



Quarantine Amendment (National Health Security) Bill 2008

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Quarantine Amendment (National Health Security) Bill 2008

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Links: The *relevant links* to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill introduces requirements for vaccinations and other prophylaxis;¹ related health certificates; and charges relating to the prescribed health measures² undertaken in complying with the proposed legislative requirements for travellers.³

Background

International Health Regulations (IHR)

What are the International Health Regulations?

The following information derives from the World Health Organisation's web-site, from which further information is available.⁴

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1. 'Prophylaxis' is 'a measure taken for the prevention of a disease or condition': see <http://www.medterms.com/script/main/art.asp?articlekey=12063>, accessed on 8 April 2008.
 2. 'Health measure' is defined as 'procedures applied to prevent the spread of disease or contamination; a health measure does not include law enforcement or security measures': World Health Organisation, *International Health Regulations 2005*, Article 1, clause 1. See also the definition of 'prescribed health measure' in proposed section 64A: **item 9 Schedule 2 of the Bill**.
 3. 'Traveller' means 'a natural person undertaking an international voyage': World Health Organisation, *International Health Regulation 2005*, Article 1. See also the definition of 'traveller' in proposed section 64B: **item 9 Schedule 2 of the Bill**.
 4. See <http://www.who.int/csr/ihr/en/>.

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The IHR 2005 is an international agreement aimed at protecting international public health security by controlling the spread of infectious diseases in ways that avoid unnecessary interference with international trade and traffic. Once adopted by the Health Assembly of the World Health Organisation (WHO), the IHR 2005 is legally binding on all WHO States Parties that neither rejected nor filed a reservation to the IHR 2005 by 15 December 2006.⁵ The IHR 2005 came into force on 15 June 2007. Australia has neither rejected nor filed an objection to the IHR 2005.

The International Health Regulations (the IHR), originally adopted in 1969, was a means to control cholera, plague, yellow fever, smallpox, relapsing fever and typhus. The IHR was updated in 1973 and 1981, and the number of notifiable diseases was reduced to cholera, plague and yellow fever.

The IHR was then substantially revised in 2005, significantly broadening its scope to include all public health emergencies of international concern. The IHR 2005 requires States Parties to develop particular minimum core public health capacities to detect, assess, and notify the WHO of health emergencies that are of international concern.

Relevant provisions of the IHR 2005

The provisions of the IHR 2005 particularly relevant to the Bill are briefly discussed here. Please note that the full text of these provisions is contained in the Appendix to this Digest.

Article 3 sets out the principles of the IHR 2005. Importantly, it provides that the IHR 2005 be implemented with full respect for people's dignity, human rights and fundamental freedoms.

Article 30 relates to travellers under public health observation. It provides that, subject to Article 43 (below) or as authorised in applicable international agreements, a traveller who is suspected of posing a public health risk and placed under observation on arrival, may continue on his or her travel if that traveller does not pose an imminent public health risk and the proper authority at the traveller's destination is informed of their expected arrival. In addition, the traveller must report to that proper authority on arrival.

Article 43 relates to health measures that States Parties may implement in response to specific public health risks or public health emergencies that are of international concern. In particular, it provides that States Parties may implement such health measures to attain

For further discussion on the IHR 2005, see also Buckmaster, L and Thomas, M, 'National Health Security Bill 2007', *Bills Digest*, Parliamentary Library, Canberra, no. 53, 2007–08.

5. See also http://www.aph.gov.au/house/committee/jsct/8august2006/treaties/health_nia.pdf, accessed on 11 April 2008.

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the same or a higher level of health protection than WHO recommends or which are otherwise prohibited under Articles 25 (ships and aircraft in transit), 26 (civilian lorries, trains and coaches in transit), 30 (travellers under public health observation), 33 (goods in transit), paragraphs 28(1), 28(2) (ships and aircraft at points of entry), or 31(1)(c) (health measures as condition of entry of travellers) of the IHR 2005. However, those health measures must be the least restrictive measures that may be taken in the circumstances and consistent with the IHR 2005.

In addition, Article 43 lists the factors upon which States Parties may determine whether to implement health measures under paragraphs 43(1) (above), or additional health measures under paragraphs 23(2) (below), 27(1), 28(2) and (31)(2)(c) (below) of the IHR 2005. These factors are scientific principles; available scientific evidence of a risk to human health (where this is unavailable — information from WHO and other relevant intergovernmental and international organisations); as well as WHO guidance.

The State Party must review its implementation of such health measure within three months of its implementation.

If implementation of a health measure by a State Party significantly interferes with international traffic (for example, delay or refusal of entry or departure of international travellers; and such things as baggage, cargo and conveyances for more than 24 hours), that State Party must inform WHO of the health measure and justify the implementation of that health measure to WHO within 48 hours of implementation (unless covered by a recommendation made by WHO⁶). WHO will then consult with and share the information with other States Parties, after which WHO may ask the implementing State Party to reconsider its health measure. States Parties affected by the implementation of a health measure may ask the implementing State Party to consult with them to reach a mutually acceptable solution.

Article 23 relates to health measures on arrival to and departure from a country. In trying to assess whether there is evidence of a public health risk, a State Party may obtain information about a traveller; the traveller's destination and contact details; the traveller's itinerary and health documents; as well as conduct the least invasive form of medical examination of the traveller. The State Party may also inspect baggage; cargo; and conveyances, among other things.

If there is evidence of a public health risk, the State Party may implement additional health measures consistent with the IHR 2005. In general, this must be implemented:

- on a case by case basis

6. For the definitions of 'standing' and 'temporary' recommendations made by WHO, see *International Health Regulations 2005*, Article 1, clause 1.

