

HEALTH SERVICES BILL 2016

Consideration in Detail

Postponed clause 20: Functions of Department CEO —

The clause was postponed on 22 March after it had been partly considered.

The ACTING SPEAKER (Mr I.M. Britza): We are considering the Health Services Bill 2016. The Legislation Committee on the Health Services Bill 2016 agreed to postpone the following clauses for consideration in the Legislative Assembly: clause 20, clause 102, clauses 141 to 143, and clauses 161 to 174.

Ms J.M. FREEMAN: Mr Acting Speaker, I am not sure how we should deal with this. At page 25 of the uncorrected proof *Hansard* of the Legislative Assembly Legislation Committee of 22 March, clauses 20 to 23 were postponed. I was not in the room at that time, but, other than that, I have a good understanding of what happened subsequently. We then went on to clause 24. So my question is: did we deal with clauses 21 to 23 at some later stage? There were postponed clauses and the report we got—I clearly did not look at that, but I have a bit of paper from Wendy Duncan—shows that they were the postponed clauses, but that does not appear to properly correlate with the *Hansard* I am looking at. I would like clarification to begin with about why we are only looking at clause 20 and not clauses 21, 22 and 23.

Mr J.H.D. DAY: I am advised that clauses 21, 22 and 23 were dealt with at the end of the Legislation Committee. I understand that clause 20 was overlooked at the time.

The ACTING SPEAKER (Mr I.M. Britza): What the minister has said is in fact correct. The video has confirmed that clauses 21 to 23 were dealt with and that clause 20 would be dealt with in consideration in detail in the Legislative Assembly.

Ms J.M. FREEMAN: Just for clarification, when were they dealt with? They were not dealt with on the night. Did we deal with them on the Thursday or the Wednesday?

Mr J.H.D. Day: On Thursday, on the last day.

Ms J.M. FREEMAN: On the last day, okay.

The ACTING SPEAKER: It was on the Thursday.

Ms J.M. FREEMAN: So clause 20 is the only clause we are looking at at this point in time?

The ACTING SPEAKER: That is correct.

Ms J.M. FREEMAN: I will just start off. Again, as I said, I was not there at the time, but I understand that the issue with clause 20 was the functions of the department CEO in relation to its industrial relations responsibilities. There was concern from members that the CEO would not take the general position for the whole of the health system and that different systems would occur. Does the minister want to comment on that? I will then leave it to my colleagues who were in the committee who had those concerns.

Mr J.H.D. DAY: As the member has intimated, I was not there in the committee as the Minister for Health at the time—we have had a change in the meantime—but I am advised that to address the concerns raised clause 24 was amended to ensure that a delegation by the CEO of the department could not be given to a staff member of the health service provider. As I said, clause 24 was amended to address the concerns that were expressed.

Mr D.J. KELLY: I was one of the members of the committee who raised the concern about the function of the government's industrial relations policy. One of the functions of the department CEO is identified in clause 20(1)(f) as follows —

managing WA health system-wide industrial relations on behalf of the State, including the negotiation of industrial agreements, and making applications to make or vary awards;

One of the concerns I had in the context of the other provisions of the bill was that the government could potentially break up, deregulate or atomise, or whatever we want to say, industrial outcomes between various hospitals. At the moment my understanding is that single negotiations cover different classifications of staff across hospitals—at least when they are employed by the health department. The concern I had was how this power under clause 20(1)(f) sits with the rest of the provisions of the bill, which seem to me to give ability to the government to basically have different industrial outcomes at different hospitals. The minister's predecessor said very strongly that that was not the government's intention and it was not something he would support. Given that we have had a change of jockey, I would very much be interested to hear from the new minister reaffirmation that that is still the government's view, particularly, I suppose, how the amendment to clause 24 assists to ensure that in terms of that function of the CEO this bill is not used to deliver something other than a statewide

industrial relations system, and we in fact do not end up with different negotiations and industrial outcomes at different public hospitals.

