

Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 26 and 29 November 2018 (consideration of 12 bills from this period has been deferred);¹
 - legislative instruments registered on the Federal Register of Legislation between 19 October and 8 November 2018 (consideration of 5 legislative instruments from this period has been deferred);² and
 - bills and legislative instruments previously deferred.

Instruments not raising human rights concerns

1.2 The committee has examined the legislative instruments registered in the period identified above, as listed on the Federal Register of Legislation. Instruments raising human rights concerns are identified in this chapter.

1.3 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.

1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. See, <https://www.legislation.gov.au/>.

Response required

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

National Health (Privacy) Rules 2018 [F2018L01427]

Purpose	Making Rules concerned with the handling of information obtained by government agencies in connection with a claim for a payment or benefit under the Medicare Benefits Program and the Pharmaceutical Benefits Program ('claims information')
Portfolio	Health
Authorising legislation	<i>National Health Act 1953</i>
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 15 October 2018; tabled Senate 15 October 2018)
Right	Privacy
Status	Seeking additional information

Linking of identifiable claims information

1.5 The National Health (Privacy) Rules 2018 (Privacy Rules) prescribe how information obtained by government agencies in connection with a claim for a payment or benefit under the Medicare Benefits Program and the Pharmaceutical Benefits Program ('claims information') is handled.

1.6 Generally, the Privacy Rules provide that claims information under the Medicare Benefits Program and the Pharmaceutical Benefits Program must be held in separate unlinked databases¹ and that the claims information be stripped of personal identification components, such as name and address information, with the exception of a Medicare card number or a Pharmaceutical entitlements number.² Information that is more than five years old ('old information') must not be stored with any personal identification components.³

1.7 However, there are some exemptions provided under the Privacy Rules to these provisions. The Department of Human Services and the Department of Health

¹ Privacy Rules, sections 7 and 8.

² Privacy Rules, section 8(3).

³ Privacy Rules, section 11(1)(b).

may link claims information relating to the same individual from the Medicare Benefits claims database and the Pharmaceutical Benefits claims database where:⁴

- *for internal use*, where it is in relation to the enforcement of a criminal law, the enforcement of a law imposing a pecuniary penalty, or the protection of public revenue;
- *for the purpose of external disclosure* where that disclosure is required by law, for the enforcement of a criminal law, the enforcement of a law imposing a pecuniary penalty, or the protection of public revenue;
- to determine an individual's eligibility for a benefit under one program, where eligibility for that benefit is dependent upon services provided under the other program;
- where it is necessary to prevent or lessen a serious and imminent threat to the life or health of any individual; or
- for disclosure to an individual where that individual has given their consent.

1.8 The Privacy Rules also provide that the Department of Human Services and the Department of Health may relink 'old information' to its personal identification components in certain circumstances.⁵

1.9 The Privacy Rules additionally provide that the Department of Human Services can disclose claims information to the Department of Health in specified circumstances.⁶

1.10 The Privacy Rules also allow for the disclosure of identifiable claims information for medical research purposes where the individual consents or in

4 Privacy Rules, section 9(1).

5 Section 11(2) of the Privacy Rules state that 'old information' may be relinked for the purpose of taking action on an unresolved compensation matter; taking action on an investigation or prosecution; taking action for recovery of a debt; determining entitlement on a late lodged claim or finalising the processing of a claim; determining entitlement for a related service rendered more than five years after the service which is the subject of the old information; fulfilling a request for that information from the individual concerned or from a person acting on behalf of that individual; or lawfully disclosing identified information in accordance with the secrecy provisions of relevant legislation and this instrument.