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- by the least intrusive and invasive means available
- with minimal risk of disease transmission, and
- with the traveller's prior express informed consent under the law and international obligations of the State Party.

The traveller must be informed of risks associated with the vaccination or prophylaxis, or the non-administration thereof.

Article 31 relates to the entry of travellers into a country. In general, a State Party must not require invasive medical examination, vaccination or other prophylaxis as a condition of a traveller's entry into a country. However, a State Party may require medical examination, vaccination or other prophylaxis (or proof thereof) in the following circumstances:

- when necessary, to determine whether there is a public health risk
- as a condition of entry
 - for travellers who seek temporary or permanent residence in the country, or
 - pursuant to Article 43 (above) or Annexes 6 and 7 (below), or
- pursuant to Article 23 (above).

Article 31 also addresses situations of a traveller's failure to consent to a health measure or to provide information, which may result in denial of entry to that traveller. In addition and importantly, where there is evidence of an imminent public health risk, the State Party may compel that traveller to undergo a health measure to the extent necessary to control the risk.

Article 32 contains provisions enshrining the importance of respect for travellers' dignity, human rights and fundamental freedoms, as well as minimising discomfort or distress related to the health measures implemented. This includes consideration of a traveller's gender, socio-cultural and religious concerns.

Article 42 provides that health measures must not be delayed and must be applied in a transparent and non-discriminatory manner.

Article 40 relates to charges imposed for certain prescribed health measures administered to travellers to protect public health. Those charges are generally only imposed on travellers seeking temporary or permanent residence in the country. However, other charges may be imposed for health measures which are primarily for the traveller's benefit.

Where a charge is imposed, there must only be one tariff and it must be published no less than 10 days before any levy is made (and with which the charge must conform); the

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charge not exceed the actual cost of the health measure administered and must be levied without discrimination.

States Parties may seek reimbursement for expenses related to health measures provided from conveyance operators or owners (relating to their employees) and from applicable insurance sources.

However, travellers and conveyance operators must not be denied the ability to leave the country pending payment of such charges.

Article 45 deals with travellers' personal data.

Annex 6 sets out the requirements for vaccinations, prophylaxis and related certificates. Vaccines and prophylaxis must be of suitable quality and approved by WHO. Such approval is necessary for validity of certificates verifying vaccination or prophylaxis for individual people. Annex 6 also sets out the procedural requirements for such certificates, for example, language and signature requirements. Importantly, where a supervising clinician opines that the vaccination or prophylaxis is contraindicated for medical reasons, the supervising clinician must give the person concerned the reasons underlying that opinion, as well as inform the person of risks associated with non-vaccination or non-administration of prophylaxis in accordance with paragraph 23(4) of the IHR 2005.

Annex 7 sets out the requirements of vaccination or prophylaxis for specific diseases, which to date only relates to yellow fever.

Yellow fever

Yellow fever is a short lasting viral disease that is primarily transmitted by mosquitos,⁷ whose symptoms vary in severity — including a sudden onset of fever, muscle pain and nausea through to bleeding, jaundice and death.⁸

Yellow fever has caused large epidemics and is currently endemic in 32 African and 11 Central and South American countries.⁹

7. See <http://www.health.gov.au/internet/main/publishing.nsf/Content/ohp-yellow-fever-certificate-factsheet.htm>, accessed on 7 April 2008. The yellow fever virus is found in East and West Africa and South America: <http://www.who.int/mediacentre/factsheets/fs100/en/>, accessed on 20 May 2008.

8. For further information on yellow fever, see *ibid*.

9. For a list of affected countries, see <http://www.health.gov.au/internet/main/publishing.nsf/Content/ohp-yellow-fever-certificate-factsheet.htm>, *op. cit*. See also <http://www.who.int/mediacentre/factsheets/fs100/en/>, *op. cit*.

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According to WHO, vaccination is the most useful and effective way to prevent yellow fever and mass vaccination campaigns have been highly successful in doing so in the past.¹⁰

Quarantine in Australia

Constitutional basis of quarantine power

The Commonwealth was granted an express power to make laws with respect to quarantine pursuant to section 51(ix) of the *Commonwealth of Australia Constitution Act 1901* (the Constitution).

The principal Act under section 51(ix) is the *Quarantine Act 1908* (Cth) (the Quarantine Act). ‘Quarantine’ is defined in section 4 of the Quarantine Act as having:

... relation to measures for the inspection, exclusion, detention, observation, segregation, isolation, protection, treatment, sanitary regulation, and disinfection of vessels, installations, persons, goods, things, animals, or plants, and having as their object the prevention of the introduction or spread of diseases or pests affecting human beings, animals, or plants.

The power to make laws with respect to quarantine is a concurrent power, which means that both the Commonwealth and the States may make laws with respect to this subject matter. However, under section 109 of the Constitution, any law made by the States regarding quarantine will be inoperative to the extent of being inconsistent with the Commonwealth law.

The role of the Commonwealth Government

The Commonwealth government is responsible for quarantine controls at points of entry to Australia, for example, airports and sea ports.

