Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at Appendix 1.

Australian Immunisation Register Bill 2015

Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015

Portfolio: Health
Introduced: House of Representatives, 10 August 2015

Purpose

2.3 The Australian Immunisation Register Bill 2015 (the bill) creates a new legislative framework for the operation of Australian immunisation registers, and repeals existing registers established under the *Health Insurance Act 1973* and the *National Health Act 1953*.

2.4 The Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015 provides for the consequential and transitional provisions required to support the operation of the *Australian Immunisation Register Act 2015*.

2.5 Together these bills provide for the expansion of immunisation registers in two stages:

- From 1 January 2016 the Australian Childhood Immunisation Register (ACIR) will be expanded, so as to collect and record all vaccinations given to young people under the age of 20 years (currently only vaccinations given to children aged under seven years are collected and recorded); and
- From late 2016 the register will be renamed the Australian Immunisation Register (AIR) and will collect and record all vaccinations given to every person in Australia from birth to death.

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

Background

2.7 The committee previously considered the bills in its *Twenty-ninth Report of the 44th Parliament* (previous report) and requested further information from the

Minister for Health as to the compatibility of the bills with the right to privacy and right to a fair trial (presumption of innocence).[1]

2.8 The bill passed both Houses of Parliament on 15 October 2015 and achieved Royal Assent on 12 November 2015.

Use and disclosure of personal information from the Australian Immunisation Register

2.9 Under the bills, from late 2016 all persons in Australia enrolled in Medicare and, if not eligible for Medicare, anyone vaccinated in Australia, will be automatically registered on the AIR. This will include the vast majority of people in Australia, including those that choose not to receive vaccinations. The AIR can include significant personal information.[2]

2.10 The committee considers that the use and disclosure of personal information engages and limits the right to privacy.

Right to privacy

2.11 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

2.12 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measure with the right to privacy

2.13 The statement of compatibility for the bill acknowledges that the bill engages the right to privacy but states that the engagement is 'reasonable, appropriate and necessary for the objectives and purposes of the Bill'.[3]

2.14 The committee previously noted that the objectives of the bill appear to include facilitating the establishment of records of vaccinations which will assist with information about vaccination coverage; monitoring the effectiveness of

1 Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (18 August 2015) 4-8.

2 This includes contact details, Medicare number, vaccination status, general practitioner information regarding non-vaccination status and other information relevant to vaccinations.

3 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 6.

vaccinations; identifying areas of Australia at risk during disease outbreaks; and promoting health and well-being.[4] The committee considered that these objectives are likely to be considered legitimate objectives for the purposes of international human rights law, and the inclusion of information on the AIR is likely to be rationally connected to these objectives.

2.15 However, it remained unclear whether all of the powers enabling the use, recording and disclosure of information are proportionate to achieving those objectives. In particular, the committee was concerned about the ability of the minister to authorise a person to use or disclose protected personal information for a purpose that the minister (or delegate) is satisfied is in the public interest.

2.16 The statement of compatibility does not explain why it is necessary to include this broadly defined power.[5]

2.17 Under international human rights law, when considering whether a limitation on a right is proportionate to achieve the stated objective it is necessary to consider whether there are other less restrictive ways to achieve the same aim.

2.18 The committee also noted that the explanatory memorandum refers to disclosure being limited to 'a specified person or to a specified class of persons',[6] however, clause 22(3) is not limited in this way but allows the minister to authorise 'a person' to use or disclose protected information.

2.19 The committee therefore sought the advice of the Minister for Health as to whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the measure is sufficiently circumscribed to ensure it operates in the least rights restrictive manner.

Minister's response

> I note the Committee's enquiry regarding the ability for I, as the Minister for Health, to authorise (under subsection 22(3) of the Bill) a person to make a record of, disclose or otherwise use protected information for a specified purpose that I am satisfied is in the public interest.
>
> The proposed subsection is consistent with existing powers I have to certify that disclosure of protected information is necessary in the public interest, as contained within paragraph 135A(3)(a) of the *National Health Act 1953* and paragraph 130(3)(a) of the *Health Insurance Act 1973*, which currently apply to the National Human Papillomavirus Vaccination Program Register and the Australian Childhood Immunisation Register (ACIR) respectively.

4 See clause 10 of the Australian Immunisation Register Bill 2015.

5 EM, SoC 6.

6 EM 15.

An example of the type of authorisations these are, and when this public interest power may be used, is where a child protection agency requests information when investigating the welfare of a child. In the 2014-15 financial year, more than 18,000 authorisations occurred for this purpose, authorised under paragraph 130(3)(a) of the *Health Insurance Act 1973*. In this circumstance, the Department of Human Services who operates the ACIR on behalf of my Department, releases information to child protection agencies [a]long with the police to assist in the determination of a child's welfare. To assess the child's welfare, ACIR information including whether a child is protected against certain vaccine preventable diseases through their immunisation history can be determined by child protection agencies.

Another example could involve a request by a vaccine supplier or a vaccination provider to obtain the contact details of one or more vaccine recipients in order to contact the individuals to inform them if a manufacturing error or cold chain breach is identified in relation to a batch of vaccine stock. In this circumstance, the release of the protected information from the register would not fit within the purposes of the Australian Immunisation Register Bill 2015 as defined in section 10, and could only be released under a public interest disclosure.

Such a power is considered necessary to provide an ability to authorise use or disclosure where it does not fit within the purposes of the Australian Immunisation Register Bill 2015, but there is a public interest in the protected information being used or disclosed for that purpose. The purposes for which there might be a public interest in use or disclosure cannot be ascertained with certainty. Whether there is a public interest will depend on a case by case assessment of any requests, and therefore this general public interest power is required to create the ability to allow disclosure in situations like the examples above.

I can assure the Committee that the decision to authorise a person to make a record of, disclose or use protected information is not one which is taken lightly. In making such decisions consideration would be given to an individual's privacy and other interests, which would be balanced against the identified public interest outcome. This limitation is a reasonable and proportionate measure to achieve the intended objectives of the legislation and as previously provided for under existing legislation will be applied in the least restrictive manner protecting individual privacy.

I note your concern regarding the reference in the explanatory memorandum, to information being able to be disclosed to 'a specified person or to a specified class of persons'. You have expressed concern that this wording does not appear in the text of the provision itself. I draw the Committee's attention to subsection 22(3) which authorises me to *disclose* protected information if I am satisfied it is in the public interest. The use of the word 'disclose' inherently implies that information could be released by me to another person or persons (i.e. the recipient of the information),

> which I would specify when making my decision whether or not to release information.[7]

Committee response

2.20 **The committee thanks the Minister for Health for her response.**

2.21 In particular, the committee thanks the minister for providing examples of when the public interest power may be used, including in cases of child welfare and enabling vaccination recipients to be notified when there are faulty batches of vaccines. The committee notes the minister's assurance that 'in making such decisions consideration would be given to an individual's privacy and other interests' and that the limitation 'will be applied in the least restrictive manner protecting individual privacy'.

2.22 However, the minister's response does not discuss or demonstrate how the power to disclose protected information will be sufficiently circumscribed, other than as a matter of policy, to ensure it operates in the least rights restrictive manner and ensures against any disproportionate limitation on an individual's right to privacy. For example, in response to the committee's comment that words in the explanatory memorandum about limiting disclosure to 'a specified person or to a class of persons' are not included in the bill, the minister's advice is that:

> the use of the word 'disclose' inherently implies that information could be released by me to another person or persons (i.e. the recipient of the information), which I would specify when making my decision whether or not to release information.

2.23 In considering this response the committee notes the comments contained in the 11th Report of the Senate Standing Committee for the Scrutiny of Bills:

> While it may be open for this implication to be made, and the committee welcomes the Minister's commitment to specify the person or persons to whom information could be released, the committee still considers that it would assist if such a limitation were included in the text of the provision itself. The committee's concern is that it would be possible for material to be authorised for disclosure without specifying or limiting the authorised recipients of the information.[8]

2.24 The measure, by empowering the minister to disclose protected information to 'a person' rather than 'a specified person or to a class of persons', appears to enable disclosure without specifying or limiting the recipients of the information.

2.25 The committee also notes the minister's advice that disclosures of information from the register relating to child welfare appear to occur routinely

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7 See Appendix 2, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 1-2.

8 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2015* (14 October 2015) 651.

under existing legislation. Given the thousands of disclosures that occur in relation to child welfare it is unclear why disclosure to child welfare authorities is not included in the bill as a specific object for which disclosure may be authorised, rather than relying on the broad public interest disclosure power in each instance.

2.26 **In order to better protect the right to privacy, the committee recommends that consideration be given to amendments to:**

- **ensure that the disclosure of protected information is limited to a specified person or class of persons;**
- **include child welfare as a specific purpose for disclosure, rather than relying on blanket public interest disclosure provisions in such instances; and**
- **ensure that, when disclosures are made on broad public interest grounds, the decision-maker is required to consider the impact of such disclosure on the privacy of an affected individual.**

Reversal of the burden of proof

2.27 Clause 23 of the bill makes it an offence for a person to make a record of, disclose or otherwise use protected information if that record, use or disclosure is not authorised by the bill. Clauses 24 to 27 provide a number of exceptions to this offence. These exceptions reverse the burden of proof.

2.28 The committee considers that the reversal of the burden of proof engages and limits the right to a fair trial (presumption of innocence).

Right to a fair trial (presumption of innocence)

2.29 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

2.30 An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

2.31 Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Compatibility of the measure with the right to a fair trial

2.32 The statement of compatibility for the bill does not acknowledge that the right to a fair trial is engaged by these measures.

2.33 The committee therefore sought the advice of the Minister for Health as to whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> Proposed section 23 creates an offence if a person obtains protected information, and makes a record of, discloses or otherwise uses the information, where it is not authorised by section 22 of the Bill. Exceptions to this offence are provided in sections 24 through to 27 to provide people with a defence in certain circumstances.
>
> An evidential burden placed on the defendant is not uncommon. Similar notations to those used in the current Bill exist in many other [pieces of] Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* - where a person has an evidential burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code). The defences used in the Australian Immunisation Register Bill 2015 are modelled on those used in sections 586 to 589 of the *Biosecurity Act 2015*.
>
> In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the facts relating to each defence in sections 24 to 27 of the Bill are peculiarly within the knowledge of the defendant, and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant. The burden that sections 24 to 27 of the Bill impose on a defendant is an evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden in proving the elements of the offence in section 23 of the Bill.
>
> Section 24 simply requires a person to produce or point to evidence that suggests a reasonable possibility that the person made a record of, disclosed or otherwise used protected information in good faith and in purported compliance with section 22 of the Bill.
>
> Section 25 requires that a person, who makes a record of, discloses or otherwise uses protected information that is commercial-in-confidence, produce or point to evidence to demonstrate that they did not know that the information was commercial-in-confidence.
>
> Section 26 requires that a person, who discloses protected information, produce or point to evidence that the protected information was disclosed to the person to whom the information relates.

