal proceedings. Control orders are a protective and preventative mechanism subject to numerous legislative safeguards that preserve the fundamental human rights of a person subject to a control order. The nature of the restrictions imposed by control orders will always be subject to the overarching legislative requirements that include consideration by the issuing court that any limitation is "reasonably necessary" and "reasonably appropriate and adapted" to protecting the public from a terrorist act. While there is an expectation that the number

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38 *AP v Secretary of State for the Home Department* [2010] UKSC 24.

39 EM 18.



of control orders made will increase in coming years, the small number of control orders made to date and the small number relative to investigations and prosecutions reflects the policy intent that they are extraordinary measures which are to be used sparingly – and this is especially so with children.<sup>40</sup>

1.85 The policy intent that the limitation on human rights be imposed rarely is a relevant consideration in assessing proportionality. However, policy intent, in and of itself, is an insufficient safeguard for the purposes of international human rights law. As set out above at paragraph [1.63], a control order may be granted in circumstances that are much broader than seeking to stop a terrorist act. In this respect, to characterise the regime as providing for 'extraordinary measures' does not reflect the breadth of circumstances in which a control order may be granted, including that such an order would substantially assist in the prevention of, the support for, or the facilitation of, a terrorist act. Such support or facilitation does not need to be direct or critical to the carrying out of the terrorist act, and the terrorist act does not need to be imminent.

1.86 In addition, there is no requirement that the court consider whether there are other criminal justice alternatives that may achieve the protection of the public but impose less restrictions on a person subject to the control order.

1.87 The issues outlined above raise questions as to the proportionality of Schedule 2, which could have been explained more fully in the statement of compatibility.

**1.88 The committee has assessed the amendments to lower the age at which a person may be subject to a control order to 14 years of age against multiple human rights in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.**

1.89 As set out above, the amendments engage and limit multiple human rights. The committee therefore seeks the advice of the Attorney-General as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether the measures are rationally connected to that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

## **Schedule 2—Court-appointed advocate for children**

1.90 Item 46 of Schedule 1 to the bill would insert a new section 104.28AA in the Criminal Code to provide for an issuing court to appoint a lawyer as an advocate to act on behalf of a child between the ages of 14 and 17 who has been made subject to an interim control order.

1.91 The court-appointed advocate would not be acting as the child's legal representative and, as such, is not obliged to act on the instructions or wishes of the child.

1.92 The committee considers that the introduction of court-appointed advocates for children engages and limits the right of the child to be heard in judicial and administrative proceedings.

### ***Right of the child to be heard in judicial and administrative proceedings***

1.93 Article 12 of the CRC provides that state parties shall assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child. The views of the child must be given due weight in accordance with the age and maturity of the child.

1.94 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### ***Compatibility of the measure with the right of the child to be heard in judicial and administrative proceedings***

1.95 The bill provides that the court-appointed advocate of a person must:

(b) form an independent view, based on the evidence available to the advocate, of what is in the best interests of the person; and

(c) act in what the advocate believes to be the best interests of the person;  
[and]

(e) ensure that any views expressed by the person in relation to the control order matters are fully put before an issuing court...<sup>41</sup>

1.96 However, the court-appointed advocate is not required to take into account the wishes of the child or act on their instructions during any court proceedings, and is able to act independently and make recommendations as to a specific course of action which may be explicitly in opposition to the wishes of the child. As the explanatory memorandum says:

...the advocate is an independent party who is responsible for representing the young person's best interests rather than the expressed wishes of the young person.<sup>42</sup>

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41 See item 46 of Schedule 2 to the bill, proposed new section 104.28AA(2).

1.97 Further, the court-appointed advocate is authorised to disclose to the court any information provided to the advocate by the child, if the advocate believes that the disclosure is in the best interests of the child.<sup>43</sup> This disclosure is authorised even in situations where it may be against the wishes of the child.<sup>44</sup>

1.98 The explanatory memorandum stipulates that the bill allows that such information does not necessarily have to be disclosed in order to 'facilitate a relationship of trust and open communication between the young person and the advocate'.<sup>45</sup> However, the bill enables an advocate to disclose this should they so choose.

1.99 The statement of compatibility for the bill notes that the proposed new section 104.28AA is modelled on sections 68L and 68LA of the *Family Law Act 1975*, which provide for the appointment of an independent children's lawyer. The statement explains that the significant difference between the provisions in that Act and those in the current bill is that the court-appointed advocate is not acting as the child's legal representative but rather as an advocate for the child's best interests.<sup>46</sup>

1.100 However, as set out above at paragraphs [1.53] to [1.54], the imposition of control orders imposes severe restrictions on the human rights of those subject to it. As such, the use of advocates in such proceedings is entirely different from the family law context where issues relating to children are primarily related to a child's residential or custody arrangements with his or her parents or guardians.

1.101 Further, the recommendations of the advocate are not required to take into account a consideration of the age of the child, or an individual assessment of their maturity. The primary obligation under the CRC is to support decision making by minors consistent with their maturity and capacity. The children affected by these amendments would be between the ages of 14 and 17, and likely to have strong or well-formed opinions regarding how their situation is handled before the courts.

1.102 The statement of compatibility states that a child may also engage their own independent legal representative.<sup>47</sup> However, the ability of the court-appointed advocate to make recommendations against the wishes of the child nevertheless engages the right as set out above at paragraphs [1.93] to [1.94].

1.103 The statement of compatibility does not address this right and, accordingly, it would be useful for the Attorney-General to provide further information in relation to the right of the child to be heard in judicial and administrative proceedings.

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42 EM 55.

43 See item 46 of Schedule 2 to the bill, proposed new section 104.28AA(4).

44 See item 46 of Schedule 2 to the bill, proposed new section 104.28AA(4).

45 EM 55.

46 EM, Statement of Compatibility (SoC) 17.

47 EM, SoC 17.

1.104 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law.

**1.105 The committee has assessed amendments allowing for the court-appointed advocate for children against article 12 of the Convention on the Rights of the Child (right of the child to be heard in judicial and administrative proceedings).**

**1.106 As set out above, the amendments engage and limit the right of the child to be heard in judicial and administrative proceedings. The committee therefore seeks the advice of the Attorney-General as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether the measures are rationally connected to that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

#### **Schedule 5—'Imminent' test and preventative detention orders**

1.107 Currently, a preventative detention order (PDO) can be applied for if it is suspected, on reasonable grounds, that a person will engage in a terrorist act, possesses something in connection with preparing for or engaging in a terrorist act, or has done an act in preparation for planning a terrorist act.<sup>48</sup> The terrorist act must be one that is imminent and expected to occur, in any event, at some time in the next 14 days.<sup>49</sup>

1.108 Schedule 5 of the bill seeks to change the current test of 'imminent' for the grant of (PDOs), by providing a new definition of 'imminent terrorist act' as one that it is suspected, on reasonable grounds, is capable of being carried out, and could occur, within the next 14 days.

1.109 As PDOs allow for the detention of a person for up to 48 hours, and the amendments would broaden the basis on which a PDO can be made, the bill engages and limits the right to liberty.

#### ***Right to liberty***

1.110 Article 9 of the ICCPR protects the right to liberty—the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. The prohibition against arbitrary detention requires that the state should not deprive a person of their

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48 See subsection 105.4(4) of the *Criminal Code Act 1995* (Criminal Code). There is also the power for a PDO to be issued if a terrorist act has occurred within the last 28 days and it is reasonably necessary to detain a person to preserve evidence (subsection 105.4(6)).

49 See subsection 105.4(5) of the Criminal Code.

liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.111 Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require the detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary.

*Compatibility of the measure with the right to liberty*

1.112 The statement of compatibility states that the change to the imminent test engages but does 'not impact upon the right' to liberty.

1.113 However, the proposed amendments would lower the threshold on which a PDO can be sought, so that instead of an event being 'expected to occur' within the next 14 days it need only be 'capable of being carried out' and 'could occur' within the next 14 days. In this regard, the measure limits the right to liberty, and accordingly it is necessary to understand whether the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.114 First, the statement of compatibility states that the legitimate objective of the PDO regime as a whole is to prevent an imminent terrorist act occurring and preserve evidence of, or relating to, a recent terrorist act.<sup>50</sup>

1.115 However, the statement of compatibility does not provide an explanation of the legitimate objective for lowering the threshold as to when an act is considered to be 'imminent'. While the explanatory memorandum states that the current test can be interpreted as 'imposing impractical constraints on law enforcement agencies' in certain circumstances,<sup>51</sup> it does not provide evidence or explanation as to the nature of those circumstances so that the committee can understand the practical reasons for the legislative change. In addition, the objective for the measure is somewhat unclear, because the explanatory memorandum states that a PDO may be necessary when a terrorist act could occur within 'months', but the statement of compatibility characterises PDOs as being 'clearly preventative [in] nature' and employed only in 'emergency circumstances where traditional law enforcement powers are unavailable'.<sup>52</sup>

1.116 In this respect, it would be useful for the statement of compatibility to fully articulate the reasoning and evidence underpinning the legitimate objective to be achieved by the proposed change to the imminent test.

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50 EM, SoC 22.

51 EM 60.

52 EM, SoC 22.

1.117 Second, noting that the objective of the PDO regime generally is to prevent an imminent terrorist act from occurring, it has not been fully explained how the amendments lowering the threshold of what is considered to be imminent is rationally connected to that objective.

1.118 In particular, there has been some debate as to the effectiveness of the PDO regime. In 2013 the *Council of Australian Governments Review of Counter-Terrorism Legislation* (the COAG review) extensively reviewed the PDO regime. It concluded that the PDO scheme 'is, as presently structured, neither effective nor necessary' and recommended that the PDO scheme be repealed.<sup>53</sup>

1.119 The finding of the COAG review expanded on the concerns raised in 2012 by the former INSLM, who questioned the efficacy and proportionality of PDOs taking into account their particular character and the extent of their use. The INSLM noted:

The combination of non-criminal detention, a lack of contribution to CT [(counter-terrorism)] investigation and the complete lack of any occasion so far considered appropriate for their use is enough to undermine any claim that PDOs constitute a proportionate interference with liberty.<sup>54</sup>

1.120 The INSLM noted that the case for extraordinary powers for policing of terrorism related offences, above the traditional powers and approaches to the investigation and prosecution of criminal behaviour, had not been established:

There has been no material or argument demonstrating that the traditional criminal justice response to the prevention and prosecution of serious crime through arrest, charge and remand is ill-suited or ill-equipped to deal with terrorism. Nor has this review shown that the traditional methods used by police to collect and preserve evidence, eg search warrants, do not suffice for the investigation and prosecution of terrorist suspects. There is, by now, enough experience in Australia of police operations in the detection and investigation, and support for prosecution, of terrorist offences. There is therefore substantial weight to be given to the lack of a demonstrated functional purpose for PDOs as a matter of practical experience.<sup>55</sup>

1.121 Notwithstanding this evidence, the committee notes the government's advice, set out above at paragraph [1.37], that the terrorism threat has subsequently evolved; and, as such, this evidence may be outdated in the current security environment. Accordingly, it would be useful for the Attorney-General to provide

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53 *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 70 and recommendation 39.

54 Independent National Security Legislation Monitor, *Declassified annual report* (20 December 2012) 45.

55 Independent National Security Legislation Monitor, *Declassified annual report* (20 December 2012) 52-53.

more information as to how the measure is rationally connected to the objective of preventing imminent terrorist acts.

1.122 Third, to assess whether lowering the imminent threshold is compatible with the right to liberty it is necessary to assess whether the current PDO regime, together with the proposed amendments, provides sufficient safeguards so as to be proportionate to the objective sought to be achieved.

1.123 In this respect, the statement of compatibility states that the right to liberty is safeguarded by the existing provisions in the PDO regime, and because the basis on which PDOs can be granted 'highlights the clearly preventative nature of the PDO power'.<sup>56</sup> In particular, the statement of compatibility points to certain requirements of subsection 105.4(4)—namely, that there is a reasonable suspicion that a person will engage in a national terrorist act; and that the AFP member and issuing authority must be satisfied of three key matters:

- the terrorist act is imminent;
- making the order would substantially assist in preventing an attack; and
- detaining the person is reasonably necessary to achieve the preventative purpose.

1.124 However, the committee notes that the PDO regime necessarily involves significant limitations on human rights. This is because it allows the imposition of a PDO on an individual without the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt. Effectively, PDOs permit a person's detention by the executive without charge or arrest.<sup>57</sup>

1.125 It is clear that the current requirement that a terrorist act be imminent and expected to occur, in any event, at some time in the next 14 days is intended to be a safeguard on the use of PDOs because it restricts their use, as the statement of compatibility says, to emergency circumstances where traditional law enforcement powers are unavailable.<sup>58</sup>

1.126 However, the amendments make two changes to this safeguard. First, the current test requires that the act be both 'imminent' (which is undefined) and

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57 It should also be noted that while the PDO is restricted to a maximum of 48 hours detention, there is an agreement with the states and territories that there is a nationally consistent regime for PDOs. The main difference is that while federal PDOs are restricted to 48 hours detention, state and territory PDOs can enable the detention of a person for up to 14 days. Any changes to the imminent threshold at the federal level are likely to be reflected in the nationwide PDO regime: see Council of Australian Governments, Inter-governmental Agreement on Counter-terrorism Laws (25 June 2004) which provides for consultation between the Commonwealth and the states and territories on amendments to counter-terrorism laws.

58 EM, SoC 22.

expected to occur, in any event, within 14 days. The proposed new definition would, in effect, remove the requirement that the act be imminent according to the common definition of the term (that is, almost certain to happen very soon or likely to occur at any moment). For example, a person could be detained, without arrest or charge, for up to two days where it is reasonably suspected that they possess a thing that is connected with preparing for a terrorist act that is capable of being carried out and could occur within the next 14 days.

1.127 Second, the changes would mean that a terrorist act would be imminent if it was capable of being carried out and could occur in the next 14 days, without there being a need to suspect that such an act is likely to occur within the next 14 days—as the explanatory memorandum notes, this could mean that the act could occur within months.

1.128 While these changes may be based on operational advice it is not clear from the information provided in the statement of compatibility that these amendments are proportionate to their objective.

**1.129 The committee has assessed the amendments to lower the threshold of when an attack is considered to be 'imminent' for the purposes of a preventative detention order against article 9 of the International Covenant on Civil and Political Rights (right to liberty).**

**1.130 As set out above, the amendments engage and limit the right to liberty. The committee therefore seeks the advice of the Attorney-General as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; and**
- **whether the measures are rationally connected to that objective;**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

### **Schedules 8 to 10—Monitoring compliance with control orders**

1.131 Schedule 8 seeks to establish a regime of monitoring warrants to permit a police constable to enter, by consent or by monitoring warrant, premises connected to a person subject to a control order. A person subject to a control order may also, by consent or monitoring warrant, be subject to a search of their person including a frisk search. A search must be for a prescribed purpose including protecting the public from a terrorist act or determining whether a control order is (or has been) complied with.

1.132 Schedule 9 seeks to amend the TIA Act to allow law enforcement agencies to obtain warrants for the purposes of monitoring compliance with a control order. It would allow telecommunications interception information to be used in any



proceedings associated with that control order. The power to use telecommunications interception for monitoring purposes is a covert power.

1.133 Schedule 10 seeks to amend the SD Act to allow law enforcement agencies to obtain warrants to monitor a person who is subject to a control order to detect breaches of the order. The amendments would allow surveillance device information to be used in any proceedings associated with that control order. They would also extend the circumstances in which agencies may use less intrusive surveillance device without a warrant, to include monitoring of a control order, and allow protected information obtained under a control order warrant to be used to determine whether the control order has been complied with. The power to use surveillance devices for monitoring purposes will remain a covert power.

1.134 The Crimes Act and other Commonwealth legislation confer a range of investigative powers on law enforcement and intelligence agencies. The committee considers that the significant change proposed by these measures is the power to search premises, intercept telecommunications and install surveillance devices for the purposes of monitoring compliance with a control order in the absence of any evidence (or suspicion) that the order is not being complied with and/or any specific intelligence around planned terrorist activities.

1.135 These powers involve serious intrusions into a person's private life, including the power for law enforcement agencies to search property, conduct frisk searches, listen into telephone calls, monitor internet usage and install covert devices that would listen into private conversations between individuals.

1.136 The powers also involve significant intrusions into the privacy of individuals unrelated to the person who is subject to a control order, including people who use computers at the same education facilities as a person subject to a control order.

1.137 Accordingly, these schedules engage and limit the right to privacy.

### ***Right to privacy***

1.138 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

1.139 Privacy is linked to notions of personal autonomy and human dignity: it includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

1.140 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

*Compatibility of the measures with the right to privacy*

1.141 The statement of compatibility states that the measures limit the right to privacy and concludes that any such limitation is justified:

[The legitimate objective of the measures]...is to assist law enforcement officers prevent serious threats to community safety. The potentially intrusive nature of the powers is balanced by their use solely in respect of terrorism offences, which constitute the gravest threat to the safety of Australians.<sup>59</sup>

1.142 Assisting law enforcement officers to prevent serious threats to community safety is likely to be a legitimate objective for the purposes of international human rights law and, as the monitoring powers may assist in law enforcement efforts, the measures are rationally connected to that objective.

1.143 In relation to proportionality, the primary expansion in investigative powers provided for by the measures is in relation to compliance with a control order. Control orders necessarily include very broad and significant restraints on an individual's liberty. A breach of any condition of a control order is a criminal offence punishable by five years imprisonment.

1.144 As set out above at paragraph [1.49], the conditions of a control order could include requiring a person to stay in a certain place at certain times, preventing a person from going to certain places and preventing a person from possessing or using a telephone or the internet. A breach of a control order could be relatively minor—for example, breaching a curfew by 30 minutes or talking innocently on a phone in breach of an order.

1.145 If these intrusive powers were used solely in respect of terrorism offences and not in relation to potentially minor breaches of a control order, it is likely that the measures in this bill would be compatible with international human rights law. However, as the powers are much broader, more information would assist the committee to assess whether these powers impose only a proportionate limitation on the right to privacy.

1.146 A monitoring warrant may be obtained not just in relation to the place that a person subject to a control order is ordinarily resident but also in relation to premises to which the person has a 'prescribed connection'. This includes the place where such a person goes to school or university, a place where they work or undertake voluntary work and even a friend's place. Under these measures it would therefore be possible, for example, to obtain a monitoring warrant for a university library to determine whether a person subject to a control order, who is a student at that university, has used the library to access the internet in breach of their control order.

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59 EM 12.

1.147 In relation to telephone intercepts, agencies will be able to apply for telecommunications service warrants (A-party (control order subject) and B-party (third party)) and named person warrants. An interception warrant may also authorise access to stored communications and telecommunications data associated with the service or device.

1.148 The statement of compatibility explains:

The amendments establish a number of safeguards to ensure that any interference with privacy is for a legitimate objective and implemented in a proportionate manner...[T]he judge or nominated AAT member must have regard to the privacy of any person or persons would be likely to be interfered with by intercepting under a warrant communication made to or from the telecommunications service...The judge or AAT member must also have regard to what extent methods...that do not involve intercepting communications have been used by or are available to the agency seeking the warrant, [and] how much the use of such methods would be likely to assist...<sup>60</sup>

1.149 A telecommunications warrant can be obtained where it would assist in determining compliance with a control order, and there is no requirement that there be a suspicion of a breach of the warrant or that there be any investigation on foot. Importantly, the privacy of the control order subject and third parties communicating with that person are required to be considered before a telecommunications intercept warrant may be issued. In addition, the issuing authority must have regard to alternatives for obtaining that evidence without the interception. However, while the provisions require the consideration of privacy, it is not a determinative factor. There is no requirement that the warrants only be issued where the evidence cannot be obtained by less intrusive means.

1.150 Moreover, warrants to intercept telecommunications can be obtained not just in relation to the person subject to the control order but also in relation to any person that they are likely to communicate with (B-Party warrants). While there are strict rules around such interception, including the exhaustion of certain practical alternatives, given the breadth of control order conditions and that the purpose of such interception is simply to monitor compliance, it would be useful if more information was provided to explain whether the ability to issue B-Party warrants is appropriate in the circumstances.

1.151 In relation to surveillance devices, such devices can currently be obtained only when the issuing authority is satisfied that there are reasonable grounds for suspecting that a relevant offence has been, is being, or is likely to be, committed. Under the bill the only requirement for the use of such devices is that it would substantially assist in determining the control order has been, or is being, complied with. Any surveillance device that monitors where a person subject to a control order

goes and who they talk to is likely to meet this test. There is no requirement that such devices only be placed in properties connected with the control order subject. The bill would also allow the use of certain devices without a warrant for the purposes of monitoring compliance with a control order—this could include tracking the movement of vehicles that the control order subject may travel in.

1.152 In relation to surveillance devices, the statement of compatibility states:

Only people who are subject to a control order will have their right to privacy limited by these amendments.<sup>61</sup>

1.153 However, a surveillance device may be authorised if it would substantially assist in determining that the control order has been, or is being, complied with. This would include listening into conversations between people in the home, car, workplace, or university of a control order subject, and thus would limit the right to privacy of those third parties. Accordingly, it appears that the privacy implications of the use of surveillance devices could extend to innocent third parties in addition to the control order subject.

1.154 The statement of compatibility also states:

Judicial oversight prior to the use of a privacy-intrusive surveillance device requires law enforcement agencies to demonstrate the necessity and proportionality of surveillance to an independent party. This is an important safeguard.<sup>62</sup>

1.155 The bill requires the judge or Administrative Appeals Tribunal member to have regard to the likely value of information sought to be obtained in determining whether the control order is complied with and the possibility that the person has or will contravene the control order. These are not strict conditions that require the surveillance device to be used only when necessary or as a last resort when less intrusive means are not available to determine compliance with the control order.

1.156 In terms of transparency, the bill would also introduce new deferred reporting arrangements which, in certain circumstances, will permit delayed public reporting on the use of telecommunications intercepts and surveillance devices in relation to a control order.

1.157 The statement of compatibility explains:

Due to the small number of control orders which are issued, immediate reporting of any warrants or authorisations of surveillance devices may enable an individual to determine whether they are the subject of surveillance. If a person knows, or suspects that there is a control order surveillance device warrant in place, they are more likely to be able to modify their behaviour to defeat those lawful surveillance efforts. Also, if a person knows or suspects that a surveillance device warrant is not in force,

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61 EM 28.

