

CONSUMER PROTECTION LEGISLATION AMENDMENT BILL 2018

Committee

Resumed from 3 September. The Chair of Committees (Hon Simon O'Brien) in the chair; Hon Alannah MacTiernan (Minister for Regional Development) in charge of the bill.

Clause 30: Act amended —

Progress was reported after the clause had been partly considered.

The CHAIR: Members, we are considering the Consumer Protection Legislation Amendment Bill 2018. I remind the Committee of the Whole that we have supplementary notice paper 96, issue 5, dated Tuesday, 13 August 2019. I also refresh members' memories that when we were last debating this bill, we had adopted the suggestion of the Minister for Regional Development that we treat the first clause of each of the parts as a mini clause 1 debate, to enable us to marshal our consideration of the bill more efficiently. I am reminded that the minister was responding to a very brilliant suggestion by Hon Michael Mischin.

Hon RICK MAZZA: When we debated this bill the last time, I asked questions about the deposit of up to 6.5 per cent that is paid to a builder, and the ability of the home indemnity insurance to cover that deposit should the builder become insolvent. From memory, the minister advised that the Department of Mines, Industry Regulation and Safety was aware of the exposure to a consumer, whereby their deposit could be at risk if the builder did not take out the insurance, received the deposit and then became insolvent. What work is the department doing around trying to rectify this situation?

Hon ALANNAH MacTIERNAN: I went through this in some detail last time, and acknowledged, as the department of the Minister for Commerce acknowledges, that there is a gap here, and I set out the precise nature of that gap. These measures will be interim measures. There is now a wholesale review going on of the insurance scheme and how best to structure that. There will be a paper, which we hope will be released by the end of this year, that will seek to address these issues and obtain feedback. As I said, we are trying to corral a bunch of amendments that were developed in 2014 and make sure that we make progress with those. We acknowledge that that is another issue, but it is a much bigger issue for this scheme, which, over the years, has had to change and modify, as the member will be aware. The scheme became subject to a government guarantee in about 2013. I recall this legislation being introduced in the late 1990s, I think, when I used to run something called the homebuyers action group. We are very conscious that this is an iterative process, but the issue of the deposit and the gap in coverage will be dealt with in this review.

Hon RICK MAZZA: I thank the minister for that bit of information. I am glad to see that the indemnity insurance scheme will be reviewed. I want to confirm a couple of things within that review. My understanding is that insurance must currently be taken out for all contracts over \$20 000, and I wonder what intention there might be in that review for the value of contracts for which insurance will be required. Another aspect of home indemnity insurance is that there is a limit of \$100 000 payable to a consumer should the builder become insolvent—I think that is still the case—I guess partly because institutions and consumers would only pay progress payments, depending on which stage the building was up to. However, in this day and age, I think \$100 000 may be deficient in many cases. I am wondering what scope there is for the \$100 000 maximum to be increased. In considering that, the minister is quite right to say that the government has had to underwrite this insurance scheme, because it has been commercially unviable for commercial insurance underwriters to maintain the policy, unless premiums increased dramatically. Again, if we are going to review this, what parameters will there be around the maximum? Is there an intention to make this commercially viable for insurance underwriters; and, if so, does the minister or the department think there will be a significant increase in premiums, which might add to the cost of building?

Hon ALANNAH MacTIERNAN: The member is quite right: we have to always look at the two factors, and I do not think we would be looking at reducing the threshold for contracts. This is about protecting people from very significant loss, rather than putting a lot of red tape around small contractual arrangements. Certainly, the minister has asked for some actuarial work to be done on what actual losses are being incurred, and then to give us some framework of what the actual cost would be if we were to raise the threshold beyond \$100 000. We are basically doing the number crunching at this point in time to see what that cost would be. We obviously have an amount in reserve as part of the WA Treasury account, so we need to look at what that liability would be if we were to raise that limit, and whether that would be properly covered by the funds within the Treasury account. That work is being undertaken, but it is very detailed actuarial work.

Hon RICK MAZZA: I have one last question on the Home Building Contracts Act 1991. My understanding is that the government has been subsidising the underwriting of this insurance coverage. Is the minister able to advise what has been the government's cost for subsidising this in the last 12 months?

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Hon ALANNAH MacTIERNAN: My advice is that it is not a subsidy. Although we provide a guarantee for the fund, and I think that change was introduced around 2013, the scheme has sustained itself and we have not been required to use taxpayers' funds. Although we provide a guarantee for the fund, it is actually in surplus.

Hon MICHAEL MISCHIN: Can I clarify that please, minister? As I understand it, private insurance companies write the policies and the government underwrites the risk, at least for contracts after 2013 or 2014—something like that. Albeit that the government is not paying a subsidy, a fee is collected by those who write the policies on behalf of the government. How many insurers are currently involved in those policies?

Hon ALANNAH MacTIERNAN: We pay a fee to QBE to manage the scheme, but that has been funded through the premiums. There has been no requirement for an allocation from the consolidated account.

Hon MICHAEL MISCHIN: This is not really material to what we are dealing with so far as payouts and the liability of the government to date and what it might be exposed to into the future, but have the premiums increased over the last two years?

Hon ALANNAH MacTIERNAN: There was a small increase in 2017 for the larger builders who were on fixed rates. The actuarial advice is that no further increase in the premium is required to meet the current liability framework.

Clause put and passed.

Clauses 31 and 32 put and passed.

Clause 33: Act amended —

Hon RICK MAZZA: Proposed new section 33A refers to an offence of giving false or misleading information in an application for a land valuer's licence. Can the minister advise how many cases there have been of people giving false or misleading information in an application for a land valuer's licence?

Hon ALANNAH MacTIERNAN: There have been no prosecutions to date.

Hon RICK MAZZA: If that is the case, why has the department seen it necessary to insert this new clause?

Hon ALANNAH MacTIERNAN: At the moment, the application process relies on a statutory declaration, which then requires police action. This is understandably not a matter that the police are prepared to take forward. Perhaps the lack of prosecution might be, in part, because the structure is inappropriate. As we said, this process started in 2014. It is important that these different elements across the property industry are lined up so that there are equivalent penalties within all the different licensing areas and the framework has some national consistency. Although there have been no prosecutions, which is not necessarily a bad thing—maybe people are not undermining this—we think the current structure mitigates proper enforcement, and it would be a bit bizarre to reform all the other areas and not this part.

Hon MICHAEL MISCHIN: I suppose this could wait until we get to clause 34 but perhaps I will ask it now and save a bit of time. What seems to be happening here is the removal of the existing section 20, which concerns an offence of giving false or misleading information that bears a penalty of \$20 000, and its replacement with new section 33A, which does more or less the same thing. What is the point of the exercise? There is no increase in penalty, apparently.

Hon ALANNAH MacTIERNAN: My understanding is that the original provision dealt with the initial application, whereas the redefined offence covers all information, including that which subsequently may be required to be given to the Public Sector Commissioner. It applies to false and misleading information, not only at the time of the application, but also at any time it is given to the commissioner.

Clause put and passed.

Clauses 34 to 37 put and passed.

Clause 38: Act amended —

Hon RICK MAZZA: I have a couple of general questions on the Real Estate and Business Agents Act, much of which seems to be around licensing and holding a licence. Can the minister advise what mutual recognition tests there are in Western Australia for people who hold a real estate agent's licence in another state?

Hon ALANNAH MacTIERNAN: The advice I am receiving is that that entitlement is the result of a federal ministerial fiat. The commonwealth mutual recognition legislation allows the minister to specify whether the industry is going to be the subject of mutual recognition. I am advised that real estate and business agents are then caught under that federal legislation. They have been declared as being covered by that legislation.

Hon RICK MAZZA: Thank you for that, minister. Currently, a person who holds a real estate and business agent's licence but not a triennial certificate has to pay a licence-holding fee that lasts for three years. They are

two separate things. A licensed business agent requires a triennial certificate to operate. My understanding is that, currently, if a person fails to renew their real estate and business agent's licence within three months of its expiry date, that is it. It is more or less guillotined; they cannot renew it. It is a hard and fast rule. Do these proposed amendments before us provide for the department to be able to provide discretion to somebody who has failed to renew their licence within the three months of its expiry, due to no fault of their own—maybe it was a mailing error or some other way that they did not receive it?

