

**40TH PARLIAMENT**



## **Report 130**

# **STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW**

*National Disability Insurance Scheme (Worker Screening) Bill 2020*

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Presented by  
Hon Michael Mischin MLC (Chairman)  
October 2020

## **Standing Committee on Uniform Legislation and Statutes Review**

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## EXECUTIVE SUMMARY

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- 1 The National Disability Insurance Scheme (NDIS) provides support to people with disability, their families and carers. It is jointly governed and funded by the Australian, State and Territory governments.
- 2 The NDIS commenced in stages from 1 July 2013. The scheme commenced in all jurisdictions except Western Australia from July 2016.
- 3 In Western Australia, a nationally consistent but State-operated NDIS was introduced in July 2017, with the Commonwealth assuming responsibility for the NDIS in Western Australia from 1 July 2018.
- 4 The Commonwealth, States and Territories have agreed to a shared approach to worker screening for the NDIS. To support this agreement, the *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme* (IGA) was developed. It was signed by the Premier on behalf of the Western Australian Government on 4 June 2019.
- 5 The IGA states 'the objective of nationally consistent NDIS worker screening is to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services under the NDIS',<sup>1</sup> primarily from persons who may be charged with or have convictions for certain offences.
- 6 The National Disability Insurance Scheme (Worker Screening) Bill 2020 (Worker Screening Bill) implements the IGA to provide for nationally consistent NDIS worker screening.
- 7 The Standing Committee on Uniform Legislation and Statutes Review (Committee) has identified that several clauses in the Worker Screening Bill impact upon the sovereignty and law-making powers of the Parliament of Western Australia.
- 8 The Committee has drawn these clauses to the Legislative Council's attention for consideration during debate on the Worker Screening Bill.

## Findings and recommendations

**Findings and recommendations are grouped as they appear in the text at the page number indicated:**

### FINDING 1

Page 7

Clause 2(b) of the National Disability Insurance Scheme (Worker Screening) Bill 2020, in providing that the Executive determines its commencement date, erodes the Western Australian Parliament's sovereignty and law-making powers.

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<sup>1</sup> *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme*, entered into between the Commonwealth, States and Territories, signed by Hon Mark McGowan MLA, Premier, on 4 June 2019, p 6.

## RECOMMENDATION 1

Page 7

Clause 2 of the National Disability Insurance Scheme (Worker Screening) Bill 2020 be amended to require the proposed *National Disability Insurance Scheme (Worker Screening) Act 2020* to be automatically repealed, if not operational, at the expiration of 10 years of receiving Royal Assent.

## FINDING 2

Page 12

Clauses 6(1)(a) and 6(2)(a) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 are Henry VIII clauses as they enable regulations, rather than an Act of Parliament, to modify the operation of the *National Disability Insurance Scheme (Worker Screening) Act 2020*.

## FINDING 3

Page 12

Clauses 6(1)(a) and 6(2)(a) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 erode the Western Australian Parliament's sovereignty and law-making powers.

## FINDING 4

Page 12

The current Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.

## FINDING 5

Page 12

Clauses 6(1)(a) and 6(2)(a) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 are acceptable by reason of the need for Western Australia to be able to introduce new or amended conditions attached to offences listed in Schedules 1 and 2 by regulation, in order to maintain nationally consistent worker screening.

## RECOMMENDATION 2

Page 12

The second reading speech or Explanatory Memorandum for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.

## RECOMMENDATION 3

Page 12

The Minister for Disability Services table an amended Explanatory Memorandum for the National Disability Insurance Scheme (Worker Screening) Bill 2020 in the Legislative Council that identifies all Henry VIII clauses and the rationale for them.

## FINDING 6

Page 15

Clauses 6(1)(c) and 6(2)(c) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 are Henry VIII clauses as they enable the addition of Class 1 and Class 2 offences through regulations rather than an Act of Parliament.

**FINDING 7**

Page 15

Clauses 6(1)(c) and 6(2)(c) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 erode the Western Australian Parliament's sovereignty and law-making powers.

**FINDING 8**

Page 15

The current Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.

**FINDING 9**

Page 15

Clauses 6(1)(c) and 6(2)(c) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 are justifiable by reason of the need for national consistency in worker screening.

**FINDING 10**

Page 17

Clause 82(3) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 is a Henry VIII clause as it enables regulations, rather than an Act of Parliament, to modify the *National Disability Insurance Scheme (Worker Screening) Act 2020*.

**FINDING 11**

Page 17

Clause 82(3) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 erodes the Western Australian Parliament's sovereignty and law-making powers.

**FINDING 12**

Page 17

The current Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.

**FINDING 13**

Page 17

Clause 82(3) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 is justified in order to effect a smooth transition to the new regulatory scheme and acceptable by reason of its focused operation.





# 1 Introduction

- 1.1 On 9 September 2020, the National Disability Insurance Scheme (Worker Screening) Bill 2020 (Worker Screening Bill) was introduced into the Legislative Council.<sup>2</sup>
- 1.2 The Worker Screening Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Standing Order 126. The Committee was required to report to the Legislative Council by 3 November 2020, being the first Legislative Council sitting day following the expiry of the 45 day reporting period.
- 1.3 The Worker Screening Bill seeks to:
  - provide for nationally consistent worker screening and ongoing monitoring of people who engage in work under the National Disability Insurance Scheme (NDIS)<sup>3</sup>
  - amend the *Working with Children (Criminal Record Checking) Act 2004* and the *Spent Convictions Act 1988*.
- 1.4 When enacted, it will be the *National Disability Insurance Scheme (Worker Screening) Act 2020* (Act).
- 1.5 This report includes discussion and analysis of the:
  - NDIS
  - *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme* (IGA)
  - Worker Screening Bill and its impact on Parliamentary sovereignty and law-making powers.

# 2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its website at [Uniform Legislation Committee homepage](#). The general public was immediately notified of the referral via social media.<sup>4</sup>
- 2.2 Given the Committee's terms of reference, the Committee considered that any broader advertising or invitation for submissions from the public was neither necessary nor warranted.

# 3 Supporting documents

- 3.1 The Committee received copies of the Worker Screening Bill, its second reading speech and Explanatory Memorandum when the Worker Screening Bill was introduced into the Legislative Council.
- 3.2 Standing Order 126(5) states:

The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 working days after referral...

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<sup>2</sup> The bill was introduced by Hon Stephen Dawson MLC, Minister for Disability Services.

