

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Home Affairs

Public Order (Protection of Persons and Property) Act 1971

Public Order (Protection of Persons and Property) Regulations 2019

The *Public Order (Protection of Persons and Property) Act 1971* (the Act) establishes a regulatory framework to provide for the protection of protected premises and persons in Australia as defined in the Act. The Act establishes minimum-security requirements to preserve public order in certain territories and in respect of Commonwealth premises; the premises of certain federal courts and tribunals; and the premises and personnel of diplomatic and special missions, consular posts, designated overseas missions and international organisations. The Act imposes restrictions on the activities of people who have assembled at a protected premises or close to protected personnel (for example, diplomatic staff). It empowers authorised personnel to remove groups who have assembled near protected premises or personnel if they have committed or are reasonably suspected of committing violent acts.

Section 13H of the Act provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed for the purposes of Part IIA of the Act (Provisions relating to premises of certain investigatory authorities); or necessary or convenient to be prescribed for carrying out or giving effect to this Part; and, in particular, providing for the dealing with information given by a person in response to a requirement made under this Part.

The *Public Order (Protection of Persons and Property) Regulations 1999* (the POPPP Regulations) give effect to the provisions in Part IIA of the Act. The POPPP Regulations allow police and other authorised officers to take protective security measures in relation to persons who may be engaging in conduct that may cause harm to protected persons or property.

The purpose of the *Public Order (Protection of Persons and Property) Regulations 2019* (the proposed Regulations) is to re-make the POPPP Regulations. The proposed Regulations make slight updates to style and structure, however no substantial changes would be made to existing arrangements. The proposed Regulations would provide measures to ensure the protection of persons and property by prescribing investigative authorities, proof of authority, frisk searches, disclosing and recording information and returning the identity card. In particular, the proposed Regulations would place limits on how authorised officers can deal with persons who are suspect of posing a security risk to protected premises or personnel.

In addition to remaking the POPPP Regulations, section 13H of the Act allows the Governor-General to make Regulations prescribing matters for the purposes of Part IIA or that necessary or convenient to be prescribed for carrying out or giving effect to Part IIA. Part IIA of the Act allows police and other authorised officers to take protective security measures in relation to hearings and examinations conducted by prescribed bodies.

The Attorney-General's Department, Australian Federal Police, Australian Criminal Intelligence Commission, Australian Commission for Law Enforcement Integrity and

Department of Home Affairs have been consulted in regards to the proposed Regulations and were given opportunity comment on the changes before they were made. Consultation took place through email.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights because to the extent that it may limit human right, those limitations are reasonable, necessary and proportionate. A copy of the Statement is at Attachment A.

Details of the proposed Regulations are set out in the Attachment B.

The Act does not specify any conditions that need to be satisfied before the power to make the proposed Regulations can be exercised.

The proposed Regulations is a legislative instrument for the purposes of the *Legislation Act 2003*.

The proposed Regulations commences on 1 April 2019.

The Minute recommends that the proposed Regulations be made in the form proposed.

Authority: Section 13H of the
Public Order (Protection of Persons and Property) Act 1971

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Public Order (Protection of Persons and Property) Regulations 2019

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Public Order (Protection of Persons and Property) Act 1971* (the Act) establishes a regulatory framework to provide for the protection of protected premises and persons in Australia as defined in the Act. The Act establishes minimum-security requirements to preserve public order in certain territories and in respect of Commonwealth premises, the premises of certain federal courts and tribunals and the premises and personnel of diplomatic and special missions, consular posts, designated overseas missions and international organisations.

The *Public Order (Protection of Persons and Property) Regulations 1999* (the POPPP Regulations) gives effect to the provisions in Part IIA of the Act. The POPPP Regulations allow police and other authorised officers to take protective security measures in relation to persons who may be engaging in conduct that may cause harm to the protected persons or property. The POPPP Regulations are scheduled to be automatically repealed on 1 April 2019 in accordance with the sunset regime in the *Legislation Act 2003* (section 50).

The *Public Order (Protection of Persons and Property) Regulations 2019* (the Regulations) will re-make and replicate the effect of the POPPP Regulations.

In addition to remaking the POPPP Regulations, section 13H of the Act allows the Governor-General to make Regulations prescribing matters for the purposes of Part IIA or that necessary or convenient to be prescribed for carrying out or giving effect to Part IIA. Part IIA of the Act allows police and other authorised officers to take protective security measures in relation to hearings and examinations conducted by prescribed bodies.

As such, the Regulations will specify two bodies to which Part 11A of the act applies: the Australian Criminal Intelligence Commission (ACIC) and the Australian Commission for Law Enforcement Integrity (ACLEI). Division 2 of the Regulations will also provide limits on the exercise of powers under sections 13C and 13D of the Act. Division 3 provides conditions on dealing with information given in response to a requirement made under Part IIA of the Act.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- Right to Privacy in Article 10 of the International Covenant on Civil and Political Rights (ICCPR)

Section 5 and Division 3 of the Regulations engage the right to privacy contained in Article 17 ICCPR. Article 17 prohibits unlawful or arbitrary interferences with a person's privacy.