> Section 27 requires that a person produce or point to evidence which indicates that the protected information that was disclosed to another person was originally obtained from that same person.
>
> The evidential burden in each of these circumstances can easily be met by the defendant. In these circumstances, therefore, the imposition of an evidential burden on the defendant is reasonable. [9]

Committee response

2.34 **The committee thanks the Minister for Health for her response.** The committee considers that the response demonstrates that the defences provided in the bill are likely to be peculiarly within the defendant's knowledge. **Accordingly, the committee considers that this aspect of the bill is likely to be compatible with the right to a fair trial (presumption of innocence) and has concluded its examination of this aspect of the bill.**

9 See Appendix 2, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 2-3.

Defence Legislation (Enhancement of Military Justice) Bill 2015

Portfolio: Defence
Introduced: House of Representatives, 26 March 2015

Purpose

2.35 The Defence Legislation (Enhancement of Military Justice) Bill 2015 (the bill) sought to make a number of amendments to the *Defence Force Discipline Act 1982* (Defence Force Discipline Act) and the *Defence Act 1903.*

2.36 The bill also sought to amend the *Military Justice (Interim Measures) Act (No. 1) 2009* to extend the period of appointment of the Chief Judge Advocate and full-time Judge Advocates by a further two years, making the period of appointment up to eight years instead of six years.

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

Background

2.38 In 2005, the Senate Standing Committee on Foreign Affairs, Defence and Trade conducted an inquiry into the effectiveness of Australia's military justice system (the 2005 report).[1] Following the 2005 report, legislation[2] was introduced to create a permanent military court (the Australian Military Court) which was intended to satisfy the principles of impartiality, judicial independence and independence from the chain of command.[3]

2.39 In 2009 the High Court struck down this legislation as being unconstitutional.[4] In response, Parliament put in place a series of temporary measures pending the introduction of legislation to establish a constitutional court. The *Military Justice (Interim Measures) Act (No. 1) 2009* (Interim Act) largely returned the service tribunal system to that which existed before the creation of the Australian Military Court.[5]

2.40 In 2013 the Military Justice (Interim Measures) Amendment Bill 2013 amended the Interim Act to extend the appointment, remuneration, and entitlement arrangements of the Chief Judge Advocate and judge advocates by an additional two years. The committee reported on this bill in its *Sixth Report of 2013*.[6]

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1 See Senate Standing Committee on Foreign Affairs, Defence and Trade, *The effectiveness of Australia's military justice system* (June 2005).

2 *Defence Legislation Amendment Act 2006*.

3 See Explanatory Memorandum (EM) to the Defence Legislation Amendment Bill 2006, notes on clauses 3(b).

4 *Lane v Morrison* [2009] HCA 29.

5 See EM to the Military Justice (Interim Measures) Bill (No. 1) 2009, 1.

6 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 40.

2.41 The committee then reported on the current bill in its *Twenty-second Report of the 44th Parliament*, and requested further information from the Minister for Defence as to whether the bill was compatible with the right to a fair trial.[7] The committee considered the Minister for Defence's response in its *Twenty-sixth Report of the 44th Parliament* (previous report), and requested further information in relation to this right in order to finalise its consideration of the bill.[8]

2.42 The bill passed both Houses of Parliament on 25 June 2015 and achieved Royal Assent on 30 June 2015.

Extension of the appointments of Chief Judge Advocate and judge advocates

2.43 Initially, the Interim Act provided a fixed tenure of up to two years for both the Chief Judge Advocate and full-time judge advocates who were appointed pursuant to the provisions of the Interim Act. This was extended in 2011 and 2013.[9] That tenure is due to expire in September 2015. The bill amends Schedule 3 of the Interim Act to extend the appointment, remuneration, and entitlement arrangements provided for in that Act for an additional two years. The bill therefore provides a fixed tenure for the Chief Judge Advocate and current full-time judge advocates of up to eight years, or until the Minister for Defence declares, by legislative instrument,[10] a specified day to be a termination day, whichever is sooner.

2.44 The committee previously considered that extending the operation of the existing military justice system through extending the appointment period for the Chief Judge Advocate and judge advocates engages and may limit the right to a fair hearing and fair trial.

Right to a fair hearing and fair trial

2.45 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

2.46 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in

7 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 42-46.

8 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44th Parliament* (18 August 2015) 26-33.

9 See the *Military Justice (Interim Measures) Amendment Act 2011* (extended the period of appointment to four years) and *Military Justice (Interim Measures) Amendment Act 2013* (extended the period of appointment to six years).

10 The legislative instrument would not be subject to disallowance.

criminal proceedings, such as the right to not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to fair hearing and fair trial

2.47 The committee previously considered that extending the appointments of the Chief Judge Advocate and full-time judge advocates, and thereby extending the current system of military justice, may limit the right to a fair hearing. The statement of compatibility does not address this issue. The committee therefore sought the advice of the Minister for Defence as to whether extending the operation of the existing system of military justice is compatible with the right to a fair trial.

2.48 Having regard to the response and advice provided by the minister, and relevant comparative human rights law jurisprudence,[11] the committee considered in its previous report that the current structure for conducting military justice would appear to meet the requirement that hearings are conducted by an independent and impartial body.

2.49 However, the committee also considered that in determining whether a tribunal can be considered 'independent', regard must also be had to the term of office for those who conduct military justice hearings. The committee noted that under the transitional provisions of the Interim Act, which the bill extends, the Chief Judge Advocate and judge advocates are appointed for eight years from the date of the Interim Act.[12] However, the Interim Act also provides that the minister may declare in writing any day to be the 'termination day' so the appointment of the Chief Judge Advocate or judge advocates will end on this earlier date.[13] There is no guidance as to when the minister may make such a declaration and this declaration, while a legislative instrument, is specifically excluded from being subject to disallowance.[14]

2.50 The European Court of Human Rights has said that the 'irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence' and this forms part of the requirement of a fair trial.[15] It is recognised that this irremovability does not always have to be recognised in law, if it is recognised in fact and other necessary guarantees are present.

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11 See, for example, *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005 (cf the earlier system of military justice which raised concerns regarding the perception of independence and impartiality: *Findlay v United Kingdom* European Court of Human Rights, (1997) 24 EHRR 221).

12 See items 2 and 4 of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

13 See item 8 of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

14 See item 8(2) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

15 *Campbell and Fell v United Kingdom,* European Court of Human Rights, Application No. 7819/77 and 7878/77, 28 June 1984, para 80. See also *Morris v the United Kingdom*, European Court of Human Rights, Application No. 38784/97, 26 May 2002, para 68 and *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005, para 118.

However, in this case, the opposite is true—the Interim Act expressly gives the executive the power to remove the Judge Advocate General and judge advocates simply by declaring a 'termination day'.

2.51 The committee noted that the requirements of independence and impartiality are not just that the tribunal must be independent, but it must also present an appearance of independence: it 'must also be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect'.[16] The minister's power to terminate the appointment of the Judge Advocate General and the judge advocates, at any time, raises concerns that the military courts could be perceived as not being independent or impartial. The minister's response did not address this aspect of the committee's concerns.

2.52 The requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception, and this applies to both civilian and military courts.[17] It is therefore not possible to justify any limitation on this right.

2.53 Accordingly, the committee considered that enabling the executive to terminate the appointments of the Chief Judge Advocate and judge advocates at any time gives rise to a perception that the system of military justice is not objectively independent. Therefore, the committee sought the Minister for Defence's advice as to whether extending the appointments of the Chief Judge Advocate and judge advocates, and thereby extending the current system of military justice, limits the right to a fair hearing.

2.54 Further, the committee sought the Minister for Defence's advice as to whether the Interim Act should be amended to remove the power of the minister to unilaterally revoke the appointments of the Chief Judge Advocate and judge advocates.

Minister's response

> I note for the Committee's benefit that the previous minister recently appointed the full-time Judge Advocate to be the new Director of Military Prosecutions, so the Committee's concerns now only relate to the Chief Judge Advocate's (CJA) appointment.
>
> While from one point of view the *Military Justice (Interim Measures) Act (No 1) 2009* (the Interim Measures Act) gives me the exercise of a broad power, which has the effect of terminating the CJA's appointment, I do not share the Committee's concern that I can terminate CJA's appointment for any reason, or that the existence of the power limits an accused person's right to a fair military trial. The power to prescribe a termination day under the Interim Measures Act is not unfettered, and could not legitimately be exercised for the purpose of attempting to influence the CJA in the

16 *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005, para 104.

17 See UN Human Rights Committee, General Comment No. 32 (2007) para [22].

performance of their official duties. Rather, the primary purpose of the termination power is merely to provide a mechanism to make changes which might be required if the current 'interim' system of military discipline was replaced with a new system, not to terminate the CJA's appointment per se.

The Interim Measures Act was enacted following the 2009 High Court decision in *Lane v Morrison* (2009) HCA 29, which declared the military court system to be unconstitutional. The Interim Measures Act reinstated the military tribunal system, which the High Court had declared in a series of cases before *Lane v Morrison* to be constitutional. This was done in order to sustain the military discipline system until such time as the Parliament decided how to address the issue of the trials of serious service offences. It was originally envisaged that the Interim Measures Act would operate for a period of no more than two years.

The Interim Measures Act was amended by the *Military Justice (Interim Measures) Amendment Act 2011* (the first Amending Act) by the then Labor Government when it became clear, as the then Minister for Defence indicated in his Second Reading Speech, that a permanent solution to the issue may not be enacted before the expiration of the Interim Measures Act. The Government extended the operation of the Interim Measures Act by amending Schedule 3 to it, so as to provide that the appointment, remuneration and entitlement arrangements for the CJA and other Judge Advocates continued unchanged for another two years. Additionally, the Interim Measures Act was amended to provide that the Minister may declare in writing a specified day to be the 'termination day' for the purposes of the Schedule to cease the operation of the Act (the termination power).

Further two-year extensions to the Interim Measures Act were enacted by the *Military Justice (Interim Measures) Amendment Act 2013* (the second Amending Act), by the then Labor Government, and, again more recently, by the Principal Act, by the current Government. As the previous minister indicated in his Second Reading Speech to the Principal Act, it was necessary to extend the CJA's and then the full-time Judge Advocate's appointments so that the superior tribunal system could continue while the Government considered further reforms to the military discipline system. I note that each extension has retained the termination power.

The Explanatory Memorandum to the first Amending Act indicated that the termination power was inserted to provide the Government of the day with an expedient mechanism to end the interim superior service tribunal system on commencement of the replacement system. In particular, paragraph 17 of the Explanatory Memorandum explained that the 'termination day is likely to be the day upon which a permanent solution to the trial of serious service offences is implemented'.

The exercise of the termination power would not simply terminate the CJA's appointment. Rather, as the Explanatory Memoranda to the first Amending Act and the Principal Act explain, the exercise of the power

> would symbolically and practically bring an end to the interim disciplinary arrangements. Accordingly, the primary purpose of the termination power is to allow a single deemed statutory appointment to be brought to an end as a necessary and incidental consequence of Parliament replacing the interim arrangements with an enduring military discipline system. Considered in this way, the termination power is designed to terminate the interim arrangements, not the CJA's appointment per se.
>
> Moreover, the exercise of the termination power is not unfettered and cannot be arbitrarily used to terminate the CJA's appointment. Like most statutory powers, the termination power cannot be exercised for an improper purpose. The termination power cannot be used by me to influence the CJA in the performance of their duties. Any attempt to use the termination power in this way could of course be impugned on the basis of having been used for an improper purpose. For example, in such circumstances, the CJA could seek judicial review of the exercise of the termination power under section 75(v) of the *Constitution* or section 39B of the *Judiciary Act 1903*.
>
> I advise the Committee that for these reasons the extension of the CJA's appointment through the Principal Act does not affect or limit an accused person's right to a fair military trial and, accordingly, there is no need to amend the Interim Measures Act.
>
> I reiterate the previous minister's concluding remark in his Second Reading Speech on the Principal Act that the Government is committed to modernising the military discipline system. I expect to inform the Parliament of our policy in relation to the future of the superior service tribunal system at an appropriate time during the term of this Government.[18]

Committee response

2.55 **The committee thanks the Minister for Defence for her response**. The committee appreciates the minister's advice that as the full-time Judge Advocate was appointed as the new Director of Military Prosecutions the committee's concerns relate only now to the Chief Judge Advocate's (CJA) appointment.

