

HEALTH AND DISABILITY SERVICES (COMPLAINTS) AMENDMENT BILL 2021

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Peter Foster) in the chair; Hon Samantha Rowe (Parliamentary Secretary) in charge of the bill.

Clause 1: Short title —

Committee was interrupted after the clause had been partly considered.

Hon SAMANTHA ROWE: Before question time, Hon Nick Goiran was asking some questions. We are going to take some of those questions on notice, which I alluded to at the time.

Hon Martin Aldridge asked for the communications strategy to be tabled, and I table that now.

[See paper [1702](#).]

Hon MARTIN ALDRIDGE: I thank the parliamentary secretary for following up that matter. The Legislative Assembly not sitting this week would probably add to the difficulty of consulting with the minister responsible, so I appreciate the parliamentary secretary's efforts.

I would like to ask a couple of questions about what I think could be described as widespread support, following the consultation, for empowering HADSCO to investigate breaches of the national code and issue prohibition orders or interim prohibition orders. We have had access to the December 2017 *National code of conduct for health care workers in Western Australia: Consultation paper* for a while. The last paragraph under the heading "Prohibition orders", on page 15, before question 7, says —

It is proposed that the authority to issue prohibition orders and interim prohibition orders be available to the Director of HaDSCO following implementation of the National Code. It is proposed that prohibition orders may be issued against individual health care workers, or a body corporate, in accordance with the definition of a provider under Section 3 of the HaDSC Act.

Will the bill allow for a prohibition order or an interim prohibition order to be issued against an individual healthcare worker and a body corporate?

Hon SAMANTHA ROWE: It will only be individuals.

Hon MARTIN ALDRIDGE: That was certainly my understanding from reading the bill. In its consultation paper, the government proposed to empower the director to issue these orders against individuals and bodies corporate. Why have we landed on a policy position of having these orders apply just to individuals?

Hon SAMANTHA ROWE: I am advised that the intention is for the national code scheme to apply only to individuals and we want to be consistent with that.

Hon MARTIN ALDRIDGE: If that is the case, why did the Health and Disability Services Complaints Office go out in December 2017, following the 2015 final report of COAG, and suggest in its consultation that it was at least implied—it might be too strong to say that it was its intent—that the powers would be available to be used on individuals and bodies corporate?

Hon SAMANTHA ROWE: Honourable member, I am advised that it had been identified, and, I suppose, talked about with other jurisdictions, that it might be beneficial to apply to other organisations, but then over the passage of time, it was decided that we would stick with the COAG decision to implement the national code and stick just to individuals.

Hon MARTIN ALDRIDGE: I cannot do anything else but accept the answer, but it seems unusual that COAG released a final report in 2015 and then HADSCO released a consultation paper at the end of 2017 that, according to the evidence that we have had today, is inconsistent with the COAG decision and, therefore, has been discarded by government as a consideration of this bill because it is not nationally consistent. It seems peculiar to me that the government would consult on something that is not consistent with the COAG final report if the government's intention is to implement COAG's 2015 decision. When we look at the national code of conduct for healthcare workers—the version I am referring to is at page 13 of appendix 1 of the Standing Committee on Uniform Legislation and Statutes Review's 138th report—and the types of matters contained in the code, we see that there are obvious things that are, for want of a better expression, within the power or responsibility of the healthcare worker.

Let me give an example. The national code of conduct for healthcare workers requires that healthcare workers not practice while under the influence of alcohol or other unlawful substances, misinform their clients or make claims to cure certain serious illnesses. I envisage matters that could arise in the course of a complaint about some of those things that are listed within the code that are, in certain circumstances, outside the individual control of the healthcare worker—for example, "Clause 12: Health care workers not to financially exploit clients". If a healthcare worker is engaged by a body corporate or, in other terms, a provider—whether that is a provider as defined by

section 3 of the act or not—they may not, in that case, have a relationship with the consumer for matters of billing. How will the code apply to a healthcare worker in those circumstances?

That is only one example; there are probably other elements of the code for which the individual healthcare worker may not, depending on the circumstances, have control over the matter of concern. If the issue is deemed to be outside the control of the healthcare worker and, therefore, not a breach of the code and it is the government's decision to exclude bodies corporate from the application of the bill, how will the consumer be protected against violations of this type?

Hon SAMANTHA ROWE: I am advised that the member is correct. The provision of health services by an individual, not a body corporate, is captured under the national code of conduct. That might come under the remit of, say, Consumer Protection. If someone has an issue with a body corporate, they would have to go through Consumer Protection. If it is an individual, they would go through this national code scheme.

Hon MARTIN ALDRIDGE: I hope that establishing a body corporate will not be available as a shield for some to avoid the provisions of the bill that we are contemplating because of a government policy decision that is contrary to the position stated in its consultation paper—that bodies corporate were going to be included in the scope of the bill, but are not. I think that the majority of the code would apply in nearly all cases to the individual—the healthcare worker—but there could be circumstances in which a healthcare worker is working in an environment, a practice or employment arrangement, in which many of those things are outside their control. Even aspects of record keeping, the financial transaction, maintaining privacy, keeping appropriate records and keeping appropriate insurance could be matters for which there could be a shared responsibility or there could be no or limited responsibility taken by the healthcare worker because of the arrangements under which they are contracted or employed as a healthcare worker for a body corporate or for some other entity. I hope that the point I am making is understandable to the parliamentary secretary, because it seems that we have deviated at this point, notwithstanding her assertion that including bodies corporate would be inconsistent with the nationally agreed approach. I wonder whether this area could be exploited or could in some circumstances at least be a defence to those matters that I have just outlined.

I take the parliamentary secretary to two references to the Corruption and Crime Commission in the consultation report. The first appears on page 16 and it says —

The failure of a health care worker to comply with a prohibition order, or an interim order, may also require notification under the *Corruption, Crime and Misconduct Act 2003* for public officers or those contracted to perform a function of a public officer. Arrangements for collaboration of notification requirements and protocols between the CCC, PSC, HaDSCO and AHPRA may be warranted.

I now ask the parliamentary secretary to turn to page 23, which says —

Depending on the severity of the matter, a breach of the National Code may require notification to the CCC or PSC under the *Corruption, Crime and Misconduct Act 2003*. If HaDSCO were to achieve more significant investigation powers, it would possibly be an option for the PSC or CCC to refer a matter concerning misconduct in a medical context to HaDSCO to investigate.

Two ideas have been put forward here. One is that there could be circumstances in which a breach has been alleged or, indeed, established against a public officer who is also a healthcare worker that may require referral to the Corruption and Crime Commission or the Public Sector Commission, because they now have shared responsibility under the CCM act. The second proposal is that there could be instances in which the CCC refers an allegation of misconduct it receives to HADSCO. Initially, what consultation has occurred with the CCC and the Public Sector Commission on this bill? Further, can the parliamentary secretary elaborate on what policies, procedures or memoranda of understanding have been established to provide for this exchange of information?

Hon SAMANTHA ROWE: I am advised that currently it is a statutory obligation for the director to refer matters to the Corruption and Crime Commission or the Public Sector Commission when there has been an issue of misconduct. That already occurs. No specific consultation is undertaken when matters are referred to the Health and Disability Services Complaints Office from the CCC or the PSC, but both of those entities can do that if they see fit. It is up to them.

Hon MARTIN ALDRIDGE: On the parliamentary secretary's first point that HADSCO can refer a matter to the CCC or the PSC, I assume that would be for issues of misconduct pursuant to the Corruption, Crime and Misconduct Act. How regularly does that happen?

Hon SAMANTHA ROWE: I am advised that it happens from time to time.

Hon MARTIN ALDRIDGE: The second question was about the CCC, or indeed the PSC, lightening its load with this ability—this enhanced and better resourced HADSCO with a refreshed statute—when it gets complaints of a particular nature, making allegations that are directly relevant to the code of conduct for unregistered healthcare

workers. I reckon if I were the Public Sector Commissioner or the Corruption and Crime Commissioner, I would handball the allegations as quickly as I could. Is the parliamentary secretary saying that there has been no consultation with the Corruption and Crime Commissioner or the Public Sector Commissioner about arrangements that might exist in a matter of weeks, or a few months, for the referral of allegations between these agencies?

Hon SAMANTHA ROWE: In relation to the honourable member's question on consultation, it has not occurred at this time.

