EDUCATION AND CARE SERVICES NATIONAL LAW (WA) AMENDMENT BILL 2018

Second Reading

Resumed from an earlier stage of the sitting.

HON MICHAEL MISCHIN (North Metropolitan — Deputy Leader of the Opposition) [5.09 pm]: Before the afternoon recess, I think I was observing that the procedures in the standing orders reflect those that had previously been there under standing order 230A of the standing orders before they were revised in about 2010 or 2011. In the event that a bill is not originally referred automatically by reason of the member introducing it and advising the house that it is a uniform legislation bill within the meaning of the standing orders, it can still be referred under standing order 128. That was the manner in which the irregularity had been cured in this particular case. The Standing Committee on Uniform Legislation and Statutes Review considered that to ensure that inasmuch as it could difficulties would not arise in the future. The committee report goes through the processes by which a bill can be referred to the uniform legislation committee and what would be of assistance to the house when a minister advises the house whether a bill is a uniform legislation bill. It also reproduces the substance of a number of past rulings. Ultimately, of course, the question about whether a bill is a uniform legislation bill is one for the chamber to answer, but at paragraphs 4.30 and 4.31 the committee identifies some rulings and the trends that can arise from that. The judgements of the former and current President may assist the chamber in dealing with these matters.

So much for the process involved. I particularly invite the government to consider how the committee has dealt with referral and how in future cases that might assist in avoiding some difficulties the committee has encountered. I should add that since then, a further bill has been referred to the committee. Without pre-empting what the committee will be doing in that regard, that too involved a similar question about whether a bill was a uniform legislation bill or not. In that particular case, the minister who introduced the bill, Hon Alannah MacTiernan, indicated that it was not a uniform legislation bill but signified that the government would seek to refer it to the uniform legislation committee anyway, and gave a reason for that. However, it must be borne in mind that the Standing Committee on Uniform Legislation and Statutes Review has a very narrow remit when considering the bills that are sent to it. Unless there is some change to the standing orders, or its remit is changed in some way by way of an appropriate resolution of this place, a bill that is referred to it can be considered only in the light of its terms of reference, which are set out in part 6 of schedule 1 of the standing orders, so it can look only at the question of any impact upon parliamentary sovereignty and not at a wider consideration of the legislation and its policy or merit or the way it would operate in another regard. If that course of referring a bill under standing order 128 is taken, I suggest, with respect, that consideration be given to what the person referring the bill to the committee wants the committee to do; otherwise, the committee's time will be consumed by dealing with a bill on a very narrow basis, and the house will still have questions about the wider operation of the legislation, which the committee is not instructed or not capable of dealing with. I do not press that point any further at this time. However, having highlighted the issue, members or perhaps the Standing Committee on Procedure and Privileges may wish to consider whether some tweaking of the standing orders is necessary to make the scope of the committee's functions quite plain. I note in that regard there was a deliberate refinement some years ago of the terms of reference of the Standing Committee on Uniform Legislation and Statutes Review to ensure that it did not stray into areas of policy and other facets of the bill, so that it could meet its time limits expeditiously and operate effectively.

I turn now to one other element of the bill, as I foreshadowed—that is, to comment on its progress to this place. I make the point in light of a letter dated 30 May this year that was sent to me by the minister. Before I get to that, I should put its receipt in some context. This bill was foreshadowed by way of a notice of motion to introduce it into the Legislative Assembly on 15 May. It was introduced and second-read on 16 May. Debate then took place on 19 June, just over a month later. It was disposed of in fairly short order on that day—a number of members spoke on it, but the debate wound up on that day—and it was read a third time and then referred by message in the usual manner to this place. It was received here on 26 June, a second reading speech was delivered and, after the turmoil that I have referred to and discussion, it was referred to the Standing Committee on Uniform Legislation and Statutes Review and the committee tabled its report on 14 August.