2.56 The committee notes the minister's advice that the power to prescribe a 'termination day' is not unfettered and could not be used to terminate the CJA's appointment per se, but that it could only be exercised if the current interim system of military discipline is replaced with a new system. In particular, the minister relies on the explanatory material that accompanied the bill that brought in the power, which explained that 'termination day is likely to be the day upon which a permanent solution to the trial of serious service offences is implemented'. The committee notes the minister's advice that exercise of the power would not simply terminate the CJA's

18 See Appendix 1, Letter from Senator the Hon Marise Payne, Minister for Defence, to the Hon Philip Ruddock MP (received 16 November 2015) 1-2.

appointment but would 'symbolically and practically' bring to an end the interim disciplinary arrangements.

2.57 However, while the committee accepts that the clear intention of the government is that the CJA's appointment would only occur once the interim disciplinary arrangements transition to more permanent arrangements, the legislation is not restricted in this way. Rather, the Interim Act simply provides that the CJA's appointment ends after eight years or on 'termination day', and that day may be declared by the minister in writing. This declaration is not subject to disallowance.

2.58 Therefore, an unfettered discretion is given to the minister to declare a day to be 'termination day', as long as it is before the eight years already specified as the CJA's term of appointment. The term 'termination day' applies only to the termination of the appointment of the CJA and the judge advocates (and it is otherwise only referenced by provisions relating to benefits that accrue to the CJA and judge advocate upon termination). While termination of the CJA's appointment may 'symbolically and practically' only occur when the interim system of military justice ceases, legally, a minister's declaration will simply end the appointment of the CJA; it will not end the interim system of military justice. Rather, it is the committee's understanding that a new CJA could be appointed under the current *Defence Force Discipline Act 1982*.[19]

2.59 As the committee has previously noted, the requirements of independence and impartiality under the right to a fair hearing include that judges are independent (and not able to be removed by the executive during their term of office) and a tribunal must present an appearance of independence. The requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception, and this applies to both civilian and military courts.[20] It is therefore not possible to justify any limitation on this right.

2.60 **The committee considers that the minister's power under the Interim Act to terminate the appointment of the CJA, at any time, raises concerns that the military courts may not be, in law, independent or impartial, and may be perceived as not being independent and impartial. The committee welcomes the minister's advice that she expects to inform Parliament of the government's policy in relation to the future of the superior service tribunal system during the term of this government. However, out of an abundance of caution and in order to avoid incompatibility with the right to a fair hearing, the committee recommends that pending any permanent changes to the current system of military justice, the Interim Act be amended to ensure that the power to terminate the appointment of the CJA is tied to the termination of the interim arrangements as a whole.**

19 See Part XI of the *Defence Force Discipline Act 1982*.

20 See UN Human Rights Committee, *General Comment No. 32* (2007) para [22].

Health Legislation Amendment (eHealth) Bill 2015

Portfolio: Health
Introduced: House of Representatives, 17 September 2015

Purpose

2.61 The Health Legislation Amendment (eHealth) Bill 2015 (the bill) amends the law relating to the personally controlled electronic health record system (PCEHR). The PCEHR (to be renamed the 'My Health Record') provides an electronic summary of an individual's health records. Currently, under legislation governing the PCEHR, an individual's sensitive health records are only uploaded on to the register if the individual expressly consents (or 'opts-in').

2.62 The bill enables opt-out trials to be undertaken in defined locations, whereby an individual's health records will be automatically uploaded onto the My Health Record system unless that individual takes steps to request that their information not be uploaded. The bill allows the opt-out process to apply nationwide following a trial.

2.63 The bill amends the privacy framework by revising the way that permissions to collect, use and disclose information are presented, and included new permissions to reflect how entities engage with one another. The bill also introduces new criminal and civil penalties for breaches of privacy; provides that enforceable undertakings and injunctions are available; and extends mandatory data breach notification requirements.

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

Background

2.65 The committee previously considered the bill in its *Twenty-ninth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Health as to the compatibility of the bills with the right to privacy, rights of the child, rights of persons with disabilities and the right to a fair trial.[1]

2.66 The bill passed both Houses of Parliament on 12 November 2015 and achieved Royal Assent on 26 November 2015.

Automatic inclusion of health records on the My Health Record system: 'opt-out' process

2.67 As set out above, the bill removes the requirement for the express consent of an individual before their personal health records are uploaded onto the PCEHR. Rather, an individual will need to expressly advise that they do not wish to participate (to 'opt-out').

1 Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (18 August 2015) 9-24.

2.68 The committee noted in its previous report that the bill seeks to promote the right to health. The committee considered that the bill, in enabling the uploading of everyone's personal health records onto a government database without their consent, engages and limits the right to privacy.

Right to privacy

2.69 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

2.70 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Compatibility of the measure with the right to privacy

2.71 The statement of compatibility acknowledges that the bill limits the right to privacy, however, it concludes that the limitation on this right is reasonable, necessary and proportionate. It explains the objective of the My Health Record system as to address the 'fragmentation of information across the Australian health system and provide healthcare providers the information they need to inform effective treatment decisions.[2]

2.72 The statement of compatibility also explains that the opt-out model is intended to drive the use of My Health Records by healthcare providers as part of normal healthcare in Australia.[3]

2.73 The committee noted previously that the overall objective of the My Health Record system, in seeking to provide healthcare providers with the necessary information to inform effective treatment decisions, is likely to be considered a legitimate objective for the purposes of international human rights law. However, it is questionable whether the objective behind the bill, in amending the system to an opt-out model, would be considered a legitimate objective for the purposes of international human rights law.

2.74 Increasing the number of people using the My Health Record system, in an attempt to drive increased use by healthcare providers, may be regarded as a

2 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 28.

3 EM, SoC 31-32.

desirable or convenient outcome but may not be addressing an area of public or social concern that is pressing and substantial enough to warrant limiting the right.

2.75 In relation to the proportionality of the measure, the statement of compatibility sets out a number of safeguards in place for the use and disclosure of healthcare information held on the database, including that individuals with a My Health Record can control who can access their information and what information can be accessed.[4]

2.76 However, the statement of compatibility gives little information about the proportionality of the proposed opt-out process. It explains that the opt-out process will be initially trialled in specific locations, meaning 'My Health Records will be created for people living in specified locations unless they say they do not want one'.[5]

2.77 However, the bill itself does not set out any safeguards to ensure that healthcare recipients would be given reasonable notice or a reasonable amount of time to decide whether to opt-out.

2.78 In addition, once an individual's personal details are included on the My Health Record there is no ability for the person to erase their record from the register – all they can do is ensure that the personal health information stored on the database will not be authorised for disclosure.[6]

2.79 The EM states that there will be 'various channels' available for people to opt-out, including online or as a tick-box on an application form to register newborns or immigrants with Medicare. However, these are not set out in the legislation.

2.80 The EM also states that for those without online access, with communication disabilities, or without the required identity documents, 'other channels will be available, such as phone and in person'.[7] No information is given as to how this would work in practice.

2.81 The committee's interpretation of international human rights law is that, where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation.[8]

2.82 In considering whether the limitation on the right to privacy is proportionate to the stated objective it is also necessary to consider whether there are other less restrictive ways to achieve the same aim. In order to achieve the objective of having

4 EM, SoC 31.

5 EM, SoC 31.

6 EM 95.

7 EM 94.

8 See, for example, Human Rights Committee, General Comment 27 , Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

more people register for the My Health Record system it is not clear, on the basis of the information provided, why the current opt-in model has not succeeded.

2.83 The bill also provides that once the opt-out trial has taken place the Minister for Health can, by making rules, apply the opt-out model to all healthcare recipients in Australia. In making this decision the bill provides that the minister 'may' take into account the evidence obtained in applying the opt-out model and any other matter relevant to the decision.[9] There is no requirement that the minister consider the privacy implications of this decision.

2.84 The committee therefore sought the advice of the Minister for Health as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the opt-out model is the least rights restrictive approach and whether there are sufficient safeguards in the legislation.

Minister's response

> *Opt-out arrangements and their effect on healthcare recipients, including children and people with disabilities*
>
> A key theme of the Human Rights Report in relation to the eHealth Bill is whether the proposed opt-out arrangements are:
>
> (i) necessary to achieve a legitimate objective; and
>
> (ii) proportionate, necessary and reasonable to achieving that objective.
>
> I am of the view that the opt-out arrangements in the Bill are a proportionate, necessary and reasonable way of achieving the policy objective of improved health outcomes for all Australians, including children and persons with disabilities. My reasons are set out below.
>
> The *Personally Controlled Electronic Health Records Act 2012* (to be renamed the My Health Records Act) has, and will continue to have, the objective of ***improving health outcomes*** by establishing and operating a national system for accessing individual's health information to[10]:
>
> (a) help overcome the fragmentation of health information;
>
> (b) improve the availability and quality of health information;
>
> (c) reduce the occurrence of adverse medical events and the duplication of treatment; and

9 See proposed clause 2 of proposed Schedule 1 to the *Personally Controlled Electronic Health Records Act 2012* (the PCEHR Act) as proposed to be inserted by item 106 of the bill.

10 Section 3 of the PCEHR Act.

(d) improve the coordination and quality of healthcare provided to individuals by different healthcare providers.

Having a My Health Record is likely to improve health outcomes, making getting the right treatment faster, safer, easier and more cost-effective:

- **faster** - because doctors and nurses and other healthcare providers will not have to spend time searching for past treatment information;
- **safer** - because authorised healthcare providers can view an individual's important healthcare information, including any allergies and vaccinations and the treatment the individual has received;
- **easier** - because individuals will not have to remember the results of tests they have had, or all the medications they have been prescribed; and
- **more cost effective** - because healthcare providers won't have to order duplicate tests - e.g. when an individual visits a different GP whilst on holidays. The time necessary to provide treatment may also be reduced as an individual's health information will be available in one place. As a result, the cost of treatment may be reduced, freeing up funds for improving health outcomes in other areas.

Health information is currently spread across a vast number of different locations and systems. In many current healthcare situations, quick access to key health information about an individual is not always possible. Limited access to health information at the point of care can result in:

- a greater risk to patient safety (e.g. as a result of an adverse drug event due to a complete medications history not being available);
- increased costs of care and time wasted in collecting or finding information (e.g. when a general practitioner has to call the local hospital to get information because the discharge summary is not available);
- unnecessary or duplicated investigations (e.g. when a person attends a new provider and their previous test results are not available);
- additional pressure on the health workforce (e.g. needing to make diagnosis and treatment decisions with incomplete information); and
- reduced participation by individuals in their own healthcare management.