Hon ALANNAH MacTIERNAN: I will clarify this. As I understand it, the licence is ongoing but the triennial certificate has a time limit, like a driver's licence or any other licence. The advice I have is that that time limit is one month and there is no discretion for extending that. The person would have to reapply; they could not extend the existing licence. Clause 61 of the bill will amend schedule 1 of the act and proposes including a range of provisions that will make it easier for someone who has had a certificate but has failed to renew it on time to be able to reapply without having to requalify.

Hon RICK MAZZA: The minister just explained to me that a person has up to 12 months to renew their triennial certificate. The question I asked was about the agent's licence. I referred to someone who has a holding fee on only their licence and they do not hold a triennial certificate. If they fail to renew that licence at the end of the three years, within three months of the expiry date, there is no scope or ability for the department to renew that licence. Their licence is basically terminated and they have to start again. My question is not about the triennial certificate but the actual real estate and business agent's licence, and whether there is some relief in this bill for people who hold just the licence.

Hon ALANNAH MacTIERNAN: I will clarify this because I have received further advice. I am advised that the licence, which is what the member is dealing with, has a 60-day discretion, and it is not unreasonable to have some time period. If members look at clause 61, the schedule 1 provisions make it less onerous. For a person who may have let their licence lapse because they had not reapplied within 60 days or had not paid the holding fee for their licence to continue, but who had, within a period of five years immediately preceding the application, done a number of things, the bill sets out a range of provisions. Fundamentally, the reapplication process for people who have already been in the system is less onerous. They do not have to start as though they were a total freshman. There is recognition that if they have previously held that licence, there will be a less onerous set of hurdles for them to jump to reobtain that licence.

Hon MICHAEL MISCHIN: The minister may have touched on it in her second reading speech in reply, but this part of the bill makes quite a number of changes to the regulation and licensing of real estate and business agents. To what extent was the Real Estate Institute of Western Australia or others consulted about the proposed changes, and what did they think of the changes?

Hon ALANNAH MacTIERNAN: I am advised that there has been ongoing discussion with the Property Industry Advisory Committee, which seems to be set up under the department, and the Real Estate Institute of Western Australia is represented on that committee. A document has been prepared that gives a little more detail, but the advisers are unable to access it at the moment. I am happy to table that document when we find it.

Hon MICHAEL MISCHIN: I would appreciate that. Is the minister able to say whether there was broad agreement or whether either the minister or the department has received any complaints regarding any of the proposed amendments occasioned by this part of the bill?

Hon ALANNAH MacTIERNAN: We understand that the only concern raised was the capacity for imprisonment due to defalcation of the trust account. The view was that generally that penalty is available when there is defalcation on trust accounts. Although we understand that the industry would perhaps prefer not to have that level of liability—whether imprisonment would ever be invoked would obviously depend on the scale—certain provisions around trust accounts are needed.

We have a general letter of support from REIWA dated 1 November 2018, which states that REIWA does not support the inclusion of a possible penalty of two years' imprisonment in cases of an offence against section 78(4) and (5). REIWA believes that introducing imprisonment is unnecessary and that is the area on which it demurred, but, as I said, we were looking at the obligations of other people who manage trust funds and thought that it would be appropriate to have a similar penalty. Obviously, that penalty is not likely to be invoked for minor sums, but it would depend on the circumstances.

Hon MICHAEL MISCHIN: On that, I have extracts of the Real Estate and Business Agents Act as far as they have been amended. May I sight that letter, because it might assist me? Is the minister able to table a copy of that letter for me, please?

Hon ALANNAH MacTIERNAN: I am happy to table a copy of this letter.

[See paper 3024.]

Hon MICHAEL MISCHIN: I wonder whether we could wait a few minutes so I have a chance to read it.

Hon Alannah MacTiernan: The member can ask another question.

Hon MICHAEL MISCHIN: Did the minister refer to section 78 of the principal act? What is that about? I do not have a copy of that particular section. I do note that there is a proposal to introduce a penalty of up to two years' imprisonment into section 84 of the principal act by way of clause 53 of the bill, but I am not aware of section 78, I am sorry.

Hon ALANNAH MacTIERNAN: To clarify, the penalties have always been in section 84 of the principal act. I will re-read the letter —

... REIWA does not support the inclusion of a possible two year imprisonment in cases of an offence against section 68 (4) and (5).

My understanding is that the offences relating to the trust fund are set out in the legislation, but the penalties are in section 84 of the principal act.

Hon RICK MAZZA: The first paragraph on the second page of REIWA's letter dated 1 November states that REIWA does not support a possible penalty of two years' imprisonment in cases of offences against sections 68(4) and (5). The minister has advised that that relates to breaches of the trust account. There have been a number of cases over the years in which staff have misappropriated funds out of a trust fund and real estate agents have gone on extended holidays on a trust fund. The Criminal Code has been used to deal with those cases and in quite a number of those cases people have been imprisoned for those breaches. Why did the department feel it was necessary to include a penalty of two years' imprisonment in this legislation?

Hon ALANNAH MacTIERNAN: That is a reasonable question, member, but the reality is that the experience has been overwhelmingly and consistently that the police are not interested in following up on these consumer protection matters. It is Consumer Protection's experience that police generally will not actively follow up these referrals because they perceive them to be regulatory matters. The fraud squad has made it clear that it will not prioritise these areas. If we are to have any rigour around these trust funds, we believe that the power needs to be in this regulatory framework, rather than seeking to rely on an external penalty from another piece of legislation. It is just not happening now. To be honest, I think for the sorts of sums that one would probably see imprisonment would be extremely rare. We think this whole notion of defalcation of a trust fund is serious. The special obligation and seriousness of holding money on trust is a very important principle enshrined in law and we want to ensure that this is properly managed, because when the Consumer Protection division tries to get police involved, as a practical matter it rarely happens.

Hon RICK MAZZA: I must say that it is somewhat disturbing that the police are not prioritising thefts from trust funds. The very term "trust fund" is pretty self-explanatory. I am aware of a number of prosecutions that have happened over the years of people who have, for want of a better word, stolen from a trust fund. The minister is saying that the Western Australia Police Force is not interested in cases of thefts from trust funds, which in some cases can be tens, if not hundreds, of thousands of dollars. There are such cases from time to time. It disturbs me greatly that the department has to be the prosecutor when money from trust funds goes missing. Surely, there could be a better outcome if the fraud squad were to deal with these matters, particularly given the resources available to the police and their experience and expertise in dealing with them. In the past I recall the fraud squad having undertaken stings of staff who have stolen money from trust funds. I struggle to believe that the department will be able to undertake the surveillance that will be required to identify and prosecute these breaches.

Hon ALANNAH MacTIERNAN: I understand the member's point, but I need to demur from it. It makes much more sense for the agency that is already dealing with this, Consumer Protection, to deal with these matters. It is taking the disciplinary action, is very familiar with the act and has its own legal team. It is a more rational allocation of resources than trying to get someone from the police to come in and acquainting them with all the facts for them to take the action. That does not seem to be the most sensible pathway. The agency that has the responsibility for administering this legislation is on top of the facts and has a detailed knowledge of the industry. That is its daily bread and butter. It will also be running the actions for disbarment, discontinuance of licence and the financial penalties. I honestly think that it would not be appropriate, efficient or the best use of taxpayer resources to try to drag in another agency. I think this is much crisper. It will be able to be dealt with in a proper fashion.

Hon RICK MAZZA: Thank you for that, minister. If that is the case, can the minister advise how the department identifies breaches of trust accounts? Is it relying on qualified audits? Is it doing spot checks on trust accounts? Is it relying on whistleblowers? Can the minister advise how many prosecutions have taken place in the last three years and whether dedicated staff in the department act as investigators and prosecutors in these matters?

Hon ALANNAH MacTIERNAN: A number of factors again suggest that this is something that is much better handled by the agency. There are audit requirements. Each year, trust accounts are required to be audited and a report

prepared, and breaches sometimes show up. Sometimes it is the result of whistleblowers. It is often staff members in an office. Some audits are performed when people are deemed to be at risk.

The member asked for some examples. In 2014, a settlement agent admitted to stealing almost \$129 000 from her client's trust account. She was convicted of the offences, fined \$9 000, and ordered to pay compensation. She has yet to pay that compensation, which is why we think it should be a more serious offence.

