



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

FOURTH REPORT
OF
2011

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator G Marshall
Senator L Pratt
Senator R Siewert
Senator the Hon J Troeth

TERMS OF REFERENCE

Extract from *Standing Order 24*

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 2011

The Committee presents its Fourth Report of 2011 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

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Environment Protection and Biodiversity Conservation (Abolition of Alpine Grazing) Bill 2011

Introduced into the House of Representatives on 28 February 2011

By: Mr Bandt

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2011*. Mr Bandt responded to the Committee's comments in a letter dated on 28 April 2011. A copy of the letter including the explanatory memorandum is attached to this report.

Alert Digest No. 3 of 2011 - extract

Background

This bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to deem that the minister has: received from the Victorian government a referral of its proposal to trial cattle grazing in the Alpine National Park; and decided that the trial of alpine grazing is unacceptable.

No explanatory memorandum

This bill, introduced as a Private Member's bill, was introduced without an explanatory memorandum. The Committee prefers to see explanatory memorandums to all bills and recognises the manner in which such documents assist in the interpretation of bills, and ultimately, Acts. If the bill proceeds to further stages of debate the Committee **requests that the Private Member** provide an explanatory memorandum.

Pending the Private Member's reply, the Committee draws Senators' attention to this circumstance, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Member's response - extract

Though I had approved circulation of an explanatory memorandum, the document did not find its way from the Clerk's office to the Table Office. I attach a copy of the explanatory memorandum for the benefit of Senators, though I do not intend to seek leave in the House to formally circulate it at this late stage. I encourage the Committee to include the attachment in its next sitting week report.

The committee also resolved to draw to the attention of Senators the lack of any formally circulated explanatory memorandum, "as it [the bill] may be considered to trespass unduly on personal rights and liberties". It is worth noting that the Committee provided no rationale for this curious recommendation.

Committee Response

The Committee thanks the Member for this response and for the copy of the explanatory memorandum he had authorised for circulation – both of these documents are included at the end of this *Report*.

In his reply the Member observes that: The Committee also resolved to draw to the attention of Senators the lack of any formally circulated explanatory memorandum, "as it [the bill] may be considered to trespass unduly on personal rights and liberties". It is worth noting that the Committee provided no rationale for this curious recommendation.

By way of clarification, the 'it' the Committee referred to was the circumstance of the lack of an available explanatory memorandum, not the content of the Bill (about which the Committee made no substantive comment in its *Digest*).

The Committee has had a long-standing interest in the provision of quality explanatory memoranda, which not only facilitate the Committee's ability to perform its functions under Senate Standing Order 24, but also enhance the ability for citizens to understand and access the law. This is a matter that the Committee is considering further as part of its current inquiry into its future role and direction (and its terms of reference).

Human Services Legislation Amendment Bill 2010

Introduced into the House of Representatives on 25 November 2010

Portfolio: Human Services

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2011* and the *Third Report of 2011*. The Minister responded to the Committee's comments in the *Alert Digest* in a letter dated on 28 February 2011. Subsequently, the Minister responded when the Committee sought further advice in a letter dated 11 April 2011. A copy of the letter is attached to this report.

Alert Digest No. 1 of 2011 - extract

Background

This bill amends the *Medicare Australia Act 1973* (the MA Act) and the *Commonwealth Services Agency Delivery Act 1997* to formalise the changes already under way and further integrates service delivery agencies in the Portfolio by:

- The abolition of the statutory offices of Chief Executive Officer of Medicare Australia and Chief Executive Officer of Centrelink;
- The creation of the statutory offices of Chief Executive Medicare and Chief Executive Centrelink within the Department;
- The abolition of Medicare Australia and Centrelink as statutory agencies;
- Providing for service related functions currently delivered by Medicare Australia and Centrelink in support of their Chief Executives to be delivered by Departmental employees; and
- Providing for new functions taken on by the Chief Executive Medicare and the Chief Executive Centrelink in the future to be delivered by Departmental employees.

The bill clarifies the operation of program secrecy provisions after the restructure, to ensure, in particular, no new kinds of data sharing without customer consent

The bill also:

- amends the *Child Support (Registration and Collection) Act 1988* to align the provisions for the appointment of the Child Support Registrar with the provisions for the appointment of the Chief Executive Centrelink and the Chief Executive Medicare; and
- makes consequential amendments to a number of other Acts that currently refer to the agencies or statutory authorities which will be abolished; and
- amends investigative search and seizure provisions of the Part IID of the MA Act.

Trespass on personal rights and liberties

Schedule 1, items 74 and 76

Item 74 has the effect of diminishing the obligations on the Chief Executive of Medicare to notify a patient that their records have been seized as part of a Part IID investigation. The old law required notification in all cases, whereas the new provision requires notification only in cases where a patient's record is actually examined. The explanatory memorandum at page 26 states that the old arrangements were 'onerous and expensive' and could 'cause needless worry to patients whose records have not been examined'.

