

HEALTH AND DISABILITY SERVICES LEGISLATION AMENDMENT BILL 2009

Second Reading

Resumed from an earlier stage of the sitting.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [12.43 pm]: I rise to indicate the opposition's support for the Health and Disability Services Legislation Amendment Bill 2009, and I thank the house for accommodating me in this way.

Every day Western Australians are cared for, whether it be for a particular health condition or a disability, and every day Western Australians receive world-class care. Our systems are robust and our quality control of those systems is also robust. However, the nature of the personal care and, in respect of health conditions, the procedures conducted means that if something goes wrong, it can go very wrong and the consequences can be terrible. That is why we need equally robust legislation in place to handle—that is, to receive, to investigate, and to mediate and resolve—complaints about the health and disability services provided to Western Australians. We have had such health legislation in place for some time now through the legislation that applied to the Office of Health Review.

It is also the case that complaints are occasionally made about things, not as perhaps dramatic as a medical procedure going wrong or as dramatic as somebody with a disability being treated or cared for inappropriately, in the stressful and busy business that is the provision of personal care. Sometimes the recipients of care, particularly those with a disability, are made to feel less than first-class citizens and are made to feel that they do not have the same entitlement to be treated with the respect and dignity that everybody else is treated with. Be it a complaint about somebody not being treated respectfully; a complaint about the time management of the care being provided not being suitable to the recipient of the care; or, at the more dramatic end of the scale, a complaint about a medical procedure gone badly wrong or the abuse by a carer of somebody in a residential facility, for all those reasons we need to ensure the legislation that applies to and sets the framework for the handling of complaints is robust.

The legislation before us today will make several changes that go to strengthening the entitlements that people with disabilities will be able to access, and will remove some of the anomalies in the disability complaints regime, thereby bringing it in line with other health services regimes. In a cosmetic sense, the bill will change the name of the office that handles the complaints. Although that might seem to be a minor amendment, it is a pretty sensible change to make for those people seeking to find where to go to make a complaint. Indeed, the big organisations and the well-respected organisations have in place procedures such that those people using their services are made aware of how they can make a complaint, but sometimes that information is not readily available to people. Sometimes, in those less administratively robust organisations, that information is not available at all. Therefore, having the name of the organisation properly reflect what it does is important so that people can more easily find out how they can lodge a complaint.

The Health and Disability Services Legislation Amendment Bill will do a number of things that I will touch on briefly. As I have indicated, the bill will, in the making and handling of complaints, extend certain rights that apply to people making a complaint about the health system to those people who want to make a complaint about the disability system. To that extent, it removes certain inconsistencies between the two complaint regimes.

I will be asking the minister some questions. I have to say that he asked me before whether I had any issues and I told him I did not, because at that point I had not familiarised myself with the file. But now that I have, I want to raise two questions with him. I will be happy to deal with them either in the minister's reply to the second reading debate or in committee—if we go into committee.

The bill requires the director to collaborate with groups of providers or users when suggesting ways to remove or minimise the causes of complaints and, importantly, when bringing them to the attention of the public. The Health Consumers' Council WA raised an issue when the debate on this bill began in the other place. That council has an issue about changes to the language in the legislation dealing with how the director is to make information public. I will be interested to hear from the minister the government's view on the concern of the Health Consumers' Council about whether there will still be the same emphasis on the office bringing to public attention, at the end of a complaint process, the policy and practice issues that arise, when it can clearly be seen that systemic changes are needed. I will be asking a question about that.

The bill also puts in place certain measures to address issues that came to our attention during the review of the Office of Health Review and in the course of its practice over some years. One of those measures will allow the director to accept a complaint regardless of whether the complainant, or the person acting on behalf of the complainant, has taken steps to resolve the complaint with the service provider. Some people might say that that is not good practice in the sense that it does not require people to make every reasonable effort to try to resolve

their issues themselves. If we were talking about what might be described as a level playing field, I would say that that is a reasonable approach to take; that we should encourage people to try to resolve issues themselves. However, given the nature of some of the complaints that come before this Office of Health Review, the playing field is not level. The office deals with people who because of either a health condition or a disability are at a disadvantage in presenting their own best case to resolve a matter. Therefore, I think it is good to give the director the power to take that on when the person, for whatever reason, says, "I can't go back and discuss this", or has issues that go to very sensitive personal matters, the raising of which with the person or organisation whom the complainant sees as responsible for the wrongdoing would revisit part of the trauma or whatever the complaint is about. That is a good change. I am sure that the office will apply that power judiciously, and in situations in which it is appropriate for a complainant to try to resolve the issue himself, the office will encourage that person to do that. This measure provides protection for people who do not have the same capacity to represent themselves as perhaps other people do.