Currently about 1 in 10 individuals have a My Health Record. Since the vast majority of individuals don't have a My Health Record, healthcare providers generally lack any incentive to adopt and contribute to the system, thereby limiting the usefulness of the system. This means there are currently too few individuals and healthcare providers using the system for health outcomes to be significantly improved for the benefit of all Australians.

The Review of the *Personally Controlled Electronic Health Record*[11] (**PCEHR Review**) recommended moving to opt-out participation arrangements for individuals as the most effective way of achieving participation of both healthcare providers and individuals in the system and through this delivering the objective of improving health outcomes. Opt-out arrangements are supported by a wide range of peak bodies representing healthcare recipients, healthcare providers and other stakeholders[12]. Of the 137 responses to the *Electronic Health Records and Healthcare Identifiers: Legislation Discussion Paper* issued in May 2015, around half of them commented on opt-out arrangements. Of those, about 85 per cent gave full or conditional support to national implementation of opt-out, while about 98 per cent supported opt-out trials. Supporters of opt-out were equally individuals (and organisations representing them) and healthcare providers.

Annual Commonwealth healthcare costs are forecast to increase by $27 billion to $86 billion by 2025, and will increase to over $250 billion by 2050[13].

Improved health outcomes and productivity improvements such as those that can be delivered by eHealth are needed to help counter the expected increases in the healthcare costs. Leveraging eHealth is one of the few strategies available to drive microeconomic reform to reduce Commonwealth health outlays and, at the same time, achieve the objective of improved health outcomes. Without implementation of the changes in the eHealth Bill, in particular implementation of opt-out, the quality of healthcare available to all Australians may reduce in the future as costs become prohibitive.

Without a move to opt-out participation arrangements, the required critical mass of registered individuals may not occur, or may be significantly delayed. As a result, the anticipated objective of improving health outcomes and reducing the pressure on Commonwealth health funding may not occur or may be significantly delayed. Under the current opt in registration arrangements, a net cumulative benefit of $11.5 billion is expected over 15 years to 2025. It is anticipated that the move to a national opt-out system would deliver these benefits in a shorter period.

National opt-out eHealth record systems have been implemented in a number of countries that are also subject to Human Rights Conventions including Denmark, Finland, Israel, England, Scotland and Wales. This supports the view that opt-out participation arrangements for electronic health record systems are not inherently an unjustified limitation on individuals' right to privacy.

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11 http://health.gov.au/intemet/main/publishing.nsf/Content/ehealth-record.

12 See, for example, the comments from the Consumers Health Forum supporting opt-out which are extracted on page 28 of the PCEHR Review.

13 Australian Government's 2010 Intergenerational Report.

While the PCEHR Review recommended moving to national opt-out arrangements, the Government has decided to trial opt-out arrangements first to ensure there is community acceptance and support of opt-out arrangements, that is, the community considers opt-out arrangements as proportionate and reasonable to achieve the objective of improving health outcomes.

Individuals in the opt-out trials will be made aware of how their personal information will be handled, and how to opt-out or adjust privacy control settings, so they can make an informed decision. Comprehensive information and communication activities are being planned for the opt-out trials to ensure all affected individuals, including parents, guardians and carers, are aware they are in an opt-out trial and what they need to do to participate, adjust privacy controls associated with their record, or to opt-out if they choose. This will include letters to affected individuals, targeted communication to carers and advocacy groups, extensive online information, and education and training for healthcare providers in opt-out trials.

The eHealth Bill ensures that strong and significant privacy protections will continue to exist under the current opt-in arrangements and will apply under the proposed new opt-out arrangements (whether as part of a trial or under national implementation).

These protections include the ability to do the following for all people registered with the My Health Record system, including children and persons with disabilities:

- set access controls restricting access to their My Health Record entirely or restricting access to certain information in their My Health Record;
- request that their healthcare provider not upload certain information or documents to their My Health Record, in which case the healthcare provider will be required not to upload that information or those documents;
- request that their Medicare data not be included in their My Health Record, in which case the Chief Executive Medicare will be required to not make the data available to the System Operator;
- monitor activity in relation to their My Health Record using the audit log or via electronic messages alerting them that someone has accessed their My Health Record;
- effectively remove documents from their My Health Record;
- make a complaint if they consider there has been a breach of privacy; and
- cancel their registration (that is, cancel their My Health Record).

The *Personally Controlled Electronic Health Records Act 2012* (PCEHR Act) and the system currently provide special arrangements to support children

and vulnerable people to participate in the system by allowing authorised representatives to act on their behalf and protect the rights of children and people with a disability. Authorised representatives generally have parental responsibility for a child, or some other formal authority to act on behalf of the individual. Nominated representatives can also be appointed by an individual (or by their authorised representative) to help the individual manage their electronic health record. The concept of nominated representatives allows for a less formal appointment of another person to help an individual manage their electronic health record. Nominated representatives could be, for example, a family member, neighbour or friend who will generally not have any formal authority to act on behalf of the individual, but whom the individual appoints to assist them in managing their record.

Representatives are currently required to act in the best interests of the person they are representing, and have regard to any directions given by that person. In light of international changes in the treatment of individuals who require supported decision-making, recognising that one person cannot necessarily determine what is in the best interests of another person, the eHealth Bill provides that people providing decision-making support will instead need to give effect to the will and preference of the person to whom they provide decision-making support. Ensuring that representatives can continue to act on behalf of individuals (including children and persons with a disability) to help them to manage their record as part of opt-out is a privacy positive under the eHealth Bill. Authorised representatives will be able, for example, to opt-out the individual for whom they have responsibility from having an electronic health record.

Finally in relation to privacy, a move to opt-out is likely to improve privacy for individuals, including children and persons with a disability, in a number of ways. As noted in the Commonwealth's *Concept of Operations: Relating to the introduction of a personally controlled electronic health record system* (2011):

According to the Australian Medical Association (AMA), over 95% of GPs have computerised practice management systems. The majority of GPs with a computer at work used it for printing prescriptions recording consultation notes, printing test requests and Referral letters and receiving results for pathology tests electronically. Roughly one third of GPs keep 100% of patient information in an electronic format and the remainder of general practices use a combination of paper and electronic records. (pages 126-7)

Implementing opt-out participation arrangements is likely to increase the number of individuals with a My Health Record, and it is anticipated that this will result in the majority of healthcare provider organisations viewing records for their patients in the system and contributing clinical content to those records as part of the process of providing healthcare. Increased participation by healthcare providers, planned improvements in system functionality and ease of use, together with planned incentives to use the

system, will lead to much greater use of the system in providing healthcare to individuals.

Increased use of the system is a privacy positive as it will reduce the use of paper records, which pose significant privacy risks. For example, where a patient is receiving treatment in a hospital's emergency department for a chronic illness, the hospital may request from the patient's regular doctor information about the patient's clinical history which is likely to be faxed to the hospital. The fax might remain unattended on the fax machine for an extended period of time before being placed into the patient's file, or the information may be sent to the wrong fax number. Either of these things could lead to an interference with the patient's privacy should a third party read the unattended fax or incorrectly receive the fax. In contrast, under the My Health Record system, the patient's Shared Health Summary would be securely available only to those people authorised to see it. There are other similar scenarios where an increase in the level of use of the My Health Record system is likely to lead to a reduction in privacy breaches associated with paper based records.

In summary, the combination of opt-out trials, extensive information and strong personal controls mean that moving to opt-out participation arrangements for individuals is proportionate, necessary and reasonable for achieving the objective of improving health outcomes. Furthermore, increased registration with, and use of, the PCEHR system is likely to increase individuals' privacy, especially compared to existing paper based records that are still used to some degree by around two-thirds of healthcare providers.[14]

Committee response

2.85 **The committee thanks the Minister for Health for her response.** In particular, the committee thanks the minister for her detailed description as to the overall objective behind the My Health Record system. The committee previously accepted that this objective, of improving health outcomes, is likely to be a legitimate objective for the purposes of international human rights law. The question raised by the committee was what is the reasoning or evidence that establishes that the objective behind the opt-out model is a legitimate objective; in that it seeks to address a pressing or substantial concern. In relation to this, the committee notes the minister's response that under the current rates of participation for My Health Records, healthcare providers generally lack any incentive to adopt and contribute to the system, thereby limiting the usefulness of the system. The minister also notes that currently roughly two-thirds of healthcare providers use paper based records and increased registration with, and use of, the My Health Record system would encourage the use of healthcare providers to use electronic records for their patients in the My Health Record system. The minister also states that increased use of the

14 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 3-7.

My Health Record system will deliver cost benefits to the healthcare system, which will occur more quickly under an opt-out model than the current opt-in model.

2.86 Reducing costs to the healthcare system is likely to be a legitimate objective for the purposes of international human rights law. However, the committee notes that the minister's response does not provide any evidence to demonstrate that increasing numbers of persons registered on the My Health Record system would in fact reduce healthcare costs.

2.87 However, even assuming that the opt-out model would result in increased use of the My Health Record system by healthcare professionals, and thus reduce healthcare costs, the committee remains concerned that the means to achieve this increased usage may not be proportionate to the objective sought to be achieved. In particular, no information is provided by the minister as to why the current opt-in model has not succeeded, and whether there are other methods available to ensure more people voluntarily decide to include their health records on the My Health Record system. This is relevant to the question of whether there are other less rights restrictive ways to achieve the same aim.

2.88 The minister's response states that people in the initial trial locations will be notified by letter that their personal health information will be automatically uploaded on the national register. However, no detail is provided as to whether this will provide sufficient detail to people to allow them to be fully aware of their rights to opt-out of the system. The committee reiterates that the bill itself does not set out any safeguards to ensure that healthcare recipients are given reasonable notice or a reasonable amount of time to decide whether to opt-out.

2.89 The committee also notes the minister's statement that the move to automatically upload everyone's personal health records onto the national database is 'likely to improve privacy' for individuals, as it will decrease reliance on paper records. However, it is not apparent that including all personal health data on a centralised national database would better protect privacy – information on government databases also run the risk of being inappropriately accessed, and including more personal information that can be accessed by more people is not likely to improve the right to privacy for individuals.

2.90 **The committee considers that the automatic inclusion of the health record of all Australians on the My Health Record register engages and limits the right to privacy in article 17 of the International Covenant on Civil and Political Rights.**

2.91 **Some committee members consider that the minister's response has demonstrated that the bill seeks to improve health outcomes and promotes the right to health and so consider the measures are justifiable.**

2.92 **Other committee members consider that the minister's response has not adequately addressed the committee's concerns in relation to this right. For the reasons set out above, those committee members consider that the legislation is**

likely to be incompatible with the right to privacy and recommend, in order to better protect the right to privacy, the legislation be amended:

- **to set out the detail of how and when a health care recipient will be notified that their records will uploaded onto the My Health Records system;**
- **to require that healthcare recipients be given a reasonable amount of time to decide whether to opt-out of the My Health Records system;**
- **to provide that healthcare recipients are able erase their record from the register at any time;**
- **to require that if the minister applies the opt-out model to all healthcare recipients in Australia, the minister must consider the privacy implications of this decision and be satisfied that healthcare recipients in the trials were given an appropriate and informed opportunity to opt-out.**

Automatic inclusion of children's health records on the My Health Record system

2.93 Currently under the *Personally Controlled Electronic Health Records Act 2012* (the PCEHR Act) a person under the age of 18 years is automatically assigned an 'authorised representative' who has the power to manage the child's health records.[15] The authorised representative can be any person who has parental responsibility for the child. A parent is considered to be the child's authorised representative until the child turns 18 years of age or until the child takes control of their record. A child who wishes to take control of their health record needs to satisfy the System Operator that they want to manage his or her own PCEHR and are capable of making decisions for themselves.[16]

2.94 The committee previously considered that automatically uploading the private health records of all children in Australia, unless their parent chooses to opt-out of the register, engages and both promotes and limits the rights of the child.

