

## **Court Security Bill 2013**

### **Court Security (Consequential Amendments) Bill 2013**

*Introduced into the House of Representatives on 20 March 2013*

*Portfolio: Attorney-General*

#### **Summary of committee view**

1.1 The committee seeks clarification as to why it is necessary, when a security officer has the power to detain a person for an alleged offence, to provide an exception allowing the officer not to inform the person in general terms of the alleged offence for which they are being detained and how this is consistent with the right to liberty and the right to be informed promptly.

1.2 The committee seeks clarification as to why it is necessary to empower a security officer to escort a person to and from court premises for their safety in circumstances where a person may not consent to being escorted, and how this is consistent with the right to freedom of movement and the right to privacy.

1.3 The committee seeks clarification as to whether the power to make a court security order prohibiting a person from being on court premises – that may be made initially without the subject of the order being heard and without the right to review the decision – is consistent with the right to a fair hearing.

1.4 The committee seeks clarification as to why it is necessary in some instances to impose an evidential burden on a defendant in circumstances that do not appear to be 'peculiarly within the defendant's knowledge, and how this is consistent with the right to be presumed innocent.

#### **Overview**

1.5 The Court Security Bill 2013 creates a new framework for court security arrangements for federal courts and tribunals. It replaces the current security framework for federal courts and tribunals under Part IIA of the *Public Order (Protection of Persons and Property) Act 1971* (Public Order Act). The Court Security (Consequential Amendments) Bill 2013 makes consequential amendments to the Public Order Act to refer to the new legislation.

The main purpose of the Court Security Bill 2013 is to:

- Allow courts to appoint people as security officers and authorised court officers, who are able to exercise a range of powers to ensure the safety of judicial officers, court staff and court users, including powers to:

- request persons entering a court to be subject to screening, undergo a frisk search, to leave dangerous items or recording devices for safekeeping while on court premises etc;
- refuse entry to a person or direct a person to leave court premises when they may be harassing or intimidating another, causing a reasonable apprehension of violence or damage, significantly disrupting proceedings or committing an offence;
- seize dangerous items or detain persons for the purposes of delivering them into the custody of a police officer;
- escort people to and from court premises.
- Give members of certain courts the power to make an order prohibiting specified persons from doing a specified act, including entering court premises.
- Prescribe offences relating to court security.

## **Compatibility with human rights**

1.6 The Court Security Bill is accompanied by a detailed ten-page self-contained statement of compatibility that identifies a number of rights engaged by the bill. The rights identified include the right of access to justice; the right to liberty; the right to freedom of movement; the right to the presumption of innocence; the right to privacy; and the right to enjoy and benefit from culture.<sup>1</sup>

1.7 The Court Security (Consequential Amendments) Bill is accompanied by a short self-contained statement of compatibility that identifies a strict liability offence as engaging the right to be presumed innocent under article 14 of the International Covenant on Civil and Political Rights (ICCPR).

1.59 The committee considers that, in many respects, the statement of compatibility for the Court Security Bill adequately addresses the issues it raises and provides sufficient justifications for any proposed limitations. The committee accepts that ensuring the security of court premises and the safety of persons on court premises is a legitimate objective and considers that, in general, the bill tightly confines the powers of security officers and authorised court officers. However, some issues are not fully explored in the statement of compatibility and the committee's concerns in relation to those aspects of the bill are set out below.

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1 See articles 14 (access to justice), 9 (liberty), 12 (freedom of movement), 14 (presumption of innocence), 17 (privacy), 27(right to culture) of the International Covenant on Civil and Political Rights and article 15 (right to culture) of the International Covenant on Economic, Social and Cultural Rights.

*Right to liberty and right to be informed promptly*

1.60 Clause 28 of the Court Security Bill empowers a security officer to detain a person on court premises in order to deliver them into the custody of a police officer if they believe the person may have committed an offence on the premises or must be detained to prevent violence or serious damage. A security officer who detains a person under this provision must inform the person in general terms of the alleged offence that they are being detained for. However, under clause 28(3)(b)(i) the security officer is not required to do so if 'it is reasonable to expect that the person knows of his or her alleged commission of the offence or attempt to commit it'.

1.61 Article 9 of the ICCPR provides that everyone has the right to liberty and security of person. Article 9(2) provides:

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

1.62 Although clause 29 does not give a formal power of arrest, the effect is that a person is detained - and their right to liberty limited - in order to be delivered into the custody of a police officer due to an alleged offence. Clause 28(3)(b)(ii) already provides that a person does not need to be informed in general term of the alleged offence if 'it is impracticable for the security officer to do so'. It is unclear why it is necessary to have a provision<sup>2</sup> that requires the security officer to determine whether or not the person sufficiently knows the reasons for their detention – rather than just inform all persons of the reason for their detention, unless it is impracticable to do so.