Mr J.H.D. DAY: I do not have any reason to vary the statements that were made by my predecessor as Minister for Health. The policy of the government then is still the policy of the government; it has not changed in the last week or so. A clear policy is not to allow delegation of the role of the department on a statewide basis for the purpose of overseeing and setting the industrial framework, including enterprise bargaining agreements. I do not have the amendment that was made here, but it would obviously be in *Hansard* and will be reflected in the bill when it is finally printed. The amendment reflects that clear policy intention. I am assured that the amendment ensures that that function is not able to be delegated in the way expressed in the concerns.

Mr D.J. KELLY: I thank the minister for those comments. My concerns are well grounded in history. There was a time when under the previous Court government —

Mr W.J. Johnston: You were the minister!

Mr D.J. KELLY: And we respected him deeply when he was!

Mr J.H.D. Day: I don't recall that!

Mr D.J. KELLY: I do not recall that, no!

Was the minister succeeded by Graham Kierath or was there some other poor soul in between him and the former member for Riverton?

Mr J.H.D. Day: Kevin Prince preceded me, Graham Kierath preceded Kevin Prince and Peter Foss preceded Graham Kierath.

Mr D.J. KELLY: With some indulgence, I remember one meeting I had with Graham Kierath as the minister when I made a comment that he had only been minister for a week and his predecessor said such and such. He said to me, "I'm the minister, and I'll be the minister for a long time", and the next week he lost the ministry! I remained secretary of the union throughout all those ministers, but I digress.

There was a time when there was a policy view that there would be different outcomes, not only in different hospitals, but also with individual contracts that allowed different outcomes for different people within the same classification. The minister can forgive me if I press him, but he has said that it is not the government's policy to have differing outcomes across different hospitals. Does this legislation allow the department CEO to implement a statewide system that nevertheless has different outcomes from hospital to hospital, and in fact from individual staff member to individual staff member? Does this legislative framework allow that to happen, notwithstanding that I accept that the minister said that it is currently not the policy of the government to have that sort of system in place?

Mr J.H.D. DAY: The advice I have is that the effect of the Health Services Bill 2016 does not provide for the circumstance that the member just inquired about. The whole tension in relation to the policy aspect of the bill and the whole structure of the bill is to establish a standard and consistent approach to the employment and industrial framework across the Western Australian public health system, including health service providers. I will answer the member for Bassendean's question directly. Does the bill allow for the circumstances he expressed concern about? The advice that I have is no.

Mr D.J. KELLY: I thank the minister for that response. I will just ask the minister about clause 20(1)(i), which states —

- (i) establishing the conditions of employment for employees in health service providers in accordance with the requirements of any binding award, order or industrial agreement under the *Industrial Relations Act 1979*;

The only legislation referred to is the Industrial Relations Act 1979. Can I just clarify: are any employees covered by the WA health system covered by the federal Fair Work Act 2009; and, if so, should there not be a reference to that legislation in this clause as well?

Mr J.H.D. DAY: I am advised that no employees within the Western Australian public health system are covered by the commonwealth Fair Work Act. They are state government employees and, therefore, are unable to be covered by that act.

Mr D.J. KELLY: Further to that point, I understand that employees of trading corporations are covered under the Fair Work Act, so there is always a question of whether or not public hospitals are in fact trading corporations. Simply because they are state government employees does not preclude them from being covered by the Fair Work Act; it is a question of the nature of the entity and whether it is defined as a trading corporation. My understanding is that it is a test that lawyers have made quite a bit of money out of litigating in various circumstances. Entities such as the Water Corporation, I understand, are trading corporations, so they

have people who are covered. There has been debate around public hospitals because in some of their activities they do trade, including their interactions with private health insurance providers—the whole works. I am not disagreeing with the minister's view that no-one is covered by the Fair Work Act; I suppose I just seek a further explanation or clarification that, in the government's view, none of the hospitals within the public health system are in fact trading corporations and, therefore, none of the staff are captured by the provisions of the Fair Work Act.

