

Dental Benefits Legislation Amendment Bill 2014

Portfolio: Health

Introduced: House of Representatives, 26 March 2014

Purpose

1.30 The Dental Benefits Legislation Amendment Bill 2014 (the bill) seeks to amend the *Dental Benefits Act 2008* and *Health Insurance Act 1973* to apply the Professional Services Review Scheme to dental services provided under the Child Dental Benefits Schedule.

1.31 The bill will amend the *Health Insurance Act 1973* to require the Chief Executive Medicare (CEM) to waive certain debts incurred by dentists in relation to the Chronic Disease Dental Scheme (CDDS).

1.32 The bill will also amend the *Dental Benefits Act 2008* to:

- enable the CEM or their delegate to obtain certain documents from dentists to substantiate the payments of benefits under the CDBS;
- delegate ministerial functions and powers; amend the definition of ‘dental practitioner’;
- enable the disclosure of certain protected information; and
- make a technical amendment.

Committee view on compatibility

Right to a fair trial and fair hearing rights

1.33 The right to a fair trial and fair hearing is contained in 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.

1.34 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 and minimum guarantees in criminal proceedings, such as the right to not to incriminate oneself (article 14(3)(g)). The ICCPR also provides a guarantee against retrospective criminal laws (article 15(1)) and the right not to incriminate oneself (article 14(3)).

Whether civil penalties may be regarded as 'criminal' for the purposes of human rights law

1.35 Proposed new section 32C of the *Dental Benefits Act 2008* provides that the Chief Executive of Medicare may issue a written notice to persons whom he or she reasonably believes to have possession, custody or control of one or more documents relevant to ascertaining whether an amount paid for a dental service should have been paid. The notice may require the person to produce the document or extract from the document within a specified period.

1.36 Proposed new section 32D(1) provides for the imposition of a civil penalty on a person who fails to comply with a requirement to do something specified in a notice issued under the new section 32C. Subsection 32D(2) provides that it is a defence in proceedings against a person for any such failure if the person proves (on the balance of probabilities) that (a) the failure is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and (b) the person could not reasonably be expected to guard against the failure. The applicable penalty for the civil penalty contravention is 20 penalty units for an individual and 100 penalty units for a body corporate.

1.37 As set out in the committee's *Practice Note 2 (interim)*, the committee considers that a penalty described as 'civil' may nonetheless be regarded as 'criminal' for the purposes of human rights law depending on its purpose, character or severity. Where this is the case, the specific guarantee of criminal process rights in articles 14 and 15 of the ICCPR may apply to such penalties and proceedings to enforce them. In the present case, for example, a number of provisions would appear to be inconsistent with those guarantees if the section 32D(1) civil penalty were to be regarded as 'criminal' for the purposes of human rights law (for example the requirement that the civil standard of proof and civil rules of procedure and evidence apply to civil penalty proceedings.)¹

1.38 Accordingly, the committee's usual expectation is that statements of compatibility provide an assessment as to whether proposed civil penalty provisions are likely to be regarded as 'criminal' for the purposes of human rights law and, if so, whether they are compatible with the guarantees of criminal process rights under the ICCPR.

1 *Health Insurance Act 1973*, s 125B (4) (new subsection 32D(3) applies the provisions of Part VIA of the *Health Insurance Act 1973* relating to the enforcement of civil penalties under that Act to the enforcement of civil penalties under section 32D). On the issue of civil penalties regarded as 'criminal' more generally, see Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, Clean Energy Legislation (Carbon Tax Repeal) Bill 2013), pp 3-8.

1.39 The committee notes that these issues are not addressed in the statement of compatibility for the bill.

1.40 The committee therefore seeks the Minister for Health's advice as to the whether the proposed civil penalties may be regarded as 'criminal' for the purposes of human rights law and, if so, whether they are compatible with the criminal process rights in articles 14 and 15 of the ICCPR (including whether any limitations on those rights are reasonable, necessary and proportionate to achieving a legitimate objective).

1.41 The committee draws the minister's attention to the committee's *Practice Note 2 (interim)* (see Appendix 3) in preparing his advice on this matter.

Strict liability offences and reverse burden of proof – presumption of innocence

1.42 The bill proposes the creation of a number of new strict liability offences under the *Dental Benefits Act 2008*. Proposed new sections 20C and 20E will create strict liability offences and provide for a reasonable excuse defence. The defendant will bear an evidential burden in relation to the defence (thus requiring the defendant to provide evidence that suggests a reasonable possibility that the defence is made out).

1.43 The committee notes that, strict liability offences limit the right to be presumed innocent until proven guilty (article 14(2)) because they allow for the imposition of criminal liability without the need to prove fault. However, strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence.

1.44 Similarly, a reverse burden of proof limits the right to be presumed innocent until proven guilty because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. However, reverse burden clauses, whether in a criminal or civil context, will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of objective being sought and maintain the defendant's right to a defence or to a fair hearing.

1.45 Accordingly, where a bill provides for a strict liability offence or a reverse burden of proof, the committee's usual expectation is that the statement of compatibility provide an assessment of whether such limitations on the presumption of innocence are proposed in pursuit of a legitimate objective, and are a reasonable, necessary and proportionate means to achieving that objective.

