

PUBLIC HEALTH AND WELLBEING BILL

Statement of compatibility

Mr ANDREWS (Minister for Health) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act:

PUBLIC HEALTH AND WELLBEING BILL

1716 ASSEMBLY Thursday, 8 May 2008

Part 8 — Management and control of infectious diseases, micro-organisms and medical conditions

Part 8 of the bill provides for the management and control of infectious diseases, micro-organisms and medical conditions. Each division regulates a discrete aspect. This part of the bill engages a number of human rights and for this purpose each division is discussed in turn.

Division 1 — principles applying to the management and control of infectious diseases

The objective of this division is to set out the principles that should be taken into account when interpreting and applying the provisions in part 8 of the bill insofar as they relate to infectious diseases. The division does not limit any of the rights specifically protected by the charter.

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ASSEMBLY Thursday, 8 May 2008

Section 10(c) — right not to be subjected to medical treatment without his or her full free and informed consent

Clauses 113 and 116 limit a person's right not to be subjected to medical treatment without his or her full, free and informed consent because they enable the chief health officer (CHO) to make an order that requires a person to undergo an examination and/or test, and make it an offence to fail to comply with such an order.

Clauses 117 and 120 also limit this right because they enable the CHO to require a person to:

undergo an assessment by a specified psychiatrist or specified neurologist;

receive specified prophylaxis, including a specified vaccination, within a specified period; and

undergo specified pharmacological treatment for the infectious disease.

Reasonableness of the limitation

Nature of the right

The nature of this right is considered above in the context of the overview of the rights engaged by the bill.

Importance and purpose of the limitation

The purpose of requiring a person to undergo a test or examination is to ascertain whether a person has an infectious disease that may constitute a serious risk to public health. Ascertaining whether a person is infected with a particular infectious disease will assist the CHO to make an informed decision about whether a public health order should be made with respect to the person.

The purpose of requiring a person to undergo an assessment by a psychiatrist or neurologist is to ascertain whether a person is suffering co-morbidities that affect the person's ability or willingness to take steps to reduce the risk their infectious disease poses to others. Access to this information will enable the CHO to make an informed decision about the most appropriate way to control the risk that person poses to others.

The purpose of requiring a person to undergo specified pharmacological treatment or receive specified prophylaxis for the infectious disease is to reduce the risk that the person would otherwise pose to public health. It is anticipated that the power to require a person to undergo pharmacological treatment will be predominantly exercised to require people with tuberculosis (TB) to take antituberculosis medication. Individuals with TB who do not adhere to prescribed treatment pose a particularly serious risk to public health, because they are more likely to develop multiple drug resistant TB (MDR-TB) or extensively drug-resistant TB (XDR-TB).

Nature and extent of the limitation

The circumstances in which the CHO can make an examination and testing order or a public health order are clearly specified in the bill. Moreover, when making either order, the CHO will be required to have regard to the principles set out in clauses 111 and 112 as well as part 2 of the bill.

A person who fails to comply with an examination and testing order will be guilty of an offence against the bill and may be fined up to 60 penalty units. Such a person could also be detained for 72 hours at a specified place for the purpose of undergoing the specified examination or test. However, the person could not be physically forced to undergo a test or examination. Similarly, while a person who fails to comply with a public health order will be guilty of an offence and may be fined up to 120 penalty units, that person could not be physically forced to undergo an assessment, or receive prophylaxis or pharmacological treatment.

The relationship between the limitation and its purpose

There is a direct and rational relationship between these limitations on the right not to be subjected to medical treatment without one's full, free and informed consent and the purposes these limitations seek to achieve.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

The Health Act does not enable a person to be required to accept pharmacological treatment for the purpose of reducing the person's risk to public health. The current scheme is therefore less restrictive of a person's right not to be subjected to medical treatment without one's full, free and informed consent. The disadvantage of not having the power to compel a person to receive medical treatment is that in some circumstances it may be necessary to indefinitely detain a person who could be completely cured of the infectious disease.

