

Chapter 1

New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 14 to 17 September 2015, legislative instruments received from 28 August to 17 September 2015, and legislation previously deferred by the committee.

1.2 The report also includes the committee's consideration of responses arising from previous reports.

1.3 The committee generally takes an exceptions based approach to its examination of legislation. The committee therefore comments on legislation where it considers the legislation raises human rights concerns, having regard to the information provided by the legislation proponent in the explanatory memorandum and statement of compatibility.

1.4 In such cases, the committee usually seeks further information from the proponent of the legislation. In other cases, the committee may draw matters to the attention of the relevant legislation proponent on an advice-only basis. Such matters do not generally require a formal response from the legislation proponent.

1.5 This chapter includes the committee's examination of new legislation, and continuing matters in relation to which the committee has received a response to matters raised in previous reports.

Bills not raising human rights concerns

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns. The following categorisation is indicative of the committee's consideration of these bills.

1.7 The committee considers that the following bills do not require additional comment as they either do not engage human rights or engage rights (but do not promote or limit rights):

- Aviation Transport Security Amendment (Cargo) Bill 2015;
- Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015;
- Customs Amendment (Fees and Charges) Bill 2015;
- Customs Depot Licensing Charges Amendment Bill 2015;
- Customs Tariff Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015;
- Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015;

- Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015;
- Environment Protection and Biodiversity Conservation Amendment (Prohibition of Live Imports of Primates for Research) Bill 2015;
- Food Standards Australia New Zealand Amendment (Forum on Food Regulation and Other Measures) Bill 2015;
- Import Processing Charges Amendment Bill 2015; and
- Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015.

1.8 The committee considers that the following bills do not require additional comment as they promote human rights or contain justifiable limitations on human rights (and may include bills that contain both justifiable limitations on rights and promotion of human rights):

- Education Legislation Amendment (Overseas Debt Recovery) Bill 2015;
- Student Loans (Overseas Debtors Repayment Levy) Bill 2015;
- Fair Work Amendment (Gender Pay Gap) Bill 2015;
- Migration Amendment (Charging for a Migration Outcome) Bill 2015;
- Social Services Legislation Amendment (Cost of Living Concession) Bill 2015;
- Social Services Legislation Amendment (Low Income Supplement) Bill 2015;
- Social Services Legislation Amendment (More Generous Means Testing for Youth Payments) Bill 2015;
- Superannuation Legislation Amendment (Trustee Governance) Bill 2015; and
- Trade Marks Amendment (Iconic Symbols of National Identity) Bill 2015.

Instruments not raising human rights concerns

1.9 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.¹ Instruments raising human rights concerns are identified in this chapter.

1.10 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

1 See Parliament of Australia website, 'Journals of the Senate', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

Deferred bills and instruments

1.11 The committee has deferred its consideration of the following bill and instruments:

- Migration and Maritime Powers Amendment Bill (No. 1) 2015;
- Fair Work (State Declarations — employer not to be national system employer) Endorsement 2015 (No. 1) [F2015L01420]; and
- Radiocommunications (27 MHz Handphone Stations) Class Licence 2015 [F2015L01441].

1.12 The committee continues to defer its consideration of the Marriage Legislation Amendment Bill 2015 (deferred 8 September 2015) and the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).

1.13 As previously noted, the committee continues to defer one bill and a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.²

2 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); and Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015).

Response required

1.14 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Australian Immunisation Register Bill 2015

Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015

Portfolio: Health

Introduced: House of Representatives, 10 August 2015

Purpose

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

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

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

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

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

Use and disclosure of personal information from the Australian Immunisation Register

1.19 Under the bills, from late 2016 all persons in Australia enrolled in medicare and, if not eligible for medicare, anyone vaccinated in Australia, will be automatically registered on the AIR. This will include the vast majority of people in Australia, including those that choose not to receive vaccinations. The AIR can include significant personal information.¹

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

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

Right to privacy

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

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

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

Compatibility of the measure with the right to privacy

1.23 The statement of compatibility for the bill acknowledges that the bill engages the right to privacy but states:

The authorisations of used [sic] and disclosure of personal information are reasonable, appropriate and necessary for the objectives and purposes of the Bill and adequately describes persons who are requiring access to the immunisation Register to achieve the objectives of the Register. The provisions in the Bill also provide individuals with freedom to access their own personal information. The limiting provisions surrounding the access of personal information are well described. The limitations for purposes for which the information can be disclosed are a reasonable and proportionate use of individual's personal information.²

1.24 The committee notes that while the statement of compatibility does not explicitly set out the objectives of the bill, the objectives of the bill appear to include facilitating the establishment of records of vaccinations which will assist with information about vaccination coverage; monitoring the effectiveness of vaccinations; identifying areas of Australia at risk during disease outbreaks; and promoting health and well-being.³ The committee considers that these objectives are likely to be considered legitimate objectives for the purposes of international human rights law, and the inclusion of information on the AIR is likely to be rationally connected to these objectives.

1.25 However, it is unclear whether all of the powers enabling the use, recording and disclosure of information are proportionate to achieving those objectives. In

2 Explanatory memorandum (EM), Statement of Compatibility (SoC) 6.

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

particular, the committee is concerned about the ability of the minister (or his or her delegate) to authorise a person to use or disclose protected personal information for a purpose that the minister (or delegate) is satisfied is in the public interest. This power is in addition to the other powers under subclause 22(2), which provides detailed authorisation for the use and disclosure of protected information to specified persons or bodies and for specified purposes.

1.26 The statement of compatibility does not explain why it is necessary to include this broadly defined power. Rather, it states:

The Minister (or his or her delegate) may also disclose personal information if they are satisfied that it is in the public interest to do so. An example is where a child protection agency requests information when investigating the welfare of a child. Section 23 of the Bill creates an offence for making a record, using or disclosing personal information where not authorised. In the 2014-2015 financial year, more than 18,000 authorisations occurred for this purpose.⁴

1.27 Under international human rights law, when considering whether a limitation on a right is proportionate to achieve the stated objective it is necessary to consider whether there are other less restrictive ways to achieve the same aim. It is not clear why it is necessary to have such a broad power to enable disclosure to any person if it is considered to be 'in the public interest', in addition to the already expansive powers to authorise the use or disclosure of information under subclause 22(3) of the bill. If the intention is to allow child protection agencies to access the information, the provision could have been drafted more narrowly. The committee also notes that the statement of compatibility says that in one year, 18 000 authorisations for disclosure were made under the existing legislation. It would assist the committee to understand more about what type of authorisations these were, to whom and for what purpose.