<sup>3</sup> The National Disability Insurance Scheme is explained in section 4 of this report.

<sup>4</sup> Legislative Council, 9 September 2020, retrieved from <https://twitter.com/WALegCouncil/status/1303650633480679424>.

- 3.3 The Minister for Disability Services (Minister) forwarded the information required under Ministerial Office Memorandum MM 2007/01<sup>5</sup> to the Committee, which it received on 14 September 2020, the third working day after referral.
- 3.4 The Committee extends its appreciation to the Minister for the timely provision of the supporting documentation and information, which has facilitated the Committee's efficient discharge of its responsibilities.

## 4 Background

### National Disability Insurance Scheme

- 4.1 The NDIS provides support to people with disability, their families and carers. It is jointly governed and funded by the Australian, State and Territory governments.
- 4.2 The NDIS was introduced on 1 July 2013, beginning with a trial phase known as the NDIS Launch. The legislative framework for the NDIS Launch was established with the *National Disability Insurance Scheme Act 2013* (Cth), which received the Royal Assent on 28 March 2013.
- 4.3 The NDIS commenced in stages from 1 July 2013. The scheme commenced in all jurisdictions except Western Australia from July 2016. The NDIS is implemented by an independent Commonwealth Government agency known as the National Disability Insurance Agency (NDIA).
- 4.4 In Western Australia, a nationally consistent but State operated NDIS was introduced in July 2017. In December 2017, it was announced that the national NDIS would be implemented in Western Australia, with the NDIA assuming responsibility for the NDIS in Western Australia from 1 July 2018.<sup>6</sup>

### National Disability Insurance Scheme Quality and Safeguarding Framework

- 4.5 In December 2016, the Council of Australian Governments (COAG) agreed to the NDIS Quality and Safeguarding Framework (Framework).<sup>7</sup> The Framework sets out a national approach to the regulation of supports and services delivered under the NDIS. It:

provides a nationally consistent approach to help empower and support NDIS participants to exercise choice and control, while ensuring appropriate safeguards are in place, and establishes expectations for providers and their staff to deliver high quality supports.<sup>8</sup>

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<sup>5</sup> Ministerial Office Memorandum MM 2007/01 requires the provision of information to the Committee such as a copy of the relevant intergovernmental agreement/memorandum of understanding or a copy of the communique from the Ministerial Council meeting at which it was agreed to introduce the legislation, a statement as to any timetable for the implementation of the legislation, the advantages and disadvantages to the State of Western Australia as a participant in the relevant scheme or agreement, any relevant constitutional issues, an explanation as to whether and by what mechanism the State can opt out of the scheme, the mechanisms by which the bill, once enacted, can be amended and, if the legislation has been developed by reference to a model bill, a copy of that model bill.

<sup>6</sup> M Turnbull, Prime Minister, C Porter, Minister for Social Services, J Prentice, Assistant Minister for Disability Services, *Western Australian to join the nationally-delivered National Disability Insurance Scheme*, media statement, 12 December 2017.

<sup>7</sup> Council of Australian Governments meeting Communique, 9 December 2016, p 2.

<sup>8</sup> Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework*, p 1.

- 4.6 The NDIS Quality and Safeguards Commission (NDIS Commission) is an independent Commonwealth agency established in December 2017 to implement the Commonwealth's responsibilities under the Framework.

## **5 Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme**

- 5.1 To support a shared approach to worker screening, the Commonwealth, States and Territories developed the IGA, which was signed by the Premier on behalf of the Western Australian Government on 4 June 2019.
- 5.2 The IGA sets out the national policy for NDIS worker screening, which will be brought into effect through relevant Commonwealth, State and Territory legislation and policy guidelines.
- 5.3 According to the IGA:

Worker screening has a preventative effect in deterring individuals who pose a high risk of harm from seeking work in the sector, and reducing the potential for providers to employ workers who pose an unacceptable risk of harm to people with disability. Worker screening also has a corrective effect in prohibiting those persons who pose an unacceptable risk or are proven to have harmed vulnerable people from having more than incidental contact with people with disability when working for a registered NDIS provider.<sup>9</sup>

- 5.4 The IGA also states 'the objective of nationally consistent NDIS worker screening is to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services under the NDIS' by:
- a) demonstrating that the rights of people with disability to be safe and protected are a high community priority
  - b) reducing the potential for providers to employ or engage individuals who pose an unacceptable risk of harm to people with disability
  - c) prohibiting individuals who have a history of harm against people with disability from having more than incidental contact with people with disability when working for a registered NDIS provider
  - d) deterring individuals who pose a high risk of harm from seeking work in the NDIS sector.<sup>10</sup>
- 5.5 Under the national policy for NDIS worker screening, people who provide NDIS supports and services through a registered NDIS provider and have more than incidental contact with a participant are required to undergo worker screening. Worker screening is open to other workers but is not mandatory for workers with only incidental contact with a participant.<sup>11</sup>
- 5.6 The implementation of nationally consistent NDIS worker screening will result in NDIS worker screening decisions being portable across jurisdictions and employers within the NDIS.

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<sup>9</sup> *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme*, entered into between the Commonwealth, States and Territories, signed by Hon Mark McGowan MLA, Premier, on 4 June 2019, p 3.

<sup>10</sup> *ibid.*, p 6.

<sup>11</sup> *ibid.*, p 3.

- 5.7 Under the IGA, the Commonwealth has responsibility for the broad policy design and oversight of nationally consistent NDIS worker screening policy. This includes establishing and administering the National Clearance Database to record the outcomes of NDIS worker screening checks and enable employers to verify workers and check their clearance status. The Commonwealth's responsibilities under the Framework will be implemented by the NDIS Commission.
- 5.8 The States and Territories have responsibility for the operation of the policy in their jurisdictions.<sup>12</sup> This includes:
- introducing or amending legislation establishing a scheme for the screening of NDIS workers consistent with the national policy as outlined in the IGA
  - establishing and operating NDIS worker screening units
  - facilitating effective information sharing between NDIS worker screening units and the NDIS Commission
  - checking all nationally cleared workers against State criminal history records for ongoing monitoring.
- 5.9 The Worker Screening Bill implements the IGA to provide for nationally consistent NDIS worker screening. It is discussed in section 6.
- 5.10 The IGA raises no Parliamentary sovereignty concerns.