I need to clarify one of the answers that I gave the member previously. The CCC can refer matters to HADSCO. I think I said that the PSC can as well. I need to clarify that because I am not sure. It may well be able to but it may not. I need to check that. The CCC can refer matters.

Hon NICK GOIRAN: During debate on clause 1, we referred fairly extensively to the consultation report and have fairly reasonably covered questions 1 through to 7. There are 15 questions. The reason this has taken some time, as I outlined earlier, is regrettably because of the approach taken to leave it until the very last minute to provide this report to the opposition on the floor of Parliament this afternoon rather than many weeks ago when it was first requested. That said, having extensively covered questions 1 to 7 with my hardworking friend Hon Martin Aldridge, I note that questions 8 to 15 can conveniently be dealt with under clause 28 of the bill. I raise this now to flag with those who might be providing the parliamentary secretary with assistance that questions on parts 8 to 15 of the consultation paper will come at clause 28, but not now at clause 1.

In the meantime, in rounding out the few threads associated with clause 1, I ask the parliamentary secretary about the issue of consultation. This document has been most helpful, as we can see, because there has been a range of views. Despite the fact that the minister might say there has been widespread support, it really depends on the question being asked. In some circumstances, as Hon Martin Aldridge pointed out, particularly with respect to question 2, we could hardly say there is widespread support when 16 people said yes, 17 said no and nine gave no response. This has been an instructive exercise, not the least of which is the revelation that the Mental Health Commissioner had not been consulted about a matter particularly affecting those with mental health complaints or about mental health service providers. That said, this consultation was undertaken more than four years ago. Were the 43 stakeholders consulted four and a half years ago also consulted about the bill before us?

Hon SAMANTHA ROWE: In what capacity?

Hon NICK GOIRAN: Simply in the capacity of the drafting of the bill and the provision of the bill. In other words, would the 43 stakeholders have seen the bill for the first time as everybody else when it was first introduced in the other place?

Hon SAMANTHA ROWE: I am advised that this was the consultation process that happened four years ago.

Hon NICK GOIRAN: Who instructed parliamentary counsel on this? Was it the Department of Health or the Health and Disability Services Complaints Office?

Hon SAMANTHA ROWE: It was HADSCO.

Hon NICK GOIRAN: This is very interesting, because in some respects—in a major respect—this bill will give more power to HADSCO. The consultation paper mentioned nothing about own-motion powers being given to HADSCO for an unlimited time. In fact, the consultation paper stated that the powers should be limited to three years, consistent with the statute of limitation on medical negligence complaints, yet here we have a statutory body that goes off and instructs parliamentary counsel and gives itself more power—unlimited power over these complaints for an unlimited time. I find it curious that the government has decided to entrust that body with this particular task.

It makes me wonder who has been looking at the detail. It seems that very few people have. It is not apparent to me that the minister responsible for the overall bill has reviewed this matter, because the minister said that there is widespread support, yet this document, which has been hidden from the opposition for a number of weeks, reveals quite the opposite. Now we find out that the statutory body responsible for all this is actually the instructor to parliamentary counsel, and that a range of important stakeholders have not been consulted. In fact, the last time anyone was consulted about this matter seems to have been more than four years ago. This is a most unsatisfactory process; nevertheless, that is the situation we find ourselves in.

This takes me to the reviews that might have been done in other jurisdictions in the meantime. The parliamentary secretary mentioned earlier that Western Australia is signing up to this particular code of conduct, as have some other jurisdictions—not all. When we last met three weeks ago, the parliamentary secretary helpfully provided some information on South Australia and its prohibition orders. Have any of those jurisdictions that have implemented the national code of conduct undertaken some form of review? Are there any findings? Is there data available on those jurisdictions; and, if so, has that been considered by the government?

Hon SAMANTHA ROWE: I am advised that no reviews have been undertaken that we are aware of. However, there was a parliamentary inquiry in New South Wales relating to cosmetic surgery, and New South Wales made some legislative changes, which came into effect on 1 September 2022, resulting from that inquiry. Those changes have resulted in a code of conduct comparable to the national code and apply to certain types of organisations providing health services in New South Wales. That contrasts with the national code scheme being implemented in Western Australia, which will be applicable only to individual healthcare workers. That was from a parliamentary inquiry.

Hon NICK GOIRAN: We mentioned previously that a statutory review is currently underway. The bill before us has no clauses that I can see that includes a review. Is that why? Did the government not include a review clause in this bill because the substantive act already has a review clause?

Hon SAMANTHA ROWE: The honourable member may remember that I noted in my second reading reply that the government is going to accept recommendation 4 of the report of the Standing Committee on Uniform Legislation and Statutes Review, which is to include a review clause. Therefore, when we get to that, towards the end of the bill, the government will accept it.

Hon NICK GOIRAN: I do recall that, parliamentary secretary. The issue remains, though, that there is apparently a statutory review on foot at the moment, and the parliamentary secretary has indicated that that review might benefit from an early consideration of the implementation of this bill. The statutory review will not be completed until 2024, and there is a process at the moment; it is in its infant stage and so on and so forth. But what is the basis for that review at the moment? A review of the act is set out at section 79 of the Health and Disability Services (Complaints) Act 1995. Is that the review that is currently on foot that the parliamentary secretary is referring to?

Hon SAMANTHA ROWE: Yes, it is.

Hon NICK GOIRAN: The reason I scratch my head about that is that the act says that the review is to occur —

... as soon as practicable after 5 years after the date on which the *Health and Disability Services Legislation Amendment Act 2010* section 29 comes into operation.

As I can best understand it, looking at the compilation table at the back of the act—it can sometimes be a bit of a needle in a haystack—it appears that the commencement date was 30 November 2010. Therefore, is this the review that was legislated to commence in 2015?

Hon SAMANTHA ROWE: I am advised that it was not practicable at the time. The honourable member will note that the wording is that the review is undertaken every five years, or when practicable, and there are reasons for that. Firstly, there was priority given to implementing the national code; and secondly, there was the transition of the NDIS complaints jurisdiction out to the NDIS Quality and Safeguards Commission, which happened on 1 December 2020.

Hon NICK GOIRAN: I must say that this is why, over the passage of time, these review clauses have changed in terms of their drafting. Section 79 of the substantive act is the old wording. The parliamentary secretary can see that the wording that is proposed by the committee is what I would describe as the new wording. It is proposed that there be a review as soon as practicable after the fifth anniversary, but the minister must report by no later than 12 months after the fifth anniversary. The new wording makes sure that, no matter what, a report will come to Parliament on the sixth anniversary. The old wording of section 79 is what we are dealing with here, which provides that ministers can do that whenever it is practicable. It does not matter whether their name is Hames, Day, Cook or Sanderson; whatever their surname might be, under the old provision, “as soon as practicable after five years” could, in fact, mean 12 years. This commenced in 2010 and here we are in 2022, and it is only commencing now. Despite the fact that legislators in 2010—which included some of us—agreed at the time that this should happen after five years, we now find that it is happening after 12 years.

I want to raise a point with the parliamentary secretary here, at clause 1, in readiness for when we get to the supplementary notice paper, and I ask her to take it away for consideration by the minister, notwithstanding the point I am making about the drafting and that we absolutely do not want the old drafting, which has been demonstrated to be an absurdity; the Parliament asked for something to be done after five years, and we find that it is actually getting done after 12 years. The review clause that is proposed by the learned Standing Committee on Uniform Legislation and Statutes Review—which the government says it is inclined to agree with—is a narrow review clause. All it will do is create a statutory review in five years’ time, only with regard to the amendments that are before us in this bill. It will not review the entire proposed act. If we look at section 79 of the substantive act, we see that it is drafted in such a way that it is a once-and-only review clause; it is not a recurring review clause. The point I am asking the parliamentary secretary to take on notice and take to the minister is that it seems to me that there is a better review clause that ought to be considered by government and, prospectively, moved by government—that is, that there be a review in five years’ time, but for the whole proposed act, not just for the bill before us. I wonder if that is something that the parliamentary secretary could take up with the minister.

Hon SAMANTHA ROWE: I will take that on notice.

Hon NICK GOIRAN: We are coming to the end of clause 1. With regard to any breaches that might occur, who will be responsible for prosecuting them?