The bill now provides the director with the opportunity to mediate to try to seek a negotiated settlement. Therefore, rather than forcing people to go down the path of a form of litigation or into a confrontational or adversarial process, the director has the power to mediate to try to help people reach a negotiated settlement. I think that is a very positive step forward. The mediation will be without prejudice; that is, people can put everything that they want on the table and genuinely try to reach a negotiated outcome knowing that whatever they put on the table will not be used against them if the mediation fails and they need to proceed with a more adversarial form of dispute resolution.

Another important change the bill makes is to increase the time limit for making a health complaint from 12 months to 24 months, which will make the health and disability sides consistent. It also recognises that sometimes, for a range of reasons, a person's capacity to stand up for himself takes a bit of time; it can be a while for a person who has been through a traumatic or difficult experience to feel strong enough to stand up for himself and say, "That shouldn't have happened to me in that fashion." This is a good provision and I am pleased that it has been included in the bill.

The Health and Disability Services Legislation Amendment Bill contains provisions to ensure that complaints can be dealt with in a more timely fashion. I am sure all members have from time to time had constituents go to their electorate offices because they are frustrated that matters of public policy take a long time to shift. We know that people in the public sector often do very difficult work and do it well, but sometimes the fact that it takes so long to get a resolution can be an enormous source of frustration for people who are outside the system, and it can put people off pursuing a complaint in the first place. Therefore, the fact that the bill provides the director with the power to set specified times within which people have to respond is a good thing.

Another provision in the bill requires a complaint investigation to meet a test, if we like, that balances the investigation costs against the benefits of conducting the investigation. I know that the Health Consumers' Council WA had some concerns about whether there should be a test and the emphasis that would be placed on determining the cost-benefit analysis. Its concerns come from the fact that people who make these sorts of complaints are often not on a level playing field. Given that often a single individual, or a family on behalf of somebody with a disability, who may well already be dealing in his life with the consequences of his health condition, or the consequences of having somebody in his family with a disability, is up against a corporate body that has the resources to defend itself—which it is entitled to do—the Health Consumers' Council raised the question of whether that test ought to exist. Therefore, I welcome comment from the minister either in his second reading response or at the committee stage about what advice we can give to the Health Consumers' Council and consumers generally. Will that test be applied erring on the side of ensuring that an investigation is given a full and proper hearing? I hope that we can get that kind of assurance.

Hon Simon O'Brien: Are you referring to clause 16?

Hon SUE ELLERY: My notes refer to the insertion of new section 34(c), which requires a complaint investigation to meet a test.

Hon Simon O'Brien: That is clause 16. I will get that advice.

Hon SUE ELLERY: I thank the minister. These changes have been a long time coming and we welcome them. The Office of Health Review has done a commendable job. I think that these changes will give it greater strength and will provide consumers with greater confidence. The office will continue to play an important role in ensuring that our systems are robust and that quality control remains at the forefront of how we deliver services to people who are often in difficult circumstances because of their health condition or disability. With those words, the opposition supports the second reading of the Health and Disability Services Legislation Amendment Bill.

HON SIMON O'BRIEN (South Metropolitan — Minister for Disability Services) [12.58 pm] — in reply: I thank members from all sides for their indication of support for the second reading of the Health and Disability Services Legislation Amendment Bill 2009.

A number of matters were raised by Hon Giz Watson and Hon Sue Ellery that I propose to deal with, but looking at the time, it will probably be after the lunch suspension. I hope the sense of anticipation will not spoil members' lunch, but it will be worth waiting for!

Hon Ken Travers: Let's just cancel lunch and get on with it!

Hon SIMON O'BRIEN: The member can stay in the chamber and the rest of us will adjourn.

I will limit my remarks just now to acknowledging the support of members. The bill seeks to do a number of things. It is about making the Office of Health Review more accessible, which it will first do by renaming it to the Health and Disability Services Complaints Office, because that describes what it is and will, hopefully, in due course make it easier for people who require the services of that office to access it. This legislation is also about encouraging open communication between consumers and service providers and about facilitating the timely resolution of consumer complaints. Members have asked questions about these changes and I look forward to providing explanations about how we will achieve those things. I think I can do so in a way that may or may not preclude us going to the committee stage, but that is an option the government will take at the house's pleasure in due course.

