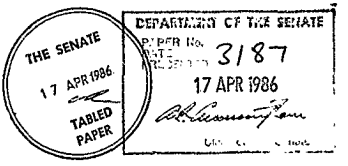
THE AUSTRALIAN SENATE

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Seventy-Ninth Report

April 1986



Report on the Committee's scrutiny of certain Health Insurance Regulations disallowed by effluxion of time

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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Members of the Committee

THIRTY-FOURTH PARLIAMENT

First Session - Third Period

Senator B. Cooney (Chairman)
Senator A.W.R. Lewis (Deputy Chairman)
Senator J. Coates
Senator P. Giles
Senator A.E. Vanstone
Senator the Rt. Hon. R.G. Withers

Principles of the Committee

(Adopted 1932; Amended 1979)

The Committee scrutinises delegated legislation to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependant upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

Recommendations of the Committee

(i) The Minister should satisfy himself that the release of nationwide identification data, which he seeks to achieve by issuing certificates under sub-section 130(7) of the Health Insurance Act 1973, is lawful under the Act.

(ii) If it is lawful, the Minister should be satisfied that physical transfer can be achieved without the possibility that medical data could be included.

(iii) Proposed amendments to the Health Insurance Act to broaden the Minister's regulation-making power should make it unlawful for the HIC to release to the Department of Social Security any information other than expressly defined identification verification data.

(iv) In preparing these amendments and the associated Regulations the Minister should address the need to limit the information which may be released to the Secretary of the Department of Veterans' Affairs.

(v) The computer systems and administrative procedures already in use or proposed to be used in releasing HIC data to Social Security or Veterans' Affairs should be reviewed to ensure that -

(a) no medical data can be released to Social Security; and

(b) no medical data, other than that relating to veterans, and properly necessary for the discharge of its functions, be released to Veterans' Affairs.

CHAPTER 1

SUMMARY OF THE COMMITTEE'S SCRUTINY

Introduction

1. On 13 February 1986 the Chairman of the Regulations and Ordinances Committee gave notice of motion of disallowance of the Health Insurance Regulations (Amendment) being Statutory Rules 1985 No. 290, tabled in the Senate on 11 November 1985. In an accompanying statement (Senate Hansard, 13 February 1986, page 233), the Chairman explained that the Regulations prescribed the Secretary of the Department of Social Security to be a person to whom might be given otherwise confidential information from the records of the Health Insurance Commission. The Committee was concerned under its Principles that by this bald prescription, personal rights to medical privacy might be infringed if Commission information were to be made available to a large Department within the federal bureaucracy, without legal definition of the nature of the information which could be released, and without legal specification of the circumstances in which it might be released.

Correspondence

2. The Committee corresponded extensively with the Minister for Health and the Minister for Social Security pressing its view that there should be express legal controls to eliminate the possibility that medical information could lawfully be released to the other areas of the bureaucracy. The Minister for Health indicated that his clear intention was to release only identification data like name, address, date of birth and marital status and that the computer systems proposed to be used made it impossible for any medical information to be revealed.

Disallowance by Effluxion of Time

3. In the light of the Committee's strongly expressed objections to the Regulations as they stood, it was eventually accepted that the Regulations would be disallowed by effluxion of time when the Senate rose on 10 April 1986. Under sub-section 48(5) of the Acts Interpretation Act 1901 that date was the last day on which the Committee's motion of disallowance could have been called on for debate. It was, by agreement, not called on and the Regulations were thereby disallowed. (See Gazette No. S168, Tuesday, 15 April 1986.)

Report to the Senate

4. On only one previous occasion has delegated legislation been disallowed in the Senate by effluxion of time. (See the Seventy-Sixth Report, Report upon a Certain Ordinance of the Australian Capital Territory Disallowed by Effluxion of Time, December 1985). As was the case then, the Committee considers that the background to automatic disallowance should be reported to the Senate at the earliest date. In this case however, the implications of the Regulations and the Minister's agreement to their disallowance should be the subject of special note.

The Committee's Principles and the Right to Privacy

5. This is not the first occasion on which the Committee has applied its Principles to prevent erosion by delegated legislation of the right to privacy. In its Fifty-First Report, March 1976, the Committee described how it sought and obtained amendments to certain Postal Services Regulations which contained provisions empowering the Postal Commission to open and dispose of mail. Also, on 19 March 1986 the Committee received a letter from the Minister for Housing and Construction in which he gave an undertaking to amend the First Home Owners Regulations (Amendments). These amendments would protect confidential records concerning applicants to

the First Home Owners Scheme from unjustified dispersal to other areas of the federal bureaucracy. The correspondence describing the Committee's scrutiny of these Regulations appears in Appendix 3.

CHAPTER 2

HEALTH INSURANCE COMMISSION

Commission's Computer Resources

6. The Health Insurance Commission was established by Parliament in 1974 to administer the Australian health insurance arrangements. Although the details of these arrangements have changed under successive governments, nevertheless the Commission has, over time, become the recipient and the repository of vast amounts of historical and current computerised medical information about the health of millions of Australians. At present more than 15.8 million persons are enrolled in Medicare. It is therefore necessary for the Commission to operate and be responsible for the security of one of the largest computerised medical claims systems in the world. In view of the scale and complexity of its operations, the Commission's computer strategies encompass operations close to the limits of available technology and in some cases in a pioneering role.

Statistics

7. The Commission's computer systems receive and process over one million messages daily. In a full year of its operations, Medicare benefits are payable for about 113 million medical services to the value of 2.2 billion dollars. This averages 7 distinct medical services per annum per head of the population.

8. It is one of the Commission's objectives to maintain appropriate statistical records for health planning and cost control. Statistical tables in the Commission's annual reports detail the numbers of persons enrolled and the number of services processed, by sex, age, and State; the number and type of services processed whether involving G.P.'s,

specialists, obstetrics, pathology, radiology etc. The computer codes used can, of course, identify particular medical conditions and their treatment by identified providers.

Potential Cross-tabulations

9. Quite obviously then, it is not beyond the technical facilities available to the Health Insurance Commission to produce medical profiles on identifiable individuals, families, members of ethnic groups identifiable by name and place of residence, members of work forces making use of corporate medical officers, and other groups identified by cross-tabulated variables. Accumulated medical information describes an individual's or a community's physical and psychological weaknesses. Thus, it is, for an individual or a group of individuals, a source of enormous social and political vulnerability. It has been recognised as such and used by states where the rule of law and the scrutiny of delegated legislation are unknown even to the imagination. It is the wish of the Committee that it can never be misused in Australia because of powerful legal barriers to such misuse. It is with the intention of improving legal controls to protect medical privacy that the Committee objected to the Health Insurance Regulations and pressed for their amendment. As a consequence of the Committee's scrutiny the Minister for Health has undertaken to make those legal controls and barriers more protective than they have been to date.

CHAPTER 3

HEALTH INSURANCE REGULATIONS (AMENDMENT)

Introduction

10. Section 130 of the Health Insurance Act makes it unlawful for an officer directly or indirectly to divulge any information about a person which the officer has acquired in the performance of his or her duties. There are however, certain exceptions to this general prohibition and the Health Insurance Regulations (Amendment) relates to one of these. The Regulations were made by the Governor-General on 31 October 1985 under section 133(1) of the Act which provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed. Paragraph 130(3)(b) provides that, notwithstanding the secrecy provisions in sub-section 130(1) of the Act, the Secretary of the Department of Health or the General Manager of the Health Insurance Commission (HIC) may divulge otherwise confidential information (including medical details) to a prescribed person. By virtue of paragraph 9B(2A)(a) of the Regulations, the Secretary of the Department of Social Security was prescribed as a person to whom such confidential information might be divulged.

Explanatory Statement

11. The Explanatory Statement accompanying the Regulations explained that the Government had agreed that the Department of Social Security should be permitted to make use of "computer records" of other Commonwealth instrumentalities, including the Commission, for the purpose of verifying identification details supplied by claimants and beneficiaries under legislation administered by that Department. The "computer records" involved would be those

otherwise secret records relating to payments of medicare benefits. It was stated that "cross-matching" of these records with those of the Department of Social Security would provide an efficient means of identity verification with the minimum investigation of and inconvenience to bona fide claimants.

Previous Regulations

12. Previous Regulations have prescribed other persons and authorities outside the HIC to whom might be released confidential records. However, none of these gave rise to implications as far-reaching as the latest amendment. For example, Statutory Rules 1975 No. 230 prescribed the Medical Boards of the States, the Northern Territory and the A.C.T. In a similar vein, Statutory Rules 1983 No. 106 prescribed officially appointed persons who were investigating medical disciplinary matters. Also, Statutory Rules 1985 No. 95 prescribed specific legal officers in the New South Wales Complaints Unit of the State's Department of Health.

13. These prescriptions are not ideally drafted. They are not qualified to eliminate the possibility of wholesale release of medical data unrelated to the activities of the persons and authorities prescribed. However, in so far as they authorise release of medical data for legal and medical purposes, they tend to highlight the departure from this pattern which the latest Regulations represent.

CHAPTER 4

THE COMMITTEE'S CORRESPONDENCE

Initial Letter

14. The Committee's correspondence is fully incorporated as an appendix to this Report. In its initial letter of 16 January 1986 to the Minister for Health the Committee stated its concern that the Regulations made it lawful to release material that could reveal highly confidential medical facts about whether an insured person or family member suffered from, for example, genetic, sexual, psychiatric or contagious diseases. It could also include information about whether a person had undergone socially embarrassing or controversial medical procedures such as an abortion, a vasectomy or electro-convulsive therapy etc. The Committee noted that its principles might be infringed by delegated legislation which made it lawful to release such data to officials in another non-medical area of the bureaucracy for purposes totally urelated to the health insurance scheme, without the knowledge or consent of the individuals concerned. While the Committee supported the Minister in his desire to reduce social security fraud, the Regulations gave rise to fundamental questions of principle concerning the use of delegated legislation to facilitate the interlocking of the federal bureaucracy's computer information systems.

Minister's Reply

15. In his reply of 14 February 1986 the Minister indicated that he shared the Committee's concern about the privacy of very sensitive medical information. However, the issue had been carefully considered before the Government decided in May 1985 that the Department of Social Security should have access to HIC records relating to individuals. The access

was granted for the exclusive purpose of validating the identity of social security pensioners. This would be done by release of records of address, date of birth and marital status and no medical information would be revealed.