62 EM 28.

the deterrence value of the control order is limited to the extent that the person believes they can engage in proscribed activity without risk of detection. Deferred reporting balances the public interest in timely and transparent reporting with the need to preserve the effectiveness of control orders to prevent individuals from committing terrorist acts.<sup>63</sup>

1.158 While this sets out why there are legitimate reasons for delayed notifications, the reporting requirements provide transparency around the use of very intrusive investigative tools. Transparency is an important safeguard that is relevant to the assessment of the proportionality of the measures. Accordingly, the reduction in transparency needs to be considered in assessing whether these measures impose a proportionate limitation on the right to privacy.

**1.159 The committee has assessed the investigative powers in Schedules 8, 9 and 10 of the bill against article 17 of the International Covenant on Civil and Political Rights (right to privacy).**

**1.160 As set out above, the amendments engage and limit the right to privacy. The statement of compatibility explains how that limitation achieves a legitimate objective and is rationally connected to that objective. However, further information would assist in determining that the limitation is proportionate. The committee therefore seeks the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

#### **Schedules 9 and 10—Use of information obtained under warrant if interim control declared void**

1.161 Schedules 9 and 10 of the bill seek to include new provisions in the TIA Act and the SD Act to allow for the use of information intercepted or accessed under a warrant relating to an interim control order that is subsequently declared to be void.<sup>64</sup> This relates to the proposed new interception and surveillance warrants as described at paragraphs [1.132] to [1.133] above.

1.162 The bill would ensure that, where a warrant was issued on the basis that an interim control order was in force, and a court subsequently declares that order to be void, any information obtained under the warrant (while in force) can be used, recorded or given as evidence. The information can only be used if the person using it reasonably believes that doing so is necessary to prevent or reduce the risk of the commission of a terrorist act, serious harm to a person or serious damage to property, and only for purposes relating to a PDO.<sup>65</sup>

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63 EM 29.

64 See item 53 of Schedule 9 (proposed new section 299) and item 39 of Schedule 10 (proposed new section 65B).

65 See item 53 of Schedule 9 (proposed new section 299) and item 39 of Schedule 10 (proposed new section 65B).

1.163 The use of information obtained under a warrant relating to an interim control order that is subsequently declared void engages and may limit the right to a fair hearing and fair trial, in particular the right to equality of arms.

***Right to a fair trial and fair hearing***

1.164 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals. The right is concerned with procedural fairness and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.165 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

***Compatibility of the measure with the right to a fair trial and fair hearing***

1.166 The right to a fair trial encompasses the right to equality of arms, which is an essential component of the right to a fair trial. It requires that a defendant must not be placed at a substantial disadvantage to the prosecution. The UN Human Rights Committee's General Comment 32 notes that this means:

...the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or unfairness to the defendant.<sup>66</sup>

1.167 Allowing one party in an application for a PDO to rely on evidence or information obtained under a warrant for an interim control order that is subsequently declared to be void engages and may limit the rights of a person subject to that order to equality of arms.

1.168 However, the statement of compatibility has not addressed this right specifically. In discussing the amendments in general terms the statement of compatibility explains that they reflect the public interest in protecting the public from terrorist acts and serious harm and preventing serious damage to property. It states:

Notwithstanding that the underlying order in relation to which the warrant was made is no longer valid, there remains a strong justification for allowing the information be used to prevent significant harm to the public.<sup>67</sup>

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66 United Nations Human Rights Committee, *General Comment 32: Right to equality before courts and tribunals and to a fair trial* (2007) paragraph 13.

67 EM, SoC 32.

1.169 The committee notes that preventing serious harm to the public is a legitimate objective for the purposes of international human rights law. It is also clear that the measures are likely to be rationally connected to this objective (that is, they are likely to be capable of achieving that objective). However, further information would assist in clarifying that the measures are proportionate to that objective.

**1.170 The committee has assessed the amendments allowing the use of information intercepted or accessed under a warrant relating to an interim control order that is subsequently declared to be void against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial and fair hearing).**

**1.171 As set out above, the amendments engage and may limit the right to a fair trial and fair hearing. The committee therefore seeks the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

#### **Schedule 15—Non-disclosure of information to the subjects of control orders and their legal representatives**

1.172 Currently, the NSI Act allows a court to prevent the disclosure of information in federal criminal and civil proceedings where it would be likely to prejudice national security (except where this would seriously interfere with the administration of justice). A range of protections for sensitive information is available, including allowing such information to be redacted or summarised, and preventing a witness from being required to give evidence.

1.173 Schedule 15 of the bill would amend the NSI Act to allow a court to make the new types of orders restricting or preventing the disclosure of information in control order proceedings such that:

- the subject of the control order and their legal representative may be provided with a redacted or summarised form of national security information (although the court may consider all of the information contained in the original source document);<sup>68</sup>
- the subject of the control order and their legal representative may not be provided with any information contained in the original source document (although the court may consider all of that information);<sup>69</sup> or
- the subject of the control order and their legal representative may not be provided with evidence from a witness in the proceedings (although the court may consider all of the information provided by the witness).<sup>70</sup>

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68 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(2).

69 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(3).

70 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(4).

1.174 The court may make such orders where it is satisfied that the subject of the control order has been given sufficient notice of the allegations on which the control order request was based, even if they have not been given notice of the information supporting those allegations.<sup>71</sup>

1.175 In addition, currently under the NSI Act a court can hold a closed hearing to decide whether information potentially prejudicial to national security may be disclosed (and, if so, in what form); and whether to allow a witness to be called.<sup>72</sup> The court has the discretion to exclude non-security cleared persons from the hearing if their presence would be likely to prejudice national security.

1.176 The bill would further provide that a court may order, on the application of the Attorney-General, that one or more specified parties to the control order proceeding and their legal representative cannot be present during closed hearing proceedings. This would apply even where the legal representative has security clearance;<sup>73</sup> and prevent any record of the closed hearing being made available to the legal representative.<sup>74</sup>

1.177 Excluding the subject of the control order and their legal representative from accessing information and evidence that supports the making of a control order, and from hearings to decide whether to restrict such information, engages and limits the right to a fair hearing.

#### ***Right to a fair trial and fair hearing***

1.178 The right to a fair trial and fair hearing is described above at paragraphs [1.164] to [1.165].

#### ***Compatibility of the measure with the right to a fair trial and fair hearing***

1.179 The statement of compatibility acknowledges that the measures in Schedule 15 limit the right to a fair hearing and particularly the principle of equality of arms, which requires that all parties have a reasonable opportunity to present their case under conditions that do not disadvantage them against other parties to the proceedings.

1.180 The statement of compatibility states that the objective of the measure is to protect national security information where disclosure may be likely to prejudice national security. It explains:

In some circumstances, the information will be so sensitive that the existing protections under the NSI Act are insufficient. The inadvertent or

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71 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(1).

72 See section 38I of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act).

73 See item 12 of Schedule 15 to the bill.

74 See item 15 of Schedule 15 to the bill.



deliberate disclosure of such national security information may endanger the safety of individuals as well as the general public, or jeopardise sources and other intelligence methods. In the absence of the amendments contained in Schedule 15, a control order may not be able to be obtained because of the inability to provide such information to the issuing court.<sup>75</sup>

1.181 The committee notes that protecting national security is a legitimate objective for the purposes of international human rights law.

1.182 However, it would be useful to have additional evidence and reasoning that explains why the existing NSI Act provisions are insufficient, and examples as to when information cannot currently be provided in support of a control order application. For the reasons set out below, it is unclear why the existing arrangements for protecting information on national security grounds are insufficient.

1.183 The NSI Act currently allows the Attorney-General to issue a non-disclosure certificate or witness exclusion certificate, which requires the court to hold a closed hearing to determine whether the information should be excluded, disclosed in full or disclosed only as a summary or statement of the facts.<sup>76</sup> This means that the subject of the control order and their legal representative can already be excluded from a hearing, unless the legal representative has security clearance.

1.184 In addition, the existing definition of 'information' under the NSI Act is drafted broadly, and includes 'information of any kind, whether true or false and whether in a material form or not'; and an opinion and a report of a conversation, whether or not in the public domain.<sup>77</sup> This allows scope for different types of information to be prescribed as protected and sensitive, and on that basis to be withheld from persons subject to civil proceedings (which includes control order proceedings).

1.185 Further, the Criminal Code also currently allows information to be withheld from the subject of a control order. Specifically, an interim control order must set out a summary of the grounds on which the order is made, but not if that information is likely to prejudice national security.<sup>78</sup> When confirmation of an interim control order is sought, the affected person must be served with such details as to allow them 'to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order'. However, information is

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75 EM, SoC 24.

76 See Part 3A of the NSI Act.

77 See section 7 of the NSI Act which states that 'information' means that which is defined in section 90.1 of the Criminal Code.

78 See section 104.5(2A) of the Criminal Code.

not required to be served or given if it would prejudice national security (or carry other, broader risks).<sup>79</sup>

1.186 Noting these existing arrangements for the protection of information in control order proceedings, the main purpose of the bill appears to be to provide for circumstances where the subject of a control order and their legal representative may not be provided with any details at all about the information being relied on, but which can still be considered by a court, in control order proceedings.

1.187 In addition to seeking to achieve a legitimate objective, a measure that limits human rights must also be rationally connected to, and a proportionate way to achieve, its legitimate objective. The statement of compatibility states that the measures are proportionate as the court has 'the inherent capacity' to act fairly and impartially, and there are safeguards in the NSI Act.<sup>80</sup>

1.188 First, the statement of compatibility notes that proposed new section 38J(1)(c), which provides that the court is to be satisfied that the subject of a control order 'has been given notice of the allegations on which the control order request was based', will apply even where no information supporting those allegations has been given. This means that the subject of the control order:

...has sufficient knowledge of the essential allegations on which the control order request is sought (or varied), such that they are able to dispute those allegations during the substantive control order proceedings.<sup>81</sup>

1.189 The explanatory memorandum gives an example of how this might work in practice:

...if a control order application alleged the subject had attended a terrorist training camp in a foreign country, the subject may only be informed of that allegation in general terms, if a court was satisfied disclosure of further and more detailed information about the person's attendance at that terrorist training camp would involve an unacceptable risk to sensitive national security intelligence sources.<sup>82</sup>

1.190 However, providing a person with 'notice of the allegations' on which a control order request is based may not give sufficient detail to a person to be able to dispute the allegations against them. In relation to the example provided above, it would be sufficient for a person to be told of the allegation that they had attended 'a terrorist training camp' without any detail of when or where the camp was held. In the absence of such information the person may not be able to provide exonerating evidence (for example an alibi or alternative explanation for their presence at the camp) to effectively challenge the allegation.

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79 See subsections 104.12A(2) and (3) of the Criminal Code.

80 EM, SoC 24.

81 EM, SoC 24.

82 EM 122.

1.191 The European Court of Human Rights has held that it is permissible to place restrictions on the right to a fully adversarial procedure if there are strong national security grounds that require certain information to be kept secret.<sup>83</sup> However, while information can be withheld from a person, sufficient information about the allegations against the person must be provided to enable them to give effective instructions in relation to those allegations.<sup>84</sup> The UK courts have said in relation to control orders that the standard of disclosure is relatively high, and 'where detail matters, as it often will, detail must be met with detail'; and there must be 'a real opportunity for rebuttal'.<sup>85</sup> A bare allegation without detail of what, when and where an act is said to have occurred (for example, that a person was involved in 'a terrorist act'), may not enable a person to lead evidence to refute that allegation.

1.192 The COAG review extensively reviewed all aspects of the control orders regime.<sup>86</sup> It noted that the existing legislation may limit the right to a fair trial, and recommended that it be amended to provide for a minimum standard concerning the extent of the information to be given to the subject of a control order. It stated:

It is intended to enable the person and his or her ordinary legal representatives of choice to insist on a minimum level of disclosure to them. The minimum standard should be: "the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations."<sup>87</sup>

1.193 The proposed amendments have not been enacted.

1.194 In addition, unlike schemes in jurisdictions such as Canada and the United Kingdom, which allow a special advocate to be involved in proceedings and seek instructions from an affected person (albeit without disclosing the full information to the person), the scheme in the NSI Act and as proposed to be amended would allow a person's legal representative to be excluded entirely from a hearing or from accessing the information.

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83 See *A and Others v the United Kingdom*, European Court of Human Rights, Application no. 3455/05 (19 February 2009) 205.

84 See *A and Others v the United Kingdom*, European Court of Human Rights, Application no. 3455/05 (19 February 2009) 220. See also the recent judgment of *Sher and Others v the United Kingdom*, European Court of Human Rights, Application no. 520/11 (20 October 2015) which states, at 149, that 'the authorities must disclose adequate information to enable the applicant to know the nature of the allegations against him and have the opportunity to lead evidence to refute them. They must also ensure that the applicant or his legal advisers are able effectively to participate in court proceedings concerning continued detention'.

85 See *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28 per Lord Hope at paragraph 87 and per Lord Scott at paragraph 96.

86 *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), available at: <http://www.ag.gov.au/Consultations/Documents/COAGCTReview/Final%20Report.PDF>.

87 *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 59, recommendation 31.

1.195 With regard to these considerations, it is unclear why it is necessary to exclude a person's legal representative, even if they are security-cleared, from a hearing to determine if information will be considered by the court but not provided to the subject of the control order. Excluding a person's legal representative in such circumstances does raise questions as to how the measure may be compatible with the principle of equality of arms.

1.196 Second, the statement of compatibility notes that, in addition to having regard to the potential prejudice to national security in not making an order to exclude information, the court must have regard to whether making the order 'would have a substantial adverse effect on the substantive hearing in the proceeding'. The statement of compatibility states that the court must therefore expressly contemplate the effect of any potential order on a party's ability to receive a fair hearing.<sup>88</sup>

1.197 However, consideration of 'a substantial adverse effect on the substantive hearing' is not the same as requiring the court to consider whether restricting information would limit a person's right to a fair hearing—rather, it requires consideration of the overall effect on the hearing, including in relation to ensuring a control order may be imposed.

1.198 Third, the statement of compatibility notes the general discretion of the court not to make (control) orders:

Where a legislative scheme departs from the general principles of procedural fairness, the question for the judiciary will be whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid practical injustice.<sup>89</sup>

1.199 It is unclear how a court's discretion nevertheless may ensure procedural fairness to both parties. While the discretion of the court not to make a relevant order is important to whether a fair hearing will be achieved in a particular instance, the committee's analysis of the compatibility of the legislation itself must look to whether the legislation would enable an order to be made that may unjustifiably limit the right to a fair hearing.

**1.200 The committee has assessed the amendments allowing a court to rely on information when making or varying a control order that has not been disclosed to the person subject to the control order or their legal representative against article 14 of the International Covenant on Civil and Political Rights (right to a fair hearing).**

**1.201 As set out above, the amendments engage and limit the right to a fair hearing. The committee therefore seeks the advice of the Attorney-General as to:**

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88 EM, SoC 25.

89 EM, SoC 25.

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective (particularly whether there is evidence demonstrating that the existing powers under the *National Security Information (Criminal and Civil Proceedings) Act 2004* and the *Criminal Code Act 1995* to redact or summarise information or exclude witnesses are insufficient); and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective (particularly whether it is proportionate to exclude a security-cleared legal representative from a hearing as to whether information should be withheld from the subject of a control order; and for allegations on which a control order request is based to be provided to the subject of a control order, without a requirement that sufficient information is provided to allow a real opportunity to rebut those allegations).

## **Privacy Amendment (Protecting Children from Paparazzi) Bill 2015**

*Sponsor: Mr Katter MP*

*Introduced: House of Representatives, 23 November 2015*

### **Purpose**

1.202 The Privacy Amendment (Protecting Children from Paparazzi) Bill 2015 (the bill) seeks to amend the *Privacy Act 1988* to insert a new criminal offence provision for persons who harass the children of celebrities or any other person in certain circumstances.

1.203 Measures raising human rights concerns or issues are set out below.

### **Offence of causing a victim to be annoyed or distressed**

1.204 The new criminal offence provision in the bill prohibits engaging in conduct in relation to a child under 16 years which causes the child, or would be likely to cause a reasonable person in the position of the child, to be annoyed, alarmed, tormented, or terrorised, or causes emotional distress, and the conduct is engaged in because of the vocation or occupation of a parent, carer or guardian of the child. The prohibited conduct involves attempting to photograph or record the child's image or voice, and following or lying in wait for the child.

1.205 The committee considers that the bill promotes the right to privacy and the rights of the child. The committee also considers that the new offence provision prohibiting conduct that causes a victim to be annoyed or distressed engages and limits the right to freedom of expression.

### ***Right to freedom of expression***

1.206 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

1.207 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*)<sup>1</sup>, or public health or morals. Limitations must be prescribed by

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1 'The expression 'public order (*ordre public*)'...may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*): Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

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law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.<sup>2</sup>

*Compatibility of the measure with the right to freedom of expression*

1.208 The statement of compatibility does not acknowledge that any rights are engaged by the bill, and as such has not explained how an offence for conduct that annoys, alarms, or distresses a person is a justifiable limit on the freedom of expression.

1.209 The offence prohibiting conduct that annoys, alarms or distresses a person is very broad. It would prohibit conduct that might be simply irritating to a person, such that they feel annoyed. The offence captures conduct by any person engaging in the conduct in a public space, regardless of whether they are in fact 'paparazzi' or simply members of the public. Even if the conduct does not actually annoy, alarm or distress the child in question, a person can still be convicted if their conduct is found to be 'likely to cause a reasonable person in the position of the victim' to be annoyed, alarmed or distressed.

1.210 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought, including whether there are less restrictive ways to achieve the same aim. The right to freedom of expression includes a right to use expression or behave in a way 'that may be regarded as deeply offensive'.<sup>3</sup> The right to freedom of expression protects not only favourable information and ideas but also those that offend, shock or disturb because 'such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society'.<sup>4</sup> The distribution of media depicting celebrities and their children is still protected by freedom of expression regardless of the worth or merit of such information. The right to freedom of expression, however, can be permissibly limited and the content of the information being communicated will be relevant to whether the limitation is proportionate.

1.211 In order to limit the right to freedom of expression it must be demonstrated that there is a specific threat that requires action which limits freedom of expression, and it must be demonstrated that there is a direct and immediate connection between the expression and the threat.<sup>5</sup> It is not clear to the committee that the broad wording of the offence meets these criteria.

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2 See UN Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

3 See UN Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 11.

4 *Handyside v United Kingdom* (1976) 1 EHRR 737.

5 See UN Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 35.

1.212 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1, and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

**1.213 The committee's assessment against article 19 of the International Covenant on Civil and Political Rights (right to freedom of expression) of the offence provision for conduct that annoys, alarms, or causes distress raises questions as to whether the offence is compatible with the right to freedom of expression.**

**1.214 As set out above, the offence provision for conduct that annoys, alarms, or causes distress engages and limits the right to freedom of expression. The statement of compatibility does not justify that limitation for the purposes of international human rights law. In accordance with paragraph [1.212], the committee therefore seeks the advice of the legislation proponent as to:**

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



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## Migration Regulations 1994 - Specification of Required Medical Assessment - IMMI 15/119 [F2015L01747]

*Portfolio: Immigration and Border Protection*

*Authorising legislation: Migration Regulations 1994*

*Last day to disallow: Exempt from disallowance*

### **Purpose**

1.215 The Migration Regulations 1994 - Specification of Required Medical Assessment - IMMI 15/119 (the instrument) prescribes classes of people who are required to take medical assessments when entering Australia.

1.216 Measures raising human rights concerns or issues are set out below.

### **Medical assessments for certain visa applicants**

1.217 The instrument specifies that certain visa applicants are required to take certain medical tests in order to satisfy decision makers that they meet the health requirements for the visa for which they have applied.

1.218 The instrument alters the arrangements set by the previous instrument<sup>1</sup> in a number of ways, including moving from a 'three tiered' system, specifying countries as 'low', 'medium' and 'high' risk, to a two tiered system. Most significantly, the instrument reduces the period of temporary stay for which a medical assessment is generally not required from 12 to six months.

1.219 The instrument would see more people who intend to spend between six and 12 months in Australia needing to undergo a medical assessment before they are granted a visa. As a result, more people may have their applications rejected on health grounds. The required medical tests may exclude individuals who have a medical condition that is a disability for the purposes of international human rights law.

1.220 The committee understands and supports the importance of protecting the Australian community from public health risks and containing public expenditure on health care and services. It considers that appropriate health checks are required in order to better promote the right to health. However, as these changes widen the circumstances in which persons with a disability may not be granted a visa, the instrument engages the right to equality and non-discrimination for persons with a disability, and the committee requires further information to properly assess the impact of the instrument on this right.

1.221 The committee also notes that subjecting individuals to medical testing will also engage and limit the right to privacy, but considers that in the context of the visa application process this is likely to be a justifiable limitation.

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1 Migration Regulations 1994 - Specification of Required Health Assessment - IMMI 14/042 [F2014L00981].

***Right to equality and non-discrimination (rights of persons with disabilities)***

1.222 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

1.223 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.224 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or on the basis of disability),<sup>2</sup> which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.<sup>3</sup> The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.<sup>4</sup>

1.225 The Convention on the Rights of Persons with Disabilities (CRPD) further describes the content of these rights, describing the specific elements that State parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

1.226 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

***Compatibility of the measure with the right to equality and non-discrimination***

1.227 The instrument is not accompanied by a statement of compatibility as the instrument is not specifically required to have such a statement under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act). However, the committee's role under section 7 of the Act is to examine all instruments for compatibility with human rights (including instruments that are not required to have statements of compatibility).

1.228 The instrument widens the circumstances in which temporary visa applicants may have the grant of a visa refused on health grounds. As persons with a disability necessarily have pre-existing health conditions, they may be disproportionately affected by this instrument. The concept of indirect discrimination in international

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2 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

3 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989).

4 *Althammer v Austria* HRC 998/01, [10.2].

human rights law looks beyond the form of a measure and focuses instead on whether the measure could have a disproportionately negative effect on particular groups in practice. However, under international human rights law such a disproportionate effect may be justifiable.