Rights of the child

2.95 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child (CRC). All children under the age of 18 years are guaranteed these rights. The rights of children include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and

15 See subsection 6(1) of the PCEHR Act.

16 See subsection 6(3) of the PCEHR Act.

- the right to access health care, education and services that meet their needs.

2.96 State parties to the CRC are required to ensure to children the enjoyment of fundamental human rights and freedoms and are required to provide for special protection for children in their laws and practices. In interpreting all rights that apply to children, the following core principles apply:

- rights are to be applied without discrimination;
- the best interests of the child are to be a primary consideration;
- there must be a focus on the child's right to life, survival and development, including their physical, mental, spiritual, moral, psychological and social development; and
- there must be respect for the child's right to express his or her views in all matters affecting them.

Compatibility of the measure with the rights of the child

2.97 The statement of compatibility recognises that the rights of the child are engaged by the bill but states that these rights continue to be protected.[17]

2.98 The committee previously noted that an attempt to drive increased use by healthcare providers may be regarded as a desirable or convenient outcome but may not address an area of public or social concern that is pressing and substantial enough to warrant limiting the rights of the child. In addition, the committee considered that the opt-out model may not be regarded as a proportionate means of achieving that objective.

2.99 The committee previously noted the bill's limitations on the child's right to privacy and more broadly on the rights of the child. The committee previously noted that there are particular problems with the way in which the current opt-out arrangements are provided for in the bill, and that there is no additional information as to how a child, who wishes to take control of their own record, is able to do so.

2.100 The committee previously noted that the bill does impose an obligation on an authorised representative to give effect to the will and preferences of the child, unless to do so would pose a serious risk to the child's personal and social wellbeing.[18] While this is a welcome measure, there are no consequences in the legislation if the parent does not give effect to the child's will and preferences. In

17 EM, SoC 36.

18 See proposed new section 7A to the PCEHR Act, item 64 of the bill.

addition, even if a child does manage to become responsible for their own health records, it appears that the child's parent will be notified when that occurs.[19]

2.101 The committee therefore sought the advice of the Minister for Health as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the opt-out model is the least rights restrictive approach and whether there are sufficient safeguards in the legislation to protect the rights of the child.

Minister's response

2.102 See the minister's response set out above in relation to the right to privacy.[20]

Committee response

2.103 **The committee thanks the Minister for Health for her response.** The minister's response did not separately address the issue of the compatibility of the automatic inclusion of children's health records on the My Health Record system with the rights of the child. Rather, the minister's response broadly states that the system of authorised representatives protects the rights of children. The minister states that authorised representatives, who generally have parental responsibility for a child, can help a child manage their e-health record as part of the opt-out process, which the minister states is a 'privacy positive' under the bill.

2.104 The committee's previous analysis noted that under the opt-out model a child must rely on their parents taking active steps to ensure their health record is not automatically included on the My Health Record (noting once a record is included the information will permanently remain on the system). A child's parent is automatically the authorised representative of a person aged under 18 and any child who wants to take control of their health record needs to satisfy the System Operator that they are capable of making decisions for themselves. The committee raised concerns that there was no provision in the bill as to how a child, who wishes to take control of their own record, is able to do so. No information is given as to what a child needs to do in order to satisfy the Systems Operator that their parent should not be considered to be their authorised representative. No information is

19 See Parents FAQ, on the eHealth.gov.au website which states 'Parents or Authorised Representatives who are managing the eHealth record for a person under 18 years old will be notified when the person has taken control of their own eHealth record': see http://www.ehealth.gov.au/internet/ehealth/publishing.nsf/Content/faqs-individuals-parents (accessed 23 September 2015).

20 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 3-7.

given as to the timeframe in which the Systems Operator should make the decision as to whether the child is capable of managing their own affairs and whether this would occur within sufficient time to allow the child to exercise their opt-out rights.

2.105 **The committee considers that the automatic inclusion of all children's health records on the My Health Record register engages and limits a number of rights under the Convention on the Rights of the Child.**

2.106 **Some committee members consider that the minister's response has demonstrated that the bill seeks to improve health outcomes for children and so consider the measures are justifiable.**

2.107 **Other committee members recommend, in order to avoid an unjustifiable limitation on the rights of the child, that the detail as to how a child is to take control of their own health record be set out in legislation and the legislation be amended to ensure children's health records are not subject to automatic inclusion on the My Health Record.**

Automatic inclusion of the health records of persons with disabilities on the My Health Record system

2.108 Currently under the PCEHR Act a healthcare recipient can apply to the System Operator to register for the PCEHR, thereby opting-in to have their health care records included on the register. A person with disabilities can do so on an equal basis with other healthcare recipients. However, where the Systems Operator of the PCEHR is satisfied that a person aged over 18 years is not capable of making decisions for him or herself, another person will be considered to be the authorised representative of that person, and only that person will be able to manage the person's health records.[21]

2.109 The committee previously considered that automatically uploading the private health records of all persons with disabilities in Australia, unless they or an authorised representative choose to opt-out of the register, engages and limits the rights of persons with disabilities.

Rights of persons with disabilities

2.110 The Convention on the Rights of Persons with Disabilities (CRPD) sets out the specific rights owed to persons with disabilities. It describes the specific elements that state parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others, and to participate fully in society.

2.111 Article 4 of the CRPD states that in developing and implementing legislation and policies that concern issues relating to persons with disabilities, states must closely consult with and actively involve persons with disabilities, through their representative organisations.

21 See subsection 6(4) of the the PCEHR Act.

2.112 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

2.113 Article 12 of the CRPD requires state parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to exercise their legal capacity.

2.114 Article 22 requires state parties to protect the privacy of the personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

Compatibility of the measure with the rights of persons with disabilities

2.115 The statement of compatibility for the bill recognises that the rights of persons with disabilities are engaged by the bill, but states that 'people with a disability are provided equal opportunity to participate in the My Health Record system and make decisions about access to their personal information'.[22]

2.116 The committee previously noted that an attempt to drive increased use by healthcare providers, may be regarded as a desirable or convenient outcome but may not address an area of public or social concern that is pressing and substantial enough to warrant limiting the rights of persons with disabilities. In addition, the committee considered that the opt-out model may not be regarded as a proportionate means of achieving that objective.

2.117 In particular, the committee previously noted that the current law provides that whenever the Systems Operator is satisfied that a healthcare recipient 'is not capable of making decisions for himself or herself' the Systems Operator will deem whomever they are satisfied is an appropriate person to be the healthcare recipient's authorised representative. Once that representative is stated to be acting for a healthcare recipient, the healthcare recipient is not entitled to have any role in managing their health records.[23]

2.118 However, article 12 of the CRPD affirms that all persons with disabilities have full legal capacity. While support should be given where necessary to assist a person with disabilities to exercise their legal capacity, it cannot operate to deny the person legal capacity by substituting another person to make decisions on their behalf. In August 2014 the Australian Law Reform Commission made 12 recommendations specifically for Supported Decision-Making in Commonwealth Laws, to ensure that the presumption of legal capacity is recognised and that measures are in place to

22 EM, SoC 35.

23 See subsection 6(7) of the PCEHR Act.

provide decision-making support in accordance with the National Decision-Making principles.[24]

2.119 The current PCEHR Act, by denying a person the right to manage any of their health records as soon as the Systems Operator makes an assessment that the person lacks the capacity to make decisions for him or herself, removes the person's right to legal capacity.

2.120 The amendments in the bill, in requiring an authorised representative to make reasonable efforts to ascertain the healthcare recipient's will and preferences in relation to their My Health Record,[25] are important in respecting the rights of persons with disabilities. However, the design of the current legislation is such that the authorised representative would always be exercising substitute decision-making, rather than supported decision-making.[26]

2.121 In addition, while the bill imposes an obligation on an authorised representative to give effect to the will and preferences of the healthcare recipient, there are no consequences in the legislation if the authorised representative does not give effect to the person's will and preferences. The statement of compatibility states that a failure of the representative to meet these duties 'may result in their appointment being suspended or cancelled, or access to the individual's My Health Record being blocked under the My Health Records Rules'.[27] However, it is not clear how this would work in practice.

2.122 The use of substitute decision-making through the authorised representative process in the bill is of particular concern from an international human rights law perspective.[28]

2.123 In addition, there is no information as to how persons with disabilities will be notified appropriately about their right to opt-out of the scheme.

2.124 The committee therefore sought the advice of the Minister for Health as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the opt-out model is the least rights restrictive approach and

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24 Australian Law Reform Commission (ALRC), *Equality, Capacity and Disability in Commonwealth Laws* (*ALRC Report 124*), 24 November 2014, see in particular Recommendations 4-1 to 4-12, available from https://www.alrc.gov.au/publications/equality-capacity-disability-report-124.

25 See proposed new section 7A to the PCEHR Act, item 64 of the bill.

26 See subsection 6(7) of the PCEHR Act.

27 EM, SoC 35.

28 See UN Committee on the Rights of Persons with Disabilities, *General comment No. 1: Article 12: Equal recognition before the law* (2014), paragraph 47.

whether there are sufficient safeguards in the legislation to protect the rights of persons with disabilities.

Minister's response

2.125 See the minister's response set out above in relation to the right to privacy.[29]

Committee response

2.126 **The committee thanks the Minister for Health for her response.** The minister's response did not separately address the issue of the compatibility of the automatic inclusion of the health records of persons with disabilities on the My Health Record system with the rights of persons with disabilities. Rather, the minister's response broadly states that the system of authorised and nominated representatives protects the rights of persons with disabilities. The minister states that nominated representatives can be appointed, and that these could be family members, neighbours or friends who may not have any formal authority to act on behalf of the person but can be appointed by the person to help them manage their record. The minister states that such representatives can help a person with disabilities manage their e-health record as part of the opt-out process, which the minister states is a 'privacy positive' under the bill.

2.127 The committee's previous analysis raised concerns about the process by which an authorised or nominated representative manages the record of a person with disabilities. Currently, where the Systems Operator is satisfied that a person aged over 18 years is not capable of making decisions for him or herself, the Systems Operator will deem whomever they are satisfied is an appropriate person to be the healthcare recipient's authorised representative. Once an authorised representative is stated by the Systems Operator to be acting for a healthcare recipient, that authorised representative is authorised to do anything the healthcare recipient can do and the healthcare recipient is not entitled to have any role in managing their health records.[30]

2.128 However, the CRPD affirms that all persons with disabilities have full legal capacity. While support should be given where necessary to assist a person with disabilities to exercise their legal capacity, it cannot operate to deny the person legal capacity by substituting another person to make decisions on their behalf. The design of the current legislation is such that the authorised representative would always be exercising substitute decision-making, rather than supported decision-making.[31]

29 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 3-7.