1.28 It is also of note that the explanatory memorandum refers to disclosure being limited to 'a specified person or to a specified class of persons',⁵ however, clause 22(3) is not limited in this way but allows the minister to authorise 'a person' to use or disclose protected information.

1.29 The committee's assessment of the measure authorising the use or disclosure of protected information against article 17 of the International Covenant on Civil and Political Rights (right to privacy) raises questions as to whether the measure adopts the least rights restrictive approach.

1.30 As set out above, the measure authorising the use or disclosure of protected information engages and limits the right to privacy. The statement of compatibility does not sufficiently justify that limitation for the purposes of

4 EM, SoC 6.

5 EM 15.

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

Reversal of the burden of proof

1.31 Clause 23 of the bill makes it an offence for a person to make a record of, disclose or otherwise use protected information if that record, use or disclosure is not authorised by the bill. Clauses 24 to 27 provide a number of exceptions to this offence, including if the use is in good faith, the person is unaware that information is commercial-in-confidence, that the disclosure was to the person to whom the information relates or to the person who provided the information. These exceptions reverse the burden of proof, requiring the defendant to bear an evidential burden if relying on these defences.

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

Right to a fair trial (presumption of innocence)

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

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

1.35 Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision. Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

Compatibility of the measure with the right to a fair trial

1.36 The statement of compatibility for the bill does not acknowledge that the right to a fair trial is engaged by these measures. The explanatory memorandum to the bill also provides no justification for these measures.

1.37 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,⁶ and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.⁷ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.38 The committee's assessment of the reversal of the burden of proof against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial) raises questions as to whether the measure is justifiable.

1.39 As set out above, the reversal of the burden of proof engages and limits the right to a fair trial. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Health as to:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

6 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

7 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>.

Health Legislation Amendment (eHealth) Bill 2015

Portfolio: Health

Introduced: House of Representatives, 17 September 2015

Purpose

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

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

1.42 The bill seeks to simplify the privacy framework by revising the way that permissions to collect, use and disclose information are presented, and will include new permissions to reflect how entities engage with one another. The bill also seeks to introduce new criminal and civil penalties for breaches of privacy; provide that enforceable undertakings and injunctions are available; and extend mandatory data breach notification requirements.

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

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

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

1.45 The committee considers that the bill, in enabling the uploading of everyone's personal health records onto a government database without their consent, engages and limits the right to privacy.

Right to privacy

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

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and

- the right to control the dissemination of information about one's private life.

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

Compatibility of the measure with the right to privacy

1.48 The statement of compatibility acknowledges that the bill limits the right to privacy, however, it concludes that the limitation on the right to privacy is reasonable, necessary and proportionate. It explains the overall objective of the My Health Record system:

The objective of the system is to address the fragmentation of information across the Australian health system and provide healthcare providers the information they need to inform effective treatment decisions.¹

1.49 The statement of compatibility also explains that the bill responds to recommendations made from a review of the PCEHR system and addresses issues identified in the early years of operating the system.² It explains that the opt-out model is intended to drive the use of My Health Records by healthcare providers as part of normal healthcare in Australia:

Increased participation by individuals is anticipated to drive increased and meaningful use by healthcare providers. Combined with other measures to improve the usability of the system and the clinical content of My Health Records, if nearly all individuals have a My Health Record, healthcare providers will be more likely to commit to using and contributing to the My Health Record system, thereby increasing the utility of the system by increasing the amount of clinically valuable information.³

1.50 The committee notes that the overall objective of the My Health Record system, in seeking to provide healthcare providers with the necessary information to inform effective treatment decisions, is likely to be considered a legitimate objective for the purposes of international human rights law. However, it is questionable whether the objective behind the bill, in amending the system to an opt-out model, would be considered a legitimate objective for the purposes of international human rights law. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Increasing the number of people using the My Health Record system, in an attempt to drive increased use by healthcare providers, may be regarded as a desirable or convenient outcome but

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

2 EM, SoC 28.

3 EM, SoC 31-32.

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

1.51 Even if the opt-out model, and the corresponding limitation on the right to privacy, is considered to be seeking to achieve a legitimate objective, it must also be demonstrated that the limitation is proportionate to the objective being sought.

1.52 The statement of compatibility sets out a number of safeguards in place for the use and disclosure of healthcare information held on the database, noting:

Individuals who have a My Health Record can control who can access their information and what information can be accessed, and can elect to be notified when someone accesses their My Health Record. Individuals can set the access controls on their My Health Record online or over the phone. They can limit which healthcare providers can access their My Health Record...They can effectively remove records that have been uploaded...Once they have a My Health Record an individual can cancel their registration.⁴

1.53 The committee accepts that the safeguards contained in the My Health Record system, as a whole, are likely to mean that the limitation on the right to privacy, for those who actively register for a My Health Record and choose to have their private health records uploaded to the database, is likely to be proportionate to the overall objective of maintaining the My Health Record system.

1.54 However, the statement of compatibility gives little information about the proportionality of the proposed opt-out process. It explains that the opt-out process will be initially trialled in specific locations, meaning 'My Health Records will be created for people living in specified locations unless they say they do not want one'.⁵ Little detail is given as to how people in these specified locations will be notified that their personal health information will be automatically uploaded on a national register unless they take active steps to opt out.⁶

1.55 Further information is provided in the explanatory memorandum (EM) to the bill as to how the opt-out arrangements might work in practice. It states:

In any opt-out arrangements, it is intended that healthcare recipients would be given a reasonable amount of notice before opt-out is implemented so they could learn about the My Health Record system, and would be given a reasonable amount of time to decide whether or not to opt-out. Various methods would be made available to healthcare recipients to opt-out, for example, online, in person or by phone.⁷

4 EM, SoC 31.

5 EM, SoC 31.

6 EM, SoC 31.

7 EM 92.

1.56 However, the bill itself does not set out any safeguards to ensure that healthcare recipients would be given reasonable notice or a reasonable amount of time to decide whether to opt-out. Rather, a person's health records would automatically be registered on the system if the System Operator 'is satisfied' that the healthcare recipient 'has been given the opportunity' not to be registered (not a 'reasonable' opportunity).⁸

1.57 When a healthcare recipient elects not to be registered they must do so in 'the approved form' and if the rules so require it, to do so 'within a period, or on the occurrence of an event' specified in the rules. There is no requirement in the bill that this period of time be within a reasonable time after an individual is notified that their personal health records are being uploaded onto the national database—nor is there any requirement in the legislation to notify individuals that their personal health records will be automatically uploaded onto the register unless they actively opt-out.

