HEALTH AND DISABILITY SERVICES (COMPLAINTS) AMENDMENT BILL 2021

Committee

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

Clause 28: Parts 3D and 3E inserted —

Committee was interrupted after the clause had been partly considered.

Hon SAMANTHA ROWE: We were talking about breaches of the code and prohibition orders. Hon Nick Goiran asked how that would relate to a person charged. Is that correct?

Hon Nick Goiran: Yes.

Hon SAMANTHA ROWE: If someone is charged, it has to relate to a breach of the code. If there is a criminal charge against a healthcare worker, the charge has to relate to a breach of the code for it to be relevant.

Hon NICK GOIRAN: Does HADSCO have a list of the types of criminal matters that it would be particularly interested in? That is the first question. Secondly, is there some kind of memorandum of understanding with the Western Australia Police Force so that HADSCO will be notified of relevant police charges?

Hon SAMANTHA ROWE: There is no criminal matter list. The consultation with the Western Australia Police Force, consumer protection and the Department of Health about what those prescribed offences will be is ongoing. As part of that consultation with police, they will obviously be working through how police will be informing HADSCO and whether that will form a memorandum of understanding.

Hon NICK GOIRAN: The consultation is with the Consumer Protection division, the police and the Department of Health. The Health and Disability Services Complaints Office is running that consultation process, I take it.

Hon Samantha Rowe: Yes.

Hon NICK GOIRAN: With respect to charges, if I could get the parliamentary secretary to turn to page 13 of the bill, which refers to proposed section 52B—the first of the proposed sections in new part 3D that will be inserted by clause 28—she will see a reference in proposed subsection (3) to two scenarios in which the director can issue an interim prohibition order. The second of those scenarios is a conviction for a prescribed offence. It can be only a conviction; it cannot be charges. I take it that the parliamentary secretary is saying to the chamber that the first of the two will cover charges being laid. If the director is informed that charges have been laid and, in addition to having received that information, he or she then reasonably believes that the healthcare worker has failed to comply with a code of conduct applying to that healthcare worker and, in addition to all that, he or she is also satisfied that it is necessary to do this to avoid a serious risk to the life, health, safety or welfare of a person or to the public, he or she can issue the interim prohibition order.

Hon Samantha Rowe: Yes, that is correct.

Hon NICK GOIRAN: That being so, the consultation paper that we have referred to fairly extensively as we have scrutinised this bill mentions that some consideration should be given to options for extending an interim prohibition order and issuing a second interim prohibition order. This is on page 26 of the consultation paper. The reason it is suggested this might be necessary is that it may take the director more than 12 weeks to undertake an investigation into a breach of the national code. Presumably, the concern was that we would not want there to be an interim prohibition order and then nothing for a period because it takes a bit of time to undertake the investigation. What options will be available to the director for either extending an interim prohibition order or issuing a second one?

Hon SAMANTHA ROWE: Under proposed section 52B(4), interim prohibition orders have a 12-week duration and the director can have an additional IPO issued when an investigation takes longer than 12 weeks due to its complexity.

Hon NICK GOIRAN: Can he issue a second one and is that then the limit? He cannot issue a third one, for example.

Hon SAMANTHA ROWE: No, that is not the limit. He can issue multiple orders.

Hon MARTIN ALDRIDGE: I will follow on from this issue of interim prohibition orders, but I first want to go to the issue of the review of decisions. Question 10 in the final consultation report, Legislative Council tabled paper 1699, asks —

> *Do you agree with the State Administrative Tribunal in Western Australia reviewing the decision to issue a prohibition order, including interim orders, at the request of the health care worker?*

Figure 11 illustrates the response to question 10. The parliamentary secretary can see that 27 respondents confirmed they agreed with that statement, two did not and 13 provided no response. In the text that follows figure 11, a number of extracts, if you like, have been highlighted in support of the submission —

- Such a process is a requirement for natural justice.
- This would ensure consistency with the process for issuing prohibition orders in other jurisdictions.
- SAT is the most suitable entity for such a role in Western Australia (an independent third party for review of decisions made by government agencies).