Bearing in mind that the second reading speech in the Legislative Assembly was given on 16 May and the bill did not complete its passage, and in fact was not brought on for debate in that place, until 14 June, on 30 May the minister wrote to me, and I will table a copy of the letter for reference. It is addressed to me in my capacity as Deputy Leader of the Opposition in the Legislative Council, and to my post office box for my electorate office. It reads —

> Western Australia has been a signatory to the COAG National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care since 2009. This Agreement ensures the safety, health and

> wellbeing of children attending education and care services through the provision of high quality early childhood education and care.
>
> The 2014 Review of the National Quality Agenda found that the National Law is functioning effectively, noting some opportunities to reduce red tape for service providers, whilst continuing to improve learning outcomes for young children. The COAG Education Council agreed to all of the Review's recommendations on 31 January 2017.

I make the point at this stage that that was while the previous government was in caretaker mode and a month and a half before the election. But the council agreed to the review's recommendations then. It continues —

> The Education and Care Services National Law Amendment Bill 2017 passed Victorian Parliament on 23 March 2017, and received Royal Assent on Monday, 27 March 2017.

The model bill from which the scheme is drawn for incorporation into Western Australian legislation was quite expeditiously dealt with by the Victorian Parliament within two weeks of the election and less than two months after the COAG agreement. Some considerable work must have been done up until that stage, at least in Victoria and at the commonwealth level, to have legislation passed in that short order and receive royal assent. The letter goes on —

> The amendments have been developed in consultation with all state and territory governments, the Australian Government and the Australian Children's Education and Care Quality Authority (ACECQA). The amended National Law commenced on 1 October 2017 in every state and territory except Western Australia, which has its own corresponding legislation.

Within about six months of its passage, it had been passed in every other jurisdiction and commenced. I reinforce that some considerable work had been done at some level before our government entered into caretaker mode, and, presumably with the imprimatur of the then minister, who I believe was Andrea Mitchell, MLA, agreements were made at the Council of Australian Governments' Education Council level that we would enter into this scheme. But of course, mere agreement presupposes that there has been some significant groundwork undertaken up until then. It would certainly seem that every other state managed to prepare the legislation so that it could come into operation on 1 October 2017.

The minister went on to say —

> On 15 May 2018 I gave Notice of Motion to introduce a Bill into Parliament which gives effect to amendments to the Education and Care Services National Law (WA). On 16 May I delivered the second reading of the Bill 'Education and Care Services National Law (WA) Amendment Bill 2018'.

That was over a year after the amendments came into operation in Victoria, and while other jurisdictions were presumably working towards some legislation that meant they could be part of the scheme—every jurisdiction other than Western Australia—by 1 October 2017. The minister went on to say —

> Until the Amendment Bill is passed by Parliament, services in Western Australia will continue to operate under the previous version of the National Law.

As at the date of the letter, that had been going on for some eight months, yet the bill was introduced only on 15 May, or at least there was notice of its introduction on 15 May. The minister went on to say —

> Urgent passage of the Bill through Parliament is required to minimise the period of inconsistency in the National Law, and fulfil the State's obligations under the National Partnership Agreement on the National Quality Agenda.

That may be right, but, as I say, the bill was introduced into the other place over a year after the amendments came into operation in Victoria, and seven and a half months after the national law amendments had commenced in every other jurisdiction. The minister went on to say —

> Pursuant to Standing Order 126(1), I have received advice that this amendment Bill is not a uniform legislation Bill. It does not ratify or give effect to an intergovernmental agreement or multilateral agreement to which the Government of the State is a party. Nor does this Bill introduce a uniform scheme or uniform laws through the Commonwealth. Rather, it amends an existing scheme.
>
> I am writing to seek your support to expedite this Bill through the uniform Legislation Committee process, to ensure these amendments are passed in a timely fashion. I would be happy to meet with you to discuss the Bill and related amendments in further detail to support its passage through the Legislative Council.