Item 76 further diminishes the existing notice requirement by stating that no notice is required where, after examining a record, the officer did not obtain any knowledge of clinical details relating to the patient. The Committee is concerned that these items will impact on the privacy of individuals and is particularly interested to understand who will determine whether clinical knowledge was obtained, what training they will have and whether any safeguards are in place to protect patients. The Committee therefore **seeks the Minister's further advice** about these matters.

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Third Report of 2011- extract

Amendments to section 8ZN of the Medicare Australia Act 1973

Section 8ZN is a provision in Part 110 of the Medicare Australia Act 1973. Part IID confers a range of powers on the Chief Executive Officer of Medicare Australia to investigate non-compliance with certain legislative requirements. These powers support Medicare Australia's compliance functions in relation to Medicare, Pharmaceutical Benefits Scheme and other health programs delivered by Medicare Australia. The powers are limited to the investigation of certain offences and civil penalty provisions specified in

the Medicare Australia Act 1973 and to certain civil penalty provisions specified in the Health Insurance Act 1973.

The Committee requested advice about items 74 and 76 of Schedule 1 of the Bill, which make amendments to section 8ZN of the Medicare Australia Act 1973. The Committee sought additional information on the impact of the proposed changes on the privacy of individuals, including who will determine whether clinical knowledge was obtained, what training they would receive and whether any safeguards are in place to protect patients.

In the course of exercising its powers under section 8ZN, from time to time Medicare Australia may seize or copy hard drives containing electronically recorded clinical data. The proposed amendments to section 8ZN seek to address anomalies which arise when a computer hard drive is seized or copied under warrant. A seized or copied hard drive may potentially contain a large number of patient records. In most cases, only a small number of those patient records will be relevant to the investigation. This may be because the investigation relates to particular services rendered to particular patients on specific dates.

The proposed amendments to section 8ZN seek to produce a sensible outcome which will ensure that patients continue to be notified when their clinical details have been scrutinised by Commonwealth officers. The amendments will put a stop to the unnecessary worry for patients and the waste of resources associated with large scale notifications to patients whose clinical details were never actually scrutinised. While the Committee expresses concern that the proposed amendments may impact on the privacy of individuals. Every patient whose clinical details are actually scrutinised would still need to be notified.

As amended, Part IID of the renamed Human Services (Medicare) Act 1973 will contain a number of safeguards to patient privacy in circumstances where multiple patient records are held together in electronic form:

- Under new section 8ZF, the authorised officer or an officer assisting may in certain circumstances take material or equipment to another place to examine it to determine whether it may be seized. New section 8ZGA will allow an officer who takes electronic equipment away under this provision to copy data from the equipment to a data storage device. If the data is not used in evidence, section 8ZF requires it to be destroyed.
- New section 8ZG allows the authorised officer or an officer assisting to operate electronic equipment found at the warrant premises to access data. In certain circumstances the officer may copy the data and take the device from the premises. If the data is not used in evidence, section 8ZG requires it to be destroyed.
- Under existing section 8ZM, any material seized but not used in evidence must be returned to the owner or the person from whom it was seized.

Whether or not a patient's clinical details are accessed or examined will be an operational decision to be determined in the context of the particular investigation. In most circumstances, the primary requirement which must be met for the coercive powers under

Part IID of the *Medicare Australia Act* to be exercised is that the investigation must be into conduct of a criminal nature. For example, where an investigation centres on fraudulent claiming by a doctor for an item in the Medicare Benefits Schedule (MBS) which requires the patient to have a particular medical condition, the records of patients who received that particular MBS item from the doctor may need to be examined for evidential purposes.

Delegation to seek to use these powers is held at Senior Executive Officer level only. The case must be strong enough for a magistrate to approve a warrant to enable Medicare Australia to seize records.

Medicare Australia currently has procedures in place to manage and secure records obtained as a result of the exercise of its search and seizure powers. Where patient records containing clinical details are seized and it is necessary to examine those clinical records, the examination is undertaken by appropriately trained and qualified Medical Advisers employed by Medicare Australia. In circumstances where it is necessary for Medicare Australia Compliance Officers to have access to clinical details, that access is overseen by Medicare Australia Medical Advisers.

Medicare Australia's Medical Advisers are appropriately qualified medical practitioners with current and unrestricted registration. Medicare Australia's Compliance Officers who undertake investigations into fraud allegations are required at a minimum to hold a Certificate IV in Government Investigations.

Further to these accreditations. Compliance Officers and Medical Advisers are also required to undergo privacy training as a part of their induction into Medicare Australia and receive annual privacy refresher training.

Medicare Australia has robust IT security infrastructure and physical security measures in place to ensure all patient records and other information obtained in the course of compliance activities is protected from unauthorised access. Only officers with a requirement to access these records are granted access to systems containing patient records and other information relevant to compliance activities. There have been no recorded instances of unauthorised access by Medicare Australia officers to patient records seized under warrant for compliance purposes.