Page 27 of the report lists another three dot points of issues that were raised by the submissions to consider when finalising the policy for implementation. It is not an exhaustive list, but nevertheless the Health and Disability Services Complaints Office has listed three key issues that were identified in the submissions. I might work backwards through the list. The last dot point states —

- Describe the process by which a health care worker who is subject to a complaint will have the right to be heard.

I guess we will come to that in a moment in the context of the clause. The second dot point states —

- HaDSCO will need to consider that SAT is a public forum and even if the health worker is exonerated, this may cause unwarranted reputational damage.

The first dot point states —

- In relation to the right to be heard and right of appeal it is not clear how the proposed processes and timeframes are intended to work when there is a need for an interim prohibition order.

As I said, this is where I want to follow on from Hon Nick Goiran's questions on proposed section 52B, but now in reference to division 4 and proposed section 52P, "Review of decisions to make interim prohibition orders and prohibition orders". This provision simply states —

> If the Director makes an interim prohibition order or prohibition order in relation to a person, the person may apply to the State Administrative Tribunal for a review of the Director's decision to make the order.

I made some comments during the second reading debate about whether this is a meaningful review clause, particularly in the context of an interim prohibition order that under proposed section 52B is for a period of not more than 12 weeks; it could be for less than 12 weeks, but not more than 12 weeks. RUN ON

In terms of accessing natural justice in challenging a decision of the director by way of the State Administrative Tribunal, can the parliamentary secretary perhaps provide some information about how someone could reasonably access the tribunal in those circumstances? I will start initially with interim prohibition orders. How would someone be able to reasonably access natural justice via SAT within a time frame of 12 weeks or less?

Hon SAMANTHA ROWE: Under proposed section 52C(2), the director has to give the healthcare worker written notice of an interim prohibition order. That notice must be provided as soon as possible. The notice must also contain a statement informing the healthcare worker that they can apply for a review of that decision to SAT under the SAT Tribunal Rules 2004. An application to SAT under its review jurisdiction must be made within 28 days. In appropriate circumstances, SAT may expedite a review; however, that is ultimately a matter for the tribunal having regard to all the circumstances.

Hon MARTIN ALDRIDGE: Proposed section 52C, to which the parliamentary secretary has just drawn my attention, states in subsection (1) —

> As soon as possible after making an interim prohibition order in relation to a person, the Director must give written notice of the interim prohibition order to the person.

Obviously, a definitive time frame is not imposed on the director, but it must be done "as soon as possible". We need to keep in mind that the clock will start ticking once the decision has been made, and that the healthcare worker in this case will have 28 days within which to make an application to the tribunal. The period could be less than 28 days, depending upon when the director provides notice to the worker or when the worker receives the notice. One would think that things would move fairly quickly and would play out within seven days, or perhaps even sooner. I cannot imagine that there would be a significant barrier to notifying a person about an IPO. One would probably want that to happen as soon and as efficiently as possible to ensure compliance with the powers conferred by an IPO. My issue is that if the director effectively forms a view pursuant to this legislation that the healthcare worker can no longer do any work in this field for, let us say, the entire 12 weeks—it could be less than that period—they will have 28 days to lodge an application with the tribunal. I want to get some confidence in whether the tribunal is going to reasonably and fairly consider that matter. Remember, the director has potentially taken away the healthcare worker's only income.

Hon Samantha Rowe: Because there is a serious risk to the health of people.

Hon MARTIN ALDRIDGE: That is the view of the director. That is the view of one person. The director may have formed that view. The mechanism that the government has included in the bill can be found at proposed section 52P, which provides for the State Administrative Tribunal to review the matter. Of course, there is no time frame for when that review might happen. I can understand it in the context of a prohibition order, which is a permanent order. The tribunal's efficiency in dealing with that matter is a little different from dealing with an interim prohibition order, whereby somebody is essentially being sat down for 12 weeks. I want to know whether somebody could apply to, and receive a decision of, the tribunal within a period of less than 12 weeks. Does the parliamentary secretary have information at her disposal that would convince me that the tribunal is sufficiently efficient to meet that, in my view, very short time frame?