Although the Australian Quarantine and Inspection Service (AQIS) generally administers the Quarantine Act,¹¹ its responsibilities in relation to human quarantine are limited to administering specific human quarantine functions at Australian international air and sea ports.¹²

10. *ibid.* WHO also advocates strong surveillance and epidemic preparedness: *ibid.*

11. See <http://www.daffa.gov.au/aqis/quarantine/legislation>, accessed on 8 April 2008.

12. See <http://www.daffa.gov.au/aqis/quarantine/human>, accessed on 8 April 2008.

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The Department of Health and Ageing (the DH&A) is responsible for developing and maintaining human quarantine and public health policy in Australia.¹³

According to the DH&A website:

The purpose of these activities is to allow for the identification and surveillance of persons who have been potentially exposed to a quarantinable disease, the provision of appropriate medical treatment if necessary, and the application of public health measures to prevent the outbreak of any of the quarantinable diseases in Australia.¹⁴

The human diseases that are subject to quarantine controls in Australia are:

- plague
- rabies
- cholera
- yellow fever
- viral haemorrhagic fever
- smallpox
- SARS, and
- avian influenza in humans.¹⁵

However, there is a third Commonwealth Government Department that may be involved — the Department of Immigration and Citizenship (DIAC). DIAC administers the *Migration Act 1958* (among other related legislation) and manages the entry of people into Australia, including immigration and determining visa applications.

It is noted that there already are health requirements for temporary and permanent visa applicants.¹⁶ In addition, visa applicants are generally responsible for paying expenses of

13. *ibid.*

14. See Department of Health and Ageing, 'Quarantine and Travel Health Information', <http://www.health.gov.au/internet/main/publishing.nsf/Content/health-publth-strateg-quaranti-index.htm>, accessed on 8 April 2008.

15. See *ibid.*

16. See Department of Immigration and Citizenship, 'Health Requirements', <http://www.immi.gov.au/allforms/health-requirements/index.htm>, accessed on 7 April 2008.

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health examinations involved,¹⁷ unless the visa applicant is an accepted Refugee or Special Humanitarian Program applicant in subclass 201, 202, 203 or 204.¹⁸

Basis of policy commitment

Australia had played a significant role in contributing to the IHR 2005 and is a State Party to it.¹⁹

In the 2004-05 Budget, the government allocated \$1.6 million over three years to develop national health security legislation. This coincided with Australia agreeing to adopt the IHR 2005 in May 2005.²⁰

On 8 August 2006, the [National Interest Analysis](#) for the IHR 2005 was tabled in Parliament and on 14 August 2006, the Joint Standing Committee on Treaties held a public hearing on the IHR 2005. All relevant Commonwealth Ministers have now formally approved the adoption of the IHR 2005.²¹

The Bill is part of a package of new national health security legislation, which specifically addresses requirements under the IHR 2005 regarding vaccinations, related health certificates and charges thereof.²²

17. *ibid.*

18. See <http://www.diac.gov.au/allforms/health-requirements/index.htm#f>, accessed on 17 April 2008.

19. See http://www.who.int/csr/ihr/states_parties/en/index.html, accessed on 7 April 2008; http://www.aph.gov.au/house/committee/jsct/8august2006/treaties/health_nia.pdf, accessed on 11 April 2008.

20. See Abbott. T, Minister for Health and Aging, 'Second reading speech: National Health Security Bill 2007', House of Representatives, *Debates*, 13 September 2007; Roxon. N MP, 'Second reading speech: National Health Security Bill 2007', House of Representatives, *Debates*, 20 September 2007. See also http://www.aph.gov.au/house/committee/jsct/8august2006/treaties/health_nia.pdf, accessed on 11 April 2008.

21. See http://www.austlii.edu.au/au/legis/cth/num_reg_es/qar20073n341o2007430.html, accessed on 10 April 2008.

22. Explanatory Memorandum, Quarantine Amendment (National Health Security) Bill 2008, p. 1. See also [National Health Security Bill 2007](#).

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Position of significant interest groups

The position of significant interest groups on the specific provisions of this Bill was not ascertainable at the time of writing. It is noted that there is no information in the Second Reading Speech or in the Explanatory Memorandum to the Bill on what, if any, consultation occurred in relation to the Bill.

However, it is noted that there had been a review of Australia's human quarantine provisions in the Quarantine Act in 2000 undertaken by what was then the Department of Health and Aged Care (the Review).²³ According to the [Human Quarantine Final Review](#) (the Final Report), some submissions received in relation to human rights considerations of the Review commented that:

- protecting public health was of paramount importance
- it was necessary to incorporate human rights considerations into the legislation, and
- although detention could be enforced, treatment could not be enforced.²⁴

According to the Review:

The *Quarantine Act 1908* confers broad and sweeping powers that could affect individual and collective human rights. The emphasis is on the restriction of the movement of individuals and communities with general powers to compel the individual to do whatever is required to halt or contain the spread of disease, all without the right of appeal.

The International Covenant on Civil and Political Rights, to which Australia is a signatory, advocates for civil liberty and is against arbitrary detention. Pursuant to this Convention, any breach of an individual's civil liberty should be underpinned by a legislative regime that is clear and accountable. The legislation should provide limits and conditions on the nature of the intervention while at the same time providing appropriate checks and balances such as review and appeal processes.²⁵

The Review concluded that since Australia was a party to the International Covenant on Civil and Political Rights, it should, where possible, ensure that the Quarantine Act is consistent with the principles of that Covenant.²⁶ The Review recommended that a

23. See <http://www.health.gov.au/internet/main/publishing.nsf/Content/health-publth-strateg-quaranti-quarant.htm>, accessed on 11 April 2008.

24. Department of Health and Aged Care, *Human Quarantine Final Review – Final Report*, November 2000, p. 5 (a list of people and organisations that lodged submissions relating to the Review is contained at Appendix 4 of the Final Report).

25. *ibid.*

26. *ibid.*, p. 7.

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practical review and appeal process should be implemented in relation to human quarantine only and further advice was sought as to the most appropriate system.²⁷ The then Minister for Health approved the final report of the Review on 20 December 2000 and some work on implementation of the Review's recommendations commenced in 2001.²⁸ It is unclear as to how far that work had proceeded.