Medicare Australia officers are also subject to the secrecy provisions of the *Health Insurance Act 1973* and the *Notional Health Act 1953* that set penalties for the unauthorised disclosure of information, including fines and imprisonment. Medicare Australia is also subject to the requirements of the *Privacy Act 1988* that restrict and regulate the collection, use and disclosure of personal information.

If the Bill is passed, the powers and functions under Part IID will be exercised by officers of the Department of Human Services, rather than Medicare Australia and the existing controls would be continued by these officers.

Committee Response in the Third Report

The Committee thanks the Minister for this response and notes the Minister's advice that 'every patient whose clinical details are actually scrutinised would still need to be notified'.

The Committee is particularly interested to understand whether there could be patients whose records are scrutinised but the patients are not notified of this because the officer did not obtain any knowledge of clinical details relating to the patient. For example, the Committee would like to know whether it is possible that there could be a category of patients whose records are examined and although no clinical details were obtained details other than clinical details (eg other personal or financial details) are obtained. If so, would there be an obligation to notify the patient that the record had been examined? The Committee **seeks the Minister's further advice** about this matter.

Minister's response - extract

Where Medicare Australia relies on Part 11D of the *Medicare Australia Act 1973* to seize records from a health professional, it is usually seeking information to assist in investigating fraudulent claiming under the Medicare program. The relevant information is primarily clinical records or records that detail claiming under the Medicare program, and in some cases also audit log information that records when claim data was transmitted. There are also occasions when Part 11D powers are exercised in investigating claims by pharmacists under the Pharmaceutical Benefits Scheme (PBS).

Other personal or financial information about the patient is usually not relevant to an investigation, so is seldom sought. In any event, in practice, health professionals and practices usually retain only limited information on their systems about their patients outside of clinical and personal contact information.

Section 8ZN of the *Medicare Australia Act 1973* currently only requires notification of a patient where a record containing clinical details about that patient is seized under Part 11D. The policy represented by section 8ZN is that patients should be notified when the exercise of Part 11D powers results in clinical records being examined, because clinical records are the most sensitive information held by medical practitioners. The amendments to section 8ZN seek to better implement that policy, by requiring patient notification only when the seizure of records about a particular patient results in clinical health details being obtained about that patient.

Notification will continue to be required when a record containing only clinical details is seized, and the seizure results in clinical details being obtained by officers as a result of the seizure. In cases where seized records contain only non-clinical information, there will continue to be no notification requirement.

In contrast to section 8ZN, the equivalent provisions in the *Crimes Act 1914*, on which Part 11D is modelled, contain no notification requirement. Thus, if the Australian Federal Police (the AFP) obtained and executed a search warrant under the Crimes Act and seized patient records from a medical practitioner, the AFP would not be required to notify those patients of the seizure, even if clinical records were obtained.

Committee Response

The Committee thanks the Minister for this response.

National Health Reform Amendment (National Health Performance Authority) Bill 2011

Introduced into the House of Representatives on 3 March 2011

Portfolio: Health and Ageing

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2011*. The Minister responded to the Committee's comments in a letter dated on 10 May 2011. A copy of the letter is attached to this report.

Alert Digest No. 3 of 2011 - extract

Background

This bill establishes the National Health Performance Authority as agreed to at the Council of Australian Governments (COAG) meeting in April 2010 and reconfirmed in the Heads of Agreement – National Health Reform of 13 February 2011. Clause 68 of the Heads of Agreement – National Health Reform provides that the Heads of Agreement will lapse after all parties sign the National Health Reform Agreement.

Reversal of onus

Schedule 1, items 127 and 130

Item 127 of Part 1 of Schedule 1 inserts a new subsection 54A(1). This provision would establish an offence for an official of the Australian Commission on Safety and Quality in Health Care to disclose or use 'protected' information that has been obtained in the course of their work. Proposed subsection 54A(2) provides for a number of exceptions to the offence, and imposes an evidentiary burden of proof on a defendant who wishes to rely upon them.

This reverse onus applies in relation to the question of whether the action of disclosing protected information was 'authorised by this Part' or was in compliance with a law of the Commonwealth or a prescribed law of a State or Territory. Item 127 of the bill also sets out the exceptions whereby 'disclosure or use is authorised by this Part'. These are listed at page 7 of the explanatory memorandum.

As stated at page 29 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, the 'mere fact that it is difficult for the prosecution to prove an element of an offence has not traditionally been considered in itself, a sound justification

for reversing the onus of proof'. The *Guide* also indicates that criteria such as (1) whether a matter is peculiarly within the defendant's knowledge, (2) the centrality of the question to the issue of culpability for the offence, (3) the severity of the penalty, and (4) whether the conduct proscribed by the offence poses grave dangers to public health or safety, are relevant to the issue of whether the reversal of the onus of proof is legitimate.