The right to privacy protects personal information that might be gathered by authorities. The Human Rights Committee's General Comment 16 on Article 17 (1988) states at paragraph 10 that:[\[1\]](#)

[t]he gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant.

Section 8 of the Regulations require that an authorised officer for an investigatory agency show their identity card to a person they intend to require information from or conduct a search on under sections 13C and 13D of the Act. Section 5 of the Regulations defines 'identity card' for the purposes of section 8. The definition engages the right to privacy to the extent that personal information (an authorised officer's photograph) is collected from the authorised officer and displayed to the public. To the extent that Section 5 limits the right to privacy, it is necessary in the interests of public order and the protection of the rights and freedoms of others. Investigatory authorities carry out functions involving members of the public who may behave in ways which threaten or harm the safety of others. Authorised officers are responsible for ensuring that persons within the premises of the investigatory agency are there for reasonable purposes and do not present a threat to other persons within the premises.

It is necessary that the ACIC and ACLEI are specified by the Regulations to ensure that protective security measures can be used in respect to hearings and examinations held by those agencies. These agencies have the power to conduct hearings and summon persons or government agencies to produce documents or things or attend a hearing to give evidence under oath and be cross examined. Given the nature of evidence/and or material that the ACIC and ACLEI can obtain during hearings and the nature of persons that may attend (such as law enforcement officers and witnesses) security at these hearings are paramount. Were ACIC and ACLEI not specified under the Regulations, there would be no basis other than the ACIC and ACLEI's right's as occupants of their premises and the consent of the individuals involved, to conduct searches of persons or obtain information from attendees to hearings or examinations.

It is important that authorised officers are easily identifiable to the public as authorised officers may exercise powers under Part IIA of the Act. These powers include the right search

individuals or direct persons to leave a premise in certain circumstances. The limit on the right to privacy is also reasonable and proportionate in that the nature and quantity of personal information collected is limited—only the authorised officer’s photograph is required to be on the identity card. In addition to this, the card will include the first name of the authorised officer. No other person information will be included on the identity card. The display of personal information for this purpose is neither unlawful nor arbitrary.

Section 13C of the Act provides that an authorised officer may request a person’s personal information and section 13D provides that an authorised officer may conduct a screening or frisk search of the person. The requirement to provide personal information or submit to a screening or frisk search is a limitation on the person’s right to privacy. Section 8 of the Regulations supports Article 17 of the ICCPR by creating a procedural safeguard that an authorised officer must perform if practicable before requiring provision of personal information. The requirement for the authorised officer to produce their identity card before exercising these powers ensures that the person subject to the powers is aware that the officer is an authorised officer and that the request is lawful.

Section 9 of the Regulations supports Article 17 of the ICCPR by requiring the authorised officer to notify the person, before conducting the frisk search, of the procedure for the search and that the person cannot be required to remove their clothes (subsection 13D(4)), that an authorised person of the same-sex (or another person of the same-sex requested by the person and who agrees to conduct the frisk search) will conduct the search (subsection 13D(5)) and that the authorised officer is not permitted to use more force, or subject a person to greater indignity, than is reasonably necessary in order to conduct the frisk search (subsection 13D(7)). This is a protective requirement that ensures that the person subject to the search warrant is aware of the legislative safeguards regarding the performance of the frisk search.

Sections 11 and 12 engage the right to privacy to the extent that they permit authorised officers to store information obtained under section 13C of the Act electronically and disclose such information to the Australian Federal Police, Chief Executive Officer of the ACIC or Integrity Commissioner. This limitation is necessary for the protection of the public, to allow authorised officers to share security-relevant personal information collected under Part IIA of the Act. For example, the name of an individual collected under section 13C of the Act who was asked to leave a premise under section 13E of the Act because they failed to satisfy the authorised officer that they were on the premises for a proper reasons, may be shared with other authorised officers within the officer’s agency. This may assist the agency in preparing protective security measures for hearings and examinations where there is a possibility that the particular individual may attend in the future. The limitation is proportionate as subsection 11(4) provides that information obtained in exercising section 13C of the Act, which would be personal information, can only be disclosed if the authorised officer believes on reasonable grounds, that it is necessary in the interests of security for example, that the person has failed to comply with a direction under section 13E of the Act previously. This ensures there are protections regarding the sharing of personal information written into the relevant legislation.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Details of the proposed *Public Order (Protection of Persons and Property) Regulations 2019*

Proposed Section 1 – Name

This section provides the title of the proposed Regulations is the *Public Order (Protection of Persons and Property) Regulations 2019*.

Proposed Section 2 – Commencement

This section provides for the Regulations to commence on 1 April 2019.

Proposed Section 3 – Authority

This section provides for the Regulations to be made under the *Public Order (Protection of Persons and Property) Act 1971* (the Act)

Proposed Section 4 – Schedules

The section provides each instrument specified in a schedule to this instrument would be amended or repealed as set out in this instrument.

Proposed Section 5 – Definitions

This section provides references to the ‘Act’ in the Regulations means the *Public Order (Protection of Persons and Property) Act 1971*.

