

## Dental Benefits Legislation Amendment Bill 2014

*Portfolio: Health*

*Introduced: House of Representatives, 26 March 2014*

### Purpose

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

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

2.24 The bill also seeks to amend the *Dental Benefits Act 2008* to:

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

### Background

2.25 The committee reported on the bill in its *Sixth Report of the 44th Parliament*.

### Committee view on compatibility

#### ***Right to fair trial and fair hearings right***

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

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

### Minister's response

At paragraph 1.40 of the Report, the Committee seeks clarification on whether the civil penalty proposed by new section 32D may be regarded as 'criminal' for the purposes of articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

Proposed new section 32C provides a power to the Chief Executive Medicare to issue to certain persons a notice to produce documents

relevant to substantiating the payment of dental benefits under the Dental Benefits Act 2008 (the DB Act). A notice may be issued to the dental provider who billed the service or to another person who may have custody or control of relevant documents, other than the patient or the person who incurred the dental expenses in respect of the service (for example, the patient's parent).

Where a dental provider does not comply with the notice to produce documents, the amount paid, purportedly by way of dental benefit, is recoverable as a debt due to the Commonwealth from the dental provider. The civil penalty provision proposed by new section 320 applies to people, other than a dental provider, who fail to comply with the notice to produce documents. This is intended to apply to entities such as a corporatised dental practice which may employ the dental provider.

The provisions in Part 3 of Schedule 1 of the Bill requiring the production of documents are modelled closely on provisions contained in the Health Insurance Act 1973 (the HI Act) and are intended to be similar in scope. As with the civil penalty provision under section 129AAE of the HI Act, proposed new section 32D is necessary as it would not be acceptable to seek recovery of dental benefits from a practitioner and impose a penalty if that practitioner was unable to verify the benefit paid for the service due to refusal by another party to provide relevant documents. This compliance measure would also be unworkable if practitioners were able to establish corporate entities or structure employment arrangements in such a way as to avoid complying with the requirements of the proposed legislation.

The United Nations Human Rights Committee established under the ICCPR can be referred to for guidance on the nature of the proposed civil penalties for the purposes of human rights law.

In its General Comment 32, the United Nations Human Rights Committee sets out its view that an offence, designated as 'civil' in domestic law, may be regarded as 'criminal' because of its purpose, character or severity.

In considering the nature of the civil penalty under proposed section 320, the penalty could be considered as punitive as its purpose is to deter non-compliance and to punish non-compliance when it occurs.

However, the penalty does not apply to the public at large and operates in a regulatory context. It applies only to people, other than dental providers or patients, who may have custody of a document containing information able to substantiate payment of a dental benefit. It is necessary to ensure the integrity of the regulatory framework for the payment of dental benefits. Therefore, the civil penalty does not appear to be criminal in nature.

In relation to the severity of the penalty, the maximum penalty imposed under proposed new section 320 is 20 penalty units for an individual and 100 penalty units for a corporation. This penalty is minor and does not

reflect the degree of severity required to be considered 'criminal' for the purposes of human rights law.

Given the purpose, character and severity of the penalty, it is my view that it should not be considered as 'criminal' for the purposes of human rights law.<sup>1</sup>

### **Committee response**

#### **2.27 The committee thanks the Minister for Health for his response and has concluded its examination of this matter.**

##### *Reverse burden of proof – presumption of innocence*

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

### **Minister's response**

At paragraph 1.53 of the Report, the Committee seeks advice on the compatibility of the reverse onus of proof provision in proposed new subsection 32D (2) with the right to a fair trial and fair hearing contained in article 14 of the ICCPR.

Proposed subsection 32D (2) provides that it is a defence if the failure to produce documents is brought about through circumstances outside the person's control or if they could not reasonably be expected to guard against the failure.

This limitation on the right to be presumed innocent is reasonable and necessary because the defendant alone will have knowledge of the circumstances that might reasonably excuse non-compliance. As the civil evidence and procedure rules apply, the defendant need only prove their innocence on the balance of probabilities, rather than to the criminal evidence requirement of 'beyond reasonable doubt'.<sup>2</sup>

### **Committee response**

#### **2.29 The committee thanks the Minister for Health for his response and has concluded its examination of this matter.**

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1 See Appendix 2, Letter from the Hon Peter Dutton MP, Minister for Health, to Senator Dean Smith, 29 May 2014, pp 1-2.

2 See Appendix 2, Letter from the Hon Peter Dutton MP, Minister for Health, to Senator Dean Smith, 29 May 2014, p. 2.

**2.30** However, the committee notes that, where it is proposed to place a reverse burden of proof on a defendant in criminal or civil penalty provisions, the committee's usual expectation is that the statement of compatibility address the question of why a reverse burden of proof is preferred over the imposition of an evidential burden (on the basis that, where a right is to be limited, a less intrusive alternative should be preferred).

*Exclusion of the right not to incriminate oneself*

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

**Minister's response**

Paragraph 1.61 of the Report seeks clarification on whether the limitation of the right not to incriminate oneself in proposed section 32E is a reasonable and necessary limitation and is proportionate to achieving a legitimate objective.

As noted in the explanatory memorandum to the Bill (page 10):

This Part is intended to ensure that benefits may be recovered if they have been incorrectly paid. Excusing persons from producing documents on the basis that they may have to repay benefits would allow persons to retain incorrectly paid benefits by refusing to comply with the request. The public interest in ensuring that benefits under the Act are not paid inappropriately, and that inappropriate payments are recovered, is considered to outweigh the harm to individual rights from encroaching on the privilege against self-incrimination.

Prior to the introduction of similar powers to the HI Act requiring the production of documents to substantiate Medicare benefits (and a similar abrogation of the privilege against self-incrimination), around 20 per cent of practitioners did not cooperate with the request to produce documents.

The abrogation of the privilege against self-incrimination is necessary to ensure the integrity of programmes operating under the DB Act, in particular, the new Child Dental Benefits Schedule (COBS). The COBS is expected to spend \$2.5 billion of public money over four years from 2014-15.

Further, under the COBS, benefits are limited to a maximum of \$1,000 per eligible patient over two calendar years. This means that, if a dental provider claims benefits for services that have not been provided, the patient may not have sufficient funds remaining in the cap to receive necessary treatment from a different dental provider. This may leave patients in need of treatment but unable to pay for it themselves. The

requirement for providers to produce documents provides the Department of Human Services with a mechanism to limit adverse effects on patients, particularly where benefits are limited.

Under these circumstances, I consider that the protection of public money and patient access to timely and appropriate dental treatment outweigh the harm on an individual's rights to be protected against self-incrimination.<sup>3</sup>

### **Committee response**

**2.32 The committee thanks the Minister for Health for his response and has concluded its examination of this matter.**

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3 See Appendix 2, Letter from the Hon Peter Dutton MP, Minister for Health, to Senator Dean Smith, 29 May 2014, p. 3.