Committee's Second Letter

16. In a further letter of 28 February 1986 the Committee again indicated that it was not satisfied with the Regulations and that in the absence of amendments they could be viewed as infringing the Committee's Principles. The Committee again expressed its general concern about the use of an executive decree to authorise the interlocking of disparate computer systems holding otherwise legally protected medical secrets, the unauthorised release of which could make individuals vulnerable. The Committee pointed out that increasing numbers of public servants were being given access to an ever increasing assortment of private information about individuals. While the Committee had no reason to doubt the general integrity of public servants, for the purposes of its scrutiny of the Regulations there was no guarantee that future generations of officials would equally uphold these high standards of trustworthiness. The Regulations enlarged considerably the numbers of persons who could lawfully have access to HIC medical records.

Legal Barriers

17. In place of informal administrative controls over the flow of such information the Committee preferred to see legal barriers to the release of information other than identity data. The Committee took the view that when a legislative instrument set out the precise nature of the information to be released and the circumstances and purpose of its release, the legitimate rights to vital medical privacy would be safeguarded and be seen to be safeguarded. The Committee urged the Minister to amend the Regulations to achieve this outcome.

Minister's Second Letter

18. In a reply of 12 March 1986 the Minister explained how the Regulations could assist Social Security, how privacy would be respected under them, and how, under the Health Insurance Act, a certification procedure could have been used had he been desirous of avoiding parliamentary scrutiny of his intention to allow inter-departmental information transfers.

Social Security Fraud Prevention

19. The HIC, having attempted to enrol the entire population of Australia for the purposes of Medicare, possesses a unique source of identification details which is subject to constant verification each time a person presents an account to Medicare. It is believed that fraudulent misrepresentation of identity in order to claim social security benefits could be markedly reduced if claimants' identities could be validated against such up-to-date data.

Protection of Privacy

20. The Minister explained that not only had he no intention to disclose medical information but the computer systems to be used and administrative measures to be followed would preserve complete medical confidentiality. Social Security would only have access to enrolment data, including medicare numbers, on a computer file from which medical history could not be deduced. (See Appendix 2, page 43. The Committee had difficulty in assessing the technical adequacy of these systems and procedures as a foolproof means of avoiding release of any medical data. However, in the event, it has not been necessary for the Committee to conclude that they were technically sufficient or otherwise.)

Parliamentary Scrutiny

21. The Minister also explained that he could have released the information required for Social Security's verification of client identities by means of the certification procedure under sub-section 130(7) of the Health Insurance Act. He chose to use Regulations instead because of the important questions of principle inherent in any arrangements for the transfer of personal data between the computer systems of Government instrumentalities and because of the desirability of having these arrangements subject to parliamentary scrutiny.

Other Matters

22. The Minister reminded the Committee that officials in the Department of Social Security were subject to the secrecy provisions of both the Health Insurance Act and the Social Security Act. The Minister also pointed out that ultimately the security of HIC records rested with the General Manager of the Commission. It would be an almost non-existent risk that he or she would act unilaterally and contrary to the expressed intention of the Goverment by using his or her discretion to release more than identification data to Social Security.

Representations from the Minister for Social Security

23. On 19 March 1986 the Committee received a letter from the Minister for Social Security whose Department had a keen and obvious interest in the survival of the Regulations. The Minister indicated that administrative arrangements for handing over HIC data to Social Security reflected a level of Government concern for privacy rights and civil liberties equal to that of the Committee. He reminded the Committee of the numerous procedural controls which would block transference to Social Security of medical records. Identification details only were sought, not medical data.

Policy Decision

24. The Minister pointed out that the decision to make HIC identity information available to his Department was taken by the Government as a matter of policy. Such a step was believed to be necessary to facilitate the detection of social security fraud. The Minister did not believe it was open to the Committee to seek to alter such a policy decision.

Committee's Third Letter

25. In a further letter of 20 March 1986, the Committee repeated its fundamental concern about the absence from the Regulations of legal barriers which would make it unlawful for information other than identity verification data to be released to the bureaucracy.

26. In applying its Principles, the Committee has of course been influenced, over time, by changes in communal attitudes to privacy rights. These changes have, to some extent, been brought about by the sophisticated computer resources of Government. A declared policy to protect medical privacy in association with technical and administrative procedures might not be an adequate counter to that sophistication without the vital presence of legal barriers to prevent release.

Trespass Per Se

27. For the Health Insurance Commission to transfer to Social Security any information given to it in good faith by millions of Australians who, of necessity, use the Commission, could be viewed as per se a trespass on the right to privacy. However, the Committee was concerned, under its Principle (b), with "undue trespass". It had in effect conceded that release of identification data only would not infringe its Principles provided it was made

unlawful to release information other than that. When technological, administrative and legal barriers were all in place to guarantee medical privacy, the policy goal of assisting Social Security with its fraud prevention measures could be achieved without the need to trespass unduly on personal rights.

Legal Controls

28. The Committee again pressed the Minister to amend the Regulations or, if necessary, the Act to make it unlawful to release information other than identification data. The Committee considered that the regulations should define the type of information to be released and specify the circumstances of its release. The Committee emphasised its view that without such legal controls, the possibility remained that medical details, which are generally the most private information a person can possess, could lawfully be made available to Social Security in relation to millions of Australians. The Committee would be remiss in its application of Principle (b) if the possibility that this could happen under delegated legislation were not eliminated as a consequence of its scrutiny.

Minister's Final Letter

29. In a final letter of 8 April 1986 the Minister informed the Committee that he now agreed with the Committee on the desirability of a legal barrier to any possibility that access to HIC medical records could be abused. He therefore accepted that the Regulations would be disallowed by effluxion of time. He undertook to introduce amendments to the Health Insurance Act in the Budget Sittings 1986 to enlarge his power to make Regulations. Advice previously received from the Attorney-General's Department had indicated that the prescription described in paragraph 130(3)(b) of the Act permits only the prescription of an authority or person and cannot be used to authorise

limitations on the nature of the information to be released. The foreshadowed amendment to the Act would overcome this and allow the making of Regulations which would meet all of the Committee's concerns.

Certificate Releases

30. In the meantime the Minister would assist the Secretary of the Department of Social Security in implementation of fraud prevention checks by issuing certificates under sub-section 130(7) of the Health Insurance Act. This sub-section provides that where the Minister certifies in writing that it is desirable for administering social security legislation that information referred to in the certificate should be communicated, the Secretary or the General Manager of the HIC may divulge that information to the Secretary of the Department of Social Security. However, information relating to the rendering of a professional service shall not be divulged in a manner that is likely to enable the identification of the person involved (unless medi-fraud offences have been committed or are reasonably suspected).

CHAPTER 5

THE COMMITTEE'S SCRUTINY IN FOCUS

31. In terms of the large numbers of people who might have been affected by them, the Health Insurance Regulations (Amendments) were perhaps the most significant regulations examined by the Committee in 48 years of its peace time existence. The Regulations made it lawful for the HIC to transfer to the Secretary of the Department of Social Security any information, including hundreds of millions of processable medical details on over 15 million Australians.

32. Yet on their face no Regulations could have appeared more innocuous. They consisted of a one line prescription of the Secretary of the Department of Social Security "for the purposes of sub-section 130(3) of the Act". The process of scrutiny which enabled the Committee to come to a full appreciation of the implications of the Regulation was complex. In scrutinising these Regulations, the Committee was confronted for the first time with highly complex issues concerning the use and interlocking of state-of-the-art computer technologies. For the first time, HIC computer systems were to be used as bureaucratic tools to improve surveillance and monitoring, by another federal Department, of potentially fraudulent social security claimants.

33. As a result of the Committee's scrutiny the Regulations were ultimately disallowed in a unique fashion since the Minister eventually accepted that the force of the Committee's criticism warranted such an outcome. Notice of motion of disallowance having been given on behalf of the Committee and not withdrawn, called on or disposed of within 15 sitting days of the notice, the Regulations were disallowed by effluxion of time.

34. For the second time in twelve months the Committee's scrutiny has identified a delegated instrument the flaws in which can be overcome only by means of a Bill for an Act to amend the legislation under which the Regulations were made. The Minister has given a firm undertaking to introduce such a Bill in the Budget Sittings. (The other regulations were the Extradition (Republic of South Africa) Regulations, Statutory Rules 1985 No. 14, discussed in the Committee's Seventy-Seventh Report, March 1986.)

35. From the outset, the Committee harboured no doubts that the issue with which it was involved was one of fundamental principle concerning vital personal rights to medical privacy. At one point it was suggested that it was a matter of Government policy that a one line instrument of delegated legislation be used to authorise release of identity details, notwithstanding that the instrument incidentally authorised wholesale inter-bureaucracy transfers of personal medical data. However, the point of principle at stake was always clear to the Committee.

36. The Regulations made it lawful to transfer medical records to the Department of Social Security. That Department is the largest investigative arm of the federal bureaucracy. In terms of staff size it is one of the largest Departments of State. It is daily an applicant, respondent, amicus curiae or witness before the Administrative Appeals Tribunal, the Federal Court and the Family Court. It is involved in litigation on a large range of social security matters, employees' compensation cases and family law questions where an unacknowledged use of otherwise privileged medical fact, opinion and innuendo could be of advantage to an unscrupulous advocate. It is a Department whose views may be canvassed directly or indirectly by Cabinet or other Departments on questions of individuals' employment and promotion, and in relation to appointments to statutory, judicial or other high office.

37. The Committee does not, of course, suggest that even if medical information were deliberately or inadvertently released by the HIC to Social Security it would be put to improper use. Neither the Minister for Health, the Minister for Social Security nor the HIC would countenance this. But the legal possibility of abuse exists and the Committee's responsibility to the Senate is to remove that possibility. The Committee cannot underwrite the present or guarantee the future where there exists legal powers which could result in serious abuse of personal rights to privacy. When harnessed to other expanding governmental powers, a legal power to release medical data would eventually serve to accelerate the erosion of personal rights by the combination of centralised bureaucratic and technocratic power. The Committee was prepared to concede that release of prima facie confidential identification data only would not be an "undue" trespass and thus would not infringe its Principles. The Committee has accepted that reasonable fraud prevention measures require this in accordance with Government policy. But it has been this very concession and the preliminary access to vast private data banks which it gives, which has made the Committee so insistent that legal controls and definitions must ensure that nothing but identification data can, in practice, be lawfully released.

CHAPTER 6

INFORMATION ACCESS BY THE DEPARTMENT OF VETERANS' AFFAIRS

Release to Veterans' Affairs

38. In the course of its scrutiny of the Health Insurance Regulations (Amendment), the Committee was made aware of earlier Regulations (Statutory Rules 1985 No. 50 made on 23 April 1985) which had the effect of prescribing the Secretary of the Department of Veterans' Affairs to be a person who can receive confidential HIC information. The reference in the Regulations presently under scrutiny to the Secretary of this Department appears to have been a duplication, since under the earlier Regulations the Secretary currently enjoys a power of access identical to that which has precipitated the grave concerns reflected in this Report.