The section includes a number of expressions used in this instrument as defined in the Act, including constable; frisk search; and Police Force.

This section provides the definition of ‘authorised officer’ has the same meaning as in Part IIA of the Act.

This section specifies the definition of the ‘identity card’ of an authorised officer. The card would include a statement that the holder of the card is an authorised officer for the purposes of Part IIA of the Act, state the office held by the issuer of the card and contain a recent photograph of the officer. The term was defined in section 5 of the POPPP Regulations. The proposed Regulations move the term to the definition section to keep all defined terms together.

This section provides the ‘Integrity Commissioner’ has the same meaning under the *Law Enforcement Integrity Commissioner Act 2006*.

The note at the end of section 5 clarifies Part 2 of the Regulations and Part IIA of the Act only apply to investigatory authorities listed in section 6 of this instrument.

Part 2 – Provisions relating to premises of certain investigatory authorities

Division 1 – Investigatory authorities to which Part IIA of the Act applies.

Part 2 inserts a new division 1 clarifying the authorities that are subject to Part IIA of the Act and these Regulations.

Proposed section 6 – Investigatory authorities to which Part IIA of the Act applies.

The proposed item would prescribe for the purpose of Part IIA of the Act:

- a) The Australian Criminal Intelligence Commission;
- b) The Integrity Commissioner.

Division 2 – Limits on exercising powers under sections 13C and 13D of the Act.

Sections 13C and 13D of the Act set out limits to the powers that can be exercised by an authorised officer. This Division also makes provision for additional limitations to be imposed by the Regulations made under the Act. Division 2 sets out the additional limits of powers that can be exercised by an authorised officer.

Proposed section 7 - Authority

Proposed section 7 would provide that the proposed Division 2 is made for the purposes of 13C (1) and 13D (1) of the Act.

Proposed section 8 – Revealing status as authorised officer before exercising power

Proposed section 8 would provide for an authorised officer to inform the person they are an authorised person, and disclose their identification to the person for the purposes of exercising their power under sections 13C and 13D of the Act in relation to a person.

Proposed subsection 8(b) would prescribe that each authorised officer, who is a constable, is required to display his or her identity card as a constable to the person under security check to prove his or her true identity as an authorised person.

Proposed subsection 8(c) would prescribe that each authorised officer, who is not a constable, is required to display his or her identity card to the person under security check to prove his or her true identity as an authorised person.

The purpose of this subregulation is to allow an authorised officer to prove his or her true identity to the person under security check, in order to address the potential risk to persons through the imparting of personal information to unauthorised officers posing as authorised officers.

Proposed section 9 – Explaining before conducting frisk search

Proposed section 9 would prescribe the requirement of the authorised officer who conducts a frisk search of a person under section 13D of the Act to tell the person about the procedure for the frisk search and the effect of subsections 13D(4), (5) and (7) of the Act which set out safeguards for an authorised officer. The proposed section would provide certain safeguards would be built into the exercise of the personal search power by authorised officers. A protected person would not be required to remove any clothing, nor is an authorised officer empowered to remove a person's clothing for the purposes of a frisk search. Authorised

officers would be under an obligation not to use force or to subject the person they are frisk searching to any greater indignity than is necessary to achieve the purposes of a frisk search.

Division 3 – Dealing with information given in response to a requirement made under Part IIA of the Act.

Proposed section 10 - Authority

Proposed section 10 sets out that Division 3 is for the purpose of section 13H of the Act, so far that section relates to providing for the dealing with information given by a person in response to a requirement made under Part IIA of the Act.

Proposed section 11 – Disclosing information

Proposed section 11 may require an authorised officer to disclose information he or she obtains under section 13C of the Act to the following organisations:

- a) the Australian Federal Police or the police force of a State or Territory;
- b) Chief Executive Officer of the Australian Criminal Intelligence Commission where the authorised officer is from the Australian Commission for Law Enforcement Integrity;
- c) Integrity Commissioner where the authorised officer is from the Australian Commission for Law Enforcement Integrity.

Proposed item would outline that despite the above an authorised officer may disclose the information to an organisation if the officer believes on reasonable grounds that it is necessary in the interests of security to do so. This would ensure that personal information is not shared with law enforcement agencies without reasonable basis.

Proposed section 12 – Recording information electronically

Proposed section 12 would specify that the information obtained under section 13C of the Act may be recorded electronically.

Division 4 – Returning identity cards.

Proposed Division 4 would set out the process an authorised officer is to follow in returning identity cards.

Proposed section 13 – Returning identity cards

Proposed section 13 would require a person who ceases to be an authorised officer, as soon as practicable, to return the card, to the person who issued the card issuer or if not available another person authorised to receive the card. The purpose of the proposed Regulation is to ensure identity cards do not fall in the hands of unauthorised persons who may abuse their use

Part 3 – Transitional Provisions

The proposed Regulations would insert a Part 3 that deals with transitional provisions. The proposed division under this Part would provide that the proposed Division 3 of Part 2 would

apply to information given by a person in response to a requirement made under Part 2 irrespective of when the information was given.