Hon Michael Mischin: What date was that offence and what date was the conviction?

Hon ALANNAH MacTIERNAN: The date I have been given is 2014.

In 2015, a real estate representative who admitted stealing almost \$30 000 from her employer's trust account was convicted and fined \$20 000. In 2016, a real estate agent was estimated to have removed over \$300 000 from her client's trust account. She was convicted of trust account offences and fined \$8 000. In 2016, a real estate agent was estimated to have removed over \$686 000 from his trust account to invest in real estate transactions. He is yet to face court. In all those cases, active attempts were made by the department to engage the police for prosecution under the Criminal Code, but they were not successful. I think this is a sensible arrangement. Two layers of people will not have to be brought in. One body will deal with the offences and will make progress. Obviously, some pretty large defalcations have taken place.

Hon RICK MAZZA: This is more of a statement than a question. The large sums of money that have been appropriated are very alarming. In 2014, it was \$123 000, with a fine of \$9 000, with compensation yet to be paid and, obviously, no jail time. I missed the 2015 example. In 2016, it was \$300 000, with a penalty of only \$8 000. It beggars comprehension that the Western Australia Police Force is not interested in these very large thefts of money from trust accounts. It is mind-boggling. I understand why the department is looking to have more scope to prosecute these people itself. I am amazed at the low financial penalties that have been imposed on these people. I think more pressure should be brought to bear on the Western Australia Police Force to deal with these matters.

The CHAIR: Members, the question is that clause 38 do stand as printed. If there is an indication from the minister or either of the lead speakers that they would like to go clause by clause, I will entertain that, but for now we will proceed with the question that clause 38 stand as printed as members canvass across part 8. I give the call to Hon Michael Mischin.

Hon MICHAEL MISCHIN: I want to pursue the question of penalties a little further. I accept that the minister is not representing the Minister for Police, but I am surprised that a defalcation in the order of \$686 000 has been declined as not being something worthy of the police's attention. In reality, that is an offence under section 68(4) of the Real Estate and Business Agents Act, which states —

Moneys received by an agent for or on behalf of another person in respect of a transaction shall not be withdrawn from a trust account except for the purposes of the transaction ...

I can fully understand a desire on the part of the department to deal efficiently and effectively with relatively small amounts of money commensurate with the penalties available, but we are talking about in excess of half a million dollars being stolen from a trust account and the department has been unable to interest the police in treating it seriously. If that were a defalcation from a bank by a bank staffer, we would be reading about it in the newspapers as something being dealt with in the District Court. I fail to understand why the police cannot be persuaded to take action.

I am not blaming the department in this regard. Can the minister expand a little further on how many cases involving, say, over \$100 000 being stolen from a trust account have been referred to the police and the police saying, "Sorry, we're not interested; we've got better things to do"? I am astonished that that is their attitude.

Hon ALANNAH MacTIERNAN: It is simply a question of resources and priorities. We have to be realistic. We can actually solve this problem. We can allow the consumer protection body, which has responsibility for oversight and for taking other action, to also include this issue as part of a suite of measures for which it has responsibility. It is a problem that we can solve. I think this was proposed during the term of the previous government. Indeed, the other states have an imprisonment penalty for this defalcation. It is often the case that the money has been spent, so the penalty for compensation simply does not get assuaged because there is no money left.

We think that this is a very sensible reform. It is about the proper allocation of resources. We have a specialist agency that has been developed to superintend these industries that have the legal expertise, that are familiar with the obligations and that are overseeing the audits. This is the appropriate body. It simply does not make sense to drag in the police and add to the expense of all the liaison when we have the capability to do it in the Consumer Protection portfolio. To me, it is sensible and rational. We have one agency, which has the expertise and all that information, getting on with it so the police can get on with what they are doing.

Hon AARON STONEHOUSE: I can appreciate the argument that the Consumer Protection division is specialised in investigating and pursuing individuals who might steal money from a trust. I would like to ask a very specific

question. When staff in the department identify that a person has stolen money from a trust, do they notify the WA Police Force?

Hon ALANNAH MacTIERNAN: Yes, there is liaison with the police, and a determination is made about how best to deal with it. Obviously, if a crime has been committed, we would negotiate, but Consumer Protection would still advise the police. People make sensible agreements about how a matter will be pursued. Generally, the police may say, “This is caught up in this regulation. It is better that you take that action because it is a regulatory regime.” We are saying that we should beef up those penalties so that we have legitimate penalties relating to defalcation that we see elsewhere, and that will just streamline the process. That will make it simpler to get some justice done without dragging in other agencies to try to get across all the detail and run two different actions, one which is based on the more general Criminal Code provisions and others that are based on the breaches of their obligations. Rather than two separate legal actions, there would be one.

Hon AARON STONEHOUSE: Just to be completely clear, when the theft of moneys from a trust is identified, does the Consumer Protection division make a decision at that time about whether it pursues the case or hands it on or refers it to the police, or does it go to the police in the first instance and then a discussion is had with the police on the best course of action?

Hon ALANNAH MacTIERNAN: It is a consultation process during which the police say, “Obviously, we think there are breaches here and there are also breaches of the Criminal Code.” A determination is then made as a practical matter occurs. Every day police and other agencies make decisions about how many paths they can go down. That is just the practical reality of life. It would be much more streamlined if those fundamental penalties were then included within the remit of the regulatory environment. This could be a much simpler process and we would see these matters move forward far more speedily.

Hon AARON STONEHOUSE: I appreciate that. I am not questioning the need for beefed up penalties. I am trying to ensure that we do not have a situation in which staff within Consumer Protection are taking it upon themselves to decide which cases are referred to police and which cases are not referred to police or when police are or are not made aware.

Hon Alannah MacTiernan: No. It is done in consultation.

Hon AARON STONEHOUSE: That is fine. That is what I wanted to be absolutely clear about; that is, in all cases, police are notified of crimes taking place when money in trust is misused or stolen.

Hon RICK MAZZA: The minister gave examples of when trust funds were stolen—\$123 000 in 2014 and \$300 000 in 2016. Can the minister advise whether any of those losses were claimed against the fidelity guarantee fund?

Hon ALANNAH MacTIERNAN: I do not have that information. I can see whether we can find that.

Hon MICHAEL MISCHIN: If I understand it correctly, if a report of a defalcation, for want of a better term, under section 68(4) is reported firstly to the department, the department will make some preliminary inquiry into that and then consult with the police about who ought to lay the charge. Is that the way it works?

Hon Alannah MacTiernan: Yes.

Hon MICHAEL MISCHIN: If the police get a report because a client or a real estate agent says, “I think money has been stolen out of my trust account”, what happens to it then? Will the police routinely hand it over to the department to worry about or do they commence inquiries themselves? How is that handled?

Hon ALANNAH MacTIERNAN: We cannot speculate on cases that are taken to the police directly. We are talking about cases that we detect, whether it is through our audit process or through whistleblower information. We can only talk about that. That is what we do. Anyone who has been involved in the real world knows that practical decisions about the allocation of resources have to be made every day. We have explained why we think it makes eminent sense to keep this with one agency. If someone wants to take it to the police separately and not deal with it through this legislation, we are not cutting off that right for them; we are enhancing the opportunity for these provisions to have a bit of substance.

Hon MICHAEL MISCHIN: I am not arguing against the appropriate regulatory agency having an armoury of enforcement measures at its disposal. If that means the creation of specific offences to deal with specific problems within the ambit of its responsibilities or an increase in penalties to enable those offences to be properly enforced, I do not have an argument with that. I am just curious about the process and whether the department, which, I am sure, is also subject to resource restrictions and constraints, is not by default taking over the responsibility of our police. It seems to me that a matter of theft from a trust account involving a lawyer would not be dealt with by the Legal Practice Board of Western Australia simply as a regulatory matter; the police would be involved in that sort of stuff—likewise, theft from a bank or any other organisation. We are talking about hundreds of thousands of dollars and the police are saying, “We are not interested in investigating it. If you want to take action, Commissioner for Consumer Protection, it’s up to you; we’re not interested in this”, which surprises me. Is the department aware of

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any consultations with the police during which it has raised with the police a defalcation under section 68(4), which may also amount to a theft, that the police have taken over; and, if so, what were the circumstances involved?