Access to Medical Data

39. The Department of Veterans' Affairs may have a reasonable need to have access to certain medical information held by the HIC. The Explanatory Statement accompanying the earlier Regulations explained that since the introduction of Medicare in 1984, the Department's beneficiaries may have a dual entitlement to benefits under the repatriation legislation and Medicare. It may be reasonable therefore that the Department should have access to claims data held by the HIC in order to streamline claiming procedures and to minimise the opportunities for lodging fraudulent claims on either organisation.

Undue Trespass

40. Although the Committee does not object in principle to these arrangements, it does consider, in the light of this Report, that the legal power to access all HIC data, rather than data related solely to veterans' affairs, is an undue trespass on rights to privacy. The Committee considers that the sentiments, conclusions and recommendations expressed in this Report apply with equal force to release to Veterans' Affairs of any data other than that relating to claimants for veterans' benefits. There should be legal controls and barriers to make it unlawful and procedurally impossible for medical information on persons who are not veterans to be released by the HIC to the Secretary of the Department of Veterans' Affairs.

CHAPTER 7

THE WAY FORWARD

Six Month Rule

41. Since the Regulations in question have been disallowed, paragraph 49(1)(b) of the Acts Interpretation Act will prevent any other Regulations the same in substance, from being made within 6 months of the disallowance, unless the Senate, by resolution, approves the making of such Regulations. There will thus eventuate either, a period of six months during which the Minister for Health and his advisers can prepare suitable amendments to the Health Insurance Act and suitable draft Regulations to be made thereunder, or, within a shorter time, an opportunity for the whole Senate to resolve affirmatively that fresh Regulations are acceptable.

Continued Committee Scrutiny

42. The process of the Committee's scrutiny is not therefore completed until the Minister's udertakings are satisfactorily implemented. As with all such undertakings the Committee will have a keen interest in their progress. However, the outcome of its scrutiny perhaps leaves the Committee more than usually anxious that acceptable legislative solutions are found. These solutions must balance fraud prevention imperatives against the easily overlooked expectations of groups in general and individuals in particular to enjoy adequate legal protection of the right to medical privacy. The most effective protection is one which combines technical security with legal sanctions, while permitting the controlled use of identification data. The Committee's primary interest is to see in place legal impediments to the release of details other than identity information. In a matter of such sensitivity, constraints

based on statements of ministerial intention, administrative handling policies, standard computer systems and the avowed integrity of essentially independent Commission officials, must be supplemented by the presence of legal controls to ensure that the public continues to have confidence in the system.

Certificates

43. Pending amendments to the Health Insurance Act, the Minister proposes to issue a series of certificates under sub-section 130(7) of the Act to authorise release of identity verification data on the basis that it is desirable in the interests of administering the Social Security Act. It is of course a matter for the Minister and his advisers to determine whether the terms of that sub-section are wide enough to overcome the kind of limitation which prevented the Minister from using paragraph 130(3)(a) of the Act. This paragraph, which empowers the Minister to release otherwise confidential data if it is necessary in the public interest, could not authorise the wholesale release of Australia-wide information but rather it appears to be confined to the release of material concerning one person or a small number of individuals. It may be that, on a proper construction, sub-section 130(7) is similarly limited.

Amendments to the Act

44. The Committee has accepted that, in the peculiar circumstances of this case, it is reasonable for the Minister to broaden his regulation-making powers in order adequately to meet the Committee's concerns. However, the Committee is not unmindful that this is a course of action which requires sensitive handling. It is but rarely a solution to regulatory infringements of personal rights and civil liberties for regulatory power to be further broadened. The Senate Standing Committee on the Scrutiny of Bills will, of course, have an opportunity to scrutinise and

report on the amending Bill in accordance with its terms of reference and in the light of this Report. The Committee does not expect that the Minister for Health will deal with this matter in a way other than with the fairness, openness and sensitivity to rights which has characterised his exchanges with the Committee.

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

Minister and Officials

45. Throughout its scrutiny of the Regulations the Committee has been motivated by a desire to protect rights without impeding reasonable administration. That has been the touchstone of its operations since 1932. This approach has formed the basis of the co-operation which the Committee receives from Ministers and Departments when it draws attention to possible problems with delegated legislation. In its scrutiny of these Regulations, no less than with many others, the Committee received much appreciated advice and assistance from the Minister for Health and his officials. In the final analysis the Minister acted decisively by issuing instructions not to contest the disallowance of the Regulations. He took this action when it became apparent to him and the Committee that, while the Regulations remained in force, a properly protective balance could not be struck between the need legally to protect privacy while also affording Social Security reasonable fraud prevention information. His agreement to disallowance has removed the legal possibility that medical data could be transferred to Social Security under the authority of delegated legislation.

Veterans' Affairs

46. The Committee is confident that he will give serious consideration to the removal of any legal possibility that medical data concerning persons other than veterans could be transferred to the Department of Veterans' Affairs.

Law Reform Report

47. On a final cautionary note, the Committee draws the attention of the Minister and the Senate to the Report of the Australian Law Reform Commission on Privacy (Report No. 22, Parl. Paper No. 304/1983) in particular paragraph 937 where the Commission commented:

> "When a government department or agency receives information on the understanding that it is to be used for a particular purpose, it might not feel constrained to limit its dissemination to fulfilment of that purpose, if wider circulation seemed to meet the needs of the Commonwealth."

The fear which lies behind this sentiment is one which it is hoped the Minister will allay by his proposed amendments.

Recommendations

48. In the light of its scrutiny therefore the Committee recommends that:

(i) The Minister should satisfy himself that the release of nationwide identification data, which he seeks to achieve by issuing certificates under sub-section 130(7) of the Health Insurance Act 1973, is lawful under the Act.

(ii) If it is lawful, the Minister should be satisfied that physical transfer can be achieved without the possibility that medical data could be included.

(iii) Proposed amendments to the Health Insurance Act to broaden the Minister's regulation-making power should make it unlawful for the HIC to release to the

Department of Social Security any information other than expressly defined identification verification data.

(iv) In preparing these amendments and the associated Regulations, the Minister should address the need to limit the information which may legally be released to the Secretary of the Department of Veterans' Affairs.

(v) The computer systems and administrative procedures already in use or proposed to be used in releasing HIC data to Social Security or Veterans' Affairs should be reviewed to ensure that -

(a) no medical data can be released to Social Security; and

(b) no medical data, other than that relating to veterans, and properly necessary for the discharge of its functions, be released to Veterans' Affairs.

Barney Cooney
Chairman
17th April 1986

Senate Standing Committee on Regulations and Ordinances

APPENDIX I

Statutory Rules 1985 No. 290[1]

Health Insurance Regulations[2] (Amendment)

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulation under the *Health Insurance Act 1973*.

Dated 31 October 1985.

N. M. STEPHEN
Governor-General

By His Excellency's Command,

NEAL BLEWETT
Minister of State for Health

Prescribed authorities for the purposes of paragraph 130 (3) (b) of the Act

Regulation 9B of the Health Insurance Regulations is amended by omitting sub-regulation (2A) and substituting the following sub-regulation:

"(2A) For the purposes of paragraph 130 (3) (b) of the Act, each of the following is a prescribed person:

(a) the Secretary of the Department of Social Security;

(b) the Secretary of the Department of Veterans' Affairs.".

NOTES

1. Notified in the *Commonwealth of Australia Gazette* on 7 November 1985.

2. Statutory Rules 1975 No. 80 as amended to date. For previous amendments *see* Note 2 to Statutory Rules 1985 No. 36 and *see also* Statutory Rules 1985 Nos. 36, 50, 95 and 205.

Printed by Authority by the Commonwealth Government Printer
14506/85 (S R 327/85) Cat. No. 85 4925 1

EXPLANATORY STATEMENT

STATUTORY RULES 1985 NO. 290

ISSUED BY AUTHORITY OF THE MINISTER FOR HEALTH

HEALTH INSURANCE ACT 1973

HEALTH INSURANCE REGULATIONS (AMENDMENT)

Section 133 of the Health Insurance Act 1973 ('the Act') provides that the Governor-General may make regulations prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out our giving effect to the Act.

Sub-section 130(1) of the Act provides that a person shall not, directly or indirectly, except in the performance of his duties, or in the exercise of his powers or functions, under the Act, and while he is, or after he ceases to be, an officer, make a record of, divulge or communicate to any person, any information with respect to the affairs of another person acquired by him in the performance of his duties, or in the exercise of his powers or functions, under the Act. An "officer" is, by virtue of sub-section 130(14) of the Act, a person performing duties, or exercising powers or functions, under, or in relation to, the Act.

S.R. No. 327/85

By virtue of paragraph 130(3)(b) of the Act, the Secretary or the General Manager of the Health Insurance Commission ('the Commission') may divulge information to which sub-section 130(1) of the Act relates, notwithstanding the provisions of that sub-section, to any prescribed authority or person. Sub-section 130(4) of the Act, however, prohibits information so divulged from being further divulged by the recipient authority or person, and by any person or employee under the control of that person or authority.

Regulation 9B of the Health Insurance Regulations ('the Regulations') prescribes for the purposes of paragraph 130(3)(b) of the Act, authorities and persons to whom information, to which sub-section 130(1) of the Act relates, may be divulged.

The Government agreed that the Department of Social Security should be permitted to make use of computer records of other Commonwealth instrumentalities, including the Commission, for the purpose of verifying identification details supplied by claimants and beneficiaries under legislation administered by that Department. Cross-matching of these records with those of

the Department of Social Security provides an efficient means of verification with minimum investigation of, and inconvenience to, bona fide claimants and beneficiaries. Relevant computer records of the Commission are those relating to payments of medicare benefits under the Act which are subject to sub-section 130(1) of the Act.

The Statutory Rules amend regulation 9B of the Regulations, to prescribe the Secretary of the Department of Social Security for the purposes of paragraph 130(3)(b) of the Act. This permits access by the Secretary and persons or employees under the control of the Secretary, to computer records of the Commission for the purpose described above.

The Statutory Rules came into operation on the date of their notification in the Commonwealth of Australia Gazette.

S.R. No. 327/85

APPENDIX 2

035

PARLIAMENT OF AUSTRALIA · THE SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

16 January 1986

The Hon. Dr. Neal Blewett, M.P.
Minister for Health,
Parliament House,
CANBERRA A.C.T. 2600

Dear Minister,

At its meeting on 5 December 1985, the Committee considered the Health Insurance Regulations (Amendment) (Statutory Rules 1985 No. 290, tabled in the Senate on 11 November 1985).

