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.

Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015

Sponsors: Senators Leyonhjelm and Day
Introduced: Senate, 13 August 2015

Purpose

2.3 The Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015 (the bill) seeks to amend the *Fair Work Act 2009* to exclude employers in the restaurant and catering, hotel, and retail industries which employ fewer than 20 employees from being required to pay penalty rates under an existing or future modern award unless:

- the work is in addition to ten hours of work in a 24 hour period; or
- the work is on a public holiday; or
- the work is on a weekend and in addition to 38 hours of work over the relevant week.

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

Background

2.5 The committee previously considered the bill in its *Twenty-seventh Report of the 44th Parliament* (previous report) and requested further information from the legislation proponent as to the compatibility of the bill with the right to just and favourable conditions of work, right to an adequate standard of living and right to equality and non-discrimination.[1]

Removal of penalty rates in certain circumstances

2.6 Most employees in Australia have their minimum wages and conditions set by awards, though other instruments such as individual contracts or enterprise agreements often provide additional wages and conditions above the minimum conditions established in awards. Penalty rates generally apply to non-standard

1 Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament* (17 September 2015) 8-15.

hours of work (such as weekend and night work), overtime and work on public holidays.

2.7 As set out above, this bill would exempt small business employers (with fewer than 20 employees) in the restaurant and catering, hotel, and retail industries from being required to pay penalty rates under an existing or future modern award unless certain conditions are met. Awards will be allowed to include penalty rates provisions for work: in addition to ten hours of work (in a 24 hour period); on a weekend but only if the work is in addition to 38 hours in the week; and on a public holiday.

2.8 The bill engages and may limit the right to just and favourable conditions of work, as the changes to penalty rates for non-standard work hours (such as weekend and night work) may reduce the take home pay of individuals in those industries.

2.9 In reducing the income of some of the lowest paid employees in Australia, the measure also engages and may limit the right to an adequate standard of living.

2.10 In addition, the measure engages and may limit the right to equality and non-discrimination. In particular, the measure may constitute indirect discrimination on the basis of gender and age, as women and young people are disproportionately represented in the affected industries.

Right to just and favourable conditions of work

2.11 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2]

2.12 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right;

2 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 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 and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

- 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.

2.14 The right to work may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Compatibility of the measure with the right to just and favourable conditions of work

2.15 The statement of compatibility for the bill acknowledges that the measure engages the right to work and rights in work but states that the bill does not limit the right of employees to earn either fair wages or equal remuneration.[3] However, the statement of compatibility does not directly address the limitation on the right to just and favourable conditions of work.

2.16 The statement of compatibility states that the bill is 'intended to support and encourage greater employment within small businesses'. The statement of compatibility does not outline how this measure pursues a legitimate objective for the purposes of international human rights law; nor has it demonstrated that the measure is rationally connected to that objective.

2.17 The statement of compatibility has also not demonstrated that the measure is proportionate to its stated objective (that is, that it is the least rights restrictive means of achieving that objective). The committee considered in its previous analysis that there is likely to be a less rights restrictive alternative to achieving the stated objective of the bill, such as wage subsidies or incentive payments for hiring eligible job seekers.

2.18 The committee therefore sought the advice of the legislation proponents 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; there is a rational connection between the limitation and that objective; and the limitation is a reasonable and proportionate measure for the achievement of that objective.

Right to an adequate standard of living

2.19 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.

2.20 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to

3 Explanatory Memorandum (EM), Statement of Compatibility (SOC) 5.

ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living.

Compatibility of the measure with the right to an adequate standard of living

2.21 The committee previously noted that employees in the restaurant and catering, hotel and retail industries have the lowest average full time weekly earnings in Australia, and employees in these industries are likely to be reliant on the conditions in awards.[4]

2.22 The changes in the payment of penalty rates proposed by the bill has the potential to have a sizeable impact on the wages earnt by the affected low paid employees, particularly existing employees who may have structured their work patterns according to the available wages and penalty rates. It is also possible that penalty rates have been part of the overall wage packages in such industries, and average wage rates would have been higher if penalty rates were lower (or zero).

2.23 As the statement of compatibility does not identify the measure as limiting the right to an adequate standard of living in this way, no justification for the limitation is provided.

2.24 The committee therefore sought the advice of the legislation proponent 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; there is a rational connection between the limitation and that objective; and the limitation is a reasonable and proportionate measure for the achievement of that objective.

Right to equality and non-discrimination

2.25 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).

2.26 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.

2.27 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[5] which has either the purpose (called

4 Australian Bureau of Statistics 2015, *Average Weekly Earnings, Australia, May 2015*, Cat. No. 6302.0, released 13 August 2015.

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.

'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[6] 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.[7]

2.28 In addition to the articles on non-discrimination in the ICCPR and CEDAW, article 2(2) of the ICESCR guarantees the right to equality and non-discrimination in the exercise of economic, social and cultural rights, including the right to earn fair wages or equal remuneration sufficient to earn a decent living in article 7 of the ICESCR.