The Review's findings and recommendations presumably reflect the concerns of some stakeholders in relation to the administration of vaccines and other prophylaxis to travellers entering Australia.

Committee consideration

The Senate Standing Committee for the Scrutiny of Bills noted the Bill and has not made any comments on it.²⁹

Financial implications

The Explanatory Memorandum does not clearly state what the financial implications of the Bill would be — if any.³⁰

However, there would be financial implications for those who will bear the costs of health measures administered to them — those people seeking temporary or permanent residence in Australia, including people in a financially disadvantaged position, for example, some migrants,³¹ refugees and humanitarian entrants in categories that are not recognised for support.³²

27. *ibid.*

28. Department of Health and Ageing, 'Human Quarantine Legislation Review', <http://www.aodgp.gov.au/internet/main/publishing.nsf/Content/health-publth-strateg-quaranti-quarant.htm>, accessed on 27 May 2008.

29. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 3 of 2008*, Parliament House, 14 May 2008. p. 41.

30. See Explanatory Memorandum, *op. cit.*, p. 2.

31. For information about DIAC's immigration requirements, see <http://www.diac.gov.au/migrants/index.htm>, accessed on 30 April 2008.

32. For information about DIAC's requirements relating to refugees and humanitarian entrants, see <http://www.diac.gov.au/refugee/index.htm>, accessed on 30 April 2008.

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Key issues

The key issues in relation to the Bill are as follows.

Does the Bill comply with the IHR 2005?

How will the proposed provisions in the Bill affect the civil and political liberties of those people to whom the Bill applies, particularly in relation to:

- individuals' consent to health measures administered to them
- involuntary detention issues associated with quarantine, and
- costs of health measures being borne by disadvantaged groups?

How to balance the need to protect national health security vis a vis protecting individual rights?

These issues are discussed in the relevant parts of the 'Main provisions' section of this Digest.

Main provisions

Schedules 1 and 2 of the Bill propose amendments to the Quarantine Act, of which only the major ones will be addressed in this Digest.

Schedule 1

The amendments proposed in Schedule 1 would include prophylaxis³³ into the Quarantine Act.

Currently, section 75 of the Quarantine Act provides that a quarantine officer may require a person to be vaccinated or inoculated with any prophylactic or curative vaccine.

Items 2-4 in the Bill propose to **amend section 75** of the Quarantine Act by enabling the use of other prophylaxis, in addition to vaccines. It is proposed that a quarantine officer may require a person to submit himself or herself to vaccination or administration of other prophylaxis only if the IHR 2005 does not preclude that requirement and:

33. 'Prophylaxis' is 'a measure taken for the prevention of a disease or condition': see <http://www.medterms.com/script/main/art.asp?articlekey=12063>, accessed on 8 April 2008.

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- the quarantine officer opines that the health measure is necessary to prevent the spread of a ‘quarantinable disease’ (see list of diseases subject to quarantine control above), or
- the vaccine or prophylaxis is listed in Annex 7 of the IHR 2005 (referred to on page 7 of the Digest).

The Bill also proposes that the vaccine or other prophylaxis administered to a person (including related certificates) must conform to Annexes 6 and 7 of the IHR 2005 (referred to on page 7 of the Digest).

Comments

It is submitted in the Explanatory Memorandum that it is recognised that there may be situations where people would not agree to being vaccinated or having other prophylaxis administered to them, such as for religious or medical reasons.³⁴ It is further submitted in the Explanatory Memorandum that the quarantine officer can take those reasons into account and that where a person refuses vaccination or other prophylaxis under the Act, the quarantine officer would make his or her decision on the advice of a qualified medical practitioner.³⁵

However, it is noted that the Bill does not amend subsections 75(1A) and (1B) of the Quarantine Act, which provide that people who refuse to be vaccinated or have other prophylaxis administered to them, where required under section 75, are guilty of a strict liability offence,³⁶ punishable by 20 penalty units (\$2 200).³⁷

The Quarantine Act and the Bill are silent as to how such a situation will actually be handled, for example, how to reconcile a situation where the legislation provides for strict liability offences when a medical officer may advise that no vaccination should be administered in the particular circumstances.

Paragraphs 23(3)-(5) of the IHR 2005 place much importance on travellers’ informed consent to examinations, vaccinations, prophylaxis and health measures, as well as the need to inform travellers of any risk associated with the administration and non administration of vaccines and other prophylaxis. This is not clearly reflected in the Bill.

34. Explanatory Memorandum, op. cit, p. 5.

35. *ibid.*

36. ‘Strict liability offences’ means those offenses for which proof of fault or negligence is not required: see LxisNexis AU, *Encyclopaedic Australian Legal Dictionary* (online).

37. A penalty unit is currently \$110: *Crimes Act 1914* subsection 4AA(1).

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Paragraph 31(2) of the IHR 2005, on the other hand, provides for travellers to be compulsorily vaccinated or have other prophylaxis administered to them if there is evidence of an imminent public health risk,³⁸ and would deny entry to travellers who do not consent. While clause 31(2) does refer to options other than vaccines and other prophylaxis to be used if there is evidence of an imminent public health risk, including:

the least invasive and intrusive medical examination that would achieve the public health objective ...,

the Bill does not.

It is also noted that the Explanatory Memorandum says that:

- there may be cases where there is a broader public health interest in reducing the spread of disease in Australia, and
- the proposed provisions enabling quarantine officers to require people to be vaccinated or administered other prophylaxis is for 'extraordinary situations'.³⁹

The term 'extraordinary situations' is not defined in the Explanatory Memorandum.