**1.229 As stated above, the committee understands and supports the importance of protecting the Australian community from public health risks and containing public expenditure on health care and services; and considers that appropriate health checks are required in order to better promote the right to health. However, as the instrument is not accompanied by a statement of compatibility, the committee does not have enough information before it to establish if the instrument does impact disproportionately on persons with disabilities and, if so, whether any such disproportionate effect is justifiable.**

**1.230 The committee considers that the requirement for medical assessments for temporary visa applicants engages and may limit the right to equality and non-discrimination under articles 2 and 26 of International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities.**

**1.231 Noting that the instrument was not accompanied by a statement of compatibility, the committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

## **Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015 [F2015L01658]**

*Portfolio: Attorney-General*

*Authorising legislation: Telecommunications (Interception and Access) Act 1979*

*Last day to disallow: 22 February 2015 (Senate)*

### **Purpose**

1.232 The *Telecommunications (Interception and Access) Act 1979* (the Act) prohibits the Australian Security Intelligence Organisation (ASIO) or enforcement agencies from authorising access to telecommunications data relating to a journalist, or their employer where the purpose is to identify a journalist's source, unless a warrant has been obtained (a journalist information warrant).<sup>1</sup>

1.233 The Act requires that when considering an application for a journalist information warrant, the minister (in the case of ASIO) or the issuing authority (in the case of enforcement agencies) is satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source. The Act provides that in making that assessment, the minister or issuing authority is to have regard to any submissions made by a 'Public Interest Advocate' (PIA).<sup>2</sup>

1.234 The *Telecommunications (Interception and Access) Amendment (Public Interest Advocate and Other Matters) Regulation 2015* (the regulation) prescribes the process requirements for applying for a journalist information warrant and matters relating to the performance of the role of a PIA, including:

- providing that only the most senior members of the legal profession may be appointed as PIAs and prescribing levels of security clearance for certain PIAs;
- requiring that agencies provide a PIA with a copy of a proposed request or application for a journalist information warrant or notify a PIA prior to making an oral application; and
- enabling PIAs to receive further information (or a summary of further information) provided to the minister or issuing authority by agencies and to prepare new or updated submissions based on that information.

1.235 Measures raising human rights concerns or issues are set out below.

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1 See Division 4C of Part 4-1 of Chapter 4 of the *Telecommunications (Interception and Access) Act 1979*.

2 See subparagraphs 180L(2)(b)(v) and 180T(2)(b)(v) of the *Telecommunications (Interception and Access) Act 1979*.

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## Background

1.236 The Act was amended by the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (the bill) to introduce the journalist information warrant and PIA schemes. The committee commented on the bill in its *Fifteenth Report of the 44<sup>th</sup> Parliament*, its *Twentieth Report of the 44<sup>th</sup> Parliament* and its *Thirtieth Report of the 44<sup>th</sup> Parliament*.<sup>3</sup> Because the journalist information warrant and PIA schemes were introduced as amendments to the bill they did not form part of the committee's consideration.

1.237 The committee considers that the journalist information warrant and PIA schemes that were introduced as amendments to the bill improve the compatibility of the bill. Requiring a warrant before journalist's metadata can be accessed ensures that there is at least some assessment of both the law enforcement need for the metadata and the importance of protecting journalists' sources which contribute to reporting in the public interest *before* the metadata is accessed by law enforcement agencies.

### Role of Public Interest Advocate in journalist information warrant process

1.238 The regulation prescribes the process for a PIA to make a submission regarding an application for a journalist information warrant. However, the regulation does not make provision for the PIA to access or speak with the journalist or other person affected by an application for a journalist information warrant, nor does it guarantee that any submission or input from the PIA regarding such an application would, in fact, be considered prior to the issuance of a warrant. The regulation also provides the minister with a discretion to provide the PIA with only a summary of any further information provided to the minister or issuing authority relating to proposed journalist information warrant requests or applications.

1.239 The committee considers that the regulation, while seeking to better promote the protection of privacy and the right to freedom of expression by prescribing a warrant process for accessing journalist's metadata, also engages and may limit multiple rights.

### Multiple rights

1.240 Accessing telecommunications data relating to a journalist, or their employer, where the purpose is to identify a journalist's source, together with the journalist information warrant and PIA scheme, engages and may limit multiple rights, including:

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3 See Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (November 2014) 10-22; Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 39-74; and Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 133-139.

- right to an effective remedy;<sup>4</sup>
- right to a fair hearing;<sup>5</sup>
- right to privacy;<sup>6</sup> and
- right to freedom of expression.<sup>7</sup>

1.241 Accessing a journalist's metadata may limit their right to privacy as the information can reveal important information about the personal life of the journalist including who they contact and where they travel.

1.242 Accessing a journalist's metadata can limit freedom of expression because it may make it harder for journalists to find sources for important news reporting in the public interest if sources know that they may be identified by metadata.

1.243 As the approval process for accessing a journalist's metadata does not include notifying the party whose data is accessed, that person will not know if their data is accessed improperly and, as such, would be unable to seek redress. This engages the right to an effective remedy (though it is noted that any limitation on this right may be justifiable).

1.244 The right to a fair hearing may also be engaged by the regulation, as it does not make provision for the PIA to access or speak with the journalist or other person affected by an application for a journalist information warrant, nor does it guarantee that any submission or input from the PIA regarding such an application would in fact be considered prior to the issuance of a warrant. While it may be justifiable not to notify individuals in advance that their metadata may be accessed, where metadata access occurs on an ex parte basis, even with the involvement of a PIA, it may not be fully in accordance with the procedural guarantees provided for by the right to a fair hearing.

#### *Compatibility of the measures with multiple rights*

1.245 The statement of compatibility states that the regulation engages and promotes the rights to freedom of expression and privacy. However, it provides no assessment of any limitation on those rights or of the compatibility of the measures with the rights to an effective remedy or a fair hearing.

1.246 The statement of compatibility states that the measures:

...facilitate independent scrutiny of application for warrants enabling access to data in certain circumstances.

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4 Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

5 Article 14, ICCPR.

6 Article 17, ICCPR.

7 Article 19, ICCPR.

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...ensure the [Public Interest] Advocates are appropriately skilled and independent and able to advocate in the public interest.<sup>8</sup>

1.247 While the committee considers that the journalist information warrant and PIA schemes seek to better promote the protection of privacy and the right to freedom of expression by prescribing a warrant process for accessing journalist's information, the regulation may lack sufficient safeguards to appropriately protect these rights, as well as the right to an effective remedy and a fair hearing. In particular:

- the regulation does not enable the PIA to seek instructions from any person affected by the journalist information warrant (namely the journalist or their potential sources). As such, the journalist has no opportunity to provide instructions to the PIA on the substance of an application for a journalist information warrant, or to present a case against such an application, limiting the effectiveness of the PIA. The committee notes there may be circumstances where a journalist could not be notified in advance of a warrant being sought, for example when it might jeopardise an ongoing investigation. However, the committee notes that the PIA scheme is established in such a way that the PIA cannot seek instructions from any person who may be affected by a warrant in any circumstance, including where it would have no impact on an ongoing investigation;
- under the regulation the minister has the discretion to provide the PIA with only a summary of further information provided to the minister or issuing authority relating to proposed journalist information warrant requests or applications. As such, the PIA may not be in a position to effectively mount a case against an application for a journalist information warrant. It is unclear why it is necessary to provide PIAs with only a summary of further information if the intention of the regulation is to ensure PIAs are able to advocate in the public interest; and
- the regulation provides no procedural guarantees to ensure the PIA is able to make a submission on an application for a journalist information warrant prior to the issuance of a warrant. The regulation sets out a process by which a PIA must be notified of an application, but it does not require that the application for a warrant be stayed pending any submission from a PIA. As a result, a journalist information warrant may be issued without the benefit of any possible submissions that could be made by the PIA.

1.248 The committee notes that the statement of compatibility refers to a range of procedural safeguards that apply to the journalist information warrant regime. However, it is unclear whether the measures identified above operate to facilitate

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8 Explanatory Statement, Statement of Compatibility 6.

the independent scrutiny of applications for journalist information warrants or ensure that PIAs are able to advocate in the public interest.

**1.249 The committee's assessment against articles 2, 14, 17 and 19 of the International Covenant on Civil and Political Rights (right to an effective remedy, fair hearing, privacy and freedom of expression) of the journalist information warrant and public interest advocate (PIA) schemes, and the process by which a person's data can be accessed without their knowledge, raises questions as to the compatibility of the regulation with these rights.**

**1.250 As set out above, the amendments engage and may limit the right to an effective remedy, fair hearing, privacy and freedom of expression. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Attorney-General as to whether the limitation is proportionate to the stated objective, in particular:**

- **whether the process that does not provide an affected journalist, in any circumstance, with an opportunity to provide instructions to the PIA on the substance of an application for a journalist information warrant, or to present a case against such an application, is a reasonable and proportionate limitation (though the committee emphasises that it recognises there may be circumstances where prior notification would be inappropriate, in particular where it might jeopardise an ongoing investigation);**
- **whether giving the minister the discretion to provide a PIA with only a summary of further information provided to the minister or issuing authority relating to proposed journalist information warrant requests or applications is a reasonable and proportionate limitation; and**
- **whether permitting a journalist information warrant to be issued without the benefit of any possible submissions that could be made by the PIA is a reasonable and proportionate limitation.**



## Chapter 2

### Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at Appendix 1.

#### **Australian Immunisation Register Bill 2015**

#### **Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015**

*Portfolio: Health*

*Introduced: House of Representatives, 10 August 2015*

##### **Purpose**

2.3 The Australian Immunisation Register Bill 2015 (the bill) creates a new legislative framework for the operation of Australian immunisation registers, and repeals existing registers established under the *Health Insurance Act 1973* and the *National Health Act 1953*.

2.4 The Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015 provides for the consequential and transitional provisions required to support the operation of the *Australian Immunisation Register Act 2015*.

2.5 Together these bills provide for the expansion of immunisation registers in two stages:

- From 1 January 2016 the Australian Childhood Immunisation Register (ACIR) will be expanded, so as to collect and record all vaccinations given to young people under the age of 20 years (currently only vaccinations given to children aged under seven years are collected and recorded); and
- From late 2016 the register will be renamed the Australian Immunisation Register (AIR) and will collect and record all vaccinations given to every person in Australia from birth to death.

2.6 Measures raising human rights concerns or issues are set out below.

##### **Background**

2.7 The committee previously considered the bills in its *Twenty-ninth Report of the 44th Parliament* (previous report) and requested further information from the

Minister for Health as to the compatibility of the bills with the right to privacy and right to a fair trial (presumption of innocence).<sup>1</sup>

2.8 The bill passed both Houses of Parliament on 15 October 2015 and achieved Royal Assent on 12 November 2015.

### **Use and disclosure of personal information from the Australian Immunisation Register**

2.9 Under the bills, from late 2016 all persons in Australia enrolled in Medicare and, if not eligible for Medicare, anyone vaccinated in Australia, will be automatically registered on the AIR. This will include the vast majority of people in Australia, including those that choose not to receive vaccinations. The AIR can include significant personal information.<sup>2</sup>

2.10 The committee considers that the use and disclosure of personal information engages and limits the right to privacy.

#### ***Right to privacy***

2.11 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

2.12 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

#### ***Compatibility of the measure with the right to privacy***

2.13 The statement of compatibility for the bill acknowledges that the bill engages the right to privacy but states that the engagement is 'reasonable, appropriate and necessary for the objectives and purposes of the Bill'.<sup>3</sup>

2.14 The committee previously noted that the objectives of the bill appear to include facilitating the establishment of records of vaccinations which will assist with information about vaccination coverage; monitoring the effectiveness of

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1 Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (18 August 2015) 4-8.

2 This includes contact details, Medicare number, vaccination status, general practitioner information regarding non-vaccination status and other information relevant to vaccinations.

3 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 6.

vaccinations; identifying areas of Australia at risk during disease outbreaks; and promoting health and well-being.<sup>4</sup> The committee considered that these objectives are likely to be considered legitimate objectives for the purposes of international human rights law, and the inclusion of information on the AIR is likely to be rationally connected to these objectives.

2.15 However, it remained unclear whether all of the powers enabling the use, recording and disclosure of information are proportionate to achieving those objectives. In particular, the committee was concerned about the ability of the minister to authorise a person to use or disclose protected personal information for a purpose that the minister (or delegate) is satisfied is in the public interest.

2.16 The statement of compatibility does not explain why it is necessary to include this broadly defined power.<sup>5</sup>

2.17 Under international human rights law, when considering whether a limitation on a right is proportionate to achieve the stated objective it is necessary to consider whether there are other less restrictive ways to achieve the same aim.

2.18 The committee also noted that the explanatory memorandum refers to disclosure being limited to 'a specified person or to a specified class of persons',<sup>6</sup> however, clause 22(3) is not limited in this way but allows the minister to authorise 'a person' to use or disclose protected information.

2.19 The committee therefore sought the advice of the Minister for Health as to whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the measure is sufficiently circumscribed to ensure it operates in the least rights restrictive manner.

### **Minister's response**

I note the Committee's enquiry regarding the ability for I, as the Minister for Health, to authorise (under subsection 22(3) of the Bill) a person to make a record of, disclose or otherwise use protected information for a specified purpose that I am satisfied is in the public interest.

The proposed subsection is consistent with existing powers I have to certify that disclosure of protected information is necessary in the public interest, as contained within paragraph 135A(3)(a) of the *National Health Act 1953* and paragraph 130(3)(a) of the *Health Insurance Act 1973*, which currently apply to the National Human Papillomavirus Vaccination Program Register and the Australian Childhood Immunisation Register (ACIR) respectively.

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4 See clause 10 of the Australian Immunisation Register Bill 2015.

5 EM, SoC 6.

6 EM 15.

An example of the type of authorisations these are, and when this public interest power may be used, is where a child protection agency requests information when investigating the welfare of a child. In the 2014-15 financial year, more than 18,000 authorisations occurred for this purpose, authorised under paragraph 130(3)(a) of the *Health Insurance Act 1973*. In this circumstance, the Department of Human Services who operates the ACIR on behalf of my Department, releases information to child protection agencies [a]long with the police to assist in the determination of a child's welfare. To assess the child's welfare, ACIR information including whether a child is protected against certain vaccine preventable diseases through their immunisation history can be determined by child protection agencies.

Another example could involve a request by a vaccine supplier or a vaccination provider to obtain the contact details of one or more vaccine recipients in order to contact the individuals to inform them if a manufacturing error or cold chain breach is identified in relation to a batch of vaccine stock. In this circumstance, the release of the protected information from the register would not fit within the purposes of the Australian Immunisation Register Bill 2015 as defined in section 10, and could only be released under a public interest disclosure.

Such a power is considered necessary to provide an ability to authorise use or disclosure where it does not fit within the purposes of the Australian Immunisation Register Bill 2015, but there is a public interest in the protected information being used or disclosed for that purpose. The purposes for which there might be a public interest in use or disclosure cannot be ascertained with certainty. Whether there is a public interest will depend on a case by case assessment of any requests, and therefore this general public interest power is required to create the ability to allow disclosure in situations like the examples above.

I can assure the Committee that the decision to authorise a person to make a record of, disclose or use protected information is not one which is taken lightly. In making such decisions consideration would be given to an individual's privacy and other interests, which would be balanced against the identified public interest outcome. This limitation is a reasonable and proportionate measure to achieve the intended objectives of the legislation and as previously provided for under existing legislation will be applied in the least restrictive manner protecting individual privacy.

I note your concern regarding the reference in the explanatory memorandum, to information being able to be disclosed to 'a specified person or to a specified class of persons'. You have expressed concern that this wording does not appear in the text of the provision itself. I draw the Committee's attention to subsection 22(3) which authorises me to *disclose* protected information if I am satisfied it is in the public interest. The use of the word 'disclose' inherently implies that information could be released by me to another person or persons (i.e. the recipient of the information),

which I would specify when making my decision whether or not to release information.<sup>7</sup>

## Committee response

### 2.20 The committee thanks the Minister for Health for her response.

2.21 In particular, the committee thanks the minister for providing examples of when the public interest power may be used, including in cases of child welfare and enabling vaccination recipients to be notified when there are faulty batches of vaccines. The committee notes the minister's assurance that 'in making such decisions consideration would be given to an individual's privacy and other interests' and that the limitation 'will be applied in the least restrictive manner protecting individual privacy'.

2.22 However, the minister's response does not discuss or demonstrate how the power to disclose protected information will be sufficiently circumscribed, other than as a matter of policy, to ensure it operates in the least rights restrictive manner and ensures against any disproportionate limitation on an individual's right to privacy. For example, in response to the committee's comment that words in the explanatory memorandum about limiting disclosure to 'a specified person or to a class of persons' are not included in the bill, the minister's advice is that:

the use of the word 'disclose' inherently implies that information could be released by me to another person or persons (i.e. the recipient of the information), which I would specify when making my decision whether or not to release information.

2.23 In considering this response the committee notes the comments contained in the 11<sup>th</sup> Report of the Senate Standing Committee for the Scrutiny of Bills:

While it may be open for this implication to be made, and the committee welcomes the Minister's commitment to specify the person or persons to whom information could be released, the committee still considers that it would assist if such a limitation were included in the text of the provision itself. The committee's concern is that it would be possible for material to be authorised for disclosure without specifying or limiting the authorised recipients of the information.<sup>8</sup>

2.24 The measure, by empowering the minister to disclose protected information to 'a person' rather than 'a specified person or to a class of persons', appears to enable disclosure without specifying or limiting the recipients of the information.

2.25 The committee also notes the minister's advice that disclosures of information from the register relating to child welfare appear to occur routinely

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7 See Appendix 2, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 1-2.

8 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2015* (14 October 2015) 651.

under existing legislation. Given the thousands of disclosures that occur in relation to child welfare it is unclear why disclosure to child welfare authorities is not included in the bill as a specific object for which disclosure may be authorised, rather than relying on the broad public interest disclosure power in each instance.

**2.26 In order to better protect the right to privacy, the committee recommends that consideration be given to amendments to:**

- **ensure that the disclosure of protected information is limited to a specified person or class of persons;**
- **include child welfare as a specific purpose for disclosure, rather than relying on blanket public interest disclosure provisions in such instances; and**
- **ensure that, when disclosures are made on broad public interest grounds, the decision-maker is required to consider the impact of such disclosure on the privacy of an affected individual.**

### **Reversal of the burden of proof**

2.27 Clause 23 of the bill makes it an offence for a person to make a record of, disclose or otherwise use protected information if that record, use or disclosure is not authorised by the bill. Clauses 24 to 27 provide a number of exceptions to this offence. These exceptions reverse the burden of proof.

2.28 The committee considers that the reversal of the burden of proof engages and limits the right to a fair trial (presumption of innocence).

### ***Right to a fair trial (presumption of innocence)***

2.29 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

2.30 An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

2.31 Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

### *Compatibility of the measure with the right to a fair trial*

2.32 The statement of compatibility for the bill does not acknowledge that the right to a fair trial is engaged by these measures.

2.33 The committee therefore sought the advice of the Minister for Health as to whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

### **Minister's response**

Proposed section 23 creates an offence if a person obtains protected information, and makes a record of, discloses or otherwise uses the information, where it is not authorised by section 22 of the Bill. Exceptions to this offence are provided in sections 24 through to 27 to provide people with a defence in certain circumstances.

An evidential burden placed on the defendant is not uncommon. Similar notations to those used in the current Bill exist in many other [pieces of] Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* - where a person has an evidential burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code). The defences used in the Australian Immunisation Register Bill 2015 are modelled on those used in sections 586 to 589 of the *Biosecurity Act 2015*.

In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the facts relating to each defence in sections 24 to 27 of the Bill are peculiarly within the knowledge of the defendant, and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant. The burden that sections 24 to 27 of the Bill impose on a defendant is an evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden in proving the elements of the offence in section 23 of the Bill.

Section 24 simply requires a person to produce or point to evidence that suggests a reasonable possibility that the person made a record of, disclosed or otherwise used protected information in good faith and in purported compliance with section 22 of the Bill.

Section 25 requires that a person, who makes a record of, discloses or otherwise uses protected information that is commercial-in-confidence, produce or point to evidence to demonstrate that they did not know that the information was commercial-in-confidence.

Section 26 requires that a person, who discloses protected information, produce or point to evidence that the protected information was disclosed to the person to whom the information relates.

Section 27 requires that a person produce or point to evidence which indicates that the protected information that was disclosed to another person was originally obtained from that same person.

The evidential burden in each of these circumstances can easily be met by the defendant. In these circumstances, therefore, the imposition of an evidential burden on the defendant is reasonable.<sup>9</sup>

### **Committee response**

2.34 **The committee thanks the Minister for Health for her response.** The committee considers that the response demonstrates that the defences provided in the bill are likely to be peculiarly within the defendant's knowledge. **Accordingly, the committee considers that this aspect of the bill is likely to be compatible with the right to a fair trial (presumption of innocence) and has concluded its examination of this aspect of the bill.**

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9 See Appendix 2, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 2-3.



## Defence Legislation (Enhancement of Military Justice) Bill 2015

*Portfolio: Defence*

*Introduced: House of Representatives, 26 March 2015*

### Purpose

2.35 The Defence Legislation (Enhancement of Military Justice) Bill 2015 (the bill) sought to make a number of amendments to the *Defence Force Discipline Act 1982* (Defence Force Discipline Act) and the *Defence Act 1903*.

2.36 The bill also sought to amend the *Military Justice (Interim Measures) Act (No. 1) 2009* to extend the period of appointment of the Chief Judge Advocate and full-time Judge Advocates by a further two years, making the period of appointment up to eight years instead of six years.

2.37 Measures raising human rights concerns or issues are set out below.

### Background

2.38 In 2005, the Senate Standing Committee on Foreign Affairs, Defence and Trade conducted an inquiry into the effectiveness of Australia's military justice system (the 2005 report).<sup>1</sup> Following the 2005 report, legislation<sup>2</sup> was introduced to create a permanent military court (the Australian Military Court) which was intended to satisfy the principles of impartiality, judicial independence and independence from the chain of command.<sup>3</sup>

2.39 In 2009 the High Court struck down this legislation as being unconstitutional.<sup>4</sup> In response, Parliament put in place a series of temporary measures pending the introduction of legislation to establish a constitutional court. The *Military Justice (Interim Measures) Act (No. 1) 2009* (Interim Act) largely returned the service tribunal system to that which existed before the creation of the Australian Military Court.<sup>5</sup>

2.40 In 2013 the Military Justice (Interim Measures) Amendment Bill 2013 amended the Interim Act to extend the appointment, remuneration, and entitlement arrangements of the Chief Judge Advocate and judge advocates by an additional two years. The committee reported on this bill in its *Sixth Report of 2013*.<sup>6</sup>

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1 See Senate Standing Committee on Foreign Affairs, Defence and Trade, *The effectiveness of Australia's military justice system* (June 2005).