Hon SAMANTHA ROWE: Most vocational matters are referred to the State Administrative Tribunal at the moment. As the honourable member would know, the tribunal is headed by a Supreme Court judge. All the other jurisdictions with the national code use a similar tribunal. Ultimately, it is a matter for SAT to determine how long a matter takes.

Hon MARTIN ALDRIDGE: I appreciate that. I think the explanatory memorandum says that the government consulted with the tribunal, and the tribunal said it was happy to take jurisdiction over this matter, and, in fact, it did not need any additional resources to do so.

Hon Samantha Rowe: Yes, that is correct.

Hon MARTIN ALDRIDGE: Okay. It appears to me that there will not be any uplift in capability at the tribunal following the passage of this bill because it has said, "We'll take it. We don't need any more money; we have enough resources." I take on board that the parliamentary secretary said the tribunal is the obvious place and it already has the function of regulating vocational matters. Given my focus is on interim prohibition orders for up to 12 weeks being reviewed by the tribunal, I want to get to a point at which we have a mutual understanding of how effective this review mechanism will be for IPOs. Given what the parliamentary secretary has just told me about the tribunal having jurisdiction over other vocational matters, is there some history, data or experience that shows on average how long it takes to resolve vocational matters?

Hon SAMANTHA ROWE: We do not have access to SAT's data around those sorts of figures.

Hon MARTIN ALDRIDGE: I will assist the parliamentary secretary in order to make progress on this point. I draw her attention to the State Administrative Tribunal's *Annual report 2020/21*. Pages 8 and 9 of that report focus on the vocational regulation stream.

As the parliamentary secretary said, a number of vocational boards and statutes provide jurisdiction to the tribunal to review certain decisions. One statute is the Health Practitioner Regulation National Law (WA) Act 2010. This is a type of vocational regulation that I think is comparable to the matter before us—that is, the regulation of healthcare workers. When the parliamentary secretary has an opportunity to reflect on this annual report, she will see that not many applications are lodged from year to year. For example, there were 41 applications in 2018–19, 39 applications in 2019–20 and 22 applications in 2020–21. These are in relation to only the Health Practitioner Regulation National Law (WA) Act 2010. In 2020–21, the tribunal had a clearance rate of 136 per cent. I have pursued this question about whether the review mechanism the government has crafted will be effective for IPOs because—this might surprise the parliamentary secretary—the median time to deal with a matter in 2020–21 was 22 weeks. Keeping in mind that a person can be subject to an IPO for up to 12 weeks, looking at the median in 2020–21, the tribunal took 22 weeks to resolve matters in that subsection of the vocational stream.

When we look at the eightieth percentile of that same year, we see that it took the tribunal 66 weeks to resolve those matters. Its target is 27 weeks, notwithstanding it has a massive problem meeting its target. Its actual for last year was 66 weeks for 80 per cent, and its target for 80 per cent is 27 weeks. Even if it was on target, that is more than double the time a person would be subject to an interim prohibition order. I take the parliamentary secretary back to my first question. Remembering that we are talking about interim prohibition orders, does the government believe that a review by the State Administrative Tribunal on the matter of an interim prohibition order issued by the director against a healthcare worker will provide natural justice to a person?

Hon SAMANTHA ROWE: Without having any of the details of the cases or an understanding of what SAT means by dealing with it, it is pretty hard to know whether it is comparable to what we are dealing with here. We would expect that urgent matters would be dealt with urgently.

Hon MARTIN ALDRIDGE: I would expect that too, but based on the data that the State Administrative Tribunal established in its annual report, if anything, this bill will put more pressure on those numbers. Keep in mind that it told the government, "Don't worry; we'll take on this work. We don't need any more money; we don't need any more resources. We'll deal with what we've got." Last year 80 per cent of complaints were dealt with within 66 weeks. The target was 27 weeks. Even if it hit the target, that is still more than twice the period for an IPO. I go back to the first dot point under issues in HADSCO's final consultation report, which states —

> In relation to the right to be heard and right of appeal it is not clear how the proposed processes and timeframes are intended to work when there is a need for an interim prohibition order.