### **Timetable for implementation of the National Disability Insurance Scheme (Worker Screening) Bill 2020**

- 5.11 In relation to the timeframe for implementing NDIS worker screening checks, the IGA states:
- The NDIS Worker Screening Check will be available in New South Wales and South Australia from July 2018, and be available in remaining states and territories, except Western Australia, from July 2019. In Western Australia, the NDIS Worker Screening Check will begin in 2020, subject to final negotiations.<sup>13</sup>
- 5.12 Correspondence from the Minister's office advises:
- Nationally consistent worker screening for the NDIS had previously been intended to commence in all jurisdictions by 1 July 2020...
- Western Australia's Minister for Disability Services on 21 May 2020 announced that this transition had been deferred in Western Australia until 1 December 2020, due to the impact of the COVID-19 pandemic.<sup>14</sup>
- 5.13 The Minister also advised:
- The Commonwealth has formally delayed commencement of NDIS worker screening to 1 February 2021 for all jurisdictions, to allow for a coordinated national launch and to simplify the messaging to and regulatory obligations on NDIS providers nationally.<sup>15</sup>

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<sup>12</sup> *ibid.*, p 8.

<sup>13</sup> *ibid.*, p 23.

<sup>14</sup> Hon Stephen Dawson MLC, Minister for Disability Services, letter, 14 September 2020, Attachment 1, p 2.

<sup>15</sup> *ibid.*

## 6 National Disability Insurance Scheme (Worker Screening) Bill 2020

- 6.1 The Worker Screening Bill implements the IGA to provide for nationally consistent NDIS worker screening. According to the Minister's second reading speech:

The objective of nationally consistent NDIS worker screening and [the Worker Screening Bill] is to protect and prevent people with disability from experiencing harm from poor quality or unsafe supports or services delivered under the NDIS, by deterring certain individuals from seeking work in the sector, excluding certain people from working for registered NDIS providers in certain roles, and reducing the potential for NDIS providers to employ certain workers, if those workers pose an unacceptable risk of harm to people with disability.<sup>16</sup>

- 6.2 He said:

The aim of this bill is to ensure the safety and wellbeing of people with disability and their right to live free from abuse, violence, neglect and exploitation.<sup>17</sup>

- 6.3 The 'safety and wellbeing of people with disability and, in particular, their right to live free from abuse, violence, neglect and exploitation' is to be the paramount consideration for the Chief Executive Officer of the Department of Communities or the State Administrative Tribunal in performing a function under the Act.<sup>18</sup>

### Structure of the National Disability Insurance Scheme (Worker Screening) Bill 2020

- 6.4 The Worker Screening Bill contains 90 clauses in 7 Parts.

#### Structure of uniform legislation

- 6.5 The Worker Screening Bill is 'model' legislation. This involves enacting Western Australian legislation that reflects relevant national policy and, as far as possible, the laws of other jurisdictions, but with variations accommodating local requirements. Former President of the Legislative Council, Hon Barry House MLC, described this structure as, theoretically, the least disadvantageous to State legislative sovereignty because:

it is the only structure where the legislation and any amendments are always within the control of each jurisdiction's own Parliament, as they each implement their own version of an agreed model law.<sup>19</sup>

- 6.6 This particular structure of uniform legislation does not compromise Western Australia's sovereignty. The Western Australian Parliament can amend the Worker Screening Bill, once enacted, to suit the State's requirements.

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<sup>16</sup> Hon Stephen Dawson MLC, Minister for Disability Services, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 9 September 2020, p 5564.

<sup>17</sup> *ibid.*, p 5566.

<sup>18</sup> National Disability Insurance Scheme (Worker Screening) Bill 2020 cl 4.

<sup>19</sup> *When a Nod and a Wink Amounts to an Intergovernmental Agreement. Issues faced by the Legislative Council of Western Australia in the identification and scrutiny of uniform legislation.* A paper presented by former President of the Legislative Council, Hon Barry House MLC, Parliament of Western Australia, Darwin, July 2010.

## 7 Clauses in the National Disability Insurance Scheme (Worker Screening) Bill 2020 that may impinge upon Parliamentary sovereignty and law-making powers

### Clause 2 – Commencement

- 7.1 Clause 2(a) of the Worker Screening Bill provides that Part 1 is to come into operation on the day on which the Act receives the Royal Assent. Clause 2(b) provides that the rest of the Act is to come into operation on a day fixed by proclamation, and different days may be fixed for different provisions. Proclamation is an Executive action.
- 7.2 This impinges the Parliament's sovereignty as the commencement dates will be controlled by the Executive. There is nothing in the Worker Screening Bill that requires proclamation within a specified time. It is conceivable that a proclamation may never be made and the will of the Parliament, in passing the Worker Screening Bill, would be frustrated.
- 7.3 The Explanatory Memorandum provides the following justification for this provision:
- This is necessary as regulations will be required to be made for provisions in the Bill and some provisions are subject to changes in other legislation (e.g. clause 23 is subject to amendments to be made to the *Working with Children (Criminal Record Checking) Act 2004* to extend the duration of a [Working With Children] Card).<sup>20</sup>

#### Minister's advice

- 7.4 The Committee asked the Minister:
- When he expected the Act in its entirety will have come into operation?
  - Whether there is any realistic prospect that any provision of the proposed Act will not come into operation within 10 years of the Act receiving Royal Assent? If not, is there any reason why the commencement clause for the Worker Screening Bill ought not to provide that any provision unproclaimed at the expiration of 10 years of the Act receiving Royal Assent will be automatically repealed?<sup>21</sup>
- 7.5 The Minister's advice by letter dated 22 September 2020, which is attached as Appendix 1, is that:
- The entirety of the Act is expected to come into operation on 1 February 2021, with the exception of clause 23.<sup>22</sup>
- 7.6 In relation to clause 23, the Minister said:
- Clause 23 is included in the Bill, to allow for potential future alignment of the duration of an individual's National Disability Insurance Scheme worker check clearance certificate (NDIS clearance) and working with children assessment notice (Working with Children (WWC) check) issued under the *Working with Children (Criminal Record Checking) Act 2004* (WWC Act).
- ...

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<sup>20</sup> National Disability Insurance Scheme (Worker Screening) Bill 2020, *Explanatory Memorandum*, Legislative Council, p 2.

<sup>21</sup> This is consistent with the Committee's recommendations in its Report 124, *Inquiry into the Form and Content of the Statute Book*, 19 November 2019.