Sitting suspended from 6.00 to 7.00 pm

Hon SAMANTHA ROWE: Before the dinner break, Hon Nick Goiran asked who will be responsible for prosecuting. The director will take the proceedings and then, practically, it will be referred to the State Solicitor's Office to do the actual prosecution.

Hon NICK GOIRAN: Has the State Solicitor's Office been consulted about that?

Hon SAMANTHA ROWE: My understanding is yes.

Hon NICK GOIRAN: Do we have a sense of how many prosecutions are expected to flow as a result of the new provisions in this bill?

Hon SAMANTHA ROWE: There are no exact figures. However, in other jurisdictions, there has been a small number of prosecutions each year.

Hon NICK GOIRAN: When the Health and Disability Services Complaints Office receives a complaint, as I understand it, it will seek to invoke alternative dispute resolution. It might try to mediate between the parties. As I understand it, HADSCO will continue to use that approach with this new cohort it will be dealing with. When those alternative dispute resolution methods and techniques are invoked, does it sometimes result in compensation flowing to the complainant?

Hon SAMANTHA ROWE: I am advised that there is no compensation. However, there could be a situation in which there is a refund or a waiver of fees.

Hon NICK GOIRAN: I wonder, then, whether that would have any impact on the providers of insurance for the new cohort of people who will be captured by this. Has there been any work or consultation done with the insurance industry?

Hon SAMANTHA ROWE: No, there has not been any consultation with insurance companies. We do not know what insurance, if any, those healthcare workers might have. That is sort of their issue.

Hon NICK GOIRAN: The explanatory memorandum states —

Stakeholders also noted the need for a collaborative approach with other government agencies and organisations, in terms of both co-operation during investigations and/or referral of matters.

What "other government agencies and organisations" are being referred to there?

Hon SAMANTHA ROWE: It would be government agencies like Consumer Protection, the Department of Health and the WA Police Force.

Hon NICK GOIRAN: The explanatory memorandum states —

... in terms of both co-operation during investigations ...

Is the parliamentary secretary indicating that Consumer Protection, the police and the Department of Health from time to time receive referrals from HADSCO?

Hon SAMANTHA ROWE: I am advised that we already refer to the Consumer Protection division. At this stage, we have not referred anything to the Department of Health or the police, but obviously that relationship needs to be there when we have the national code.

Hon NICK GOIRAN: Have there been discussions with those organisations in readiness or preparation for that new landscape pertaining to the referrals or investigations that are taking place? It sounds like there is an established relationship with Consumer Protection. Is there a memorandum of understanding between Consumer Protection and HADSCO for referrals and investigations?

Hon SAMANTHA ROWE: I am advised that there is ongoing communication with all three. There is no formal MOU with Consumer Protection, but it does referrals under a provision of the act.

Hon NICK GOIRAN: Parliamentary secretary, other than following up on a couple of matters that were taken on notice, I have two further matters to address—one relates to reporting and publication issues and the other relates to education for students and volunteers. With respect to the first of those matters, what are the reporting requirements—for example, the publication of an annual report or something to that effect—for HADSCO? What are those reporting requirements at the moment and to what extent will they change, if at all, as a result of the passage of the bill?

Hon SAMANTHA ROWE: HADSCO produces an annual report each year and it will continue to do so under the new act.

Hon NICK GOIRAN: As part of that, it seems that HADSCO also publishes some material in the *Health complaints trends report*. Will data on breaches of the national code of conduct be collected and published in that same report?

Hon SAMANTHA ROWE: I am advised no; it will be captured in the annual report.

Hon NICK GOIRAN: I am happy to take this by way of interjection, parliamentary secretary, if that will assist. Will the data pertaining to breaches of the national code of conduct that will be published in the annual report include things like prohibition orders and any fines that might arise from them?

Hon SAMANTHA ROWE: One example of the data that will be provided in the annual report is the numbers relating to complaints received, prosecutions and prohibition orders.

Hon NICK GOIRAN: Before I move to my last question, in terms of the matters that were taken on notice and are still outstanding, one was consideration by the government of the notion of a complete statutory review of the act rather than just a segment of the act. I take it that that matter is still in progress?

Hon SAMANTHA ROWE: Yes.

Hon NICK GOIRAN: The other two matters relate to information from HADSCO, specifically on any guidelines for the use of its discretion on mental health complaints. The parliamentary secretary will recall that issue with regard to the discretionary power of HADSCO, if I can put it that way, to resolve a complaint, or to insist that the complainant tries at first instance to resolve the complaint with the service provider. I think the parliamentary secretary was also going to get some information on another discretionary matter. Can I get an update on that?

Hon SAMANTHA ROWE: I do not have that information for the member yet.

Hon NICK GOIRAN: That is also a work in progress?

Hon SAMANTHA ROWE: Yes.

Hon NICK GOIRAN: No problem. I now move to the final area. Earlier today, the parliamentary secretary helpfully tabled the communications strategy. It is dated September 2022. I understand that is the communications strategy that HADSCO intends to implement for the new regime that will be enacted by the provisions of this bill. Groups that will be captured by this include students and volunteer healthcare workers. They will be subject to the provisions of this bill. Obviously, I have not had an opportunity to digest the communications strategy at this point, but will students and volunteers be expressly captured as part of this communications strategy?

Hon SAMANTHA ROWE: Can I clarify whether the member is asking how we will reach them?

Hon Nick Goiran: Yes.

Hon SAMANTHA ROWE: I am advised that one of the methods that will be used to reach students and volunteers with this information will be to contact education and training providers. The same method will be used for volunteers with some of the large organisations such as St John Ambulance and Ramsay Health Care. We will get the information to those providers, who will help communicate it to students and volunteers.

Clause put and passed.

Clause 2: Commencement —

Hon MARTIN ALDRIDGE: I take the parliamentary secretary to the 138th report of the Standing Committee on Uniform Legislation and Statutes Review, which states —

- 5.6 The Committee notes the Minister's position in relation to clause 2(b). The lack of an express commencement clause in a bill is an erosion of Parliamentary sovereignty. However, the Committee considers that the Minister has provided some clarification about when the Bill will become operational.
- 5.7 The Committee draws the lack of an express commencement date to the attention of the Legislative Council for consideration during debate on the Bill.

This was followed by finding 1, which states —

The lack of an express commencement date in clause 2(b) of the Health and Disability Services (Complaints) Amendment Bill 2021 is an erosion of the Parliament's sovereignty and law-making powers.

When does the government intend to proclaim the bill?

Hon SAMANTHA ROWE: I understand the response given by the minister in the other place is that she would very much like to see this occur by the end of the year.

Hon MARTIN ALDRIDGE: Obviously, there has been no update on that aim, if you like, to achieve proclamation prior to the end of this calendar year. Are we talking about a calendar year?

Hon Samantha Rowe: Yes.

Hon MARTIN ALDRIDGE: In the minister's response to the committee, she said —

The legislation cannot be implemented until the regulations prescribing the clauses of the National Code, under section 77 of the *Health and Disability Services (Complaints) Act 1995*, are gazetted.

If that is the case, given that the national code has already been established and adopted in four jurisdictions, why would the government expect a significant delay in gazetting the code pursuant to section 77?

Hon SAMANTHA ROWE: Parliamentary counsel will not draft the regulations until the bill is passed. There are three parts to the regulations that are required to implement the national code. There is the prescribing of offences under clause 28—proposed sections 52B(3)(a)(ii), 52H(3)(a)(ii) and 52R(2)(a)(ii). There is the prescribing of interstate prohibition orders, which are the orders issued by other jurisdictions, under proposed section 52Q(1). There is also the prescribing of the clauses that make up the code of conduct under clause 42—proposed section 77A.

Hon MARTIN ALDRIDGE: The answer that the minister provided to the standing committee is that at least five or six proposed sections of the bill, which the parliamentary secretary just quoted, have regulation-making powers that require regulations for the operation of this scheme, whereas the submission the minister made to the committee relied entirely on section 77. I must emphasise that section 77 is an existing statutory provision; it is not a new provision. The bill will insert proposed section 77A, which will give further guidance to existing section 77, but what the parliamentary secretary has just said is that a range of regulations will need to be enacted to give effect to this scheme, with the aim being that the bill is proclaimed prior to the end of this calendar year.

