Doctors' contracts update - 4 April 2014

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1) On 1 April 2014, the Government introduced into the Parliament the *Hospital and Health Boards Amendment Bill 2014* (the "HHB Bill"). The HHB Bill was passed on 3 April 2014.

Section 51C(3)

2) The HHB Bill introduces two (2) amendments to the HHB Act. The first is the amendment to s.51C(3) previously proposed - with some new additions. This amendment, relevantly, provides as follows:

> "...
>
> *(3) If a health employment directive is inconsistent with a high-income guarantee contract, the high-income guarantee contract prevails over the health employment directive to the extent of the inconsistency.*
>
> *(4) However, for subsection (3), to the extent a health employment directive provides for an increase in remuneration or other benefits for an employee, the directive is taken not to be inconsistent with a high-income guarantee contract.*
>
> *(5) Subsections (3) and (4) apply despite section 51E.*
>
> *(6) In this section—*
>
> *health employment directive includes—*
>
> > *(a) a decision made in the exercise of a discretion under the directive; and*
> >
> > *(b) a health service directive to which section 321 applies."*

3) These provisions would apply to contracts once they have been entered into with Senior Doctors.

4) Section 51C(3) provides that in the event of an "inconsistency" between the terms of HED and an employee's high-income guarantee contract, the contract prevails to the extent of the inconsistency.

5) There is significant ambiguity as to what is meant by the word "inconsistency" in s.51C(3) of the HHB Act. This may mean direct inconsistency to the extent that it would be impossible to comply with both the term of the contract and the HED

simultaneously. It may also mean intrusion into an area or topic which has been regulated by the contract but which is capable of simultaneous obedience. We do not know if inconsistency means substantive inconsistency as to effect or mere inconsistency as to form.

6) Absent any further clarification in the legislation, this will only be resolved by way of litigation on the legislation and the contracts.

7) The amendments also may expand the types of matters which are caught by the "inconsistency" provisions in s.51C(3) to extend to the exercise of a discretion which is provided for by the HED. There is currently no discretion in the HEDs that this may presently affect. However, in respect of future HEDS it may limit the capacity of the DG to exercise a discretion under a HED which may result in an inconsistency with the contract entered into by a Senior Doctor.

8) Depending on what is meant by inconsistency**,** there appears to be no barrier to the Director-General issuing a HED which deals with topics not covered or contemplated by the contract. If such a HED was issued, no inconsistency would arise. Given the topics covered by the present contract, the scope of further changes which would not cause an inconsistency to arise may be significant.

9) Inconsistency does not mean disadvantage. Disadvantage is a term which is broader than simple financial disadvantage, which existing contractual powers of variation potentially allow to occur. It would be open to the DG to issue a HED which causes "disadvantage" provided it was in respect of a topic not contained or contemplated by the contract.

10) It is also arguable that a HED could be introduced which supplements, or adds additional obligations to, an existing term of the contract. This would not necessarily cause an inconsistency to arise. A example of this would be the present Termination addendum and Arbitration of Dispute Addendum. Both do not prescribe the process for reviewing a termination or dispute nor the powers of the person who will deal with termination or dispute matters. A HED could be issued which prescribes the process and powers of the person tasked with undertaking matters. This would not necessarily result in any inconsistency as neither addendum, outside of prescribing the binding nature of the outcome, provides any other details of how the process will operate.

11) A further example would be in respect of the matters that are presently provided for by way of policy.

Amendment to create s.65B

12) The second amendment to the HHB Act is a new s.65B which provides that a high-income guarantee contract prevails over an "employment regulation". An "employment regulation" is defined to include a regulation made under:

a) s.282 of the HHB Act; or
b) s.193(2) of the IR Act.

13) This amendment was in direct response to the advice provided to Senior Doctors by the SMO & VMO Taskforce through the Keep Our Doctors campaign on 28 March 2014 which identified these two statutory powers as a basis for affecting Senior Doctors' terms and conditions of employment.

14) The amendments of course cannot affect the Government's power to make legislative changes that affect your employment, as was done in December 2013 by way of amendments to the IR Act and HHB Act.

15) This is a right of the Parliament, and in this respect cannot be legislatively constrained.

No effect on contractual variation powers

16) The amendment to s.51C(3) and the creation of s.65B of the HHB Act do not in any way effect the unilateral powers to vary contractual obligations which are contained in the contract presently, for example:

a) clause 10(3) - regarding Tier 2 and Tier 4 remuneration;

b) changes to policy, including policy that may impact on the exercise of clinical autonomy; see clause 6(2) which is affected by clause 22(4) of the contract.

17) These powers remain, and are profound.