<sup>22</sup> Hon Stephen Dawson MLC, Minister for Disability Services, letter, 22 September 2020, Attachment 1 p 1.

Clause 23 is not intended to commence until such time as relevant amendments to the WWC Act may be passed and enacted.

Commencement of clause 23 without an amendment to the WWC Act could lead to ongoing requests for NDIS clearances to be in force for less than five years. While clause 23 provides such decisions are at the discretion of the Chief Executive Officer (CEO) of the Department of Communities (Communities), such decisions would never align the time periods of an individual's NDIS clearance and WWC check unless the duration of the NDIS clearance was continually reduced. The exercise of this discretion would therefore undermine the intent of the Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme (IGA), which at clause 76 provides NDIS clearances will be valid for up to five years, subject to ongoing monitoring.<sup>23</sup>

- 7.7 The Minister anticipates that the amendments to the *Working with Children (Criminal Record Checking) Act 2004*, if enacted, will commence 'well within 10 years'.<sup>24</sup> He indicated that there was 'no reason why the commencement clause for the Bill ought not provide, that any provision unproclaimed at the expiration of 10 years of the Act receiving Royal Assent will be automatically repealed.'<sup>25</sup>

#### *Committee comment*

- 7.8 The lack of express commencement date for the operational clauses in the Worker Screening Bill is an erosion of the Parliament's sovereignty and law-making powers.
- 7.9 The Committee accepts the Minister's explanation as justifying an extended period for commencement for clause 23.
- 7.10 The Committee appreciates the Minister's preparedness to include in the Worker Screening Bill a clause automatically repealing the Act after 10 years if it is not operational.

#### **FINDING 1**

Clause 2(b) of the National Disability Insurance Scheme (Worker Screening) Bill 2020, in providing that the Executive determines its commencement date, erodes the Western Australian Parliament's sovereignty and law-making powers.

#### **RECOMMENDATION 1**

Clause 2 of the National Disability Insurance Scheme (Worker Screening) Bill 2020 be amended to require the proposed *National Disability Insurance Scheme (Worker Screening) Act 2020* to be automatically repealed, if not operational, at the expiration of 10 years of receiving Royal Assent.

### **Clause 6 – Class 1 offence and Class 2 offence**

- 7.11 Clause 6 establishes two classes of offences: a 'Class 1 offence' and a 'Class 2 offence'.
- 7.12 Whether a person has been charged with, or convicted of, a Class 1 offence or Class 2 offence has significant consequences. In particular, the existence of a Class 1 offence or a Class 2 offence is fundamental to:

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<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*, p 2.

<sup>25</sup> *ibid.*

- whether a person is a 'disqualified person'<sup>26</sup> or a 'presumptively disqualified person'<sup>27</sup> under clauses 8(1) and 8(2) respectively (the consequences of these terms are significant and are discussed at paragraphs 7.13 and 7.14)
- whether a person is entitled to apply for an 'NDIS worker check clearance',<sup>28</sup> or to apply for an 'NDIS worker check exclusion certificate'<sup>29</sup> to be cancelled
- the decision whether or not to grant an NDIS worker check clearance to an applicant<sup>30</sup>
- whether a 'risk assessment'<sup>31</sup> must be conducted.

7.13 If a person is a 'disqualified person', the Chief Executive Officer of the Department of Communities (CEO) must:

- impose an interim bar on the applicant for an NDIS worker check clearance if, at any time before the application for the clearance is determined, the CEO has information which indicates the applicant is a disqualified person<sup>32</sup>
- suspend an NDIS worker check clearance certificate if the CEO has received information which indicates that the certificate holder has become a disqualified person since the certificate was issued<sup>33</sup>
- invite a submission from the applicant or certificate holder<sup>34</sup>
- if not satisfied by the submission, either refuse to grant an NDIS worker check clearance to the applicant<sup>35</sup> or cancel the NDIS worker check clearance certificate<sup>36</sup> and issue an NDIS worker check exclusion certificate.<sup>37</sup>

<sup>26</sup> A person is a 'disqualified person' if 'the person has a conviction for a Class 1 offence committed by the person when an adult.' National Disability Insurance Scheme (Worker Screening) Bill 2020 cl 8(1).

<sup>27</sup> A person is a 'presumptively disqualified person' in the circumstances set out in clause 8(2) of the National Disability Insurance Scheme (Worker Screening) Bill 2020. These include if there is a pending charge against the person for an offence that is a Class 1 offence or a Class 2 offence alleged to have been committed by the person when an adult, or the person has a conviction for a Class 2 offence committed by the person when an adult.

<sup>28</sup> 'NDIS worker check clearance' or 'clearance' is defined in clause 5 of the National Disability Insurance Scheme (Worker Screening) Bill 2020 as 'a clearance granted under section 15(1) or 28(7) or under a corresponding provision under a corresponding law'. The definition captures any decision to grant a clearance under the Worker Screening Bill or a corresponding law.

<sup>29</sup> 'NDIS worker check exclusion certificate' is defined in clause 5 of the National Disability Insurance Scheme (Worker Screening) Bill 2020 as 'a certificate issued under section 15(4) or 25(11) or (14) or under a corresponding provision under a corresponding law'. It is the certificate that is issued where an application for a clearance is refused, or where an existing clearance is cancelled because the person holding the clearance becomes a disqualified person or it is determined by the Chief Executive Officer of the Department of Communities on a risk assessment that there is an unacceptable risk that a person may cause harm to people with disability in the course of carrying out NDIS work.

<sup>30</sup> The decision is to be made by the Chief Executive Officer of the Department of Communities.

<sup>31</sup> A 'risk assessment' is defined in clause 17(1) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 as 'an assessment and determination by the CEO as to whether there is an unacceptable risk that a person may cause harm to people with disability in the course of carrying out NDIS work'.

<sup>32</sup> National Disability Insurance Scheme (Worker Screening) Bill 2020 cl 13(2)(a).

<sup>33</sup> *ibid.*, cl 24(2).

<sup>34</sup> *ibid.*, cl 14(1) and cl 25(5) respectively. The only submission that the applicant or certificate holder may make is that their criminal record does not include a conviction for a Class 1 offence committed by the person as an adult: cl 14(3) and 25(7).

<sup>35</sup> National Disability Insurance Scheme (Worker Screening) Bill 2020 cl 15(1)(b).

<sup>36</sup> *ibid.*, cl 25.

<sup>37</sup> *ibid.*, cl 15(4)(d) and 25(11)(b)(iii).