In the second reading debate—I think we clarified this in the clause 1 debate during the last sitting week—we talked about the consultation that needed to occur prior to regulations being gazetted. We had an exchange. The parliamentary secretary initially said that consultation could not occur until after the bill had passed. I think she then clarified that and said that consultation could commence now and that drafting would occur after the bill passes. What is the status of consultation with stakeholders, and who are the stakeholders for the drafting of regulations?

Hon SAMANTHA ROWE: Honourable member, I am advised that consultation on drafting regulations has started with Consumer Protection, the Department of Health and the Western Australia Police Force.

Hon MARTIN ALDRIDGE: Are there any other stakeholders beyond those three? What are Consumer Protection and WA police's interests in the enactment of this scheme? Is it because those bodies ordinarily receive complaints that will be referred to the director once this scheme is enacted? What is the justification for those two agencies in particular being key stakeholders at this point?

Hon SAMANTHA ROWE: The first part of the member's question was about consultation with other stakeholders. I am advised that if it is in relation to prescribed offences, there are no other stakeholders at this point in time. The consultation with Consumer Protection and the Western Australia Police Force is happening to work out what the prescribed offences may be. If the WA Police Force is aware of a healthcare worker who has been convicted of an offence such as a sexual assault, a prohibition order may be issued. If Consumer Protection is aware of a healthcare worker who is acting contrary to the consumer acts, that would be a reason. That is what the consultation is about.

Hon MARTIN ALDRIDGE: So it specifically relates to the prescribing of the offence provisions that would make a person subject to an interim or a prohibition order? Consumer Protection and the WA Police Force is a pretty small subset of stakeholders to consult. We have identified a few stakeholders in the course of clause 1 today, namely, the Mental Health Commissioner, the Public Sector Commissioner and the Corruption and Crime Commissioner, who probably have an interest in the enactment of this scheme, one way or another. I guess that is something for the parliamentary secretary and, indeed, the minister to reflect on, but it seems to me that it probably indicates where the government is going with the offence regulations. If I am not mistaken we will debate that when we get to clause 28, where there are amendments in the name of the Standing Committee on Uniform Legislation and Statutes Review.

I think the parliamentary secretary mentioned about six sets of clauses that provide for regulations. One of them, obviously, is the code of conduct itself. I assume three sets are the offence regulations. I think there are three sets because there are interim prohibition orders, prohibition orders and the naming of a person. What am I missing? I am at five; were there five in total?

Hon SAMANTHA ROWE: It is clause 28, new section 52Q(1).

Hon MARTIN ALDRIDGE: What does that do?

Hon SAMANTHA ROWE: That is about the interstate prohibition orders.

Hon MARTIN ALDRIDGE: Interstate; okay. I think it is probably best to leave further questions until we get to clause 28 to discuss particularly the offence-related regulations. Having said that, I have no further questions on clause 2.

Clause put and passed.

Clause 3 put and passed.

Clause 4: Section 3 amended —

Hon NICK GOIRAN: The definition of “health care worker” states —

... an individual who provides a health service (whether or not the individual is a registered provider);

I note that a list of unregistered health practitioners who will be captured under the national code was tabled in the other place. Is it intended that they will include school counsellors?

Hon SAMANTHA ROWE: I am advised that the best way to describe this is by saying that it is not by category of people; it is by activity. If that school counsellor provided a health service, yes, they would be captured.

Hon NICK GOIRAN: What is the purpose of the list?

Hon SAMANTHA ROWE: They are indicative examples.

Hon NICK GOIRAN: Are they indicative examples of people who are intended to be captured by the national code because they are considered to be unregistered health practitioners?

Hon SAMANTHA ROWE: Yes, they are examples of unregistered health practitioners.

Hon NICK GOIRAN: Will a school counsellor, on an indicative basis, be considered to be an unregistered health practitioner?

Hon SAMANTHA ROWE: I am advised that if that school counsellor provides health care, yes, they will be captured. If that school counsellor provides, say, career advice, no.

Hon NICK GOIRAN: Are other employees at schools, other than the example of school counsellors we have just dealt with, intended to be captured, on an indicative basis, as unregistered health practitioners?

Hon SAMANTHA ROWE: If other people at the school who are unregistered are providing healthcare services, yes, they will be captured.

Hon NICK GOIRAN: Has there been consultation with the Department of Education about that?

Hon SAMANTHA ROWE: No, there has not been direct consultation with the education department.

Hon NICK GOIRAN: One of the definitions of “health service” includes the prescribing or dispensing of a drug or medicinal preparation. That would include giving somebody Panadol. If the school receptionist were to give Panadol to one of the students, would the government consider that that person is carrying out a health service and would be, on an indicative basis, an unregistered health practitioner?

Hon SAMANTHA ROWE: I am advised that that could potentially be classified as dispensing, but realistically we would not expect a complaint to be made due to a receptionist giving a child a Panadol. It would also be very hard to then see it as a breach of the code. Giving a child a Panadol could be potentially termed as “dispensing”.

Hon NICK GOIRAN: Even here in Parliament House from time to time I find myself with a fair headache. The government gives me a headache from time to time with its lack of transparency, its secrecy obsession and all the rest of it.

Several members interjected.

Hon NICK GOIRAN: I appreciate that members opposite might find that I give them a headache from time to time as well! My point is that sometimes I will see our friends here in the members’ bar and they will dispense me two Panadol, because sometimes the government will really give me a headache. I would wonder whether it is really truly the intention of government that that type of dispensing of a drug is intended to be captured by this legislation. Hansard does not get to pick up all the furious shaking of heads by the hardworking parliamentary secretary and her long-suffering advisers, but if the government is saying that it is not intending for that type of what I would describe as routine dispensing of a drug to be captured, we need to get it on the record. This is where problems emerge. If that is not intended to be captured, what is the threshold that is intended to be captured? We will be inserting expressly those words into this legislation at section 3 of the Health and Disability Services (Complaints) Act 1995. If it is the case that Panadol is not intended to be considered, should that be expressly excluded from the legislation?

I think the parliamentary secretary was involved earlier with Hon Martin Aldridge about a set of exclusions. Is listing it as an excluded service something that the government wants to consider? These amendments will make amendments to the primary act, which is the Health and Disability Services (Complaints) Act 1995. A health service in the primary act expressly does not include an excluded service. An excluded service at the moment means —

... a health service that is provided without remuneration in a rescue or emergency situation;

I am not too sure that a receptionist giving a Panadol to a student could be considered to be a rescue situation. I would probably defer to my friend Hon Martin Aldridge, the experienced ambulance volunteer and shadow Minister for Emergency Services, incidentally, with regard to whether it might be considered to be an emergency situation. Of course we have at our disposal the very learned Minister for Emergency Services in the chamber this evening. But I think that it would probably be highly unlikely that the dispensing of a Panadol by a receptionist to a student would be considered to be an emergency situation, let alone a rescue one. As things presently sit, even though it is not the government's intention for this type of scenario to be captured, it seems to me that it will be captured. My question is: what is the government going to do about that?

Hon SAMANTHA ROWE: I think that it is important to note that we cannot have only prescriptions listed in the legislation. One reason is we want to make sure that homeopaths or naturopaths who are dispensing substances such as herbal preparations or remedies or nutritional supplements will be captured if they are doing the wrong thing—for example, making claims that those herbal supplements can cure an illness that they clearly cannot. However, if a receptionist handed out a Panadol or if someone purchased a Panadol here at Parliament, that would not be investigated by the director of HADSCO because clearly that is not a breach of the national code or what is intended by the national code.

Hon NICK GOIRAN: I will just finish on this point and leave it to Hon Martin Aldridge to follow up. I am somewhat comforted by what the parliamentary secretary said, because I think we are in agreement that that scenario ought not be covered by this legislation. We agree with that. The difficulty is that the legislation we are about to pass expressly includes that scenario, even though that is not what any of us want. We will then have to rely on ensuring that the unelected, albeit professional, director of HADSCO, including any successors into the future, continues to agree with us. That is what I would describe as not good lawmaking. We should be expressly clear. They will have the benefit of our exchange that is on the record, which is obviously something, but it seems to me that it is open to the government to expand the scope of things that are to be excluded. It is open for the government to do that because it certainly has the numbers in both houses of Parliament, including in this chamber. The government could move an amendment at any time to make it clear that that is not the case.

I will just finish on this point: the definition of “health service” in the act includes a number of categories, one of which is described as a “prescribed service”. We are not adding a prescribed service as a result of this bill; a prescribed service is already included in the act. Are there any prescribed services at the moment, and, irrespective of whether or not there are, is there any intention to prescribe services in the immediate future?