I do not know either, because I think this review clause with respect to IPOs will effectively be meaningless, because the reality is that more likely than not, an IPO will expire before a person has the ability to access natural justice through the State Administrative Tribunal. If the government has a different view, I am happy for it to elaborate as to —

Hon Samantha Rowe: I do not think we can take it any further, member.

Hon MARTIN ALDRIDGE: That is the problem; the government is not able to elaborate or substantiate why it thinks someone will be able to access natural justice within the 12 weeks of an IPO.

Hon SAMANTHA ROWE: We do not know whether the data that the honourable member is referring to is even comparable, so I do not think that we are able to take this any further in a way in which the member is going to be satisfied.

Hon MARTIN ALDRIDGE: I think the parliamentary secretary is right: I am not going to be satisfied because I do not think it is going to work for a person who is subject to an IPO.

In this clause, there are effectively three powers that can be exercised by —

Hon Samantha Rowe: Powers?

Hon MARTIN ALDRIDGE: I am using that word generally. There are three powers that the director will be able to exercise against a healthcare worker. The first is an IPO, the second is a prohibition order and the third is an indirect power, which is that the director may publish a public health warning statement. Proposed sections 52R(1) and (2) effectively set out separate grounds for which the director may issue a public health warning statement. Proposed section 52R(1) is when the director has commenced an investigation and reasonably believes that the healthcare worker has failed to comply with the code and it is necessary to publish the statement to avoid an imminent and serious risk to the life, health, safety or welfare of a person or the public. Proposed section 52R(2) states that the director may publish a statement setting out the name of a healthcare worker after either completing an investigation and the director being satisfied that the healthcare worker has failed to comply with the code of conduct, or the healthcare worker has been convicted of a prescribed offence, and the second limb, obviously, is that the director reasonably believes that it is necessary to publish the statement to avoid a serious risk to the life, health, safety or welfare of a person or the public.

This public health warning statement is obviously separate from an IPO or a PO, and they act independently. Somebody may be subject to a public health warning statement but not subject to an IPO or a prohibition order. Does the parliamentary secretary follow? My question is: if I am the subject of a public health warning statement publicly issued by the director pursuant to proposed section 52R, what right do I have to seek a review of the decision of the director?

Hon SAMANTHA ROWE: I am advised that the intention is not to issue a public health warning statement without it accompanying either an IPO or a PO.

Hon MARTIN ALDRIDGE: It looks like we are going down the intent rabbit warren again, parliamentary secretary. What is prohibiting the director from issuing a public health statement against a person who is not subject to an IPO or prohibition order?

Hon SAMANTHA ROWE: The short answer to the honourable member's question is that, technically, nothing in the legislation would prohibit the director from issuing a public health statement. However, that is not the intention. Also, it would be a little nonsensical to put out a public health statement without there being an IPO or PO in the first place, because they are meant to work together.

Hon MARTIN ALDRIDGE: Given that the government is in the mood for amendments, could we perhaps tidy up proposed section 52R to make that intent clear—that is, the director can issue a public health warning statement only when a person is subject to an interim prohibition order or prohibition order? I agree with the parliamentary secretary: I think that is the intent of the bill and that makes sense, but that is not what the bill says. My concern is about a person finding themselves the subject of a public health warning statement, keeping in mind the concerns raised in the consultation paper about having these issues ventilated at the State Administrative Tribunal. It states —

- In relation to the right to be heard and right of appeal it is not clear how the proposed processes and timeframes are intended to work when there is a need for an interim prohibition order.

Sorry; it was the second point, which states —

- HaDSCO will need to consider that SAT is a public forum and even if the health worker is exonerated, this may cause unwarranted reputational damage.