2.29 Articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the rights to equality for women.

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

2.30 The measure engages and may limit the right to equality and non-discrimination because of the possibility of indirect discrimination on the basis of gender or age.

2.31 Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. However, under international human rights law such a disproportionate effect may be justifiable.

2.32 The committee previously noted that the majority of employees in the restaurant and catering, hotel and retail industries are female, and more women in these industries work part-time than full-time.[8] Given the low base wage for these industries, women who work part-time are possibly more reliant on penalty rates to supplement their base wage. The changes to penalty rates may possibly have a disproportionate impact on women.

2.33 Employees in the restaurant and catering, hotel and retail industries are also likely to be younger on average and award reliant.[9] Minimum wage jobs are often entry level, with a much higher reliance on minimum wage jobs observed among employees aged less than 20 years (25 per cent of employees) and between 21 to 24 years (14 per cent of employees) compared with those aged 25 to 54 (roughly 5 per

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

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

8 Australian Bureau of Statistics 2015, *Labour Force, Australia, Detailed, Quarterly, May 2015*, Cat. No. 6291.0.55.003, released 18 June 2015.

9 Australian Bureau of Statistics 2014, *Employee Earnings and Hours, Australia, May 2014*, Cat. No. 6306.0, released 22 January 2015.

cent).[10] Therefore the changes to penalty rates may possibly have a disproportionate impact on young people.

2.34 As the statement of compatibility does not identify the measure as limiting the right to equality and non-discrimination in this way, no justification for the limitation is provided.

2.35 The committee therefore sought the advice of the legislation proponent 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; there is a rational connection between the limitation and that objective; and the limitation is a reasonable and proportionate measure for the achievement of that objective.

Legislation proponent's response

> Thank you for your letter of 8 September regarding your committee's report on the *Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015*, which I introduced with Senator Day.
>
> In your report you state that my Bill 'limits the right to just and favourable conditions of work', 'limits the right to an adequate standard of living', and represents 'indirect discrimination against women and young people'.
>
> As outlined in my explanatory memorandum, my bill 'only affects the circumstances in which certain employers will be required to pay penalties above the base wage'. This means you are effectively arguing that the base wages in the affected industries do not constitute just and favourable conditions of work, do not provide an adequate standard of living, and represent discrimination against women and young people.
>
> For you to make this extraordinary argument, you presumably have a view as to the minimum base rate in the affected industries that constitutes just and favourable conditions of work, provides an adequate standard of living, and avoids discrimination against women and young people. Please advise what this wage rate is.
>
> Given the negative relationship between regulated wages and employment, as outlined by the Shadow Assistant Treasurer in the *Australian Economic Review* in March and June 2004, I also invite you to indicate how much unemployment would be created by a requirement to pay this wage rate. Further, please advise whether the unemployment created would include women and young people.
>
> I note that governments in many developed countries do not impose base rates of pay, below which it is illegal to employ people. Governments that do impose such base rates generally set them at levels well below those in

10 Productivity Commission, *Workplace Relations Framework*, Draft Report, August 2015, p. 315 based on Australian Bureau of Statistics 2014, *Microdata: Employee Earnings and Hours, Australia, May 2014*, Cat. No. 6306/0/55/001, released 11 June 2015.

> Australia. Base rates of pay in Australia are many multiples above the level of NewStart. Moreover, there is no bar on negotiating higher wages through enterprise bargaining.
>
> Your report goes on to state 'the committee considers that there is likely to be a less rights restrictive alternative to achieving the stated objectives of the bill, such as wage subsidies or incentive payments for hiring eligible job seekers'.
>
> This appears to reflect a desire by the committee to impose costs on the taxpayer, and to define human rights as an entitlement to other people's money (such as a right to social security) rather than the right of an individual taxpayer to retain his or her property. It would be helpful if you could confirm whether this understanding is accurate and to comment on its general applicability.
>
> I have copied this letter to Peter Harris AO, the Chairman of the Productivity Commission, as I anticipate he may be interested in hearing your view that a proposal to reduce penalty rate requirements in certain industries - a proposal very similar to a recommendation in the Commission's draft report on the workplace relations framework - represents a violation of human rights.
>
> He may also be interested in your committee's statement that 'employees in these industries often have little bargaining power over the conditions of their employment' - a statement apparently in conflict with the aforementioned draft report. I encourage you to outline to Mr Harris any concerns you have with the Commission's draft report.
>
> Finally, I have copied this letter to Coalition Senators on the committee, Senators Canavan and Smith, to draw attention to the statements published in their name. I have also copied this letter to the Minister for Employment, Senator the Hon Michaelia Cash, and to the Bill's cosponsor, Senator Bob Day.[11]

Committee response

2.36 **The committee thanks Senator Leyonhjelm for his response**.

2.37 The committee notes that Australia has voluntarily accepted obligations under the seven core UN human rights treaties and that the committee's role is to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations. These obligations include the right to just and favourable conditions of work and the right to an adequate standard of living under articles 6(1), 7 and 8(1)(a) and 11(1) of the ICESCR.