30 See subsection 6(7) of the PCEHR Act.

31 See subsection 6(7) of the PCEHR Act.

2.129 The committee also raised concerns that the bill provided no detail as to how persons with disabilities will be notified appropriately about their right to opt-out of the My Health Record scheme.

2.130 **The committee considers that the automatic inclusion of the health records of all persons with a disability on the My Health Record register engages and limits a number of rights in the Convention on the Rights of Persons with Disabilities.**

2.131 **Some committee members consider that the minister's response has demonstrated that the bill seeks to improve health outcomes for persons with disabilities and so consider the measures are justifiable.**

2.132 **Other committee members recommend, in order to avoid an unjustifiable limitation on the rights of persons with disabilities, that the legislation be amended to ensure that persons with disabilities are accorded full legal capacity in relation to the My Health Record system and the health records of persons with disabilities are not subject to automatic inclusion on the My Health Record. In particular, those members recommend that consideration be given to the recommendations made by the Australian Law Reform Commission[32] to ensure supported decision-making is encouraged and representative decision-makers are appointed only as a last resort.**

Civil penalty provisions

2.133 The bill introduces a number of new civil penalty provisions to apply when a person improperly uses or discloses personal information from the My Health Record system or fails to give up-to-date and complete information for the register.

2.134 For example, proposed new section 26 makes it an offence to, unless authorised, use or disclose identifying information from the My Health Records system. The penalty for the criminal offence is two years imprisonment or 120 penalty units (or both). Proposed new subsection 26(6) also applies a civil penalty to the same conduct, on the basis of recklessness, with an applicable civil penalty of 600 penalty units.

2.135 The committee previously considered that this measure engages and may limit the right to a fair trial as the civil penalty provisions may be considered to be criminal in nature under international human rights law and may not be consistent with criminal process guarantees.

Right to a fair trial and fair hearing rights

2.136 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses

32 ALRC, *Equality, Capacity and Disability in Commonwealth Laws* (*ALRC Report 124*), 24 November 2014, see in particular Recommendations 4-1 to 4-12, available from https://www.alrc.gov.au/publications/equality-capacity-disability-report-124.

notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

2.137 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to a fair trial and fair hearing rights

2.138 Under international human rights law civil penalty provisions may be regarded as 'criminal' if they satisfy certain criteria. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law. If so, such provisions would engage the criminal process rights under articles 14 and 15 of the ICCPR.

2.139 There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be considered 'criminal' for the purposes of human rights law. The committee's Guidance Note 2 sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.[33]

2.140 The statement of compatibility states that the civil penalty provisions in the bill should not be classified as criminal under human rights law.[34]

2.141 The committee previously considered that a penalty of up to 600 penalty units is a substantial penalty that could result in an individual being fined up to $108 000.[35] This is in a context where the individual made subject to the penalty may be a healthcare provider, such as a nurse, or an administrator working for a healthcare provider. The maximum civil penalty is also substantially more than the financial penalty available under the criminal offence provision, which is restricted to a maximum of 120 penalty units (or $21 600).

2.142 When assessing the severity of a pecuniary penalty the committee previously noted that it has regard to the amount of the penalty, the nature of the industry or sector being regulated and the maximum amount of the civil penalty that may be imposed relative to the penalty that may be imposed for a corresponding criminal offence. Having regard to these matters the committee considered that the civil penalty provisions imposing a maximum of 600 penalty units may be considered to be 'criminal' for the purposes of international human rights law.

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33 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 2 –Offence provisions, civil penalties and human rights* (December 2014); http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

34 EM, SoC 34.

35 The current penalty unit rate is $180 per unit, see section 4AA of the *Crimes Act 1914*.

2.143 The committee noted that the consequence of this is that the civil penalty provisions in the bill must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. However, civil penalty provisions are dealt with under the civil law in Australia and a civil penalty order can be imposed on the civil standard of proof – the balance of probabilities.

2.144 In addition, the committee noted that proposed new section 31C of the bill provides that each civil penalty provision under the bill is enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014*. This Act provides that criminal proceedings may be commenced against a person for the same, or substantially the same, conduct, even if a civil penalty order has already been made against the person.[36] If the civil penalty provision is considered criminal in nature, this raises concerns under article 14(7) of the ICCPR which provides that no one is to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted (double jeopardy).

2.145 The committee also noted that the civil penalty and offence provisions in the bill also allow for a reversal of the burden of proof, requiring the defendant to bear an evidential burden in relation to the defences in the bill. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Neither the statement of compatibility nor the EM justifies the need for the reversal of the burden of proof.

2.146 The statement of compatibility states that the objective of the penalty regime is to protect the private sensitive information held on the My Health Record system 'and the misuse of this information needs to have proportionate penalties to the potential damage to healthcare recipients'.[37] The committee considered that the protection of private sensitive information is a legitimate objective for the purposes of international human rights law. However, the objective behind including civil penalties of up to 600 penalty units (substantially more than the penalty available under the criminal offence provision) without the usual protections available to those charged with a criminal offence, and the reversal of the burden of proof, has not been explained in the statement of compatibility.

2.147 The statement of compatibility also does not explain how the civil penalty provisions, which are likely to be considered 'criminal' for the purposes of international human rights law, are proportionate to their objective.

2.148 The committee therefore sought the advice of the Minister for Health as to whether there is reasoning or evidence that establishes that the stated objective

36 See section 90 (in Division 3 of Part 4) of the *Regulatory Powers (Standard Provisions) Act 2014*.

37 EM, SoC 34.

addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

The eHealth Bill introduces further protection of an individual's health information contained in a My Health Record with the proposed introduction of further enforcement and penalty options if someone deliberately misuses the information or commits an act that may compromise the security or integrity of the system.

At present, the PCEHR Act contains a civil penalty regime for misuse of information, and the *Healthcare Identifiers Act 2010* (HI Act) contains a criminal regime. The eHealth Bill aligns the enforcement and sanction regimes under the two Acts to provide a more graduated and consistent framework for responding to inappropriate behaviour that is proportional to the severity of a breach.

Civil and criminal penalties are proposed for both Acts (up to a maximum of $108,000 for individuals and $540,000 for corporations for deliberate misuse of health information). Enforceable undertakings and injunctions will also be available.

The Committee has questioned whether the civil penalty provisions proposed by the eHealth Bill are criminal for the purposes of international human rights law and, if so, whether any limitation on the right to a fair hearing is justified.

The maximum civil penalty that can be imposed under the eHealth Bill is 600 penalty units. This penalty is justified because the My Health Record system stores the sensitive health information of many individuals. The amount of health information stored and the number of individuals whose records are stored would increase significantly under opt-out.

Penalty levels must provide an appropriate deterrent to misuse of sensitive health information. In addition, penalties need to be proportionate to the potential damage that might be suffered by individuals if the health information in their My Health Record is misused.

The civil penalty levels imposed under the eHealth Bill can be contrasted to the existing *Privacy Act 1988*:

- Under the eHealth Bill the maximum civil penalty is 600 penalty units for a misuse of sensitive health information;
- Under the Privacy Act there are significantly higher civil penalties of up to 2,000 penalty units for serious or repeated misuse of personal information. This is despite the fact that the information in question might not be sensitive health information and may only be less sensitive personal information.

Given that the civil penalties available under the Privacy Act are considered appropriate, it is most unlikely that lower penalties under the eHealth Bill would be considered criminal in nature or would limit the right to a fair trial, especially where the penalty regime imposed by the eHealth Bill is designed to protect significantly more sensitive health information than is generally the case under the Privacy Act.

In response to the Committee comments on the differential between the maximum civil penalty amount and the maximum criminal penalty amount, the eHealth Bill provides for a higher level of civil penalty (600 penalty units) compared to the maximum criminal penalty (120 penalty units) as it is not necessary to have the same levels for each. Imposition of a criminal conviction by a court has other implications that mean that higher penalty levels are not necessary to achieve the desired deterrent. For example, a criminal conviction may result in imprisonment (up to two years) or restrictions on an individual's ability to travel.

The Committee also commented on the reversal of the burden of proof in proposed new section 26 of the HI Act.

Proposed new subsections 26(3) and (4) provide exceptions to the prohibition against misusing healthcare identifiers and identifying information in subsection 26(1) of the HI Act. In doing so, subsections 26(3) and (4) reverse the burden of proof by providing that the defendant bears an evidential burden when asserting an exception applies. An evidential burden placed on the defendant is not uncommon. Similar notations to those used in the eHealth Bill exist in many other pieces of Commonwealth legislation (for example, subsection 3.3 of the *Criminal Code Act 1995* - where a person has an evidential burden of proof if they wish to deny criminal responsibility by relying on a provision of Part 2.3 of the Criminal Code).

In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the facts relating to each defence in proposed new subsections 26(3) and (4) of the HI Act are peculiarly within the knowledge of the defendant and could be extremely difficult or expensive for the prosecution to disprove whereas proof of a defence could be readily provided by the defendant.

A burden of proof that a law imposes on a defendant is an evidential burden only (not a legal burden), and does not completely displace the prosecutor's burden. Proposed subsections 26(3) and (4) simply require a person to produce or point to evidence that suggests a reasonable possibility that exceptions in those provisions apply to the person.[38]

38 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 28 October 2015) 7-9.

Committee response

2.149 **The committee thanks the Minister for Health for her response**. The committee notes the minister's advice as to why the civil penalty provisions are necessary; namely that the My Health Record system stores the sensitive health information of many individuals and there must be an appropriate deterrent to the misuse of such information. The committee accepts that the protection of private sensitive information is a legitimate objective for the purposes of international human rights law. The committee also notes the minister's advice that the criminal penalty provisions are substantially lower than the civil penalty provisions as imposition of a criminal conviction has other implications that mean a higher penalty is not necessary to achieve the desired deterrent.

2.150 The minister explains in the response that the maximum civil penalty available under the *Privacy Act 1988* is significantly higher than that under this bill, allowing for civil penalties of up to 2000 penalty units. The minister further explains that given these penalties 'are considered appropriate' it would be most unlikely that the penalties under the bill would be considered criminal under international human rights law. The committee notes it has not reviewed the civil penalty provisions under the *Privacy Act 1988* as these were introduced prior to the committee's establishment.

2.151 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law is contestable under international law. The committee considers that it is difficult to say with certainty whether the civil penalty provisions in the bill, allowing for penalties of up to $108,000, would be considered criminal for the purposes of international human rights law. However, the committee notes that this is a substantial penalty, that is intended to deter particular behaviour, and is in a context where it applies to individuals who may be healthcare providers, such as a nurse, or administrators working for a healthcare provider, rather than in a corporate or financial context. Yet, the committee notes that the penalty does apply to people in a particular regulatory context.