In addition and importantly, the Bill does not propose an appeal process in relation to decisions to administer vaccine or other prophylaxis in the absence of consent.

While acknowledging that there are difficulties in finding a balance between individual human rights and national health security, it is noted that **items 2-4** of the Bill propose wide discretionary powers but remain silent on protections relating to the exercise of those powers. It appears that operational matters relating to the exercise of these powers may be left to departmental policies and decision making.

Schedule 2

The amendments proposed in Schedule 2 relate to charges for human quarantine measures and article 40 of the IHR 2005 (see above).

In particular, **item 9** of the Bill proposes to **insert new sections 64A-64D** into the Quarantine Act.

38. 'Public health risk' means 'a likelihood of an event that may affect adversely the health of human populations, with an emphasis on one which may spread internationally or may present a serious and direct danger': IHR 2005 Article 1.

39. Explanatory Memorandum, op.cit, p. 5.

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Proposed section 64A

Proposed subsection 64A(1) would define ‘prescribed health measure’ as a health measure relating to a traveller that the Commonwealth provides under the:

- Quarantine Act
- Migration Act, or
- any other Commonwealth law,

In addition, **proposed subsection 64A(2)** would provide that the relevant health measures are:

- medical examinations to determine a traveller’s health status
- generally, vaccination or other prophylaxis administered to a traveller on entering the country
- restricting the traveller’s activities, or isolating the traveller, to prevent the disease from spreading
- health measure applied to the traveller’s personal effects,
- issuing the traveller with a certificate verifying the administration of the above health measures.

The effect of **proposed subsection 64A(3)** would be that if there is not at least 10 days notice of the requirement to be vaccinated or to have other prophylaxis administered, then the health measure that is administered to a traveller would not be chargeable under the Quarantine Act.

In addition, the effect of **subsection 64A(4)** would be that if a traveller is isolated or has his or her activities restricted to prevent disease from spreading, the following will not be subject to charge under **proposed section 64D**:

- treatment for the disease or any other medical condition other than what is listed in **proposed subsection 64A(2)**, and
- any other benefit given to the traveller solely for his or her own benefit.

Proposed section 64B

Proposed section 64B would define ‘travellers’, ‘permanent residence’, ‘temporary residence’, as well as ‘being in Australia for transit purposes only’. The definitions of these terms are relevant for **proposed sections 64C and 64D**.

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Notably, paragraph 64B(1)(b) lists the classes of people who would not fall within the definition of ‘traveller’ including those people who have been detained as unlawful non-citizens⁴⁰ under section 189 of the *Migration Act 1958*. In summary, the *Migration Act* requires people who are not Australian citizens and who are unlawfully in Australia to be detained — this is otherwise known as Australia’s mandatory detention policy. People considered unlawfully in Australia include those people who have arrived in Australia without a visa, overstayed their visa, or had their visa cancelled.⁴¹

It would also appear that under subparagraph 64B(1)(b)(i) and subsection 64B(2), people who are immigration cleared under subsection 166(1) of the *Migration Act* and who have been properly notified of prescribed health measure requirements would fall within the definition of ‘traveller’ and therefore may be subject to charges for those health measures.

Proposed section 64C

The effect of **proposed subsection 64C(1)** is that the Commonwealth is solely liable to pay for expenses of administering a prescribed health measure to a traveller who is not seeking temporary or permanent residence in Australia.

The effect of **proposed subsection 64C(2)** is that where the traveller seeks temporary or permanent residence in Australia, only the Commonwealth is liable to pay for expenses of administering a prescribed health measure to that traveller, unless the liability conforms with the tariff under **proposed section 64D** (see below).

Proposed subsection 64C(3) would allow for reimbursement of these expenses from:

- (where the traveller enters Australia as a crew member, including the master, of a vessel) the master, owner or agent of that vessel, or
- an applicable insurance source.⁴²

Proposed section 64D

Under **proposed section 64D**, the Minister may make a tariff by legislative instrument, which sets out the amount to be paid for administering a prescribed health measure⁴³ to a traveller seeking temporary or permanent residence in Australia. The amount set out must not exceed how much it actually costs to administer the prescribed health measure and will

40. As to the meaning of unlawful non-citizen, see *Migration Act 1958* sections 13, 14.

41. See <http://www.immi.gov.au/media/publications/compliance/managing-the-border/pdf/mtb-chapter10.pdf>, accessed on 30 April 2008.

42. For the definition of ‘applicable insurance source’, see article 40 of the IHR 2005.

43. As defined in proposed subsections 64A(1) and (2) (see above).

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only take effect on or after the tenth day after registration under the *Legislative Instruments Act 2003*.⁴⁴

Items 10-20 of the Bill propose amendments to **section 86E** of the Quarantine Act.

Currently, section 86E relates to the Minister's determinations and discretionary powers in relation to fees and deposits.

The proposed amendments are related to and support the new provisions proposed by **item 9**. For example, proposed amendments would:

- ensure that late payments do not apply to fees relating to a prescribed health measure (**items 15-17**) — this is consistent with requirements under the IHR 2005 that fees relating to administering prescribed health measures do not exceed the actual costs of doing so, and
- enable the Minister to remit or refund part or all of the fee relating to a prescribed health measure if satisfied that there are exceptional circumstances for doing so (**item 18**).

Comments

The group of people who would be most affected by proposed amendments in Schedule 2 of the Bill are travellers who seek temporary or permanent residence in Australia, because it is this group of people who, subject to what appears to be non-compellable and non-reviewable ministerial discretion, would have to pay the costs of prescribed health measures administered to them. As previously mentioned, it appears that this group would include people who are in an extremely financially disadvantaged position, such as some migrants, refugees and humanitarian entrants (although it is noted that some immigrants will be exempted).