Mr J.H.D. DAY: I understand that the issue the member raises has been discussed by some, but there has not been any action to confirm or to establish Western Australian public hospitals as trading corporations. Some may try to push the limits a bit, but that is certainly not the intention of the government. I am advised that a provision in this bill somewhere makes it clear that employees are employees of the state government. I draw attention to clause 108(1), which states —

Each chief executive is to be appointed by the Department CEO for and on behalf of the State.

That refers only to chief executives, obviously, but my understanding is that that is the policy reflected in relation to other employees as well.

Ms L.L. BAKER: I refer to clause 20(1)(k), “providing support services to health service providers”. I am interested to hear from the minister what the nature of those support services might be. It is something that I did not notice when we were in consideration in detail in the Legislation Committee the other night, but one of the reasons it interests me is that that is a pretty general term. Both the minister's government and the previous Labor government have been through shared services and there is always the issue of duplication of systems, including information and communications technology systems. I am really interested to know what the extent of those support services would be. Is there a ring fence around it? For instance, if one of the health service providers wants support in upgrading its IT system, would that be part of what is being provided? Is it a fee-for-service arrangement or is it support services that the CEO provides from the department for free to all health suppliers? Is that clear enough for the minister to form a response?

Mr J.H.D. DAY: I am advised that the reference to support services relates to corporate-related services or shared clinical services such as pathology, and would also include IT services. Whether those support services are provided for “free” or whether a charge is made, as part of the general health budget at the moment work is being done to try to ensure that the actual cost of providing those services is identified. Obviously, if there is to be appropriate management of the budget in the health system, there needs to be knowledge about where resources are being used and how they are being spent and so on. If changes need to be implemented, we need to have good information about the cost of particular aspects of the system.

Ms L.L. BAKER: Does the government intend to show a list of what is in the range of that support services description, because in most corporate environments support services involve human resources, industrial relations, occupational health and safety, finance support and information and communications technology. Myriad things come under the term “corporate support” in most government departments. Can a list be provided so that the house can look at what will be covered? I think it is an interesting concept, when working out exactly the costings of those services. Clearly, if it continues to grow and the department is doing recruitment or support for ICT, the government might put fees in place. It might want to levy fees on health service providers. Can that information be located?

Mr J.H.D. DAY: The sort of services that are included include those I referred to earlier, such as information technology services, pathology and other corporate support services, including payroll management, human resources management, supply services and procurement services. That is the general ambit of what is included. The health system is a very large one, of course, and at the moment I am not fully familiar with the exact details of how those services are provided. It is quite an important issue because it is such a large system and the services need to be provided in an efficient way. I imagine there is a hybrid arrangement through which the department provides services across the whole system for some areas, but others are done on a more localised basis. I do not have more detailed knowledge than that at the moment, but the sort of services provided are those that I mentioned.

Ms J.M. FREEMAN: I want to clarify a question asked by the member for Bassendean. Subsection (1)(i) refers to the Industrial Relations Act. Previously, employees of what was the Liquor, Hospitality and Miscellaneous Union, now United Voice, were covered by a federal award and a federal agreement before coming back under the state agreement after agreement was reached by the parties. I am not sure of the status of the federal award. Did that happen because it was done during a period in which the parties relied on the constitutional provision of section 51(xxxv), which refers to disputes across the borders of any one state, and because the government did not think it would fall foul of the changes that happened under the federal industrial relations system when it started using corporations power under the Workplace Relations Amendment (Work Choices) Act 2005? We all know that when John Howard became Prime Minister, he used a whole series of powers, including the corporations power under the Constitution, to take control of pretty much 98 per cent of industrial relations in