2.152 **The committee notes the minister's advice in relation to the civil penalty provisions and has concluded its examination of these provisions.**

2.153 **In addition, the committee notes the minister's advice in relation to the provision reversing the burden of proof, and considers that the response demonstrates that the defences provided in the bill are likely to be peculiarly within the defendant's knowledge. Accordingly, the committee considers that this aspect of the bill is likely to be compatible with the right to a fair trial (presumption of innocence).**

Norfolk Island Legislation Amendment Bill 2015

Portfolio: Infrastructure
Introduced: House of Representatives, 26 March 2015

Purpose

2.154 The Norfolk Island Legislation Amendment Bill 2015, Tax and Superannuation Laws Amendment (Norfolk Island Reforms) Bill 2015, A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Amendment Bill 2015, Health and Other Services (Compensation) Care Charges Amendment (Norfolk Island) Bill 2015, Health Insurance (Approved Pathology Specimen Collection Centres) Tax Amendment (Norfolk Island) Bill 2015, Health Insurance (Pathology) (Fees) Amendment (Norfolk Island) Bill 2015, Private Health Insurance (Risk Equalisation Levy) Amendment (Norfolk Island) Bill 2015 and Aged Care (Accommodation Payment Security) Levy Amendment (Norfolk Island) Bill 2015 (the bills) seek to:

- amend the *Norfolk Island Act 1979* in order to implement reforms to certain governance and legal arrangements of Norfolk Island, including the abolition of the Norfolk Island Legislative Assembly and consequent establishment of the Norfolk Island Regional Council to act as the elected local government body for the territory, and the introduction of a mechanism which applies New South Wales state law to Norfolk Island as commonwealth law; and
- extend mainland social security (including payments such as the Age Pension, Newstart Allowance, Disability Support Pension and Youth Allowance), immigration (with the effect of ensuring that Norfolk Island is treated consistently with Australia's other inhabited external territories) and health arrangements (including the Medicare Benefits Schedule, the Pharmaceutical Benefits Scheme and the Private Health Insurance Rebate) to Norfolk Island.

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

Background

2.156 The committee previously raised concerns in its *Seventh Report of the 44th Parliament*[1] in relation to the exclusion of certain New Zealand citizens from access to benefits, such as the National Disability Insurance Scheme (NDIS), despite being required to contribute to the NDIS levy. In its concluding comments, the committee noted that 'under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), non-citizens are entitled to the enjoyment of the human rights guaranteed by the covenants without discrimination.'[2]

1 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014) 76-81.

2 Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (18 June 2014) 80.

2.157 The committee previously considered the bills in its *Twenty-second Report of the 44th Parliament* (previous report) and requested further information from the Assistant Minister for Infrastructure and Regional Development as to the compatibility of the bills with the right to equality and non-discrimination and the right to social security.[3]

2.158 The Norfolk Island Legislation Amendment Bill 2015 passed both Houses of Parliament on 14 May 2015 and achieved Royal Assent on 26 May 2015.

Exclusion of some categories of Australian permanent residents from eligibility for social security

2.159 Currently, on mainland Australia all permanent visa holders are entitled to social security under the *Social Security Act 1991* (the Act). As a result of amendments made by the bill, the Act was extended to Norfolk Island in order to provide the same social security system on the island as is provided on mainland Australia. However, the extension of social security payments to residents of Norfolk Island does not apply to New Zealand citizens that hold an Australian permanent visa.[4]

2.160 The committee previously noted that while the extension of social security benefits will, in the main, promote access to healthcare and advance the right to social security, it also engages and limits the right to equality and non-discrimination and the right to social security.

Right to equality and non-discrimination

2.161 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

2.162 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.163 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[5] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[6] The UN Human Rights Committee has explained indirect

3 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 66-71.

4 See proposed section 7(2AA) of the *Social Security Act 1991*.

5 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

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

discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[7]

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

2.164 The committee previously noted that new subsection 7(2AA) would exclude New Zealand citizens who reside on Norfolk island and hold an Australian permanent visa from being considered an Australian resident under the Act, and thus result in these persons being ineligible for social security benefits.

2.165 The committee noted that it would appear that this could result in a New Zealand citizen living on mainland Australia and receiving social security benefits, losing eligibility if they were to move to Norfolk Island. The committee further noted that the proposed provision does not merely put long-term Norfolk Island residents who are New Zealand citizens in the same position as residents of Australia who are New Zealand citizens as is set out in the Explanatory Memorandum (EM).[8]

2.166 Further, the extension of social security benefits to Norfolk Island applies to Australian permanent residents who are citizens of all countries except New Zealand. No rationale is provided in the EM or statement of compatibility for this specific exclusion. Accordingly, the measure appears to be directly discriminatory and therefore limits the right to equality and non-discrimination.

2.167 Even if a provision directly or indirectly discriminates against specific groups it may nevertheless be justifiable where it pursues a legitimate objective, the measure is rationally connected to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective.

2.168 The statement of compatibility does not address this engagement with the right to equality and non-discrimination. The committee therefore sought the advice of the Assistant Minister for Infrastructure and Regional Development as to whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Right to social security

2.169 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

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

8 EM 55.

2.170 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care; and
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

2.172 Specific situations which are recognised as engaging a person's right to social security, include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

Compatibility of the measure with the right to social security

2.173 While the statement of compatibility acknowledges that the bill engages the right to social security, it does not address this particular provision or its implications for the enjoyment of the right to social security by Australian permanent residents living on Norfolk Island who are New Zealand citizens.

2.174 The exemption of these persons from receiving social security benefits limits the right to social security for this group.

2.175 As the statement of compatibility for the bill has not identified this limitation, it does not provide a justification for the limitation for the purposes of international human rights law.

2.176 The committee therefore sought the advice of the Assistant Minister for Infrastructure and Regional Development as to whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Assistant Minister's response

> The Bill was passed by both Houses of Parliament on 14 May 2015 and the *Norfolk Island Legislation Amendment Act 2015* (the Act) received the Royal Assent on 26 May 2015. The purpose of the Act is to extend the mainland social security, immigration and health arrangements to Norfolk Island from 1 July 2016.
>
> I note the Parliamentary Joint Committee on Human Rights' comments in relation to Australian permanent resident New Zealand citizens living on Norfolk Island being ineligible for social security benefits.
>
> The exclusion of this category of permanent residents from social security benefits is not consistent with the Australian Government's policy. The Department of Infrastructure and Regional Development is working with the Department of Social Services to develop an amendment to the Act to ensure New Zealand citizens living on Norfolk Island enjoy the same access to social security benefits as New Zealand citizens living on the Australian mainland.
>
> I will bring forward to the Parliament during its Autumn 2016 Sittings a Bill that will, amongst other Norfolk Island reforms, amend the social service arrangements.[9]

Committee response

2.177 **The committee thanks the Assistant Minister for Infrastructure and Regional Development for his response. The committee welcomes the government's commitment to move amendments to ensure that Australian permanent resident New Zealand citizens living on Norfolk Island will be eligible for social security benefits. The committee considers that this amendment will address its concerns and, on this basis, has concluded that the bill is compatible with the right to social security. The committee looks forward to the introduction of these amendments and thanks the Assistant Minister for his constructive engagement on this matter.**

9 See Appendix 1, Letter from the Hon Jamie Briggs MP, Assistant Minister for Infrastructure and Regional Development, to the Hon Philip Ruddock MP (dated 18 September 2015) 1-2.

Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015

Portfolio: Employment
Introduced: House of Representatives, 10 September 2015

Purpose

2.178 The Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 (the bill) seeks to amend the *Social Security (Administration) Act 1999* (SSA Act) to:

- withhold a job seeker's social security payment where a job seeker refuses to enter into an Employment Pathway Plan without a reasonable excuse for doing so, and impose an additional penalty to be deducted from the eventual payment;
- withhold a job seeker's social security payment where a job seeker acts in an inappropriate manner during an appointment such that the purpose of the appointment is not achieved without a reasonable excuse for doing so, and impose an additional penalty to be deducted from the eventual payment;
- amend the instalment period from which penalties are deducted in relation to job seekers' failure to participate in a specified activity (e.g. work for the dole) to effect a more immediate penalty;
- withhold a job seeker's social security payment where job search efforts have been inadequate (with possibility of receiving full back pay once adequate job search efforts can be proven to have resumed); and
- remove the ability of a job seeker who has failed to accept an offer of suitable employment without a reasonable excuse to apply to have the eight-week penalty period waived in lieu of undertaking additional activities.

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

Background

2.180 The committee previously considered the bill in its *Twenty-ninth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Employment as to the compatibility of the bill with the right to social security and right to an adequate standard of living.[1]

Suspension of benefits for inappropriate behaviour

2.181 Item 18 of the bill would amend the SSA Act to provide that a penalty may be deducted from a job seeker's social security payment where a job seeker acts in an

1 Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (18 August 2015) 25-30.

inappropriate manner, without a reasonable excuse, during an appointment such that the purpose of the appointment is not achieved.

2.182 This measure may result in individuals losing social security payments and accordingly the committee previously considered that it engages and limits the right to social security and the right to an adequate standard of living.

Right to social security

2.183 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

2.184 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

Right to an adequate standard of living

2.186 The right to an adequate standard is guaranteed by article 11(1) of the ICESCR, and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

2.187 In respect of the right to an adequate standard of living, article 2(1) of the ICESCR also imposes on Australia the obligations listed above in relation to the right to social security.

Compatibility of the measure with the right to social security and the right to an adequate standard of living

2.188 The statement of compatibility acknowledges that the measure engages these rights. The statement of compatibility explains the legitimate objective of the measure as 'discouraging job seekers from deliberately resisting assistance provided to them to… find work'.[2]

2.189 The committee previously noted that a legitimate objective must address a substantial and pressing concern and be based on empirical research or reasoning. No evidence is provided as to the extent to which individuals on social security are frustrating job search activities by inappropriate behaviour during appointments.

2.190 To the extent that the measure does pursue a legitimate objective, the measure is rationally connected to that objective as penalties for inappropriate behaviour may encourage better behaviour during appointments.

2.191 In terms of proportionality, no protections are included in the bill to ensure that a job seeker's behaviour can be assessed in a fair and reasonable manner. Inappropriate behaviour is not defined in the bill and it is unclear how and on what basis a person's behaviour during an interview is inappropriate.

2.192 In the absence of statutory guidance, the bill may result in individuals losing social security benefits in circumstances which are unfair or unreasonable.

2.193 The committee therefore sought the advice of the Minister for Employment as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether there are sufficient safeguards in the legislation.

Minister's response

> The Bill will introduce measures to ensure that job seekers who behave inappropriately at appointments may be subject to the same penalties as job seekers who fail to attend those appointments. This is not a unique proposal. Rules allowing penalties to be applied to job seekers who commit misconduct at activities and job interviews were introduced into the compliance framework in 2009. Administrative data indicates that misconduct at activities amounts to around 1 per cent of all failures related to activities.
>
> This measure aims to apply similar rules for appointments that job seekers are required to undertake with their employment service providers or other organisations. Qualitative analysis of feedback from providers has indicated that inappropriate behaviour is a recurring issue and providers

2 Explanatory Memorandum (EM) 46.

have requested increased scope to manage this behaviour. As providers are not currently required to report on the issue, precise data on the number of instances is not available.

This measure is aimed at achieving the legitimate objective of assisting job seekers into employment. Job seekers who prevent the purpose of provider appointments from being achieved by behaving inappropriately impede this objective by purposefully refusing support from providers intended to assist them to move off welfare payments and increase their chances of becoming productive participants in the workforce. Misconduct at appointments is also problematic due to the wasted tax payer resources involved in preparing for and conducting provider appointments that cannot be carried out.