- 7.14 If a person is a 'presumptively disqualified person', the CEO must:
- impose an 'interim bar' on the applicant for an NDIS worker check clearance if, at any time before the application for the clearance is determined, the CEO has information which indicates the applicant is a presumptively disqualified person<sup>38</sup>
  - suspend an NDIS worker check clearance certificate if the CEO has received information which indicates that the certificate holder has become a presumptively disqualified person since the certificate was issued<sup>39</sup>
  - conduct a risk assessment that must result in a decision to issue an NDIS worker check exclusion certificate unless the CEO is satisfied that there are exceptional circumstances to grant the NDIS worker check clearance.<sup>40</sup>
- 7.15 A person subject to an NDIS worker check exclusion certificate must not start or continue to be employed or otherwise engaged by a registered NDIS provider in NDIS work which involves (wholly or in part) a 'risk assessed role'.<sup>41</sup> Subject to the Act, an NDIS worker check exclusion certificate remains in force indefinitely.<sup>42</sup>
- 7.16 As previously noted, whether a person has been charged with, or convicted of, a Class 1 offence or a Class 2 offence has significant consequences. It can have an impact on a person's livelihood.

### **Clauses 6(1)(a) and 6(2)(a)**

- 7.17 Clause 6(1)(a) provides that a Class 1 offence is:
- an offence against a provision listed in Schedule 1 (if the offence complies with any condition specified in that Schedule or prescribed by the regulations) (emphasis added)
- 7.18 Clause 6(2)(a) is in the same terms for a Class 2 offence listed in Schedule 2.
- 7.19 Schedules 1 and 2 contain lists of offences in Western Australia which constitute a Class 1 offence or Class 2 offence. There are five Acts in Schedule 1<sup>43</sup> and seven Acts in Schedule 2.<sup>44</sup> Clauses 6(1)(a) and 6(2)(a) allow the Schedules to be modified by regulations.

### *Henry VIII clause*

- 7.20 Clauses 6(1)(a) and 6(2)(a) are 'Henry VIII clauses'. A 'Henry VIII clause' is a section of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.<sup>45</sup> A Henry VIII clause gives a subordinate instrument (in this case, regulations) the same effect on an Act as an amendment to that Act.
- 7.21 Clauses 6(1)(a) and 6(2)(a) are Henry VIII clauses as they permit regulations to prescribe 'any condition' that must be complied with for an offence to be a Class 1 offence or a Class 2

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<sup>38</sup> *ibid.*, cl 13(2)(a).

<sup>39</sup> *ibid.*, cl 24(2).

<sup>40</sup> *ibid.*, cl 19.

<sup>41</sup> *ibid.*, cl 68(2).

<sup>42</sup> *ibid.*, cl 27.

<sup>43</sup> *The Criminal Code, Children and Community Services Act 2004, Classification (Publications, Films and Computer Games) Enforcement Act 1996, Prostitution Act 2000 and Road Traffic Act 1974.*

<sup>44</sup> *The Criminal Code, Animal Welfare Act 2002, Children and Community Services Act 2004, Classification (Publications, Films and Computer Games) Enforcement Act 1996, Disability Services Act 1993, Misuse of Drugs Act 1981 and Road Traffic Act 1974.*

<sup>45</sup> Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The use of "Henry VII" Clauses in Queensland Legislation*, January 1997, p 24.

offence. They empower the Executive, by regulation, to qualify the operation of the Act under which they are made.

- 7.22 The words ‘any condition’ are extremely broad. As noted at paragraphs 7.12 and 7.15, whether a person has been charged with, or convicted of, a Class 1 offence or a Class 2 offence has significant consequences.
- 7.23 The Committee’s position on Henry VIII clauses has been well documented in previous Committee reports.<sup>46</sup> Such clauses are objectionable as they offend the principle of the separation of powers, give insufficient regard to the institution of Parliament as the supreme legislature and delegate to the Executive the Parliament’s sovereign function to legislate.

*Henry VIII clauses should be justified in explanatory materials*

- 7.24 The Committee’s approach is that Parliament ought not enact Henry VIII clauses without sound reason. The purpose of a proposed Henry VIII clause should be clearly explained and justified in the government’s explanatory materials in support of its bill. This enables the Legislative Council to weigh the desirability of such a clause in the particular circumstances against its impact on the institution of Parliament.<sup>47</sup>
- 7.25 The Executive is accountable to the Parliament as the law-making body in the Westminster system of government. Essential to achieving this accountability is its responsibility to fully disclose to Parliament any information relevant to the policy and intended operation of a bill. The Committee has said:

A quality explanatory memorandum, which should contain an explanation for any provision within a bill that appears to infringe the terms of reference of the relevant parliamentary committee scrutinising the proposed legislation, will assist the Executive in fulfilling this duty.<sup>48</sup>

- 7.26 The Committee made the following recommendation in its Report 55:

The Committee recommends that when introducing a bill to the Legislative Council that proposes a Henry VIII clause, the responsible Minister provide in the Explanatory Memorandum the rationale for that provision.<sup>49</sup>

*No justification in explanatory materials for Worker Screening Bill*

- 7.27 The Explanatory Memorandum for the Worker Screening Bill does not identify clauses 6(1)(a) and 6(2)(a) as Henry VIII clauses.
- 7.28 The second reading speech for the Worker Screening Bill similarly failed to identify clauses 6(1)(a) and 6(2)(a) as Henry VIII clauses.

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<sup>46</sup> See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 70, *Business Names (Commonwealth Powers) Bill 2011*, March 2012, p 7, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 91, *Rail Safety National Law (WA) Bill 2014*, March 2015, pp 19–20 and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 121, *Child Support (Commonwealth Powers) Bill 2018*. A detailed review of Henry VIII clauses is also contained in Western Australia, Legislative Council, Standing Committee on Legislation, Report 19, *Revenue Laws Amendment Bill 2012*, September 2012.

<sup>47</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 55, *Trade Measurement Legislation (Amendment and Expiry) Bill 2010*, 11 November 2010, p 12.

<sup>48</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 89, *Gene Technology (Western Australia) Bill 2014*, 10 March 2015, p 18.

<sup>49</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 55, *Trade Measurement Legislation (Amendment and Expiry) Bill 2010*, 11 November 2010, p 12 (Recommendation 2).