2 *Defence Legislation Amendment Act 2006*.

3 See Explanatory Memorandum (EM) to the Defence Legislation Amendment Bill 2006, notes on clauses 3(b).

4 *Lane v Morrison* [2009] HCA 29.

5 See EM to the Military Justice (Interim Measures) Bill (No. 1) 2009, 1.

6 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 40.

2.41 The committee then reported on the current bill in its *Twenty-second Report of the 44<sup>th</sup> Parliament*, and requested further information from the Minister for Defence as to whether the bill was compatible with the right to a fair trial.<sup>7</sup> The committee considered the Minister for Defence's response in its *Twenty-sixth Report of the 44<sup>th</sup> Parliament* (previous report), and requested further information in relation to this right in order to finalise its consideration of the bill.<sup>8</sup>

2.42 The bill passed both Houses of Parliament on 25 June 2015 and achieved Royal Assent on 30 June 2015.

### **Extension of the appointments of Chief Judge Advocate and judge advocates**

2.43 Initially, the Interim Act provided a fixed tenure of up to two years for both the Chief Judge Advocate and full-time judge advocates who were appointed pursuant to the provisions of the Interim Act. This was extended in 2011 and 2013.<sup>9</sup> That tenure is due to expire in September 2015. The bill amends Schedule 3 of the Interim Act to extend the appointment, remuneration, and entitlement arrangements provided for in that Act for an additional two years. The bill therefore provides a fixed tenure for the Chief Judge Advocate and current full-time judge advocates of up to eight years, or until the Minister for Defence declares, by legislative instrument,<sup>10</sup> a specified day to be a termination day, whichever is sooner.

2.44 The committee previously considered that extending the operation of the existing military justice system through extending the appointment period for the Chief Judge Advocate and judge advocates engages and may limit the right to a fair hearing and fair trial.

### ***Right to a fair hearing and fair trial***

2.45 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

2.46 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in

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7 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 42-46.

8 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44th Parliament* (18 August 2015) 26-33.

9 See the *Military Justice (Interim Measures) Amendment Act 2011* (extended the period of appointment to four years) and *Military Justice (Interim Measures) Amendment Act 2013* (extended the period of appointment to six years).

10 The legislative instrument would not be subject to disallowance.

criminal proceedings, such as the right to not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

*Compatibility of the measure with the right to fair hearing and fair trial*

2.47 The committee previously considered that extending the appointments of the Chief Judge Advocate and full-time judge advocates, and thereby extending the current system of military justice, may limit the right to a fair hearing. The statement of compatibility does not address this issue. The committee therefore sought the advice of the Minister for Defence as to whether extending the operation of the existing system of military justice is compatible with the right to a fair trial.

2.48 Having regard to the response and advice provided by the minister, and relevant comparative human rights law jurisprudence,<sup>11</sup> the committee considered in its previous report that the current structure for conducting military justice would appear to meet the requirement that hearings are conducted by an independent and impartial body.

2.49 However, the committee also considered that in determining whether a tribunal can be considered 'independent', regard must also be had to the term of office for those who conduct military justice hearings. The committee noted that under the transitional provisions of the Interim Act, which the bill extends, the Chief Judge Advocate and judge advocates are appointed for eight years from the date of the Interim Act.<sup>12</sup> However, the Interim Act also provides that the minister may declare in writing any day to be the 'termination day' so the appointment of the Chief Judge Advocate or judge advocates will end on this earlier date.<sup>13</sup> There is no guidance as to when the minister may make such a declaration and this declaration, while a legislative instrument, is specifically excluded from being subject to disallowance.<sup>14</sup>

2.50 The European Court of Human Rights has said that the 'irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence' and this forms part of the requirement of a fair trial.<sup>15</sup> It is recognised that this irremovability does not always have to be recognised in law, if it is recognised in fact and other necessary guarantees are present.

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11 See, for example, *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005 (cf the earlier system of military justice which raised concerns regarding the perception of independence and impartiality: *Findlay v United Kingdom* European Court of Human Rights, (1997) 24 EHRR 221).

12 See items 2 and 4 of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

13 See item 8 of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

14 See item 8(2) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

15 *Campbell and Fell v United Kingdom*, European Court of Human Rights, Application No. 7819/77 and 7878/77, 28 June 1984, para 80. See also *Morris v the United Kingdom*, European Court of Human Rights, Application No. 38784/97, 26 May 2002, para 68 and *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005, para 118.

However, in this case, the opposite is true—the Interim Act expressly gives the executive the power to remove the Judge Advocate General and judge advocates simply by declaring a 'termination day'.

2.51 The committee noted that the requirements of independence and impartiality are not just that the tribunal must be independent, but it must also present an appearance of independence: it 'must also be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect'.<sup>16</sup> The minister's power to terminate the appointment of the Judge Advocate General and the judge advocates, at any time, raises concerns that the military courts could be perceived as not being independent or impartial. The minister's response did not address this aspect of the committee's concerns.

2.52 The requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception, and this applies to both civilian and military courts.<sup>17</sup> It is therefore not possible to justify any limitation on this right.

2.53 Accordingly, the committee considered that enabling the executive to terminate the appointments of the Chief Judge Advocate and judge advocates at any time gives rise to a perception that the system of military justice is not objectively independent. Therefore, the committee sought the Minister for Defence's advice as to whether extending the appointments of the Chief Judge Advocate and judge advocates, and thereby extending the current system of military justice, limits the right to a fair hearing.

2.54 Further, the committee sought the Minister for Defence's advice as to whether the Interim Act should be amended to remove the power of the minister to unilaterally revoke the appointments of the Chief Judge Advocate and judge advocates.

### **Minister's response**

I note for the Committee's benefit that the previous minister recently appointed the full-time Judge Advocate to be the new Director of Military Prosecutions, so the Committee's concerns now only relate to the Chief Judge Advocate's (CJA) appointment.

While from one point of view the *Military Justice (Interim Measures) Act (No 1) 2009* (the Interim Measures Act) gives me the exercise of a broad power, which has the effect of terminating the CJA's appointment, I do not share the Committee's concern that I can terminate CJA's appointment for any reason, or that the existence of the power limits an accused person's right to a fair military trial. The power to prescribe a termination day under the Interim Measures Act is not unfettered, and could not legitimately be exercised for the purpose of attempting to influence the CJA in the

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16 *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005, para 104.

17 See UN Human Rights Committee, General Comment No. 32 (2007) para [22].

performance of their official duties. Rather, the primary purpose of the termination power is merely to provide a mechanism to make changes which might be required if the current 'interim' system of military discipline was replaced with a new system, not to terminate the CJA's appointment per se.

The Interim Measures Act was enacted following the 2009 High Court decision in *Lane v Morrison* (2009) HCA 29, which declared the military court system to be unconstitutional. The Interim Measures Act reinstated the military tribunal system, which the High Court had declared in a series of cases before *Lane v Morrison* to be constitutional. This was done in order to sustain the military discipline system until such time as the Parliament decided how to address the issue of the trials of serious service offences. It was originally envisaged that the Interim Measures Act would operate for a period of no more than two years.

The Interim Measures Act was amended by the *Military Justice (Interim Measures) Amendment Act 2011* (the first Amending Act) by the then Labor Government when it became clear, as the then Minister for Defence indicated in his Second Reading Speech, that a permanent solution to the issue may not be enacted before the expiration of the Interim Measures Act. The Government extended the operation of the Interim Measures Act by amending Schedule 3 to it, so as to provide that the appointment, remuneration and entitlement arrangements for the CJA and other Judge Advocates continued unchanged for another two years. Additionally, the Interim Measures Act was amended to provide that the Minister may declare in writing a specified day to be the 'termination day' for the purposes of the Schedule to cease the operation of the Act (the termination power).

Further two-year extensions to the Interim Measures Act were enacted by the *Military Justice (Interim Measures) Amendment Act 2013* (the second Amending Act), by the then Labor Government, and, again more recently, by the Principal Act, by the current Government. As the previous minister indicated in his Second Reading Speech to the Principal Act, it was necessary to extend the CJA's and then the full-time Judge Advocate's appointments so that the superior tribunal system could continue while the Government considered further reforms to the military discipline system. I note that each extension has retained the termination power.

The Explanatory Memorandum to the first Amending Act indicated that the termination power was inserted to provide the Government of the day with an expedient mechanism to end the interim superior service tribunal system on commencement of the replacement system. In particular, paragraph 17 of the Explanatory Memorandum explained that the 'termination day is likely to be the day upon which a permanent solution to the trial of serious service offences is implemented'.

The exercise of the termination power would not simply terminate the CJA's appointment. Rather, as the Explanatory Memoranda to the first Amending Act and the Principal Act explain, the exercise of the power

would symbolically and practically bring an end to the interim disciplinary arrangements. Accordingly, the primary purpose of the termination power is to allow a single deemed statutory appointment to be brought to an end as a necessary and incidental consequence of Parliament replacing the interim arrangements with an enduring military discipline system. Considered in this way, the termination power is designed to terminate the interim arrangements, not the CJA's appointment per se.

Moreover, the exercise of the termination power is not unfettered and cannot be arbitrarily used to terminate the CJA's appointment. Like most statutory powers, the termination power cannot be exercised for an improper purpose. The termination power cannot be used by me to influence the CJA in the performance of their duties. Any attempt to use the termination power in this way could of course be impugned on the basis of having been used for an improper purpose. For example, in such circumstances, the CJA could seek judicial review of the exercise of the termination power under section 75(v) of the *Constitution* or section 39B of the *Judiciary Act 1903*.

I advise the Committee that for these reasons the extension of the CJA's appointment through the Principal Act does not affect or limit an accused person's right to a fair military trial and, accordingly, there is no need to amend the Interim Measures Act.

I reiterate the previous minister's concluding remark in his Second Reading Speech on the Principal Act that the Government is committed to modernising the military discipline system. I expect to inform the Parliament of our policy in relation to the future of the superior service tribunal system at an appropriate time during the term of this Government.<sup>18</sup>

### **Committee response**

**2.55 The committee thanks the Minister for Defence for her response.** The committee appreciates the minister's advice that as the full-time Judge Advocate was appointed as the new Director of Military Prosecutions the committee's concerns relate only now to the Chief Judge Advocate's (CJA) appointment.

**2.56** The committee notes the minister's advice that the power to prescribe a 'termination day' is not unfettered and could not be used to terminate the CJA's appointment per se, but that it could only be exercised if the current interim system of military discipline is replaced with a new system. In particular, the minister relies on the explanatory material that accompanied the bill that brought in the power, which explained that 'termination day is likely to be the day upon which a permanent solution to the trial of serious service offences is implemented'. The committee notes the minister's advice that exercise of the power would not simply terminate the CJA's

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18 See Appendix 1, Letter from Senator the Hon Marise Payne, Minister for Defence, to the Hon Philip Ruddock MP (received 16 November 2015) 1-2.

appointment but would 'symbolically and practically' bring to an end the interim disciplinary arrangements.

2.57 However, while the committee accepts that the clear intention of the government is that the CJA's appointment would only occur once the interim disciplinary arrangements transition to more permanent arrangements, the legislation is not restricted in this way. Rather, the Interim Act simply provides that the CJA's appointment ends after eight years or on 'termination day', and that day may be declared by the minister in writing. This declaration is not subject to disallowance.

2.58 Therefore, an unfettered discretion is given to the minister to declare a day to be 'termination day', as long as it is before the eight years already specified as the CJA's term of appointment. The term 'termination day' applies only to the termination of the appointment of the CJA and the judge advocates (and it is otherwise only referenced by provisions relating to benefits that accrue to the CJA and judge advocate upon termination). While termination of the CJA's appointment may 'symbolically and practically' only occur when the interim system of military justice ceases, legally, a minister's declaration will simply end the appointment of the CJA; it will not end the interim system of military justice. Rather, it is the committee's understanding that a new CJA could be appointed under the current *Defence Force Discipline Act 1982*.<sup>19</sup>

2.59 As the committee has previously noted, the requirements of independence and impartiality under the right to a fair hearing include that judges are independent (and not able to be removed by the executive during their term of office) and a tribunal must present an appearance of independence. The requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception, and this applies to both civilian and military courts.<sup>20</sup> It is therefore not possible to justify any limitation on this right.

**2.60 The committee considers that the minister's power under the Interim Act to terminate the appointment of the CJA, at any time, raises concerns that the military courts may not be, in law, independent or impartial, and may be perceived as not being independent and impartial. The committee welcomes the minister's advice that she expects to inform Parliament of the government's policy in relation to the future of the superior service tribunal system during the term of this government. However, out of an abundance of caution and in order to avoid incompatibility with the right to a fair hearing, the committee recommends that pending any permanent changes to the current system of military justice, the Interim Act be amended to ensure that the power to terminate the appointment of the CJA is tied to the termination of the interim arrangements as a whole.**

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19 See Part XI of the *Defence Force Discipline Act 1982*.

20 See UN Human Rights Committee, *General Comment No. 32* (2007) para [22].

## Health Legislation Amendment (eHealth) Bill 2015

*Portfolio: Health*

*Introduced: House of Representatives, 17 September 2015*

### **Purpose**

2.61 The Health Legislation Amendment (eHealth) Bill 2015 (the bill) amends the law relating to the personally controlled electronic health record system (PCEHR). The PCEHR (to be renamed the 'My Health Record') provides an electronic summary of an individual's health records. Currently, under legislation governing the PCEHR, an individual's sensitive health records are only uploaded on to the register if the individual expressly consents (or 'opts-in').

2.62 The bill enables opt-out trials to be undertaken in defined locations, whereby an individual's health records will be automatically uploaded onto the My Health Record system unless that individual takes steps to request that their information not be uploaded. The bill allows the opt-out process to apply nationwide following a trial.

2.63 The bill amends the privacy framework by revising the way that permissions to collect, use and disclose information are presented, and included new permissions to reflect how entities engage with one another. The bill also introduces new criminal and civil penalties for breaches of privacy; provides that enforceable undertakings and injunctions are available; and extends mandatory data breach notification requirements.

2.64 Measures raising human rights concerns or issues are set out below.

### **Background**

2.65 The committee previously considered the bill in its *Twenty-ninth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Health as to the compatibility of the bills with the right to privacy, rights of the child, rights of persons with disabilities and the right to a fair trial.<sup>1</sup>

2.66 The bill passed both Houses of Parliament on 12 November 2015 and achieved Royal Assent on 26 November 2015.

### **Automatic inclusion of health records on the My Health Record system: 'opt-out' process**

2.67 As set out above, the bill removes the requirement for the express consent of an individual before their personal health records are uploaded onto the PCEHR. Rather, an individual will need to expressly advise that they do not wish to participate (to 'opt-out').

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1 Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (18 August 2015) 9-24.



2.68 The committee noted in its previous report that the bill seeks to promote the right to health. The committee considered that the bill, in enabling the uploading of everyone's personal health records onto a government database without their consent, engages and limits the right to privacy.

### ***Right to privacy***

2.69 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

2.70 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

### ***Compatibility of the measure with the right to privacy***

2.71 The statement of compatibility acknowledges that the bill limits the right to privacy, however, it concludes that the limitation on this right is reasonable, necessary and proportionate. It explains the objective of the My Health Record system as to address the 'fragmentation of information across the Australian health system and provide healthcare providers the information they need to inform effective treatment decisions.'<sup>2</sup>

2.72 The statement of compatibility also explains that the opt-out model is intended to drive the use of My Health Records by healthcare providers as part of normal healthcare in Australia.<sup>3</sup>

2.73 The committee noted previously that the overall objective of the My Health Record system, in seeking to provide healthcare providers with the necessary information to inform effective treatment decisions, is likely to be considered a legitimate objective for the purposes of international human rights law. However, it is questionable whether the objective behind the bill, in amending the system to an opt-out model, would be considered a legitimate objective for the purposes of international human rights law.

2.74 Increasing the number of people using the My Health Record system, in an attempt to drive increased use by healthcare providers, may be regarded as a

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2 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 28.

3 EM, SoC 31-32.

desirable or convenient outcome but may not be addressing an area of public or social concern that is pressing and substantial enough to warrant limiting the right.

2.75 In relation to the proportionality of the measure, the statement of compatibility sets out a number of safeguards in place for the use and disclosure of healthcare information held on the database, including that individuals with a My Health Record can control who can access their information and what information can be accessed.<sup>4</sup>

2.76 However, the statement of compatibility gives little information about the proportionality of the proposed opt-out process. It explains that the opt-out process will be initially trialled in specific locations, meaning 'My Health Records will be created for people living in specified locations unless they say they do not want one'.<sup>5</sup>

2.77 However, the bill itself does not set out any safeguards to ensure that healthcare recipients would be given reasonable notice or a reasonable amount of time to decide whether to opt-out.

2.78 In addition, once an individual's personal details are included on the My Health Record there is no ability for the person to erase their record from the register – all they can do is ensure that the personal health information stored on the database will not be authorised for disclosure.<sup>6</sup>

2.79 The EM states that there will be 'various channels' available for people to opt-out, including online or as a tick-box on an application form to register newborns or immigrants with Medicare. However, these are not set out in the legislation.

2.80 The EM also states that for those without online access, with communication disabilities, or without the required identity documents, 'other channels will be available, such as phone and in person'.<sup>7</sup> No information is given as to how this would work in practice.

2.81 The committee's interpretation of international human rights law is that, where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation.<sup>8</sup>

2.82 In considering whether the limitation on the right to privacy is proportionate to the stated objective it is also necessary to consider whether there are other less restrictive ways to achieve the same aim. In order to achieve the objective of having

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4 EM, SoC 31.

5 EM, SoC 31.

6 EM 95.

7 EM 94.

8 See, for example, Human Rights Committee, General Comment 27 , Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

more people register for the My Health Record system it is not clear, on the basis of the information provided, why the current opt-in model has not succeeded.

2.83 The bill also provides that once the opt-out trial has taken place the Minister for Health can, by making rules, apply the opt-out model to all healthcare recipients in Australia. In making this decision the bill provides that the minister 'may' take into account the evidence obtained in applying the opt-out model and any other matter relevant to the decision.<sup>9</sup> There is no requirement that the minister consider the privacy implications of this decision.

2.84 The committee therefore sought the advice of the Minister for Health as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the opt-out model is the least rights restrictive approach and whether there are sufficient safeguards in the legislation.

### Minister's response

*Opt-out arrangements and their effect on healthcare recipients, including children and people with disabilities*

A key theme of the Human Rights Report in relation to the eHealth Bill is whether the proposed opt-out arrangements are:

- (i) necessary to achieve a legitimate objective; and
- (ii) proportionate, necessary and reasonable to achieving that objective.

I am of the view that the opt-out arrangements in the Bill are a proportionate, necessary and reasonable way of achieving the policy objective of improved health outcomes for all Australians, including children and persons with disabilities. My reasons are set out below.

The *Personally Controlled Electronic Health Records Act 2012* (to be renamed the My Health Records Act) has, and will continue to have, the objective of **improving health outcomes** by establishing and operating a national system for accessing individual's health information to<sup>10</sup>:

- (a) help overcome the fragmentation of health information;
- (b) improve the availability and quality of health information;
- (c) reduce the occurrence of adverse medical events and the duplication of treatment; and

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9 See proposed clause 2 of proposed Schedule 1 to the *Personally Controlled Electronic Health Records Act 2012* (the PCEHR Act) as proposed to be inserted by item 106 of the bill.

10 Section 3 of the PCEHR Act.

(d) improve the coordination and quality of healthcare provided to individuals by different healthcare providers.

Having a My Health Record is likely to improve health outcomes, making getting the right treatment faster, safer, easier and more cost-effective:

- **faster** - because doctors and nurses and other healthcare providers will not have to spend time searching for past treatment information;
- **safer** - because authorised healthcare providers can view an individual's important healthcare information, including any allergies and vaccinations and the treatment the individual has received;
- **easier** - because individuals will not have to remember the results of tests they have had, or all the medications they have been prescribed; and
- **more cost effective** - because healthcare providers won't have to order duplicate tests - e.g. when an individual visits a different GP whilst on holidays. The time necessary to provide treatment may also be reduced as an individual's health information will be available in one place. As a result, the cost of treatment may be reduced, freeing up funds for improving health outcomes in other areas.

Health information is currently spread across a vast number of different locations and systems. In many current healthcare situations, quick access to key health information about an individual is not always possible. Limited access to health information at the point of care can result in:

- a greater risk to patient safety (e.g. as a result of an adverse drug event due to a complete medications history not being available);
- increased costs of care and time wasted in collecting or finding information (e.g. when a general practitioner has to call the local hospital to get information because the discharge summary is not available);
- unnecessary or duplicated investigations (e.g. when a person attends a new provider and their previous test results are not available);
- additional pressure on the health workforce (e.g. needing to make diagnosis and treatment decisions with incomplete information); and
- reduced participation by individuals in their own healthcare management.

Currently about 1 in 10 individuals have a My Health Record. Since the vast majority of individuals don't have a My Health Record, healthcare providers generally lack any incentive to adopt and contribute to the system, thereby limiting the usefulness of the system. This means there are currently too few individuals and healthcare providers using the system for health outcomes to be significantly improved for the benefit of all Australians.

The Review of the *Personally Controlled Electronic Health Record*<sup>11</sup> (**PCEHR Review**) recommended moving to opt-out participation arrangements for individuals as the most effective way of achieving participation of both healthcare providers and individuals in the system and through this delivering the objective of improving health outcomes. Opt-out arrangements are supported by a wide range of peak bodies representing healthcare recipients, healthcare providers and other stakeholders<sup>12</sup>. Of the 137 responses to the *Electronic Health Records and Healthcare Identifiers: Legislation Discussion Paper* issued in May 2015, around half of them commented on opt-out arrangements. Of those, about 85 per cent gave full or conditional support to national implementation of opt-out, while about 98 per cent supported opt-out trials. Supporters of opt-out were equally individuals (and organisations representing them) and healthcare providers.