2.38 As set out in the committee's initial analysis, the bill engages the right to just and favourable conditions of work as the changes to penalty rates for non-standard

11 See Appendix 1, Letter from Senator David Leyonhjelm, to the Hon Philip Ruddock MP (dated 19 October 2015) 1-2.

work hours may reduce the take home pay of individuals in those industries. In reducing the income of some of the lowest paid employees in Australia, the measure also engages the right to an adequate standard of living. Further, the measure engages the right to equality and non-discrimination (indirect discrimination) on the basis of gender and age, as women and young people are disproportionately represented in the affected industries.

2.39 The legislation proponent's response does not provide advice on the compatibility of the bill with the right to just and favourable conditions of work, right to an adequate standard of living and right to equality and non-discrimination.

2.40 The committee's usual expectation where a measure limits a human right is that the statement of compatibility provides reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. 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**.**

2.41 Accordingly, the committee encourages the legislation proponents to consult the committee's Guidance Note 1 which provides more information as to the role of the committee in scrutinising legislation for compatibility with Australia's international human rights obligations and guidance on how statements of compatibility may be prepared.

2.42 On the information provided, the committee considers that the bill is likely to be incompatible with the right to just and favourable conditions of work, the right to an adequate standard of living and the right to equality and non-discrimination.

Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014

Portfolio: Attorney-General
Introduced: House of Representatives, 30 October 2014

Purpose

2.43 The Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (the bill) amended the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) to introduce a mandatory data retention scheme. This scheme requires service providers to retain types of telecommunications data under the TIA Act for two years. The bill also provided that:

- mandatory data retention would only apply to telecommunications data (not content);
- mandatory data retention would be reviewed by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) three years after its commencement;
- the Commonwealth Ombudsman would have oversight of the mandatory data retention scheme and, more broadly, the exercise by law enforcement agencies of powers under chapters 3 and 4 of the TIA Act; and
- the number of agencies which would be able to access the data would be confined.

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

Background

2.45 The committee first commented on the bill in its *Fifteenth Report of the 44th Parliament*, and requested further information from the Attorney-General as to whether the bill was compatible with the right to privacy, the right to freedom of opinion and expression and the right to an effective remedy.[1]

2.46 The committee considered the Attorney-General's response in its *Twentieth Report of the 44th Parliament*, and concluded its consideration of most of the measures contained within the bill.[2] As the Attorney-General in his response did not address the committee's concerns in regard to the right to an effective remedy, the committee sought further advice from the Attorney-General in order to complete its consideration of this matter.

1 Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (14 November 2014) 10-22.

2 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 39-74.

2.47 The bill passed both Houses of Parliament on 26 March 2015 and received Royal Assent on 13 April 2015.

Mandatory data retention scheme—right to an effective remedy

2.48 Under the scheme, data is retained and can subsequently be accessed without the user or individual ever being informed. The committee considered in its previous analysis that the measure engages and may limit the right to an effective remedy.

Right to an effective remedy

2.49 Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires state parties to ensure access to an effective remedy for violations of human rights. State parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, state parties may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

2.50 State parties are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations.

2.51 Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of person including, and particularly, children.

Compatibility of the measure with the right to an effective remedy

2.52 The committee's initial analysis noted that the right to an effective remedy would be supported by a notification requirement. This is because, for example, it would be impossible for an individual to seek redress for breach of their right to privacy if they did not know that data pertaining to them had been subject to an access authorisation.

2.53 The committee noted that the Attorney-General's response provided a range of information regarding remedies that may be available in relation to misuse of telecommunications data. However, the response did not directly address how and whether there are sufficient mechanisms to seek redress for a violation of the right to privacy or the right to freedom of opinion and expression in circumstances where a person is not aware that their telecommunications data has been accessed.

2.54 The committee therefore reiterated its request for the advice of the Attorney-General as to what measures there are to ensure that there are effective remedies available to individuals for any breaches that may occur of the right to

privacy or the right to freedom of association (which should have read freedom of expression) as a result of the mandatory data retention regime.

Attorney-General's response

The Data Retention Bill passed both Houses of Parliament on 26 March 2015 and received Royal Assent on 13 April 2015. The Act now incorporates a number of features which respond to concerns raised by the Committee which I have highlighted below. In a number of respects, the views of the Government continue to depart from those of the Committee or its members. I have sought to explain the Government's reasoning in relation to those matters.

I would like to thank the Committee for its constructive contribution to the robust public debate on the data retention legislation. I am confident that the Act properly balances the need to retain data to underpin the efforts of agencies to protect the community with appropriate privacy protections and strong oversight arrangements.

Data set to be retained

Consistent with the Committee's view that the data set to be retained should be detailed in primary rather than delegated legislation, section 187 AA of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (the Data Retention Act) now specifies the information or documents that service providers must retain. Any amendments to the data set must be referred to the Parliamentary Joint Committee on Intelligence and Security for review.

Definition of content

The Data Retention Act does not define content. I acknowledge the Committee's view that an exclusive definition of the term 'content' may not be required where the data set is set out in the primary legislation, as is now the case. As detailed in my earlier submission to the Committee, defining the types of data to be retained under the data retention scheme is more privacy protective than defining 'content'. The risk in defining 'content' is that any new types of information that emerge as a result of rapid technological change would fall outside the defined list. They would then be excluded from the meaning of content and the protections that apply to it.