### *Minister's advice*

7.29 The Committee asked the Minister:

- Why clauses 6(1)(a) and 6(2)(a) were not identified as Henry VIII clauses in the Explanatory Memorandum for the Worker Screening Bill?
- What conditions, if any, are intended to be prescribed?
- How does he contemplate the prescription of conditions by regulation for the purposes of clauses 6(1)(a) and 6(2)(a) will operate?
- Why are clauses in this form necessary, whether any alternatives have been considered and why they have been rejected?

7.30 The Minister's advice by letter dated 22 September 2020, which is attached as Appendix 1, is that:

[The Department of] Communities did not identify through Parliamentary guidance documents, any requirement that Henry VIII clauses be identified in the Explanatory Memorandum for a Bill. The Committee's expressed preference for this to occur is acknowledged and an amended Explanatory Memorandum can be provided for the Bill, if preferred.<sup>50</sup>

7.31 The Minister advised that 'no conditions have currently been identified as needing to be prescribed, to apply to the offences listed in the Bill's Schedules 1 or 2'.<sup>51</sup>

7.32 He also said:

- the 'various conditions currently applied for the offences listed in Schedules 1 and 2 to the Bill have been agreed to nationally'
- 'Western Australia will be part of national discussions on any future changes in policy on offence categorisation'
- 'A degree of flexibility is required as the national policy develops'.<sup>52</sup>

### *Committee comment*

7.33 The Explanatory Memorandum for the Worker Screening Bill did not acknowledge and draw Parliament's attention to clauses 6(1)(a) and 6(2)(a) being Henry VIII clauses and offer an explanation for their need.

7.34 While clauses 6(1)(a) and 6(2)(a) are mentioned in the Explanatory Memorandum, the text offers no explanation of the need or desirability of such a provision.

7.35 A significant service performed by an explanatory memorandum is to explain how the components of a bill interrelate and are intended to operate.

7.36 The Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.

7.37 The Committee accepts and appreciates the Minister's offer to provide an amended Explanatory Memorandum for the Worker Screening Bill that identifies all Henry VIII clauses and the rationale for them.

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<sup>50</sup> Hon Stephen Dawson MLC, Minister for Disability Services, letter, 22 September 2020, Attachment 1 p 2.

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*, p 3.

- 7.38 So far as the Committee is able to tell, clauses 6(1)(a) and 6(2)(a) appear to be open-ended, with no parameters on what conditions may be prescribed.
- 7.39 The Committee accepts that nationally consistent worker screening depends on each jurisdiction being able to respond swiftly and appropriately to introduce new or amended conditions attached to offences listed in Schedules 1 and 2 of the Worker Screening Bill by regulation.
- 7.40 The Committee notes that any regulations made under clauses 6(1)(a) and 6(2)(a) will be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by the Parliament.

## **FINDING 2**

Clauses 6(1)(a) and 6(2)(a) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 are Henry VIII clauses as they enable regulations, rather than an Act of Parliament, to modify the operation of the *National Disability Insurance Scheme (Worker Screening) Act 2020*.

## **FINDING 3**

Clauses 6(1)(a) and 6(2)(a) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 erode the Western Australian Parliament's sovereignty and law-making powers.

## **FINDING 4**

The current Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.

## **FINDING 5**

Clauses 6(1)(a) and 6(2)(a) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 are acceptable by reason of the need for Western Australia to be able to introduce new or amended conditions attached to offences listed in Schedules 1 and 2 by regulation, in order to maintain nationally consistent worker screening.

## **RECOMMENDATION 2**

The second reading speech or Explanatory Memorandum for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.

## **RECOMMENDATION 3**

The Minister for Disability Services table an amended Explanatory Memorandum for the National Disability Insurance Scheme (Worker Screening) Bill 2020 in the Legislative Council that identifies all Henry VIII clauses and the rationale for them.

### **Clauses 6(1)(c) and 6(2)(c)**

- 7.41 Clause 6(1)(c) provides that a Class 1 offence is:
- an offence under a law of this State or another jurisdiction that is prescribed by the regulations to be a Class 1 offence (emphasis added)
- 7.42 Clause 6(2)(c) is in the same terms for a Class 2 offence.

### *Henry VIII clause*

- 7.43 Clauses 6(1)(c) and 6(2)(c) are Henry VIII clauses as they enable the addition of Class 1 and Class 2 offences through regulations.
- 7.44 Henry VIII clauses, and the Committee's position on them, is discussed at paragraphs 7.20 to 7.26.
- 7.45 The power for regulations to prescribe an offence 'under any law of this State or another jurisdiction' is open-ended.

### *Justification in explanatory materials for Worker Screening Bill*

- 7.46 The second reading speech for the Worker Screening Bill does not identify clauses 6(1)(c) and 6(2)(c) as Henry VIII clauses.
- 7.47 The Explanatory Memorandum for the Worker Screening Bill similarly failed to identify clauses 6(1)(c) and 6(2)(c) as Henry VIII clauses. It did, however, say:

This power provides flexibility to amend how offences are classified in order to accommodate the creation of new offences of relevance in Western Australia or other jurisdictions in the future.<sup>53</sup>

### *Minister's advice*

- 7.48 The Committee asked the Minister:
- Why clauses 6(1)(c) and 6(2)(c) were not identified as Henry VIII clauses in the Explanatory Memorandum for the Worker Screening Bill?
  - Why were clauses 6(1)(c) and 6(2)(c) included in the Worker Screening Bill?
  - What offences, if any, are intended to be prescribed?
  - How does he contemplate the prescription of offences by regulation for the purposes of clauses 6(1)(c) and 6(2)(c) will operate?
  - Will regulations made under clauses 6(1)(c) and 6(2)(c) be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by the Parliament?
- 7.49 The Minister's advice by letter dated 22 September 2020, which is attached as Appendix 1, is that offences under a law of another jurisdiction are intended to be prescribed by regulation because:
- it was 'considered inappropriate to list in an Act of Western Australia, offences against Acts of other jurisdictions including the Commonwealth'
  - 'the necessity to reflect all such new criminal offences by amendments to the Act resulting from the Bill may produce significant delays, resulting in workers with criminal records which include offences of concern remaining in NDIS work, without the appropriate level of scrutiny agreed necessary under the national policy'
  - 'Western Australia may more rapidly and appropriately respond to such legislative changes in other jurisdictions by the making of regulations, to assist in achieving and maintaining national consistency'.<sup>54</sup>

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<sup>53</sup> National Disability Insurance Scheme (Worker Screening) Bill 2020, *Explanatory Memorandum*, Legislative Council, p 4.