It is noted that the Minister has discretion to:

- prescribe classes of people who do not fall within the definition of 'traveller' and who would then not be subject to be charged for prescribed health measures administered to them: **proposed subparagraph 64B(1)(b)(iv)**, and
- waive or remit such charges in exceptional circumstances: **proposed subsection 86E(2H)**.

However, it is also noted that the term 'exceptional circumstances' in **proposed new subsection 86E(2H)** relating to ministerial discretion is not defined in the Bill.

44. As to disallowance of legislative instruments, see *Legislative Instruments Act 2003* sections 42, 44.

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Importantly, it is further noted that the Bill is silent in relation to appeal processes in relation to the exercise of the ministerial discretion and decisions made under Schedule 2 of the Bill.

Concluding comments

The Bill is generally and technically consistent with the IHR 2005.

The need to protect national health is of enormous importance.

However, there are concerns regarding the balancing of needs which would be inconsistent in those particular situations to which the Bill would apply, the countervailing needs being:

- protecting national health, and
- protecting individual civil rights.

Administering vaccines and other prophylaxis can be an invasive prescribed health measure. Yet:

- as previously mentioned, there is no information in the Second Reading Speech or in the Explanatory Memorandum to the Bill on what, if any, consultation occurred in relation to the Bill
- the Bill does not specify the detail of factors that must be considered in deciding whether submitting a person to vaccination or other prophylaxis is necessary to prevent the spread of a quarantinable disease, or whether there are grounds for exempting some individuals
- arguably, the Bill does not adequately address situations involving people's right to refuse consent to these measures
- the Bill is silent on appeal processes relating to decisions made about whether to administer such measures, and
- the roles played by quarantine officers and medical practitioners (both groups being employed by two different departments) in this process remains unclear.

As mentioned above, it appears that the proposed provisions relating to charges for the administration of prescribed health measures could apply to financially disadvantaged groups of people, such as certain migrants, refugees and humanitarian entrants. Yet, again:

- there is no information in the Second Reading Speech or in the Explanatory Memorandum to the Bill on what, if any, consultation occurred in relation to the Bill
- the Bill is silent as to the detail of factors to be considered by the Minister in deciding whether to remit or waive the charges in any situation, and

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- the Bill is silent on appeal processes relating to administrative decisions, such as whether to charge a person for administration of a prescribed health measure.

The Bill is vocal in its commitment to principles set out in article 32 of the IHR 2005 (see above). These principles are of paramount importance to particularly vulnerable people seeking to enter Australia, such as refugees and humanitarian entrants who have fled persecution in their home countries. However, the Bill remains silent as to how that commitment would operate in practice.

Much appears to be left to the discretion of government departments and officers.

Interestingly, given the potential significant impact on permanent and temporary visa applicants, the Bill does not address how its proposed provisions would work in with current migration legislation, policies and practices administered and managed by DIAC.

The Government has not, however, indicated any intention to undertake further consultation with significant and relevant stakeholders. Such a process may assist in addressing these concerns in more detail, thereby refining the Bill.

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APPENDIX 1

Relevant provisions of the IHR 2005

The following provisions of the IHR 2005 are particularly relevant to the Bill.

Article 3

1. The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.
2. The implementation of these Regulations shall be guided by the Charter of the United Nations and the Constitution of the World Health Organization.
3. The implementation of these Regulations shall be guided by the goal of their universal application for the protection of all people of the world from the international spread of disease.
4. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to legislate and to implement legislation in pursuance of their health policies. In doing so they should uphold the purpose of these Regulations.

Article 30

Subject to Article 43 or as authorized in applicable international agreements, a suspect traveller who on arrival is placed under public health observation may continue an international voyage, if the traveller does not pose an imminent public health risk and the State Party informs the competent authority of the point of entry at destination, if known, of the traveller's expected arrival. On arrival, the traveller shall report to that authority.

Article 43

1. These Regulations shall not preclude States Parties from implementing health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern, which:

(a) achieve the same or greater level of health protection than WHO recommendations; or

(b) are otherwise prohibited under Article 25, Article 26, paragraphs 1 and 2 of Article 28, Article 30, paragraph 1(c) of Article 31 and Article 33,

provided such measures are otherwise consistent with these Regulations.

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Such measures shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.

2. In determining whether to implement the health measures referred to in paragraph 1 of this Article or additional health measures under paragraph 2 of Article 23, paragraph 1 of Article 27, paragraph 2 of Article 28 and paragraph 2(c) of Article 31, States Parties shall base their determinations upon:

(a) scientific principles;

(b) available scientific evidence of a risk to human health, or where such evidence is insufficient, the available information including from WHO and other relevant intergovernmental organizations and international bodies; and

(c) any available specific guidance or advice from WHO.

3. A State Party implementing additional health measures referred to in paragraph 1 of this Article which significantly interfere with international traffic shall provide to WHO the public health rationale and relevant scientific information for it. WHO shall share this information with other States Parties and shall share information regarding the health measures implemented. For the purpose of this Article, significant interference generally means refusal of entry or departure of international travellers, baggage, cargo, containers, conveyances, goods, and the like, or their delay, for more than 24 hours.

4. After assessing information provided pursuant to paragraph 3 and 5 of this Article and other relevant information, WHO may request that the State Party concerned reconsider the application of the measures.

5. A State Party implementing additional health measures referred to in paragraphs 1 and 2 of this Article that significantly interfere with international traffic shall inform WHO, within 48 hours of implementation, of such measures and their health rationale unless these are covered by a temporary or standing recommendation.

