PROFESSIONAL STANDARDS AMENDMENT BILL 2009

Second Reading

Resumed from 10 September 2009.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [9.36 pm]: The opposition will be supporting this legislation. The principal act that this bill seeks to amend, the Professional Standards Act, has been in place since 1997. The act provides for certain occupational associations to enter into schemes that place a limit or cap on the civil liability of their members. This bill seek to amend that act to give effect to national uniformity in the area of civil liability for certain professions. The history of both the 1997 act and this bill is that these schemes were put in place to ensure the availability and affordability of professional indemnity insurance; to protect consumers by ensuring that defence costs would be available if they were successful in an action against a professional; and to encourage professionals to put in place risk management strategies and regimes to deal with complaints and disciplinary matters in respect of the conduct of members of that profession.

The bill seeks to amend the act in relation to defence costs. The purpose of this amendment is to implement a decision of the Standing Committee of Attorneys-General to enable professionals who are members of schemes to hold either costs-inclusive or costs-in-addition insurance policies. This proposed amendment will provide greater flexibility for professionals to hold either one of those two types of policies. It will also ensure that consumers are not disadvantaged if they are dealing with a professional who holds a costs-inclusive policy, because the maximum liability available to the consumer will be the amount of the cap that applies to the professional.

The bill also seeks to amend the act to provide for mutual recognition of professional standards schemes across Australia. Under the current legislation, different regimes apply in different jurisdictions for professionals who want to cap their liability. This is deemed to be an inefficient way of operating for professionals who want to practise across jurisdictional boundaries. This bill seeks to address that issue by providing for mutual recognition of all schemes across all jurisdictions.

All the jurisdictions in Australia have agreed to enact nationally consistent legislation in this area. Western Australia was the second state in Australia, after New South Wales, to enact professional standards legislation. New South Wales has already amended its act, and that had led to the need for Western Australia to also change its legislation to ensure that we maintain national consistency.

With those few words, I am happy to indicate that the opposition will be supporting the bill.

HON ALISON XAMON (East Metropolitan) [9.39 pm]: The Greens (WA) support this legislation.

HON ADELE FARINA (South West) [9.39 pm]: I rise to speak on this bill on behalf of the Standing Committee on Uniform Legislation and Statutes Review. This bill was referred to the committee, which conducted two hearings with officers from the Parliamentary Counsel's Office and also the deputy chairman of the Professional Standards Council of Western Australia seeking clarification on a number of aspects of the bill. The bill proposes a number of amendments to the Professional Standards Act 1997. It follows a decision of the Standing Committee of Attorneys-General to provide a uniform bill that would enable professionals who are members of schemes to hold either costs-inclusive or costs-in-addition insurance policies. The Professional Standards Council of WA, which is the independent body that approves schemes under the act, has received legal advice that the current wording of the legislation means that only costs-in-addition policies are accepted under the act. The amendments in part 2 of the bill seek to address that issue and concern of the Professional Standards Council of WA that the current wording in the legislation did not provide for both costs-in-addition and costs-inclusive policies to be entered into. It appeared, however, that there might be some concerns arising as a result of that, and I will address those in a minute.

Part 3 of the bill deals with the mutual recognition aspects and, effectively, provides for mutual recognition of professional standards schemes throughout all participating jurisdictions to address problems of red tape and duplication in the same occupational association applying for approval of a scheme in each state and to provide a more seamless national system. This mutual recognition is said to recognise the reality that the work of professional practices often transcend state boundaries.

Part 4 of the bill deals with issues of consistency with the national model legislation and some other minor amendments. Lastly, part 5 deals with the transitional matters of bringing this amendment bill into effect.

The Standing Committee on Uniform Legislation and Statutes Review made 13 recommendations, largely seeking clarification of aspects of the bill from the responsible minister. I note that the government tabled its response yesterday addressing the issues that were raised in the committee's recommendations. While the

committee clearly has not had an opportunity to consider the government's responses, I thank the government for the detailed responses that have been provided.

In relation to recommendation 1, the committee sought some clarification about the application of this bill in relation to the Civil Liability Act 2002. The minister has clearly stated that this bill has no impact on that act and has clarified that matter for members.