1.46 The committee notes that the statement of compatibility for the bill makes no reference to these provisions. However, the explanatory memorandum provides a description of the proposed offences, and in both cases the following justification for their limitation of the right to be presumed innocent:

This has been cast as a strict liability offence because it would be difficult to obtain proof of intent to fail to comply with the direction. However, a failure to comply could have significant adverse effects on consumers, who might receive services and incur expenses not realising that benefits would not be payable, and it is important to have an offence as a deterrent to non-compliance.

It is appropriate for the defendant to bear the evidential burden because they alone will have knowledge of the circumstances that might reasonably excuse non-compliance.²

1.47 The committee notes that this discussion of the proposed offences is relevant to an assessment of their compatibility with the right to be presumed innocent, and is capable of supporting a conclusion that the limitations on the right are reasonable, necessary and proportionate to achieving a legitimate objective.

1.48 However, the committee's usual expectation is that statements of compatibility are stand-alone documents that provide an assessment of a bill's compatibility with human rights, including an assessment of whether any measures that may limit human rights are reasonable, necessary and proportionate to achieving a legitimate objective.

1.49 The committee therefore draws to the attention of the Minister for Health the committee's usual expectations in relation to the content of statements of compatibility, as outlined in the committee's *Practice Note 1* (see Appendix 3).

Reverse burden of proof – presumption of innocence

1.50 As noted above, new section 32D(2) provides for a defence to the civil penalty contravention created by new section 32D(1), and places a legal burden of proof on the defendant to prove the facts which constitute the defence. A reverse burden of proof limits the right to be presumed innocent until proven guilty because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Further, if section 32D(1) may be regarded as 'criminal' under human rights law, limitations on the specific guarantee of criminal process rights in articles 14 and 15 of the ICCPR may also arise.

1.51 Accordingly, where a bill provides for a reverse burden of proof, the committee's usual expectation is that the statement of compatibility provide an

2 Explanatory memorandum (EM), pp 6-7.

assessment of whether such limitation on the presumption of innocence is proposed in pursuit of a legitimate objective, and is a reasonable, necessary and proportionate means to achieving that objective.

1.52 The committee notes that the statement of compatibility for the bill does not address these issues.

1.53 The committee therefore seeks the advice of the Minister for Health as to the compatibility of the reverse onus provision in proposed new subsection 32D(2) with the right to a fair trial and fair hearing contained in article 14 of the ICCPR (including whether any limitations on the specific guarantee of criminal process rights are reasonable, necessary and proportionate to achieving a legitimate objective).

Exclusion of the right not to incriminate oneself

1.54 Proposed new section 32E provides that, where a person is required to produce a document under section 32C, they will not be excused from doing so on the ground that it would tend to incriminate the person or expose them to a penalty.

1.55 However, while it further provides that any document produced is not generally admissible in evidence against the individual in criminal or civil proceedings (known as use immunity), they will be admissible in criminal proceedings (i) for an offence against the Act dealing with false or misleading statements; and (ii) for an offence against certain sections of the Criminal Code (dealing with false or misleading information or documents) that relate to the Act; and in civil proceedings arising under certain sections of the Dental Benefits Act 1988 (relating to recovery of amounts paid because of false or misleading statements). Similarly, any information, document or thing obtained as a consequence of producing the document will not be generally admissible in evidence against the individual in criminal or civil proceedings (known as derivative use immunity), other than the proceedings mentioned above.

1.56 The committee notes that the admissibility of such documents limits the right not to incriminate oneself in relation to criminal proceedings and proceedings which may lead to the imposition of a penalty.

1.57 Further, if the penalty may be regarded as 'criminal' under human rights law, limitations on the specific guarantee of criminal process rights in articles 14 and 15 of the ICCPR may also arise.

1.58 The committee's usual expectation where a limitation on this right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. In similar fact situations, the committee has noted its expectation that

such an assessment should be provided even where use and derivative use immunity is provided (and particularly where only partial immunity is provided as in this case).

1.59 The committee notes also its previous comments on the approach of the Senate Standing Committee on the Scrutiny of Bills to assessing proposed limitations on the right not to incriminate oneself.³

1.60 The committee notes that the statement of compatibility for the bill does not address this matter (however, the explanatory memorandum includes a partial discussion of the exception in relation to use of material produced under compulsion in proceedings for the recovery of amounts paid because of false or misleading statements).⁴

1.61 The committee therefore seeks the advice of the Minister for Health as to whether the limitation of the right not to incriminate oneself in proposed section 32E is compatible with the right not to incriminate oneself, and particularly whether it is reasonable, necessary and proportionate to achieving a legitimate objective.

3 In considering legislation affecting this right, the Scrutiny of Bills committee makes an assessment of whether the 'public benefit sought will decisively outweigh the resultant harm to the maintenance of civil rights'. See Senate Standing Committee for the Scrutiny of Bills, *The work of the committee during the 42nd Parliament February 2008 – June 2010*, June 2013, paragraph 2.6.

4 EM, p. 10.