6. A State Party implementing a health measure pursuant to paragraph 1 or 2 of this Article shall within three months review such a measure taking into account the advice of WHO and the criteria in paragraph 2 of this Article.

7. Without prejudice to its rights under Article 56, any State Party impacted by a measure taken pursuant to paragraph 1 or 2 of this Article may request the State Party implementing such a measure to consult with it. The purpose of such consultations is to clarify the scientific information and public health rationale underlying the measure and to find a mutually acceptable solution.

8. The provisions of this Article may apply to implementation of measures concerning travellers taking part in mass congregations.

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Article 23

1. Subject to applicable international agreements and relevant articles of these Regulations, a State Party may require for public health purposes, on arrival or departure:

(a) with regard to travellers:

(i) information concerning the traveller's destination so that the traveller may be contacted;

(ii) information concerning the traveller's itinerary to ascertain if there was any travel in or near an affected area or other possible contacts with infection or contamination prior to arrival, as well as review of the traveller's health documents if they are required under these Regulations; and/or

(iii) a non-invasive medical examination which is the least intrusive examination that would achieve the public health objective;

(b) inspection of baggage, cargo, containers, conveyances, goods, postal parcels and human remains.

2. On the basis of evidence of a public health risk obtained through the measures provided in paragraph 1 of this Article, or through other means, States Parties may apply additional health measures, in accordance with these Regulations, in particular, with regard to a suspect or affected traveller, on a case-by-case basis, the least intrusive and invasive medical examination that would achieve the public health objective of preventing the international spread of disease.

3. No medical examination, vaccination, prophylaxis or health measure under these Regulations shall be carried out on travellers without their prior express informed consent or that of their parents or guardians, except as provided in paragraph 2 of Article 31, and in accordance with the law and international obligations of the State Party.

4. Travellers to be vaccinated or offered prophylaxis pursuant to these Regulations, or their parents or guardians, shall be informed of any risk associated with vaccination or with non-vaccination and with the use or non-use of prophylaxis in accordance with the law and international obligations of the State Party. States Parties shall inform medical practitioners of these requirements in accordance with the law of the State Party.

5. Any medical examination, medical procedure, vaccination or other prophylaxis which involves a risk of disease transmission shall only be performed on, or administered to, a traveller in accordance with established national or international safety guidelines and standards so as to minimize such a risk.

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Article 31

1. Invasive medical examination, vaccination or other prophylaxis shall not be required as a condition of entry of any traveller to the territory of a State Party, except that, subject to Articles 32, 42 and 45, these Regulations do not preclude States Parties from requiring medical examination, vaccination or other prophylaxis or proof of vaccination or other prophylaxis:

- (a) when necessary to determine whether a public health risk exists;
- (b) as a condition of entry for any travellers seeking temporary or permanent residence;
- (c) as a condition of entry for any travellers pursuant to Article 43 or Annexes 6 and 7; or
- (d) which may be carried out pursuant to Article 23.

2. If a traveller for whom a State Party may require a medical examination, vaccination or other prophylaxis under paragraph 1 of this Article fails to consent to any such measure, or refuses to provide the information or the documents referred to in paragraph 1(a) of Article 23, the State Party concerned may, subject to Articles 32, 42 and 45, deny entry to that traveller. If there is evidence of an imminent public health risk, the State Party may, in accordance with its national law and to the extent necessary to control such a risk, compel the traveller to undergo or advise the traveller, pursuant to paragraph 3 of Article 23, to undergo:

- (a) the least invasive and intrusive medical examination that would achieve the public health objective;
- (b) vaccination or other prophylaxis; or
- (c) additional established health measures that prevent or control the spread of disease,

including isolation, quarantine or placing the traveller under public health observation.

Article 32

In implementing health measures under these Regulations, States Parties shall treat travellers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures, including by:

- (a) treating all travellers with courtesy and respect;
- (b) taking into consideration the gender, sociocultural, ethnic or religious concerns of travellers; and

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(c) providing or arranging for adequate food and water, appropriate accommodation and clothing, protection for baggage and other possessions, appropriate medical treatment, means of necessary communication if possible in a language that they can understand and other appropriate assistance for travellers who are quarantined, isolated or subject to medical examinations or other procedures for public health purposes.

Article 40

1. Except for travellers seeking temporary or permanent residence, and subject to paragraph 2 of this Article, no charge shall be made by a State Party pursuant to these Regulations for the following measures for the protection of public health:

(a) any medical examination provided for in these Regulations, or any supplementary examination which may be required by that State Party to ascertain the health status of the traveller examined;

(b) any vaccination or other prophylaxis provided to a traveller on arrival that is not a published requirement or is a requirement published less than 10 days prior to provision of the vaccination or other prophylaxis;

(c) appropriate isolation or quarantine requirements of travellers;

(d) any certificate issued to the traveller specifying the measures applied and the date of application; or

(e) any health measures applied to baggage accompanying the traveller.

2. States Parties may charge for health measures other than those referred to in paragraph 1 of this Article, including those primarily for the benefit of the traveller.

3. Where charges are made for applying such health measures to travellers under these Regulations, there shall be in each State Party only one tariff for such charges and every charge shall:

(a) conform to this tariff;

(b) not exceed the actual cost of the service rendered; and

(c) be levied without distinction as to the nationality, domicile or residence of the traveller concerned.

4. The tariff, and any amendment thereto, shall be published at least 10 days in advance of any levy thereunder.

5. Nothing in these Regulations shall preclude States Parties from seeking reimbursement for expenses incurred in providing the health measures in paragraph 1 of this Article:

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- (a) from conveyance operators or owners with regard to their employees; or
- (b) from applicable insurance sources.