The data set included in the Data Retention Act specifically excludes information that is the content or substance of a communication. In particular, paragraph 187 A(4)(b) provides that service providers are not required to retain information that details an address to which a communication was sent that was obtained by the carrier only as a result of providing a service for internet access. This provision ensures that service providers are not required to keep records of the uniform resource locators (URLs), internet protocol (IP) addresses and other internet

identifiers with which a person has communicated via an internet access service provided by the service provider.

Privacy protections

The Government maintains the view that access to telecommunications data should not be limited to investigations of complex or serious crimes, specific serious threats or the investigation of serious matters. Applying different timeframes to data access based on offence types would introduce a layer of complexity and inconsistency of application that would affect the efficacy of the data retention regime as a whole.

The various elements of the data set are relevant to all investigations; not just investigations of the most serious offences. Subscriber information, such as name and address information, is often the first source of lead information for further investigations, helping to identify potential suspects and to indicate whether an offence has been committed and the nature of that offence. Historical data also provides critical evidence needed to demonstrate to a court that the elements of a particular offence have been met, including whether a person communicated with a particular individual or organisation.

Rather than limit the range offences for which data can be accessed, the Act includes a range of additional privacy protections. Section 180F of the *Telecommunications (Interception and Access) Act 1979* has been amended to include a more stringent requirement that authorising officers be satisfied on reasonable grounds that the particular disclosure or use of telecommunications data being proposed is proportionate to the intrusion into privacy. In making a decision, authorised officers are required to consider the gravity of the conduct being investigated, including whether the investigation relates to a serious criminal offence.

The Data Retention Act will also restrict access to data to specified criminal law-enforcement agencies and to authorities or bodies declared to be an enforcement agency. The changes to the definition of 'enforcement agency' mean that access to retained data is limited to interception agencies, the Department of Immigration and Border Protection, the Australian Securities and Investments Commission, and the Australian Competition and Consumer Commission. Any permanent addition to the list of criminal law-enforcement agencies or enforcement agencies must be effected by legislative amendments and referred to the Parliamentary Joint Committee on Intelligence and Security for inquiry. Any Ministerial declaration to temporarily declare an additional enforcement agency will cease to have effect 40 sitting days after the declaration comes into force.

The Data Retention Act also includes significant new oversight requirements by the Commonwealth Ombudsman, accompanied by extensive additional record-keeping and annual reporting.

Section 182 of the *Telecommunications (Interception and Access) Act 197*9 also makes it an offence for a person to use or to disclose

telecommunications data where the use or disclosure is not 'reasonably necessary' for the enforcement of the criminal law, a law imposing a pecuniary penalty or the protection of the public revenue. The improper use or disclosure of telecommunications data is a criminal offence punishable by up to two years imprisonment.

Destruction requirements

The Committee also expressed concern about the lack of specific destruction requirements in relation to data accessed under the *Telecommunications (Interception and Access) Act 1979*. The Parliamentary Joint Committee on Intelligence and Security also considered this issue and recommended that my Department review the adequacy of the existing destruction requirements that apply to information and documents accessed under Chapter 4 of the Act and report back by 1 July 2017. The Government has agreed that the Department will conduct this review.

Legal professional privilege

I acknowledge the Committee's response that the proposed data retention scheme will protect legal professional privilege. I note that some Committee members consider that legal professional privilege would be assured only if the legislation includes a non-exclusive definition of the type of data that constitutes 'content' for the purposes of the scheme. As discussed above, the Data Retention Act does not define the term 'content'. However, the data set clearly excludes information that is the content or substance of a communication. As legal professional privilege attaches to the content of communications, rather than to the fact or existence of those communications, the Data Retention Act in no way undermines legal professional privilege.

Independent authorisations or warrants to access to data

I note that while the majority of the Committee considers that the existing authorisation requirements provide sufficient safeguards to address privacy concerns, some Committee members recommend that access to retained data be granted only on the basis of prior independent authorisation.

The introduction of a warrant process (Judicial or ministerial) for access to telecommunications data would significantly impede the operational effectiveness of agencies. However, the Government has acknowledged that specific public interest issues associated with the identification of confidential journalists' sources and amended the Data Retention Bill to introduce a journalist information warrant regime. The Act prohibits agencies that do not have a warrant from authorising the disclosure of a journalist's or their employer's telecommunications data for the purposes of identifying a journalist's confidential source.

Notification

The Data Retention Act does not include a requirement for agencies to notify individuals about access to or proposed access to their telecommunications data. The covert investigative powers contained in the *Telecommunications (Interception and Access) Act 1979* are generally used where the integrity of an investigation would be compromised by revealing its existence.

Remedies

The Data Retention Act provides that the *Privacy Act 1988* applies in relation to service providers to the extent that the activities of the service provider relate to retained data. The effect of this requirement is that the Privacy Act and the Australian Privacy Principles (APPs) will apply to all service providers as though they were 'organisations', including service providers that would otherwise be exempt from the Privacy Act under the 'small business operator' exemptions in the Privacy Act.