The Bill clearly states that the inappropriate behaviour must be of a nature that prevents the purpose of the appointment being achieved. Further details of what constitutes inappropriate behaviour are not defined in primary legislation, but will be included in a legislative instrument that will be subject to parliamentary scrutiny. This will provide statutory guidance to decision makers and ensure that decisions related to inappropriate behaviour are not left entirely to the discretion of the provider.

As is currently the case with all compliance penalties, employment service providers will have full discretion not to report a job seeker's non-compliance to the Department of Human Services, if the provider believes it will not assist in ensuring the job seeker's future engagement.

Where a provider does recommend a payment suspension, a job seeker will be able to have this lifted and receive full-back pay by attending a further appointment and behaving appropriately. Alternatively, if the job seeker feels the suspension was unjustified, he or she may request that the Department of Human Services review the decision.

If the provider recommends a financial penalty, the penalty will not be applied until a review has been conducted by the Department of Human Services. The review process includes contacting the job seeker and discussing the circumstances of the failure with them. Under subsection 42SC(2) of the *Social Security Administration Act 1991* (the Act), no financial penalty may be applied where the job seeker had a reasonable excuse for the inappropriate behaviour. Details of what constitutes a reasonable excuse are included in the Social Security (Reasonable Excuse - Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1).

The application of the reasonable excuse provisions in this measure will ensure that vulnerable job seekers are not penalised for actions that are beyond their control or are a direct consequence of their vulnerability. For example, if a job seeker's behaviour was due to a psychological or psychiatric condition, or because he or she was unable to understand a provider's instructions, no penalty will apply. This process is consistent with all financial penalties that job seekers may incur under the current compliance framework.

> Job seekers who do incur financial penalties can limit the extent of the penalty by prompt reengagement with their providers. The ability of job seekers to minimise the impact of suspensions or financial penalties simply by attending a further appointment and behaving appropriately ensures that penalties are applied proportionately to job seekers who decide to meet their requirements.
>
> Statutory protections will ensure this measure is applied fairly. If a further appointment cannot be undertaken within two business days of the job seeker attempting to reengage, the payment suspension and financial penalty period is ended immediately under subsection 42SA(2AA) of the Act Job seekers who have a reasonable excuse for not being able attend the further appointment will also have their payment suspension and financial penalty period ended immediately.[3]

Committee response

2.194 **The committee thanks the Minister for Employment for her response.** The committee considers that assisting job seekers find employment is a legitimate objective for the purpose of international human rights law. The committee also agrees that the measure is rationally connected to that objective as encouraging job seekers to engage fully with the services provided to them may assist them in finding employment.

2.195 In terms of proportionality, the committee notes the minister's response that the bill states that the inappropriate behaviour must be of a nature that prevents the purpose of the appointment being achieved. Accordingly, it is not just any inappropriate behaviour that will lead to a job seeker losing benefits but inappropriate behaviour that is so serious as to frustrate the purpose of an appointment. Notwithstanding this, there are also likely to be many cases where a person's behaviour is not extreme and a high degree of judgement is required to determine what is 'inappropriate behaviour' and whether it has caused an appointment to be frustrated.

2.196 Under this bill, such judgement is to be exercised with no statutory guidance. Moreover, many of these appointments will be with private sector service providers, where the person who will make the judgement as to whether inappropriate behaviour has caused an appointment to fail, is not bound by the Australian Public Service code of conduct.

2.197 The committee notes the minister's advice that further details of what constitutes inappropriate behaviour will be included in a legislative instrument that will be subject to parliamentary scrutiny. While it is important that this detail will be subject to parliamentary scrutiny, where a bill limits a right the safeguards should be in the primary legislation and not left to regulations or policy guidelines.

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3 See Appendix 1, Letter from Senator the Hon Michaelia Cash, Minister for Employment, to the Hon Philip Ruddock MP (dated 2 November 2015) 1-2.

2.198 The committee notes that the 'reasonable excuse' provisions will apply to this measure which provides some assurance that vulnerable job seekers will not be penalised for actions that are beyond their control or are a direct consequence of their vulnerability. However, the 'reasonable excuse' provisions do not cover all circumstances that may apply to vulnerable individuals, particularly those who may have an undiagnosed mental illness.

2.199 **The committee's assessment of the suspension of benefits for inappropriate behaviour against articles 19 and 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to an adequate standard of living) raises questions as to whether the limitation is justifiable.**

2.200 **In order to better ensure the bill's compatibility with human rights, some committee members recommend that the bill be amended as follows:**

- **the term 'inappropriate behaviour' be defined in the bill using clearly objective standards; and**
- **prior to a penalty being confirmed by the Department of Human Services (DHS), DHS must be satisfied that the job seeker is not suffering from a mental health concern that may have contributed to the 'inappropriate behaviour'.**

2.201 **Other committee members, noting the importance of simpler and clearer legislation, considered that it was appropriate that 'inappropriate behaviour' be defined in a legislative instrument using clearly objective standards.**

Removal of waivers for refusing or failing to accept a suitable job

2.202 Items 12 and 13 of the bill would make amendments to the SSA Act so that when a job seeker refuses or fails to accept an offer of suitable employment and has no reasonable excuse for the failure, a job seeker's payment would not be payable for a period of eight weeks. The current ability of the department to waive that eight week non-payment penalty would be removed by the bill.

2.203 This measure may result in individuals losing social security payments and accordingly the committee previously considered that it engages and limits the right to social security and the right to an adequate standard of living.

Right to social security

2.204 The right to social security is outlined above at paragraphs [2.183] to [2.185].

Right to an adequate standard of living

2.205 The right to an adequate standard of living is outlined above at paragraphs [2.186] to [2.187].

Compatibility of the measure with the right to social security and the right to an adequate standard of living

2.206 The statement of compatibility explains the legitimate objective for the measure as 'reducing the reliance on participation payments by job seekers who have successfully shown they are capable of obtaining suitable work'.[4]

2.207 The Explanatory Memorandum (EM) explains that in 2013-14, 78% of penalties for refusing a suitable job were waived.[5]

2.208 The EM argues that these waiver provisions act as an incentive for non-compliance. However, the committee previously noted that no evidence is provided that the high waiver rates are a result of the legislation requiring the waiver to be granted rather than there being a genuine reason for the department granting the waiver in each case. On its face, the measure pursues an objective that appears to be desirable and convenient.

2.209 To the extent that the measure does pursue a legitimate objective, the measure is rationally connected to that objective as the inability for penalties to be waived may encourage some job seekers to take jobs assessed as suitable where they may currently seek a waiver on the basis of hardship.

2.210 In terms of proportionality, no evidence is provided to show that the very high waiver rate is due to the waivers being applied by the department inappropriately.

2.211 Given these high waiver rates, it is possible that measures could be introduced to reduce the waiver rate by tightening the circumstances in which a waiver may be granted. In removing the ability of the department to provide a waiver in any circumstance, the statement of compatibility has not demonstrated that a less rights restrictive approach of changing the grounds on which a waiver may be granted is not feasible or possible.

2.212 The committee therefore sought the advice of the Minister for Employment as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> As noted in the explanatory memorandum, a range of protections exist to ensure job seekers who refuse offers of work for legitimate reasons are not subject to penalties, including through the definitions of 'suitable

4 EM 48.

5 EM 9.

work' and 'reasonable excuse' set out in subordinate legislation. These safeguards take effect before waivers are considered; that is, only job seekers who have refused work without good reason may be granted waivers.

Waivers may currently be granted if job seekers agree to undertake an additional compliance activity or if the job seeker may face financial hardship. Waivers that are granted to job seekers who agree to undertake an additional compliance activity are not based on an assessment of the job seeker's circumstances, as job seekers who had a genuine reason for refusing an offer of work will not be subject to a penalty in the first instance.

In 2014-15, 96 per cent of waivers for penalties incurred for refusing an offer of suitable work were granted because the job seekers agreed to undertake an additional compliance activity. This strongly suggests that the high rate of waivers is a result of the legislation requiring the waiver to be granted, rather than the waivers being granted for a legitimate reason related to the circumstances of the job seeker.

In practice, the additional compliance activities job seekers agree to undertake are substantially similar to a job seeker's existing requirements. In many cases, the additional activities do not substantially alter a job seeker's requirements as job seekers can satisfy the requirements by undertaking a few extra hours of activity. Consequently, by securing a waiver for a serious failure through a compliance activity, job seekers are able to refuse employment without any major changes to their activity requirements to reflect the gravity of their serious failure. This has encouraged abuse of the system.

In 2008-09, the year before waiver provisions were introduced to the legislation, there were 644 serious failures for refusing or failing to accept suitable work. In 2014-15, there were 1,412 such failures (although 73 per cent were granted waivers). This increase of 119 per cent in job seekers refusing work without good reason cannot be attributed to any comparable change in the size of the activity-tested job seeker population or increase in the number of jobs being offered-it appears to be a direct result of the leniency of the waiver provisions. The waivers have essentially enabled some job seekers to reject suitable work with impunity as the resulting serious failure they will incur can be waived. Removing the waivers, therefore, can reasonably be expected to reduce the instances of job seekers refusing suitable work, allowing more job seekers to gain employment and reduce their reliance on income support.[6]

6 See Appendix 1, Letter from Senator the Hon Michaelia Cash, Minister for Employment, to the Hon Philip Ruddock MP (dated 2 November 2015) 2-3.

Committee response

2.213 **The committee thanks the Minister for Employment for her response.** The committee notes that the response does not explicitly explain the legitimate objective of the measure nor explain how it is rationally connected to that objective. However, from the information provided, the committee understands that the objective of the measure is to reduce the instances of job seekers refusing suitable work, thus supporting more people to make the transition from welfare to work. The committee considers that the measure, in increasing the likelihood that a person who refused a job will receive a financial penalty, may encourage greater acceptance of jobs offered and is thus likely to be a legitimate objective and is rationally connected to that objective.

2.214 In terms of proportionality, the responses focuses on the fact that the high waiver rate appears to be a function of current arrangements which permit a job seeker to avoid a penalty for not accepting a suitable job by undertaking additional compliance activities. If the bill simply removed the ability of job seekers to undertake compliance activities in order to avoid a financial penalty the bill may be proportionate. However, the bill removes the ability to waive a penalty in any circumstance where a person refuses suitable work without a reasonable excuse. There may be individuals who, for a range of genuine reasons, refuse suitable work yet fail to meet the reasonable excuse test. Accordingly, while the bill will tackle unwilling workers it may also apply financial penalties to individuals who are not unwilling but, for a range of reasons, are unable to accept a particular job.

2.215 **The committee's assessment of the removal of waivers for refusing or failing to accept a suitable job against article 19 and article 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to an adequate standard of living) raises questions as to whether the limitation is justifiable.**

2.216 In order to better ensure the bill's compatibility with human rights, the committee recommends that the bill be amended to provide a waiver where, in the opinion of the Department of Human Services' officer, there are exceptional circumstances justifying the waiver in accordance with a clearly structured framework that allows for consistent application of the waiver to circumstances that are genuinely exceptional.

The Hon Philip Ruddock MP

Chair