For a number of reasons I am a bit surprised at the urgency expressed in the letter, and the need to expedite it through the process and Legislative Council. Firstly, I have mentioned that considerable work appears to have been done before our government went into caretaker mode and before the March 2017 election; such amount of work that enabled Victoria to pass its legislation and have it in operation by 27 March, having received

royal assent on that date. Then, over six months later, the national law commenced, so other jurisdictions have managed to get legislation drafted and passed in order to be part of this national scheme, but it took Western Australia until May 2018 before the bill was introduced in the other place. Before it is raised that a new incoming government needs to take some time to settle down and so forth, I entirely understand that, but in my experience an incoming minister also gets briefed on matters of urgency that require attention from the government, and yet nothing appears to have been done in a sufficiently expeditious fashion to try to meet the objective of being part of this scheme by 1 October 2017 or as soon as possible thereafter. A considerable amount of legislation in the other place has been declared urgent by the government in order for it to be dealt with with alacrity, because there has been very little for it to do from time to time down there in the last year. In this particular case, the minister did not appear to seek an order or a resolution of that place that the bill be declared urgent. It took a month before it came on for debate and was passed in the other place, and there was no indication in the minister's second reading speech, as I recall, although the minister may be able to help here, that this bill needed to be expedited in some fashion. It certainly has not been given any significant priority. We have been dealing with other legislation over the last couple of weeks and I can understand that giving some time for the house to consider the committee report is quite proper—I think a week at least—but it is not as though it was on the top of the list for this week to be disposed of as soon as possible. It certainly did not achieve any level of rapid movement in the other place before getting here, in the full knowledge that it would be a bill, notwithstanding the minister's assertions, that it was very likely to be referred to the Standing Committee on Uniform Legislation and Statutes Review to be dealt with within the standing orders in some fashion, or at least allow the committee some time to do its function if it was going to be referred. As it happens, I pointed out in the history of the bill that the minister said it was not dealt with under standing order 128 anyway, but then conceded it should be, and some time was going to be set aside for the committee to do that. I simply want an explanation of why this bill is so urgent that we need to get it passed by 1 October 2018 when there did not seem to have been a race to get it done before 1 October 2017, and why it took so long for the government to bring a bill of this nature before us and have us in line with the national scheme that the government says is critical to the proficient, effective and equitable operation of the COAG national partnership agreement and the legislation that allows it to operate in the state, to eliminate the need for us and other states to operate under different systems. I mentioned I would table the letter from the minister for reference. I seek leave to table the letter.

Leave granted. [See paper 1691.]

Hon MICHAEL MISCHIN: On that note, I conclude my remarks. If the minister is able to assist in the matters that I have raised, I have no reason from my part for the bill to go to the Committee of the Whole, but we will see how we go.

HON SUE ELLERY (South Metropolitan — Leader of the House) [5.30 pm] — in reply: I thank members for their contribution to the debate so far on the Education and Care Services National Law (WA) Amendment Bill 2018. In responding to the issues raised about the content of the bill, I will start with Hon Tjorn Sibma. I appreciate the member's comments on behalf of the childcare industry about the value parents place on the provision of child care. He made the point very well that the recompense for child care and early educators does not match the value and the esteem in which they are held by the community.

Hon Tjorn Sibma asked some specific questions about the provisions of the bill, in particular the "excellent" rating. The assessment and rating of education and care services against the national quality standard is a key feature of the national quality framework. Changes are being sought to the "excellent" rating to ensure that this special rating is reserved for services that can truly demonstrate service leadership across all of the national quality standard. Changes that were made to the national regulations, which commenced on 1 February 2018, including in Western Australia, have increased the complexity of the assessment and rating process. States and territories are working with the national regulator, the Australian Children's Education and Care Quality Authority, to address these issues nationally, and the Education and Care Regulatory Unit is working with Western Australian services on their processes.

In keeping with the intended purpose of the act, the amendment bill provides that an application can be made for the "excellent" rating only if the service holds the prescribed rating levels. It is intended that the regulations will be amended to require a service to be rated "exceeding NQS" in all quality areas in order to be eligible for the "excellent" rating level. As a result of this change, the bill also provides that ACECQA can revoke the "excellent" rating if the regulatory authority advises that the service no longer meets the requirements for the prescribed rating levels.