Hon ALANNAH MacTIERNAN: Member, all I can say is that in others states, these matters are dealt with by the consumer protection body. They still go to the Magistrates Court and are dealt with using the same standards and principles of criminal law. We are not saying that the police are not interested, but when the two agencies look at these low penalties and the fact that there is no money left, practical decisions have to be made. Government agencies have to make practical decisions every day. There is no more I can really add to that other than to say that it is absolute commonsense that the people who have access to the data, do the audit and take the disciplinary action are also the people who are empowered to seek this additional penalty. There will still be ongoing dialogue between the department and the police about different matters and if the police want to prosecute a matter under the Criminal Code, they are perfectly free to do so. Nothing in this provision inhibits in any way the police engaging in these matters if they feel that that is appropriate. I urge members to think about the real world; people have to make practical decisions about the allocation of resources every day.

Hon RICK MAZZA: At the risk of provoking the minister's wrath, I am getting mixed messages. First of all, the minister said that the police are not interested and just then she said that she did not say that the police are not interested.

Hon Alannah MacTiernan: No, I am saying that it is absolutely up to them. Nothing in this provision undermines in any way the ability of the police to take action in these matters if they believe that they also constitute a breach of the Criminal Code. We are saying that as a practical reality, often these matters do not get up the priority list so we are making available another suite of remedies to lessen the risk that people get away with defalcations. There is nothing more I can say to explain it. Members can keep asking questions over and again, but I have explained the situation. It is not that the police do not want to or that they are disinterested; rather, they have to make practical decisions about the allocation of resources.

Hon RICK MAZZA: Thank you for that, minister. I will continue with my question.

Whether or not the police are interested—we are getting mixed messages—can the minister advise on how many occasions, say, in the last three years, the department has contacted the police to report a serious breach of the Criminal Code and whether the police have become involved in dealing with those matters?

Hon ALANNAH MacTIERNAN: I will have to take that on notice. As I said before, we do not have that detail. I reinforce that there are regular discussions between the department and the police. We will see whether we can get further information.

Hon RICK MAZZA: Can the minister advise how many investigative officers in the department deal with these matters and look into breaches of trust accounts across the suite of settlement and real estate agents?

Hon ALANNAH MacTIERNAN: My advice is that there are approximately 60 people, but they are across all those industry licensing areas. As the member would imagine, there is not one person who is dedicated to real estate agents. They look at settlement agents and all those allied trades. My advice is that it is approximately 60 officers.

Hon RICK MAZZA: Sixty officers is quite a force of people investigating these matters.

Hon Alannah MacTiernan: They're not just investigating. They are requesting and processing the audits. There is a lot of routine work.

Hon RICK MAZZA: My question is about those who are dedicated to investigating a breach. Yes, there are people who look at audits and check on agents to make sure that they are doing the right thing, but how many officers are dedicated to the task of identifying and investigating issues to bring them to the point of prosecution?

Hon ALANNAH MacTIERNAN: I am not sure whether it is clear how many in the group of 60 are dedicated to just investigations, but there is a team of around 10 legally qualified staff.

Hon RICK MAZZA: I thank the minister for that. Let us look at the mechanics of this a little bit. An investigator or solicitor identifies an issue, investigates a breach of a trust account and puts together a case with the relevant circumstances and evidence that a trust account has been breached. Who within the department undertakes the prosecution in the court?

Hon ALANNAH MacTIERNAN: One of those 10 legal officers. They are required to do it anyhow for disciplinary action. The legal team within the department takes that action.

Hon MICHAEL MISCHIN: Minister, I was distracted for a little while but, as I understand it, there are 10 legal officers within the commerce and Consumer Protection division. Is that what the minister said?

Hon Alannah MacTiernan: Approximately.

Hon MICHAEL MISCHIN: Are any of them investigators as such?

Hon Alannah MacTiernan: We have just addressed that.

Hon MICHAEL MISCHIN: Yes, I am sorry; I did not catch what the minister said because I was distracted. How many investigators are there?

Hon ALANNAH MacTIERNAN: Sixty staff are, I would say, compliance people—property industry compliance.

Hon MICHAEL MISCHIN: The information is drawn from there. If they suspect something, they pass it on to the legal officers to do their stuff and charges are laid if necessary. The minister mentioned several prosecutions; there does not seem to be a vast number of prosecutions. Is there a threshold amount for which the department considers it is not worth taking action?

Hon ALANNAH MacTIERNAN: There is a public interest test, obviously. It would look at the cost–benefit analysis in the real world. It looks at the nature of the severity of the defalcation and decides whether a prosecution is warranted or other disciplinary action should be taken.

Hon MICHAEL MISCHIN: Can the minister give a ballpark figure of how often that disciplinary action takes place in the course of 12 months, so we can get a flavour of just how much of this sort of defalcation, albeit at low levels, takes place? What are the median and average amounts of moneys that are involved?

Hon ALANNAH MacTIERNAN: With prosecutions for unauthorised withdrawals from trust accounts, we have become more active over the last couple of years. I will read the numbers that we have here. In 2012, there was one prosecution; 2015, one; 2016, two; 2017, one; 2018, eight; and in 2019, two. Prosecutions are taking place, but we point out that the current penalty appears to be \$3 000.

Hon MICHAEL MISCHIN: Can the minister give some idea of the sums of money involved? She has given us \$868 000, I think, for the latest prosecution, \$120 000—something in 2014 and I cannot recall the other figure that the minister gave me. Can the minister reel off the figures for the amount of money that has been stolen in those unauthorised withdrawals, let us say, under section 68(4), apart from the ones that she has given us?

Hon Alannah MacTiernan: No, we do not have that information at hand.

Hon MICHAEL MISCHIN: That is part of what troubles me about this. Again, I stress I am not cavilling at the idea of increasing the penalties, but is it fair to say that one reason the penalties have to be increased in this legislation is that the police will not take action?

Hon ALANNAH MacTIERNAN: No, I am not saying that. It is a question of prioritisation. Understandably, the police have to make their prioritisation based on their assessment of a public interest test. We have a much simpler way of dealing with this, which we are proposing and has been embraced by every other state, so that this agency, which is already responsible and last year took action against eight different defalcators, could then in fact seek a further penalty. To me it makes absolute sense. As I said, if there is a major breach, there is nothing stopping the police taking independent action if they so wish, but the police and Consumer Protection get together, work out and make their assessments about what is best in the public interest regarding the allocation of resources. I cannot keep explaining this over and again. It is a perfectly reasonable thing for police and the Consumer Protection division to do. It is perfectly reasonable for us to say, “Let’s streamline this process, and let this be dealt with by the people who are doing the collection of the data, doing the audits, and who are bringing the other disciplinary actions forward.”

Hon MICHAEL MISCHIN: I appreciate the minister’s defence of the police, but there is no streamlining involved in this. The process is the same. We are not doing anything about process; all we are doing is providing for a greater punishment to be imposed for behaviour that is currently classed as simply an unauthorised withdrawal transaction, carrying a penalty of \$3 000. The minister told us that the police need to allocate their resources practically in the real world and, in a serious enough case, they will take action. We are talking about someone withdrawing \$868 000 without authorisation from a trust account. I do not know how much more serious it has to get before the police decide that they need to do something when the only penalty available under the regulatory agency is \$3 000. If that does not signal to them, “Hey, this is not a significant enough punishment if we leave it to the poor department to prosecute; it might be actually in the public interest a police matter”, I do not know where their priorities lie. It astonishes me that the police can say, “after a consultation with the department”, and it presumably points out that making away with \$868 000 of someone’s money out of a trust account, when the only penalty that can be imposed is a \$3 000 or a \$10 000 fine, perhaps, is not serious enough for the police to charge under the Criminal Code. As I understand it, stealing itself is seven years’ imprisonment and a fine of, I think, an unlimited amount. Stealing from a trust account is even more under the Criminal Code, yet the police, after consultation with the department, are not telling them, “We can’t punish this person badly enough. It’s in the public interest to show

that this is a serious offence.” The police are saying, “Sorry, our priorities lie elsewhere.” Is that the position? Are we having to do this because the police are not doing their job?