Sitting suspended from 1.00 to 2.00 pm

Hon SIMON O'BRIEN: Further to my introductory remarks, I would like now to respond to the specific concerns and issues that were raised as points of public interest by Hon Giz Watson in the first instance, who was quite right in saying that the bill has a history. I think its genesis can be traced back to a 2003 review of the Office of Health Review, which, in turn, was instigated in the mid-1990s. A bill was developed during the term of the previous government. I think it was in its preliminary stages in another place under the management of the then health minister, Hon Jim McGinty. In 2008, that bill's progress was interrupted by the calling of an early election, so plans went a bit astray at the time. Elections have been a bit of a theme in the house this morning, but that is not something I wish to dwell on!

The honourable member also asked when we might anticipate some other legislation subsequent to the Disability Services Act review, and that is not surprising, as I will be the minister in charge of that bill; it is my act. I, too, am looking forward to introducing that bill in due course. It has been in development for some time. Obviously, I am keen to progress it. I will return to the question of amending legislation for the Disability Services Act when I deal with some of the other queries that Hon Giz Watson raised.

The member raised a number of themes and I will seek to address them all now. She indicated that I might be able to do that during this debate. If we need to go into committee, we can have a further exchange; I am amenable to whatever the honourable member prefers, but I hope I can deal with her queries in this second reading stage. She first touched on the question of negotiated settlements, which is an important part of the conciliation process and part of dealing with consumer complaints in these spheres of activity. She asked specifically what supports complainants have. I can advise her that this is very much on the mind of the Office of Health Review at all times. I think this bill will help reinforce that and give support to the office, to make sure that there is what I think Hon Sue Ellery referred to as a level playing field. Any complainant, of course, is entitled to have the support of a spokesperson, and I will discuss that a bit more in a moment. For the present, I will call it the Office of Health Review, and that office is always mindful that it is necessary to have adequate supports available for consumers who are complainants. That is reflected in its approach to dealing with any complaint that is raised with it. The office has clear ground rules that provide for respect and fairness for all parties.

The member also asked about conflicts of interest. I will seek to respond to the points the honourable member raised in a couple of ways because I think there are two key areas. I turn firstly to clause 47 of the bill. In so doing, I will address the question of a conflict of interest arising on the part of the Office of Health Review. Clause 47 proposes to insert new section 42A, which states briefly —

A person who under section 39 has conciliated a complaint or attempted to do so must not investigate that complaint.

As I understand it, this is already a procedure in the Office of Health Review; that is, there is a degree of separation so that when someone is involved in a conciliation process, that person will not later be required to adjudicate or investigate if that process fails and a formal investigation is initiated. That is effectively the situation that exists now. It is an issue the honourable member was concerned about and raised during debate on the second reading stage. As she can see, clause 47 deals explicitly and simply with that potential concern.

However, I reassure members that, from my discussions with the director, avoidance of conflicts of interest is always on her mind.

The other question the honourable member raised was about a conflict of interest as it relates to a complaint. For example, a carer might have a separate issue from that of the consumer whom the carer is looking after. This has arisen from time to time and the Office of Health Review has its own procedures for dealing with it. Quite simply, complaints can be split and considered separately. That way the two issues and the potential conflict are divorced from each other and taken respectively on their own merits. I might add that the Office of Health Review does that not only because it is the sort of process we would expect to be adopted by an accredited mediator; it is an obligation cast by the Carers Recognition Act. I think that addresses that concern.

A further issue was the question of the rights of de facto partners in relation to a specific provision, which members will not find in the bill, and which was the point the member was raising, because it is in the act. The member wondered whether it might be convenient to address the issue as she sees it in this bill. I direct members' attention to the Disability Services Act 1993. I go to section 32, which was the focus of the member's complaint. Section 32 of the Disability Services Act refers to who may complain, and in subsection (1), it refers generally—I will talk generally rather than quote the act—to complaints being able to be made personally by the person with a disability or by others acting on that person's behalf in an advocate role. Subsection (2) then makes it clear that the director may recognise as an advocate for a person with a disability a person chosen by the person with the disability, or a person not chosen by the person with a disability if, in the director's opinion, the person with a disability is unable to personally complain or to choose a person to be his or her advocate. In other words, the spokesperson, or the representative, for the person with a disability can be anybody whom the person with a disability chooses to have represent him; or if he is incapable of choosing a person or representing himself, the director will appoint someone suitable. The honourable member's concern, though, was with subsection (3), which states —

A person who is related (by blood or marriage) to a person with a disability may be his or her advocate.