<sup>54</sup> Hon Stephen Dawson MLC, Minister for Disability Services, letter, 22 September 2020, Attachment 1 pp 4-5.

- 7.50 The Minister also advised, in relation to changes made to Western Australia laws which affect Western Australian offence provisions, 'the usual process would be for consequential amendments to be made to the Schedules of this Act. Reliance will largely be placed on this process'.<sup>55</sup>
- 7.51 He also noted that clauses 6(1)(c) and 6(2)(c):
- provide the capacity to ensure that if such consequential amendments are inadvertently overlooked, appropriate and necessary regulations referencing the relevant new Western Australian offences as Class 1 or 2 offences may be proposed, to best protect people with disability by quickly reflecting such offences in the CEO's decision-making framework.<sup>56</sup>

#### *Committee comment*

- 7.52 The Explanatory Memorandum for the Worker Screening Bill did not acknowledge and draw Parliament's attention to clauses 6(1)(c) and 6(2)(c) being Henry VIII clauses and offer an explanation for their need.
- 7.53 The Committee, again, accepts and appreciates the Minister's offer to table an amended Explanatory Memorandum for the Worker Screening Bill that identifies all Henry VIII clauses and the rationale for them (see paragraph 7.30 and Recommendation 3).
- 7.54 Clauses 6(1)(c) and 6(2)(c) offend the general principle that subsidiary legislation should contain only matters appropriate for subsidiary legislation.<sup>57</sup> Examples of provisions that should be implemented only through Acts of Parliament rather than subordinate legislation include:
- provisions imposing obligations on individuals to undertake certain activities or desist from activities
  - rules which have a significant impact on human rights and personal liberties.<sup>58</sup>
- 7.55 The need to provide flexibility must be balanced against the impact on Parliamentary sovereignty.
- 7.56 It has been said that the criteria to assist in applying this principle includes subsidiary legislation which 'takes away, reduces, circumscribes or qualifies fundamental rights and liberties traditionally enjoyed in a free and democratic society'.<sup>59</sup>
- 7.57 The greater the level of interference with individual's rights and liberties, the greater the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament. As noted at paragraph 7.15, the consequences of being issued with an NDIS worker check exclusion certificate are significant and can have an impact on a person's livelihood. Of course, this needs to be balanced against the danger of having persons who pose a risk of harm working with people with disability.
- 7.58 The Committee notes that any regulations made under clauses 6(1)(c) and 6(2)(c) will be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by the Parliament.

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<sup>55</sup> *ibid.*, p 5.

<sup>56</sup> *ibid.*

<sup>57</sup> The Standing Orders of the Legislative Council, Schedule 1, Item 10.6(d).

<sup>58</sup> Australian Government, Department of the Prime Minister and Cabinet, *Legislation Handbook*, Canberra, February 2017, p 2.

<sup>59</sup> Commonwealth, Senate, Senate Standing Committee on Regulations and Ordinances, Report 77, *Legislation Considered July 1984-June 1985*, p 13.

7.59 It would be preferable to have Class 1 and Class 2 offences identified by statute rather than regulations, especially in light of the significant consequences to a person charged with, or convicted of, such an offence. However, the Committee considers that, on balance, prescription by regulation is justified in this case by the need for national consistency in worker screening. The Committee draws this to the attention of the House for consideration during debate on the Worker Screening Bill.

7.60 The Committee reiterates Recommendations 2 and 3.

#### **FINDING 6**

Clauses 6(1)(c) and 6(2)(c) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 are Henry VIII clauses as they enable the addition of Class 1 and Class 2 offences through regulations rather than an Act of Parliament.

#### **FINDING 7**

Clauses 6(1)(c) and 6(2)(c) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 erode the Western Australian Parliament's sovereignty and law-making powers.

#### **FINDING 8**

The current Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.

#### **FINDING 9**

Clauses 6(1)(c) and 6(2)(c) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 are justifiable by reason of the need for national consistency in worker screening.

### **Clause 82 – Transitional regulations**

7.61 Clause 82(3) provides that transitional regulations may provide that specified provisions of the Act:

- (a) do not apply to or in relation to a specified matter; or
- (b) apply with specified modifications to or in relation to a specified matter.

#### *Henry VIII clause*

7.62 Clause 82(3) is a Henry VIII clause as it permits the modification of the operation of primary legislation by regulation.

7.63 Henry VIII clauses, and the Committee's position on them, is discussed at paragraphs 7.20 to 7.26.

7.64 The power for regulations to exclude or modify specified provisions of the Act is limited; it applies only if there is insufficient provision in the Act for dealing with a transitional matter.

#### *No justification in explanatory materials for Worker Screening Bill*

7.65 The Explanatory Memorandum for the Worker Screening Bill does not identify clause 82(3) as a Henry VIII clause. The second reading speech for the Worker Screening Bill similarly failed to identify clause 82(3) as a Henry VIII clause.

### *Minister's advice*

7.66 The Committee asked the Minister:

- Why clause 82(3) was not identified as a Henry VIII clause in the Explanatory Memorandum for the Worker Screening Bill?
- Why is a clause in that form necessary, whether any alternatives have been considered and why they have been rejected?
- Will regulations made under clause 82(3) be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by the Parliament?

7.67 The Minister's advice by letter dated 22 September 2020, which is attached as Appendix 1, is that:

Arrangements for the transition of existing NDIS workers into the NDIS worker screening scheme proposed by the Bill are still under consideration, including in negotiation with the Commonwealth. A clause has been included in this form, to allow arrangements for the transition of workers to be finalised.<sup>60</sup>

...

Transitional arrangements are required to ensure the orderly and appropriate transition of workers to compliance under the Bill, without overwhelming the NDIS worker screening unit with applications on the first day of its commencement, or unnecessarily subjecting all workers to the clause 68 offence provision immediately upon commencement of the Bill.<sup>61</sup>

### *Committee comment*

7.68 The Explanatory Memorandum for the Worker Screening Bill did not acknowledge and draw Parliament's attention to clause 82(3) being a Henry VIII clause and offer an explanation for its need.

7.69 While clause 82(3) is mentioned in the Explanatory Memorandum, the text does no more than is apparent from a reading of the legislation and offers no explanation of the need or desirability of such a provision. It should not be for the Western Australian Parliament to have to try to understand the purpose and effect of a provision it is being asked to make a part of a law of Western Australia.