Sub-section 130(3)(b) of the Health Insurance Act 1973 provides that, notwithstanding penalties in the Act for disclosure of confidential information relating to the affairs of a person, the Secretary or the General Manager of the Health Insurance Commission may divulge such information to any prescribed authority or person. The Regulations in question amend regulation 9B of the Health Insurance Regulations by adding a new prescribed person, being the Secretary of the Department of Social Security, to whom confidential information may be given. (I note that Statutory Rules 1985 No. 50, being Health Insurance Regulations (Amendment), have already prescribed the Secretary of the Department of Veterans' Affairs, though for purposes related to the provision of health benefits to veterans.)

The Committee notes that sub-section 130(3)(a) of the Act which also allows for release of confidential information, is to some degree protective of personal rights to privacy of information in that it requires a written Ministerial instrument certifying that the public interest is involved for the release of confidential information in the absence of consent or prescription.

The Committee notes from the Explanatory Statement accompanying the Regulations that their purpose is to facilitate the supply of the Commission's computerised confidential information to the Department of Social Security "for the purpose of verifying identification details supplied by claimants and beneficiaries under legislation administered by that Department". The Statement continues -

> "Cross matching of these records with those of the Department of Social Security provides an efficient means of verification with minimum investigation of and inconvenience to, bona fide claimants and beneficiaries."

The material to be supplied to the Department relates to "payments of medicare benefits". Presumably such material could relate to, or could reveal, the fact that an insured person or a member of an insured person's family suffers or suffered from genetic, sexual, psychiatric or other similar illness or from infectious or contagious diseases. That such information in such a form could be divulged to the officials in the Department concerned under the authority of delegated legislation, without the knowledge of the insured person, and for purposes apparently unrelated to those of the health insurance scheme, is a matter of concern to the Committee under its Principles.

Thus the use of delegated legislation to facilitate the interlocking of Government Departments' computerised information systems where information relating to highly personal and confidential information is divulged for purposes apparently other than those related to the health or health insurance claims of insured persons, may be objectionable in the absence of the knowledge and consent of individuals concerned.

The Committee is at one with you in your desire to reduce social security fraud. However, important issues of principle concerning rights to privacy of very sensitive medical information must also be weighed in the balance, particularly if, through the use of Ministerial certificates, individuals' consents and other devices, the need to use delegated legislation for wholesale interlocking of confidential personal information databanks can be reduced or even eliminated.

The Committee would welcome your comments and advice on these questions.

Yours sincerely,

Barney Cooney
Chairman

MINISTER FOR
HEALTH

037

Parliament House,
Canberra, A.C.T. 2600

14/2/86

My dear Senator

I refer to your letter in which you raised a number of questions relating to the Health Insurance Regulations (Amendment) (Statutory Rules 1985 No. 290) which were considered by your Committee on 5 December 1985.

The Statutory Rules in question amend regulation 9B of the Health Insurance Regulations by adding a new prescribed person, being the Secretary of the Department of Social Security, for the purposes of paragraph 130(3)(b) of the Health Insurance Act 1973. As you are aware section 130 is a secrecy provision which prohibits officers of the Department of Health or the Health Insurance Commission from disclosing to any person information acquired by the officer in the performance of his duties or the exercise of his powers or functions under the Act with certain exceptions such as disclosure to a prescribed authority or person under paragraph 130(3)(b).

In paragraph 5 of your letter you highlight the problems that could arise in instances where this Department provides information to the Secretary of the Department of Social Security, such as the divulging of details of an insured person's illnesses or diseases for a purpose that is totally unrelated to the health insurance scheme.

I do share your concern about delegated legislation being used to facilitate the interlocking of Government Departments' computerised information systems, especially where such information relates to personal and confidential information. I also agree that there are important issues of principle involved where personal rights to privacy of very sensitive medical information is threatened.

However, I can assure you that such issues were considered prior to the decision to allow the Secretary or the General Manager to disclose information to the Secretary of the Department of Social Security. The reasons for this decision were based on the Government's decision in May 1985 that the Department of Social Security should have access to, among other things, records relating to individuals held by the Health Insurance Commission (the Commission). In so far as the Commission is concerned access to its data was granted to enable the Department of Social Security to validate vital identity information concerning persons receiving pensions and benefits. The Government agreed that the release of information to the Department of Social Security was to be restricted to that purpose only. The nature of the information to be released would be limited to records of address, date of birth and marital status and consequently information about medical illnesses or conditions would not be disclosed. The Department and the Health Insurance Commission will therefore ensure that no information of a medical nature will be released to the Secretary of the Department of Social Security.

In paragraph 3 of your letter you suggest that paragraph 130(3)(a) provides a means of releasing information that would more readily protect a person's right to privacy of confidential information, as such release, without permission, requires Ministerial certification that the release of the confidential information is in the public interest. Prior to the making of the regulations in question consideration was given to certification under paragraph 130(3)(a) but was not proceeded with as there are arguments to suggest that the provision relates only to the release of information in a particular case where there is public interest in such a release. It was considered that certification under paragraph 130(3)(a) was inappropriate because it would not permit the release of information of a general character in the manner required by the Department of Social Security.

I trust that the foregoing will assure you that this regulation will not be used by the Department or the Commission to disclose information about a person's medical history to the Department of Social Security.

Yours sincerely

Neal Blewett

Senator B Cooney
Chairman
Senate Standing Committee on
Regulations and Ordinances
The Senate
Parliament House
CANBERRA ACT 2600

PARLIAMENT OF AUSTRALIA · THE SENATE VI

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

21 February 1986

The Hon. Neal Blewett, M.P.
Minister for Health,
Parliament House,
CANBERRA A.C.T. 2600

Dear Minister,

At its meeting on 20 February 1986, the Committee considered your letter of 14 February 1986 in connection with the Health Insurance Regulations (Amendment) (Statutory Rules 1985 No. 290). The Committee thanks you for the detailed consideration which you have given to the Committee's letter of 16 January 1985. However, the Committee retains some concern that, without amendment, the Regulations may infringe the principles under which it scrutinises delegated legislation.

The Committee is pleased to note that you share its sensitivity about delegated legislation being used to interlock disparate computer systems. Such systems contain very private information about certain individuals who may be vulnerable because of the very nature and privacy of that information. Increasing numbers of public servants are gaining access to an ever increasing assortment of private information about individuals. While the Committee has no reason to doubt the general integrity of the present generation of public servants, it can only be hoped, but not guaranteed, that future generations of public servants will equally uphold the general standards of integrity with which we have become familiar to date. In addition, as you would be the first to agree, it requires only a very small number of unsuitable employees within a large bureaucracy to jeopardise the privacy and even the safety of vulnerable individuals who have placed their trust in the security of Health Insurance Commission computer systems to protect their privacy.

The regulations presently under scrutiny have the effect of enlarging quite considerably the numbers of persons who may have access to the Commission's records. While it welcomes the informal restrictions which you will place on the nature and extent of information releases, the Committee remains uncertain as to how Health Insurance Commission records in particular will assist the Department of Social Security. Perhaps you could let the Committee know precisely what it is that the Department wishes to verify by reference to Commission data and for what purpose.

In spite of the very positive sentiments in your letter which the Committee applaudes, nevertheless the Committee does remain somewhat apprehensive about the potential effects of the regulations on privacy in the absence of some legislative provision to place those restrictions you have mentioned, on a formal footing. While the restrictions referred to in your letter suggest that only innocuous information will be divulged, there appear to be no legal barriers to the release of much more extensive information for any purpose. The Committee notes for example that the Explanatory Statement accompanying the Regulations, while referring to the verification of identification details, also refers to the "relevant computer records" as being "those relating to payments of medicare benefits". Obviously, if not properly screened and edited, such records could reveal information from which details of personal medical conditions and treatments could be deduced.

It is the Committee's view that when a legislative instrument expressly sets out the precise nature of the information released, the exclusive circumstances in which it is to be released and the purpose to which it may be put, then the citizen's legitimate rights to privacy over and above such reasonable releases can be protected and be seen to be protected. It is the Committee's suggestion that you give consideration to amendments along these lines.

It may assist you in responding to this letter if I point out to you that the Committee's concern with these issues extends beyond the scope of the Health Insurance Regulations (Amendment). On 20 November 1985 and on 18 February 1986, the Committee wrote to the Minister for Housing and Construction seeking his advice in connection with the First Home Owners Regulations (Amendment) (Statutory Rules 1985 No. 267). These regulations prescribed the Commissioner for Taxation and the Secretary of the Department of Social Security for the purposes of paragraph 29(2)(b) of the First Home Owners Act 1983. This permits otherwise confidential information to be divulged from the Home Loans Scheme in the absence of the Minister's or the Secretary's personal certification that such action is necessary in the public interest.

In its letter of 18 February 1986, the Committee wrote -

> "It would also be very useful if you could detail the rigorous standards which it is proposed your Department will adopt in determining whether information should be released from the First Home Owners Scheme data banks. During the course of its examination of these Regulations, the Committee considered that, if, in the light of any further information and comments you can supply, the Regulations were otherwise acceptable under the Committee's Principles, there may be some merit in expressly providing for inclusion of such criteria in the body of the Regulations. Such an approach may have advantages for the protection of privacy in that criteria for release of information would

be publicly known, made certain of application, definite in content and subject to parliamentary scrutiny in either an original or amended form. At present the position appears to be that vital criteria for the release of personal data can be determined, and perhaps periodically altered, on an administrative basis only.... The Committee considers that these Regulations raise some fundamental questions about the role of delegated legislation in the case of rights to privacy ...."

The Committee would welcome your comments and advice on whether it might not be preferable, if there are compelling justifications for dispersal of what appears to be essentially innocuous information, for the regulations to provide with certainty and precision, for those criteria which informal administrative guidelines might not address so effectively. Perhaps you could consider the value of amendments to provide that only identified information can be released, in identified circumstances, at the request of and with the authority of, officers of identified seniority in the respective Departments.

As the Committee has indicated to the Minister for Housing and Construction, very important questions of principle are involved in these regulations and the Committee looks forward with keen interest to receiving your views.

Yours sincerely,

Barney Cooney
Chairman

MINISTER FOR
HEALTH

Parliament House,
Canberra, A.C.T. 2600

My dear Senator

12 MAR 1986

I refer to your further letter of 28 February 1986 regarding the Health Insurance Regulations (Amendment) (Statutory Rules 1985 No 290).

I think it best that the points you have raised be dealt with separately. They can, I believe be summarised as concerns -

- about the information to be given to Social Security and the use to which it will be put;
- arrangements ensuring the privacy of Government information holdings; and
- Parliamentary scrutiny of arrangements for the exchange of information.