**1.63 The committee intends to write to the Attorney-General to seek clarification as to why it is necessary, when a security officer has the power to detain a person for an alleged offence, to provide an exception in clause 28(3)(b)(i) to allow the security officer not to inform the person in general terms of the alleged offence for which they are being detained and how this is consistent with the right to liberty under article 9 of the ICCPR.**

*Right to freedom of movement and right to privacy*

1.64 Clauses 29 and 30 of the Court Security Bill provide that a security officer may escort a person from court premises to a nearby place where transport is available or to court premises from a nearby place, if the officer reasonably believes that doing so will assist in ensuring the person's safety in connection with the person's attendance at the court premises. Clause 30 provides that the security officer can only use such force as is necessary and reasonable 'to prevent or lessen

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2 Clause 28(3)(b)(i).

an imminent threat to the safety of the person or a security officer'. The statement of compatibility makes no reference to these provisions, but the explanatory memorandum explains:

Proceedings in federal courts, particularly family law matters, are often emotionally charged and involve animosity between the parties in dispute. It is not unusual for threats to be made against particular court users or judicial officers.

...

A security officer may escort a person where the officer reasonably believes that escorting the person will help ensure the person's safety in connection with the person's attendance at court premises.

The power is to assist in ensuring that court users can safely attend proceedings in circumstances where threats may have been made against them, for example in family law proceedings involving family violence.<sup>3</sup>

1.65 The power to escort a person applies whether or not the person to be escorted has given their consent to be escorted. If a person to be escorted does not wish to be escorted (and may indeed want to go to a place other than where transport is available) it is unclear why it is necessary to empower a security officer to escort them without first seeking their consent and to authorise the use of force to do so. Although the committee appreciates that the intention of these provisions is to try to ensure a person's safety, as currently drafted these provisions may raise concerns regarding the right to freedom of movement under article 14 of the International Covenant on Civil and Political Rights (ICCPR) and the right to privacy under article 17 of the ICCPR.

**1.66 The committee intends to write to the Attorney-General to seek clarification as to why it is necessary to empower a security officer to escort a person (under clauses 29 and 30) to and from court premises for their safety in circumstances where a person may not consent to being escorted, and how this is consistent with the right to freedom of movement and the right to privacy.**

#### *Right to a fair hearing – court security orders*

1.67 Part 4 of the Court Security Bill 2013 provides that a judge, registrar or deputy registrar of the Family Court<sup>4</sup> or the Federal Circuit Court may make an order (called a court security order) prohibiting a person from doing a specified act, including entering court premises, coming within a specified distance or contacting persons on court premises. The order may be made if the person making it is satisfied that unless it is made there is an ongoing risk of significant disruption of

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3 Explanatory memorandum, pp 27-28.

4 Including the Family Court of Australia and the Family Court of Western Australia.

court proceedings, administration of the court or lawful activities on court premises or a risk of violence to the court or people on the court premises. However, the order cannot prevent the specified person from conducting legitimate business that the person has on court premises.<sup>5</sup> Contravention of a court security order is an offence punishable by imprisonment of up to 12 months.<sup>6</sup>

1.68 An ex parte interim order can be made against a person before the merits of the application are considered or the person against whom the order is to be made is heard.<sup>7</sup> It is only on making the final order that the person proposed to be specified in the order is entitled to be heard.<sup>8</sup> In making the interim order, the member of the court does not need to consider a range of factors which are required to be taken into account before a final order is made – these include whether any hardship would be caused by the making of the order or how to minimise restrictions on the rights and liberties of the person specified in the order.<sup>9</sup> There is no upper time limit as to how long an interim order may be in force. The bill provides that an interim order lasts until the full application is determined (but no specific time frame is set out as to when this is to happen, other than it is to be done 'as soon as reasonably practicable').<sup>10</sup>

1.69 It is unclear whether any right of review would apply to a decision made under Part 4. Under clause 45, only the member of the court who made the court security order may vary or revoke the order – there is no ability for the person subject to the order to seek variation or revocation. Other than a general provision that the person proposed to be specified in an order 'is entitled to be heard on the application' there are no details on what this entails, whether the person is entitled to be legally represented, whether they have sufficient time to prepare or whether they enjoy other procedural rights. In addition, as noted above, a person is not entitled to be heard before an interim order is made, the interim order effectively limits the person's liberty of movement for its duration, and the contravention of an order is a criminal offence carrying a penalty of imprisonment. These features raise concerns whether a person's right to equality of arms, as required by article 14(1) of the ICCPR, may be unfairly compromised.

1.70 Clause 47 provides that a member of a court who made a court security order against a person is not required to disqualify him or herself from hearing other

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5 Clause 41 of the Court Security Bill 2013.