Hon SAMANTHA ROWE: I am advised that the answer to both questions is no.

Hon MARTIN ALDRIDGE: We had an exchange at clause 1 on the issue of volunteers and excluded services. I must say that I remain troubled by the crafting of the provisions found in clause 4 as they relate to excluded services. It is fair to say, reflecting on the COAG final report and the final consultation report of HADSCO, that it would appear there was strong support for the inclusion of volunteers who have delivered a health service, as defined by the HADSCO act, once amended. The definition of “excluded service” is an existing provision in the act—it is not a new provision—that means a health service that is provided without remuneration in a rescue or emergency situation. I guess we could refer to it as a good Samaritan exemption when somebody renders emergency first aid or the like. They are specifically excluded on the basis that they are providing a service without remuneration and are doing it in a situation referred to as a “rescue” or “emergency” situation, even though those terms are not defined. I think I pointed out earlier that people may have different interpretations of those definitions on both counts. The definition of “remuneration” could mean different things to different people and it could be argued that some volunteers in their ordinary course of volunteering are remunerated by the reimbursement of some of the expenses incurred while volunteering, as opposed to receiving a salary. The other concern that I have is about how one might interpret what is a rescue or emergency situation. We had an exchange, parliamentary secretary, about volunteer ambulance officers and how they might be captured by this scheme depending upon whether they are receiving remuneration or are engaging in a rescue or emergency situation.

Another circumstance that has been put to me, and I am interested in the parliamentary secretary's view, is again about this inadvertent or casual volunteer, if you like. If we have a volunteer coach of a football team and one of his players sprains an ankle and he provides some medical assistance, would that meet the test of an excluded service? I think it could be argued that the coach is not receiving remuneration—although, some coaches do, but let us just say for a moment that this coach is not remunerated. The sprained ankle, I would argue, is probably not an emergency situation. I am interested in knowing: in that circumstance, is the coach of the football team providing a health service pursuant to the bill that is before us?

Hon SAMANTHA ROWE: I appreciate the honourable member's question, but it is a little bit similar to the hypothetical question that we just had from Hon Nick Goiran. The intent of the code is to capture the unregistered practitioners who are not registered with the NRAS. It is not to capture school receptionists or volunteer football

coaches—that is not the intent of the code. The member gave another example, another hypothetical, but I feel that we have just covered that with Hon Nick Goiran.

Hon MARTIN ALDRIDGE: It is reassuring to know that that is not the government’s intent, but I am more interested in what is the intent of the words that are before us in this bill. I am sure they will be more comforting to somebody in the circumstance in which a complaint has been made against them. I do not disagree with the comment the parliamentary secretary just made, but what troubles me is the lack of definition around the types of people and the types of circumstances that are excluded. In clause 4 of the bill, the provisions in the terms are so basic that they leave significant space for interpretation by the director or even by a complainant to the director.

When I look at the construct of the code, I agree with the parliamentary secretary: the intent is obvious. But I do not think the way in which this bill has been crafted will necessarily protect or comfort those who might inadvertently be captured by the definition of a healthcare worker providing a health service, notwithstanding the excluded service provision. In response to some of my earlier questioning, the parliamentary secretary said that it was not so much about the job title but what they are doing at the time and the circumstances of what they are doing at the time that is more relevant; it is not so much about whether they are a doula, a counsellor or a school receptionist. But there could be circumstances in which people who would not traditionally have considered themselves to be healthcare workers—indeed, they could be volunteers—could be captured by this bill. I referred earlier to circumstances in which they could be casual or informal volunteers, and the code could well apply to them; I think the parliamentary secretary admitted that during consideration of clause 1.

I draw one of the provisions of the code to the parliamentary secretary’s attention: under code 16, a healthcare worker is to be covered by appropriate insurance. The code also provides that a healthcare worker should ensure that appropriate indemnity insurance arrangements are in place in relation to his or her practice. In the circumstances that Hon Nick Goiran and I have provided, a breach of the code could be sustained on the basis that the person providing the service is not insured. I do not therefore take significant comfort from the fact that it is not the government’s intention to capture these individuals. My concern is that they could be captured, and I think more thought could have been given to the crafting of the definitions found in term 3—if not the definition of “health service”, then at least some examination of what is an excluded service.

It is clear from the Council of Australian Governments final report and the HADSCO final report that the submissions asked for volunteers to be included. Through this bill, the government is maintaining an exclusion of volunteer services in the circumstances of rescue or emergency situations. I assume, then, that it is the case that providing a health service—even as a volunteer, in a situation that is not a rescue or emergency situation—is captured by the bill. I do not think the government is alive to those concerns and, sadly, I think we may well see a situation arise in which this bill is used to capture a volunteer—not necessarily a volunteer—in some of the hypothetical circumstances that we have considered. The government has made it quite clear that that is the intent of its policy.

Hon NICK GOIRAN: Further to that, I recall that earlier we were looking at the processes for HADSCO. This may not have been in the exchange I had with the parliamentary secretary—it may have been in the consultation report document that the parliamentary secretary tabled—but there was reference to the notion of vexatious complaints. If I can find the specific reference, I will draw it to the parliamentary secretary’s attention.

Hon Samantha Rowe: Is this in the consultation paper?

Hon NICK GOIRAN: Yes. At question 3 on page 14, reference was made at various parts to vexatious complaints. One of the concerns raised was that we might be opening the door for more vexatious complaints. The response from the authors of the consultation report was —

It should be noted that the submissions indicating that only consumers and their representatives should be able to complain may not have considered that all complaints will be assessed in accordance with the HaDSC Act, with those deemed vexatious not being accepted.

That seems to indicate HADSCO has some kind of internal policy to deal with vexatious complaints, saying “We’re not going to accept them. They must have some form of internal definition.” Picking up on that point, I wonder about the hypothetical Panadol situation and the volunteer scenario. At the moment, is there any intention to enhance, update or revise that type of internal documentation, internal guidelines or frameworks in any way to capture these types of situations we have been discussing?

Hon SAMANTHA ROWE: I am advised that the Health and Disability Services (Complaints) Act 1995 already contains provisions concerning vexatious complaints. Under section 26(1)(a) of the act —

- (1) The Director must reject a complaint that in the Director’s opinion —
 - (a) is vexatious, trivial or without substance ...

In determining whether that comes under their jurisdiction, they will obviously be guided by today’s debate and, of course, the intention of the act, which is to cover unregistered healthcare workers.

Hon NICK GOIRAN: The section in the substantive act that the parliamentary secretary is referring to is section 26(1)(a). My eye is drawn to section 26(1)(b), which goes on to state that the director must reject a complaint that in the director's opinion does not warrant any further action. I think that the director is hearing from the parliamentary secretary, from me and from others that these types of scenarios do not warrant any further action. There is no discretion; the director must reject such a complaint. To the extent that it is subjective, it relies on the director's opinion. This goes to my earlier question about whether there are any documents, procedures or guidelines for the director. This is an existing provision that the parliamentary secretary has kindly drawn to our attention. Does the director currently have some kind of policy documents, guidelines or a procedure manual that deals with section 26 of the act for when he or she ought to develop an opinion that would lead to a complaint being rejected?

Hon SAMANTHA ROWE: We have previously undertaken to find out the policy. If there is one, it is not going to cover the new definition of "health service", because this will be a new part of the legislation.

Hon NICK GOIRAN: What is the situation with carers? Will carers be covered under the amended definition of a "health care worker"?

Hon SAMANTHA ROWE: It will depend on the activity of the carer and whether they are providing a healthcare service.

Hon NICK GOIRAN: At section 3 of the substantive act, a number of terms are used, including that of "carer". We are inserting "health care worker" and amending the definition of "health service". Can the parliamentary secretary clarify whether it is the intention that the ordinary activities of a carer, which is said to be a person who is a carer as defined in section 4 of the Carers Recognition Act 2004 in relation to a user, are not intended to be captured by the definition of "health care worker" and that the intention is to capture them only if they happen to, notwithstanding the fact that they are a carer, undertake some other kind of health service?

Hon SAMANTHA ROWE: I am advised that unpaid carers are not one of the groups that will be covered in terms of their normal activity. For example, a carer who goes out to get groceries will not be covered.