The explanatory memorandum at page 6 justifies the provision by noting that it 'would be difficult for the prosecution to bear the burden of demonstrating that the disclosure was not covered by one of the exceptions, whereas a person disclosing information should reasonably be aware of the basis for their disclosure'. While this seems to imply that relevant information could be peculiarly within the knowledge of the defendant the Committee's consideration of the appropriateness of this provision would be assisted by a more detailed elaboration of the justification for the proposed approach. The Committee therefore **seeks the Minister's advice** in relation to the reasons for this approach. This issue also arises in relation to the secrecy provisions set out in Part 3.12, inserted by item 130 of Schedule 1 and the Committee also **seeks the Minister's advice** in relation to the reasons for this approach in this item.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Minister's response - extract

Reversal of onus - Schedule 1, items 127 and 130

I note the Committee's request for advice regarding the requirements in the secrecy and disclosure provisions in items 127 and 130 of Schedule 1 for a defendant to bear an evidential burden when relying on an exception to the prohibition against using or disclosing 'protected information'. Item 127 sets out the secrecy and disclosure provisions which relate to the Australian Commission on Safety and Quality in Health Care (the Commission), while item 130 deals with secrecy and disclosure of information in relation to the National Health Performance Authority (the Performance Authority).

Items 127 and 130 of Schedule 1 relate to circumstances where an officer, or past officer, of the Commission or the Performance Authority respectively is alleged to have disclosed or used information obtained in the course of his or her work which concerns another person (which is defined in the Bill as 'protected information'). This information may include, for example, health related data which will be obtained by the Performance Authority from a number of sources under its data collection powers.

On this basis, I consider that a defendant who is the subject of legal proceedings would possess detailed knowledge surrounding the nature of the protected information, the mechanisms by which it was obtained by the Commission or the Performance Authority, and the circumstances surrounding its disclosure. In some instances it would be highly likely that the defendant would be the sole repository of such information.

For example, a Performance Authority official may disclose protected information, such as health demographic or mortality data, to the manager of a hospital when preparing a report indicating poor performance on that hospital's part. This is an essential function of the Performance Authority under the legislation and one which clearly falls within the exceptions to the secrecy provisions.

In this situation, it would be imperative that the Performance Authority disclose such data to the hospital to provide it with a reasonable opportunity to produce mitigating information to explain the reasons for poor performance. If legal proceedings were initiated against an official for disclosing this information, the circumstances surrounding the disclosure would be peculiarly within his or her knowledge.

Similarly, the exceptions to the secrecy and disclosure provisions enable a Performance Authority official to disclose protected information to certain government agencies, such as the Australian Institute of Health and Welfare or the Australian Bureau of Statistics, or to a state or territory government body, or for research purposes. In such cases, it is likely that the official who disclosed the information would have exclusive knowledge of the circumstances surrounding the disclosure.

I am therefore of the view that a defendant would be best placed to assert an exception to the secrecy and disclosure offences in a wide range of circumstances, and that the defendant would not be placed in a disadvantaged position before a court compared with the prosecution because of the reversed onus of proof.

Accordingly, I consider that the reversal of the evidential burden of proof in the secrecy and disclosure provisions of the Bill is consistent with the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (the Guide). As the Committee noted, the Guide provides that an evidential burden should be placed on the defendant only where the matter is peculiarly within the knowledge of the defence and not available to the prosecution. In addition, I would like to raise several points in relation to the standard of proof required under the *Criminal Code Act 1995* (the Criminal Code) to support the Government's argument that the reversal of the onus is appropriate. Pursuant to subsection 13.3(3) of the Criminal Code, the standard of proof imposed by the evidential burden would only require a defendant to adduce or point to 'evidence that suggests a reasonable possibility that the matter 'exists or does not exist.' If this is done, the prosecution will be required to refute the defence beyond reasonable doubt.

The Criminal Code therefore establishes that the evidential burden demands a lower standard of proof that would only require a defendant in legal proceedings to show that the

disclosure of information occurred in accordance with one of the exceptions specified in the Bill. Its purpose is to guide a court in the event that legal proceedings are initiated. This is also consistent with the position outlined in the Guide.

Further, I consider that the exceptions to the secrecy and disclosure provisions provide a broad scope for a defendant to defend any claim. This is particularly relevant in relation to subsections 54B(a) and (b) in the context of the Commission, and subsections 114(a) and (b) in the context of the Performance Authority, which permit disclosure for the purposes and functions of the Act.

Committee Response

The Committee thanks the Minister for this detailed response, which addresses its concerns.

Alert Digest No. 3 of 2011 - extract

Trespass on personal rights and liberties

Schedule 1, item 127, subsection 54A(2) and item 130

The exceptions set out in subsection 54A(2) to the offence for disclosing protected information relating to the disclosure of protected information potentially compromise an individual's privacy as they authorise the disclosure of personal information. There is no direct conflict with the Information Privacy Principles as Principle 11 allows for disclosure if 'the disclosure required or authorised by law'. Nevertheless, the explanatory memorandum merely restates the effect of the exemptions, without attempting to justify them. So as to better determine whether there is any undue encroachment of an individual's privacy the Committee seeks the **Minister's further advice** as to why disclosure of information should be authorised by these exemptions. This issue also arises in relation to the secrecy provisions set out in Part 3.12, inserted by item 130 of Schedule 1 and the Committee also **seeks the Minister's advice** in relation to this item.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Minister's response - extract

Trespass on personal rights and liberties - Schedule 1, item 127, subsection 54A(2) and item 130

I note the Committee's concerns that the disclosure of personal information may potentially compromise an individual's privacy, and the Committee's request for advice as to why the disclosure of such information should be authorised.