Hon ALANNAH MacTIERNAN: We are doing this because it makes sense. I will not explain it again. It makes absolute sense to have the agency that is doing the research, gathering the data and which has intimate knowledge of the obligations of the industry, to take a single composite action when it can seek a penalty and imprisonment. We are not saying it is because the police are incompetent or wrong; we are saying that this makes absolute sense. It is massively a streamlining. It is that ability of the department, which would have to take action under its legislation in any event, to then seek a penalty that would be commensurate with a penalty if this was being delivered under the Criminal Code. To me that is saving court time and the time of police officers, because we have the one agency that can seek the updated monetary penalty, undertake the disciplinary processes and seek imprisonment for that same identical set of facts. To me that is absolutely streamlining. That is what we want to do. We want to make the regulation of this industry more efficient, more effective and more comparable with what happens elsewhere. In that time, I think we offer the opportunity of getting better value for our taxpayers through this streamlined approach.

Hon MICHAEL MISCHIN: In the case that the minister has mentioned, which is still the subject of a prosecution that has not been resolved, let us assume for the moment that there is a conviction and it is proved that \$868 000 —

Hon Alannah MacTiernan: No, it is \$686 000.

Hon MICHAEL MISCHIN: It is \$686 000, is it? I thought it was \$868 000. Anyway, \$686 000 has been withdrawn without authorisation for a purpose other than the transaction, contrary to section 68(4). What penalties is that person facing? What is the maximum penalty that he or she can be punished with, and what other remedies are available to the department under the legislation?

Hon ALANNAH MacTIERNAN: It is \$3 000 per withdrawal. Obviously, that is a total amount of money. Now, that may have constituted different withdrawals, and each of those withdrawals carries a maximum penalty of \$3 000. Action can be taken at the same time to remove the agent’s licence to trade.

Hon MICHAEL MISCHIN: Can the minister tell us how many charges have been laid?

Hon ALANNAH MacTIERNAN: No. Sorry, how many charges in that matter?

Hon MICHAEL MISCHIN: Yes.

Hon ALANNAH MacTIERNAN: No.

Hon MICHAEL MISCHIN: All right, so it could be one charge for an unauthorised withdrawal of \$686 000, which carries a penalty of \$3 000 as a punishment, and the police were not interested in taking it on.

Hon ALANNAH MacTIERNAN: I did not say that the police were not interested in taking it on.

Hon MICHAEL MISCHIN: The police have not taken it on; is that correct?

Hon ALANNAH MacTIERNAN: No, I am not saying that. I am not saying that there has not been police action in any of those specific cases. My point is that when there is consultation, generally speaking, the strong preference of the police is that the Department of Mines, Industry Regulation and Safety deals with these matters. I am not saying that there was not police interest in that particular case, but as a general rule. That is what we are aiming at and talking about here: Can we improve the legislation? Can we make this system work better?

Hon MICHAEL MISCHIN: I am confused now, because I understood that that case was given as an example of the police leaving it to the department to take prosecution action. Is that \$686 000 unauthorised withdrawal—whether in bits or as a lump sum—the subject of police action, or is the department having to prosecute under the Real Estate and Business Agents Act?

Hon ALANNAH MacTIERNAN: We will clarify that. As I said, quite frankly, it does not go to the substance of the legislation, but we will clarify whether that is a matter that has been taken up by the police. I was talking about two separate things. Generally, there is strong consultation, because of the need to engage in the public interest test and assess what is the best value for money for the taxpayer, and, generally, it falls to the department to prosecute, and it makes more sense if it has a full range of remedies available to it.

Hon MICHAEL MISCHIN: Is it the case that in these prosecutions undertaken by the department pursuant to the offences under the Real Estate and Business Agents Act, it can require the repayment of money that has been improperly taken?

Hon ALANNAH MacTIERNAN: As I set out in my earlier comment, yes, but often the problem is that the money is gone by the time the defalcation comes to light. I set that out specifically in relation to the 2014 case, when the member was the Minister for Commerce. The agent admitted stealing \$129 500, but the compensation is yet to be paid.

Hon MICHAEL MISCHIN: What penalty was imposed on that occasion?

Hon Alannah MacTiernan: As I set out in my earlier comment, it was \$9 000.

Hon MICHAEL MISCHIN: I take it that the fine has not been paid either?

Hon Alannah MacTiernan: I do not have that information.

Hon MICHAEL MISCHIN: The \$129 500 has not been repaid. Has any action been taken by the department to try to recover those funds?

Hon Alannah MacTiernan: I do not have that advice.

Hon MICHAEL MISCHIN: The minister does not know whether the department has taken any action, or whether any action has been fruitful?

Hon Alannah MacTiernan: There was a court order.

The CHAIR: I give the call to the minister, if she has a detailed response.

Hon ALANNAH MacTIERNAN: Look, we do not have the detail of every prosecution that has taken place, and I think it is unreasonable to expect that we would. We have set out some to give members a broad colour of the legislation and some of the practical cases that come up. We do not have all the details. It would be completely unreasonable to expect that. My advice is that compensation is yet to be paid.

Hon MICHAEL MISCHIN: I am not trying to be unreasonable here, and I have no expectation that the minister would have all the facts of this information at her fingertips. I am simply trying to get an idea of how serious this problem is. As I have indicated, I do not have a difficulty with a substantial increase in the penalties available to deal with these sorts of matters, but it appears that the problem extends a little bit further than that. From what the minister has been telling us, it seems that although certain cases involve hundreds of thousands of dollars, the police do not think that they are of sufficient public interest to pursue by way of criminal prosecution and by way of the remedies available under the Sentencing Act to require restitution and compensation, and have abandoned that responsibility to the department in the knowledge that the department has a very limited means of enforcing this provision. That disturbs me, and if I had been aware of that issue, I would have taken some action on it. I support the increase in penalties. The next question is whether the increase in penalties is sufficient. Other elements of the bill refer to penalties increasing to hundreds of thousands of dollars and the like. Here, we are talking about the theft of moneys, in effect, from a trust account. What penalties would be available against a person charged under the Criminal Code for the taking of moneys unlawfully from a trust account?

Hon ALANNAH MacTIERNAN: We do not have that information available, but, as I said, these penalties are not a substitute. The police would still be able to take action in cases that they deem appropriate. I see your point. This is perhaps at the modest end of the increases. As the member knows, because he started this process, this particular penalty was last updated in 1994, as opposed to other penalties that go back as far as 1976, so the order of increase is perhaps not as great. Could it be greater? Possibly, but I think we see the term of imprisonment as the key factor in providing a greater incentive in this regard. The member could mount an argument that there could be a higher penalty in relation to defalcation; I think that would be in order. But we have done the consultation with the industry. This is the package, I think it is warranted, and we think that we will get better protection for people if we are able to put this more serious penalty. Again, I am not saying that the police are not interested. These practical decisions are made on a day-to-day basis, and I am sure that there is police action in some of the larger cases. However, as I said, last year the department brought eight cases before the courts. We would like the opportunity of an updated penalty.

Hon MICHAEL MISCHIN: I thank the minister. I appreciate that. Yes, I may have started the process; I never finished the process. But it does strike me that what the minister has said about the ability of the police to take action in serious enough cases is really avoiding the issue, because the police do not take action, from what the minister has told us. I do not expect the minister to have the information available now, but I and possibly some other members may be interested to know a little more about the defalcations that the department has become aware of, which ones it has prosecuted, the dates of the offences, the number of charges and the outcome of each of those. I understand that there may have been eight last year, but we do not know what they involved or how far they have advanced. If the minister could take it on notice to at some stage provide us with that information, I would appreciate it.

I fully support the idea of increasing the penalty. I note that the Real Estate Institute of Western Australia is concerned about the inclusion of a two-year option penalty. I am concerned that the police are not taking these sorts of cases seriously enough and leaving it up to the department, which is faced with a limited armoury of enforcement measures, to deal with them. For example—the minister may be able to help here—if the person who was prosecuted does not pay his \$129 000, is any sentencing option available to the magistrate other than to fine them and order restitution? Were any of the other options under the Sentencing Act 1995 available, or community

orders or mixed orders of various types to require further punishment and control over the miscreant? Those things are important and one reason why action might well be taken under the Criminal Code, which makes it quite clear that they may not be able to practise again because their licence has been withdrawn and they have a criminal record for what is a criminal act. It worries me that the police are saying that even an offence involving \$686 000 is not serious enough for them to investigate and lay charges, particularly when most of the investigation has already been done for them by the regulatory agency. I would appreciate some further information. We may be uncovering a far more serious problem in that although the department is being assisted in its work, perhaps it does not have enough in its armoury to deal with these sorts of cases.