6 Sections 8(9) and 14(1) of the Privacy Rules state that the Department of Human Services may only disclose claims information provided such disclosures do not include personal identification components, except: where it is necessary to clarify which information relates to a particular individual; for the purpose of disclosing personal information in a specific case or circumstances expressly authorised or required under law; or where it is directly connected to the Department of Health assisting the Chief Executive of Medicare to perform his or her health provider compliance functions in accordance with the Privacy Rules.

compliance with the guidelines issued by the National Health and Medical Research Council (NHMRC).⁷

Compatibility of the measure with the right to privacy

1.11 The right to privacy encompasses respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information.⁸

1.12 The statement of compatibility acknowledges the Privacy Rules engage the right to privacy and states that the right is positively affected by the Privacy Rules 'by ensuring that claims information held on databases is appropriately managed and protected by agencies'.⁹ It is acknowledged that many of the measures in the Privacy Rules promote the right to privacy. However, the statement of compatibility does not acknowledge that the Privacy Rules also limit the right to privacy by providing for circumstances where sensitive personal information can be linked and disclosed.¹⁰

1.13 The right to privacy 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 rationally connected (that is, effective to achieve) and proportionate to that objective.

1.14 In relation to the objective of the Privacy Rules, the statement of compatibility explains that the Privacy Rules:

...recognise the sensitivity of health information and restrict the linkage of claims information. Provision remains for the use of such information for health policy and medical research purposes in certain circumstances.¹¹

1.15 While this sets out the broad objectives of the Privacy Rules it does not specifically address whether the limitation imposed by the linking and disclosure powers pursues a pressing and substantial concern as required to constitute a legitimate objective for the purposes of international human rights law. In this respect, without further information, it is unclear that the objectives of health policy and medical research constitute legitimate objectives in the context of the measure.

1.16 The statement of compatibility also does not provide any information on whether the linking and disclosure measures in the Privacy Rules are rationally connected to (that is, effective to achieve) the objectives of health policy and medical research.

7 Privacy Rules, section 12.

8 International Covenant on Civil and Political Rights, article 17.

9 Statement of Compatibility (SOC), p. 13.

10 SOC, p 12-13.

11 SOC, p. 12.

1.17 In order to be a proportionate limitation on the right to privacy, a measure must be no more extensive than is strictly necessary to achieve its stated objective and must be accompanied by adequate and effective safeguards. The statement of compatibility outlines specific safeguards that apply to the handling of individuals' claims information by agencies.¹²

1.18 However, it is unclear whether each of the grounds for linking or disclosure of information are sufficiently circumscribed. For example, linking claims information for the protection of the public revenue is very broad and it is unclear whether it pursues a legitimate objective. This raises concerns that, notwithstanding the identified safeguards, the measures may not impose a proportionate limitation on the right to privacy.

1.19 In relation to the disclosure of identifiable claims information for the purpose of medical research, relevant safeguards include that the disclosure is with the individual's informed consent or in compliance with the NHMRC guidelines under section 95 of the *Privacy Act 1988* (Privacy Act). These guidelines set out the process for a government agency to lawfully disclose personal information for the purpose of medical research where this would otherwise involve a breach of an Australian Privacy Principle (APP) or the Privacy Act.¹³ It is unclear from the statement of compatibility whether these guidelines or any other safeguards are sufficient to ensure that the disclosure of personal information does not occur where it would not be a proportionate limitation on the right to privacy.

1.20 The statement of compatibility further notes that generally the Privacy Rules do not replace any requirements that may be imposed by the APPs and that in some instances, the Privacy Rules set a higher standard of protection for claims information than required under the Privacy Act. However, while this is relevant, it is noted that this does not fully address whether the measures in the Privacy Rules impose a proportionate limitation on human rights.¹⁴

Committee comment

1.21 The preceding analysis raises questions about whether the measures in the National Health (Privacy) Rules 2018 (Privacy Rules) are compatible with the right to privacy.

12 SOC, p 12. See, also, for example, Privacy Rules, section 8(4).

13 Guidelines under Section 95 of the *Privacy Act 1988* (2014) at: <https://nhmrc.gov.au/about-us/publications/guidelines-under-section-95-privacy-act-1988>.

14 The Australian Privacy Principles in the *Privacy Act 1988* are not a complete answer to concerns about interference with the right to privacy, as those principles contain a number of exceptions to the prohibition on disclosure of personal information. For example, an agency may disclose personal information or a government related identifier of an individual where its use or disclosure is required or authorised by or under an Australian Law: Australian Privacy Principles 6.2(b) and 9.