1. Usefulness of Commission Data for Social Security Purposes

At you are no doubt aware the Department of Social Security is responsible for some 4.8 million clients including those who receive family allowance payments.

The Department has a responsibility to ensure that the information upon which payments are based correctly reflects the clients' current circumstances. It does this by undertaking reviews of client eligibility and entitlement. These reviews are directed towards the types of cases where there is believed to be a higher than average risk of incorrect payment. The Government believes that the availability of the Commission's enrolment data for the purpose of validating identity enables Social Security to more effectively identify thoese cases where there is a risk of incorrect payment.

The Commission's enrolment data is constantly being verified through the matching of the information it holds against the identity details on the accounts presented to it for payment or refund. Allowing Social Security to validate client identity details against such up-to-date data markedly reduces the scope for successful misrepresentation.

References to "payment of medicare benefits" means only that the enrolment information held by the Commission is verified each time a claim for Medicare payment is presented to the Health Insurance Commission accompanied by an account from a medical practitioner or hospital. There never was any intention of allowing the Department of Social Security access to medical information.

2. Arrangements for ensuring the privacy of Government Computerised Information Holdings

As well as there being no intention to disclose medical information, the mechanisms for handling the data which is being made available to Social Security are themselves very tightly controlled.

I am informed that strict measures are being taken to ensure the confidentiality of information received in the Department of Social Security from the Commission. Data is received on magnetic tape and transferred by a Departmental officer direct to the National Computer Centre. The data is processed at the Centre and the original tapes returned by hand to the Health Insurance Commission. At the National Computer Centre the processed data is password protected to the Benefits Control Branch in Central Office and cannot be accessed by any other group within the Department. On-line access by Social Security is protected at the Medicare end through strictly applied system controls surrounding a computer file with no medical information included on it.

Not only is the information received by the Department of Social Security well protected, but the scope of that information is essentially limited by the function it serves. There is no reason for information to be sought or divulged other than that which could be used to validate Social Security client identities and circumstances. Such information is therefore functionally restricted to medicare enrolment data maintained by the Commission. This information is kept on a separate computer file by the Commission which does not contain data relating directly to individual claims for medicare benefits. The file contains no information whatsoever relating to any person's medical history. Information on this enrolment file is restricted to details of name, address, date of birth, medicare identification number, medicare card number, and date of medicare enrolment. It is this file only which is passed to the Secretary of the Department of Social Security, and no other access will be had to the records of the Commission.

3. Parliamentary Scrutiny of information exchange arrangements

Information required for the verification of client identities by the Department of Social Security could have been divulged by means of certification under sub-section 130(7) of the Act. However, because of the important questions of principle inherent in any arrangements for the transfer of personal data

between computerised record systems of Government instrumentalities, it was thought appropriate that those arrangements, if possible, be made the subject of Parliamentary scrutiny. For this reason in particular it was preferred to seek appropriate prescription under paragraph 130(3)(b) of the Act.

Your suggestion that consideration be given to further amendment of the regulations to limit the information available to Social Security has been taken up by my Department with the Attorney-General's Department. It has advised that paragraph 130(3)(b) of the Health Insurance Act 1973 ("the Act") does not have flexibility and permits only the prescription of an "authority or person". It is not possible to limit by this regulation the kind of information that may be divulged to a prescribed authority or person.

I think it should be again emphasised that all information divulged under paragraph 130(3)(b) of the Act is subject to sub-section 130(4) of the Act. This provides that an authority or person to whom information is divulged, and any person or employee under the control of that authority or person is in respect of that information bound by the secrecy provisions of section 130 in the same way as a person performing duties under the Act. Information passed to the Secretary of the Department of Social Security therefore will remain at all times subject to the secrecy provisions of the Act. I am informed in addition that the secrecy provisions of section 17 of the Social Security Act 1947 would apply to any information passed by the Commission to the Department of Social Security.

I appreciate your concern about the possibility of a future generation of public servants being less wedded to the general standards of integrity which exist in the bureaucracy at the present time. But it is worth mentioning that access to medical information cannot be obtained unless the General Manager of the Commission agrees to release it - section 130(3)(b) of the Health Insurance Act refers to:-

> "the General Manager of the Commission may divulge any such information to any prescribed authority or person".

It is not therefore a question of "a very small number of unsuitable employees jeopardising the privacy" but rather the risk that one person, ie. the General Manager of the Commission, will some time in the future act unilaterally and contrary to the expressed intention of Government. I personally believe that such a possibility is extremely remote so much so as to make it almost non-existent.

It can be appreciated, therefore, that the use of Commission data proposed by Social Security provides a valuable mechanism to validate client identity information. It does not involve personal medical information and there has not been any suggestion of such information being sought in relation to any other function of the Department. I trust that, in view of the foregoing, the Committee will recognise that the question of privacy was very much in the minds of those responsible for making the proposed arrangements and that every possible step was taken to ensure the principles will be maintained. I believe the risk of this not continuing in the future is extremely low.

Yours sincerely

Neal Blewett
Minister for Health

Senator B Cooney
Chairman
Senate Standing Committee on
Regulations and Ordinances
The Senate
Parliament House
CANBERRA ACT 2600

VII

PARLIAMENT OF AUSTRALIA · THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

20 March 1986

The Hon. Neal Blewett, MP
Minister for Health
Parliament House
CANBERRA ACT 2600

Dear Minister,

At meetings on 13, 19, and 20 March 1986 the Committee discussed the Health Insurance Regulations (Amendment) (S.R. 1985 No. 290) and the associated correspondence from you, in particular your latest detailed letter of 12 March 1986. The Committee thanks you for that letter and the careful way you have explained the aims and implications of the prescriptions made by the Regulations.

However, the Committee remains concerned that under the Regulations as they stand no legal barrier exists to prevent the release of any medical information to the Secretary of the Department of Social Security. The declared policy not to release any information other than computer protected enrolment data is characteristic of the strong stand you have taken in seeking both to protect privacy and to assist with protection of the public revenue. The Committee is not involved in that broader debate though of course, in applying general principles of propriety and personal rights, its interpretation of its responsibilities is influenced over time by changes in attitudes to privacy rights and the impact on such rights of the bureaucracy's computer technology.

The Committee has an obligation to the Senate to ensure that important rights are not trespassed on unduly in delegated legislation which is not debated and approved in Parliament. For the Health Insurance Commission to transfer to Social Security any information which has been given in good faith by millions of Australians who of necessity use the Commission, might be viewed by some as, per se, a trespass on the right to privacy. There are strong advocates of this opinion. However, the Committee's terms of reference require it to be alert to the consequences of "undue" trespasses on rights. Laudable policy goals may not alone be sufficient justification for these when placed alongside entrenched legal and parliamentary principles. Such principles may be seriously jeopardised by means ill chosen to achieve such goals.

As far as these Regulations are concerned the Committee is of the view that there should be some legal impediment to the current possibility that medical information of a most prejudicial kind could lawfully be released to Social Security. The Committee respectfully suggests that you consider amending legislation to

define the type of information to be released (for example enrolment data) and to specify the circumstances of its release (for example on receipt of a statutory demand). An undertaking along these lines could avoid for all concerned the serious dilemma that a trespass justified in the public interest, may be an "undue" trespass because the potential for serious abuse creates a greater competing public interest. An express legislative requirement that the procedures to be followed for releases of information must in law be of the kind administratively devised by you, could resolve many of the problems arising here. Without such legal restraints, the theoretical possibility exists that medical information, which is generally the most sensitive private information a person can possess, could lawfully be made available to Social Security in relation to millions of Australians. The Committee would be remiss in its application of principle to delegated instruments if the possibility that this could happen under delegated legislation, were not eliminated.

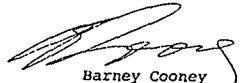
The Committee urges you to reconsider the questions raised by this letter. In order to assist you the Committee has agreed to make available for your information copies of its most recent correspondence with the Minister for Housing and Construction concerning Regulations where similar questions concerning the right to privacy arose. You will appreciate, of course, that while the First Home Owner Scheme has information of comparative sensitivity on some thousands of people, the Health Insurance Commission has, in many cases, extremely sensitive details concerning millions of Australians.

The Committee would hope that agreement can be reached along the lines of that achieved with the Minister for Housing and Construction. The Committee appreciates that, given your views on the limited nature of your regulation making powers, an amendment to the Health Insurance Act may be needed to achieve such agreement.

I should tell you that the Committee has received a letter of 19 March 1986 for the Minister for Social Security concerning the Regulations. The Committee had previously agreed to write to the Minister about the Regulations. I enclose for your information a copy of the Committee's letter and I will send a copy of this letter to him.

Important issues are at stake in this matter. The Committee looks forward to obtaining your agreement to a solution which can achieve the dual aims of legally protecting privacy and allowing reasonable fraud prevention measures.

Yours sincerely,



Barney Cooney
Chairman

COMMONWEALTH OF AUSTRALIA

MINISTER FOR SOCIAL SECURITY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

19.3.86

Senator B Cooney
Chairman
Senate Standing Committee on
Regulations and Ordinances
The Senate
Parliament House
CANBERRA ACT 2600

My dear Senator

I understand that the Committee has been considering the Health Insurance Regulations (Amendment) (Statutory Rules 1985 No 290) tabled in the Senate on 11 November 1985.

Officers of my Department have informed me that the Committee has expressed some concerns about the effect of the amendment particularly in relation to the possibility of client medical information being given to the Department of Social Security and the privacy aspects involved.

I am aware that my colleague the Minister for Health has written to you addressing these issues and I felt it desirable that I should indicate support for the views he has expressed.

The decision to make the identity information held by the Health Insurance Commission available to my Department was taken by the Government as a matter of policy.

Such a step was believed to be necessary as part of an overall approach to the detection of social security fraud. With respect I don't believe that it is open to the Committee to seek to alter such a policy decision.

So far as the administrative arrangements for handing over the HIC data are concerned I hasten to assure you that the Government is as concerned about the rights of individuals with respect to privacy and civil liberties as the Committee. The items of information specified by the Government are of an identity nature only and as my colleague has already indicated are held quite separately to any medical information. There are numerous procedural controls surrounding the latter which would block transferrance to the Department of Social Security.

I think it is also worth mentioning that there is no intention on the part of the Government or the officers of my Department to build a file of data which combines Social Security information with HIC details. The purpose of allowing my Department to have access to the HIC identity details was to allow it to validate information it was holding on clients where some risk of incorrect payments had already been established. The purpose is therefore one of checking information not one of building a new data bank which is a combination of client detials from both agencies.