In relation to part 2 of the bill, in particular clauses 4(2) and 8, the committee asks in recommendation 2 that the responsible minister provide an explanation for the amendments that justify the change in the balance of the principal act. This is detailed by the committee in the report. What became evident to the committee in examining this report is that the impact of clauses 4(2) and 8 actually result in tipping the balance that was provided in the initial principal act, which tried to provide an even balance to the benefit of the client and the interests of the professional. As a result of this amendment and bringing through the opportunity to have a costs-inclusive or a costs-in-addition policy, it actually tips the balance so that there could be a situation in which the client is adversely impacted upon and the benefit that could be obtained by the client under the former act would be lost. The committee expressed concern that this was the case and sought some clarification.

The minister's response was provided and it has been tabled. I do not intend going through all of it, but I note that the minister appears to confirm that this is the case and that it is one of the effects of the bill. I bring that to the house's attention, because this is a matter that could be of concern. As there is no requirement to necessarily raise the cap, it could be that under the new policy of scheme arrangements clients would not have access to the same amount of money that they would otherwise be able to claim. The explanation given to the committee was that this was one of those necessary evils because without that in place, the likelihood of professionals being able to get insurance cover would be greatly reduced, especially when the economy and the marketplace for insurance were facing difficult times, and that it was far worse for the client if the professional was not insured at all than to have this situation in which there may be a case in which clients are placed in a position where the damages that they can claim would be less than otherwise would be the case. I just bring that to the house's attention. I do not know what we can do, because it seems that the marketplace is totally governed by the insurance companies. It seems to me that they are really calling the shots here. Despite the committee's concern about the potential impact on a client as a result of these changes, the explanation provided by Mr Cole left us with the clear understanding that there was not going to be a lot that we can do about it, and if we did not approve the amendments proposed in the bill, the situation would be a lot worse because professionals might face a situation in which they cannot get any sort of insurance claim at all.

I note recommendation 5 of the committee's report in which the committee sought to get some clarification on whether a professional would be required under the bill to advise clients whether the professional holds a costs-inclusive or costs-in-addition policy so that the clients could make a choice about whether they wanted to look for a professional who had an insurance policy that better suited their needs in the event that they had to call on it. I note that the minister's response is that there is no requirement that a professional should advise clients on whether the professional holds costs-inclusive, costs-in-addition or any other type of occupational liability insurance. I think that is disappointing. I think that should be a requirement, but again I note that it is not included in the bill. Given the sort of marketplace that we are dealing with, with insurance companies it is quite possible that there would not be much option for clients to shop around on that basis in any event. If the government is looking at making any further amendments in this area, it should look at including a provision by which professionals are required to provide that advice to consumers. We have moved to that point with real estate transactions, where a very detailed level of disclosure is required. I think we should be looking at that in relation to this issue as well.

Recommendation 6 follows along the same lines, and the minister's response is detailed. Recommendation 6 asks a question about whether the professional is required to tell a client that the amount payable under the policy may be reduced by the defence costs for the purposes of the policy. The minister has informed the house that in the event that the professional holds a costs-inclusive occupational insurance policy, the professional is not required to specifically inform clients that the amount payable under the policy may be reduced by the defence costs for the purposes of the policy. Again, I express the view that fuller disclosure is in the best interests of the client. While I note that this is not in the bill before the house, I bring to the government's attention that my view, and that of the committee, is that this is the sort of thing government should be looking at in the event that further amendments are brought before the committee. We understand that this is a uniform bill and the nature and structure of the bill is such that we cannot effect those changes in this bill without causing a problem to the actual uniform scheme and aspect of the bill. The committee has therefore not recommended those amendments because it would be futile. However, we do want to bring these matters to the government's attention because if the Standing Committee of Attorneys-General continues to consider this issue in future, they might be brought to its attention and addressed at a later time.

Recommendation 9 reads —

> **The Committee recommends that the words "*national model legislation*" be deleted from the heading to Part 4 of the Bill and the words "*legislation in other jurisdictions*" be inserted in their place.**

I note that the minister's response is —

> This recommendation is a drafting issue for the House to consider.