Annual Commonwealth healthcare costs are forecast to increase by \$27 billion to \$86 billion by 2025, and will increase to over \$250 billion by 2050<sup>13</sup>.

Improved health outcomes and productivity improvements such as those that can be delivered by eHealth are needed to help counter the expected increases in the healthcare costs. Leveraging eHealth is one of the few strategies available to drive microeconomic reform to reduce Commonwealth health outlays and, at the same time, achieve the objective of improved health outcomes. Without implementation of the changes in the eHealth Bill, in particular implementation of opt-out, the quality of healthcare available to all Australians may reduce in the future as costs become prohibitive.

Without a move to opt-out participation arrangements, the required critical mass of registered individuals may not occur, or may be significantly delayed. As a result, the anticipated objective of improving health outcomes and reducing the pressure on Commonwealth health funding may not occur or may be significantly delayed. Under the current opt in registration arrangements, a net cumulative benefit of \$11.5 billion is expected over 15 years to 2025. It is anticipated that the move to a national opt-out system would deliver these benefits in a shorter period.

National opt-out eHealth record systems have been implemented in a number of countries that are also subject to Human Rights Conventions including Denmark, Finland, Israel, England, Scotland and Wales. This supports the view that opt-out participation arrangements for electronic health record systems are not inherently an unjustified limitation on individuals' right to privacy.

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11 <http://health.gov.au/intemet/main/publishing.nsf/Content/ehealth-record>.

12 See, for example, the comments from the Consumers Health Forum supporting opt-out which are extracted on page 28 of the PCEHR Review.

13 Australian Government's 2010 Intergenerational Report.

While the PCEHR Review recommended moving to national opt-out arrangements, the Government has decided to trial opt-out arrangements first to ensure there is community acceptance and support of opt-out arrangements, that is, the community considers opt-out arrangements as proportionate and reasonable to achieve the objective of improving health outcomes.

Individuals in the opt-out trials will be made aware of how their personal information will be handled, and how to opt-out or adjust privacy control settings, so they can make an informed decision. Comprehensive information and communication activities are being planned for the opt-out trials to ensure all affected individuals, including parents, guardians and carers, are aware they are in an opt-out trial and what they need to do to participate, adjust privacy controls associated with their record, or to opt-out if they choose. This will include letters to affected individuals, targeted communication to carers and advocacy groups, extensive online information, and education and training for healthcare providers in opt-out trials.

The eHealth Bill ensures that strong and significant privacy protections will continue to exist under the current opt-in arrangements and will apply under the proposed new opt-out arrangements (whether as part of a trial or under national implementation).

These protections include the ability to do the following for all people registered with the My Health Record system, including children and persons with disabilities:

- set access controls restricting access to their My Health Record entirely or restricting access to certain information in their My Health Record;
- request that their healthcare provider not upload certain information or documents to their My Health Record, in which case the healthcare provider will be required not to upload that information or those documents;
- request that their Medicare data not be included in their My Health Record, in which case the Chief Executive Medicare will be required to not make the data available to the System Operator;
- monitor activity in relation to their My Health Record using the audit log or via electronic messages alerting them that someone has accessed their My Health Record;
- effectively remove documents from their My Health Record;
- make a complaint if they consider there has been a breach of privacy; and
- cancel their registration (that is, cancel their My Health Record).

The *Personally Controlled Electronic Health Records Act 2012* (PCEHR Act) and the system currently provide special arrangements to support children

and vulnerable people to participate in the system by allowing authorised representatives to act on their behalf and protect the rights of children and people with a disability. Authorised representatives generally have parental responsibility for a child, or some other formal authority to act on behalf of the individual. Nominated representatives can also be appointed by an individual (or by their authorised representative) to help the individual manage their electronic health record. The concept of nominated representatives allows for a less formal appointment of another person to help an individual manage their electronic health record. Nominated representatives could be, for example, a family member, neighbour or friend who will generally not have any formal authority to act on behalf of the individual, but whom the individual appoints to assist them in managing their record.

Representatives are currently required to act in the best interests of the person they are representing, and have regard to any directions given by that person. In light of international changes in the treatment of individuals who require supported decision-making, recognising that one person cannot necessarily determine what is in the best interests of another person, the eHealth Bill provides that people providing decision-making support will instead need to give effect to the will and preference of the person to whom they provide decision-making support. Ensuring that representatives can continue to act on behalf of individuals (including children and persons with a disability) to help them to manage their record as part of opt-out is a privacy positive under the eHealth Bill. Authorised representatives will be able, for example, to opt-out the individual for whom they have responsibility from having an electronic health record.

Finally in relation to privacy, a move to opt-out is likely to improve privacy for individuals, including children and persons with a disability, in a number of ways. As noted in the Commonwealth's *Concept of Operations: Relating to the introduction of a personally controlled electronic health record system* (2011):

According to the Australian Medical Association (AMA), over 95% of GPs have computerised practice management systems. The majority of GPs with a computer at work used it for printing prescriptions recording consultation notes, printing test requests and Referral letters and receiving results for pathology tests electronically. Roughly one third of GPs keep 100% of patient information in an electronic format and the remainder of general practices use a combination of paper and electronic records. (pages 126-7)

Implementing opt-out participation arrangements is likely to increase the number of individuals with a My Health Record, and it is anticipated that this will result in the majority of healthcare provider organisations viewing records for their patients in the system and contributing clinical content to those records as part of the process of providing healthcare. Increased participation by healthcare providers, planned improvements in system functionality and ease of use, together with planned incentives to use the

system, will lead to much greater use of the system in providing healthcare to individuals.

Increased use of the system is a privacy positive as it will reduce the use of paper records, which pose significant privacy risks. For example, where a patient is receiving treatment in a hospital's emergency department for a chronic illness, the hospital may request from the patient's regular doctor information about the patient's clinical history which is likely to be faxed to the hospital. The fax might remain unattended on the fax machine for an extended period of time before being placed into the patient's file, or the information may be sent to the wrong fax number. Either of these things could lead to an interference with the patient's privacy should a third party read the unattended fax or incorrectly receive the fax. In contrast, under the My Health Record system, the patient's Shared Health Summary would be securely available only to those people authorised to see it. There are other similar scenarios where an increase in the level of use of the My Health Record system is likely to lead to a reduction in privacy breaches associated with paper based records.

In summary, the combination of opt-out trials, extensive information and strong personal controls mean that moving to opt-out participation arrangements for individuals is proportionate, necessary and reasonable for achieving the objective of improving health outcomes. Furthermore, increased registration with, and use of, the PCEHR system is likely to increase individuals' privacy, especially compared to existing paper based records that are still used to some degree by around two-thirds of healthcare providers.<sup>14</sup>

### **Committee response**

**2.85 The committee thanks the Minister for Health for her response.** In particular, the committee thanks the minister for her detailed description as to the overall objective behind the My Health Record system. The committee previously accepted that this objective, of improving health outcomes, is likely to be a legitimate objective for the purposes of international human rights law. The question raised by the committee was what is the reasoning or evidence that establishes that the objective behind the opt-out model is a legitimate objective; in that it seeks to address a pressing or substantial concern. In relation to this, the committee notes the minister's response that under the current rates of participation for My Health Records, healthcare providers generally lack any incentive to adopt and contribute to the system, thereby limiting the usefulness of the system. The minister also notes that currently roughly two-thirds of healthcare providers use paper based records and increased registration with, and use of, the My Health Record system would encourage the use of healthcare providers to use electronic records for their patients in the My Health Record system. The minister also states that increased use of the

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14 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 3-7.



My Health Record system will deliver cost benefits to the healthcare system, which will occur more quickly under an opt-out model than the current opt-in model.

2.86 Reducing costs to the healthcare system is likely to be a legitimate objective for the purposes of international human rights law. However, the committee notes that the minister's response does not provide any evidence to demonstrate that increasing numbers of persons registered on the My Health Record system would in fact reduce healthcare costs.

2.87 However, even assuming that the opt-out model would result in increased use of the My Health Record system by healthcare professionals, and thus reduce healthcare costs, the committee remains concerned that the means to achieve this increased usage may not be proportionate to the objective sought to be achieved. In particular, no information is provided by the minister as to why the current opt-in model has not succeeded, and whether there are other methods available to ensure more people voluntarily decide to include their health records on the My Health Record system. This is relevant to the question of whether there are other less rights restrictive ways to achieve the same aim.

2.88 The minister's response states that people in the initial trial locations will be notified by letter that their personal health information will be automatically uploaded on the national register. However, no detail is provided as to whether this will provide sufficient detail to people to allow them to be fully aware of their rights to opt-out of the system. The committee reiterates that the bill itself does not set out any safeguards to ensure that healthcare recipients are given reasonable notice or a reasonable amount of time to decide whether to opt-out.

2.89 The committee also notes the minister's statement that the move to automatically upload everyone's personal health records onto the national database is 'likely to improve privacy' for individuals, as it will decrease reliance on paper records. However, it is not apparent that including all personal health data on a centralised national database would better protect privacy – information on government databases also run the risk of being inappropriately accessed, and including more personal information that can be accessed by more people is not likely to improve the right to privacy for individuals.

**2.90 The committee considers that the automatic inclusion of the health record of all Australians on the My Health Record register engages and limits the right to privacy in article 17 of the International Covenant on Civil and Political Rights.**

**2.91 Some committee members consider that the minister's response has demonstrated that the bill seeks to improve health outcomes and promotes the right to health and so consider the measures are justifiable.**

**2.92 Other committee members consider that the minister's response has not adequately addressed the committee's concerns in relation to this right. For the reasons set out above, those committee members consider that the legislation is**

likely to be incompatible with the right to privacy and recommend, in order to better protect the right to privacy, the legislation be amended:

- to set out the detail of how and when a health care recipient will be notified that their records will be uploaded onto the My Health Records system;
- to require that healthcare recipients be given a reasonable amount of time to decide whether to opt-out of the My Health Records system;
- to provide that healthcare recipients are able to erase their record from the register at any time;
- to require that if the minister applies the opt-out model to all healthcare recipients in Australia, the minister must consider the privacy implications of this decision and be satisfied that healthcare recipients in the trials were given an appropriate and informed opportunity to opt-out.

### **Automatic inclusion of children's health records on the My Health Record system**

2.93 Currently under the *Personally Controlled Electronic Health Records Act 2012* (the PCEHR Act) a person under the age of 18 years is automatically assigned an 'authorised representative' who has the power to manage the child's health records.<sup>15</sup> The authorised representative can be any person who has parental responsibility for the child. A parent is considered to be the child's authorised representative until the child turns 18 years of age or until the child takes control of their record. A child who wishes to take control of their health record needs to satisfy the System Operator that they want to manage his or her own PCEHR and are capable of making decisions for themselves.<sup>16</sup>

2.94 The committee previously considered that automatically uploading the private health records of all children in Australia, unless their parent chooses to opt-out of the register, engages and both promotes and limits the rights of the child.

#### ***Rights of the child***

2.95 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child (CRC). All children under the age of 18 years are guaranteed these rights. The rights of children include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and

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15 See subsection 6(1) of the PCEHR Act.

16 See subsection 6(3) of the PCEHR Act.

- the right to access health care, education and services that meet their needs.
- 2.96 State parties to the CRC are required to ensure to children the enjoyment of fundamental human rights and freedoms and are required to provide for special protection for children in their laws and practices. In interpreting all rights that apply to children, the following core principles apply:
- rights are to be applied without discrimination;
  - the best interests of the child are to be a primary consideration;
  - there must be a focus on the child's right to life, survival and development, including their physical, mental, spiritual, moral, psychological and social development; and
  - there must be respect for the child's right to express his or her views in all matters affecting them.

*Compatibility of the measure with the rights of the child*

2.97 The statement of compatibility recognises that the rights of the child are engaged by the bill but states that these rights continue to be protected.<sup>17</sup>

2.98 The committee previously noted that an attempt to drive increased use by healthcare providers may be regarded as a desirable or convenient outcome but may not address an area of public or social concern that is pressing and substantial enough to warrant limiting the rights of the child. In addition, the committee considered that the opt-out model may not be regarded as a proportionate means of achieving that objective.

2.99 The committee previously noted the bill's limitations on the child's right to privacy and more broadly on the rights of the child. The committee previously noted that there are particular problems with the way in which the current opt-out arrangements are provided for in the bill, and that there is no additional information as to how a child, who wishes to take control of their own record, is able to do so.

2.100 The committee previously noted that the bill does impose an obligation on an authorised representative to give effect to the will and preferences of the child, unless to do so would pose a serious risk to the child's personal and social wellbeing.<sup>18</sup> While this is a welcome measure, there are no consequences in the legislation if the parent does not give effect to the child's will and preferences. In

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17 EM, SoC 36.

18 See proposed new section 7A to the PCEHR Act, item 64 of the bill.

addition, even if a child does manage to become responsible for their own health records, it appears that the child's parent will be notified when that occurs.<sup>19</sup>

2.101 The committee therefore sought the advice of the Minister for Health as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the opt-out model is the least rights restrictive approach and whether there are sufficient safeguards in the legislation to protect the rights of the child.

### **Minister's response**

2.102 See the minister's response set out above in relation to the right to privacy.<sup>20</sup>

### **Committee response**

2.103 **The committee thanks the Minister for Health for her response.** The minister's response did not separately address the issue of the compatibility of the automatic inclusion of children's health records on the My Health Record system with the rights of the child. Rather, the minister's response broadly states that the system of authorised representatives protects the rights of children. The minister states that authorised representatives, who generally have parental responsibility for a child, can help a child manage their e-health record as part of the opt-out process, which the minister states is a 'privacy positive' under the bill.

2.104 The committee's previous analysis noted that under the opt-out model a child must rely on their parents taking active steps to ensure their health record is not automatically included on the My Health Record (noting once a record is included the information will permanently remain on the system). A child's parent is automatically the authorised representative of a person aged under 18 and any child who wants to take control of their health record needs to satisfy the System Operator that they are capable of making decisions for themselves. The committee raised concerns that there was no provision in the bill as to how a child, who wishes to take control of their own record, is able to do so. No information is given as to what a child needs to do in order to satisfy the Systems Operator that their parent should not be considered to be their authorised representative. No information is

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19 See Parents FAQ, on the eHealth.gov.au website which states 'Parents or Authorised Representatives who are managing the eHealth record for a person under 18 years old will be notified when the person has taken control of their own eHealth record': see <http://www.ehealth.gov.au/internet/ehealth/publishing.nsf/Content/faqs-individuals-parents> (accessed 23 September 2015).

20 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 3-7.

given as to the timeframe in which the Systems Operator should make the decision as to whether the child is capable of managing their own affairs and whether this would occur within sufficient time to allow the child to exercise their opt-out rights.

**2.105 The committee considers that the automatic inclusion of all children's health records on the My Health Record register engages and limits a number of rights under the Convention on the Rights of the Child.**

**2.106 Some committee members consider that the minister's response has demonstrated that the bill seeks to improve health outcomes for children and so consider the measures are justifiable.**

**2.107 Other committee members recommend, in order to avoid an unjustifiable limitation on the rights of the child, that the detail as to how a child is to take control of their own health record be set out in legislation and the legislation be amended to ensure children's health records are not subject to automatic inclusion on the My Health Record.**

### **Automatic inclusion of the health records of persons with disabilities on the My Health Record system**

2.108 Currently under the PCEHR Act a healthcare recipient can apply to the System Operator to register for the PCEHR, thereby opting-in to have their health care records included on the register. A person with disabilities can do so on an equal basis with other healthcare recipients. However, where the Systems Operator of the PCEHR is satisfied that a person aged over 18 years is not capable of making decisions for him or herself, another person will be considered to be the authorised representative of that person, and only that person will be able to manage the person's health records.<sup>21</sup>

2.109 The committee previously considered that automatically uploading the private health records of all persons with disabilities in Australia, unless they or an authorised representative choose to opt-out of the register, engages and limits the rights of persons with disabilities.

### ***Rights of persons with disabilities***

2.110 The Convention on the Rights of Persons with Disabilities (CRPD) sets out the specific rights owed to persons with disabilities. It describes the specific elements that state parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others, and to participate fully in society.

2.111 Article 4 of the CRPD states that in developing and implementing legislation and policies that concern issues relating to persons with disabilities, states must closely consult with and actively involve persons with disabilities, through their representative organisations.

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21 See subsection 6(4) of the the PCEHR Act.

2.112 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

2.113 Article 12 of the CRPD requires state parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to exercise their legal capacity.

2.114 Article 22 requires state parties to protect the privacy of the personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

*Compatibility of the measure with the rights of persons with disabilities*

2.115 The statement of compatibility for the bill recognises that the rights of persons with disabilities are engaged by the bill, but states that 'people with a disability are provided equal opportunity to participate in the My Health Record system and make decisions about access to their personal information'.<sup>22</sup>

2.116 The committee previously noted that an attempt to drive increased use by healthcare providers, may be regarded as a desirable or convenient outcome but may not address an area of public or social concern that is pressing and substantial enough to warrant limiting the rights of persons with disabilities. In addition, the committee considered that the opt-out model may not be regarded as a proportionate means of achieving that objective.

2.117 In particular, the committee previously noted that the current law provides that whenever the Systems Operator is satisfied that a healthcare recipient 'is not capable of making decisions for himself or herself' the Systems Operator will deem whomever they are satisfied is an appropriate person to be the healthcare recipient's authorised representative. Once that representative is stated to be acting for a healthcare recipient, the healthcare recipient is not entitled to have any role in managing their health records.<sup>23</sup>

2.118 However, article 12 of the CRPD affirms that all persons with disabilities have full legal capacity. While support should be given where necessary to assist a person with disabilities to exercise their legal capacity, it cannot operate to deny the person legal capacity by substituting another person to make decisions on their behalf. In August 2014 the Australian Law Reform Commission made 12 recommendations specifically for Supported Decision-Making in Commonwealth Laws, to ensure that the presumption of legal capacity is recognised and that measures are in place to

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22 EM, SoC 35.

23 See subsection 6(7) of the PCEHR Act.

provide decision-making support in accordance with the National Decision-Making principles.<sup>24</sup>

2.119 The current PCEHR Act, by denying a person the right to manage any of their health records as soon as the Systems Operator makes an assessment that the person lacks the capacity to make decisions for him or herself, removes the person's right to legal capacity.

2.120 The amendments in the bill, in requiring an authorised representative to make reasonable efforts to ascertain the healthcare recipient's will and preferences in relation to their My Health Record,<sup>25</sup> are important in respecting the rights of persons with disabilities. However, the design of the current legislation is such that the authorised representative would always be exercising substitute decision-making, rather than supported decision-making.<sup>26</sup>

2.121 In addition, while the bill imposes an obligation on an authorised representative to give effect to the will and preferences of the healthcare recipient, there are no consequences in the legislation if the authorised representative does not give effect to the person's will and preferences. The statement of compatibility states that a failure of the representative to meet these duties 'may result in their appointment being suspended or cancelled, or access to the individual's My Health Record being blocked under the My Health Records Rules'.<sup>27</sup> However, it is not clear how this would work in practice.

2.122 The use of substitute decision-making through the authorised representative process in the bill is of particular concern from an international human rights law perspective.<sup>28</sup>

2.123 In addition, there is no information as to how persons with disabilities will be notified appropriately about their right to opt-out of the scheme.

2.124 The committee therefore sought the advice of the Minister for Health as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the opt-out model is the least rights restrictive approach and

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24 Australian Law Reform Commission (ALRC), *Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124)*, 24 November 2014, see in particular Recommendations 4-1 to 4-12, available from <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124>.

25 See proposed new section 7A to the PCEHR Act, item 64 of the bill.

26 See subsection 6(7) of the PCEHR Act.

27 EM, SoC 35.

28 See UN Committee on the Rights of Persons with Disabilities, *General comment No. 1: Article 12: Equal recognition before the law* (2014), paragraph 47.

whether there are sufficient safeguards in the legislation to protect the rights of persons with disabilities.

### **Minister's response**

2.125 See the minister's response set out above in relation to the right to privacy.<sup>29</sup>

### **Committee response**

2.126 **The committee thanks the Minister for Health for her response.** The minister's response did not separately address the issue of the compatibility of the automatic inclusion of the health records of persons with disabilities on the My Health Record system with the rights of persons with disabilities. Rather, the minister's response broadly states that the system of authorised and nominated representatives protects the rights of persons with disabilities. The minister states that nominated representatives can be appointed, and that these could be family members, neighbours or friends who may not have any formal authority to act on behalf of the person but can be appointed by the person to help them manage their record. The minister states that such representatives can help a person with disabilities manage their e-health record as part of the opt-out process, which the minister states is a 'privacy positive' under the bill.

2.127 The committee's previous analysis raised concerns about the process by which an authorised or nominated representative manages the record of a person with disabilities. Currently, where the Systems Operator is satisfied that a person aged over 18 years is not capable of making decisions for him or herself, the Systems Operator will deem whomever they are satisfied is an appropriate person to be the healthcare recipient's authorised representative. Once an authorised representative is stated by the Systems Operator to be acting for a healthcare recipient, that authorised representative is authorised to do anything the healthcare recipient can do and the healthcare recipient is not entitled to have any role in managing their health records.<sup>30</sup>

2.128 However, the CRPD affirms that all persons with disabilities have full legal capacity. While support should be given where necessary to assist a person with disabilities to exercise their legal capacity, it cannot operate to deny the person legal capacity by substituting another person to make decisions on their behalf. The design of the current legislation is such that the authorised representative would always be exercising substitute decision-making, rather than supported decision-making.<sup>31</sup>

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29 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 3-7.

30 See subsection 6(7) of the PCEHR Act.

31 See subsection 6(7) of the PCEHR Act.



2.129 The committee also raised concerns that the bill provided no detail as to how persons with disabilities will be notified appropriately about their right to opt-out of the My Health Record scheme.