One of the key functions of the Performance Authority is to monitor and prepare reports on the performance of Local Hospital Networks, public and private hospitals, primary health care organisations (Medicare Locals) and other health care service providers. These functions are consistent with the National Health and Hospitals Network Agreement and the Heads of Agreement - National Health Reform (the Agreements). In order to carry out its functions, the Performance Authority will be required to report on incidences of poor performance by these entities. In doing so, the Performance Authority may disclose information which could allow an individual health professional to be identified.

However, the Performance Authority will not expressly report on the performance of health professionals, such as medical practitioners, in the course of carrying out its functions. In my view, the possibility that reporting might allow the identification of a health professional is remote. However, the secrecy and provisions have been crafted such that, were an individual to be identifiable, the Performance Authority can still report in order to deliver the transparent and accountable measure of performance of the health system.

In addition, there is little real prospect that the Commission will disclose personal information, as it will not receive information which would identify individuals in the absence of additional circumstantial evidence. Therefore, I do not consider that there is any substantial possibility for any undue compromise to a person's privacy as a result of any disclosure of information by the Commission.

Importantly, neither the Commission nor the Performance Authority will disclose protected information concerning the personal affairs of patients without prior consent, as required under section 128 of the Bill. Section 128 establishes a safeguard against the unauthorised disclosure of information by either the Commission or the Performance Authority, when carrying out their legislated functions, which would identify a particular patient without prior consent.

Finally, the Government contends that the public interest dictates that poor performing entities should be subject to scrutiny and reporting by the Performance Authority, which is consistent with the aims of the Agreements. Additionally, the purpose of the *National Health and Hospitals Network Act 2011*, which establishes the Commission and which will

be amended by this Bill, is to provide safety and quality in health care as defined in section 9. In this context I feel that the slight risk of identification is outweighed by the public interest of ensuring consumer safety, and the public's need to know about matters which impact on the safety of consumers.

Committee Response

The Committee thanks the Minister for this detailed response.

Alert Digest No. 3 of 2011 - extract

Legislative Instruments Act - exemption Schedule 1, clause 130

Item 130 of Schedule 1 of the bill inserts a new Chapter 3 into the legislation, which establishes the National Health Performance Authority. The proposed paragraph 60(1)(f) enables the Minister to specify in an instrument additional functions which are to be performed by the Authority. Subsection 60(5) states that such an instrument is not a legislative instrument. This appears to be a substantive exemption from the *Legislative Instruments Act*. The reasons given for this exemption in the explanatory memorandum at page 9 are as follows: (1) the obligations which are imposed only apply to the Authority and are not general statements of law and (2) the Minister 'will usually be making these instruments at the request of the Australian Health Ministers' Conference or to give effect to COAG agreements.' In the Committee's view these reasons may be considered as justifying the exclusion of the disallowance provisions of the *Legislative Instruments Act*. However, the Committee **seeks the Minister's advice** as to whether consideration has been given to alternative means for enabling public scrutiny of these instruments, such as a requirement that they be published on the Authority's website.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Minister's response - extract

Exemption from the Legislative Instruments Act 2003 - Schedule 1, clause 130

I note the Committee's request for advice as to whether consideration has been given to establishing a mechanism for allowing public scrutiny of instruments made by the Commonwealth Minister for Health and Ageing under paragraph 60(1)(f) specifying additional functions to be performed by the Performance Authority. As the Committee has noted, these instruments are not legislative instruments in accordance with subsection 60(5) and are not subject to disallowance under the *Legislative Instruments Act 2003*.

The Government is fully supportive of measures that will improve transparency and allow for public scrutiny of the Performance Authority's activities. I therefore confirm that I am prepared to make instruments made under paragraph 50(1)(f) available to the public.

Committee Response

The Committee thanks the Minister for this response and her commitment to make instruments made under paragraph 50(1)(f) available to the public.

Alert Digest No. 3 of 2011 - extract

Wide discretion

Schedule 1, item 130, section 81

Item 130 of Schedule 1 of the bill would insert a new section 81 into the legislation. This provision enables the Minister to 'at any time' terminate the appointment of a member of the Performance Authority. This power confers a very broad discretionary power on the Minister. Given that the appointment of some members is based on the need to secure the agreement of other political actors (eg, Premiers of the States) and that members may be appointed based on their experience, knowledge and standing in particular areas (see the proposed new section 72) it is disappointing that explanatory memorandum at page 10 merely repeats the effect of this provision. The Committee **seeks the Minister's advice** as to the justification for the approach and whether it would be possible to confine or structure this discretionary power to dismiss a member of the Authority to include relevant grounds and a process for dismissal.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Minister's response - extract

Wide discretion - Schedule 1, item 130, section 81

I note the Committee's concern that section 81, which provides that the Minister may terminate a Performance Authority member's appointment at any time, confers a very broad discretionary power.