Hon NICK GOIRAN: The blue bill states —

carer means a person who is a carer as defined in section 4 of the *Carers Recognition Act 2004* in relation to a user;

That refers to a carer who is paid. Let us distinguish that from an unpaid carer, as the parliamentary secretary set out. Is it intended that a paid carer will be considered to be a healthcare worker?

Hon SAMANTHA ROWE: I am advised that a paid carer in the normal course of their duties would not be providing healthcare services. That would not be a normal part of their duties.

Hon NICK GOIRAN: Thank you, parliamentary secretary. That is all I want to know.

The parliamentary secretary will recall that earlier this afternoon, we were looking at the *Consultation report on the national code of conduct for health care workers in Western Australia*, tabled paper 1699. Page 11 deals with the question of whether the existing definition of "health service" in the act should be amended to reflect the definition of "health service" as recommended in the COAG final report. At page 11, under the heading "Legislative provisions", the second dot point makes reference to what I interpret to be some form of recommendation or suggestion from the authors of this report. It states —

- Further define what is meant by 'support services' in section (f) of the health service definition recommended in the COAG Final Report.

If we turn to the definition of "health service" in the Western Australian act, the Health and Disability Services (Complaints) Act 1995, which we are looking to amend at this clause, paragraph (f) refers to a "welfare service that is complementary to a health service". I take it that is not the same as the section (f) that is referred to in the consultation report. The consultation report refers to the term "support services" in section (f) of the health service definition recommended in the COAG final report. That section (f) seems to be different from the paragraph (f) that is before us. Where in the definition of "health service" in our WA act do we deal with this particular issue of a support service?

Hon SAMANTHA ROWE: Rather than use "support service" we have used "ancillary". Proposed section 3(1)(ga)(i) states —

is ancillary to any other service to which this definition applies ...

Hon NICK GOIRAN: The insertion of proposed paragraph (ga) is intended to capture the issue that has been set out in the consultation report—that is, to further define what is meant by "support service". In the WA context we will insert this definition of "service" that reads —

- (i) is ancillary to any other service to which this definition applies; and
- (ii) affects or may affect person who are receiving any other service to which this definition applies ...

Hon SAMANTHA ROWE: Yes, member.

Hon NICK GOIRAN: The last issue I wish to take up in clause 4 goes further to our earlier discussion about carers, in part, but also the definition of “health service”. Western Australia has this notion of a voluntary assisted dying care navigator. Is it intended that this definition will capture a health service and a healthcare worker?

Hon SAMANTHA ROWE: Yes, member.

Clause put and passed.

Clauses 5 and 6 put and passed.

Clause 7: Section 17A inserted —

Hon MARTIN ALDRIDGE: Clause 7 of the bill will insert new section 17A, “Identity cards”. It reads —

- (1) The Director may give an identity card to a member of the staff of the Office.

It goes on to say —

- (3) A person must, within 14 days after ceasing to be a member of the staff of the Office, return the person’s identity card to the Director.

Penalty for this subsection: A fine of \$2 500.

Obviously, issuing identity cards to a member of staff of the office is a discretionary matter for the director. As far as I can tell it relates solely to section 65, “Execution of warrant”, which will be amended. The bill will insert new section 65(1A), which states —

A member of the staff of the Office executing a warrant must —

- (a) produce an identity card given to the member of staff under section 17A for inspection by the occupier or a person in charge of the premises; or
- (b) display an identity card given to the member of staff under section 17A so it is clearly visible to the occupier or person in charge of the premises.

Given there is a mandatory obligation on a staff member to display an identity card, why is it then discretionary whether the director issues an identity card to a member of staff?

Hon SAMANTHA ROWE: Not all staff members will be involved in executing warrants.

Hon MARTIN ALDRIDGE: Can I ask a second question on this new section? It is about the penalty. Proposed section 17A(3) states —

A person must, within 14 days after ceasing to be a member of the staff of the Office, return the person’s identity card to the Director.

Penalty for this subsection: a fine of \$2 500.

As I said before, if I am not mistaken, the identity card relates solely to the execution of warrants. Section 66 sets out offences relating to warrants—refusing to cooperate, obstructing or hindering without reasonable excuse—and the penalty for each will be \$2 500. How can not returning an ID card within 14 days be comparable with intentionally obstructing a lawful warrant issued by a magistrate? I am wondering how the parliamentary secretary might justify the same penalty being applied in those two circumstances.

Hon SAMANTHA ROWE: I am advised that an amount has to be picked and the penalty provision under proposed section 17A is consistent with the existing penalty provisions in the act.

Hon MARTIN ALDRIDGE: That appears to be true. I am just asking whether the penalty fits the crime. The penalty for obstructing a magistrate-issued warrant will be \$2 500, and the penalty for a former staff member failing to return their identification card within 14 days will be \$2 500. What mischief might a former employee achieve by misusing an identification card, given it can be used only in a circumstance related to the execution of a magistrate-issued warrant?

Hon SAMANTHA ROWE: Honourable member, I am advised that \$2 500 is the maximum amount that someone could be fined. It is probably unlikely that the full amount would be applied on a first offence, but it is an official card used in a warrant situation and the penalty is to motivate staff to make sure that they do the right thing and return the identity card.

Hon MARTIN ALDRIDGE: I am not arguing the point that \$2 500 is an inappropriate figure. I am saying it is inappropriate in that the penalty will be the same for somebody who obstructs the warrant. Can I just clarify that the parliamentary secretary has just said that there will be discretion for a lesser fine particularly in relation to a first offence? This provision does not say “a fine of up to \$2 500”. It says “a fine of \$2 500”. I am not sure that there will be a discretion as the parliamentary secretary has stated. Quite often we see penalty provisions that

provide a discretion, but it does not appear that it will in this case. I ask whether the parliamentary secretary could confirm the response that she gave just now that the bill provides for a fine of less than \$2 500 to be applied in certain circumstances.

Hon SAMANTHA ROWE: We are going to have to get back to the honourable member on that. We are finding further information if the member wants to continue with another question.

Hon NICK GOIRAN: Proposed section 17A(4) indicates that proposed subsection (3), which is the one that the parliamentary secretary and the honourable member are engaging over, “does not apply if the person has a reasonable excuse”. Is it necessary for us to include that provision?

Hon Samantha Rowe: Does the member mean, “Is it necessary to include the penalty?”?

Hon Nick Goiran: Is it necessary to include proposed section 17A(4)?

Hon SAMANTHA ROWE: I am advised that section 17A(4) reflects the view of parliamentary counsel. In their view, it was appropriate to include for the drafting of the clause.

Hon NICK GOIRAN: I want to confirm that it is a preference by parliamentary counsel rather than a necessity.

Hon SAMANTHA ROWE: That is something that we will have to ask the drafter.

Hon NICK GOIRAN: Yes. We are here to deal with those things. It will be good if, perhaps, that matter can be taken on notice. Add it to the bundle that the hardworking, long-suffering advisers are working through.

While that is under consideration, has it been decided that we need to have these identity cards for investigations because the powers that have been given to members will increase as a result of the bill that is before us?

Hon SAMANTHA ROWE: I am advised that the identity cards will be a more commonsense approach to carrying out the investigations because they allow for more accountability for staff members who enter premises with a warrant.

Hon NICK GOIRAN: Are we only inserting proposed provision 17A and giving the director the power to issue identity cards because there is going to be this new capacity to enter premises under a warrant?

Hon SAMANTHA ROWE: The identity cards have not come about because warrant provisions are new within the act; the view is that it is best practice to hold identity cards. It is something that Victoria and Queensland have also included.

Hon MARTIN ALDRIDGE: I am just checking with the parliamentary secretary whether we have some advice yet on penalties.

Hon SAMANTHA ROWE: I will check for the member right now. Not yet, member.

Hon NICK GOIRAN: While that is still being looked at, the identity cards that will be in existence pursuant to proposed section 17A of the act, which, as the parliamentary secretary says, are being brought in under consideration of what is best practice, given that these individuals will enter premises with a warrant. Does that mean that the new provision for these identity cards is not intended in any way to change the existing process for who will undertake these investigations and their qualifications and training? All of that will remain the same, albeit of course we are talking about a broader scope of investigations that will be available because an increased cohort can be captured. All those things will remain the same; it is just that they will have an identity card and they did not have one before.

Hon SAMANTHA ROWE: Yes, member, that is correct.