6 Clause 46 of the Court Security Bill 2013.

7 Clause 43 of the Court Security Bill 2013.

8 Clause 42(3) of the Court Security Bill 2013.

9 Clause 43(1)(b) of the Court Security Bill 2013.

10 Clause 44 of the Court Security Bill 2013.

proceedings to which the person subject to the order is a party. This raises questions regarding independence and impartiality – or the appearance of it – as required by article 14(1) of the ICCPR.

**1.71 The committee intends to write to the Attorney-General to seek clarification as to whether Part 4 of the Court Security Bill is consistent with the right to a fair hearing under article 14 of the ICCPR, in particular insofar:**

- **as it gives a unilateral power to the person who made the order to determine whether to vary or revoke an order, and it is unclear what review rights a person against whom an order has been made has;**
- **as it provides for the making of an ex parte interim order, which does not require any consideration of whether any less restrictive means are available, and there is no time limit on how long an interim order can last;**
- **as a member of a court who made a court security order against a person is not required to disqualify themselves from determining other proceedings involving the person.**

*Right to be presumed innocent*

1.72 Clause 39 of the Court Security Bill makes it an offence for a person on court premises to make a recording or transmission of sounds or images associated with proceedings in court or events associated with court proceedings. This offence will not apply if the recording or transmission was expressly permitted, was done for enhancing security, is for the purpose of preparing official transcripts, is in the course of the operation of a hearing aid or for other specified purposes. A defendant bears an evidential burden in relation to the establishment of these exceptions.

1.73 This reversal of the burden of proof engages the right to be presumed innocent under article 14(2) of the ICCPR. The statement of compatibility recognises that the right to the presumption of innocence is engaged by this clause. The statement sets out a number of reverse burden offences – including clause 39 – and gives a general explanation in respect of them all:

The reverse burden provisions have a legitimate aim and are reasonable, necessary and proportionate. The penalties are low, the offences only impose an evidential burden, as the prosecution must still disprove the matters beyond reasonable doubt if the defendant discharges the evidential burden, and the burden relates to facts which are readily provable by the defendant as matters within their own knowledge or to which they have ready access.<sup>11</sup>

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11 Statement of compatibility to the Court Security Bill, p. 9.

1.74 However, it is unclear as to why a defendant would be more able to prove that they had express permission for making a recording or transmission than the person who gave – or did not give – the permission. The Commonwealth Guide to Framing Offences discusses when a reverse burden might be appropriate:

The fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant. If an element of the offence is difficult for the prosecution to prove, imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to produce the information needed to avoid conviction. This would generally be unjust. However, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence.<sup>12</sup>

1.75 Proof of express permission for making a recording or transmission does not appear to be a matter 'peculiarly within the defendant's knowledge' and it is unclear, therefore, why an evidential burden must be placed on the defendant.

**1.76 The committee intends to write to the Attorney General to clarify why it is necessary to impose an evidential burden in clause 39 on a defendant to prove if they had permission to make a recording or transmission of court proceedings when this does not appear to be 'peculiarly within the defendant's knowledge, and how this is consistent with the right to be presumed innocent.**

1.77 The Court Security (Consequential Amendments) Bill amends an existing provision in the *Public Order (Protection of Persons and Property) Act 1971* to state that the existing offence provision does not apply in relation to Commonwealth premises being used exclusively as a court (as defined under the new Court Security Act).<sup>13</sup> A defendant bears an evidential burden – meaning that the burden of proof is reversed and the defendant needs to first prove that the premises were not being used exclusively as a court. The statement of compatibility identifies that this engages the right to be presumed innocent under article 14 of the ICCPR. It states:

The reverse burden provision is consistent with Commonwealth criminal law policy and the existing provisions in the Public Order Act, and is reasonable, necessary and proportionate in the circumstances. The penalties for the offences are low and the offences only impose an evidential burden, as the prosecution must still disprove the matters

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12 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, p. 50.

13 See Schedule 1, item 1.

beyond reasonable doubt if the defendant discharges the evidential burden.<sup>14</sup>

1.78 However, this does not explain why it is necessary to require the defendant to prove that Commonwealth property was not being used exclusively as court premises. This does not appear to be something that would be peculiarly within the defendant's knowledge. Rather, it seems something the Commonwealth could more readily determine.

**1.79 The committee intends to write to the Attorney General to ask why the Court Security (Consequential Amendments) Bill imposes an evidential burden on a defendant to prove if premises were being used exclusively in connection with a court, when this does not appear to be 'peculiarly within the defendant's knowledge', and ask how this is consistent with the right to be presumed innocent.**

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14 Statement of compatibility to the Court Security (Consequential Amendments) Bill, p.3.