I am concerned that the delay in allowing the amendment to pass is interfering with the proper business of Government and I would therefore be grateful is you could convey these points to the Committee as further argument in support of the proposal.

Yours sincerely

BRIAN HOWE

PARLIAMENT OF AUSTRALIA · THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

20 March 1986

The Hon. Brian Howe, M.P.
Minister for Social Security
Parliament House
CANBERRA ACT 2600

Dear Minister,

At its meeting on 20 March 1986 the Committee agreed to write to you in connection with the Health Insurance Regulations (Amendment) (S.R. 1985 No. 290) about which it is in correspondence with the Minister for Health. The Committee acknowledges that as the Minister whose Department seeks access to certain Health Insurance Commission information you have a considerable interest in the Committee's scrutiny of these Regulations.

Your letter of 19 March 1986 concerning the Committee's scrutiny of the Regulations was received on 20 March 1986. It has not yet been formally considered by the Committee. However, as the Committee had already agreed to write to you, this letter may incidentally address some of the matters raised in your letter. A formal response to your letter will be sent to you after it has been considered by the Committee.

At its meeting on 19 March 1986 the Committee agreed that it should draw to your attention the terms of an understanding reached between it and the Minister for Housing and Construction concerning release, to your Department or Tax, of confidential personal information held within the First Home Owners Scheme bureaucracy. I have enclosed for your information copies of relevant correspondence exchanged between the Committee and the Minister on this matter. As a result of the Ministerial undertaking, the Senate did not object to withdrawal of the Notice of Motion of Disallowance pertaining to the Regulations in question.

The consequence of the agreement between the Minister and the Committee is that the Minister will amend the Regulations to ensure that there will be express legal restraints controlling the release of confidential personal information from the First Home Owners Scheme to other Departments. Under amending Regulations the type of information to be released will be expressly defined and the protective legal conditions for its release will be specified. The major legal condition which will justify release will be a statutory demand from the requesting departments. Definition of the type of

information to be released is to be further explored within the Department and, pending the outcome of this examination, the Minister or the Secretary will release information only under the usual public interest certification procedure, abuse of which can be controlled and redressed by the Federal Court.

I have enclosed for your information a copy of the Committee's latest letter to the Minister for Health.

Yours sincerely,

Barney Cooney
Chairman

MINISTER FOR
HEALTH

Parliament House,
Canberra, A.C.T. 2600

Dear Senator Cooney

8 APR 1986

I refer to your letter of 20 March 1986 regarding your Committee's continued consideration of the Health Insurance Regulations (Amendment) (Statutory Rules 1985 No 290).

I think I have already made it clear that I very much share the Committee's concern that any potential for undue trespass upon personal privacy be eliminated. Further, whilst I firmly believe that the regulation poses no threat to such privacy in permitting the transfer of information in the manner I have previously described, I must agree as to the desirability of a legal barrier to any possibility of abuse, however remote.

I would propose that the only reasonable solution, without duplicating legislative and administrative procedures, is to allow the time for notice of disallowances to run its full term which will effectively disallow the regulation.

I would then be obliged to assist the Secretary of the Department of Social Security by issuing the appropriate certificates under sub-section 130(7) of the Health Insurance Act. In issuing any certificate I have already clarified to the Committee in previous correspondence that only data which allows the Department of Social Security to validate client identities will be made available. Such specific and limited use of data, I believe, is necessary to meet the Government's resolve to prevent fraud.

I would further assure the Committee of my intentions to amend the Health Insurance legislation in the Budget sittings to enable a regulation to be drafted which would clearly meet all the Committee's concerns.

In proposing this course of action I wish to draw to the Committee's attention that any agreement in a similar format to that achieved with the Minister for Housing and Construction unfortunately is not a feasible alternative due to the limited scope of the present provisions of the Health Insurance Act.

The comments of the Committee, for which I am grateful, have highlighted the fact that the regulation making power under paragraph 130(3)(b) of the Act is not sufficiently flexible to deal adequately with the range of issues arising from modern techniques of information transfer. This will be addressed in the course of future review and development of health insurance legislation.

Yours sincerely

Neal Blewett
Minister for Health

Senator B Cooney
Chairman
Senate Standing Committee on
Regulations and Ordinances
The Senate
Parliament House
CANBERRA ACT 2600

PARLIAMENT OF AUSTRALIA · THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

/5 April 1986

The Hon. Neal Blewett, MP
Minister for Health
Parliament House
CANBERRA ACT 2600

Dear Minister,

At a special meeting on 8 April 1986 the Committee considered your letter of 8 April 1986 concerning the Health Insurance Regulations (Amendment) (Statutory Rules 1985 No.290).

The Committee noted:

- your proposal that the time for disallowance should run its course;
- that, in the absence of the Regulations, you would issue certificates under sub-section 130(7) of the Health Insurance Act 1973 in order to give Social Security access to Health Insurance Commission data which would allow Social Security to validate clients' identities; and
- that in the Budget Sittings you intend to introduce a Bill to amend the Health Insurance Act to enable regulations to be made which meet all of the Committee's concerns regarding privacy of Health Insurance Commission records.

The Committee acknowledges that, in line with your concern to protect personal privacy while allowing fraud prevention measures to be effective, this package, when implemented, may represent a satisfactory compromise. The issues raised by the prospect that other parts of the bureaucracy are to have access to selected Commission data are serious and require careful handling. Your letter reflects your perception of that and your desire to achieve a proper balance.

With agreed disallowance of the Regulations, the immediate question of concern to the Committee is removed. However, the Committee should perhaps point out that while amendments to legislation are of course matters for the Parliament, amendments which broaden regulation-making powers are subject to scrutiny under the terms of reference of the Senate Standing Committee on the Scrutiny of Bills. The Committee would respectfully suggest that the drafting of that particula. amendment will require careful consideration in order to avoid any impression that primary legislation is to be used in place of delegated

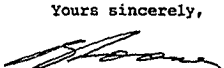
legislation merely to by-pass objections of principle raised by the Regulations and Ordinances Committee. In the light of your correspondence with it, the Committee, of course, accepts that that is not in any sense your intention.

In view of the significance of the issues raised by its scrutiny the Committee agreed to present a Report to the Senate on its examination of the Regulations.

Since the Minister for Social Security had previously written to the Committee expressing his interest in the Committee's scrutiny of the Regulations, I have sent a copy of this letter to him for his information.

Finally, the Committee wishes to thank you and your officials for the considerable co-operation and assistance which you have afforded to it in its examination of the Regulations. The Committee commends you personally for your readiness, in this matter, to act decisively in favour of the protection of rights to privacy.

Yours sincerely,



Barney Cooney
Chairman

PARLIAMENT OF AUSTRALIA · THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

15 April 1986

The Hon. Brian Howe, M.P.
Minister for Social Security
Parliament House
CANBERRA ACT 2600.

Dear Minister,

Further to your letter of 19 March 1986 and the Committee's letter to you of 20 March 1986 I have enclosed for your information a copy of a letter sent recently to the Minister for Health following the Committee's consideration of the Health Insurance Regulations (Amendments) and correspondence from you and Dr. Blewett.

Yours sincerely,

Barney Cooney
Chairman

APPENDIX 3

AUSTRALIA

Statutory Rules 1985 No. 267[1]

First Home Owners Regulations' (Amendment)

I, THE ADMINISTRATOR of the Government of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulations under the *First Home Owners Act 1983*.

Dated 11 October 1985.

J. A. ROWLAND
Administrator

By His Excellency's Command,

STEWART WEST
Minister of State for Housing
and Construction

1. Regulation 4A of the First Home Owners Regulations is repealed and the following regulation substituted:

Prescribed earnings

"4A. For the purposes of section 19 of the Act, in relation to an applicant in relation to whom a direction is in force under section 22 of the Act, the amount of the taxable income of the applicant for the relevant year of income is that amount as reduced in accordance with—

(a) if the prescribed date in relation to the applicant is a date not later than 30 June 1984 and the relevant year of income in relation to the applicant is the current year of income—the formula—

$$\frac{24{,}300}{25{,}900} \times A \quad ;$$

14484/85 (5 R 256/85) Cat No 85 4864 5

(b) if the prescribed date in relation to the applicant is a date not later than 30 June 1984 and the relevant year of income in relation to the applicant is the succeeding year of income—the formula—

$$\frac{24,300}{27,600} A \text{ ; or}$$

(c) if the prescribed date in relation to the applicant is a date later than 30 June 1984 and not later than 30 June 1985 and the relevant year of income in relation to the applicant is the current year of income—the formula—

$$\frac{25,900}{27,600} A ,$$

where A is the amount that, but for this regulation, would be the amount of the taxable income of the applicant for the relevant year of income in relation to the applicant.".

2. After regulation 26 of the First Home Owners Regulations the following regulation is inserted:

Persons prescribed for purposes of paragraph 29 (2) (b) of the Act

"27. For the purposes of paragraph 29 (2) (b) of the Act, each person who, for the time being, holds, or performs the duties of—

(a) the office of the Commissioner of Taxation; or

(b) the office of the Secretary to the Department of Social Security,

is prescribed.".

NOTES

1. Notified in the *Commonwealth of Australia Gazette* on 18 October 1985.

2. Statutory Rules 1983 No. 208 as amended to date. For previous amendments *see* Note 2 to Statutory Rules 1985 No. 39 and *see also* Statutory Rules 1985 No. 39.

Printed by Authority by the Commonwealth Government Printer

EXPLANATORY STATEMENT

STATUTORY RULES 1984 NO. 267

FIRST HOME OWNERS REGULATIONS (AMENDMENT)

Issued by Authority of the Minister for Housing and Construction

Statutory Rule No. makes Regulations under the First Home Owners Act 1983, to provide the formulae to be used in deflating incomes, where an applicant's income is required to be reduced by reason of the circumstances described in section 22 of the Act. Ordinarily an applicant will be eligible for assistance only if his income in the year preceding his "prescribed date" (that being, the date he entered the contract to purchase his home, or, as an owner-builder, commenced the construction of his home) is below certain limits. Section 22, however, permits in some circumstances, an applicant's income during the year in which his prescribed date falls, or the following year, to be used as the basis for assessing his eligibility under the Act. However, where an applicant's income in those years is used to assess his eligibility, it is deflated, to ensure equity with other applicants, whose income during the earlier year is being tested.

The amending Regulations also enable officers of the Department to divulge information acquired by them in consequence of their administration of the Act to the Australian Taxation Office and the Department of Social Security.