I thank the honourable member for his patience with this. Section 9(2) of the Sentencing Act states —

If the statutory penalty for an offence is a fine of a particular amount or a particular term of imprisonment, then that penalty is the maximum penalty that may be imposed for that offence ...

Hon MARTIN ALDRIDGE: Thanks, parliamentary secretary. I was casting my mind to the Interpretation Act during the pause, but obviously the Sentencing Act contains that provision.

I will finish on this point: I understand that a statutory review of the Health and Disability Services (Complaints) Act is imminent. The government would have my support in casting its mind to the offence provisions generally contained in the act. I do not think it is fair to compare the penalty for a former staff member who fails to return an identity card with one for somebody who intentionally obstructs a magistrate-issued warrant. I think any fair-minded person would agree with that assessment. That is not to say that there is a problem with the provision before us in clause 7, but there are probably other sections of the act that are not under consideration by the chamber this evening that would benefit from some examination by government.

Clause put and passed.

Clause 8 put and passed.

Clause 9: Section 19 amended —

Hon NICK GOIRAN: I am finding it easier to work from the blue bill, but of course that does not provide for ease of reference to the clauses. Clause 9 of the bill before us will amend section 19 of the act. It is the provision that seems to create that inconsistency that we were discussing earlier about who will be able to lodge complaints. Can the parliamentary secretary confirm that?

Hon SAMANTHA ROWE: Yes, that is correct.

Hon NICK GOIRAN: This is just a comment at this stage, rather than a question. The parliamentary secretary will see that clause 9—I encourage members to familiarise themselves with this clause—which will be the new section 19 of the Health and Disability Services (Complaints) Act 1995, will create a rather peculiar situation. New section 25(1) specifically sets out eight matters for which under new section 19(1) a complaint could be made to the director of the Health and Disability Services Complaints Office by a user, a user’s representative recognised under section 20—I note for the benefit of parliamentary counsel that section 19(1)(b) has “recognized”, but nevertheless—or, under subsection (1)(c), a provider to whom section 22 applies. New section 19(3) states “A complaint alleging 1 or more of the matters set out” in another three scenarios “may be made to the Director by any person.” The parliamentary secretary can see very easily the difference between the two provisions. Eight matters will be able to be brought forward only by a user and in a couple of other scenarios; whereas, any person will be able to bring forward the other three matters. That will create the inconsistency that stakeholders were concerned about.

I simply remind members that when asked about this earlier, the government gave no explanation. The government has no explanation for why it would be acceptable for us to have two situations at play here—one for registered healthcare workers and one for unregistered healthcare workers. As a result of the passage of this clause in moment, we will create a situation in which any person can make a complaint about an unregistered healthcare worker but not any person, only a user, can make a complaint about a registered healthcare worker. There are arguments for both scenarios. I find it particularly peculiar that a scheme, a regime, would include both. I would have thought that if the government’s position was that any person should be able to put a complaint against an unregistered health worker, its position ought to be consistently that any person can put in a complaint against a registered health worker. For reasons yet to be explained, as set out in the *Hansard* for earlier today, that is the situation. The government has conceded that there is an inconsistency, but it has not provided an explanation for why.

Clause put and passed.

Clause 10 put and passed.

Clause 11: Section 25 amended —

Hon NICK GOIRAN: I turn to clause 11 of the bill before us. It will insert after section 25(1)(h)—this is another example of when it is easier to refer to the blue bill—situations in which complaints can be made. The parliamentary secretary will see that it includes —

a health care worker has failed to comply with a code of conduct that applies to the health care worker;

How many codes of conduct apply to healthcare workers?

Hon SAMANTHA ROWE: There will be one, once the act is passed.

Hon NICK GOIRAN: The reference to a code of conduct only relates to that particular code of conduct. Do each of the registered professions not have their own standalone or ancillary codes? I will give the parliamentary secretary a practical example. In the legal profession, we have special rules for barristers, but then we also have a general code of conduct for lawyers that also captures barristers. Barristers have to comply with two codes of conduct. Is there is no situation like that for healthcare workers? Do they just have the one code of conduct to comply with?

Hon SAMANTHA ROWE: I am advised that professional associations may have their own industry codes. They will be separate from the prescribed national code of conduct that will come under this act.

Hon NICK GOIRAN: If there was a failure to comply with that industry code, that is not intended to be captured by this?

Hon Samantha Rowe: That is right.

Hon NICK GOIRAN: Of the one code that is intended to be referred to here, what is the mechanism by which that could be amended or revised from time to time?

Hon SAMANTHA ROWE: It will be through amending regulations.

Hon NICK GOIRAN: Will these be Western Australian regulations?

Hon SAMANTHA ROWE: Yes, that is correct.

Clause put and passed.

Clause 12: Section 29 amended —

Hon NICK GOIRAN: To assist the passage of the subsequent clauses, I have questions on clauses 15 and 25, and I think both Hon Martin Aldridge and I have a number of questions on clause 28. We are dealing first with clause 12. If the director of the Health and Disability Services Complaints Office proceeds to deal with a complaint despite the fact that the person making the complaint has withdrawn their complaint, I would not quite describe it as due process, but as a matter of ordinary HADSCO process, will any update be provided to the original complainant?

Hon Samantha Rowe: By way of interjection, does the member mean under the new scheme?

Hon NICK GOIRAN: Yes, pursuant to clause 12 of the bill, the amendment to section 29.

Hon SAMANTHA ROWE: There will be no requirement to notify that person.

Hon NICK GOIRAN: No, that is right. That is precisely what is set out at clause 12, which will amend section 29, which states —

- (3) If the Director decides under subsection (2) to proceed to deal with the complaint, the Director is not required to —

...

- (b) provide to the person who complained any further information under another provision of this Act that would otherwise require the provision of information to the person.

That is, as a matter of law, they are not obliged to provide any information. My question was: as a matter of ordinary process, is it intended that this type of update would still be provided to the original complainant?

Hon SAMANTHA ROWE: The intention is not to provide the information.

Hon Nick Goiran: Not to provide the information?

Hon SAMANTHA ROWE: Yes.

Hon NICK GOIRAN: In terms of the other party, the party that is being complained of, there is a provision here at what will be new section 29(3)(a) that the director is not required to give notice of the withdrawal. I read that as meaning the person who is being complained of. The director is not required to tell them that the other person has withdrawn their complaint. Is that what is being referred to here? The question then becomes: Why not? Why would the director not simply tell the person being complained of that the original complainant has withdrawn their complaint; however, notwithstanding that, the director intends to proceed nevertheless?

Hon SAMANTHA ROWE: I am advised that investigations into breaches of the national code, or a prohibition order, concern whether a healthcare worker is endangering public health and safety by providing a health service and, as a result, providing notification to the healthcare worker of the withdrawal of the complaint that initiated the investigation would not be relevant to the proceeding. An example might be a client who withdraws their complaint that their counsellor had engaged in an improper personal relationship with them. That individual may withdraw their complaint under pressure or coercion from the counsellor. Under the provisions inserted by clause 12, the director may continue to deal with this complaint to determine whether the counsellor had breached the specific clauses of the national code of conduct that prevent the healthcare worker from engaging in an improper relationship with their clients.

Hon NICK GOIRAN: I agree with the principle that has been articulated. However, my question remains: is it still intended that the person who has been complained of—the service provider—will be informed that the original complainant has given notice of the withdrawal? Technically, under this legislation, the notice of withdrawal, as I understand it, will actually come from the director, so perhaps it is unhelpful to speak of it as a notice of withdrawal, but will an indication at least be given to the person that the original complainant is not proceeding, but that, nevertheless, the director has decided to proceed under the relevant powers available to them under section 29?

Hon SAMANTHA ROWE: The intention is probably not to do that, but it could just be a case-by-case decision.

Hon NICK GOIRAN: Nothing turns on it with respect to this section. I would just encourage the director to reconsider that particular issue and really give serious consideration about why they would not. I think it would be good practice. I think it would be transparent. I think it would be accountable. I do not think anything would be lost by simply saying to them: “Notwithstanding the fact that person X has withdrawn their original complaint, I am now exercising the power available to me under this particular provision.” I am not clear that anything is lost by that. In the original example the parliamentary secretary gave of the counsellor with the inappropriate relationship who was putting pressure on the other person, evidently they would already know because they were the catalyst to the complaint being withdrawn. But that may not always be the case, and I think that it would be good for the director to consider that issue.