In particular, service providers will be required to comply with the information security obligations contained in APP 11.1 in relation to all retained data, and will be required to de-identify or destroy retained data at the end of the retention period (except as allowed by APP 11.2). Individuals will also be able to request access to their personal retained data in accordance with APP 12, removing any uncertainty about whether particular types of retained data are personal information.

Privacy protection will be further enhanced by the Data Retention Act through requirements that service providers protect and encrypt telecommunications data that has been retained for the purposes of the mandatory data retention scheme. Encryption will supplement the existing information security obligations under the Privacy Act and the Telecommunications Consumer Protection Code. The Government has also agreed to introduce legislation to enact a mandatory data breach notification scheme.

Conclusion

The Data Retention Act contains a number of additional safeguards that engage and promote privacy rights and the right to freedom of expression while ensuring that the Government meets its obligations under Articles 6 and 9 of the *International Covenant on Civil and Political Rights* to protect the life and physical security of individual Australians.[3]

Committee response

2.55 **The committee thanks the Attorney-General for his response, and for providing additional information regarding amendments that were made to the bill before it passed both Houses of Parliament**. The committee notes that its remaining

3 Appendix 1, Letter from Senator the Hon. George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 17 September 2015) 1-4.

question for the Attorney-General related solely to whether the legislation was compatible with the right to an effective remedy. As such, though it appreciates this additional information it makes no further comment on it.

2.56 The committee notes the Attorney-General's advice that the government has agreed to introduce legislation to enact a mandatory data breach notification scheme, and notes that the Attorney-General has stated elsewhere the government intends to introduce such a scheme by the end of 2015 in response to the recommendations of the PJCIS.[4]

2.57 The committee also notes the Attorney-General's advice that the privacy principles will apply to all service providers, requiring them to comply with the *Privacy Act 1988* (the Privacy Act). The committee notes that there are a range of enforcement mechanisms available under the Privacy Act.

2.58 The committee considers that a mechanism that ensures that individuals are notified when their telecommunications data has been accessed (noting that there may be circumstances where such notification would need to be delayed to avoid jeopardising any ongoing investigation) is essential to ensuring persons are able to exercise their right to effective review.

2.59 The committee welcomes the Attorney-General's advice that legislation regarding a mandatory data breach notification scheme will be introduced. Depending on the extent of such a notification scheme, this may address many of the committee's concerns as to whether a person would be able to seek redress for any breach of their right to privacy and right to freedom of expression. The committee notes that as the bill has now been enacted and is in force this commitment should be implemented expeditiously. The committee will assess any such legislation to determine whether the forthcoming legislation will address the committee's concerns.

4 See also the Attorney-General's response to Recommendation 38 of the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (27 February 2015) at: http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/Government-Response-To-Committee-Report-On-The-Telecommunications-Interception-And-Access-Amendment-Data-Retention-Bill.aspx.

Family Assistance (Public Interest Certificate Guidelines) Determination 2015 [F2015L01269]

Paid Parental Leave Amendment Rules 2015 [F2015L01266]

Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 [F2015L01267]

Student Assistance (Public Interest Certificate Guidelines) Determination 2015 [F2015L01268]

Portfolio: Social Services
Authorising legislation: A New Tax System (Family Assistance) (Administration) Act 1999; *Paid Parental Leave Act 2010*; *Social Security (Administration) Act 1999*; *and Student Assistance Act 1973*
Last day to disallow: 15 October 2015 (House and Senate)

Purpose

2.60 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015; the Paid Parental Leave Amendment Rules 2015; the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015; and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015 (the determinations) either amend or remake existing instruments relating to the issuing of public interest certificates.

2.61 Under legislation relating to payments for family assistance, social security, student assistance and paid parental leave it is an offence to make an unauthorised use of personal information obtained under the legislation; and officers are not required to disclose information or documents to any person, except for the purposes of the relevant law they are administering.[1]

2.62 However, the Secretary (or delegate) of the Department of Social Services or the Department of Human Services may certify that it is necessary in the public interest to disclose such information in a particular case or class of case. In doing so, the secretary must act in accordance with guidelines made under the relevant Act.[2] These determinations set out the guidelines for the exercise of this power.