The member's concern was about someone in a de facto relationship, for example, because the definition given there does not cover de facto relationships. The member asked, therefore, whether they could be precluded. As I understand it, the member is probably concerned about the reason why this subsection exists. The previous subsections establish that anyone whom the person with a disability chooses can be an advocate; why then would we have this additional provision? My understanding is that it is to make clear that a person who is related to a person with a disability may be his or her advocate, and this is to get around a situation in which someone who may have a financial interest in the matter would otherwise be precluded by those reasons; that is why the reference is there to someone of such an immediate relationship, whether by blood—they are related because they are immediate family—or by marriage—they become a family by that process. Subsection (3) exists to extend that capacity of those people to be the advocate, or to make it clear that those people may be the advocate; it is not to narrow the scope of who may be an advocate. Nonetheless, the subsection perhaps needs to make clear that a relation could include a de facto partner. I recognise that and the government recognises that. I would prefer to take the member's query on board as a consideration for the imminent bill to amend the Disability Services Act that I discussed earlier. I think that would be the appropriate way to do things. That would allow me the opportunity to retire from these proceedings to consider the form that such an amendment should take, because I am sure that members would not want me to take the other course of action of trying to amend this legislation on the run, and perhaps do something that was counter to the outcomes that we are trying to achieve. Therefore, that is how I intend to address that matter. I recognise that this is a fair point, but I do not think anyone will be prejudiced by the amendment not being made now on the spot.

Moving quickly ahead, the member observed quite correctly that clause 13 of the Health and Disability Services Legislation Amendment Bill amends section 24 of the Health Services (Conciliation and Review) Act by providing that a complaint must be brought within 24 months of the cause of the complaint arising, and that is an extension from the current 12-month deadline. I do not know if I misheard the member when she was speaking, but that actually aligns health consumers and their interests with the existing provisions in the Disability Services Act, not the other way around. I think that would be well received; not only does it align the period of time, which is very desirable, but also it extends the capacity for health consumers to lodge complaints.

Clause 16 gave rise to a query about the costs of an investigation. If we refer to clause 16 of the bill, we see that it provides for an amendment to section 34 of the Health Services (Conciliation and Review) Act, and it does so by deleting the existing section 34(4) and inserting a new subsection (4) —

- (4) If the Director decides to accept a complaint in whole or in part, the Director must then —
 - (a) attempt to settle it in accordance with Division 3A; or

- (b) refer it for conciliation under Division 3 if the Director is of the opinion it is suitable to be dealt with under that Division; or
- (c) investigate it if the Director is of the opinion that —
 - (i) it is not suitable to be dealt with under either Division 3A or 3; and —

This is the point the member was querying —

- (ii) an investigation is warranted, taking into account the likely costs and benefits of the investigation.

The member has asked how this will work and whether it poses a threat to people's complaints being taken seriously or reduced in an undesirable way so that just a consideration of the dollar value is placed upon them. Section 34(4)(c)(ii) will require the director, if she decides to accept a complaint in whole or in part, to investigate it if she is of the opinion that the complaint is not suitable to be dealt with under the other provisions that I have mentioned and to make sure that the investigation is warranted, taking into account the likely costs and benefits of the investigation.

The director sought that provision, not the government. The motivation was to obtain greater flexibility to have the discretion to not investigate a matter under certain circumstances. Those circumstances, I expect, would be rare, and I am satisfied that the current director, or anybody else occupying that position, would exercise this consideration with great caution and comply fully with the principles of natural justice by providing written reasons for not doing so. The discretion could be exercised in a range of circumstances. For example, when a complainant is seeking a refund of \$20, it may not be worthwhile launching an investigation that might consume considerable resources—particularly bearing in mind that resources are always going to be limited—when there may be other matters that, in the judgement of the director, are more serious and need investigative resources. In that way the system and a wider range of consumers will be protected. Of course, some complainants become fixated and decide to pursue beyond the point of reason a matter that might be seen by others as relatively minor. The government believes that the director needs a release mechanism, such as the one provided in the provision that I just discussed.