1.58 In addition, once an individual's personal details are included on the My Health Record there is no ability for the person to erase their record from the register – all they can do is ensure that the personal health information stored on the database will not be authorised for disclosure.⁹

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

1.60 The EM also states that for those without online access, with communication disabilities, or without the required identity documents, 'other channels will be available, such as phone and in person'.¹⁰ No information is given as to how this would work in practice. There are no legislative safeguards in the bill to ensure that people will be appropriately notified.

1.61 The committee's interpretation of international human rights law is that, where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation.¹¹ This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended at any time.

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

8 See proposed clause 3 of proposed Schedule 1 to the *Personally Controlled Electronic Health Records Act 2012* as proposed to be inserted by item 106 of the bill.

9 EM 95, words underlined emphasised (words in bold in the original).

10 EM 94.

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

more people register for the My Health Record system it is not clear, on the basis of the information provided, why the current opt-in model has not succeeded. The committee notes that the Regulatory Impact Statement (RIS) attached to the EM for the bill weighed up a number of legislative options. No explicit consideration of the right to privacy is included in the RIS and there is no evidence that the option set out in the bill is in fact the least rights restrictive.

1.63 The bill also provides that once the opt-out trial has taken place the Minister for Health can, by making rules, apply the opt-out model to all healthcare recipients in Australia. In making this decision the bill provides that the minister 'may' take into account the evidence obtained in applying the opt-out model and any other matter relevant to the decision.¹² There is no requirement that the minister consider the privacy implications of this decision or whether people in the trials were given an appropriate and informed opportunity to opt-out.

1.64 The committee's assessment of the opt-out model provided for by the bill against article 17 of the International Covenant on Civil and Political Rights (right to privacy) raises questions as to whether the opt-out model is a justifiable limitation on the right to privacy.

1.65 As set out above, the opt-out model engages and limits the right to privacy. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Health as to:

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

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

1.66 Currently under the *Personally Controlled Electronic Health Records Act 2012* a person under the age of 18 years is automatically assigned an 'authorised representative' who has the power to manage the child's health records.¹³ The authorised representative can be any person who has parental responsibility for the

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

13 See subsection 6(1) of the *Personally Controlled Electronic Health Records Act 2012*.

child. A parent is considered to be the child's authorised representative until the child turns 18 years of age or until the child takes control of their record. A child who wishes to take control of their health record needs to satisfy the System Operator that they want to manage his or her own PCEHR and are capable of making decisions for themselves.¹⁴

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

Rights of the child

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

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

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

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

Compatibility of the measure with the rights of the child

1.70 The statement of compatibility for the bill recognises that the rights of the child are engaged by the bill but states:

The existing arrangements allowing parents or other appropriate people to act on behalf of a child (section 6 of the My Health Records Act) are not affected by the Bill. ... [T]he privacy of children is protected as representatives such as parents and legal guardians can set the privacy controls such as removing information or restricting access to content...

14 See subsection 6(3) of the *Personally Controlled Electronic Health Records Act 2012*.

The My Health Records Act continues to allow a child who is capable of making decisions for themselves to take control of their My Health Record, set access controls or cancel their registration (if already registered) if they choose to do so. The Bill will enable a child who is capable of making decisions for themselves to, like other individuals, opt themselves out of registration in the My Health Record system. ...

[T]he Bill shifts the duty of authorised representatives for children from being required to act in the 'best interests' of an individual, to a duty to give effect to the 'will and preferences' of the individual. This change realises the principle that children with appropriate maturity have an equal right to make decisions and to have those decisions respected...¹⁵

1.71 As noted above at [1.50] an attempt to drive increased use by healthcare providers, may be regarded as a desirable or convenient outcome but may not address an area of public or social concern that is pressing and substantial enough to warrant limiting the rights of the child.

1.72 In addition, the committee considers that the opt-out model may not be regarded as a proportionate means of achieving that objective. As discussed above, the amendments in the bill will enable the collection of all children's personal sensitive health information to be automatically included on the My Health Record, unless their authorised representative opts-out of this process, or they can prove to the Systems Operator that they should not have an authorised representative and so can opt-out themselves. Similarly to the discussion above at paragraphs [1.48] to [1.62], this significantly limits the child's right to privacy and, in so doing, limits the rights of the child. In particular, as the UN Committee on the Rights of the Child has noted, the child has the right to the protection of their confidential health-related information:

In order to promote the health and development of adolescents, States parties are also encouraged to respect strictly their right to privacy and confidentiality, including with respect to advice and counselling on health matters (art. 16). Health-care providers have an obligation to keep confidential medical information concerning adolescents, bearing in mind the basic principles of the Convention. Such information may only be disclosed with the consent of the adolescent, or in the same situations applying to the violation of an adult's confidentiality. Adolescents deemed mature enough to receive counselling without the presence of a parent or other person are entitled to privacy and may request confidential services, including treatment.¹⁶

1.73 Under the proposed opt-out arrangements in the bill a child must rely on their parent taking active steps to ensure the child's record is not automatically

15 EM, SoC 36.

16 Committee on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child* (2003), paragraph 11.

included on the My Health Record. As set out above at paragraphs [1.54] to [1.61] there are particular problems with the way in which the current opt-out arrangements are provided for in the bill. There is also no additional information as to how a child, who wishes to take control of their own record, is able to do so. No information is given as to what a child needs to do in order to satisfy the Systems Operator that their parent should not be considered to be their authorised representative. No information is given as to what timeframe the Systems Operator makes the decision as to whether the child is capable of managing their own affairs and whether this would occur within sufficient time to allow the child to exercise their opt-out rights.

1.74 The committee notes that the bill does impose an obligation on an authorised representative to give effect to the will and preferences of the child, unless to do so would pose a serious risk to the child's personal and social wellbeing.¹⁷ While this is a welcome measure, there is nothing in the legislation that makes this requirement binding, as there are no consequences in the legislation if the parent does not give effect to the child's will and preferences. In addition, even if a child does manage to become responsible for their own health records, it appears that the child's parent will be notified when that occurs.¹⁸

1.75 The committee's assessment of the automatic inclusion of all children's health records on the My Health Record register against the Convention on the Rights of the Child (rights of the child) raises questions as to whether the automatic inclusion of the health records of all children on the register is compatible with the rights of the child.