I come now to training, and the assessment and rating for staff of regulatory authorities. ACECQA provides training to assessment officers in the regulatory authority on the assessment and rating process to ensure consistency in practice. This training is not provided to the education and care sector. The training of new assessment officers, which is typically ongoing for about four months, involves attending a two-part assessment and rating training course run by ACECQA. The course consists of online modules; an intensive four-day,

face-to-face session; two-day testing, which participants must pass before they can undertake an assessment; mentoring by a senior assessment officer, during which they participate in at least six assessment and rating visits; and training in report writing and reading the law and regulations, as well as specific knowledge related to the quality areas, such as the cycle of planning, and critical reflection. Every two months, assessment officers must undertake further "drift" testing to remain reliable, as well as complete a certificate IV in government compliance and driver training funded by the Department of Communities. I might come back to that.

I come now to the IT system. Until proposed section 271, which deals with the disclosure of information, is enacted in Western Australia, Western Australia is effectively restricted in how we access information from other jurisdictions that enhances regulatory oversight to improve child safety and education. Once the database is aligned, the functionality will be enhanced for all jurisdictions, with Western Australia essentially completing the picture.

Hon Tjorn Sibma also made reference to the Standing Committee on Uniform Legislation and Statutes Review's 115th report, specifically findings 2 and 3. They state —

> **FINDING 2**
>
> The Committee finds that clause 2(b)(ii) of the Education and Care Services National Law (WA) Amendment Bill 2018, in providing that the Executive determines commencement dates, erodes the Western Australian Parliament's sovereignty and law-making powers.
>
> **FINDING 3**
>
> The Committee finds that there are acceptable reasons for leaving the proclamation of Parts 2, 3 and 4 of the Education and Care Services National Law (WA) Amendment Bill 2018 to be determined by the Executive.

Although the committee made these findings, it did not make any recommendations that the house needs to consider. It is worth noting that finding 2, which is about commencement dates, is probably an issue that the house more broadly needs to consider. I will come back and talk about the committee report when I deal with Hon Michael Mischin's contribution.

Hon Alison Xamon raised a number of issues, which I will go through in roughly the right order. If she did not specifically raise enforceable undertakings in her contribution to the second reading speech, she raised it in the briefing. One of the questions she asked was about whether enforceable undertakings preclude criminal proceedings for an offence that is not a contravention. The response to that is accepting an undertaking prevents the regulatory authority from bringing proceedings for any offence constituted by the alleged contravention in respect of which the undertaking is given. Undertakings would be accepted over contraventions of the national law. This would not prevent police from bringing proceedings for assault or other breaches of the Criminal Code. Hon Alison Xamon asked what sorts of issues would attract an enforceable undertaking versus a suspension, prohibition or criminal proceedings. Western Australia has accepted only one undertaking in six years of the national law being in force. Other jurisdictions may be more likely to use undertakings when they cannot prove a contravention on the criminal standard of proof or if the breach does not appear criminal in its nature, as there is no provision in the national law, only in Western Australian corresponding law, to prosecute breaches of the national law in an administrative tribunal or civil jurisdiction. Western Australia has published its compliance enforcement framework online for anyone to read. For the benefit of the house, I will table a copy. It is titled, "Education and Care: Compliance Enforcement Framework" and was last updated on 20 June 2018.

[See paper 1692.]

