

Public Health and Wellbeing Amendment (No Jab, No Play) Bill 2015

Introduced	15 September 2015
Second Reading Speech	16 September 2015
House	Legislative Assembly
Member introducing Bill	Hon. Jill Hennessy MLA
Portfolio responsibility	Minister for Health

Purpose

The Bill is for an Act to amend the *Public Health and Wellbeing Act 2008* (the Principal Act) which would in effect require that a parent provide evidence that their child has been immunised, according to the appropriate schedule, as a condition of enrolment at an 'early childhood service' (new section 143B). (*Refer to Charter report below*)

The bill would insert a new definition of 'early childhood service' into section 3(1) of the Principal Act, which would include childcare centres and kindergartens but would exclude services for school-age children such as out-of-school-hours care and vacation care programs, as well as casual occasional care such as crèches at shopping centres and gyms.

Section 143B would not apply for several categories of disadvantaged and vulnerable children (listed in section 143C(1)), including children in circumstances to be specified by the Secretary under new section 143D. For a child in one of those categories, the early childhood service would instead be required to take reasonable steps to ensure that evidence of immunisation is provided by a parent within 16 weeks of the child's first attendance at the centre (new section 143(C)(2)).

A medical exemption (from the requirement to provide evidence of immunisation) would apply for children with a contraindication to a vaccine (new section 147(2)(c)).

The Secretary would also have the power to specify (in a notice published in the Government Gazette) particular documents as evidence of immunisation (new section 147(2)(d)).

Submissions received

The Committee received a number of submissions in relation to the Public Health and Wellbeing Amendment (No Jab, No Play) Bill 2015. Submissions accepted by the Committee will be published on the Committee's website.

The Committee also received correspondence in relation to the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015, which is currently before the Commonwealth parliament.

The Committee thanks all those who took the time to share their views with the Committee.

Charter report

Discrimination on the basis of possible future disease – Unvaccinated children cannot enrol in early childhood services – Race discrimination – Unvaccinated Aboriginal and Torres Strait Islander children can enrol in early childhood services

Summary: *The Committee will write to the Minister seeking further information as to whether or not new section 143B's ban on the enrolment of most unvaccinated children in early childhood services is compatible with the Charter's rights against direct or indirect discrimination on the basis of possible future disease.*

The Committee notes that clause 5, inserting a new section 143B, bars the confirmation of a child's enrolment at an early childhood service unless the child's parent has provided an immunisation status certificate indicating that either:

- the child is vaccinated for all vaccine-preventable diseases in accordance with a vaccination schedule determined in a federal legislative instrument;⁶ or
- the child's immunisation is medically contraindicated in accordance with specifications set out in the *Australian Immunisation Handbook*.⁷

The Committee observes that the effect of new section 143B is to exclude most unvaccinated children from early childhood services.⁸ The Committee considers that, to the extent that new section 143B distinguishes between vaccinated and unvaccinated children because of their different future susceptibility to acquiring a vaccine-preventable disease,⁹ clause 5 may engage the Charter's rights against direct or indirect discrimination on the basis of the possible future presence in children's bodies of organisms that may cause disease.¹⁰

The Committee also notes that new section 143C exempts various categories of children from the prohibition in new section 143B. The Second Reading Speech remarks:

The bill recognises that there are a number of vulnerable and disadvantaged children in the community who may be in exceptional circumstances or whose families find it difficult to access immunisation services. Children in these circumstances, which are outlined in the bill, will be able to enrol in an early childhood education and care service if their immunisations

⁶ See the definition of 'age appropriately immunised' inserted by clause 4 and the definition of 'immunised' in existing s. 3. Reg 81 of the *Public Health and Wellbeing Regulations 2009* currently prescribes Diphtheria, Tetanus, Whooping Cough, Poliomyelitis, Haemophilus influenza type b, Hepatitis B, Pneumococcal, Rotavirus, Measles, Mumps, Rubella, Meningococcal C and Varicella as vaccine-preventable diseases. The *Family Assistance (Vaccination Schedules) (FaHCSIA) Determination 2012* (Cth) presently specifies vaccinations at 2, 4, 6 and 12 months, and 4 years. (The new definition wrongly refers to the 'A New Tax (Family Assistance) Act 1999 of the Commonwealth', rather than the *A New Tax System (Family Assistance) Act 1999* (Cth)).