Australia, excluding unincorporated small businesses and state governments. The Victorian government handed its powers over to the federal government. There was indeed a time when workplace relations legislation did apply in a dispute across borders of any one state because there was an award and there was an agreement. On that basis, if there is still active capacity for a dispute and a dispute is found and detailed, is it such that the federal workplace relations legislation would completely rely on corporations legislation such that the traditional aspects of industrial relations, which involved disputes across the borders of any two states, would no longer hold and therefore there is reason for the government to reflect binding awards, orders or industrial agreements under the federal system of the Fair Work Act? From my perspective it seems too simple to say that there is no concept of hospitals being seen as trading corporations. Certainly St John of God Hospital and Joondalup hospital are covered by the federal system and have workers who are covered by the federal system. Prior to the changes brought by the Howard government, which used corporations power to distinguish the rights and responsibilities of industrial relations over state workers, industrial powers were found in the Constitution under section 53(xxxv). A dispute was found across the borders of any one state in the case of health and that delivered a federal award and subsequently federal agreements. Why has that dispute not been reflected in this case, because it could still have some currency? We have been told on a number of occasions that the government is futureproofing; why is there no inclusion of that to futureproof if that dispute continues?

Mr J.H.D. DAY: The issue that the member has raised relates to commonwealth legislation. I do not pretend to be an expert on commonwealth workplace relations or corporations legislation. What we are dealing with here, as I explained before, are employees of the Western Australian state government. To elaborate on what I said in response to the member for Bassendean earlier, I also draw attention to clause 140(1), which states that a health service provider may employ and manage employees for and on behalf of the state, so we do not expect the circumstance that the member for Mirrabooka just outlined to apply. We are dealing with state legislation and the state industrial relations system.

Ms J.M. FREEMAN: I think there could still be a dispute and that the commonwealth legislation must be able to apply, unless the minister can tell me by virtue of fact that it uses corporations power and only corporations power to establish the fair work legislation. I do not think the government has done any futureproofing. That aside, if a future government decided to do what Victoria did, which handed over its industrial relations to the federal system because there was such a small amount of coverage—its public servants are in the federal system as well—does that mean that the government would have to come in here and purposely change the legislation to include the commonwealth Fair Work Act so that in terms of futureproofing, the government would need to ensure that those other provisions of awards or agreements under the Fair Work Act are binding?

Mr J.H.D. DAY: If the state was going to transfer its responsibility for industrial relations to the commonwealth, I am advised there would need to be an amendment to this bill and that would be included in whatever legislation is put forward to enable such a change, but the government does not have any intention or plans to do that. It is not something that has come up in any discussions I have been involved in, certainly in my recent memory, so it is an academic consideration.

Ms J.M. FREEMAN: Subclause (1)(i) refers to an order or industrial agreement under the Industrial Relations Act. How is it that the Minimum Conditions of Employment Act is not included?

Mr J.H.D. DAY: I do not have a clear answer for why that is not spelt out in here, but I imagine it is on the advice of parliamentary counsel that it is not necessary because those conditions are applied, either implied or explicit, somewhere in Western Australia's legislation; and, clearly, there is no intention to do otherwise.

Mr W.J. JOHNSTON: I want to raise the wording of that paragraph, because it states that the functions of the department CEO include —

establishing the conditions of employment for employees in health service providers in accordance with the requirements of any binding award, order or industrial agreement under the *Industrial Relations Act 1979*;

The conditions of employment are established by the contract of employment; the contract of employment cannot be contrary to the provisions of the binding award, order or industrial agreement. It is not the CEO who establishes the conditions of employment; they are the subject of the contract between the employee and the employer under the Minimum Conditions of Employment Act. Minimum conditions are implied in all contracts of employment in Western Australia, and, indeed, because these are state public servants, they would be covered by long service leave arrangements, which are also binding on the employer, but they are not mentioned here. I am concerned with the phrasing of this paragraph, which the member for Mirrabooka just drew to our attention. I do not understand why the words “establishing the conditions” are used, because the conditions are not established administratively; they are established by the contracts. The contracts have to comply with certain provisions, which is a different issue, so I am not sure why the word “establishing” is used here.