The parliamentary secretary has illustrated the government's intent for proposed section 52R, but there is no protection from the director using these powers to issue a public health warning statement against a person, saying that a person is a serious risk to the life, health and safety or welfare of a person or the public, but that person has no right of review to the State Administrative Tribunal under the review provision in proposed section 52P, because, as we know, that section is limited to a review of decisions to make interim prohibition orders and prohibition orders. Therefore, I think a simple amendment could be made here, either at proposed section 52R to qualify that the director cannot make a public statement without an IPO or PO in place or at proposed section 52P in which the government could extend the review decision to a public health warning statement under proposed section 52R. Will the government contemplate supporting an amendment to make its intent clear and provide those protections?

Hon SAMANTHA ROWE: Honourable member, I will take that on notice.

Hon MARTIN ALDRIDGE: Thanks, parliamentary secretary. I will not go on any further, but I think we have made our point there. It will be interesting to see what the government's response is in due course.

Earlier, Hon Nick Goiran mentioned proposed section 52B(4), which states —

> The Director may, on the expiration of the period specified in the interim prohibition order under subsection (2)(a) or (b), make another interim prohibition order in relation to the health care worker.

From my briefing, I established that there will be no limit to the number of IPOs that a person can be subject to. Literally, every three months the director could wake up and sign another IPO for another 12 weeks on the basis that the director is still satisfied that the thresholds within the amended act warrant a further IPO being issued. I want to make it clear that this is a new order; it is not an extension of an existing order, and if I am on the wrong path, please interject, parliamentary secretary. Therefore, every three months, a person can be the subject of a new order of which there is no limit.

I will jump back to the issue of review and the information that I presented about the State Administrative Tribunal—that is, 80 per cent of cases under the national practitioner regulation national law are resolved within 66 weeks, which means that 20 per cent take greater than 66 weeks. My concern is that we have considerable wait times in the tribunal, notwithstanding that some people may or may not get expedited passage. If someone has received a notice and is subject to an IPO, they have lodged their application with the tribunal within 28 days and the tribunal is unable to hear and decide the matter within 12 weeks, the order will expire and a fresh order will be issued for another 12 weeks. Where do they then stand as an applicant to the tribunal?

Hon Samantha Rowe: Where do you stand with SAT—is that what you're saying?

Hon MARTIN ALDRIDGE: Yes. What would be their standing with the tribunal? They are seeking the tribunal's review of an order that has expired and they are now the subject of a new order.

Hon SAMANTHA ROWE: I am advised that the healthcare worker could lodge a further appeal with SAT and then have those joined, or the healthcare worker could apply for a stay of the order, which would mean that it would not be reasonable for the director to then issue a further order in the same terms as the previous order. That would not be a reasonable outcome.

Hon MARTIN ALDRIDGE: I am not familiar with the operations of the tribunal, but what the parliamentary secretary has effectively told me is that there are options to allow a person to proceed with a tribunal review, notwithstanding that the original order they were complaining about has fallen away and a new order in the same or similar terms has been served. There will be options for that person to continue pursuing and progressing the original application to the tribunal without having to walk away and start again.

Hon Samantha Rowe: Yes.

Hon MARTIN ALDRIDGE: For somebody subject to a public health warning statement, we have established there is no prerequisite that requires an interim prohibition order or prohibition order and therefore there is no right of review at the tribunal, notwithstanding our earlier conversation that the parliamentary secretary has taken on notice. If I am subject to a public statement by the director that I am a serious risk to the life, health, safety or welfare of a person or the public, notwithstanding what I believe are some deficiencies here in the tribunal review provision, what actions could I take in these circumstances? Would it be to pursue some sort of civil action in the courts for defamation? Could the parliamentary secretary explain what the options are outside the provisions that exist within the bill for review of IPOs and POs?

Hon SAMANTHA ROWE: Honourable member, I am advised that under proposed section 52T, a healthcare worker can show the director why the statement is incorrect. If the director then forms the opinion that a public health warning statement is incorrect, the director must publish a correction statement setting out the reason for that correction. Otherwise, the healthcare worker could take civil proceedings for defamation or seek a judicial review in the Supreme Court.

Hon NICK GOIRAN: Further to this line of questioning from the honourable member, is there any protection for the director from any action in defamation?

Hon SAMANTHA ROWE: I am advised that there is protection for the director and the staff under section 69(1) of the act.