⁷ The handbook presently specifies only anaphylaxis from a prior dose of a relevant vaccine or component or where the child is significantly immunocompromised as medical contraindications: *Australian Immunisation Handbook* 10th Edition (Updated June 2015), Part 2.1.4, 'Contraindications to vaccination' (and see also 'False contraindications to vaccination'.) (New section 143B(1)(b) wrongly refers to the 'A New Tax (Family Assistance) Act 1999 of the Commonwealth', rather than the *A New Tax System (Family Assistance) Act 1999* (Cth).)

⁸ Clause 5 does not bar unvaccinated children from early childhood services where vaccination is medically contraindicated or an exemption in new section 143C applies.

⁹ The Committee notes that (subject to any future exemption under new section 143D) clause 5's ban on most unvaccinated children from early childhood services extends to children with a natural immunity to a vaccine-preventable disease. (Compare existing s. 147(2)(b), providing for an immunisation status certificate certifying 'laboratory evidence that the child has developed a natural immunity against the vaccine-preventable disease and does not require immunisation', a condition which may be neither 'age appropriately immunised' nor a specified medical contraindication.)

¹⁰ Charter ss. 8(3), 17(2). See the definition of 'discrimination' in Charter s. 3, and para (d) and the concluding words of the definition of 'disability' in s. 4 of the *Equal Opportunity Act 2010*, and s. 6(e) of that Act.

are not up to date on the proviso that for a period of 16 weeks after commencement at the service, the service will take reasonable steps to obtain the immunisation status certificate for the child.

One category of children exempted by new section 143C(1)(d) is any child whose parent states that the child is an Aborigine or Torres Strait Islander. The Committee observes that new section 143C(1)(d) may engage the Charter's rights against race discrimination, unless the exemption is a measure taken for the purpose of assisting or advancing persons or groups disadvantaged because of discrimination.¹¹

The Statement of Compatibility does not address the Charter's equality rights.

The Committee will write to the Minister seeking further information as to whether or not:

- **new section 143B's ban on the enrolment of most unvaccinated children in early childhood services is compatible with the Charter's rights against direct or indirect discrimination on the basis of possible future disease; and**
- **new section 143C(1)(d)'s exemption of all Aborigines and Torres Strait Islanders from this requirement is a measure taken for the purpose of assisting or advancing persons or groups disadvantaged by discrimination.**

Medical treatment without free consent – Children must be vaccinated to enrol in early childhood services – Whether less restrictive alternative reasonably available

Summary: The effect of clause 5 is that most parents must agree to have their children vaccinated if they wish to enrol their children in an early childhood service. The Committee refers to Parliament for its consideration the question of whether there is a less restrictive alternative reasonably available to achieve clause 5's purpose.

The Committee notes that, currently:

- the Secretary of the Department of Health may direct the person in charge of a children's services centre to ensure that a child who is not immunised against a vaccine-preventable disease does not attend the centre until the Secretary directs that such attendance can be resumed;¹²
- certain federal benefits are not available to meet the costs of care to a child who is not immunised in accordance with the federal vaccination schedule, unless a recognised immunisation provider has certified that: the child has a specified medical contraindication; the child has natural immunity; or he or she has discussed with the parent the benefits and risks of immunising the child and the parent has declared in writing that he or she has a conscientious objection to the child being immunised based on a personal, philosophical, religious or medical belief against vaccination under the federal vaccination schedule.¹³

¹¹ Charter ss. 8(3), 17(2). See the definition of 'discrimination' in Charter s. 3, and s. 6(m) of the *Equal Opportunity Act 2010*. Charter s. 8(4) provides that: 'Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.'

¹² *Public Health and Wellbeing Regulations 2009*, reg. 85.