Other relevant factors

A number of other jurisdictions in Australia authorise a person to be required to accept treatment for an infectious disease (see section 23 of the Public Health Act 1991 (NSW); section 130 of the Public Health Act 2005 (Qld) and section 42 of the Public Health Act 1997 (Tas)).

Conclusion

These clauses limit a person's right not to be subject to medical treatment without his or her full, free and informed consent. Nevertheless, these limitations are reasonable and demonstrably justified in a free and democratic society because of the importance of protecting the community from the spread of infectious diseases; **a person cannot be physically forced to receive medical treatment** (broadly defined); and the maximum penalty that may be imposed on a person who fails to comply with an examination and testing order or a public health order is a fine rather than a term of imprisonment.

Section 12 — freedom of movement

The making of a public health order may also limit the right to freedom of movement because an individual subject to a public health order may be required to refrain from visiting a specified place or a specified class of place or reside at a specified place of residence at all times or during specified times.

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Reasonableness of the limitation

Nature of the right

The nature of this right is considered above in the general overview of the rights engaged by the bill.

Importance and purpose of the limitation

The purpose of limiting the freedom of movement of a person subject to a public health order is to contain the spread of an infectious disease in the community.

Nature and extent of the limitation

While a public health order could potentially significantly restrict a person's freedom of movement, the bill provides that the least restrictive measure that would be effective in minimising the risk to public health should be preferred. A public health order should therefore only limit a person's freedom of movement to the degree necessary to protect public health.

The relationship between the limitation and its purpose

There is a direct and rational relationship between the limitation and the purpose it seeks to achieve.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

As the CHO may only require a person to submit to restrictions on his or her freedom of movement if less restrictive options would not be as effective in minimising the risk that the person poses to public health, there is no less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Any other relevant factor

The right of a person subject to a public health order to seek review of that order at any time by the CHO or VCAT will assist to safeguard the rights of a person whose freedom of movement is restricted by a public health order.

Conclusion

While clause 117 limits a person's right to freedom of movement, this is reasonable and demonstrably justified in a democratic society because of the importance of containing the spread of infectious diseases and the fact that the bill does not authorise a person's freedom of movement to be restricted if there are less restrictive ways of minimising the person's risk to public health.

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PART 10--PROTECTION AND ENFORCEMENT PROVISIONS

Division 3--Emergency powers

Part 10

Part 10 provides for powers for the chief health officer to respond to risks to public health. These are the powers used to deal with the investigation and management of the most common risks to public health, such as outbreaks of salmonella and gastroenteritis. However, they have been made flexible enough to deal with other less common risks as they arise.

Part 10 also provides for the declaration of a public health emergency by the Minister for Health. An emergency will only be declared after consultation with the relevant authorities under the Emergency Management Act. Should that consultation determine that action is more appropriately taken under the Emergency Management Act, the minister would not declare an emergency under these provisions.

Whilst it is hoped that such an emergency will not often arise, it is essential that Victoria has the appropriate planning and legal framework to address these risks.

The powers would allow the chief health officer to order persons or groups of persons to remain at a place, or not to enter particular areas. An order to detain people will be subject to a requirement that it be reviewed every 24 hours. Decisions to detain people for more than 24 hours will be supervised by the chief health officer, and reportable to the minister. The vast majority of people are cooperative with authorities in such circumstances, through both self interest and civil duty. Those who are not could be made subject to more specific public health orders if necessary to protect public health.

The bill provides mechanisms for the chief health officer to obtain the assistance of council officers and the police in the course of an emergency. It is envisaged that council officers will be authorised to perform specified roles, and that the police would carry out normal policing duties, in accordance with agreed protocols.

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Section 12 — freedom of movement

Clause 190(1)(b) engages the right to freedom of movement because it enables an authorised officer to direct a person or group of persons not to enter or to leave any particular premises.

Clause 200(1) of the bill also engages the right to freedom of movement because it enables an authorised officer, in narrowly defined circumstances, to restrict the movement of any person or group of persons within the emergency area and to prevent any person or group of persons from entering the emergency area.

The purpose of the limitation in clause 200 is to control the movement of persons during a state of emergency which may help to contain the emergency. It may be necessary to exercise this power, for example, if there were an outbreak in a geographically confined area of a highly infectious disease that caused unusually severe illness in order to slow the spread of that disease.