Details of the amending Regulations are as follows -

Regulation 1 repeals Regulation 4A of the Principal Regulations and substitutes a new Regulation 4A, to provide the formulae for deflating an applicant's income where -

(a) the applicant's prescribed date falls before 30 June 1984 and his relevant year of income, for the purposes of the Act, is the 1983/84 year [Regulation 4A(a)];

(b) the applicant's prescribed date falls before 30 June 1984 and his relevant year of income, for the purposes of the Act, is the 1984/85 year [Regulation 4A(b)]; or

(c) the applicant's prescribed date falls between 1 July 1984 and 30 June 1985 and his relevant year of income, for the purposes of the Act, is the 1984/85 year [Regulation 4A(c)].

Regulation 2 inserts into the Principal Regulations a new Regulation, Regulation 27, which prescribes the Commissioner of Taxation and the Secretary to the Department of Social Security (and any person for the time being performing the duties of those positions) as persons to whom information, acquired by Departmental officers in their administration of the Act, may be released.

S.R. 256/85

061

PARLIAMENT OF AUSTRALIA · THE SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

20 November 1985

Stewart West, M.P.
Minister for Housing and Construction,
Parliament House,
CANBERRA ACT 2600

At its meeting on 14 November 1985, the Committee considered the First Home Owners Regulations (Amendment) (Statutory Rules 1985 No. 267), tabled in Parliament on 5 November 1985. The Committee seeks your advice in connection with confidentiality of information.

Paragraph 29(2)(b) of the First Home Owners Act 1983 provides that, notwithstanding penalties in the Act for disclosure of confidential information, an officer may divulge any such information to any authority or person prescribed by the regulations. New regulation 27 prescribes the Commissioner of Taxation and the Secretary of the Department of Social Security. The Explanatory Statement accompanying the regulations does not explain the reason for these new prescriptions.

The Committee notes that sub-section 20(4) of the Act permits the Commissioner of Taxation to furnish officers administering the scheme with a certificate of taxable income, presumably with a view to combating fraudulent claims. The Committee also notes that in paragraph 29(2)(a) of the Act there are protective provisions to facilitate release of confidential information but only if the Minister or the Secretary certifies that this is necessary in the public interest. In the absence of any explanation for prescribing Taxation and Social Security officers, prescriptive releases give rise to doubts as to whether a protective public interest criterion is being applied.

The use of delegated legislation interlocking Government Departments' information systems containing a wide range of confidential personal details may cause concern in the absence of some stated purpose not inconsistent with current standards for the protection of personal rights and liberties. The Committee is concerned about the right to privacy of information in the form of protection from unexplained and unwarranted dispersal of that information within the Government bureaucracy, particularly where it is

not immediately apparent that the information can be used for the purpose of prosecuting persons accused of taxation or social security fraud.

The Committee would welcome your comments and advice on this matter.

Barney Cooney
Chairman

MINISTER FOR
HOUSING AND
CONSTRUCTION

The Hon Stewart WEST MP
Parliament House Canberra ACT 2600

Senator B. Cooney
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT

24 DEC 1985

Dear Senator Cooney,

I refer to your memorandum of 20 November 1985 relating to the prescribing of the Commissioner of Taxation and the Secretary to the Department of Social Security (DSS) as persons to whom information obtained in the administration of the First Home Owners Act 1983 may be released.

At the outset I would like to say that I am conscious of the need to safeguard the privacy of citizens and my Department will not be disclosing information of its own volition. Relevant information will only be provided to the Department of Social Security or the Australian Taxation Office upon receipt of a properly authorised request in accordance with the respective Social Security or Taxation legislation.

As you are aware, release of such information would ordinarily constitute a contravention of section 29 of the Act which prohibits the release of information by Departmental officers. Like the Committee, I am concerned to ensure that the privacy of citizens is adequately protected from unwarranted intrusion by Government instrumentalities. The making of regulation 27, however, was not intended to permit the unfettered transfer of information about individuals by my Department to the Australian Tax Office and DSS.

As you note, section 29(2)(a) of the Act already provides a non-delegable function to certify that where it is in the public interest information may be divulged to such persons as either I or the Secretary to my Department direct. Requests for information from the Australian Tax Office or DSS, however, are made not infrequently and it is administratively impracticable for every such request to be personally reviewed by the Secretary or myself.

.../2

It is proposed that my Department will adopt rigorous standards in determining whether information should be supplied to the Australian Tax Office or DSS. These will be no less stringent than those that I and the Secretary currently apply. For instance, as I have said, it will be clear policy that information will be supplied to the Australian Tax Office or DSS only in pursuance of a statutory demand for information from the Commissioner, the Secretary to that Department or their respective delegates.

In relation to the possible use of any information provided to the Australian Tax Office or DSS, I would point out that privacy considerations may in some instances be counter-balanced by the public interest of enforcing the criminal law or protecting the public revenue. Information concerning applicants' financial and personal affairs, obtained for the purposes of the administration of the FHO Scheme, on occasion evidences a clear intention by persons to evade tax or unjustifiably claim a benefit.

I have instructed my Department to closely monitor the abovementioned administrative arrangements to ensure that there is no unwarranted or unnecessary intrusions into the personal affairs of applicants for FHO Scheme assistance.

Finally I would note that section 20(4) of the Act to which the Committee makes reference only provides for the Secretary of my Department to request the Commissioner of Taxation to provide the Secretary with a certificate as regards an applicant's taxable income. In the context of section 20 and Division 2 of Part III of the Act this provision is designed solely to assist in determining whether an applicant falls within the statutory income limits of the Act below which assistance may be paid.

Yours sincerely,

STEWART WEST

PARLIAMENT OF AUSTRALIA · THE SENATE V

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

18 February, 1986

The Hon. Stewart West, M.P.
Minister for Housing and Construction,
Parliament House,
CANBERRA A.C.T. 2600

Dear Minister,

At its meeting on 13 February 1986, the Committee considered your letter of 24 December 1985 in connection with the First Home Owners Regulations (Amendment) (S.R. 1985 No. 267) and the question of communication to Taxation and Social Security officials of confidential personal information collected by the Home Loans Scheme.

The Committee thanks you for your detailed response and in particular notes that like it, you are concerned to ensure that the privacy of citizens is adequately protected from unwarranted intrusion by Government instrumentalities. However, the Committee remains concerned that, in their present form, the Regulations could result in that privacy being to some extent unnecessarily undermined.

In your letter you point out that relevant information held by the Home Loans Scheme will be provided to the Department of Social Security and the Australian Taxation Office only upon receipt of a properly authorised request in accordance with the respective Social Security or Taxation legislation. The Committee notes that it will be clear policy that information will be supplied to the Australian Taxation Office or the Department of Social Security only in pursuance of a "statutory demand" for information from the Commission, the Secretary or their respective delegates. It would be very helpful to the Committee in its examination of the Regulations if you could indicate what social security and taxation legislative provisions are involved which authorise those departments to make statutory demands for information from the Home Loans Scheme.

It would also be very useful if you could detail the rigorous standards which it is proposed your Department will adopt in determining whether information should be released from the First Home Owners Scheme data banks. During the course of its examination of these Regulations the Committee considered that, if, in the light of any further information and comments you can supply, the Regulations were otherwise acceptable under the Committee's Principles, there may be some merit in expressly providing for inclusion of such criteria in the body of the

Regulations. Such an approach may have advantages for the protection of privacy in that criteria for release of information would be publicly known, made certain of application, definite in content and subject to parliamentary scrutiny in either an original or amended form. At present the position appears to be that vital criteria for the release of personal data can be determined, and perhaps periodically altered on an administrative basis only.

Tax evasion and social security fraud are subversive offences in that they affect the entire community's pooled resources. Thus, the Committee agrees with you that fraud on the public revenue is a serious offence, the detection and prevention of which should not be unduly impeded. However, three points may be made. Firstly, the Committee is uncertain how information obtained by the First Home Owners Scheme can amount to evidence of a clear intention to commit tax or social security related crimes. Perhaps you could indicate how this arises.

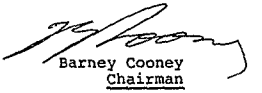
Secondly, if this problem arises only "on occasion" is it not preferable, in the interests of confidentiality and privacy to continue to deal with this issue using your existing powers under paragraph 29(2)(a) of the First Home Owners Act 1983. This might remove any need for the Regulations which, in their present form, are of some concern to the Committee. The Committee is uncertain whether the "occasional" evidence of intent to commit crime or the "not infrequent" requests for information from the Taxation Office and the Department of Social Security are a complete justification for Regulations which may infringe rights to privacy. The level of responsibility at which the important decision to release information is taken will be lowered and the public interest criterion which is currently applied in a justifiably very senior Ministerial or administrative office may be diluted.

Thirdly, it appears that a person who receives First Home Owners Scheme information may not use that material for any purposes other than the purposes of the First Home Owners Act. Thus, it may be that the interlocking, by means of delegated legislation, of Departments' personal information data banks which could seriously undermine conventional rights to privacy of personal information may in practice be of extremely limited use in the prosecution of those alleged tax and social security frauds of which the data is presumed to be evidence..

The Committee considers that these Regulations raise some fundamental questions about the role of delegated legislation in the area of rights to privacy and the Committee would be very grateful to receive your comments and advice on the points made above.

I should take this opportunity to remind you that in order to protect its freedom of action in considering the serious issues raised, the Committee on 5 December 1985 gave notice of motion of disallowance of these Regulations. Pending your further advice the motion of disallowance has been postponed until 14 March 1986.

Yours sincerely,



Barney Cooney
Chairman

068 MINISTER FOR
HOUSING AND
CONSTRUCTION

The Hon. Stewart WEST M.P.
Parliament House, Canberra, ACT 2600

14 MAR 1986

Chairman
Standing Committee on Regulations and Ordinances
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney,

I refer to your letter of 18 February 1985, making further comments in relation to earlier correspondence on the Regulations prescribing the Commissioner of Taxation and the Secretary to the Department of Social Security (DSS) as persons to whom information obtained in the administration of the First Home Owners Act 1983 (the "FHO Act") may be released (Statutory Rules 1985 No. 267).

As indicated in my last letter, the Commissioner of Taxation and the Secretary to the DSS possess comprehensive statutory powers to demand information to enable the efficient administration of the government's tax and social security legislation and to assist in the detection and prevention of attempts to defraud the public revenue.

The specific provisions, in section 264 of the Income Tax Assessment Act 1936 and section 135TF of the Social Security Act 1947 enable demands to be made upon, inter alia, Commonwealth officers for information or documents in their possession.

As I noted in my previous letter, the amended Regulation will enable information to be supplied to the Australian Taxation Office or DSS without the approval of the Minister or Secretary for Housing and Construction, only where the request is in pursuance of a statutory demand. Under the Social Security Act, a statutory demand may only be issued where there exists:

> "reason to believe that a person is capable of furnishing information, producing documents or giving evidence in relation to [a] matter that might affect, or have affected, the grant or payment of a pension benefit or allowance to that person or any other person, or the liability of that person ...(to pay an amount to the Department)."