**2.130 The committee considers that the automatic inclusion of the health records of all persons with a disability on the My Health Record register engages and limits a number of rights in the Convention on the Rights of Persons with Disabilities.**

**2.131 Some committee members consider that the minister's response has demonstrated that the bill seeks to improve health outcomes for persons with disabilities and so consider the measures are justifiable.**

**2.132 Other committee members recommend, in order to avoid an unjustifiable limitation on the rights of persons with disabilities, that the legislation be amended to ensure that persons with disabilities are accorded full legal capacity in relation to the My Health Record system and the health records of persons with disabilities are not subject to automatic inclusion on the My Health Record. In particular, those members recommend that consideration be given to the recommendations made by the Australian Law Reform Commission<sup>32</sup> to ensure supported decision-making is encouraged and representative decision-makers are appointed only as a last resort.**

### **Civil penalty provisions**

2.133 The bill introduces a number of new civil penalty provisions to apply when a person improperly uses or discloses personal information from the My Health Record system or fails to give up-to-date and complete information for the register.

2.134 For example, proposed new section 26 makes it an offence to, unless authorised, use or disclose identifying information from the My Health Records system. The penalty for the criminal offence is two years imprisonment or 120 penalty units (or both). Proposed new subsection 26(6) also applies a civil penalty to the same conduct, on the basis of recklessness, with an applicable civil penalty of 600 penalty units.

2.135 The committee previously considered that this measure engages and may limit the right to a fair trial as the civil penalty provisions may be considered to be criminal in nature under international human rights law and may not be consistent with criminal process guarantees.

### ***Right to a fair trial and fair hearing rights***

2.136 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses

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32 ALRC, *Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124)*, 24 November 2014, see in particular Recommendations 4-1 to 4-12, available from <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124>.

notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

2.137 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

*Compatibility of the measure with the right to a fair trial and fair hearing rights*

2.138 Under international human rights law civil penalty provisions may be regarded as 'criminal' if they satisfy certain criteria. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law. If so, such provisions would engage the criminal process rights under articles 14 and 15 of the ICCPR.

2.139 There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be considered 'criminal' for the purposes of human rights law. The committee's Guidance Note 2 sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.<sup>33</sup>

2.140 The statement of compatibility states that the civil penalty provisions in the bill should not be classified as criminal under human rights law.<sup>34</sup>

2.141 The committee previously considered that a penalty of up to 600 penalty units is a substantial penalty that could result in an individual being fined up to \$108 000.<sup>35</sup> This is in a context where the individual made subject to the penalty may be a healthcare provider, such as a nurse, or an administrator working for a healthcare provider. The maximum civil penalty is also substantially more than the financial penalty available under the criminal offence provision, which is restricted to a maximum of 120 penalty units (or \$21 600).

2.142 When assessing the severity of a pecuniary penalty the committee previously noted that it has regard to the amount of the penalty, the nature of the industry or sector being regulated and the maximum amount of the civil penalty that may be imposed relative to the penalty that may be imposed for a corresponding criminal offence. Having regard to these matters the committee considered that the civil penalty provisions imposing a maximum of 600 penalty units may be considered to be 'criminal' for the purposes of international human rights law.

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33 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 2 – Offence provisions, civil penalties and human rights* (December 2014); [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources).

34 EM, SoC 34.

35 The current penalty unit rate is \$180 per unit, see section 4AA of the *Crimes Act 1914*.

2.143 The committee noted that the consequence of this is that the civil penalty provisions in the bill must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. However, civil penalty provisions are dealt with under the civil law in Australia and a civil penalty order can be imposed on the civil standard of proof – the balance of probabilities.

2.144 In addition, the committee noted that proposed new section 31C of the bill provides that each civil penalty provision under the bill is enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014*. This Act provides that criminal proceedings may be commenced against a person for the same, or substantially the same, conduct, even if a civil penalty order has already been made against the person.<sup>36</sup> If the civil penalty provision is considered criminal in nature, this raises concerns under article 14(7) of the ICCPR which provides that no one is to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted (double jeopardy).

2.145 The committee also noted that the civil penalty and offence provisions in the bill also allow for a reversal of the burden of proof, requiring the defendant to bear an evidential burden in relation to the defences in the bill. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Neither the statement of compatibility nor the EM justifies the need for the reversal of the burden of proof.

2.146 The statement of compatibility states that the objective of the penalty regime is to protect the private sensitive information held on the My Health Record system 'and the misuse of this information needs to have proportionate penalties to the potential damage to healthcare recipients'.<sup>37</sup> The committee considered that the protection of private sensitive information is a legitimate objective for the purposes of international human rights law. However, the objective behind including civil penalties of up to 600 penalty units (substantially more than the penalty available under the criminal offence provision) without the usual protections available to those charged with a criminal offence, and the reversal of the burden of proof, has not been explained in the statement of compatibility.

2.147 The statement of compatibility also does not explain how the civil penalty provisions, which are likely to be considered 'criminal' for the purposes of international human rights law, are proportionate to their objective.

2.148 The committee therefore sought the advice of the Minister for Health as to whether there is reasoning or evidence that establishes that the stated objective

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36 See section 90 (in Division 3 of Part 4) of the *Regulatory Powers (Standard Provisions) Act 2014*.

37 EM, SoC 34.

addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

### **Minister's response**

The eHealth Bill introduces further protection of an individual's health information contained in a My Health Record with the proposed introduction of further enforcement and penalty options if someone deliberately misuses the information or commits an act that may compromise the security or integrity of the system.

At present, the PCEHR Act contains a civil penalty regime for misuse of information, and the *Healthcare Identifiers Act 2010* (HI Act) contains a criminal regime. The eHealth Bill aligns the enforcement and sanction regimes under the two Acts to provide a more graduated and consistent framework for responding to inappropriate behaviour that is proportional to the severity of a breach.

Civil and criminal penalties are proposed for both Acts (up to a maximum of \$108,000 for individuals and \$540,000 for corporations for deliberate misuse of health information). Enforceable undertakings and injunctions will also be available.

The Committee has questioned whether the civil penalty provisions proposed by the eHealth Bill are criminal for the purposes of international human rights law and, if so, whether any limitation on the right to a fair hearing is justified.

The maximum civil penalty that can be imposed under the eHealth Bill is 600 penalty units. This penalty is justified because the My Health Record system stores the sensitive health information of many individuals. The amount of health information stored and the number of individuals whose records are stored would increase significantly under opt-out.

Penalty levels must provide an appropriate deterrent to misuse of sensitive health information. In addition, penalties need to be proportionate to the potential damage that might be suffered by individuals if the health information in their My Health Record is misused.

The civil penalty levels imposed under the eHealth Bill can be contrasted to the existing *Privacy Act 1988*:

- Under the eHealth Bill the maximum civil penalty is 600 penalty units for a misuse of sensitive health information;
- Under the Privacy Act there are significantly higher civil penalties of up to 2,000 penalty units for serious or repeated misuse of personal information. This is despite the fact that the information in question might not be sensitive health information and may only be less sensitive personal information.

Given that the civil penalties available under the Privacy Act are considered appropriate, it is most unlikely that lower penalties under the eHealth Bill would be considered criminal in nature or would limit the right to a fair trial, especially where the penalty regime imposed by the eHealth Bill is designed to protect significantly more sensitive health information than is generally the case under the Privacy Act.

In response to the Committee comments on the differential between the maximum civil penalty amount and the maximum criminal penalty amount, the eHealth Bill provides for a higher level of civil penalty (600 penalty units) compared to the maximum criminal penalty (120 penalty units) as it is not necessary to have the same levels for each. Imposition of a criminal conviction by a court has other implications that mean that higher penalty levels are not necessary to achieve the desired deterrent. For example, a criminal conviction may result in imprisonment (up to two years) or restrictions on an individual's ability to travel.

The Committee also commented on the reversal of the burden of proof in proposed new section 26 of the HI Act.

Proposed new subsections 26(3) and (4) provide exceptions to the prohibition against misusing healthcare identifiers and identifying information in subsection 26(1) of the HI Act. In doing so, subsections 26(3) and (4) reverse the burden of proof by providing that the defendant bears an evidential burden when asserting an exception applies. An evidential burden placed on the defendant is not uncommon. Similar notations to those used in the eHealth Bill exist in many other pieces of Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* - where a person has an evidential burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code).

In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the facts relating to each defence in proposed new subsections 26(3) and (4) of the HI Act are peculiarly within the knowledge of the defendant and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant.

A burden of proof that a law imposes on a defendant is an evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden. Proposed subsections 26(3) and (4) simply require a person to produce or point to evidence that suggests a reasonable possibility that exceptions in those provisions apply to the person.<sup>38</sup>

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38 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 7-9.

## **Committee response**

2.149 **The committee thanks the Minister for Health for her response.** The committee notes the minister's advice as to why the civil penalty provisions are necessary; namely that the My Health Record system stores the sensitive health information of many individuals and there must be an appropriate deterrent to the misuse of such information. The committee accepts that the protection of private sensitive information is a legitimate objective for the purposes of international human rights law. The committee also notes the minister's advice that the criminal penalty provisions are substantially lower than the civil penalty provisions as imposition of a criminal conviction has other implications that mean a higher penalty is not necessary to achieve the desired deterrent.

2.150 The minister explains in the response that the maximum civil penalty available under the *Privacy Act 1988* is significantly higher than that under this bill, allowing for civil penalties of up to 2000 penalty units. The minister further explains that given these penalties 'are considered appropriate' it would be most unlikely that the penalties under the bill would be considered criminal under international human rights law. The committee notes it has not reviewed the civil penalty provisions under the *Privacy Act 1988* as these were introduced prior to the committee's establishment.

2.151 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law is contestable under international law. The committee considers that it is difficult to say with certainty whether the civil penalty provisions in the bill, allowing for penalties of up to \$108,000, would be considered criminal for the purposes of international human rights law. However, the committee notes that this is a substantial penalty, that is intended to deter particular behaviour, and is in a context where it applies to individuals who may be healthcare providers, such as a nurse, or administrators working for a healthcare provider, rather than in a corporate or financial context. Yet, the committee notes that the penalty does apply to people in a particular regulatory context.

2.152 **The committee notes the minister's advice in relation to the civil penalty provisions and has concluded its examination of these provisions.**

2.153 **In addition, the committee notes the minister's advice in relation to the provision reversing the burden of proof, and considers that the response demonstrates that the defences provided in the bill are likely to be peculiarly within the defendant's knowledge. Accordingly, the committee considers that this aspect of the bill is likely to be compatible with the right to a fair trial (presumption of innocence).**

## Norfolk Island Legislation Amendment Bill 2015

*Portfolio: Infrastructure*

*Introduced: House of Representatives, 26 March 2015*

### Purpose

2.154 The Norfolk Island Legislation Amendment Bill 2015, Tax and Superannuation Laws Amendment (Norfolk Island Reforms) Bill 2015, A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Amendment Bill 2015, Health and Other Services (Compensation) Care Charges Amendment (Norfolk Island) Bill 2015, Health Insurance (Approved Pathology Specimen Collection Centres) Tax Amendment (Norfolk Island) Bill 2015, Health Insurance (Pathology) (Fees) Amendment (Norfolk Island) Bill 2015, Private Health Insurance (Risk Equalisation Levy) Amendment (Norfolk Island) Bill 2015 and Aged Care (Accommodation Payment Security) Levy Amendment (Norfolk Island) Bill 2015 (the bills) seek to:

- amend the *Norfolk Island Act 1979* in order to implement reforms to certain governance and legal arrangements of Norfolk Island, including the abolition of the Norfolk Island Legislative Assembly and consequent establishment of the Norfolk Island Regional Council to act as the elected local government body for the territory, and the introduction of a mechanism which applies New South Wales state law to Norfolk Island as commonwealth law; and
- extend mainland social security (including payments such as the Age Pension, Newstart Allowance, Disability Support Pension and Youth Allowance), immigration (with the effect of ensuring that Norfolk Island is treated consistently with Australia's other inhabited external territories) and health arrangements (including the Medicare Benefits Schedule, the Pharmaceutical Benefits Scheme and the Private Health Insurance Rebate) to Norfolk Island.

2.155 Measures raising human rights concerns or issues are set out below.

### Background

2.156 The committee previously raised concerns in its *Seventh Report of the 44<sup>th</sup> Parliament*<sup>1</sup> in relation to the exclusion of certain New Zealand citizens from access to benefits, such as the National Disability Insurance Scheme (NDIS), despite being required to contribute to the NDIS levy. In its concluding comments, the committee noted that 'under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), non-citizens are entitled to the enjoyment of the human rights guaranteed by the covenants without discrimination.'<sup>2</sup>

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1 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014) 76-81.

2 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014) 80.

2.157 The committee previously considered the bills in its *Twenty-second Report of the 44th Parliament* (previous report) and requested further information from the Assistant Minister for Infrastructure and Regional Development as to the compatibility of the bills with the right to equality and non-discrimination and the right to social security.<sup>3</sup>

2.158 The Norfolk Island Legislation Amendment Bill 2015 passed both Houses of Parliament on 14 May 2015 and achieved Royal Assent on 26 May 2015.

### **Exclusion of some categories of Australian permanent residents from eligibility for social security**

2.159 Currently, on mainland Australia all permanent visa holders are entitled to social security under the *Social Security Act 1991* (the Act). As a result of amendments made by the bill, the Act was extended to Norfolk Island in order to provide the same social security system on the island as is provided on mainland Australia. However, the extension of social security payments to residents of Norfolk Island does not apply to New Zealand citizens that hold an Australian permanent visa.<sup>4</sup>

2.160 The committee previously noted that while the extension of social security benefits will, in the main, promote access to healthcare and advance the right to social security, it also engages and limits the right to equality and non-discrimination and the right to social security.

### **Right to equality and non-discrimination**

2.161 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

2.162 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.163 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),<sup>5</sup> which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.<sup>6</sup> The UN Human Rights Committee has explained indirect

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3 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 66-71.

4 See proposed section 7(2AA) of the *Social Security Act 1991*.

5 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

6 UN Human Rights Committee, *General Comment 18, Non-discrimination* (1989).



discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.<sup>7</sup>

*Compatibility of the measure with the right to equality and non-discrimination*

2.164 The committee previously noted that new subsection 7(2AA) would exclude New Zealand citizens who reside on Norfolk island and hold an Australian permanent visa from being considered an Australian resident under the Act, and thus result in these persons being ineligible for social security benefits.

2.165 The committee noted that it would appear that this could result in a New Zealand citizen living on mainland Australia and receiving social security benefits, losing eligibility if they were to move to Norfolk Island. The committee further noted that the proposed provision does not merely put long-term Norfolk Island residents who are New Zealand citizens in the same position as residents of Australia who are New Zealand citizens as is set out in the Explanatory Memorandum (EM).<sup>8</sup>

2.166 Further, the extension of social security benefits to Norfolk Island applies to Australian permanent residents who are citizens of all countries except New Zealand. No rationale is provided in the EM or statement of compatibility for this specific exclusion. Accordingly, the measure appears to be directly discriminatory and therefore limits the right to equality and non-discrimination.

2.167 Even if a provision directly or indirectly discriminates against specific groups it may nevertheless be justifiable where it pursues a legitimate objective, the measure is rationally connected to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective.

2.168 The statement of compatibility does not address this engagement with the right to equality and non-discrimination. The committee therefore sought the advice of the Assistant Minister for Infrastructure and Regional Development as to whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

***Right to social security***

2.169 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

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<sup>7</sup> *Althammer v Austria* HRC 998/01, [10.2].

<sup>8</sup> EM 55.

2.170 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care; and
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

2.171 Under article 2(1) of the ICESCR, Australia has certain obligations in relation to the right to social security. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

2.172 Specific situations which are recognised as engaging a person's right to social security, include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

*Compatibility of the measure with the right to social security*

2.173 While the statement of compatibility acknowledges that the bill engages the right to social security, it does not address this particular provision or its implications for the enjoyment of the right to social security by Australian permanent residents living on Norfolk Island who are New Zealand citizens.

2.174 The exemption of these persons from receiving social security benefits limits the right to social security for this group.

2.175 As the statement of compatibility for the bill has not identified this limitation, it does not provide a justification for the limitation for the purposes of international human rights law.

2.176 The committee therefore sought the advice of the Assistant Minister for Infrastructure and Regional Development as to whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

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## Assistant Minister's response

The Bill was passed by both Houses of Parliament on 14 May 2015 and the *Norfolk Island Legislation Amendment Act 2015* (the Act) received the Royal Assent on 26 May 2015. The purpose of the Act is to extend the mainland social security, immigration and health arrangements to Norfolk Island from 1 July 2016.

I note the Parliamentary Joint Committee on Human Rights' comments in relation to Australian permanent resident New Zealand citizens living on Norfolk Island being ineligible for social security benefits.

The exclusion of this category of permanent residents from social security benefits is not consistent with the Australian Government's policy. The Department of Infrastructure and Regional Development is working with the Department of Social Services to develop an amendment to the Act to ensure New Zealand citizens living on Norfolk Island enjoy the same access to social security benefits as New Zealand citizens living on the Australian mainland.

I will bring forward to the Parliament during its Autumn 2016 Sittings a Bill that will, amongst other Norfolk Island reforms, amend the social service arrangements.<sup>9</sup>

## Committee response

**2.177 The committee thanks the Assistant Minister for Infrastructure and Regional Development for his response. The committee welcomes the government's commitment to move amendments to ensure that Australian permanent resident New Zealand citizens living on Norfolk Island will be eligible for social security benefits. The committee considers that this amendment will address its concerns and, on this basis, has concluded that the bill is compatible with the right to social security. The committee looks forward to the introduction of these amendments and thanks the Assistant Minister for his constructive engagement on this matter.**

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9 See Appendix 1, Letter from the Hon Jamie Briggs MP, Assistant Minister for Infrastructure and Regional Development, to the Hon Philip Ruddock MP (dated 18 September 2015) 1-2.

## Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015

*Portfolio: Employment*

*Introduced: House of Representatives, 10 September 2015*

### Purpose

2.178 The Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 (the bill) seeks to amend the *Social Security (Administration) Act 1999* (SSA Act) to:

- withhold a job seeker's social security payment where a job seeker refuses to enter into an Employment Pathway Plan without a reasonable excuse for doing so, and impose an additional penalty to be deducted from the eventual payment;
- withhold a job seeker's social security payment where a job seeker acts in an inappropriate manner during an appointment such that the purpose of the appointment is not achieved without a reasonable excuse for doing so, and impose an additional penalty to be deducted from the eventual payment;
- amend the instalment period from which penalties are deducted in relation to job seekers' failure to participate in a specified activity (e.g. work for the dole) to effect a more immediate penalty;
- withhold a job seeker's social security payment where job search efforts have been inadequate (with possibility of receiving full back pay once adequate job search efforts can be proven to have resumed); and
- remove the ability of a job seeker who has failed to accept an offer of suitable employment without a reasonable excuse to apply to have the eight-week penalty period waived in lieu of undertaking additional activities.

2.179 Measures raising human rights concerns or issues are set out below.

### Background

2.180 The committee previously considered the bill in its *Twenty-ninth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Employment as to the compatibility of the bill with the right to social security and right to an adequate standard of living.<sup>1</sup>

### Suspension of benefits for inappropriate behaviour

2.181 Item 18 of the bill would amend the SSA Act to provide that a penalty may be deducted from a job seeker's social security payment where a job seeker acts in an

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1 Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (18 August 2015) 25-30.

inappropriate manner, without a reasonable excuse, during an appointment such that the purpose of the appointment is not achieved.

2.182 This measure may result in individuals losing social security payments and accordingly the committee previously considered that it engages and limits the right to social security and the right to an adequate standard of living.

### ***Right to social security***

2.183 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

2.184 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

2.185 Under article 2(1) of the ICESCR, Australia has certain obligations in relation to the right to social security. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

### ***Right to an adequate standard of living***

2.186 The right to an adequate standard is guaranteed by article 11(1) of the ICESCR, and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

2.187 In respect of the right to an adequate standard of living, article 2(1) of the ICESCR also imposes on Australia the obligations listed above in relation to the right to social security.

*Compatibility of the measure with the right to social security and the right to an adequate standard of living*

2.188 The statement of compatibility acknowledges that the measure engages these rights. The statement of compatibility explains the legitimate objective of the measure as 'discouraging job seekers from deliberately resisting assistance provided to them to... find work'.<sup>2</sup>

2.189 The committee previously noted that a legitimate objective must address a substantial and pressing concern and be based on empirical research or reasoning. No evidence is provided as to the extent to which individuals on social security are frustrating job search activities by inappropriate behaviour during appointments.

2.190 To the extent that the measure does pursue a legitimate objective, the measure is rationally connected to that objective as penalties for inappropriate behaviour may encourage better behaviour during appointments.

2.191 In terms of proportionality, no protections are included in the bill to ensure that a job seeker's behaviour can be assessed in a fair and reasonable manner. Inappropriate behaviour is not defined in the bill and it is unclear how and on what basis a person's behaviour during an interview is inappropriate.

2.192 In the absence of statutory guidance, the bill may result in individuals losing social security benefits in circumstances which are unfair or unreasonable.

2.193 The committee therefore sought the advice of the Minister for Employment as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether there are sufficient safeguards in the legislation.

### **Minister's response**

The Bill will introduce measures to ensure that job seekers who behave inappropriately at appointments may be subject to the same penalties as job seekers who fail to attend those appointments. This is not a unique proposal. Rules allowing penalties to be applied to job seekers who commit misconduct at activities and job interviews were introduced into the compliance framework in 2009. Administrative data indicates that misconduct at activities amounts to around 1 per cent of all failures related to activities.

This measure aims to apply similar rules for appointments that job seekers are required to undertake with their employment service providers or other organisations. Qualitative analysis of feedback from providers has indicated that inappropriate behaviour is a recurring issue and providers

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2 Explanatory Memorandum (EM) 46.

have requested increased scope to manage this behaviour. As providers are not currently required to report on the issue, precise data on the number of instances is not available.

This measure is aimed at achieving the legitimate objective of assisting job seekers into employment. Job seekers who prevent the purpose of provider appointments from being achieved by behaving inappropriately impede this objective by purposefully refusing support from providers intended to assist them to move off welfare payments and increase their chances of becoming productive participants in the workforce. Misconduct at appointments is also problematic due to the wasted tax payer resources involved in preparing for and conducting provider appointments that cannot be carried out.