1.76 As set out above, automatic inclusion of the health records of all children on the register engages and limits the rights of the child. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Health as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**

17 See proposed new section 7A to the *Personally Controlled Electronic Health Records Act 2012*, item 64 of the bill.

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

- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the opt-out model is the least rights restrictive approach and whether there are sufficient safeguards in the legislation to protect the rights of the child.**

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

1.77 Currently under the *Personally Controlled Electronic Health Records Act 2012* (the PCEHR Act) a healthcare recipient can apply to the System Operator to register for the PCEHR, thereby opting-in to have their health care records included on the register. A person with disabilities can do so on an equal basis with other healthcare recipients. However, where the Systems Operator of the PCEHR is satisfied that a person aged over 18 years is not capable of making decisions for him or herself, another person will be considered to be the authorised representative of that person, and only that person will be able to manage the person's health records.¹⁹

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

Rights of persons with disabilities

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

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

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

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

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

19 See subsection 6(4) of the *Personally Controlled Electronic Health Records Act 2012*.

Compatibility of the measure with the rights of persons with disabilities

1.84 The statement of compatibility for the bill recognises that the rights of persons with disabilities are engaged by the bill, but states:

Consistent with Article 12, people with a disability are provided equal opportunity to participate in the My Health Record system and make decisions about access to their personal information. Continuing current arrangements, authorised representatives can support people to interact with the My Health Record system and act on behalf of the individual if they are unable to act for themselves. These arrangements allow for people with a disability to participate in the My Health Record system, control access to their personal information and withdraw participation in the My Health Record system if they choose to do so. This functionality also supports Article 22 of the CRPD protecting the privacy of people with a disability.

The Bill shifts the duty of authorised representatives from being required to act in the 'best interests' of an individual, to a duty to give effect to the 'will and preferences' of the individual. This change realises the principle that people with disability have an equal right to make decisions and to have those decisions respected...²⁰

1.85 As noted above at [1.50], an attempt to drive increased use by healthcare providers, may be regarded as a desirable or convenient outcome but may not address an area of public or social concern that is pressing and substantial enough to warrant limiting the rights of persons with disabilities.

1.86 In addition, the committee considers that the opt-out model may not be regarded as a proportionate means of achieving that objective. As discussed above, the amendments in the bill will enable the collection of the personal sensitive health information of all persons with disabilities to be automatically included on the My Health Record register, unless they or their authorised representative opts-out of this process. Similar to the discussion above at paragraphs [1.48] to [1.62], this significantly limits the right to privacy of persons with disabilities. The processes proposed by the bill also do not appear to provide persons with disabilities the support necessary to enable them to exercise their legal capacity.

1.87 In particular, the current law provides that whenever the Systems Operator is satisfied that a healthcare recipient 'is not capable of making decisions for himself or herself' the Systems Operator will deem whomever they are satisfied is an appropriate person to be the healthcare recipient's authorised representative. Once an authorised representative is stated by the Systems Operator to be acting for a healthcare recipient, that authorised representative is authorised to do anything the

20 EM, SoC 35.

healthcare recipient can do and the healthcare recipient is not entitled to have any role in managing their health records.²¹

1.88 However, article 12 of the CRPD affirms that all persons with disabilities have full legal capacity. While support should be given where necessary to assist a person with disabilities to exercise their legal capacity, it cannot operate to deny the person legal capacity by substituting another person to make decisions on their behalf. The UN Committee on the Rights of Persons with Disabilities has considered the basis on which a person is often denied legal capacity, which includes where a person's decision-making skills are considered to be deficient (known as the functional approach). It has described this approach as flawed:

The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.²²

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

1.90 The amendments in the bill, in requiring an authorised representative to make reasonable efforts to ascertain the healthcare recipient's will and preferences in relation to their My Health Record,²³ are important in respecting the rights of persons with disabilities. However, the design of the current legislation is such that the authorised representative would always be exercising substitute decision-making, rather than supported decision-making.²⁴ In addition, while the bill imposes an obligation on an authorised representative to give effect to the will and

21 See subsection 6(7) of the *Personally Controlled Electronic Health Records Act 2012*.

22 UN Committee on the Rights of Persons with Disabilities, *General comment No. 1: Article 12: Equal recognition before the law* (2014), paragraph 15.

23 See proposed new section 7A to the *Personally Controlled Electronic Health Records Act 2012*, item 64 of the bill.

24 See subsection 6(7) of the *Personally Controlled Electronic Health Records Act 2012*.

preferences of the healthcare recipient, there is nothing in the legislation that makes this requirement binding, as there are no consequences in the legislation if the authorised representative does not give effect to the person's will and preferences. The statement of compatibility states that a failure of the representative to meet these duties 'may result in their appointment being suspended or cancelled, or access to the individual's My Health Record being blocked under the My Health Records Rules'.²⁵ However, it is not clear how this would work in practice.

1.91 The use of substitute decision-making through the authorised representative process in the bill is of particular concern from an international human rights law perspective. As the UN Committee on the Rights of Persons with Disabilities has explained:

Substitute decision-making regimes, in addition to being incompatible with article 12 of the Convention, also potentially violate the right to privacy of persons with disabilities, as substitute decision-makers usually gain access to a wide range of personal and other information regarding the person. In establishing supported decision-making systems, States parties must ensure that those providing support in the exercise of legal capacity fully respect the right to privacy of persons with disabilities.²⁶

1.92 The Australian Law Reform Commission (ALRC) has identified a number of Commonwealth laws that are not fully compliant with article 12 of the CRPD and has made recommendations to bring legislation into line with international law. The recommendations could relevantly inform the drafting of the bill in a matter consistent with international law.²⁷

1.93 In addition, there is no information as to how persons with disabilities will be notified appropriately about their right to opt-out of the scheme. As the UN Committee on the Rights of Persons with Disabilities has noted:

Lack of accessibility to information and communication and inaccessible services may constitute barriers to the realization of legal capacity for some persons with disabilities, in practice. Therefore, States parties must make all procedures for the exercise of legal capacity, and all information and communication pertaining to it, fully accessible. States parties must review their laws and practices to ensure that the right to legal capacity and accessibility are being realized.²⁸

25 EM, SoC 35.

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

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

28 UN Committee on the Rights of Persons with Disabilities, *General comment No. 1: Article 12: Equal recognition before the law* (2014), paragraph 37.

1.94 The committee's assessment of the automatic inclusion of the health records of all persons with disabilities on the My Health Record register against the Convention on the Rights of Persons with Disabilities (rights of persons with disabilities) raises questions as to whether the automatic inclusion of the health records of all persons with disabilities on the register is compatible with the rights of persons with disabilities.