The policy rationale underlying section 81 is, in part, to provide a vehicle for dismissing a Performance Authority member due to the Council of Australian Governments (COAG) dissatisfaction with his or her performance or for a range of additional reasons without the need for broader consultation, including, for example, absence without leave, engaging in criminal activities, misbehaviour or bankruptcy.

In addition, the Australian Government Solicitor has advised that the power conferred on the Minister under section 81 of the Bill is subject to the rules of natural justice and therefore may not be exercised in an unfettered manner. As such, the Minister would be obliged to notify a Performance Authority member before making a decision under section 81 that he or she is considering making such a decision. The Minister would also be required to state the reasons or grounds on which he or she proposes to invoke the dismissal power. Those grounds would need to be relevant to the proper exercise by the Performance Authority of its functions. Both political and policy considerations relating to the exercise of the Performance Authority's functions may be taken into account. Finally, the Minister would be required to give the Performance Authority member with an opportunity to make submissions in response before a final decision may be made.

Committee Response

The Committee thanks the Minister for this detailed response.

Senator the Hon Helen Coonan
Chair

28 April 2011

The Hon Senator Helen Coonan
Chair, Senate Standing Committee for the Scrutiny of Bills

Dear Senator Coonan,

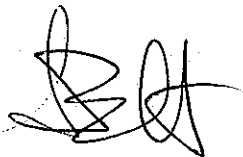
Re: Scrutiny of bills

The Secretary of the Senate Standing Committee for the Scrutiny of Bills has written to me regarding the committee's deliberations into my bill, the *Environment Protection and Biodiversity Conservation (Abolition of Alpine Grazing) Bill 2011*, drawing particular attention to the lack of any explanatory memorandum.

Though I had approved circulation of an explanatory memorandum, the document did not find its way from the Clerk's office to the Table Office. I attach a copy of the explanatory memorandum for the benefit of Senators, though I do not intend to seek leave in the House to formally circulate it at this late stage. I encourage the Committee to include the attachment in its next sitting week report.

The committee also resolved to draw to the attention of Senators the lack of any formally circulated explanatory memorandum, "as it [the bill] may be considered to trespass unduly on personal rights and liberties". It is worth noting that the Committee provided no rationale for this curious recommendation.

Best regards,



Adam Bandt

Member from Melbourne
House of Representatives

CC Toni Dawes, Committee Secretary

2011

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION (ABOLITION OF
ALPINE GRAZING) BILL 2011**

EXPLANATORY MEMORANDUM

Circulated by the authority of Adam Bandt

Environment Protection and Biodiversity Conservation (Abolition of Alpine Grazing) Bill 2011

BACKGROUND

The Victorian Government, through the State Department of Sustainability and Environment, allowed a 'scientific trial' of alpine grazing by cattle in Alpine National Park from January 2011, under the guise of investigating the effect of grazing on fire fuel reduction.

The Park is a declared National Heritage place, and contains many threatened and endangered species listed by the EPBC.

The Victorian Government has argued that the grazing trial is not required to be referred to the Federal Minister under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC).

Given the significant impact that grazing is having on threatened and endangered species in the Alpine National Park at the time of introduction of this bill, the bill removes any doubt as to the application of Commonwealth environmental law on this activity, thus requiring cattle to be removed from the Park.

BILL OUTLINE

The Environment Protection and Biodiversity Conservation (Abolition of Alpine Grazing) Bill 2011 amends the EPBC to provide that:

1. under subsection 74E(a), the Minister is deemed to have received from the Government of Victoria a referral of its proposal to allow the 'controlled action' of grazing in Alpine National Park; and
2. under subsection 74E(b), the Minister is deemed to have decided that the 'controlled action' is 'clearly unacceptable' under the Act, due to the 'significant impact' of grazing on threatened species and ecological communities. This in itself is enough to stop the trial, however the subsection goes further to specify other reasons, including that grazing on a scale actually necessary to achieve any fire control objectives would have a much larger impact.

The effect of deeming the Minister to have made these decisions would be to require the Minister, under section 74C of the EPBC, to notify the Victorian Government 'as soon as practicable' of the deemed decision, including the reasons for the decision, thus disallowing the 'controlled action'.

FINANCIAL IMPACT

None.



RECEIVED

14 APR 2011

Senate Standing C'ttee
for the Scrutiny
of Bills

**The Hon Tanya Plibersek MP
Minister for Human Services
Minister for Social Inclusion**

C11/I335

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

I refer to the letter of 24 March 2011 from Ms Toni Dawes, drawing my attention to the Senate Scrutiny of Bills Committee's *Third Report of 2011* (23 March 2011) and seeking further advice about amendments in the *Human Services Legislation Amendment Bill 2010* (the Bill).