The Bill clearly states that the inappropriate behaviour must be of a nature that prevents the purpose of the appointment being achieved. Further details of what constitutes inappropriate behaviour are not defined in primary legislation, but will be included in a legislative instrument that will be subject to parliamentary scrutiny. This will provide statutory guidance to decision makers and ensure that decisions related to inappropriate behaviour are not left entirely to the discretion of the provider.

As is currently the case with all compliance penalties, employment service providers will have full discretion not to report a job seeker's non-compliance to the Department of Human Services, if the provider believes it will not assist in ensuring the job seeker's future engagement.

Where a provider does recommend a payment suspension, a job seeker will be able to have this lifted and receive full-back pay by attending a further appointment and behaving appropriately. Alternatively, if the job seeker feels the suspension was unjustified, he or she may request that the Department of Human Services review the decision.

If the provider recommends a financial penalty, the penalty will not be applied until a review has been conducted by the Department of Human Services. The review process includes contacting the job seeker and discussing the circumstances of the failure with them. Under subsection 425C(2) of the *Social Security Administration Act 1991* (the Act), no financial penalty may be applied where the job seeker had a reasonable excuse for the inappropriate behaviour. Details of what constitutes a reasonable excuse are included in the Social Security (Reasonable Excuse - Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1).

The application of the reasonable excuse provisions in this measure will ensure that vulnerable job seekers are not penalised for actions that are beyond their control or are a direct consequence of their vulnerability. For example, if a job seeker's behaviour was due to a psychological or psychiatric condition, or because he or she was unable to understand a provider's instructions, no penalty will apply. This process is consistent with all financial penalties that job seekers may incur under the current compliance framework.

Job seekers who do incur financial penalties can limit the extent of the penalty by prompt reengagement with their providers. The ability of job seekers to minimise the impact of suspensions or financial penalties simply by attending a further appointment and behaving appropriately ensures that penalties are applied proportionately to job seekers who decide to meet their requirements.

Statutory protections will ensure this measure is applied fairly. If a further appointment cannot be undertaken within two business days of the job seeker attempting to reengage, the payment suspension and financial penalty period is ended immediately under subsection 42SA(2AA) of the Act. Job seekers who have a reasonable excuse for not being able to attend the further appointment will also have their payment suspension and financial penalty period ended immediately.<sup>3</sup>

### **Committee response**

**2.194 The committee thanks the Minister for Employment for her response.** The committee considers that assisting job seekers find employment is a legitimate objective for the purpose of international human rights law. The committee also agrees that the measure is rationally connected to that objective as encouraging job seekers to engage fully with the services provided to them may assist them in finding employment.

2.195 In terms of proportionality, the committee notes the minister's response that the bill states that the inappropriate behaviour must be of a nature that prevents the purpose of the appointment being achieved. Accordingly, it is not just any inappropriate behaviour that will lead to a job seeker losing benefits but inappropriate behaviour that is so serious as to frustrate the purpose of an appointment. Notwithstanding this, there are also likely to be many cases where a person's behaviour is not extreme and a high degree of judgement is required to determine what is 'inappropriate behaviour' and whether it has caused an appointment to be frustrated.

2.196 Under this bill, such judgement is to be exercised with no statutory guidance. Moreover, many of these appointments will be with private sector service providers, where the person who will make the judgement as to whether inappropriate behaviour has caused an appointment to fail, is not bound by the Australian Public Service code of conduct.

2.197 The committee notes the minister's advice that further details of what constitutes inappropriate behaviour will be included in a legislative instrument that will be subject to parliamentary scrutiny. While it is important that this detail will be subject to parliamentary scrutiny, where a bill limits a right the safeguards should be in the primary legislation and not left to regulations or policy guidelines.

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3 See Appendix 1, Letter from Senator the Hon Michaelia Cash, Minister for Employment, to the Hon Philip Ruddock MP (dated 2 November 2015) 1-2.



2.198 The committee notes that the 'reasonable excuse' provisions will apply to this measure which provides some assurance that vulnerable job seekers will not be penalised for actions that are beyond their control or are a direct consequence of their vulnerability. However, the 'reasonable excuse' provisions do not cover all circumstances that may apply to vulnerable individuals, particularly those who may have an undiagnosed mental illness.

**2.199 The committee's assessment of the suspension of benefits for inappropriate behaviour against articles 19 and 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to an adequate standard of living) raises questions as to whether the limitation is justifiable.**

2.200 In order to better ensure the bill's compatibility with human rights, some committee members recommend that the bill be amended as follows:

- the term 'inappropriate behaviour' be defined in the bill using clearly objective standards; and
- prior to a penalty being confirmed by the Department of Human Services (DHS), DHS must be satisfied that the job seeker is not suffering from a mental health concern that may have contributed to the 'inappropriate behaviour'.

2.201 Other committee members, noting the importance of simpler and clearer legislation, considered that it was appropriate that 'inappropriate behaviour' be defined in a legislative instrument using clearly objective standards.

### **Removal of waivers for refusing or failing to accept a suitable job**

2.202 Items 12 and 13 of the bill would make amendments to the SSA Act so that when a job seeker refuses or fails to accept an offer of suitable employment and has no reasonable excuse for the failure, a job seeker's payment would not be payable for a period of eight weeks. The current ability of the department to waive that eight week non-payment penalty would be removed by the bill.

2.203 This measure may result in individuals losing social security payments and accordingly the committee previously considered that it engages and limits the right to social security and the right to an adequate standard of living.

#### ***Right to social security***

2.204 The right to social security is outlined above at paragraphs [2.183] to [2.185].

#### ***Right to an adequate standard of living***

2.205 The right to an adequate standard of living is outlined above at paragraphs [2.186] to [2.187].

*Compatibility of the measure with the right to social security and the right to an adequate standard of living*

2.206 The statement of compatibility explains the legitimate objective for the measure as 'reducing the reliance on participation payments by job seekers who have successfully shown they are capable of obtaining suitable work'.<sup>4</sup>

2.207 The Explanatory Memorandum (EM) explains that in 2013-14, 78% of penalties for refusing a suitable job were waived.<sup>5</sup>

2.208 The EM argues that these waiver provisions act as an incentive for non-compliance. However, the committee previously noted that no evidence is provided that the high waiver rates are a result of the legislation requiring the waiver to be granted rather than there being a genuine reason for the department granting the waiver in each case. On its face, the measure pursues an objective that appears to be desirable and convenient.

2.209 To the extent that the measure does pursue a legitimate objective, the measure is rationally connected to that objective as the inability for penalties to be waived may encourage some job seekers to take jobs assessed as suitable where they may currently seek a waiver on the basis of hardship.

2.210 In terms of proportionality, no evidence is provided to show that the very high waiver rate is due to the waivers being applied by the department inappropriately.

2.211 Given these high waiver rates, it is possible that measures could be introduced to reduce the waiver rate by tightening the circumstances in which a waiver may be granted. In removing the ability of the department to provide a waiver in any circumstance, the statement of compatibility has not demonstrated that a less rights restrictive approach of changing the grounds on which a waiver may be granted is not feasible or possible.

2.212 The committee therefore sought the advice of the Minister for Employment as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

### **Minister's response**

As noted in the explanatory memorandum, a range of protections exist to ensure job seekers who refuse offers of work for legitimate reasons are not subject to penalties, including through the definitions of 'suitable

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4 EM 48.

5 EM 9.

work' and 'reasonable excuse' set out in subordinate legislation. These safeguards take effect before waivers are considered; that is, only job seekers who have refused work without good reason may be granted waivers.

Waivers may currently be granted if job seekers agree to undertake an additional compliance activity or if the job seeker may face financial hardship. Waivers that are granted to job seekers who agree to undertake an additional compliance activity are not based on an assessment of the job seeker's circumstances, as job seekers who had a genuine reason for refusing an offer of work will not be subject to a penalty in the first instance.

In 2014-15, 96 per cent of waivers for penalties incurred for refusing an offer of suitable work were granted because the job seekers agreed to undertake an additional compliance activity. This strongly suggests that the high rate of waivers is a result of the legislation requiring the waiver to be granted, rather than the waivers being granted for a legitimate reason related to the circumstances of the job seeker.

In practice, the additional compliance activities job seekers agree to undertake are substantially similar to a job seeker's existing requirements. In many cases, the additional activities do not substantially alter a job seeker's requirements as job seekers can satisfy the requirements by undertaking a few extra hours of activity. Consequently, by securing a waiver for a serious failure through a compliance activity, job seekers are able to refuse employment without any major changes to their activity requirements to reflect the gravity of their serious failure. This has encouraged abuse of the system.

In 2008-09, the year before waiver provisions were introduced to the legislation, there were 644 serious failures for refusing or failing to accept suitable work. In 2014-15, there were 1,412 such failures (although 73 per cent were granted waivers). This increase of 119 per cent in job seekers refusing work without good reason cannot be attributed to any comparable change in the size of the activity-tested job seeker population or increase in the number of jobs being offered-it appears to be a direct result of the leniency of the waiver provisions. The waivers have essentially enabled some job seekers to reject suitable work with impunity as the resulting serious failure they will incur can be waived. Removing the waivers, therefore, can reasonably be expected to reduce the instances of job seekers refusing suitable work, allowing more job seekers to gain employment and reduce their reliance on income support.<sup>6</sup>

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6 See Appendix 1, Letter from Senator the Hon Michaelia Cash, Minister for Employment, to the Hon Philip Ruddock MP (dated 2 November 2015) 2-3.

## **Committee response**

**2.213 The committee thanks the Minister for Employment for her response.** The committee notes that the response does not explicitly explain the legitimate objective of the measure nor explain how it is rationally connected to that objective. However, from the information provided, the committee understands that the objective of the measure is to reduce the instances of job seekers refusing suitable work, thus supporting more people to make the transition from welfare to work. The committee considers that the measure, in increasing the likelihood that a person who refused a job will receive a financial penalty, may encourage greater acceptance of jobs offered and is thus likely to be a legitimate objective and is rationally connected to that objective.

2.214 In terms of proportionality, the responses focuses on the fact that the high waiver rate appears to be a function of current arrangements which permit a job seeker to avoid a penalty for not accepting a suitable job by undertaking additional compliance activities. If the bill simply removed the ability of job seekers to undertake compliance activities in order to avoid a financial penalty the bill may be proportionate. However, the bill removes the ability to waive a penalty in any circumstance where a person refuses suitable work without a reasonable excuse. There may be individuals who, for a range of genuine reasons, refuse suitable work yet fail to meet the reasonable excuse test. Accordingly, while the bill will tackle unwilling workers it may also apply financial penalties to individuals who are not unwilling but, for a range of reasons, are unable to accept a particular job.

**2.215 The committee's assessment of the removal of waivers for refusing or failing to accept a suitable job against article 19 and article 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to an adequate standard of living) raises questions as to whether the limitation is justifiable.**

**2.216 In order to better ensure the bill's compatibility with human rights, the committee recommends that the bill be amended to provide a waiver where, in the opinion of the Department of Human Services' officer, there are exceptional circumstances justifying the waiver in accordance with a clearly structured framework that allows for consistent application of the waiver to circumstances that are genuinely exceptional.**

**The Hon Philip Ruddock MP**

**Chair**

# **Appendix 1**

## **Correspondence**

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**THE HON SUSSAN LEY MP  
MINISTER FOR HEALTH  
MINISTER FOR AGED CARE  
MINISTER FOR SPORT**

Ref No: MC15-017636

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

Dear ~~Chair~~ *Philip*

Thank you for your correspondence of 13 October 2015 in which you seek my advice in relation to the Australian Immunisation Register Bill 2015 and Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015, and the Health Legislation Amendment (eHealth) Bill 2015.

**Australian Immunisation Register Bill 2015 and Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015**

I note the Committee's enquiry regarding the ability for I, as the Minister for Health, to authorise (under subsection 22(3) of the Bill) a person to make a record of, disclose or otherwise use protected information for a specified purpose that I am satisfied is in the public interest.

The proposed subsection is consistent with existing powers I have to certify that disclosure of protected information is necessary in the public interest, as contained within paragraph 135A(3)(a) of the *National Health Act 1953* and paragraph 130(3)(a) of the *Health Insurance Act 1973*, which currently apply to the National Human Papillomavirus Vaccination Program Register and the Australian Childhood Immunisation Register (ACIR) respectively.

An example of the type of authorisations these are, and when this public interest power may be used, is where a child protection agency requests information when investigating the welfare of a child. In the 2014-15 financial year, more than 18,000 authorisations occurred for this purpose, authorised under paragraph 130(3)(a) of the *Health Insurance Act 1973*. In this circumstance, the Department of Human Services who operates the ACIR on behalf of my Department, releases information to child protection agencies along with the police to assist in the determination of a child's welfare. To assess the child's welfare, ACIR information including whether a child is protected against certain vaccine preventable diseases through their immunisation history can be determined by child protection agencies.

Another example could involve a request by a vaccine supplier or a vaccination provider to obtain the contact details of one or more vaccine recipients in order to contact the individuals to inform them if a manufacturing error or cold chain breach is identified in

relation to a batch of vaccine stock. In this circumstance, the release of the protected information from the register would not fit within the purposes of the Australian Immunisation Register Bill 2015 as defined in section 10, and could only be released under a public interest disclosure.

Such a power is considered necessary to provide an ability to authorise use or disclosure where it does not fit within the purposes of the Australian Immunisation Register Bill 2015, but there is a public interest in the protected information being used or disclosed for that purpose. The purposes for which there might be a public interest in use or disclosure cannot be ascertained with certainty. Whether there is a public interest will depend on a case by case assessment of any requests, and therefore this general public interest power is required to create the ability to allow disclosure in situations like the examples above.

I can assure the Committee that the decision to authorise a person to make a record of, disclose or use protected information is not one which is taken lightly. In making such decisions consideration would be given to an individual's privacy and other interests, which would be balanced against the identified public interest outcome. This limitation is a reasonable and proportionate measure to achieve the intended objectives of the legislation and as previously provided for under existing legislation will be applied in the least restrictive manner protecting individual privacy.

I note your concern regarding the reference in the explanatory memorandum, to information being able to be disclosed to 'a specified person or to a specified class of persons'. You have expressed concern that this wording does not appear in the text of the provision itself. I draw the Committee's attention to subsection 22(3) which authorises me to *disclose* protected information if I am satisfied it is in the public interest. The use of the word 'disclose' inherently implies that information could be released by me to another person or persons (i.e. the recipient of the information), which I would specify when making my decision whether or not to release information.

Proposed section 23 creates an offence if a person obtains protected information, and makes a record of, discloses or otherwise uses the information, where it is not authorised by section 22 of the Bill. Exceptions to this offence are provided in sections 24 through to 27 to provide people with a defence in certain circumstances.

An evidential burden placed on the defendant is not uncommon. Similar notations to those used in the current Bill exist in many other Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* - where a person has an evidential burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code). The defences used in the Australian Immunisation Register Bill 2015 are modelled on those used in sections 586 to 589 of the *Biosecurity Act 2015*.

In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the facts relating to each defence in sections 24 to 27 of the Bill are peculiarly within the knowledge of the defendant, and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant. The burden that sections 24 to 27 of the Bill impose on a defendant is an evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden in proving the elements of the offence in section 23 of the Bill.



Section 24 simply requires a person to produce or point to evidence that suggests a reasonable possibility that the person made a record of, disclosed or otherwise used protected information in good faith and in purported compliance with section 22 of the Bill.

Section 25 requires that a person, who makes a record of, discloses or otherwise uses protected information that is commercial-in-confidence, produce or point to evidence to demonstrate that they did not know that the information was commercial-in-confidence.

Section 26 requires that a person, who discloses protected information, produce or point to evidence that the protected information was disclosed to the person to whom the information relates.

Section 27 requires that a person produce or point to evidence which indicates that the protected information that was disclosed to another person was originally obtained from that same person.

The evidential burden in each of these circumstances can easily be met by the defendant. In these circumstances, therefore, the imposition of an evidential burden on the defendant is reasonable.

### **Health Legislation Amendment (eHealth) Bill 2015**

In its *Twenty-ninth report of the 44<sup>th</sup> Parliament (Human Rights Report)*, the Committee questioned whether the opt-out arrangements for the My Health Record system proposed by the Health Legislation Amendment (eHealth) Bill 2015 (**eHealth Bill**) are a justifiable limitation on the right to privacy, and whether the automatic inclusion of health records in the My Health Record system is compatible with the rights of a child and the rights of persons with disabilities.

The Committee has also questioned whether the new civil penalties in the eHealth Bill might be considered criminal in nature under international human rights law and might not be consistent with criminal process guarantees.

#### *Opt-out arrangements and their effect on healthcare recipients, including children and people with disabilities*

A key theme of the Human Rights Report in relation to the eHealth Bill is whether the proposed opt-out arrangements are:

- (i) necessary to achieve a legitimate objective; and
- (ii) proportionate, necessary and reasonable to achieving that objective.

I am of the view that the opt-out arrangements in the Bill are a proportionate, necessary and reasonable way of achieving the policy objective of improved health outcomes for all Australians, including children and persons with disabilities. My reasons are set out below.

The *Personally Controlled Electronic Health Records Act 2012* (to be renamed the My Health Records Act) has, and will continue to have, the objective of **improving health outcomes** by establishing and operating a national system for accessing individual's health information to<sup>1</sup>:

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<sup>1</sup> Section 3 of the *Personally Controlled Electronic Health Records Act 2012*

- (a) help overcome the fragmentation of health information;
- (b) improve the availability and quality of health information;
- (c) reduce the occurrence of adverse medical events and the duplication of treatment; and
- (d) improve the coordination and quality of healthcare provided to individuals by different healthcare providers.

Having a My Health Record is likely to improve health outcomes, making getting the right treatment faster, safer, easier and more cost-effective:

- **faster** – because doctors and nurses and other healthcare providers will not have to spend time searching for past treatment information;
- **safer** – because authorised healthcare providers can view an individual’s important healthcare information, including any allergies and vaccinations and the treatment the individual has received;
- **easier** – because individuals will not have to remember the results of tests they have had, or all the medications they have been prescribed; and
- **more cost effective** – because healthcare providers won’t have to order duplicate tests – e.g. when an individual visits a different GP whilst on holidays. The time necessary to provide treatment may also be reduced as an individual’s health information will be available in one place. As a result, the cost of treatment may be reduced, freeing up funds for improving health outcomes in other areas.

Health information is currently spread across a vast number of different locations and systems. In many current healthcare situations, quick access to key health information about an individual is not always possible. Limited access to health information at the point of care can result in:

- a greater risk to patient safety (e.g. as a result of an adverse drug event due to a complete medications history not being available);
- increased costs of care and time wasted in collecting or finding information (e.g. when a general practitioner has to call the local hospital to get information because the discharge summary is not available);
- unnecessary or duplicated investigations (e.g. when a person attends a new provider and their previous test results are not available);
- additional pressure on the health workforce (e.g. needing to make diagnosis and treatment decisions with incomplete information); and
- reduced participation by individuals in their own healthcare management.

Currently about 1 in 10 individuals have a My Health Record. Since the vast majority of individuals don’t have a My Health Record, healthcare providers generally lack any incentive to adopt and contribute to the system, thereby limiting the usefulness of the system. This means there are currently too few individuals and healthcare providers using the system for health outcomes to be significantly improved for the benefit of all Australians.

The *Review of the Personally Controlled Electronic Health Record*<sup>2</sup> (**PCEHR Review**) recommended moving to opt-out participation arrangements for individuals as the most effective way of achieving participation of both healthcare providers and individuals in the system and through this delivering the objective of improving health outcomes. Opt-out arrangements are supported by a wide range of peak bodies representing healthcare recipients, healthcare providers and other stakeholders<sup>3</sup>. Of the 137 responses to the *Electronic Health Records and Healthcare Identifiers: Legislation Discussion Paper* issued

<sup>2</sup> <http://health.gov.au/internet/main/publishing.nsf/Content/ehealth-record>

<sup>3</sup> See, for example, the comments from the Consumers Health Forum supporting opt-out which are extracted on page 28 of the PCEHR Review.

in May 2015, around half of them commented on opt-out arrangements. Of those, about 85 per cent gave full or conditional support to national implementation of opt-out, while about 98 per cent supported opt-out trials. Supporters of opt-out were equally individuals (and organisations representing them) and healthcare providers.

Annual Commonwealth healthcare costs are forecast to increase by \$27 billion to \$86 billion by 2025, and will increase to over \$250 billion by 2050<sup>4</sup>.

Improved health outcomes and productivity improvements such as those that can be delivered by eHealth are needed to help counter the expected increases in the healthcare costs. Leveraging eHealth is one of the few strategies available to drive microeconomic reform to reduce Commonwealth health outlays and, at the same time, achieve the objective of improved health outcomes. Without implementation of the changes in the eHealth Bill, in particular implementation of opt-out, the quality of healthcare available to all Australians may reduce in the future as costs become prohibitive.

Without a move to opt-out participation arrangements, the required critical mass of registered individuals may not occur, or may be significantly delayed. As a result, the anticipated objective of improving health outcomes and reducing the pressure on Commonwealth health funding may not occur or may be significantly delayed. Under the current opt in registration arrangements, a net cumulative benefit of \$11.5 billion is expected over 15 years to 2025. It is anticipated that the move to a national opt-out system would deliver these benefits in a shorter period.

National opt-out eHealth record systems have been implemented in a number of countries that are also subject to Human Rights Conventions including Denmark, Finland, Israel, England, Scotland and Wales. This supports the view that opt-out participation arrangements for electronic health record systems are not inherently an unjustified limitation on individuals' right to privacy.

While the PCEHR Review recommended moving to national opt-out arrangements, the Government has decided to trial opt-out arrangements first to ensure there is community acceptance and support of opt-out arrangements, that is, the community considers opt-out arrangements as proportionate and reasonable to achieve the objective of improving health outcomes.

Individuals in the opt-out trials will be made aware of how their personal information will be handled, and how to opt-out or adjust privacy control settings, so they can make an informed decision. Comprehensive information and communication activities are being planned for the opt-out trials to ensure all affected individuals, including parents, guardians and carers, are aware they are in an opt-out trial and what they need to do to participate, adjust privacy controls associated with their record, or to opt-out if they choose. This will include letters to affected individuals, targeted communication to carers and advocacy groups, extensive online information, and education and training for healthcare providers in opt-out trials.

The eHealth Bill ensures that strong and significant privacy protections will continue to exist under the current opt-in arrangements and will apply under the proposed new opt-out arrangements (whether as part of a trial or under national implementation).