I want to raise an issue at the other end of the scale: the provision of a fine of \$5 000 for failing to comply with educational requirements prescribed by regulations. That seems to be a very broad sort of an offence that leaves it to regulation to prescribe educational requirements, which could mean anything, and that a failure to qualify can result in a fine of up to \$5 000 under proposed section 50C. How is it envisaged that that will work? Does the department manage any other legislation that requires someone to maintain certain educational qualifications prescribed by regulation that also can result in a criminal offence for failing to be educated enough?

Hon ALANNAH MacTIERNAN: The member raised this issue before and I think I addressed it in my second reading reply. New section 40B provides that an agent must meet the prescribed educational requirements to complete the compulsory professional educational activities as required by the regulations. A penalty is attached to the failure to do this. As I explained to the member in my second reading reply because he raised this issue, the only option available was to discontinue the licence and remove one's livelihood, which seemed to be perhaps too harsh a penalty. The enforcement of this requirement has been separated from the licensing function with the creation of new offences of failure to complete the requirements, which it is anticipated would be dealt with by issuing an infringement notice. Of course, if the agent or sales representative repeatedly offends, consideration could be given to prosecution for the offence or placing a condition on the licence or certificate.

Hon MICHAEL MISCHIN: Is the infringement notice idea available now under the Fines, Penalties and Infringement Notices Enforcement Act or is it planned to include it within the ambit of that act?

Hon ALANNAH MacTIERNAN: It has not been prescribed yet so it is not in place. It will come into play once the regulations are prescribed.

Hon MICHAEL MISCHIN: When does the minister expect that that might take place?

Hon ALANNAH MacTIERNAN: Once the legislation is passed, we will then go through the process of drafting the regulations. We anticipate that it will take three to six months to prepare the regulations that are attached to this omnibus bill.

Hon MICHAEL MISCHIN: I will explore that a little further. At the moment, the minister says that the only sanction against someone who fails to keep up their qualifications is to have their licence withdrawn or presumably some qualification could be put on their licence. Is that option available at present?

Hon ALANNAH MacTIERNAN: No, that is not available at the moment. It is an option that will become available under this legislation.

Hon MICHAEL MISCHIN: If someone is not suitably qualified, why is it not unreasonable to simply say that unless they get that qualification within the next period of time, their licence will not be renewed at some point in the future or it will be withdrawn as a means of requiring them to not only take that course, but also qualify in that course? If it is simply a fine that is imposed for a person failing to achieve the necessary level of competence, if they do not achieve that level of competence, they are still going to be able to practise under the licence.

Hon ALANNAH MacTIERNAN: I understand the question. Often a situation might arise in which a certain amount of continuous professional development has taken place but the person has not met the full requirement. When this matter was considered and discussed with the Public Sector Commissioner and the agent's representatives and they looked at the cases over the last six to nine years, their assessment was that very often the disbarring or discontinuation of the licence was disproportionate to the nature of the offence. The preference is to have some flexibility. The amendments will still allow the commissioner to refuse the licence when there is in his or her assessment gross noncompliance with the educational requirements. If there is a real failure to engage in any professional development, that becomes a significant factor that the commissioner takes into account. Sometimes the breaches might be relatively trivial, and in the judgement of the commissioner and our government, we considered the cancellation of the licence to be disproportionate to the offence. Again, we think that to have a more nuanced range of responses available to the commissioner is better than a simple, "You cannot have your licence renewed." This provision, I understand, is supported by the agents.

Chair; Hon Rick Mazza; Hon Alannah MacTiernan; Hon Michael Mischin; Hon Aaron Stonehouse; Deputy Chair

Hon AARON STONEHOUSE: I have some questions around defalcation and when Consumer Protection decides to pursue a case and when it is handled by the police. First, I am wondering: What redress is available to a victim of defalcation? What compensation or restitution might be available to someone, and how might they pursue it?

Hon ALANNAH MacTIERNAN: There is a fidelity fund, and, obviously, if there is court-ordered compensation, I understand that the party would have access to the fidelity fund. The details of the fidelity fund are set out in section 116. The fidelity account is held and applied to reimburse a person for a person's pecuniary or property loss to the extent of defalcation, and the bill sets out the circumstances. Therefore, a fidelity fund is available.

Hon AARON STONEHOUSE: I will have some questions about the fidelity fund in a moment. A court may order some kind of redress; the minister mentioned it before when she spoke about the fidelity fund. I am a little unfamiliar with how that works. Could such court-ordered redress be part of the proceedings that Consumer Protection pursues or engages in, or is it available only in a criminal trial that police would pursue?

Hon ALANNAH MacTIERNAN: No. It is already available and we will be making changes. When we come to clause 57, which amends section 116 of the act, we can talk in detail about those changes. If departmental action finds an unauthorised withdrawal and that the person has lost money, the person is entitled to make a claim against the fidelity fund. Under the current regime, they are entitled to make a claim against the fidelity fund.

Hon RICK MAZZA: I will ask about the fidelity guarantee fund. This bill has a provision for a claim to be made against the fidelity guarantee fund for up to six months after the agent ceases to hold the licence and triennial certificate, whereas, currently, a claim for defalcation can be made only while a licence and triennial certificate are current. Can the minister explain to me the impetus behind extending that period for six months after the triennial certificate and licence ceases to be current?

Hon ALANNAH MacTIERNAN: Member, I would rather go into that detail when we get to clause 57, because the detail of those changes to the fidelity fund is in fact what clause 57 is about.

Hon RICK MAZZA: I get that, but I have a few general questions around it as well. I am just trying to find out why we have this extension of six months. Do we find that most of these defalcations take place after the licence holder ceases to hold the licence? Is that one of the reasons for extending this for six months?

Hon ALANNAH MacTIERNAN: No. There is no evidence to suggest that the defalcations themselves take place after a person ceases to be a licence holder. Sometimes it is not the licence holder; in some of those cases, it is an employee of the licence holder.

Hon RICK MAZZA: I probably did not explain that too well. The point I am trying to make is: Do the claims arise after the licence and triennial certificate cease to be current? Is it the case that an agent becomes insolvent or they have been penalised and their licence and triennial certificate have been cancelled and then they find that in three months' time there are claims against them because the agent has breached their trust account along the way? Can the minister give us some evidence around why the extra six months is required?

Hon ALANNAH MacTIERNAN: It just logically make sense. The licence holder might have been in compliance and they might have held the licence, in which case there would be a case against the defalcation fund. But, from time to time, a defalcation might have taken place while there was a licence and it was picked up in an audit, action was taken, and, subsequently, it was found that after the licence holder had lost their licence, there had been other defalcations. Therefore, it gives a period of six months. It is a bit similar to these other provisions that we were talking about in other areas with home building insurance. It permits a claim on the fund when the defalcation occurs within six months after the agent ceases to hold a licence and when the CEO considers it to be just and reasonable. Therefore, if the person against whom the defalcation was made presumably had every reason to believe that they were dealing with a licensed person when that defalcation took place, there is flexibility to allow that claim on the fidelity fund. This provides flexibility for cases in which a person previously had the armour of being a licensed person and is perhaps still holding themselves out to be a licensed person, even though they may have lost their licence, which I think is something that the member would support, based on his comments about home building insurance.

Hon RICK MAZZA: Can the department give us some statistics on how many people have tried to make a claim on the fidelity guarantee fund for a loss and then found they could not because the agent had ceased to hold that licence and triennial certificate?

Hon ALANNAH MacTIERNAN: Member, we do not have it. But, as part of the general review, we are trying to look at circumstances when this might happen. Bear in mind that this package has been a work in progress for six years and there have been discussions that this type of thing could happen. We do not have documented cases of whether it has happened, but, as I said, the member can understand the circumstances, much as he outlined in the home building insurance example of people believing they were still dealing with a licensed person but the person had lost their licence. This provides that flexibility.