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

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1 See sections 164 and 167 of the *A New Tax System (Family Assistance) (Administration) Act 1999*; sections 204 and 207 of the *Social Security (Administration) Act 1999*; sections 353 and 354 of the *Student Assistance Act 1973*; and sections 129 to 132 of the *Paid Parental Leave Act 2010.*

2 Section 168 of the *A New Tax System (Family Assistance) (Administration) Act 1999*; section 208 of the *Social Security (Administration) Act 1999*; section 355 of the *Student Assistance Act 1973* and section 128 of the *Paid Parental Leave Act 2010.*

Background

2.64 The committee previously considered the 2015 Guidelines in its *Twenty-eighth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Social Services as to the compatibility of the determinations with the right to privacy and the rights of the child.[3]

Disclosure of personal information

2.65 As set out above, the determinations prescribe particular circumstances when a public interest certificate may be issued. They provide that the secretary may issue the certificate if:

- the information cannot reasonably be obtained from a source other than a department;
- the person to whom the information will be disclosed has a sufficient interest in the information (being a genuine and legitimate interest); and
- the secretary is satisfied that the disclosure is for at least one of a number of specified purposes.[4]

2.66 The purposes for which personal protected information can be disclosed include:

- for the enforcement of laws;
- if necessary for the making of (or supporting or enforcing) a proceeds of crime order;
- to brief a minister;
- to assist with locating a missing person or in relation to a deceased person;
- for research, statistical analysis and policy development;
- to facilitate the progress or resolution of matters of relevance within departmental portfolio responsibilities;
- to a department or other authority of a state or territory, or an agent or contracted service provider of a department or authority, if the information is about a public housing tenant (or applicant), or is necessary to facilitate income management measures; and
- to ensure a child is enrolled in or attending school, or to meet or monitor infrastructures and resource needs in a school.[5]

3 Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 3-9.

4 See section 7 of the Family Assistance (Public Interest Certificate Guidelines) Determination 2015; section 7 of the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015; section 7 of the Student Assistance (Public Interest Certificate Guidelines) Determination 2015; and section 4 of the Paid Parental Leave Rules 2010.

2.67 The issuing of public interest certificates to allow for the disclosure of personal protected information engages and limits the right to privacy.

Right to privacy

2.68 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;
- the right to control the dissemination of information about one's private life.

2.69 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

2.70 The statements of compatibility for the determinations acknowledge that the instruments engage and limit the right to privacy. However, they provide assessments of only three of the numerous purposes for which personal protected information can be disclosed.

2.71 This is despite the fact that three of the four Determinations[6] are remaking the guidelines, including all the specified purposes for which a public interest certificate can be made.

2.72 The committee noted in its previous analysis that the stated objective of the three purposes that are assessed—to allow information to be disclosed for proceeds of crimes orders; research, analysis and policy development; the administration of the National Law; and public housing administration—appears to be a legitimate objective for the purposes of international human rights law. The disclosure of such information also appears to be rationally connected to the stated objectives.

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5 Note, there are more purposes in the individual Determinations, and not all purposes are included in each Determination. See Part 2 of the Family Assistance (Public Interest Certificate Guidelines) Determination 2015; Part 2 of the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015; Part 2 of the Student Assistance (Public Interest Certificate Guidelines) Determination 2015; and Division 4.1.2 of Part 4-1 of the Paid Parental Leave Rules 2010 as amended by the Paid Parental Leave Amendment Rules 2015.

6 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015, the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015, but not the Paid Parental Leave Amendment Rules 2015.

2.73 However, it is unclear whether the disclosure of personal protected information in the circumstances set out in the determinations is proportionate to the stated objectives.

2.74 First, while the statements of compatibility state that the *Privacy Act 1988* (the Privacy Act) will continue to apply to the management of disclosed information, it is not clear that all recipients of the information would be subject to the provisions of that Act.

2.75 Second, the manner in which the information can be disclosed may not, in all instances, be the least rights restrictive approach.

2.76 Third, the determinations provide that in appropriate circumstances the disclosure of information may be accompanied by additional measures to protect the information. It is not clear why the requirement to further protect the information in such cases is not set out in the determinations themselves.

2.77 The committee therefore sought the advice of the Minister for Social Services as to whether each of the proposed purposes for which information can be shared are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and each objective; and whether the limitation is a reasonable and proportionate measure for the achievement of each objective, particularly whether there are adequate safeguards in place to protect personal information and that the sharing of protected personal information takes the least rights restrictive approach.

Minister's response

> With respect to the approach taken to the statement of human rights compatibility, normally the Statement of Compatibility with Human Rights would consider everything that is presented in the instruments. On this occasion it was thought appropriate to remake three of the four instruments to assist users. Since there were relatively few changes to the previous versions of the instruments, the Statements of Compatibility focussed only on the substantive changes. Only the *Paid Parental Leave Rules 2010* were not remade in full due to their length.
>
> I understand that the Committee's key concerns are: whether the limitations on the right to privacy are reasonable and proportionate to the objectives; whether the limitations are rationally connected to legitimate objectives; whether the safeguards protecting information are adequate; and if the least rights restrictive approach is used when sharing personal information.
>
> Issues that the Parliamentary Joint Committee on Human Rights raised about the instruments are considered below.
>
> <u>Legitimate objectives and rational connection with limitations</u>
>
> The purposes set out in the Public Interest Certificate Guidelines achieve various legitimate objectives. The grounds for disclosure are precisely-

defined, and are all subject to the condition that information can only be disclosed if:

- it cannot reasonably be obtained from a source other than a Department; and
- the person to whom the information relates has "sufficient interest" in the information.

The term "sufficient interest" is met if the Secretary is satisfied that the person has a genuine and legitimate interest in the information, or the person is a Minister.