1.95 As set out above, automatic inclusion of the health records of all persons with disabilities on the register engages and limits the rights of persons with disabilities. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Health as to:

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

Civil penalty provisions

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

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

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

Right to a fair trial and fair hearing rights

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

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

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

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

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

1.102 There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be considered 'criminal' for the purposes of human rights law. The committee's Guidance Note 2 sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.²⁹

1.103 The statement of compatibility states that the civil penalty provisions in the bill should not be classified as criminal under human rights law:

Under the civil penalty provisions, proceedings are instituted by a public authority with statutory powers of enforcement in a court. A finding of culpability precedes the imposition of a penalty. This might make the penalties appear "criminal" however this is not determinative. While the provisions are deterrent in nature, these penalties generally do not apply to the public at large. Only a specific group of users, being healthcare providers and other participants in the My Health Record system with access to sensitive information will generally be impacted by these penalties. Further, the severity of the penalties is not too high, with the highest pecuniary penalty that can be imposed being only 600 units. This penalty is justified as the My Health Record system deals with privacy sensitive information and the misuse of this information needs to have proportionate penalties to the potential damage to healthcare recipients. In light of this analysis, the nature and application of the civil penalty provisions suggest that they should not be classed as criminal under human rights law.³⁰

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

30 EM, SoC 34.

1.104 The committee considers that a penalty of up to 600 penalty units is a substantial penalty that could result in an individual being fined up to \$108 000.³¹ This is in a context where the individual made subject to the penalty may be a healthcare provider, such as a nurse, or an administrator working for a healthcare provider. The maximum civil penalty is also substantially more than the financial penalty available under the criminal offence provision, which is restricted to a maximum of 120 penalty units (or \$21 600).

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

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

1.107 In addition, the committee notes that proposed new section 31C of the bill provides that each civil penalty provision under the bill is enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014*. This Act provides that criminal proceedings may be commenced against a person for the same, or substantially the same, conduct, even if a civil penalty order has already been made against the person.³² If the civil penalty provision is considered criminal in nature, this raises concerns under article 14(7) of the ICCPR which provides that no one is to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted (double jeopardy).

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

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

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

1.109 The statement of compatibility states that the objective of the penalty regime is to protect the private sensitive information held on the My Health Record system 'and the misuse of this information needs to have proportionate penalties to the potential damage to healthcare recipients'.³³ The committee considers that the protection of private sensitive information is a legitimate objective for the purposes of international human rights law. However, the objective behind including civil penalties of up to 600 penalty units (substantially more than the penalty available under the criminal offence provision) without the usual protections available to those charged with a criminal offence, and the reversal of the burden of proof, has not been explained in the statement of compatibility.

1.110 The statement of compatibility also does not explain how the civil penalty provisions, which are likely to be considered 'criminal' for the purposes of international human rights law, are proportionate to their objective. The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.111 The committee's assessment of the civil penalty provisions in the bill against article 14 of the International Covenant on Civil and Political Rights (right to a fair hearing) raises questions as to whether the provisions are criminal for the purposes of international human rights law and, if so, whether any limitation on the right to a fair hearing is justifiable.

1.112 As set out above, the civil penalty provisions engage and may limit the right to a fair hearing. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Health as to:

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

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

Portfolio: Employment

Introduced: House of Representatives, 10 September 2015

Purpose

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

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

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

Suspension of benefits for inappropriate behaviour

1.115 Item 18 of the bill would amend the SSA Act to provide that a penalty may be deducted from a job seeker's social security payment where a job seeker acts in an inappropriate manner, without a reasonable excuse, during an appointment such that the purpose of the appointment is not achieved.

1.116 This measure may result in individuals losing social security payments and accordingly engages and limits the right to social security and the right to an adequate standard of living.

Right to social security

1.117 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the

importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

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

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

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

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

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

Right to an adequate standard of living

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

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

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

1.123 The statement of compatibility acknowledges that the measure engages these rights. The statement of compatibility explains the legitimate objective of the measure as:

...discouraging job seekers from deliberately resisting assistance provided to them to identify and find work.¹

1.124 A legitimate objective must address a substantial and pressing concern and be based on empirical research or reasoning. No evidence is provided as to the extent to which individuals on social security are frustrating job search activities by inappropriate behaviour during appointments. On its face, the measure pursues an objective that appears to be desirable and convenient. Accordingly, it is questionable as to whether the measure pursues a legitimate objective for the purposes of international human rights law.

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

1.126 In terms of proportionality, the statement of compatibility states that:

The measure is proportionate as protection would be added to the compliance framework to ensure that a job seeker's behaviour can be assessed in a fair and reasonable manner.²

1.127 However, none of those protections are included in the bill. The committee's interpretation of international human rights law is that, where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation.³ This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended at any time.

1.128 Inappropriate behaviour is not defined in the bill and it is unclear how and on what basis a person's behaviour during an interview is inappropriate. While there may be extreme cases, where it is very clear that a person is deliberately behaving in a manner designed to frustrate an appointment, there are also likely to be many cases where a person's behaviour is not so extreme and a high degree of judgement is required to determine what is appropriate behaviour and what is inappropriate behaviour. Under this bill, such judgement is to be exercised with no statutory guidance. Moreover, many of these appointments will be with private sector service

1 Explanatory Memorandum (EM) 46.

2 EM 46.

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

providers, where the person who will make the judgement as to whether inappropriate behaviour has caused an appointment to fail is not bound by the Australian Public Service code of conduct. In the absence of statutory guidance, the bill may result in individuals losing social security benefits in circumstances which are unfair or unreasonable.

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

1.130 As set out above, the removal of the suspension of benefits for inappropriate behaviour engages and limits the right to social security and right to an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Employment as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether there are sufficient safeguards in the legislation.**

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

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

1.132 This measure may result in individuals losing social security payments and accordingly engages and limits the right to social security and the right to an adequate standard of living.

Right to social security

1.133 The right to social security is outlined above at paragraphs [1.117] to [1.120].

Right to an adequate standard of living

1.134 The right to an adequate standard of living is outlined above at paragraphs [1.121] to [1.122].

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

1.135 The statement of compatibility explains that the measure does limit the right to social security and the right to an adequate standard of living and that such limitations are justified for the purposes of international human rights law.