It is not clear to me from that comment whether that amendment can be made as an administrative amendment by the Clerk of the house or whether it needs to be formally moved. I note that a supplementary notice paper incorporating that amendment has not been produced, so I assume it can be administratively made by the Clerk. If not, I hope we can get some clarification of that and deal with it if the house supports that position.

In recommendation 11 the committee sought some clarification from the minister on whether there were any administrative processes by which the ministers of different jurisdictions could resolve any differences that may arise in decisions to gazette schemes operating in one or more jurisdictions. The minister has assured us that this is not likely to happen because any of these sorts of issues would be ironed out well before gazettal. I hope the minister is right because the bill does not contain a mechanism to deal with the issue if they do not manage to iron out any issues.

Part 5 of the bill is the issue of retrospectivity of the legislation. Recommendation 12 is as follows —

> **… that the responsible Minister clarify the effect of Item 10 of Schedule 4 proposed by clause 29 of the Bill.**

The committee was seeking clarification of whether that provides for retrospectivity in relation to certain aspects of the bill. The minister's response is not clear to me. It appears that the minister is saying that the bill has no retrospective application. However, as I said, I am not clear whether that is exactly what the minister is saying. I ask therefore that, in his response to this second reading debate, the parliamentary secretary clarify that matter.

That concludes my comments on the report. It is a very detailed report and I hope members have all the information they need before them to consider the bill. I would like to acknowledge the staff of the committee who put in an amazing effort on this report. We had to do quite a bit of work to understand the implications of some of the provisions of the bill. Susan O'Brien, our advisory officer, did an excellent job working through them, as did members of the committee, so I extend my thanks to her, Mark Warner and members of the committee.

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [9.55 pm] — in reply: I will not take up too much of the house's time. I thank members for their contributions to the debate and for the support of the Labor Party and the Greens (WA). As Hon Adele Farina pointed out, the forty-second report of the Standing Committee on Uniform Legislation and Statutes Review into the proposed amendment was detailed. I make the observation that the Professional Standards Amendment Bill 2009 passed through the other place with bipartisan support—in this place in another form, geographically—without any adverse comment and, indeed, with support. The committee quite properly made a number of recommendations by way of seeking clarification about certain aspects of the bill and its operation. I tabled the government's response yesterday, to which Hon Adele Farina has alluded. I do not propose to go into that in any great depth, except to say that insofar as recommendation 2 is concerned, it appears that the committee was concerned that persons who were suing professionals may very well be prejudiced by the recognition in the bill of costs-inclusive policies, as opposed to costs-in-addition policies. Paragraph 6 on page 2 of the Attorney General's response points out that a protection is provided by the inclusion in clause 8 of the bill of a new section 40A to the principal act, the Professional Standards Act 1997. The new section will endeavour to ensure that no defence costs will erode the benefits available to a claimant and will therefore protect consumers to the level of the cap. However, as has been recognised, many of the issues that were raised are, unfortunately, realities in the marketplace. The bill recognises those realities in the other jurisdictions. As I understand it, the reality is that the market in New South Wales drives the position that is to be adopted in the other states. Western Australia is currently the only state that is out of kilter with what has become a de facto national scheme.

As to recommendation 5, it is true that there is no requirement in either the bill or the principal act to advise a client, who may ultimately be a claimant, about whether the professional he is engaging holds a costs-inclusive or costs-in-addition or some other type of occupational liability policy. However, a statement that must be disclosed sets out to the client the limitation of liability under the relevant legislation, and a variety of other information must also be disclosed. Again, that is set out in not only section 45(1) of the principal act, but also the Attorney General's response to the committee. Recommendation 6 falls under the same category.

Recommendation 9 is a wording issue that has been left to the house to determine and it does not appear to be of any great moment. It recommends that the words "national model legislation" be deleted from the heading to part 4 of the bill. The headings have only limited relevance in any event. Once the bill becomes law and is incorporated into the principal act, the amended act essentially becomes irrelevant; it is the substantive amendments that will count.

As for recommendation 12, there is a distinction to be drawn between a retrospective application of a bill that becomes an act and an amendment that becomes law and a clarification of the extent of liability that may have existed already. That is what the proposed clause does. It does not, as such, create a retrospective liability, but simply clarifies an existing liability in the light of the amendments.

Debate adjourned, pursuant to standing orders.