Clause 200 of the bill limits the right more significantly because it permits a person's or group of person's freedom of movement to be constrained for a maximum period of six months. The maximum penalty that could be imposed on a person who failed to comply with a direction given under clause 200 of the bill is 120 penalty units (see clause 203).

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Section 16 — freedom of assembly and freedom of association

Clause 200(1) limits the right to freedom of assembly because a person or group of people could be prevented from entering or leaving an emergency area as well as moving within the emergency area. These restrictions on the right to freedom of assembly are demonstrably justified in a free and democratic society for the same reasons that these limitations on the right to freedom of movement are demonstrably justified.

Section 21 — right to liberty and security of person

Clause 190 engages the right to liberty because it enables a person to be directed to remain at particular premises for up to 4 hours (although this direction could be repeatedly extended for up to 12 hours if this were reasonably necessary for the purpose of investigating, eliminating or reducing the risk to public health). Clause 200 also engages the right to liberty because it allows a person or group of persons to be detained in the emergency area for a period no longer than is reasonably necessary to eliminate or reduce a serious risk to public health. Both clauses are consistent with the rights protected by section 21(3) of the charter because they specifically define the circumstances in which a person may be detained.

Clause 200 minimises the risk of a person's detention becoming arbitrary by requiring an authorised officer to review whether the continued detention of the person is necessary to eliminate or reduce a serious risk to public health at least once every 24 hours. An authorised officer who decides to detain a person or continue that person's detention must notify the CHO of that fact. The notification must include the name of the person detained and briefly explain why the person has, or continues to be, subject to detention. The CHO must then inform the Minister for Health of any notice he or she has received.

Neither clause limits the Supreme Court's jurisdiction to review the lawfulness of a person's detention under order 57 of the Supreme Court (General Civil Procedure) Rules 2005.

Both clauses require a person who is detained to be informed of the reason for their detention (see clauses 190(2) and (3) and 200(3)) unless it is not practicable to do so in the particular circumstances. These clauses are therefore consistent with section 21(4) of the charter.

Part 8 — Management and control of infectious diseases, micro-organisms and medical conditions

Part 8 of the bill provides for the management and control of infectious diseases, micro-organisms and medical conditions. Each division regulates a discrete aspect. This part of the bill engages a number of human rights and for this purpose each division is discussed in turn.

Division 1 — principles applying to the management and control of infectious diseases

The objective of this division is to set out the principles that should be taken into account when interpreting and applying the provisions in part 8 of the bill insofar as they relate to infectious diseases. The division does not limit any of the rights specifically protected by the charter.

Division 2 — examination and testing orders and public health orders

In broad terms, the purpose of division 2 is to ensure that people who have an infectious disease, or who have been exposed to an infectious disease in circumstances where they are likely to contract the disease, take steps to reduce the risk of transmitting the disease to others. The division gives the CHO the power to make two different kinds of orders — examination and testing orders and public health orders.

Clause 113 enables the CHO to make an examination and testing order that requires a person to undergo one or more tests or examinations. The CHO may only make such an order with respect to a person if the CHO believes that specified criteria are satisfied, including that the person has an infectious disease or has been exposed to an infectious disease in circumstances where a person is likely to contract the disease; if infected with the disease the person constitutes a serious risk to public health; and the making of the order is necessary to ascertain whether the person has the infectious disease.

Clause 117 of the bill enables the CHO to make a public health order that requires a person comply with conditions that are designed to minimise the person's risk to public health. These conditions range from being required to participate in counselling to undergoing specified pharmacological treatment and submitting to detention.

Clause 112 of the bill specifically requires that where alternative measures are available which are equally effective in minimising the risk to public health, the measure which is the least restrictive of the rights of the person should be chosen.

The powers in this division have been conferred on the CHO because the CHO must be a registered medical practitioner (see clause 20). This ensures that decisions are only made by people who are skilled at assessing whether a particular person poses a serious risk to public health, and the measures that need to be taken to reduce that risk.