1.136 The statement of compatibility states that:

...this measure has the legitimate objective of reducing the reliance on participation payments by job seekers who have successfully shown they are capable of obtaining suitable work.⁴

1.137 A legitimate objective must address a substantial and pressing concern and be based on empirical research or reasoning. In terms of empirical research, the explanatory memorandum (EM) explains that in 2009-2010, 45% of penalties for refusing a suitable job were waived and that in 2013-14, 78% of penalties for refusing a suitable job were waived.⁵

1.138 The EM argues that the waiver provisions act as an incentive for non-compliance. However, no evidence is provided that the high waiver rates are a result of the legislation requiring the waiver to be granted rather than there being a genuine reason for the department granting the waiver in each case. On its face, the measure pursues an objective that appears to be desirable and convenient. Accordingly, it is questionable as to whether the measure pursues a legitimate objective for the purposes of international human rights law.

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

1.140 In terms of proportionality the statement of compatibility states:

Existing protections such as the reasonable excuse provisions and safeguards for vulnerable job seekers will still apply, and the Bill will not change the process used to make decisions as to what constitutes suitable work. A job seeker cannot be penalised for failing to accept a job that they are not capable of doing (or for which the employer will not provide training), that does not meet the applicable statutory conditions, that involves unreasonable commuting or that would aggravate any pre-existing medical conditions.⁶

1.141 However, notwithstanding these protections, as set out in the EM, there is a very high waiver rate of the eight week penalty for failure to accept a suitable job

4 EM 48.

5 EM 9.

6 EM 48.

applied by the department. No evidence is provided that these waivers are applied by the department inappropriately. If the waivers are currently applied appropriately it is foreseeable that the bill, in taking away the department's discretion to apply a waiver, may result in undue hardship. This is not addressed in the statement of compatibility.

1.142 Further, in order for a measure to impose a proportionate limitation on the right to social security and right to an adequate standard of living, the measure must be the least rights restrictive method of achieving the stated objective. Given the high waiver rates by the department, it is possible that measures could be introduced to reduce the waiver rate by tightening the circumstances in which a waiver may be granted. In removing the ability of the department to provide a waiver in any circumstance, the statement of compatibility has not demonstrated that a less rights restrictive approach of changing the grounds on which a waiver may be granted is not feasible or possible. Accordingly, the statement of compatibility has not demonstrated that the measure is proportionate for the purposes of international human rights law.

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

1.144 As set out above, the removal of waivers for refusing or failing to accept a suitable job engages and limits the right to social security and right to an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Employment as to:

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

Social Services Legislation Amendment (No Jab, No Pay) Bill 2015

Portfolio: Social Services

Introduced: House of Representatives, 16 September 2015

Purpose

1.145 The Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (the bill) seeks to amend the *A New Tax System (Family Assistance) Act 1999* to provide that child care benefit, child care rebate and the Family Tax Benefit Part A supplement will only be payable where a child fully meets the immunisation requirements.

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

No exception for religious or conscientious objections

1.147 Currently the *A New Tax System (Family Assistance) Act 1999* provides that certain family assistance payments are conditional on meeting the childhood immunisation requirements for children at all ages. However, there are currently exceptions where the child's parent has declared in writing that he or she has a conscientious objection to the child being immunised. A conscientious objection is defined as follows:

An individual has a conscientious objection to a child being immunised if the individual's objection is based on a personal, philosophical, religious or medical belief involving a conviction that vaccination under the latest edition of the standard vaccination schedule should not take place.¹

1.148 The bill would repeal this exception meaning that certain family assistance payments would only be payable in relation to a child that has been immunised (unless there is a medical contradiction to immunisation or immunisation is unnecessary as the child has developed a natural immunity). There would no longer be an exception where the parent objected to immunisation based on their religious or personal beliefs.

1.149 The committee considers that the removal of the exemption for conscientious objectors engages and may limit the right to freedom of thought, conscience and religion.

Right to freedom of thought, conscience and religion

1.150 Article 18 of the International Covenant on Civil and Political Rights (ICCPR) protects the rights of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs. Subject to certain limitations, persons also have the right to demonstrate or manifest religious or other

1 See section 5 of the *A New Tax System (Family Assistance) Act 1999*.

beliefs, by way of worship, observance, practice and teaching. The right includes the right to have no religion or to have non-religious beliefs protected.

1.151 The right to freedom of thought, conscience and religion not only requires that the state should not, through legislative or other measures, impair a person's freedom of thought, conscience and religion, but that the state should also take steps to prevent others from coercing persons into having, or changing, beliefs or religions.

1.152 The right also requires the state to respect the convictions of parents and guardians of children in the provision of education. This allows public schools to teach particular religions or beliefs, but only if it is taught in a neutral and objective way or there is a non-discriminatory alternative for those children whose parents or guardians do not wish them to be educated in that religion or belief.

1.153 The right to hold a religious or other belief or opinion is an absolute right. However, the right to exercise one's belief can be limited given its potential impact on others. The right can be limited as long as it can be demonstrated that the limitation is reasonable and proportionate and is necessary to protect public safety, order, health or morals or the rights of others. The right to non-discrimination often intersects with the right to freedom of religion and each right must be balanced against one another.

Compatibility of the measure with the right to freedom of thought, conscience and religion

1.154 The statement of compatibility acknowledges that the right to freedom of thought, conscience and religion is engaged by this measure as families will no longer be eligible to receive certain levels of family assistance where they have a conscientious or religious belief that prevents them from immunising their children. However, it notes that article 18 of the ICCPR permits limitations on the right if necessary to protect public health or the fundamental rights and freedoms of others and states:

The objection to vaccination can limit the rights of others to physical and mental health. As the most effective method of preventing infectious diseases, vaccination provides a necessary protection of public health.

Further, these families continue to have the right to uphold their conscientious or religious belief by electing not to receive child care benefit, child care rebate or the family tax benefit Part A supplement.²

1.155 The statement of compatibility also states that the purpose of the bill is to 'encourage parents to immunise their children' and notes that in so doing the bill promotes the right to health as vaccination is recognised to be the most effective

method of preventing infectious diseases and providing protection to both the vaccinated individuals and the wider community.³

1.156 The committee accepts that the objective of the bill, in encouraging parents to immunise their children and thereby prevent the spread of infectious diseases is a legitimate objective for the purposes of international human rights law.

1.157 However, no information is provided in the statement of compatibility as to whether the measures in the bill are rationally connected to that objective. In other words, no information is provided to explain whether the measures would be likely to be effective in achieving the objective of encouraging vaccination. It is not clear to the committee whether these particular measures which result in certain family assistance payments being withheld would be likely to encourage persons with strongly held objections to vaccinate their child.