Hon AARON STONEHOUSE: I have a few more questions around the compensation available for victims of defalcation, because it has an impact on which path government agencies take. If it is pursued by Consumer Protection, there are some ways of compensating victims. If it is pursued by police, there are other ways. As I understand it—I could be wrong, and I am happy to be corrected here—if it is dealt with as a criminal matter and if police investigate fraud or defalcation, a victim may apply to the court for a reparation order, compensation order or restitution order to reclaim money or lost property. Whereas, if Consumer Protection pursues it, it seems as though those options would not be available to a victim of defalcation—a victim of fraud—and they would have to go through the fidelity account. That is why it is important to clarify the implications of Consumer Protection pursuing these cases rather than police. For a start, perhaps the minister could clarify whether my assessment is correct—then I may have a few questions on the fidelity account. I think rather than leaving these questions until we debate clause 57, we should discuss them now because we are talking about the penalties that will be imposed, whether Consumer Protection is the best-placed agency to pursue these matters and whether the penalties are adequate and an adequate deterrent for these matters, as opposed to police dealing with them and criminal penalties being applied. Perhaps the minister could confirm whether my assessment of the compensation available through defalcations dealt with as criminal matters and those dealt with by Consumer Protection for restitution is correct.

Hon ALANNAH MacTIERNAN: It is important to understand that they will be criminal matters. The prosecutions undertaken by the department will be heard in the Magistrates Court and any offence that has a sentence of imprisonment attached to it is considered a criminal offence. I think the member is running down a rabbit hole here, because the biggest problem is there not being any money. As we quoted earlier, a person might get a compensation order but there is no money. The best thing for that person would be to have speedy access to the fidelity fund because, as I understand it, even without a prosecution, it is still possible to make a claim under the fidelity fund. If we are focusing on practical, real-world solutions, a much better outcome for the victim is to have this administered within Consumer Protection.

Hon AARON STONEHOUSE: I thank the minister for clarifying that. I asked that question because in this case, the fidelity fund is the best form of compensation for victims of defalcation. If somebody raided a trust and spent the money on their gambling addiction, obviously, the victim will not get much help from a restitution order made by a court, but in cases in which the culprit has funds, the victim could potentially still apply to the court, even if Consumer Protection is handling the case. At the time of sentencing, the victim could still apply to the court for compensation or restitution. The only issue would be the practical limitation if the person who had stolen the money had already spent it or did not have any money to compensate the victim.

Having had that issue clarified, I will move on to the fidelity guarantee account. I am not sure whether a member has asked this question previously. Could the minister tell us what the eligibility criteria will be for making a claim against the fidelity guarantee account? The minister mentioned that a criminal conviction would not be required. What will be required to make that claim? I may have a couple more questions that follow on from that.

Hon ALANNAH MacTIERNAN: Member, I really do think that we are never going to make progress if we continue this way. The fidelity fund is dealt with in a specific clause. The department already has the power to seek and obtain a compensation order under the existing consumer protection legislation. If that is not paid, there is the ability to access the fidelity fund. There is no double dipping. Obviously, if a person gets compensation or reimbursement from the defalcator, they will not get access to the fidelity fund. But if a person is unable to get compensation or reimbursement, the fidelity fund is a backstop. I am advised that in some cases, for whatever reason, prosecutions are not undertaken, but if a loss can be established, it is possible to go directly to the fidelity fund.

Hon AARON STONEHOUSE: I thank the minister, because that has made it very clear for me. Are there two separate pools of money—one for settlement agents and one for real estate agents—within the fidelity guarantee account or are they kept together? I would also like to know what the two balances are if they are separated or the total balance if they are together.

Hon ALANNAH MacTIERNAN: Member, I think we are going right outside the general agreement that we would be talking about particular provisions. I will make one further comment that there are two separate funds—one for settlement agents and one for real estate agents. I do not have the sums available.

Hon AARON STONEHOUSE: I am not trying to be funny; it is just that I think that the compensation available to a victim is relevant to this discussion of penalties. We are at the top of the amendments to the Real Estate and Business Agents Act, but in discussing penalties, when Consumer Protection pursues these cases and when police pursue these cases is relevant to the type of compensation that might be available.

Hon Alannah MacTiernan: It doesn't impact on the fidelity fund at all. There is no impact.

Hon AARON STONEHOUSE: I think access to the fidelity fund is relevant when we are talking about the penalties that will be applied to people found guilty of defalcation and the compensation available to victims of defalcation. If the minister will indulge me a little further, I want to know who will contribute to that fidelity account.

Chair; Hon Rick Mazza; Hon Alannah MacTiernan; Hon Michael Mischin; Hon Aaron Stonehouse; Deputy
Chair

Hon ALANNAH MacTIERNAN: It is a contribution by way of a levy on the licensees. Income is derived from the investment of the money standing to the credit of the fidelity account. All moneys are recovered by or on behalf of the state for the benefit of the fidelity fund; that is, if a payout is made, subsequent action is taken against someone. The fundamental feedstock of the fidelity fund is the levy on licence fees.

The DEPUTY CHAIR (Hon Adele Farina): Before putting the question again, I want to remind members that there was an agreement that we could use the first clause in relation to each component of the acts being amended to talk about all the clauses and how they interrelate. We seem to be very much focused on clause 57, and I think if this line of questioning continues, it is more appropriate for that detailed questioning to happen once we get to clause 57. If members want to explore a comparison between clause 57 and another clause in the bill, I am happy to continue to entertain that, but I might remind members that we should not be debating clauses we have not yet reached unless we are talking about its relationship with another clause of the bill.

Hon RICK MAZZA: I thank Madam Deputy Chair for her guidance. I think Hon Aaron Stonehouse's questions on the balances of the settlement agent and real estate agent fidelity guarantee funds are very relevant. The minister provided information earlier that there was a loss of \$123 000 in 2014. I missed the figure for 2015. It was \$300 000 in 2016 and the current loss is \$686 000. A bit over \$1 million has been lost to fraudulent activity on trust funds. It is very important that we know the balance of those funds so we can make sure that there are funds available when claims are made. I understand that the courts find someone guilty and apply a penalty, but it would be a matter of a consumer applying to the department to recover the money they lost in the fraud that was committed. I am interested to know what those balances are to ensure that enough coverage is there should there be a number of further defalcations or defalcations of large amounts. I think it is very important that those fidelity guarantee funds are able to cover those situations.

Hon ALANNAH MacTIERNAN: The member is wrong to presume that all the cases I read out were cases in which recompense was not paid. I think I said that it was one case. I assure the member that the funds are well and truly cashed up. We are talking about a sum in the tens of millions of dollars. There is no suggestion that there will be any shortfall in the funds.

Hon RICK MAZZA: I am not trying to be antagonistic, but to say that the fund is cashed up in the tens of millions of dollars does not give me any indication of what the fund is worth. With all its resources, the department can surely provide the minister with a simple balance, or an indication of a balance, of the fidelity guarantee fund.

The DEPUTY CHAIR: Member, that sounds very much like a clause 57 question.

Hon ALANNAH MacTIERNAN: We will seek to get that information and will, hopefully, have it when we get to clause 57.

Hon AARON STONEHOUSE: This is a slightly different question. I will not ask about the fidelity account. I think this will be my last question on this. My question is about penalties. Forgive my ignorance, but when fines are successfully applied for defalcation, what happens to the money collected? Does it go into consolidated revenue, the agency's budget or the fidelity account? Where does that money go exactly?

Hon ALANNAH MacTIERNAN: My understanding is that all fines go into the consolidated account.

Clause put and passed.

Clauses 39 to 51 put and passed.

Clause 52: Section 50C inserted —

Hon MICHAEL MISCHIN: This clause will introduce a new section 50C into the act. It states —

A sales representative must comply with the educational requirements prescribed by the regulations.

It provides for a penalty of a fine of \$5 000. The minister has told us that in due course it is expected that this will be dealt with by way of an infringement notice and modified penalty under the Fines, Penalties and Infringement Notices Enforcement Act. Leaving aside that element for the moment, can the minister tell us what sort of educational requirements are currently prescribed by regulations, if any, or what is anticipated to be the educational requirement that, if not attained, will attract a fine of up to \$5 000 following a prosecution?