Where Medicare Australia relies on Part IID of the *Medicare Australia Act 1973* to seize records from a health professional, it is usually seeking information to assist in investigating fraudulent claiming under the Medicare program. The relevant information is primarily clinical records or records that detail claiming under the Medicare program, and in some cases also audit log information that records when claim data was transmitted. There are also occasions when Part IID powers are exercised in investigating claims by pharmacists under the Pharmaceutical Benefits Scheme (PBS).

Other personal or financial information about the patient is usually not relevant to an investigation, so is seldom sought. In any event, in practice, health professionals and practices usually retain only limited information on their systems about their patients outside of clinical and personal contact information.

Section 8ZN of the *Medicare Australia Act 1973* currently only requires notification of a patient where a record containing clinical details about that patient is seized under Part IID. The policy represented by section 8ZN is that patients should be notified when the exercise of Part IID powers results in clinical records being examined, because clinical records are the most sensitive information held by medical practitioners. The amendments to section 8ZN seek to better implement that policy, by requiring patient notification only when the seizure of records about a particular patient results in clinical health details being obtained about that patient.

Notification will continue to be required when a record containing only clinical details is seized, and the seizure results in clinical details being obtained by officers as a result of the seizure. In cases where seized records contain only non-clinical information, there will continue to be no notification requirement.

In contrast to section 8ZN, the equivalent provisions in the *Crimes Act 1914*, on which Part IID is modelled, contain no notification requirement. Thus, if the Australian Federal Police (the AFP) obtained and executed a search warrant under the Crimes Act and seized patient records from a medical practitioner, the AFP would not be required to notify those patients of the seizure, even if clinical records were obtained.

The contact officer in my Department for the Bill is Mr Paul Menzies-McVey, Executive Counsel, who can be contacted on (02) 6223 4512.

Yours sincerely



Tanya Plibersek

11.4.11



**THE HON NICOLA ROXON MP
MINISTER FOR HEALTH AND AGEING**

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

Thank you for your letter of 24 March 2011 regarding comments about the National Health Reform Amendment (National Health Performance Authority) Bill 2011 (the Bill) in the Senate Standing Committee for the Scrutiny of Bills (the Committee) Alert Digest No.3 of 2011.

I am pleased to provide the following response in relation to the issues raised by the Committee.

Reversal of onus – Schedule 1, items 127 and 130

I note the Committee's request for advice regarding the requirements in the secrecy and disclosure provisions in items 127 and 130 of Schedule 1 for a defendant to bear an evidential burden when relying on an exception to the prohibition against using or disclosing 'protected information'. Item 127 sets out the secrecy and disclosure provisions which relate to the Australian Commission on Safety and Quality in Health Care (the Commission), while item 130 deals with secrecy and disclosure of information in relation to the National Health Performance Authority (the Performance Authority).

Items 127 and 130 of Schedule 1 relate to circumstances where an officer, or past officer, of the Commission or the Performance Authority respectively is alleged to have disclosed or used information obtained in the course of his or her work which concerns another person (which is defined in the Bill as 'protected information'). This information may include, for example, health related data which will be obtained by the Performance Authority from a number of sources under its data collection powers.

On this basis, I consider that a defendant who is the subject of legal proceedings would possess detailed knowledge surrounding the nature of the protected information, the mechanisms by which it was obtained by the Commission or the Performance Authority, and the circumstances surrounding its disclosure. In some instances it would be highly likely that the defendant would be the sole repository of such information.

For example, a Performance Authority official may disclose protected information, such as health demographic or mortality data, to the manager of a hospital when preparing a report indicating poor performance on that hospital's part. This is an essential function of the Performance Authority under the legislation and one which clearly falls within the exceptions to the secrecy provisions.

In this situation, it would be imperative that the Performance Authority disclose such data to the hospital to provide it with a reasonable opportunity to produce mitigating information to explain the reasons for poor performance. If legal proceedings were initiated against an official for disclosing this information, the circumstances surrounding the disclosure would be peculiarly within his or her knowledge.

Similarly, the exceptions to the secrecy and disclosure provisions enable a Performance Authority official to disclose protected information to certain government agencies, such as the Australian Institute of Health and Welfare or the Australian Bureau of Statistics, or to a state or territory government body, or for research purposes. In such cases, it is likely that the official who disclosed the information would have exclusive knowledge of the circumstances surrounding the disclosure.

I am therefore of the view that a defendant would be best placed to assert an exception to the secrecy and disclosure offences in a wide range of circumstances, and that the defendant would not be placed in a disadvantaged position before a court compared with the prosecution because of the reversed onus of proof.

Accordingly, I consider that the reversal of the evidential burden of proof in the secrecy and disclosure provisions of the Bill is consistent with the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (the Guide). As the Committee noted, the Guide provides that an evidential burden should be placed on the defendant only where the matter is peculiarly within the knowledge of the defence and not available to the prosecution. In addition, I would like to raise several points in relation to the standard of proof required under the *Criminal Code Act 1995* (the Criminal Code) to support the Government's argument that the reversal of the onus is appropriate. Pursuant to subsection 13.3(3) of the Criminal Code, the standard of proof imposed by the evidential burden would only require a defendant to adduce or point to 'evidence that suggests a reasonable possibility that the matter exists or does not exist.' If this is done, the prosecution will be required to refute the defence beyond reasonable doubt.