1.158 In addition, little information is provided in the statement of compatibility as to whether the measures are proportionate to their stated objective. In determining whether a measure is proportionate regard must be had to whether there are any less rights restrictive options available to achieve that objective. No information is given as to whether other less restrictive options, such as education campaigns or support for parents to encourage them to vaccinate their child, have been explored.

1.159 The committee's assessment of the removal of the conscientious objector exemption against article 18 of the International Covenant on Civil and Political Rights (right to freedom of thought, conscience and religion) raises questions as to whether the limitation is justifiable.

1.160 As set out above, the removal of the conscientious objector exemption engages and limits the right to freedom of thought, conscience and religion. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to:

- **whether there is a rational connection between the limitation and the stated objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular that it is the least rights restrictive approach to achieving that objective.**

3 EM, SOC 1-2.

Advice only

1.161 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Social Services Legislation Amendment (Youth Employment) Bill 2015

Portfolio: Social Services

Introduced: House of Representatives, 16 September 2015

Purpose

1.162 The Social Services Legislation Amendment (Youth Employment) Bill 2015 (the bill) seeks to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to:

- amend the ordinary waiting period for working age payments;
- remove access to Newstart Allowance and Sickness Allowance to 22 to 24 year olds and replace these benefits with access to Youth Allowance (Other);
- provide for a four-week waiting period for certain persons aged under 25 years applying for Youth Allowance (Other) or Special Benefit; and
- introduce new requirements and activities for job seekers to complete during the above four-week waiting period as part of new program 'RapidConnect Plus'.

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

Background

1.164 The bill reintroduces a number of measures previously included in the Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015 (the previous bill), which itself reintroduced measures previously contained within the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014 (the No. 4 bill). The No. 4 bill reintroduced some measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (the No. 1 bill) and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 (the No. 2 bill).

1.165 The committee reported on the No. 1 bill and No. 2 bill in its *Ninth Report of the 44th Parliament*,¹ and concluded its examination of the No. 2 bill in its *Twelfth*

1 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 83.

*Report of the 44th Parliament.*² In that report, the committee requested further information from the Minister for Social Services regarding measures contained within the No. 1 bill.³

1.166 The committee then considered the No. 4 bill in its *Fourteenth Report of the 44th Parliament*, and in the *Seventeenth Report of the 44th Parliament* concluded its consideration of the No. 1 bill and No. 4 bill.⁴

1.167 The committee considered the previous bill in its *Twenty-fourth Report of the 44th Parliament*, and requested further information from the Minister for Social Services as to whether the bill was compatible with Australia's international human rights obligations.⁵

1.168 Noting that the previous bill had been negated in the Senate on 9 September 2015, the committee concluded its consideration in its *Twenty-eighth Report of the 44th Parliament.*⁶

Schedule 2 – Age requirements for various Commonwealth payments

1.169 Schedule 2 of the bill would provide that 22-24 year olds are no longer eligible for Newstart Allowance (or Sickness Allowance), and are instead eligible for Youth Allowance. Existing recipients of Newstart Allowance (or Sickness Allowance) would continue to receive those payments until such time as they are no longer eligible.

1.170 The committee examined this measure in its previous analysis, and considered that increasing the age of eligibility for various Commonwealth payments engages and limits the right to equality and non-discrimination.

Right to equality and non-discrimination

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

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

2 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 67.

3 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 55-64.

4 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 94-95, and Parliamentary Joint Committee on Human Rights, *Seventeenth Report of the 44th Parliament* (2 December 2014) 11-13.

5 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (24 June 2015) 12-19.

6 Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 51-63.

entitled without discrimination to the equal and non-discriminatory protection of the law.

1.173 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),⁷ which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.⁸ The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.⁹

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

1.174 The changes to the threshold for Newstart eligibility in Schedule 2 of the bill reintroduce measures contained within the No. 2 bill, the No. 4 bill and the previous bill. The statement of compatibility for the bill does not identify the measures as engaging and potentially limiting the right to equality and non-discrimination.

1.175 As discussed in previous analysis in the committee's *Ninth Report of the 44th Parliament*, *Twelfth Report of the 44th Parliament*, *Twenty-fourth Report of the 44th Parliament* and *Twenty-eighth Report of the 44th Parliament*, the measure clearly engages the right to equality and non-discrimination as by reducing access to the amount of social security entitlements for persons of a particular age, the measure directly discriminates against persons of this age group.¹⁰

1.176 The committee notes that it has previously commented on its expectation that where a measure that it has considered is reintroduced, previous responses to the committee's requests for further information be used to inform the statement of compatibility for the reintroduced measure. It was on the basis of the further information provided by the Minister for Social Services that the committee was previously able to conclude that the measure was compatible with the right to equality and non-discrimination. This information has again not been provided in the statement of compatibility for the new bill.

1.177 As the statement of compatibility does not identify the measure as engaging and limiting the right to equality and non-discrimination despite the minister's

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

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

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

10 See Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 94-95; *Twelfth Report of the 44th Parliament* (24 September 2014) 78-79 (where the committee concluded that the measure was incompatible with the right to equality and non-discrimination); *Twenty-fourth Report of the 44th Parliament* (24 June 2015) 13-15; and *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 52-55.

previous dialogue with the committee on the measure, the scrutiny dialogue between the committee and proponents of legislation is less effective.

1.178 Accordingly, the committee reiterates its above comments and concludes its consideration of the matter on the basis of the previous additional information provided by the Minister for Social Services.

Schedule 3 – Income support waiting periods and Schedule 4 – Other amendments

1.179 Schedule 3 of the bill would introduce a requirement that individuals under the age of 25 be subject to a four-week waiting period, as well as any other waiting periods that may apply, before social security benefits become payable.

1.180 The measure would apply to applicants seeking Youth Allowance (Other) and Special Benefit. The four-week waiting period may be reduced if a person has previously been employed, and there are a range of exemptions for parents and individuals with a disability. The new bill also has an additional exemption where a person may need to be reassessed on the basis of new or additional information being provided, leading to that person being classified as requiring a certain level of employment services or disability employment services.

1.181 The committee considered previously that the income support waiting periods engage and limit the rights to social security and an adequate standard of living.

Right to social security

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

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

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

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

- the immediate obligation to satisfy certain minimum aspects of the right;

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

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

Right to an adequate standard of living

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

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

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

1.188 The introduction of the four-week waiting period in Schedule 3 of the bill reintroduces measures contained within the No. 2 bill, the No. 4 bill and the previous bill (amended in the previous bill from a 26-week waiting period).