Hon ALANNAH MacTIERNAN: As the member will be aware from his legal days, professional development systems work by prescribing a certain number of hours. The hours prescribed are quite modest; it is 10 hours of learning. I will give the member some examples of courses. One course for real estate agents is called "Managing Risk in your Agency". Another is about the new family and domestic violence provisions in the Residential Tenancies Act. Perhaps the member could run a small program on that one! Other courses for real estate agents are on business management practices for licensees and a review of legislative requirements for the disposal and storage of abandoned goods. Some programs for settlement agents involve key changes to the joint form of general

conditions, undertaking settlements involving subdivisions, a review of Australian Consumer Law, writing special conditions in residential contracts of sale, preventing cybercrime and identifying fraud in settlements.

This change will bring in a penalty for failing to meet that full 10 hours. It is possible that if there has been no attempt at professional development, it will be open for the commissioner to make a decision that that is a gross violation and that the licence not be renewed. That will allow a slightly more nuanced response, as we discussed in previous clauses.

Hon MICHAEL MISCHIN: I thank the minister for the suggestion that at some point I might want to run one of the courses.

Hon Alannah MacTiernan: You just have a lot of knowledge of it!

Hon MICHAEL MISCHIN: Yes. As I recall from the debate on that piece of legislation, I had a lot more knowledge of it than the minister who was managing the bill in the other place. Who prescribes these courses and runs them now?

Hon ALANNAH MacTIERNAN: Various programs are put forward by registered training organisations. Sometimes it is by the RTO body of the Real Estate Institute of Western Australia itself. The programs need to be preapproved by the commissioner. Propositions are put forward by RTOs and receive approval from the commissioner.

Hon MICHAEL MISCHIN: Is the assessment of whether someone has attained the necessary educational requirements done on the basis of the number of hours they have attended the courses or is it a number of continuing professional development points, as is the case for legal practitioners? Some courses may not qualify as CPD courses and therefore do not prescribe points. Other courses may have a varying number of points and people have to achieve a certain number in order to retain their practice certificate. Is that a similar situation or is that yet to be developed by way of regulations?

Hon ALANNAH MacTIERNAN: That is the current structure. Each calendar year, real estate agents must obtain 10 continuing professional development points and settlement agents must obtain six CPD points. The courses must include the mandatory core subjects set by the Commissioner for Consumer Protection. For real estate agents, three of the 10 points are for mandatory courses. For settlement agents, four of the six points are for mandatory courses. Licensees are not required to pay for those. The balance of points is to be made up from approved elective courses, for which attendances are paid for by licensees. Generally speaking, points are attributed at the rate of one point for an hour of learning conducted by an RTO. Fewer points are attributed if it is a breakfast seminar.

Hon MICHAEL MISCHIN: Not being a morning person, I think of those as particular cruelties.

So, 10 points are needed over a year and there are different weightings depending on the type of course—three of them are compulsory and free. Roughly how much do these courses cost? Is there any indication from the department of what a licensee is looking to spend if they are obliged to attend these courses? I think it is important because not only does a certain amount of money have to be forked out—I suspect that the course will be tax deductible down the track—but also someone is looking at a fine of \$5 000 if they do not attend one of these breakfasts to keep up their points.

Hon ALANNAH MacTIERNAN: It is really important to understand that we are not changing this part of the legislation. It is currently in the legislation and it is not changing. All we are changing is the ability for the commissioner to fine a person if they fall a few points short, rather than suspend their licence. We are not changing the actual requirement. We do not know what these courses cost; most of them would probably be around the \$100 mark. We could try to get some information on that. It is important to point out in this debate that nothing is changing. The requirements for the CPD points remain unchanged. The only relevant thing that is changing is the commissioner's ability to impose a fine, rather than cancel a licence for a minor defalcation.

Hon MICHAEL MISCHIN: I appreciate that a regime is currently in place that provides for continuing professional development. It is a pretty significant change to make it an offence not to comply with them and for the commissioner to prosecute. Presumably, a prosecution notice would have to be drafted by the legal staff down at the department, be served on the "criminal" and be taken to court. That is a significant change. Is the minister or the department aware of a similar provision relating to continuing professional development requirements under any other legislation? For example, are legal practitioners potentially fined if they do not keep up their CPD points?

Hon ALANNAH MacTIERNAN: The view of the industry was that it was a much more lethal weapon to lose a licence for failing to comply with the points. It is important to understand that this is seen to be a benefit for real estate agents and settlement agents who just fall short of the requirement. I have some examples of courses run by REIWA. They pan out at around \$40. They are not terribly expensive. We outlined earlier that under the regulations, it is possible that infringement notices will be issued, so a big court action will not necessarily be needed to deal with this. We think it is much more appropriate and it is certainly a measure that has the support of the agents.

Hon RICK MAZZA: Just on these development points, the minister said that it costs \$40 for a REIWA course. It is a bit more than that for many country members, as they may have to travel a couple of hours to attend one of

these REIWA courses. It could take almost a day to attend them. Can the minister explain how the points are set each year? A registered sales representative who has been in the industry for 10 or 15 years would undertake these courses time and again every single year. How many times can people talk about particular aspects of real estate? How are these things set? Is there discretion for someone who has been in the industry for a long period to not undertake some of these courses to gain points?

Hon ALANNAH MacTIERNAN: The whole philosophy behind this professional development is that because that was the practice, if someone practised for years, they did not need to update their skills. As the member can see from a number of the programs that I read out, they are very much about the changes that have occurred, very much about getting on top of changes to the conditions and very much about getting on top of problems with cybersecurity and identification. The whole concept of continuing professional development is to ensure that we do not fossilise in our professions and that we continue to explore these changes—for example, the legislative changes to the domestic violence provisions and the changes that we are talking about today. There is ample need for a mere 10 hours of professional development a year. There is more than enough material on new things, and it is important to keep people refreshed. I remember when these points were first introduced in the legal profession. They made sure that people kept their qualifications contemporary and they kept up to date with the changes that were going on within the law. That is our intention. Webinars are available, so many of these courses can be accessed. There is a whole online CPD capability. It is not necessary to travel to Perth to do the courses. It is important for people in the profession to keep on top of these things. We know from the amount of legislation that we are dealing with in this place that there are important changes that we want people to know about.

Hon RICK MAZZA: I thank the minister for that. I agree that it is important for people to keep up their continuing professional development points. I suppose the point I am trying to make is that things vary from year to year. Recently, we debated the domestic violence legislation and the residential tenancies legislation. We have some more legislation coming through relating to residential parks that some real estate agents may need to be across. During some years, real estate agents and representatives are required to get across a lot of information, but in other years, there is not so much. Is there flexibility within these CPD points for the department to say, “This year you will have to achieve 10 points because a lot of legislation has come through and a lot of information needs to be provided to the industry”? In other years, when there is not so much, people might need only five points for that year. Is that flexibility available or is there a set amount of points every single year?

Hon ALANNAH MacTIERNAN: It is a set amount. We have to be able to plan these things. Quite frankly, I do not believe that 10 hours is onerous. I think it is less—some seven hours—for settlement agents. It is the same each year. There is plenty of new material and plenty of agencies and plenty of registered training organisations, including REIWA and the settlement agents body, are preparing these courses. A small number are mandatory. They run for three hours or four hours for a settlement agent. The others are available for people to choose. I do not think any modern profession would consider that to be excessive.

Hon MICHAEL MISCHIN: I asked whether the minister was aware of any other penalties being imposed under other legislation for a failure to maintain required educational requirements. Is the minister aware of any?

Hon ALANNAH MacTIERNAN: In the legal profession, a person would not get their legal practising certificate. This was considered an option that was less onerous on agents because it allowed some minor failure to comply to be dealt with another way, even by something as simple as an infringement notice. It is certainly designed to give greater flexibility to perhaps allow the client to more closely fit the penalty. It was judged that with some of these failures, such as the shortfall of a couple of points, losing their licence was too onerous, so the decision was made to go down this path.

Hon MICHAEL MISCHIN: The minister said that the Real Estate Institute of Western Australia is supportive of this change. Is that correct?

Hon ALANNAH MacTIERNAN: My advice is yes.

Committee interrupted, pursuant to standing orders.

[Continued on page 6730.]