The member also asked whether reasons for decisions will be given. The answer is yes, most definitely; in fact, that is already the case. It is embedded in the existing guidelines and established procedures of the Office of Health Review. It is also a principle of natural justice that reasons for decisions by panels of administrative review are given, and that practice is already an obligation of the office. I might add that even though investigations of the Office of Health Review generally reach a determined and satisfactory outcome, if a complainant believes that his case has not been resolved satisfactorily, he can take the matter to the Ombudsman. Other options are also available.

Hon Giz Watson also asked me to comment on clause 24 of the bill. I am rather glad she did, because I have to provide a point of explanation about that clause. Clause 24 inserts proposed section 52A. It refers to reporting to Parliament where a report is not made or remedial action is not taken. I fancy that the marginal note that is the title of that clause could have been better drafted. Given that in itself it is not a legal part of the bill—or the statute as it will emerge from this place—it might need to be revisited when it is published. Proposed section 52A outlines how we will deal with a situation in which a notice is given under section 50, including any action that the director believes ought to be taken by the provider to remedy a matter, and the provider does not report in accordance with section 51. In that situation the new provision will provide that the director must give the minister a copy of the notice and a written report about the refusal or failure by the provider to so report. Proposed subsection (2) is similar. It relates to situations in which the director has directed the service provider to remedy a matter and the provider does not take that action. This provision will require that the director must give the minister a copy of the notice and a written report about the refusal or failure to take that action. In the first instance it relates to what the director must do when reports that are required are not given and in the second instance it relates to action that is required and is not taken. In either case it is to be reported to the minister. From there the minister has a range of options, some of which are not canvassed by the bill. They do not need to be, because they could be any sorts of things. The bill does provide that after receiving a notice and a report under either of those proposed subsections, the minister may lay both before each house of Parliament. The other proposed subsection provides protection of the complainant's identity, which does not concern us at the moment. The member asked how many reports have been so tabled under the existing provision. I am advised none, which shows that it is an awfully rare occurrence. It also shows that not only is there not a great deal of intransigence entrenched in the sector with which we are dealing, but also that the Office of Health Review has been very successful in bringing complaints to a successful conclusion when certain actions are required. The thing that has come to my notice since the member raised it is that the explanatory memorandum prescribes that pursuant to this clause 24, the intended provision means that a minister must table the report. As Hon Giz Watson can see from the wording of the bill, that is incorrect. I apologise to members for bringing that to their

attention, but it is corrected for the record in case there is any misunderstanding. In any case, the wording of the bill would obviously prevail over the explanatory memorandum. I can only guess that during the development process, which took place over a period of years, earlier consideration might have been given to using the term “must”. The bill was changed, but the explanatory memorandum was not.

I turn to further matters raised by Hon Sue Ellery. I have already touched on a number of those matters in my reply. I have addressed the question of a level playing field and the attitude of the office. The member raised a concern that was raised with her by the Health Consumer Council about a change of language in some of the documents we are considering. The substantial question was: how does the director make public information about issues of policy and practice? The member wants to ensure that there is transparency and that information is free flowing. The relevant part of the bill that amends section 10 of the act is clause 9, if members wish to follow it. That is where we use the terms —

in collaboration with groups of providers or groups of users or both,

It has to be read in the context of the substantive section in the Health Services (Conciliation and Review) Act 1995, which continues —

to review and identify the causes of complaints, and to suggest ways of removing and minimizing those causes and bringing them to the notice of the public

To respond directly to the member’s question, the ways in which the director will bring them to the notice of the public include annual reports; stand-alone reports to the Parliament under section 56; regular newsletters to stakeholders; published policy documents; and reports relating to section 75 of the principal act.

The Office of Health Review was the beneficiary of regulations gazetted on 21 May under section 75 of the act, and the regulations require prescribed health service providers to give the director annual returns regarding complaints received that year and action taken on those complaints. The director is required to collate and analyse those annual returns, which will enable systemic issues and trends to be identified and reported on. The director will also work with providers and users—which will include bodies like the Health Consumer Council—on the findings, and work with them to find ways to address any problems or potential problems identified. That will help health and disability services delivery. The purpose of the amendment is to require the director to conduct that function in collaboration with groups of providers or groups of users, or both.

Again, as I said in my opening remarks to this closing part of the debate, a key part of the intended purpose of the bill before the house is, among other things, to encourage open communication between consumers and service providers. I am glad that members have the view that the bill does, indeed, achieve those things. I thank members again for their support and commend the second reading to the house, in the hope that I have satisfied all the questions that were raised.

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 Simon O'Brien (Minister for Disability Services)**, and passed.