6. Under no circumstances shall travellers or conveyance operators be denied the ability to depart from the territory of a State Party pending payment of the charges referred to in paragraphs 1 or 2 of this Article.

Article 42

Health measures taken pursuant to these Regulations shall be initiated and completed without delay, and applied in a transparent and non-discriminatory manner.

Annex 6

1. Vaccines or other prophylaxis specified in Annex 7 or recommended under these Regulations shall be of suitable quality; those vaccines and prophylaxis designated by WHO shall be subject to its approval. Upon request, the State Party shall provide to WHO appropriate evidence of the suitability of vaccines and prophylaxis administered within its territory under these Regulations.
2. Persons undergoing vaccination or other prophylaxis under these Regulations shall be provided with an international certificate of vaccination or prophylaxis (hereinafter the "certificate") in the form specified in this Annex. No departure shall be made from the model of the certificate specified in this Annex.
3. Certificates under this Annex are valid only if the vaccine or prophylaxis used has been approved by WHO.
4. Certificates must be signed in the hand of the clinician, who shall be a medical practitioner or other authorized health worker, supervising the administration of the vaccine or prophylaxis. The certificate must also bear the official stamp of the administering centre; however, this shall not be an accepted substitute for the signature.
5. Certificates shall be fully completed in English or in French. They may also be completed in another language, in addition to either English or French.
6. Any amendment of this certificate, or erasure, or failure to complete any part of it, may render it invalid.
7. Certificates are individual and shall in no circumstances be used collectively. Separate certificates shall be issued for children.
8. A parent or guardian shall sign the certificate when the child is unable to write. The signature of an illiterate shall be indicated in the usual manner by the person's mark and the indication by another that this is the mark of the person concerned.

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9. If the supervising clinician is of the opinion that the vaccination or prophylaxis is contraindicated on medical grounds, the supervising clinician shall provide the person with reasons, written in English or French, and where appropriate in another language in addition to English or French, underlying that opinion, which the competent authorities on arrival should take into account.

The supervising clinician and competent authorities shall inform such persons of any risk associated with non-vaccination and with the non-use of prophylaxis in accordance with paragraph 4 of Article 23.

10. An equivalent document issued by the Armed Forces to an active member of those Forces shall be accepted in lieu of an international certificate in the form shown in this Annex if:

(a) it embodies medical information substantially the same as that required by such form; and

(b) it contains a statement in English or in French and where appropriate in another language in addition to English or French recording the nature and date of the vaccination or prophylaxis and to the effect that it is issued in accordance with this paragraph.

[Form of certificate]

This certificate must be signed in the hand of the clinician, who shall be a medical practitioner or other authorized health worker, supervising the administration of the vaccine or prophylaxis. The certificate must also bear the official stamp of the administering centre; however, this shall not be an accepted substitute for the signature.

Any amendment of this certificate, or erasure, or failure to complete any part of it, may render it invalid.

The validity of this certificate shall extend until the date indicated for the particular vaccination or prophylaxis. The certificate shall be fully completed in English or in French. The certificate may also be completed in another language on the same document, in addition to either English or French.

Annex 7

1. In addition to any recommendation concerning vaccination or prophylaxis, the following diseases are those specifically designated under these Regulations for which proof of vaccination or prophylaxis may be required for travellers as a condition of entry to a State Party:

Vaccination against yellow fever.

2. Recommendations and requirements for vaccination against yellow fever:

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(a) For the purpose of this Annex:

- (i) the incubation period of yellow fever is six days;
- (ii) yellow fever vaccines approved by WHO provide protection against infection starting 10 days following the administration of the vaccine;
- (iii) this protection continues for 10 years; and
- (iv) the validity of a certificate of vaccination against yellow fever shall extend for a

period of 10 years, beginning 10 days after the date of vaccination or, in the case of a revaccination within such period of 10 years, from the date of that revaccination.

(b) Vaccination against yellow fever may be required of any traveller leaving an area where the Organization has determined that a risk of yellow fever transmission is present.

(c) If a traveller is in possession of a certificate of vaccination against yellow fever which is not yet valid, the traveller may be permitted to depart, but the provisions of paragraph 2(h) of this Annex may be applied on arrival.

(d) A traveller in possession of a valid certificate of vaccination against yellow fever shall not be treated as suspect, even if coming from an area where the Organization has determined that a risk of yellow fever transmission is present.

(e) In accordance with paragraph 1 of Annex 6 the yellow fever vaccine used must be approved by the Organization.

(f) States Parties shall designate specific yellow fever vaccination centres within their territories in order to ensure the quality and safety of the procedures and materials employed.

(g) Every person employed at a point of entry in an area where the Organization has determined that a risk of yellow fever transmission is present, and every member of the crew of a conveyance using any such point of entry, shall be in possession of a valid certificate of vaccination against yellow fever.

(h) A State Party, in whose territory vectors of yellow fever are present, may require a traveller from an area where the Organization has determined that a risk of yellow fever transmission is present, who is unable to produce a valid certificate of vaccination against yellow fever, to be quarantined until the certificate becomes valid, or until a period of not more than six days, reckoned from the date of last possible exposure to infection, has elapsed, whichever occurs first.

(i) Travellers who possess an exemption from yellow fever vaccination, signed by an authorized medical officer or an authorized health worker, may nevertheless be allowed entry, subject to the provisions of the foregoing paragraph of this Annex

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and to being provided with information regarding protection from yellow fever vectors. Should the travellers not be quarantined, they may be required to report any feverish or other symptoms to the competent authority and be placed under surveillance.

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