Hon NICK GOIRAN: Section 69(1)?

Hon SAMANTHA ROWE: Yes. But note that under section 69(3), there is not for the Crown.

Hon NICK GOIRAN: In accordance with that, the advice of the parliamentary secretary to the chamber is that a person who has been wrongly subjected to a notice—let me get the language right; a "public health warning statement"—with the director's acknowledgement that that statement is incorrect, retains an action in defamation against the Crown, because of the actions of the director?

Hon SAMANTHA ROWE: Yes, that is correct.

Hon NICK GOIRAN: Part of the issuing of the interim prohibition orders may pertain to bodies corporate. This issue was taken up in the consultation paper that we have referred to extensively. It is acknowledged on page 26 of the consultation paper that the consultation paper is silent on the conditions for the issue of an interim prohibition order for a body corporate. Will an interim probation notice be able to be issued against a body corporate?

Hon SAMANTHA ROWE: No. It is only for healthcare workers—individuals.

Hon NICK GOIRAN: The government has made an express decision that it will capture only individuals and not bodies corporate. One of the concerns that was raised about the interim prohibition orders—this is in part what Hon Martin Aldridge has been driving at as well—is that once a notice has been issued as an interim prohibition order, a person can go to the State Administrative Tribunal to have that reviewed. An issue arises in that this will then become a public forum. SAT might then agree on review that it should never have been issued, but the damage to the person's reputation will have already occurred. No public health warning might have been issued.

The point the honourable member is making is that it would be desirable—this has been taken on notice, parliamentary secretary—for a public health warning statement to be made only if an interim prohibition order or a prohibition order has been made. At the moment, that will not be the case; they will be able to issue that in any event. It is also an option at the moment for the director to just issue an interim prohibition order and not issue a public health warning statement. It will be up to the director; it will be at his or her discretion. Notwithstanding that, the person will still be subject to an interim prohibition order or a prohibition order, yet SAT could come along afterwards and say, "That is not right." There might even be a situation in which a full investigation is done and the person will be completely cleared and exonerated. What is intended to be done to remedy that person's unwarranted reputational damage?

Hon SAMANTHA ROWE: I am advised that the Health and Disability Services Complaints Office will revoke the order and provide an explanation of why that order has been revoked, which will be published on its website. If the State Administrative Tribunal revokes the order, that is obviously already a public matter. It is not intended that there will be compensation. I appreciate the member's concerns around this, but the intent of the bill before us is to protect public health and safety from those unregistered health practitioners who are doing the wrong thing. As we have previously discussed, we envisage only a very small number of prohibition orders and interim prohibition orders going to SAT.

Hon NICK GOIRAN: What will be the time frame for doing that, because there was discussion in the consultation paper about a period of time for any publication to occur? It is one thing —

Hon Samantha Rowe: On HADSCO's website?

Hon NICK GOIRAN: Yes, or in any other form that the director chooses, which, I think, is the language in the bill. Proposed section 52O is headed "Publication of information about interim prohibition orders and prohibition orders". As the parliamentary secretary pointed out, the director must publish the order on the office's website, but there does not appear to be any time frame in which that should be done. That said, there is reference to "as soon as practicable after making an order". That is somewhat dangerous, depending again on the intention to exercise this discretion by the director; for example, an order has been made, but the director knows it could be subject to review by the State Administrative Tribunal. It would seem a little improper to then go ahead and publish it. HADSCO might even have received notice that it is currently under review by SAT. The parliamentary secretary's point was that the person might apply for a stay. Is there an intention to internally apply any time frame around this? At page 28 of the consultation paper, reference is made to the possibility of a 28-day period. It states —

> A 28 day cut-off may be applicable for appeals against the initial decision, but a health care worker should be able to ask for a review of the decision at any time …

What is intended to be done with publication with regard to the phrase "as soon as practicable"?

Hon SAMANTHA ROWE: I am advised that HADSCO would have internal procedures to publish it as soon as it is issued. Also, HADSCO's intention would be to follow the legislation, which states "as soon as practicable". That is the intention it will follow.

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

House adjourned at 6.19 pm