1.22 The committee therefore seeks the advice of the minister 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;**
- **how the measures are effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitations are a proportionate means to achieve the stated objective (including whether the measures are sufficiently circumscribed and whether there are adequate and effective safeguards in place with respect to the right to privacy).**

Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018 [F2018L01377]

Purpose	Introduces a range of measures relating to apprehended violence orders, special measures to assist vulnerable witnesses to give evidence in court, sentencing processes in relation to sex and violent offenders, and a presumption against bail.
Portfolio	Regional Development and Territories
Authorising legislation	<i>Norfolk Island Act 1979</i>
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate 15 October 2018)
Rights	Presumption of innocence
Status	Seeking additional information

Reverse legal burden

1.23 Schedule 3 of the ordinance amends the Criminal Procedure Act 2007 (NI) (CP Act) to make it an offence for a person to publish, in relation to a sexual offence proceeding, the complainant's name, or protected identity information about the complainant, or a reference or allusion that discloses the complainant's identity, or a reference or allusion from which the complainant's identity might reasonably be worked out.¹ The penalty is imprisonment for 12 months or 60 penalty units, or both. It is a defence to the offence if the person proves that the complainant consented to the publication before the publication happened.² A defendant bears a legal burden of proof in relation to this defence.

Compatibility of the measure with the presumption of innocence

1.24 The right to be presumed innocent until proven guilty according to law usually requires that the prosecution prove each element of the offence (including fault elements and physical elements).³

1.25 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 also 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. Similarly, a statutory exception,

1 Section 167F(1).

2 Section 167F(2).

3 See, article 14(2) of the International Covenant on Civil and Political Rights.

defence or excuse may effectively reverse the burden of proof, such that a defendant's failure to make out the defence may permit their conviction despite reasonable doubt. These provisions 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.

1.26 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

1.27 The statement of compatibility does not acknowledge that the reverse burden defence engages and limits the right to be presumed innocent. However, the explanatory statement includes some information about the reverse legal burden. The explanatory statement explains that the reverse legal burden is appropriate because:

... the knowledge as to consent is peculiarly in the defendant's knowledge and would be readily and cheaply able to be proved by the defendant (and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish); and to publish such information without consent would pose a grave danger to the safety of complainants and their communities. The subsection (and the penalty for an offence under the subsection) is similar to section 181U of the current Evidence Act, which also prohibits the publication of a complainant's identity without their consent. The ACT and most other Australian jurisdictions have similar prohibitions.⁴

1.28 However, it is unclear from the information provided why the offence provision reverses the legal rather than merely the evidential burden of proof. This raises concerns that the reverse burden offences may not be the least rights restrictive approach to achieving the objective of the proposed legislative regime. It is also noted that the information provided in the explanatory statement is not sufficient as it does not provide an assessment of whether the limitation on the presumption of innocence is permissible.

Committee comment

1.29 The proposed reverse legal burden in section 167F engages and limits the presumption of innocence.

1.30 The committee draws to the attention of the minister its *Guidance Note 1* and *Guidance Note 2* which set out information specific to reverse burden offences.

4 Explanatory Statement, p.52.

1.31 The committee seeks the advice of the minister as to the compatibility of the measure with the right to be presumed innocent, including:

- whether the reverse legal burden is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the reverse legal burden is effective to achieve (that is, rationally connected to) the legitimate objective; and
- whether the measure is a proportionate limitation on the right to be presumed innocent (including why the legal burden rather than the evidential burden is reversed).

Bills not raising human rights concerns

1.32 Of the bills introduced into the Parliament between 26 and 29 November, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Environment Protection and Biodiversity Conservation Amendment (Great Australian Bight) Bill 2018
- Equal Pay Standard Bill 2018
- Future Drought Fund Bill 2018
- Future Drought Fund (Consequential Amendments) Bill 2018
- Passenger Movement Charge Amendment (Timor Sea Maritime Boundaries Treaty) Bill 2018
- Timor Sea Maritime Boundaries Treaty Consequential Amendments Bill 2018