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<sup>4</sup> Australian Government's 2010 Intergenerational Report

These protections include the ability to do the following for all people registered with the My Health Record system, including children and persons with disabilities:

- set access controls restricting access to their My Health Record entirely or restricting access to certain information in their My Health Record;
- request that their healthcare provider not upload certain information or documents to their My Health Record, in which case the healthcare provider will be required not to upload that information or those documents;
- request that their Medicare data not be included in their My Health Record, in which case the Chief Executive Medicare will be required to not make the data available to the System Operator;
- monitor activity in relation to their My Health Record using the audit log or via electronic messages alerting them that someone has accessed their My Health Record;
- effectively remove documents from their My Health Record;
- make a complaint if they consider there has been a breach of privacy; and
- cancel their registration (that is, cancel their My Health Record).

The *Personally Controlled Electronic Health Records Act 2012* (PCEHR Act) and the system currently provide special arrangements to support children and vulnerable people to participate in the system by allowing authorised representatives to act on their behalf and protect the rights of children and people with a disability. Authorised representatives generally have parental responsibility for a child, or some other formal authority to act on behalf of the individual. Nominated representatives can also be appointed by an individual (or by their authorised representative) to help the individual manage their electronic health record. The concept of nominated representatives allows for a less formal appointment of another person to help an individual manage their electronic health record. Nominated representatives could be, for example, a family member, neighbour or friend who will generally not have any formal authority to act on behalf of the individual, but whom the individual appoints to assist them in managing their record.

Representatives are currently required to act in the best interests of the person they are representing, and have regard to any directions given by that person. In light of international changes in the treatment of individuals who require supported decision-making, recognising that one person cannot necessarily determine what is in the best interests of another person, the eHealth Bill provides that people providing decision-making support will instead need to give effect to the will and preference of the person to whom they provide decision-making support. Ensuring that representatives can continue to act on behalf of individuals (including children and persons with a disability) to help them to manage their record as part of opt-out is a privacy positive under the eHealth Bill. Authorised representatives will be able, for example, to opt-out the individual for whom they have responsibility from having an electronic health record.

Finally in relation to privacy, a move to opt-out is likely to improve privacy for individuals, including children and persons with a disability, in a number of ways. As noted in the Commonwealth's *Concept of Operations: Relating to the introduction of a personally controlled electronic health record system* (2011):

*According to the Australian Medical Association (AMA), over 95% of GPs have computerised practice management systems. The majority of GPs with a computer at work used it for printing prescriptions recording consultation notes, printing test requests and Referral letters and receiving results for pathology tests electronically. Roughly one third of GPs keep 100% of patient information in an electronic format and the remainder of general practices use a combination of paper and electronic records. (pages 126-7)*

Implementing opt-out participation arrangements is likely to increase the number of individuals with a My Health Record, and it is anticipated that this will result in the majority of healthcare provider organisations viewing records for their patients in the system and contributing clinical content to those records as part of the process of providing healthcare. Increased participation by healthcare providers, planned improvements in system functionality and ease of use, together with planned incentives to use the system, will lead to much greater use of the system in providing healthcare to individuals.

Increased use of the system is a privacy positive as it will reduce the use of paper records, which pose significant privacy risks. For example, where a patient is receiving treatment in a hospital's emergency department for a chronic illness, the hospital may request from the patient's regular doctor information about the patient's clinical history which is likely to be faxed to the hospital. The fax might remain unattended on the fax machine for an extended period of time before being placed into the patient's file, or the information may be sent to the wrong fax number. Either of these things could lead to an interference with the patient's privacy should a third party read the unattended fax or incorrectly receive the fax. In contrast, under the My Health Record system, the patient's Shared Health Summary would be securely available only to those people authorised to see it. There are other similar scenarios where an increase in the level of use of the My Health Record system is likely to lead to a reduction in privacy breaches associated with paper based records.

In summary, the combination of opt-out trials, extensive information and strong personal controls mean that moving to opt-out participation arrangements for individuals is proportionate, necessary and reasonable for achieving the objective of improving health outcomes. Furthermore, increased registration with, and use of, the PCEHR system is likely to increase individuals' privacy, especially compared to existing paper based records that are still used to some degree by around two-thirds of healthcare providers.

#### *Civil penalties*

The eHealth Bill introduces further protection of an individual's health information contained in a My Health Record with the proposed introduction of further enforcement and penalty options if someone deliberately misuses the information or commits an act that may compromise the security or integrity of the system.

At present, the PCEHR Act contains a civil penalty regime for misuse of information, and the *Healthcare Identifiers Act 2010* (HI Act) contains a criminal regime. The eHealth Bill aligns the enforcement and sanction regimes under the two Acts to provide a more graduated and consistent framework for responding to inappropriate behaviour that is proportional to the severity of a breach.

Civil and criminal penalties are proposed for both Acts (up to a maximum of \$108,000 for individuals and \$540,000 for corporations for deliberate misuse of health information). Enforceable undertakings and injunctions will also be available.

The Committee has questioned whether the civil penalty provisions proposed by the eHealth Bill are criminal for the purposes of international human rights law and, if so, whether any limitation on the right to a fair hearing is justified.

The maximum civil penalty that can be imposed under the eHealth Bill is 600 penalty units. This penalty is justified because the My Health Record system stores the sensitive health information of many individuals. The amount of health information stored and the number of individuals whose records are stored would increase significantly under opt-out.

Penalty levels must provide an appropriate deterrent to misuse of sensitive health information. In addition, penalties need to be proportionate to the potential damage that might be suffered by individuals if the health information in their My Health Record is misused.

The civil penalty levels imposed under the eHealth Bill can be contrasted to the existing *Privacy Act 1988*:

- Under the eHealth Bill the maximum civil penalty is 600 penalty units for a misuse of sensitive health information;
- Under the Privacy Act there are significantly higher civil penalties of up to 2,000 penalty units for serious or repeated misuse of personal information. This is despite the fact that the information in question might not be sensitive health information and may only be less sensitive personal information.

Given that the civil penalties available under the Privacy Act are considered appropriate, it is most unlikely that lower penalties under the eHealth Bill would be considered criminal in nature or would limit the right to a fair trial, especially where the penalty regime imposed by the eHealth Bill is designed to protect significantly more sensitive health information than is generally the case under the Privacy Act.

In response to the Committee comments on the differential between the maximum civil penalty amount and the maximum criminal penalty amount, the eHealth Bill provides for a higher level of civil penalty (600 penalty units) compared to the maximum criminal penalty (120 penalty units) as it is not necessary to have the same levels for each. Imposition of a criminal conviction by a court has other implications that mean that higher penalty levels are not necessary to achieve the desired deterrent. For example, a criminal conviction may result in imprisonment (up to two years) or restrictions on an individual's ability to travel.

The Committee also commented on the reversal of the burden of proof in proposed new section 26 of the HI Act.

Proposed new subsections 26(3) and (4) provide exceptions to the prohibition against misusing healthcare identifiers and identifying information in subsection 26(1) of the HI Act. In doing so, subsections 26(3) and (4) reverse the burden of proof by providing that the defendant bears an evidential burden when asserting an exception applies. An evidential burden placed on the defendant is not uncommon. Similar notations to those used in the eHealth Bill exist in many other pieces of Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* – where a person has an evidential burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code).

In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the facts relating to each defence in proposed new subsections 26(3) and (4) of the HI Act are peculiarly within the knowledge of the defendant and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant.

A burden of proof that a law imposes on a defendant is an evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden. Proposed subsections 26(3) and (4) simply require a person to produce or point to evidence that suggests a reasonable possibility that exceptions in those provisions apply to the person.

I trust that this additional information will be sufficient to address the Committee's concerns.

Yours sincerely

**The Hon Sussan Ley MP**

**28 OCT 2015**



**Senator the Hon Marise Payne  
Minister for Defence**

Parliament House  
CANBERRA ACT 2600

Telephone: 02 6277 7800

MC15-002778

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

Dear Mr Ruddock *Philip*

Thank you for your letter of 18 August 2015 requesting further clarification of a matter in relation to the *Defence Legislation (Enhancement of Military Justice) Act 2015* (the Principal Act), which recently made various amendments to Defence legislation. I apologise for the delay in responding.

In paragraph 1.141 of its Human Rights Scrutiny Report of 18 August 2015, the Committee expressed the view that 'enabling the executive to terminate the appointments of the Chief Judge Advocate and judge advocates at any time gives rise to a perception that the system of military justice is not objectively independent'. Accordingly, the Committee seeks my advice as to whether:

- 'extending the appointments of the Chief Judge Advocate and judge advocates, and thereby extending the current system of military justice, limits the right to a fair hearing'; and
- the *Military Justice (Interim Measures) Act (No 1) 2009* 'should be amended to remove the power of the minister to unilaterally revoke the appointments of the Chief Judge Advocate and judge advocates'.

I note for the Committee's benefit that the previous minister recently appointed the full-time Judge Advocate to be the new Director of Military Prosecutions, so the Committee's concerns now only relate to the Chief Judge Advocate's (CJA) appointment.



While from one point of view the *Military Justice (Interim Measures) Act (No 1) 2009* (the Interim Measures Act) gives me the exercise of a broad power, which has the effect of terminating the CJA's appointment, I do not share the Committee's concern that I can terminate CJA's appointment for any reason, or that the existence of the power limits an accused person's right to a fair military trial. The power to prescribe a termination day under the Interim Measures Act is not unfettered, and could not legitimately be exercised for the purpose of attempting to influence the CJA in the performance of their official duties. Rather, the primary purpose of the termination power is merely to provide a mechanism to make changes which might be required if the current 'interim' system of military discipline was replaced with a new system, not to terminate the CJA's appointment per se.

The Interim Measures Act was enacted following the 2009 High Court decision in *Lane v Morrison* [2009] HCA 29, which declared the military court system to be unconstitutional. The Interim Measures Act reinstated the military tribunal system, which the High Court had declared in a series of cases before *Lane v Morrison* to be constitutional. This was done in order to sustain the military discipline system until such time as the Parliament decided how to address the issue of the trials of serious service offences. It was originally envisaged that the Interim Measures Act would operate for a period of no more than two years.

The Interim Measures Act was amended by the *Military Justice (Interim Measures) Amendment Act 2011* (the first Amending Act) by the then Labor Government when it became clear, as the then Minister for Defence indicated in his Second Reading Speech, that a permanent solution to the issue may not be enacted before the expiration of the Interim Measures Act. The Government extended the operation of the Interim Measures Act by amending Schedule 3 to it, so as to provide that the appointment, remuneration and entitlement arrangements for the CJA and other Judge Advocates continued unchanged for another two years. Additionally, the Interim Measures Act was amended to provide that the Minister may declare in writing a specified day to be the 'termination day' for the purposes of the Schedule to cease the operation of the Act (the termination power).

Further two-year extensions to the Interim Measures Act were enacted by the *Military Justice (Interim Measures) Amendment Act 2013* (the second Amending Act), by the then Labor Government, and, again more recently, by the Principal Act, by the current Government. As the previous minister indicated in his Second Reading Speech to the Principal Act, it was necessary to extend the CJA's and then the full-time Judge Advocate's appointments so that the superior tribunal system could continue while the Government considered further reforms to the military discipline system. I note that each extension has retained the termination power.

The Explanatory Memorandum to the first Amending Act indicated that the termination power was inserted to provide the Government of the day with an expedient mechanism to end the interim superior service tribunal system on commencement of the replacement system. In particular, paragraph 17 of the Explanatory Memorandum explained that the 'termination day is likely to be the day upon which a permanent solution to the trial of serious service offences is implemented'.

The exercise of the termination power would not simply terminate the CJA's appointment. Rather, as the Explanatory Memoranda to the first Amending Act and the Principal Act explain, the exercise of the power would symbolically and practically bring an end to the interim disciplinary arrangements. Accordingly, the primary purpose of the termination power is to allow a single deemed statutory appointment to be brought to an end as a necessary and incidental consequence of Parliament replacing the interim arrangements with an enduring military discipline system. Considered in this way, the termination power is designed to terminate the interim arrangements, not the CJA's appointment per se.

Moreover, the exercise of the termination power is not unfettered and cannot be arbitrarily used to terminate the CJA's appointment. Like most statutory powers, the termination power cannot be exercised for an improper purpose. The termination power cannot be used by me to influence the CJA in the performance of their duties. Any attempt to use the termination power in this way could of course be impugned on the basis of having been used for an improper purpose. For example, in such circumstances, the CJA could seek judicial review of the exercise of the termination power under section 75(v) of the *Constitution* or section 39B of the *Judiciary Act 1903*.

I advise the Committee that for these reasons the extension of the CJA's appointment through the Principal Act does not affect or limit an accused person's right to a fair military trial and, accordingly, there is no need to amend the Interim Measures Act.

I reiterate the previous minister's concluding remark in his Second Reading Speech on the Principal Act that the Government is committed to modernising the military discipline system. I expect to inform the Parliament of our policy in relation to the future of the superior service tribunal system at an appropriate time during the term of this Government.

Yours sincerely

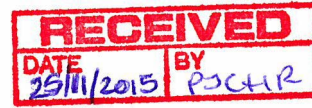
**MARISE PAYNE**



## The Hon Jamie Briggs MP

Assistant Minister for Infrastructure  
and Regional Development  
Member for Mayo

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PDR ID: MC15-004125

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



Dear Mr Ruddock *Philip*

Thank you for your letter about the Norfolk Island Legislation Amendment Bill 2015 (the Bill).

The Bill was passed by both Houses of Parliament on 14 May 2015 and the *Norfolk Island Legislation Amendment Act 2015* (the Act) received the Royal Assent on 26 May 2015. The purpose of the Act is to extend the mainland social security, immigration and health arrangements to Norfolk Island from 1 July 2016.

I note the Parliamentary Joint Committee on Human Rights' comments in relation to Australian permanent resident New Zealand citizens living on Norfolk Island being ineligible for social security benefits.

The exclusion of this category of permanent residents from social security benefits is not consistent with the Australian Government's policy. The Department of Infrastructure and Regional Development is working with the Department of Social Services to develop an amendment to the Act to ensure New Zealand citizens living on Norfolk Island enjoy the same access to social security benefits as New Zealand citizens living on the Australian mainland.

I will bring forward to the Parliament during its Autumn 2016 Sittings a Bill that will, amongst other Norfolk Island reforms, amend the social service arrangements.

I trust this information will be of assistance

Yours sincerely *All my best,*

**Jamie Briggs**

**18 SEP 2015**



**Senator the Hon Michaelia Cash**  
Minister for Employment  
Minister for Women  
Minister Assisting the Prime Minister for the Public Service

Reference: MB15-000212

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

Dear Chair

**Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance)  
Bill 2015**

Thank you for your letter of 13 October 2015 concerning the Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 (the Bill). I trust that the following advice will provide assurance to the Committee on the compatibility of the Bill with international human rights law.

*Suspension of benefits for inappropriate behaviour*

The Bill will introduce measures to ensure that job seekers who behave inappropriately at appointments may be subject to the same penalties as job seekers who fail to attend those appointments. This is not a unique proposal. Rules allowing penalties to be applied to job seekers who commit misconduct at activities and job interviews were introduced into the compliance framework in 2009. Administrative data indicates that misconduct at activities amounts to around 1 per cent of all failures related to activities.

This measure aims to apply similar rules for appointments that job seekers are required to undertake with their employment service providers or other organisations. Qualitative analysis of feedback from providers has indicated that inappropriate behaviour is a recurring issue and providers have requested increased scope to manage this behaviour. As providers are not currently required to report on the issue, precise data on the number of instances is not available.

This measure is aimed at achieving the legitimate objective of assisting job seekers into employment. Job seekers who prevent the purpose of provider appointments from being achieved by behaving inappropriately impede this objective by purposefully refusing support from providers intended to assist them to move off welfare payments and increase their chances of becoming productive participants in the workforce. Misconduct at appointments is also problematic due to the wasted tax payer resources involved in preparing for and conducting provider appointments that cannot be carried out.

The Bill clearly states that the inappropriate behaviour must be of a nature that prevents the purpose of the appointment being achieved. Further details of what constitutes inappropriate behaviour are not defined in primary legislation, but will be included in a legislative instrument that will be subject to parliamentary scrutiny. This will provide statutory guidance to decision makers and ensure that decisions related to inappropriate behaviour are not left entirely to the discretion of the provider.

As is currently the case with all compliance penalties, employment service providers will have full discretion not to report a job seeker's non-compliance to the Department of Human Services, if the provider believes it will not assist in ensuring the job seeker's future engagement.

Where a provider does recommend a payment suspension, a job seeker will be able to have this lifted and receive full-back pay by attending a further appointment and behaving appropriately. Alternatively, if the job seeker feels the suspension was unjustified, he or she may request that the Department of Human Services review the decision.

If the provider recommends a financial penalty, the penalty will not be applied until a review has been conducted by the Department of Human Services. The review process includes contacting the job seeker and discussing the circumstances of the failure with them. Under subsection 42SC(2) of the *Social Security Administration Act 1991* (the Act), no financial penalty may be applied where the job seeker had a reasonable excuse for the inappropriate behaviour. Details of what constitutes a reasonable excuse are included in the Social Security (Reasonable Excuse – Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1).

The application of the reasonable excuse provisions in this measure will ensure that vulnerable job seekers are not penalised for actions that are beyond their control or are a direct consequence of their vulnerability. For example, if a job seeker's behaviour was due to a psychological or psychiatric condition, or because he or she was unable to understand a provider's instructions, no penalty will apply. This process is consistent with all financial penalties that job seekers may incur under the current compliance framework.

Job seekers who do incur financial penalties can limit the extent of the penalty by prompt reengagement with their providers. The ability of job seekers to minimise the impact of suspensions or financial penalties simply by attending a further appointment and behaving appropriately ensures that penalties are applied proportionately to job seekers who decide to meet their requirements.

Statutory protections will ensure this measure is applied fairly. If a further appointment cannot be undertaken within two business days of the job seeker attempting to reengage, the payment suspension and financial penalty period is ended immediately under subsection 42SA(2AA) of the Act. Job seekers who have a reasonable excuse for not being able attend the further appointment will also have their payment suspension and financial penalty period ended immediately.

#### Removal of waivers for failing to accept a suitable job

As noted in the explanatory memorandum, a range of protections exist to ensure job seekers who refuse offers of work for legitimate reasons are not subject to penalties, including through the definitions of 'suitable work' and 'reasonable excuse' set out in subordinate legislation. These safeguards take effect before waivers are considered; that is, only job seekers who have refused work without good reason may be granted waivers.

Waivers may currently be granted if job seekers agree to undertake an additional compliance activity or if the job seeker may face financial hardship. Waivers that are granted to job seekers who agree to undertake an additional compliance activity are not based on an assessment of the job seeker's circumstances, as job seekers who had a genuine reason for refusing an offer of work will not be subject to a penalty in the first instance.

In 2014–15, 96 per cent of waivers for penalties incurred for refusing an offer of suitable work were granted because the job seekers agreed to undertake an additional compliance activity. This strongly suggests that the high rate of waivers is a result of the legislation requiring the waiver to be granted, rather than the waivers being granted for a legitimate reason related to the circumstances of the job seeker.

In practice, the additional compliance activities job seekers agree to undertake are substantially similar to a job seeker's existing requirements. In many cases, the additional activities do not substantially alter a job seeker's requirements as job seekers can satisfy the requirements by undertaking a few extra hours of activity. Consequently, by securing a waiver for a serious failure through a compliance activity, job seekers are able to refuse employment without any major changes to their activity requirements to reflect the gravity of their serious failure. This has encouraged abuse of the system.

In 2008–09, the year before waiver provisions were introduced to the legislation, there were 644 serious failures for refusing or failing to accept suitable work. In 2014–15, there were 1,412 such failures (although 73 per cent were granted waivers). This increase of 119 per cent in job seekers refusing work without good reason cannot be attributed to any comparable change in the size of the activity-tested job seeker population or increase in the number of jobs being offered—it appears to be a direct result of the leniency of the waiver provisions. The waivers have essentially enabled some job seekers to reject suitable work with impunity as the resulting serious failure they will incur can be waived. Removing the waivers, therefore, can reasonably be expected to reduce the instances of job seekers refusing suitable work, allowing more job seekers to gain employment and reduce their reliance on income support.

I trust this information addresses the committee's concerns.

Yours sincerely

Senator the Hon Michaelia Cash

2 November 2015

## **Appendix 2**

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### **Guidance Note 1 and Guidance Note 2**





## GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

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*This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.*

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### Background

#### *Australia's human rights obligations*

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

#### *Civil and political rights*

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

## ***Economic, social and cultural rights***

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

### **Limiting a human right**

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.<sup>1</sup> For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

#### ***Prescribed by law***

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

#### ***Legitimate objective***

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.<sup>2</sup>

#### ***Rational connection***

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

#### ***Proportionality***

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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<sup>1</sup> Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

<sup>2</sup> For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

### ***Retrogressive measures***

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

### **The committee's approach to human rights scrutiny**

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*, may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

### **The committee's expectations for statements of compatibility**

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department.<sup>3</sup>

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

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<sup>3</sup> The Attorney-General's Department guidance may be found at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role>

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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## GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

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*This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.*

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### Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).<sup>1</sup>

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.<sup>2</sup>

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.<sup>3</sup> However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

### Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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<sup>1</sup> For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>.

<sup>2</sup> The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

<sup>3</sup> See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

### ***Strict liability and absolute liability offences***

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

### ***Mandatory minimum sentencing***

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).<sup>4</sup> Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

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<sup>4</sup> See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, [522]* (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.<sup>5</sup>

### ***Civil penalty provisions***

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.<sup>6</sup> This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if:

- a) the purpose of the penalty is to punish or deter; **and**
- b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

**Note:** even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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<sup>5</sup> This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

<sup>6</sup> The UN Human Rights Committee, while not providing further guidance, has determined that civil penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).



### ***When a civil penalty provision is 'criminal'***

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

#### ***a) Classification of the penalty under domestic law***

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

#### ***b) The nature of the penalty***

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

#### ***c) The severity of the penalty***

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

### ***The consequences of a conclusion that a civil penalty is 'criminal'***

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

### ***Criminal process rights and civil penalty provisions***

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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