Hon SUE ELLERY: It sets out the sanctions that Western Australia might use, and factors it would take into account. There is no set of criteria for undertakings. WA would use civil disciplinary proceedings in cases in which the incident is a one-off and is considered very serious, such as a child leaving the service unsupervised, or being left in a vehicle or a place unsupervised; and in cases in which the issues leading to the incident had been addressed so that the suspension was not called for but where the circumstances called for a serious sanction rather than simply a warning. In similar circumstances, another jurisdiction might accept an undertaking instead of prosecuting, believing the breach was serious but did not call for the significant investment of time and money, and uncertainty, of a result inherent in a criminal prosecution. WA's view is that accepting an undertaking to correct matters that should have been correct in the first place is not a useful sanction. One matter occurred in WA of a prohibition notice being issued to a family day care educator. If the current amendments were in place, an undertaking might have been accepted. The educator wounded her husband with a knife in the presence of her children but not in the presence of children enrolled in her service. There is a likelihood that she was living in circumstances of domestic violence. The prohibition notice prevented her from working in any capacity in education and care. WA could not accept an undertaking as she had not contravened a national law. She was given a time line after which she might apply to have the prohibition notice withdrawn and an expectation that within that time she would have completed specified counselling. Under the amended national law, WA might have accepted an undertaking that she not work in family day care from her home, which would not prevent her from working in centre-based care where she would have had more support and an undertaking that she do the required counselling.

I will give an example of the enforceable undertaking. A family day care educator was found to be in breach of a regulation. At the time, she informed the investigator that she was no longer going to undertake family day care. If she had resigned from the service, there would have been no recourse for offence penalty and the matter would have had to be taken to the Magistrates Court. An enforceable undertaking was made that the educator refrain from providing education and care to children in an education and care service and from being engaged as a supervisor, educator, family day care educator, employee, contractor, staff member or volunteer at an education and care service. The person can apply to have the undertaking withdrawn prior to returning to employment in an education and care service but must provide evidence to the relevant approved provider that she has attended the appropriate training.

Hon Alison Xamon raised a question about oversight of decision-making. Decisions on sanctions are made at various levels in the Department of Communities. The assistant director general makes the final decision on whether to take compliance action and what form of action based on information provided by education and care regulatory unit staff, which may include the director, legal officer, investigators and team leaders. The possibility and benefits or drawbacks of accepting an undertaking or other alternative sanctions are part of the considerations, as noted in the compliance enforcement framework that I have just tabled.

There was a question about what information will be provided to parents and by what means. Although the national law provides that a regulatory authority may publish certain specified enforcement actions, WA's approach is to publish every enforcement action it is permitted to publish on the department's website. The regulatory authority does not have the ability to provide information to parents, nor does it have power under the law to direct a service to provide information to parents.

A question was asked about monitoring of compliance. Any monitoring of the terms of an undertaking would depend entirely on what the person had undertaken to do. For example, if it was to rectify certain matters at a service within a set period of time, WA would schedule a visit to the service after that time to monitor.

A question was asked about disclosure of information. Clause 82 sets out when information can be disclosed by the national authority—regulatory authority, government departments, public authorities or local authorities. Proposed section 271(4) sets out the purposes for which information can be disclosed. The first of these states —

> (a) the disclosure is reasonably necessary to promote the objectives of the national education and care services quality framework.

As this is broad, we were asked what sort of circumstances are envisaged. Section 271(4) is intended to enable regulatory authorities and the national authority to share information, in particular, to ensure the safety, health and wellbeing of children when the sharing of information is not permitted under the other subsections.

The issue of early childhood education care service in high-rise buildings has become increasingly relevant over the past 12 months, particularly in Queensland and New South Wales. Queensland has provided information to other jurisdictions about ongoing discussions with councils, emergency services, planning bodies and building standards bodies to ensure that all jurisdictions have access to information that will enhance the health safety and wellbeing of children. In WA, the regulatory unit has shared information with other public authorities in relation to water hazards in family day care residences for the purposes of enhancing the health, safety and wellbeing of children.

I have a bit more information on Hon Alison Xamon's question about the "excellent" rating. Currently, no services in Western Australia have an excellent rating or have applied for the excellent rating. There was a question about the federal government not renewing the national partnership agreement. That has created some difficulties for the state. The state will be out of pocket approximately $1.4 million per annum. Around $500 000 was allocated to staff. The regulatory unit will absorb this cost and reprioritise activities away from support to the commonwealth in identifying fraud and towards activities that focus on child safety. The national partnership will expire at the end of this year, and the commonwealth has announced that it will not be renewing it. The cost of the information technology system is $35 000 per annum for WA for the next two years. The commonwealth will fully fund ACECQA for its functions, including the IT system. After this two-year period, it is anticipated that WA and every other jurisdiction will have to pick up the bill.