1.189 The committee accepted in relation to the previous bill that the measure pursues a legitimate objective and that the measure is rationally connected to that objective, but sought further information from the minister in relation to the proportionality of the measure. Of particular concern to the committee was whether the measure was the least rights restrictive approach.

1.190 The minister's response to the committee's questions regarding the previous bill provided advice that the measure specifically targets those young people who are job ready and that there are important protections for parents and those assessed as unable to work who will be exempt from the measure. However, the measure will apply to all individuals assessed as job ready (in Stream A of jobactive) and there will be no individual assessment of each job seeker's engagement with seeking work, nor an individual assessment of their ability to find jobs. The committee also noted that currently, there is a youth unemployment rate of 13.4 per cent which suggests there are more job seekers than jobs available. Evidence was not provided in the minister's response to confirm that all jobseekers will be eligible and able to immediately engage with education and immediately gain income support.

1.191 Further, the measure does not allow for an individual assessment of the individual's capacity to live without social security support for four weeks and there

is no discretion that would enable Centrelink to waive the waiting period if the individual does not meet the set exemptions. In the absence of these protections, the committee previously considered that the measure cannot be said to be the least rights restrictive means of achieving a legitimate objective and therefore does not impose a proportionate limitation on the right to social security.

1.192 In relation to the right to an adequate standard of living, the minister's further information in relation to the previous bill suggested that 46% of young people do not live at home and are thus not fully supported by their parents. The majority of these would appear to be in private rental accommodation of some sort. The committee noted that it is not clear how those young people will meet the costs of housing during the waiting period and meet other basic living costs to provide an adequate standard of living.

1.193 The committee also noted that the additional funding provided to Emergency Relief providers would not be able to ensure that all individuals affected by the measure will be able to maintain an adequate standard of living.

1.194 The committee therefore considers that the measure is not proportionate as it does not include an individual assessment for each person affected by the measure nor does it provide safeguards to ensure that no individual is left unable to meet their basic needs during the waiting period.

1.195 The committee notes that Schedule 4 of the bill also introduces new measures intended to complement the income support waiting period in Schedule 3. These measures would require certain job seekers to participate in a new programme, RapidConnect Plus, during the four-week waiting period in order to receive social security payments at the end of the waiting period. RapidConnect Plus would require job seekers who have been classified as not having significant barriers to employment to participate in a number of activities during this period, including attending interviews with jobactive providers, entering into a Job Plan and undertaking job searches. If job seekers do not complete these activities without a reasonable excuse, the waiting period may be further extended beyond the four-week period.

1.196 The committee considers that as the new measures under Schedule 4 of the bill extend the obligations required of job seekers under Schedule 3 of the bill, they potentially compound the existing limitations on the right to social security and the right to an adequate standard of living. This is especially the case as the requirements in Schedule 4 would require job seekers to undertake activities that may result in the job seeker incurring costs (such as travel and clothing) while they are receiving no social security benefits.

1.197 The committee therefore reiterates its comments in relation to these measures in the previous bill, particularly, that its assessment of the proposed income support waiting period for young people aged under 25 against articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights

(right to social security and right to an adequate standard of living) raises questions as to whether the changes are justifiable under international human rights law.

1.198 As set out above, the proposed income support waiting periods engage and limit the right to social security and right to an adequate standard of living under articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights. Some committee members consider that the measure has not been justified as a proportionate limitation on those rights. Accordingly, those members of the committee consider that the measure is incompatible with the right to social security and the right to an adequate standard of living.

1.199 Other members of the committee consider that the limitation on the right to social security and right to an adequate standard of living under articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights has been justified and further consider that incentivising young people to find work is an important policy objective.

Right to equality and non-discrimination

1.200 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR. More information is provided above at paragraphs [1.171] to [1.173].

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

1.201 The committee previously concluded that the measure (in relation to the No. 2 bill) was incompatible with the right to equality and non-discrimination on the basis of age (direct discrimination).¹¹ In its analysis in relation to the previous bill, the committee again considered that the income support waiting periods for young people aged under 25 raise questions as to whether the measure is justifiable under international human rights law.

1.202 The statement of compatibility for the bill acknowledges that the measure engages the right to equality and non-discrimination on the basis of age, but concludes that 'those subjected to a waiting period are young enough to reasonably draw on family support to assist them during the waiting period'.¹²

1.203 As noted in its analysis on the previous bill, the committee considers that a measure that impacts differentially on or excludes individuals based on their age is likely, on its face, to be incompatible with the right to equality and non-discrimination. In this respect, by imposing a four-week waiting period based on a person's age, the measure directly discriminates against persons under 25 years of age.

11 See Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 79, para 2.25.

12 EM, SoC 12.

1.204 While the committee had accepted that the measure pursues a legitimate objective and that the measure is rationally connected to that objective, it considered that there were issues in relation to the proportionality of the measure.

1.205 The statement of compatibility states that 43 per cent of young people receiving unemployment benefits are living at home with their parents, compared with 7 per cent of those aged over 25.¹³ This shows there is some evidence that the measure is targeted at young people, taking into account their ability to seek support from their parents. However, this also shows that the majority of young people on unemployment payments are not living at home (and are thus likely to have private rental costs) and are less likely to be able to rely on their parents for support during the waiting period. These figures also do not show whether a person living at home with their parents are doing so on a rent-free basis or whether such persons might be financially supporting their family members.

1.206 A human rights assessment of the measure must establish that the proposed age cut offs are necessary, reasonable and proportionate in pursuit of a legitimate objective. The statement of compatibility for the bill, along with further information provided by the minister in relation to the previous bill, do not demonstrate that nearly all, or even a majority, of individuals aged 25 or under will be able to rely on their parents for economic support. As such, the measure is not sufficiently targeted to impose a proportionate limitation on the right to equality and non-discrimination based on age.

1.207 The committee therefore reiterates its comments in relation to these measures in the previous bill, particularly, that its assessment of the proposed income support waiting periods for young people aged under 25 against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) raises questions as to whether the changes are justifiable under international human rights law.

1.208 As set out above, the proposed income support waiting period engages and limits the right to equality and non-discrimination as the four-week waiting period is applied based on a person's age. Some committee members consider that the measure has not been justified as a proportionate limitation on this right. Accordingly, those committee members consider that the measure is incompatible with the right to equality and non-discrimination.

1.209 Other members of the committee consider that the limitation on the right to equality and non-discrimination has been justified and further consider that incentivising young people to find work is an important policy objective.

13 EM, SoC 12.