No change to the current contract

18) Since the release of the most recent addendum and legislative amendments, the Government has not offered to make any further changes to either the addendum, legislation or the contract.

19) The contract, and addendum, remain flawed and massively increase managerial prerogative at the expense of your ability to advocate for your own conditions of employment and dispute management decisions.

Negotiations

20) The Government has refused to return to the negotiating table since 17 March 2014.

21) Instead the Government has been entirely reactionary to criticisms of the contract, addendum and legislation. It has commenced Federal Court proceedings against your representatives to injunct these professional and industrial associations from communicating with you.

22) This has resulted in the quite unsatisfactory and piecemeal rolling amendments to the addendum and legislation. Although some of these changes have incrementally met some of the concerns raised by Senior Doctors, a final resolution to this dispute cannot be achieved until the Government meets with Senior Doctor representatives and comprehensively deals with the deficiencies of the Government's present contract model.

Two Classes of SMOs?

23) Under industrial instruments, such as the MOCA3, every SMO regardless of when they commenced employment had the same conditions of employment. This will no longer be the case.

24) The contracts will result in SMOs having different conditions of employment depending on when they sign a contract and, given the likelihood of further variations to the contract, which contract they sign.

25) Given the deep flaws in the current contract, and the fact that usually contracts will be varied over time to meet changing circumstances, multiple iterations of the contract contained in amended or new HEDs is almost certain.

26) This is relevant given the effect of the Ministerial Direction issued on 27 March 2014, which relevantly provides:

> "*Prior to amending or appealing health employment directives to 5/14 or 6/14, the Chief Executive of the Department of Health must consult with the Queensland Health Contract Advisory Committee".*

27) The Director General is only required to *consult* with the as yet unformed "Committee" before repealing or amending the contract HEDs - that is potentially making changes that could affect your contract or the contract for your future colleagues, such as junior doctors presently undergoing their training.

28) There is no independent mechanism or process which provides for SMOs and VMOs to regularly collectively negotiate their employment conditions as previously existed under the IR Act through binding arbitration under in the QIRC. SMOs and VMOs will essentially be stuck with what the DG decides.

29) This Ministerial Direction appears to have application in two (2) respects. Firstly, in the event that the current contract HEDs were to be repealed or amended, so as to affect the terms of the contract to be offered to new employees, the DG would be obliged to consult with the "Committee", not reach agreement.

30) Secondly, in the event that the HEDs were either amended or replaced in such a way so as to relate to the terms and conditions of existing employees in respect

of matters not contemplated by the existing contracts, the DG would be required to consult with the "Committee".

31) There is no obligation to consult in respect of the introduction of new HEDs as the Ministerial direction only relates to HED 5/14 and 6/14.

32) We already know that future SMOs and VMOs contracts will be different to those currently being offered. It is open to the DG to repeal or amend the existing HEDs in respect of the future employment of SMOs and VMOs, or in circumstances where you are promoted and contractually a new contract must be offered.

33) This will almost certainly create disharmony and dissension in the workplace depending on the difference in the contracts between current SMOs and new SMOs. This may have a destructive impact on workplace harmony, which is essential to the provision of high quality patient care.

34) There is no obligation to obtain your agreement, or the "Committee's" agreement, and there is no practical way, such as a dispute in the QIRC, of challenging a decision to change the contract by HED.

35) The members of this Committee are not known. Given the Government's ideological animosity to the industrial organisations which represent Senior Doctors - ASMOF and Together - there is a significant risk that these organisations will be excluded from the Committee. That is to say the organisations with the industrial expertise, and obligation, to advocate for Senior Doctors may be excluded.

Implications of these changes

36) The new amendment creating s.65B and amending s.51C(3) demonstrates a number of matters of significance.

37) Firstly, that the Government is responding to the pressure by Senior Doctors and their supporters through the Keep Our Doctors Campaign.

38) Secondly, it undermines the Government's argument, made to the SMO & VMO Taskforce during negotiations, that legislative change cannot be achieved quickly given the Government's legislative schedule. Section 65B has appeared, quite literally, overnight.

39) Thirdly, it yet again highlights how easily the Government can pass legislation which can affect Senior Doctors' employment.

40) Finally, it demonstrates that legislative change which guarantees Senior Doctors certainty in their employment is achievable.

41) Unfortunately the proposed addendum is a deeply flawed document which does not adequately address the issues it covers.

42) This piecemeal, reactionary and fragmented approach to resolving the dispute is unnecessarily causing distress to Senior Doctors, their patients and the public.

43) The only effective way to resolve this dispute is for the Government to return to the negotiation table with Senior Doctor representatives.

44) The proposed contracts and these legislative changes will be discussed in more detail in future communications and at the Pineapple meeting on 9 April 2014.