Hon Tjorn Sibma asked a question about consequential amendments at the very beginning of his comments yesterday. Consequential amendments are proposed to two other acts: the Spent Convictions Act 1988 and the Working with Children (Criminal Record Checking) Act 2004. These amendments are a result of changes to the supervisor's certificate. Where those references appear in those acts, that is no longer appropriate. The consequential amendment to the Spent Convictions Act deletes "a supervisor certificate" from clause 1(5)6A of schedule 1. The effect of the clause remains the same; that is, a person who holds, or is applying for provider approval of, or who will be a person in management control of an education and care service is excluded from the provisions of part 3 of the Spent Convictions Act, and thus must disclose all spent convictions as part of their application. The consequential amendment to the Working with Children (Criminal Record Checking) Act 2004 deletes "a certified supervisor" from section 38(3)(b)(ii), and the effect of the section remains the same and relates

to disclosure of information about a nominated supervisor or person with management or control of an education and care service under the Education and Care Services National Law (WA) Act.

I turn now to a couple of issues raised by Hon Michael Mischin that are not related to the provisions of the bill. With reference to the provision of the Standing Committee on Uniform Legislation and Statutes Review report dealing with the government making clear whether a bill fits the criteria, if you like, to be referred to the committee, I have found the committee report very helpful in that sense. I have drawn it to the attention of ministers, and I think I have already read in a speech on a bill from the Attorney General in which we say that we do not believe the bill should be referred, and give the reasons. To take up the views expressed in that committee report, I have asked ministers to make sure that we are clear in second reading speeches. I have found it useful, and I have asked ministers to do that. Members know what that is like—we can ask our colleagues to do it, and sometimes they do it.

Hon Michael Mischin: If you'll take an interjection, thank you for your comments. They will reaffirm to members of the committee that they were doing something right.

Hon SUE ELLERY: It is good for people to feel good; we should celebrate success, and I am happy to do that.

Hon Alanna Clohesy: And reward good behaviour.

Hon SUE ELLERY: And reward good behaviour, as Hon Alanna Clohesy notes.

The other issue that Hon Michael Mischin raised was the timing of this legislation coming before the house. It is probably a combination of two things. Yes, there was a change of government and, despite the fact that certain decisions had been made earlier, it is still the case that when a new government comes to power it can take a while to get new processes in place, but also the difference between WA and other jurisdictions is that other jurisdictions are relying on applied law, so we have corresponding law.

It was the case that our drafting did not commence until after the legislation of the other jurisdictions was in place. The best advice available to me is that it was a combination of those two things. Nevertheless, the bill is now before the house. I am sorry that the Standing Committee on Uniform Legislation and Statutes Review had to spend time considering the bill when, technically, it did not need to. The view that the government took—this was based on my advice to ministers—was that we should err on the side of making sure that we refer rather than not refer and hold up consideration of legislation. I thought that was sound advice. The committee report indicated that there is a better, more efficient way to do it. I have acted on that and, accordingly, have asked my ministerial colleagues to ensure that if they do not believe it fits a reference to uniform legislation, they should spell out the reasons why. Sometimes it is difficult. The purpose of the uniform legislation committee was to take account of what can best be described as template legislation that is adopted out of national agreements. Sometimes we can have generations, if you like, of legislative change that occurs because of a national agreement made way back when. At some point we need to draw a line and ask, "Is this bill still giving effect to that and therefore is it captured?" That is probably a fairly inelegant way to describe it.

In any event, I thank the committee for its advice. I am doing my best to ensure that the government follows that advice. With those comments, I thank members of the house for their contributions and commend the bill to the house.

Question put and passed.

Bill read a second time.

Leave granted to proceed forthwith to third reading.

Third Reading

Bill read a third time, on motion by **Hon Sue Ellery (Leader of the House)**, and passed.