The Criminal Code therefore establishes that the evidential burden demands a lower standard of proof that would only require a defendant in legal proceedings to show that the disclosure of information occurred in accordance with one of the exceptions specified in the Bill. Its purpose is to guide a court in the event that legal proceedings are initiated. This is also consistent with the position outlined in the Guide.

Further, I consider that the exceptions to the secrecy and disclosure provisions provide a broad scope for a defendant to defend any claim. This is particularly relevant in relation to subsections 54B(a) and (b) in the context of the Commission, and subsections 114(a) and (b) in the context of the Performance Authority, which permit disclosure for the purposes and functions of the Act.

Trespass on personal rights and liberties – Schedule 1, item 127, subsection 54A(2) and item 130

I note the Committee's concerns that the disclosure of personal information may potentially compromise an individual's privacy, and the Committee's request for advice as to why the disclosure of such information should be authorised.

One of the key functions of the Performance Authority is to monitor and prepare reports on the performance of Local Hospital Networks, public and private hospitals, primary health care organisations (Medicare Locals) and other health care service providers. These functions are consistent with the National Health and Hospitals Network Agreement and the Heads of Agreement – National Health Reform (the Agreements). In order to carry out its functions, the Performance Authority will be required to report on incidences of poor performance by these entities. In doing so, the Performance Authority may disclose information which could allow an individual health professional to be identified.

However, the Performance Authority will not expressly report on the performance of health professionals, such as medical practitioners, in the course of carrying out its functions. In my view, the possibility that reporting might allow the identification of a health professional is remote. However, the secrecy and provisions have been crafted such that, were an individual to be identifiable, the Performance Authority can still report in order to deliver the transparent and accountable measure of performance of the health system.

In addition, there is little real prospect that the Commission will disclose personal information, as it will not receive information which would identify individuals in the absence of additional circumstantial evidence. Therefore, I do not consider that there is any substantial possibility for any undue compromise to a person's privacy as a result of any disclosure of information by the Commission.

Importantly, neither the Commission nor the Performance Authority will disclose protected information concerning the personal affairs of patients without prior consent, as required under section 128 of the Bill. Section 128 establishes a safeguard against the unauthorised disclosure of information by either the Commission or the Performance Authority, when carrying out their legislated functions, which would identify a particular patient without prior consent.

Finally, the Government contends that the public interest dictates that poor performing entities should be subject to scrutiny and reporting by the Performance Authority, which is consistent with the aims of the Agreements. Additionally, the purpose of the *National Health and Hospitals Network Act 2011*, which establishes the Commission and which will be amended by this Bill, is to provide safety and quality in health care as defined in section 9. In this context I feel that the slight risk of identification is outweighed by the public interest of ensuring consumer safety, and the public's need to know about matters which impact on the safety of consumers.

Exemption from the Legislative Instruments Act 2003 – Schedule 1, clause 130

I note the Committee's request for advice as to whether consideration has been given to establishing a mechanism for allowing public scrutiny of instruments made by the Commonwealth Minister for Health and Ageing under paragraph 60(1)(f) specifying additional functions to be performed by the Performance Authority. As the Committee has noted, these instruments are not legislative instruments in accordance with subsection 60(5) and are not subject to disallowance under the *Legislative Instruments Act 2003*.

The Government is fully supportive of measures that will improve transparency and allow for public scrutiny of the Performance Authority's activities. I therefore confirm that I am prepared to make instruments made under paragraph 50(1)(f) available to the public.

Wide discretion – Schedule 1, item 130, section 81


I note the Committee's concern that section 81, which provides that the Minister may terminate a Performance Authority member's appointment at any time, confers a very broad discretionary power.

The policy rationale underlying section 81 is, in part, to provide a vehicle for dismissing a Performance Authority member due to the Council of Australian Governments (COAG) dissatisfaction with his or her performance or for a range of additional reasons without the need for broader consultation, including, for example, absence without leave, engaging in criminal activities, misbehaviour or bankruptcy.

In addition, the Australian Government Solicitor has advised that the power conferred on the Minister under section 81 of the Bill is subject to the rules of natural justice and therefore may not be exercised in an unfettered manner. As such, the Minister would be obliged to notify a Performance Authority member before making a decision under section 81 that he or she is considering making such a decision. The Minister would also be required to state the reasons or grounds on which he or she proposes to invoke the dismissal power. Those grounds would need to be relevant to the proper exercise by the Performance Authority of its functions. Both political and policy considerations relating to the exercise of the Performance Authority's functions may be taken into account. Finally, the Minister would be required to give the Performance Authority member with an opportunity to make submissions in response before a final decision may be made.

I trust that the above information is of assistance.

Yours sincerely



NICOLA ROXON

10 MAY 2011