The division includes a number of mechanisms that will safeguard the rights of individuals who are subject to an examination and testing order or a public health order.

The following rights protected by the charter are engaged by this division:

the right of every person to enjoy his or her human rights without discrimination is engaged by the division generally;

the right not to be subjected to medical treatment without one's full, free and informed consent is engaged by clause 117;

the right to freedom of movement is engaged by clauses 113 and 117;

the right not to have one's privacy, family or home unlawfully or arbitrarily interfered with is engaged by clauses 113–115 and 117–119;

the protection of families and children is engaged by clauses 113 and 117; and

the right to liberty and security of person is engaged by clauses 113, 117 and 123 of the bill.

Section 8 — right of every person to enjoy his or her human rights without discrimination

The powers available in this division can only be exercised in relation to a person who has an infectious disease or has been exposed to an infectious disease in circumstances where a person is reasonably likely to contract that disease. The availability of these powers therefore directly discriminates against people who have, or have been exposed to, an infectious disease on the basis of impairment or personal association with a person who has an impairment.

Nature and extent of the limitation

The way in which the clauses in this division could affect a person who has or may have an infectious disease is outlined above. However, discrimination against a person on the basis that they have an infectious disease is lawful under both the Equal Opportunity Act (see section 80) and the Disability Discrimination Act 1992 (cth) (see section 38).

It is also important to note that the equivalent powers conferred by the current Health Act have only been exercised in relation to people who have refused to voluntarily take steps in order to minimise the risk of transmitting an infectious disease to others. In practice, the overwhelming majority of people who have or may have an infectious disease are anxious to take steps to minimise the risk they pose to others. As a result, most people who have or may have an infectious disease that may pose a serious risk to public health will not be subject to the exercise of the powers conferred by this division.

The relationship between the limitation and its purpose

The ability to require people who have or may have an infectious disease to take measures that would reduce their risk to public health is directly and rationally connected to the purpose of protecting the community from individuals who may pose a serious risk to public health.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

There is no less restrictive alternative available that would achieve the purpose the limitation seeks to achieve.

Conclusion

The limitations on the rights protected by section 10(2) of the charter are reasonably and demonstrably justified in a free and democratic society.

PUBLIC HEALTH AND WELLBEING BILL

Statement of compatibility

Mr ANDREWS (Minister for Health) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act:

In my opinion, the Public Health and Wellbeing Bill 2008, as introduced to the Legislative Assembly, is compatible with the human rights protected by the charter. I base my opinion on the reasons outlined in this statement.

Part 8 of the bill creates the legal framework for the management and control of infectious diseases and notifiable conditions. Part 8 limits a number of rights but in each case the limitation is reasonable and compatible with the charter.

Part 10 confers various powers that are needed to investigate, eliminate or reduce public health risks and the powers available if the minister declares a state of emergency arising out of any circumstances that are causing a serious risk to public health. Part 10 contains some limitations on rights protected by the charter, but these are reasonable in the circumstances.

Section 10(1)(c) — right not to be subjected to medical treatment without his or her full, free and informed consent

Section 10(1)(c) of the charter protects a person's right not to be subjected to medical treatment unless the person has given their full and free informed consent. In this context 'medical treatment' encompasses all forms of medical treatment and medical intervention, including compulsory counselling, examinations and testing.

In its general comment on article 12 of the ICESCR, the United Nations Economic and Social Council stated that the right to health embraces the right to control one's health and body, and includes the right to be free from non-consensual medical treatment. It also observed that article 12 of the ICESCR imposes an obligation on state parties to respect the right to health by refraining from applying coercive medical treatment.

The right not to be subjected to unwanted medical treatment is not, however, an absolute right in international human rights law. It is an accepted principle of international human rights law that it may be legitimate to require a person to undergo medical treatment in exceptional circumstances, including where it is necessary for the prevention and control of infectious diseases.

International Covenant on Civil and Political Rights

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. **No derogation from articles 6, 7, 8** (paragraphs I and 2), 11, 15, 16 and 18 **may be made under this provision.**

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, **no one shall be subjected without his free consent to medical or scientific experimentation.**