Before we finish this clause, parliamentary secretary, it has been specifically drawn to my attention that, of course, we are dealing here with a bar 2 bill; it is 60–2. Therefore, some amendments were made in the other place on this

Health and Disability Services (Complaints) Amendment Bill 2021. I appreciate that at this point we have passed through some number of clauses, but which of the clauses that we have passed and which of the ones that we are about to embark on have been changed by the other place?

Hon SAMANTHA ROWE: Honourable member, I am advised that it was just the one clause, and it is clause 43, at the end. We still have time.

Clause put and passed.

Clauses 13 and 14 put and passed.

Clause 15: Section 33 amended —

Hon NICK GOIRAN: Clause 15 will amend section 33 of the act. It will state —

Director's duties if complaint referred under s. 32

If the Director has referred a complaint to a person or body under section 32, the Director must —

- (a) within 28 days notify the user or the person who complained to the Director and the provider of the referral; and
- (b) give to the user or the person who complained to the Director and the provider a copy of each written communication that the Director gives to the person or body concerning the complaint, on the day on which that communication is given.

The concept of a “user” is not new. That is in the existing act, and it will continue. The notion of a “provider” is not new; it is in the existing act, and it will continue. What is new at this point is this notion of a “person who complained to the Director”. I take it, parliamentary secretary, this is to capture the inconsistency that we referred to earlier?

Hon SAMANTHA ROWE: Yes, member. That is correct.

Clause put and passed.

Clauses 16 to 24 put and passed.

Clause 25: Section 44A inserted —

Hon NICK GOIRAN: Clause 25 will insert proposed section 44A. In the blue bill, this is found at page 28. It states —

Director may conduct Director-initiated investigation

The Director may, on the Director's own initiative, conduct an investigation ... into whether or not —

- (a) a health care worker has failed to comply with a code of conduct that applies to the health care worker; or
- (b) an offence under section 52G, 52N or 52Q(2) has been committed.

This is the own-motion investigation to which we referred earlier in clause 1. In the event that such an own-motion investigation is initiated by the director, is there an obligation or, alternatively, an intention—it may not be mandatory, but an intention otherwise—for the director-initiated investigations to manifest themselves in a report?

Hon SAMANTHA ROWE: I am advised that there is no requirement to issue a public report. However, data would be included in the annual report. If, however, the investigation results in a prohibition order, that has to be made public.

Hon NICK GOIRAN: I compare and contrast proposed section 44A with the very next section in the primary act, section 45. That is the provision that allows the minister to direct one of these investigations. Comparing and contrasting the two, we have the own-motion investigation by the director compared with the minister-directed investigation. In the latter, the minister-directed investigation, there is reference to events taking place in accordance with such terms of reference as the minister may specify. I take it that it would ordinarily be the case that such a term of reference would include a report back to the minister so that there would be some form of accountability. The minister has directed that there be an investigation under these terms of reference, and the minister says, “When you finish it, let me know what’s happened in the form of a report.” It does not specify that, but I am reading into that that the reasonable minister of the day would insert something like that into their terms of reference. However, under an own-motion director-initiated investigation, there does not seem to be any oversight of these things. Remember, no-one has complained about it; this is just the director deciding, off their own bat, that they are going to initiate an investigation. There is no time limit for this.

This goes back to the point I made earlier under clause 1: notwithstanding the fact that the statute of limitations period for medical negligence matters is three years, here there will be an unlimited period of time for a director to initiate an investigation with no oversight and, as the parliamentary secretary says, there will be no public report. Is it the intention of the director in the annual report to disclose the frequency or total number per annum of director-initiated investigations?

Hon SAMANTHA ROWE: I am advised that the number of director-initiated investigations undertaken each year will be reported in the annual report.

Clause put and passed.

Clauses 26 and 27 put and passed.

Clause 28: Parts 3D and 3E inserted —

The DEPUTY CHAIR (Hon Dr Sally Talbot): I just draw members' attention to supplementary notice paper 60, issue 1, and the three amendments that relate to clause 28.

Hon NICK GOIRAN: Clause 28 is a substantial provision. It could well be said to be the most significant provision in the bill, running over some 12 pages, it seems to me. I have questions particularly about prohibition orders. The notion of a prohibition order will be inserted through new part 3D. Did the government undertake a regulatory impact assessment on the benefit of issuing the prohibition orders compared with the cost of implementation and operation?

Hon SAMANTHA ROWE: I am advised that a national regulatory impact assessment was undertaken by the Council of Australian Governments. In Western Australia, we did a preliminary impact assessment.

Hon NICK GOIRAN: Does the parliamentary secretary have readily available the dates that those two assessments were undertaken?

Hon SAMANTHA ROWE: The date for the COAG one was April 2013. We are still waiting on some information to try to get the date for the one that was done in WA.

Hon NICK GOIRAN: While that second date is being obtained, the parliamentary secretary mentioned that in April 2013 COAG did its regulatory impact assessment.

Hon SAMANTHA ROWE: In April 2013?

Hon NICK GOIRAN: Yes. The COAG one was in 2013.

Hon SAMANTHA ROWE: Yes.

Hon NICK GOIRAN: It is a little bit curious. If the minister has the consultation report on the national code that she tabled earlier handy, tabled paper 1699, I will get her to turn to page 25. It is actually difficult to interpret who is speaking at some points during this consultation paper report. There is a reference there to HADSCO policy and procedure. I am just going to assume that this is a branch within HADSCO that deals with policy and procedure and it is now articulating its suggestions. Irrespective of who is speaking here, they say —

- Determine if regulatory impact assessment should be completed to substantiate the benefit of regulation outweighing the cost of implementation and operation.

It is slightly curious that that recommendation was being made in June 2018 when, as the parliamentary secretary said, COAG had undertaken a regulatory impact assessment in April 2013. What was the outcome of the regulatory impact assessment by COAG? I assume it concluded that the benefits of regulation outweighed the cost.

Hon SAMANTHA ROWE: Yes, honourable member. That is correct.

Hon NICK GOIRAN: Is the parliamentary secretary in a position to shed any light on why, notwithstanding the fact that COAG had already done one saying that the benefits outweigh the costs, the authors of the consultation report still recommended that one be done? I mean, that might be partially further answered by the date of this Western Australian one. I am assuming that that was sometime after June 2018.

Hon SAMANTHA ROWE: I am advised that this could just be the fact that the stakeholder who has made this suggestion is not actually aware of the COAG implementation that had taken place in April 2013. I still do not have a date for WA yet.

Sorry, honourable member, we have got a date for when the WA impact assessment was completed. It was 2018.

Hon NICK GOIRAN: I am going to assume that that date in 2018 is after June. It would be extra peculiar if this was dated June 2018 and said, "Look, you should consider doing one", after not only the commonwealth had done one, but also the state. In any event, let us park that. Again, I take it that the Western Australian one that was completed in 2018 concluded that the benefits outweigh the cost.

Hon SAMANTHA ROWE: Yes. That is correct.

Hon NICK GOIRAN: The reason this is important is that, if the parliamentary secretary remembers, when we first started on clause 1 three weeks ago, she gave some data with regard to South Australia and its prohibition orders. My recollection is that there were not very many; there were only a few. I suspect that is the reason why all these impact assessments keep getting done, because with so few of them seemingly eventuating in other jurisdictions, some people are obviously concerned that when we put all this together, is it really worth it in the end? In the end, there have been two reviews at the Council of Australian Governments level and the WA level in 2013 and 2018 that both assessed that that will be the case. What will be the grounds for issuing a prohibition order?

Hon SAMANTHA ROWE: I am advised that the grounds for issuing a prohibition are, firstly, there has to be an investigation. The director must not make an interim prohibition order against a healthcare worker unless they reasonably believe that the healthcare worker has failed to comply with the code of conduct applying to the healthcare worker or the healthcare worker has been convicted of a prescribed offence. In addition, the director must be satisfied that it is necessary to make the interim prohibition order to avoid a serious risk to the life, health, safety or welfare of a person.

Hon NICK GOIRAN: Is that just in respect to interim prohibition orders?

Hon Samantha Rowe: Yes.

Hon NICK GOIRAN: Will the same principles apply to prohibition orders?

Progress reported and leave granted to sit again, pursuant to standing orders.