It is also important to note that the misuse or unauthorised disclosure of protected information is a criminal offence and can result in a recipient of the information being subject to a maximum penalty of two years imprisonment in the event that they misuse or improperly disclose the information.

Before disclosing information, a delegate needs to consider whether the disclosure is 'necessary' in the public interest and that the disclosure is for one or more of the purposes set out in the Public Interest Certificate Guidelines. This requirement of necessity also limits the kinds of information disclosed.

Each of the grounds for disclosure in the Guidelines is reasonable and proportionate. The measures are precisely defined and contain suitable qualifications that ensure they only target the issues they are addressing. This means that any officer making a Public Interest Certificate on the basis of the Guidelines has a tightly-controlled discretion, which is appropriate and proportionate in the circumstances.

In the Department of Social Services, the power to issue public interest certificates is only delegated to senior officers in the Department.

The objectives of the Public Interest Certificate Guidelines broadly fall under the categories of law enforcement (including criminal law, proceeds of crime and threats to Commonwealth staff and property), safety (such as stopping abuse or violence to a homeless young person, and preventing a threat to the life, health or welfare of a person or locating a missing person), welfare (by assisting with income management, ensuring that correct public housing support is received, and assisting with the administration of a deceased estate) and supporting children's education (by ensuring that a child is attending school and that schools have adequate resources).

All of these objectives require that some limitations are placed on the right to privacy in order to address these substantial and often pressing issues.

Another broad objective of the Public Interest Certificate Guidelines is to assist with accountability to Parliament. Policies and programmes are examined to ensure that they are achieving their intended outcomes and are being used appropriately, efficiently and effectively. Accountability to

Parliament requires that Ministers have access to sound and comprehensive evidence on which policies and programmes can be developed, implemented and amended over time. In order to achieve this objective, it is necessary to conduct research, statistical analysis and policy development, and progress matters of relevance within portfolio responsibilities.

Ministers require briefing to be accountable to Parliament, to consider complaints or issues raised by a person and to address a mistake of fact. On some occasions, these briefings require protected personal information to be disclosed in order to address the matter being resolved.

Although these requirements mean that some privacy limitations are introduced, they each have a demonstrated and rational connection to the objective of achieving accountability to Parliament.

The attachment to this letter contains more details about the legitimacy of the objectives and the rational connection with the limitations.

Reasonable and proportionate measure for achieving objectives

The limitations on the right to privacy introduced by the Public Interest Certificate Guidelines are minimal when considered in the context of the private and public benefits achieved by each of the objectives.

For example, the provisions in the Guidelines applicable to research and statistical analysis, policy development and briefings to Ministers enable more effectively targeted services to Australians.

Benefits to people whose information is accessed using Public Interest Certificate Guidelines far outweigh the limits to privacy. Examples include resolving cases of missing persons, improving child education, child protection, stopping abuse or violence to a homeless young person, obtaining entitlement to compensation and ensuring that correct benefits are provided by public housing.

When the benefits of these limitations are considered together with safeguards taken to protect personal information, I consider these limitations to be both reasonable and proportionate to achieve the objectives. The attachment to this letter contains further information attesting to the measures being reasonable and proportionate for the achievement of the objectives.

Safeguards to protect personal information

I note the Committee's concerns about the application of the *Privacy Act 1988* (the Privacy Act) to certain recipients of protected information.

Whilst not every recipient of information under a Public Interest Certificate will be subject to the Privacy Act, State and Territory privacy legislation will apply to many recipients of protected information.

While there will be individuals and organisations not subject to any privacy legislation, again I draw the Committee's attention to the criminal

sanctions under the *Social Security (Administration) Act 1999* (for example, section 204) and similar provisions in the other three legislative regimes.

Least restrictive rights approach

The least restrictive rights approach is used when providing access to personal information under Public Interest Certificate Guidelines.

Information is only disclosed where necessary and is limited where possible to de-identified information. However, it is not always practicable to disclose de-identifying information for research purposes where, for example, there is a need to follow up with participants for studies that are conducted over a number of years or when linking data between databases.

Determinations

The Committee has queried why methods for further protecting information are not set out in the Guidelines themselves. The purpose of the Guidelines is to list the grounds on which information can be disclosed by the Secretary (or delegate). The administrative processes pursuant to which information should be disclosed are addressed on a case-by-case basis. In relation to disclosures for research purposes, it is standard practice to require undertakings of confidentiality to be provided by the recipients and members of research teams.[7]

Committee response

2.78 **The committee thanks the Minister for Social Services for his detailed response.** In particular, the committee notes the minister's advice as to the objective behind each of the numerous purposes for which a public interest certificate can be issued, and considers that these are likely to be considered legitimate objectives for the purposes of international human rights law. The committee also notes the minister's advice as to the proportionality of the determinations and considers the measure are likely to be proportionate to achieving those objectives, in particular taking into account the minister's advice;

- that there are existing statutory provisions that the misuse or unauthorised disclosure of protected information is a criminal offence, which apply even where a recipient of the information may not be subject to the *Privacy Act 1988*;
- that it is standard practice to require undertakings of confidentiality by the recipients and members of research teams when disclosures are made for research purposes; and
- that de-identified information is provided where possible and that it is not always practicable to disclose de-identifying information.