Mr J.H.D. Day: It is parliamentary counsel's advice.

Mr W.J. JOHNSTON: I would be interested to hear that advice, because I am not sure that is the case.

Dr K.D. Hames: If you had been at the Legislation Committee meeting, you would have!

Mr W.J. JOHNSTON: I could have, but I was not a member of the committee.

The ACTING SPEAKER (Mr I.M. Britza): Members, let us stay with the debate.

Mr W.J. JOHNSTON: I am being distracted by unruly interjections from the Liberal Party backbench. The member for Dawesville thinks he has something to say in these matters. He is like all the other backbenchers; he is way down the back and nobody in the ministry listens to him anymore.

I wonder whether the minister has a better explanation for using the word “establishing” when that is not what it will be doing.

Mr J.H.D. DAY: As I explained earlier, the conditions of employment need to be made clear by the department on a statewide basis. The department has a responsibility to ensure a statewide approach to the conditions that exist, and the words in paragraph (i) reflect that point, so I think it is a fairly esoteric argument we are getting into. It is very clear that the policy intention of the government in this legislation is that there will be appropriate conditions of employment that will comply with other state legislation, which the member for Cannington outlined himself, and a statewide approach will be taken.

Mr W.J. JOHNSTON: This reminds me of when I appeared for the Shop, Distributive and Allied Employees Association of WA in an inquiry into the first round of industrial relations changes, when Peter Reith was the federal minister. I think it was Winston Crane, a Western Australian Liberal senator at the time, who asked me how many people in the retail industry were covered by individual contracts. It was a silly question because it is 100 per cent—every single employee is covered. The definition covers someone who turns up to work and gets paid; that is their contract. The question really should have been: how many are covered by a salary package? This goes back to that question. The CEO cannot establish the conditions of employment because they are established by the contract of employment. The contract of employment has to comply with certain conditions, but it is the contract that creates the conditions, not the legislation itself; the legislation regulates the conditions. Again, I get to the words “establishing the conditions of employment”. I do not see how the CEO can establish the conditions of employment, because the conditions of employment, by law, have to comply with the IR act and, by fact, with the contract of employment. It is not that the CEO is “establishing” them; the government must look for some other word. I wonder, in the few minutes before question time, whether the minister can explain what this clause is trying to achieve, because it is not establishing conditions.

Mr J.H.D. DAY: I thank the member for his learned explanation and understanding of Western Australian industrial relations legislation. As I have explained, the intention is that there will be a statewide approach. The conditions of employment, of course, will reflect the Minimum Conditions of Employment Act and other relevant Western Australian legislation. Employees will be treated fairly and equitably, as they have been all the time that we have been in government. Obviously, I was not involved in detailed drafting of this legislation, but I do not see any problem arising from the wording expressed here, albeit if we accept the member’s argument that there are perhaps a few more words than is absolutely necessary, but perhaps a cautionary approach has been taken.

Ms L.L. BAKER: During the Legislation Committee hearing, I was interested to get some clarity about subclauses (3) and (4), which state —

- (3) The Department CEO must have the written agreement of the Minister for Works before commissioning and delivering a capital work or maintenance work under subsection (1)(g).
- (4) The Minister for Works may by order exempt a work, or class of work, from the operation of subsection (3).

Could the minister give me some clarity as to what those two clauses mean, in particular, what class of work might end up being exempt? It would be good if the minister could advise whether anything further in the clause might make this clear. I go back to the CEO having written agreement of the minister before commissioning and delivering a capital work or maintenance work and, also, the Minister for Works exempting a work or class of work from the operation of subclause (3).

Debate interrupted, pursuant to standing orders.

[Continued on page 2212.]