.../2.

Similarly, although the power to issue statutory demands under the Income Tax Assessment Act is drafted in extremely wide terms, the High Court has indicated that the power may only be used for the proper purposes of that Act. Prior to the gazettal of the amending Regulation under the FHO Act on 18 October 1985, the providing of information in pursuance of such statutory demands was impeded by section 29 of the FHO Act. It prevented the disclosure of information unless the Minister or Secretary certified that the disclosure was necessary in the public interest. The amending Regulation ensures that there is no unwarranted duplicating of administrative effort with both the requesting department (DSS or the Australian Taxation Office) and either the Minister or Secretary of the Department of Housing and Construction required to consider the merits of each request.

The administrative policy of providing information without certification by the Minister or Secretary only in response to a statutory demand inhibits the making of unwarranted requests, and will protect the privacy of individuals supplying information to my Department in connection with a FHO application from unjustifiable intrusions. This being the case, I suggest that the insertion into the Regulations of "criteria" for the release of information is unnecessary.

Any release of information to DSS or the Australian Taxation Office not in pursuance of a statutory demand will require sanction by myself or the Secretary to the Department, in accordance with section 29(2)(a) of the FHO Act. In these circumstances, the Act already provides that the release may only be authorized if it is "necessary in the public interest" to do so. Criteria to be used in determining "the public interest" in any specific instance are of course numerous and difficult to comprehensively identify; it is therefore very difficult, if not impossible, to specify them in legislation.

I have noted your comment that criteria not enshrined in legislation may be subject to alteration on an administrative basis. However, the administrative guidelines will be incorporated in the Department's policy manuals which are of course accessible under the Freedom of Information Act and are therefore public in nature. Changes in policy are therefore subject to public scrutiny, and I do not envisage any alterations to policy being adopted without reflecting the broad public concern for privacy issues.

You will be aware that the use to which FHO Scheme information is put by the Australian Taxation Office or DSS is a matter beyond my scope of responsibility (other than that which attaches to sub-section 29(3) of the FHO Act). In relation to protecting the public revenue, however, there are many instances in which persons provide contradictory information to different government instrumentalities, depending on the purpose for which the information is needed. Persons receiving a social security benefit as a supporting parent, for example, may disclose evidence of a "de facto" spouse to my Department to assist their eligibility

../3.

under the FHO Scheme. The existence of such a de facto spouse, however, is such as to disqualify them from entitlement to a social security benefit.

In view of the nature of the information which is acquired by my Department to enable the processing of FHO applications, the instances where applicants disclose information relevant to DSS or the Australian Taxation Office are many and varied. However, I share your concern for protecting the privacy of information concerning FHOS applicants. Accordingly, the administrative policy is specifically designed to preclude the unfettered supply of information, which would impinge on their privacy.

That the recipient of information from my Department may be precluded by sub-section 29(3) from directly divulging that information to any other person as suggested in the penultimate paragraph of Page 2 of your letter is largely irrelevant, as the primary use of disclosed information would be expected to be in the detection of persons attempting to defraud the revenue. That is, the intent behind disclosure relates to protection of the public revenue, not necessarily to the prosecution of offenders.

Finally, I appreciate the shortcomings inherent in any proposal to develop comprehensive legislative provisions which balance privacy considerations and the need to protect the public revenue. The variety of circumstances are such that it would not be possible to guarantee in advance that all possible situations have been encompassed by such legislative provisions. However, I believe that the close monitoring of the arrangements by officers of my Department, foreshadowed in my previous letter to you, will rapidly identify any practical problems and enable any necessary action to be taken taken.

Yours sincerely,

STEWART WEST

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PARLIAMENT OF AUSTRALIA · THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

18 March 1986

The Hon. Stewart West, M.P.
Minister for Housing and Construction
Parliament House
CANBERRA ACT 2600

Dear Minister,

At a special meeting on 18 March 1986 the Committee considered your letter of 14 March 1986 in connection with the First Home Owners Regulations (Amendment) (S.R. 1985 No. 267). The Committee was grateful to you for the detailed explanations you have given concerning the prescriptions made by these Regulations. However, the Committee remains concerned about the absence of legal, as opposed to policy, protections for the privacy of individuals who have given personal information to the First Home Owners Scheme.

The Committee in its previous letters to you of 1 November 1985 and 18 February 1986, suggested that the Regulations themselves should contain express reference to criteria for information release. Such criteria could be along the lines of the reasonable limitations which your administrative policy or administrative guidelines will impose in any event. The Committee remains of the view, and again suggests, that you consider amending the Regulations to qualify what, on its face, appears to be an unqualified power to release to Social Security or Tax any private or personal information received by the First Home Owners Scheme in broad and undefined circumstances.

It is the Committee's understanding of the position that neither the Act, nor the Regulations, nor your administative policy imposes any legal impediment to divulgence of confidential personal information to the prescribed authorities. The Committee acknowledges and applauds the wisdom of your declared administrative policy to release information only in pursuance of a statutory demand while at the same time the Committee notes no limitation appears to have been placed on the nature of the information to be so released. Nevertheless, the Committee is of the view that, in this case, inter-departmental release of confidential personal information should be protected by the express terms of the Regulations rather than by the contents of current administrative policy.

The Committee asks if you might reconsider your decision and undertake to amend the Regulations so that they expressly limit the nature of the information to be released and the circumstances in which it is to be released.

The Committee is most anxious that the position it has adopted not be obstructive of reasonable attempts to detect and reduce fraud on the public revenue. Further, the Committee does not wish to stand in the way of reasonable proposals which will assist in that aim. However, notwithstanding the width of the delegation conferred on you by paragraph 29(2)(b) of the First Home Owners Act 1983, the Committee must consider the propriety of the particular prescriptions you have made as they might operate now.

Under its principles, the Committee is concerned about delegated legislation which

- may trespass unduly on personal rights and liberties;
- may make rights (like the right to privacy) unduly dependent on unreviewable administrative decisions; or
- may deal expressly or by implication with matters more appropriate for the parliamentary forum.

Each of these principles may have some application to the Regulations in their unamended form.

Firstly, under the Regulations as they stand the right to privacy of embarrassing personal, marital or financial, details (or "any information with respect to the affairs of [a] person" : sub-section 29(1)), may legally be invaded. A person giving such information to the First Home Owners Scheme in good faith does not expect it to be further retailed to Social Security or Tax. The Committee, of course, accepts the contemporary need for such procedures but argues that the nature of the information and circumstances of its release should be legislatively controlled to avoid or reduce the potential for abuse of privacy.

Secondly, with regard to release under sub-section 29(2) of the Act "an officer may divulge any such information to any ... person prescribed". There is no right to challenge the exercise of this discretion as there normally is with many other administrative discretions. The Committee is not necessarily suggesting that there is a lacuna in the Act but rather it wishes to point to what it sees as a possible source of abuse of privacy in circumstances where the Regulations have not carefully set down the criteria for release.

Finally, at a time when the debate is reaching a head on issues of privacy, fraud detection and the role of interlocking Executive computer technology, the Committee must address the very basic question of the legislative propriety of Regulations which, notwithstanding their

legality, place no legal constraint on wholesale inter-departmental information exchange where personal information is concerned.

The Committee considers that all of these difficult issues can be by-passed if amendments to the Regulations describe the type of information to be divulged (for example identity and status details) and the particular conditions to be satisfied before this occurs (for example, a statutory demand).

The Committee would respectfully urge you to reconsider the issues and it hopes you can undertake to accommodate its concerns.

As you know the matter is now very urgent with a Notice of Motion of Disallowance set down for tomorrow, Wednesday, 19 March 1986. The Committee looks forward to reaching agreement with you on these Regulations before that motion is called on.

Yours sincerely,

Barney Cooney
Chairman

MINISTER FOR
HOUSING AND
CONSTRUCTION

The Hon. Stewart WEST M.P.
Parliament House, Canberra, ACT 2600

Chairman
Standing Committee on Regulations
and Ordinances
The Senate
Parliament House
CANBERRA ACT 2600

19 MAR 1986

Dear Senator Cooney,

I refer to your letter dated 18 March 1986, and to our previous correspondence in connection with the First Home Owners Regulations (Amendment) (Statutory Rules 1985 No 267).

As indicated in my previous letters, I am mindful of the views of the Committee and share your concern that the privacy of citizens be protected from any unwarranted intrusions by the bureaucracy. I have reconsidered the matter as requested and agree to amend the Regulations to describe the type of information to be divulged and the particular conditions to be satisfied before this occurs.

You will appreciate that it may take some time to develop Regulations and identify the nature of information which may be sought by the Australian Taxation Office or the Department of Social Security. Pending the development of the necessary legislative proposal I agree not to alter the administrative policy which is described in detail in my earlier letters. In the meantime I will continue to use the certification procedure set out in Section 29 (2) (a) of the First Home Owners Act 1983.

This will ensure that the rights to privacy of individuals providing information to my Department in connection with their First Home Owners Scheme application will be afforded a necessary measure of protection.

I trust that the above agreement satisfies the requirements of your Committee.

Yours sincerely

STEWART WEST

VII

PARLIAMENT OF AUSTRALIA · THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

19 March 1986

The Hon. Stewart West, MP
Minister for Housing & Construction
Parliament House
CANBERRA ACT 2600

Dear Minister,

At a special meeting on 19 March 1986 the Committee considered your letter of 19 March 1986 in connection with the First Home Owners Regulations (Amendment) (S.R. 1985 No. 267).

The Committee thanks you for the very prompt consideration you have given to its further letter and is pleased to accept your undertaking to amend the Regulations along the lines suggested by the Committee. The Committee also appreciates your commitment that, pending preparation of the amending Regulations, you will not allow use of the new procedures which would otherwise by-pass you or your Secretary's personal appraisal of public interest considerations under paragraph 29(2)(a) of the First Home Owners Act. This aspect is always a matter of concern to the Committee since, having objected to particular proposals because they may infringe rights or liberties etc., the Committee takes the view that it could further offend the Committee's principles if the infringement were a continuing one even while amendments are prepared.

Your letter was therefore welcomed and the motion of disallowance was, of course, withdrawn shortly after its receipt.

The Committee thanks you and your officials for the assistance you have given the Committee in its scrutiny of these Regulations. The Committee also commends you personally for your willingness to act to accommodate the Committee's interest in protecting the right to privacy. The Committee looks forward to seeing the amendment Regulations in due course.

Yours sincerely,

Barney Cooney
Chairman