7 See Appendix 1, Letter from the Hon Christian Porter MP, Minister for Social Services, to the Hon Philip Ruddock MP (received 19 October 2015) 1-3.

2.79 Accordingly, the committee considers that the minister's advice has demonstrated that the determinations are likely to be compatible with the right to privacy.

Disclosure of personal information relating to homeless children

2.80 Three of the determinations provide for the disclosure of information relating to a child who is homeless.[8] These provide that a public interest certificate can be provided in a number of circumstances if the information cannot reasonably be obtained otherwise, the secretary is satisfied that the disclosure will not result in harm to the young person and the disclosure is for purposes set out in the guidelines, or will be made to a welfare authority where the child is in their care and is under 15 years old.

2.81 These measures engage and limit the child's right to privacy and may limit the obligation to consider the best interests of the child in all decision-making.

Rights of the child (including obligation to consider the best interests of the child)

2.82 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 privacy, which includes the same contents as the general right to privacy set out above at paragraphs [2.68] to [2.69].[9]

2.83 In addition, under the CRC, state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[10]

2.84 This principle requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

Compatibility of the measure with the rights of the child

2.85 The statements of compatibility for each of the three relevant determinations do not consider whether the measures engage and limit the rights of the child.[11]

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8 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015, the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015, but not the Paid Parental Leave Amendment Rules 2015.

9 Article 16 of the CRC.

10 Article 3(1) of the CRC.

2.86 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.

2.87 In respect of this obligation the committee notes that the determinations provide that the secretary can issue public interest certificates only if satisfied that the disclosure 'will not result in harm to the homeless young person'.[12]

2.88 However, this question is a broader one under international law. In particular, the child's best interests must be assessed from the child's perspective rather than that of their parents or the state, and include the enjoyment of the rights set out in the CRC, including the right to privacy.

2.89 On this basis, a less rights restrictive approach to the sharing of this personal information in such cases would be to require the decision-maker to be satisfied that the disclosure would be in the best interests of the child, rather than that the disclosure will not result in harm to the child.

2.90 The committee therefore sought the advice of the Minister for Social Services 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

> Disclosure of personal information relating to homeless children
>
> I note that Convention on the Rights of the Child refers to the need for the disclosure to be in the best interests of the child, rather than that disclosure will not result in harm to the child.
>
> As you have stated, the circumstances when the information can be disclosed include:
>
> 1. if the information is about the child's family member and the Secretary is satisfied that the child, or the child's family member, has been subjected to abuse or violence;
>
> 2. if the disclosure is necessary to verify qualifications for payments;

11 The Family Assistance (Public Interest Certificate Guidelines) Determination 2015, the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and the Student Assistance (Public Interest Certificate Guidelines) Determination 2015.

12 See paragraphs 18(1)(b) and (2)(d) of the Family Assistance (Public Interest Certificate Guidelines) Determination 2015; paragraphs 20(1)(b) and 20(2)(d) of the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and paragraphs 21(1)(b) and 21(2)(d) of the Student Assistance (Public Interest Certificate Guidelines) Determination 2015.

3. if the disclosure will facilitate reconciliation between the child and his or her parents; and

4. if necessary to inform the parents of the child as to whether the child has been in contact with the respective department.

Under point 1, I consider that it is in the best interest of the child to not be subject to abuse or violence. It is also not in the best interests of the child to witness abuse or violence being inflicted on another person.

Regarding point 2, I again consider that it is in the child's best interest to receive their correct entitlements to help them to support themselves. It is not in children's interests to allow for overpayments to occur as this may reduce their income later, if repayments are required to be made to the government.

Regarding point 3, I consider that it is in the best interests of the child to facilitate reconciliation in circumstances where harm would not result to the child.

In relation to point 4, I anticipate that a child's parents would only be contacted where this is legally necessary and subject to consideration of the risk of harm to the child.

As outlined above, each of the objectives are aimed at achieving a legitimate objective and there are rational connections between the limitation and objectives. The limitations are relatively minor compared with the benefits resulting from promoting the best interests of the child. Consequently the limitations are both proportionate and reasonable.[13]

Committee response

2.91 **The committee thanks the Minister for Social Services for his response.** In particular, the committee notes the minister's advice as to the legitimate objectives behind disclosing information relating to children and considers that these are likely to be considered legitimate objectives for the purposes of international human rights law. However, the committee reiterates its advice that while considerations of harm to the child are relevant to the question of what is in the best interests of the child, the obligation to consider the best interests of the child is broader than simply considering whether a child would be harmed by the disclosure.

2.92 The committee recommends that to ensure that the rights of the child are protected, the determinations be amended to require the secretary to be satisfied that the disclosure would be in the best interests of the child.

13 See Appendix 1, Letter from the Hon Christian Porter MP, Minister for Social Services, to the Hon Philip Ruddock MP (received 19 October 2015) 4.