¹³ See *A New Tax System (Family Assistance) Act 1999* (Cth), ss. 5, 6, 42(1)(c) (and see also Schedule 1, s. 38A). An exemption presently applies where an officer of the Church of Christ, Scientist, declares that the individual or the individual's partner is a practising member of that Church: see s.7 and *Family Assistance (Exemption from Immunisation Requirements) (FaHCSIA) Determination 2012* (Cth). A Bill currently before the Federal Parliament would remove the exemptions for conscientious objectors and Christian Scientists: *Social Services Legislation Amendment (No Jab, No Pay) Bill 2015* (Cth).

By contrast, clause 5, inserting new section 143B bars the enrolment of children in an early childhood service unless they are vaccinated in accordance with a federal vaccination schedule, have a specified medical contraindication or fall within exemptions in new section 143C.

The Committee observes that the effect of clause 5 is that most Victorian parents must agree to have their children vaccinated if they wish to enrol their children in an early childhood service (whether or not they receive federal benefits for that care.)

The Statement of Compatibility remarks:

It is noted that the bill will not mandate vaccinations, nor will it provide for the administration of vaccinations without consent. The right in section 10(c) of the Charter that provides a person must not be subjected to medical or scientific treatment without his or her full, free and informed consent is therefore not engaged.

However, the Committee notes that a parent who is unable to care for a child themselves (for example due to employment or other commitments) and cannot afford or otherwise obtain private care for their child (for example from a family member or a nanny) may have no choice other than to have his or her child vaccinated in order to enrol that child in an early childhood service.¹⁴

The Committee observes that the United States Supreme Court has held that both compulsory vaccination and a ban on school attendance of unvaccinated children are compatible with that country's constitutional bill of rights.¹⁵ However, the United States and all other comparable jurisdictions lack any equivalent to a person's express right under Victoria's Charter not to be 'subjected to medical... treatment without his or her full, free and informed consent.'¹⁶

In relation to the Charter's freedoms of conscience and expression, the Statement of Compatibility remarks:

I consider that any limitations imposed on sections 14 and 15 by the bill are justifiable having regard to the factors set out in section 7(2) of the charter, for the following reasons. Firstly, the bill does not purport to prevent a parent from holding or observing a belief that their child should not be vaccinated. Secondly, children and families have an interest in being protected from vaccine preventable diseases, which can have serious, even fatal, consequences. The weight of scientific evidence demonstrates that vaccines are safe and effective, with the benefits greatly outweighing the risks. As outlined above, high rates of immunisation in the community, particularly amongst children, are fundamental to maximising the benefits of immunisation in preventing the spread of vaccine preventable diseases. It is expected that the number of children whose participation in early childhood education and care is impacted will be smaller than the number of people who benefit from an increase in immunisation rates. Existing, less restrictive means available to increase immunisation rates — measures focused on promoting immunisation and facilitating access to immunisation services — have not achieved a significant increase in the overall immunisation rate.

¹⁴ Section 494(1) of the *Children, Youth and Families Act 2005* makes it an offence, punishable by six months' imprisonment, for a person who has control or charge of a child to leave the child without making reasonable provision for the child's supervision and care.

¹⁵ *Jacobson v Massachusetts*, 197 US 11 (1905); *Zucht v King*, 260 US 174 (1922).

¹⁶ Charter s. 10(c). The Explanatory Memorandum to the Charter states that the requirement 'that consent must be full, free and informed... is intended to reflect the requirements for consent outlined in section 5(1) of the Medical Treatment Act 1988.' Those requirements include 'that the patient's decision is made voluntarily and without inducement or compulsion'; s. 5(1)(b), *Medical Treatment Act 1988* (Vic).

The Committee notes that a similar ban on enrolment of most unvaccinated children in child care facilities that commenced in New South Wales in 2014 is subject to an exception where:¹⁷

- (i) the parent of the child certifies that the parent has a conscientious belief of a kind specified in the approved form that vaccination for specified vaccine preventable diseases should not take place, and
- (ii) an authorised practitioner certifies that the practitioner has explained the benefits and risks associated with immunisation to the parent and has informed the parent of the potential danger if a child is not immunised.

The Committee refers to Parliament for its consideration the question of whether there is a less restrictive alternative reasonably available to achieve clause 5's purpose.¹⁸

The Committee makes no further comment

¹⁷ *Public Health Act 2010* (NSW), s. 87(2)(b).

¹⁸ See Charter s. 7(2)(e).