7.70 The Committee, again, accepts and appreciates the Minister's offer to table an amended Explanatory Memorandum for the Worker Screening Bill that identifies all Henry VIII clauses and the rationale for them (see paragraph 7.30 and Recommendation 3).

7.71 Clause 82(3) is focused in its operation. It limits the purpose for which transitional regulations may be made.<sup>62</sup> This is not an open-ended provision.

7.72 That being so, the Committee considers that clause 82(3) is justified in order to effect a smooth transition to the new regulatory scheme and acceptable by reason of its focused operation.

7.73 The Committee notes that any regulations made under clause 82(3) will be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by the Parliament.

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<sup>60</sup> Hon Stephen Dawson MLC, Minister for Disability Services, letter, 22 September 2020, Attachment 1 p 6.

<sup>61</sup> *ibid.*, pp 6-7.

<sup>62</sup> National Disability Insurance Scheme (Worker Screening) Bill 2020 cl 82(1).



7.74 The Committee reiterates Recommendations 2 and 3.

**FINDING 10**

Clause 82(3) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 is a Henry VIII clause as it enables regulations, rather than an Act of Parliament, to modify the *National Disability Insurance Scheme (Worker Screening) Act 2020*.

**FINDING 11**

Clause 82(3) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 erodes the Western Australian Parliament's sovereignty and law-making powers.

**FINDING 12**

The current Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.

**FINDING 13**

Clause 82(3) of the National Disability Insurance Scheme (Worker Screening) Bill 2020 is justified in order to effect a smooth transition to the new regulatory scheme and acceptable by reason of its focused operation.



Hon Michael Mischin MLC  
**Chairman**

## APPENDIX 1

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### LETTER DATED 22 SEPTEMBER 2020 FROM THE MINISTER FOR DISABILITY SERVICES



**Minister for Environment; Disability Services; Electoral Affairs**  
**Deputy Leader of the Legislative Council**

Our ref: 62-22793  
Your ref: A841305

Hon Michael Mischin MLC  
Chair  
Uniform Legislation and Statutes Review Committee  
Parliament House  
PERTH WA 6000

Dear Mr <sup>Michael</sup>Mischin

Thank you for your letter received in this office on 16 September 2020, requesting advice in relation to four matters pursuant to the Uniform Legislation and Statutes Review Committee's (the Committee's) inquiry into the National Disability Insurance Scheme (Worker Screening) Bill 2020 (the Bill).

I have endeavoured to answer the Committee's queries in full, in the information set out in **Attachment 1**.

Once again, thank you for writing to me about this important matter. I trust the information provided is of assistance.

Yours sincerely

Hon Stephen Dawson MLC  
**MINISTER FOR DISABILITY SERVICES**

22 SEP 2020

Level 12, Dumas House, 2 Havelock Street, West Perth, Western Australia, 6005.  
Telephone +61 8 6552 5800 Email: Minister.Dawson@dpc.wa.gov.au

RESPONSE TO UNIFORM LEGISLATION AND STATUTES REVIEW COMMITTEE  
INFORMATION REQUEST DATED 16 SEPTEMBER 2020

**Clause 2 – Commencement**

**1.1 By when do you expect that the Act in its entirety will have come into operation?**

The entirety of the Act is expected to come into operation on 1 February 2021, with the exception of clause 23.

Clause 23 is included in the Bill, to allow for potential future alignment of the duration of an individual's National Disability Insurance Scheme worker check clearance certificate (NDIS clearance) and working with children assessment notice (Working with Children (WWC) check) issued under the *Working with Children (Criminal Record Checking) Act 2004* (WWC Act).

The Royal Commission into Institutional Responses to Child Sexual Abuse in their *Working with Children Checks Report* of 2015 recommended the amendment of WWC laws so that a WWC check is valid for five years, subject to continuous monitoring of national criminal history records. The Government has accepted this recommendation in principle and the matter is currently under consideration by the Minister for Child Protection.

- The Royal Commission's *Working with Children Checks Report* is publicly [available here](#).

The Bill does not amend the WWC Act to extend the duration of the WWC check. Clause 23 is not intended to commence until such time as relevant amendments to the WWC Act may be passed and enacted.

Commencement of clause 23 without an amendment to the WWC Act could lead to ongoing requests for NDIS clearances to be in force for less than five years. While clause 23 provides such decisions are at the discretion of the Chief Executive Officer (CEO) of the Department of Communities (Communities), such decisions would never align the time periods of an individual's NDIS clearance and WWC check unless the duration of the NDIS clearance was continually reduced. The exercise of this discretion would therefore undermine the intent of the *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme* (IGA), which at clause 76 provides NDIS clearances will be valid for up to five years, subject to ongoing monitoring.

**1.2 Is there a realistic prospect that any provision of the proposed Act will not come into operation within 10 years of the Act receiving Royal Assent? If not, is there any reason why the commencement clause for the Bill ought not to provide that any provision unproclaimed at the expiration of 10 years of the Act receiving Royal Assent will be automatically repealed?**

As indicated above it is proposed that the Bill will come into operation on 1 February 2021, with the exception of clause 23.

It is anticipated that the amendments to the WWC Act referred to at 1.1, if enacted, will commence well within 10 years.

In light of this, there is no reason why the commencement clause for the Bill ought not provide, that any provision unproclaimed at the expiration of 10 years of the Act receiving Royal Assent will be automatically repealed

The NDIS worker screening legislation of New South Wales and South Australia each contain equivalent provisions to clause 23, noting that WWC checks in those jurisdictions are already issued for five years

**Clauses 6(1)(a) and 6(2)(a) – Class 1 offence and Class 2 offence**

**1.3 Why clauses 6(1)(a) and 6(2)(a) were not identified as Henry VIII clauses in the Explanatory Memorandum for the Bill?**

Communities did not identify through Parliamentary guidance documents, any requirement that Henry VIII clauses be identified in the Explanatory Memorandum for a Bill. The Committee's expressed preference for this to occur is acknowledged and an amended Explanatory Memorandum can be provided for the Bill, if preferred

**1.4 What conditions, if any, are intended to be prescribed?**

No conditions have currently been identified as needing to be prescribed, to apply to the offences listed in the Bill's Schedules 1 or 2

Given legislation to implement nationally consistent worker screening for the NDIS is intended for commencement in every State and Territory on 1 February 2021, it is not currently possible to provide further certainty in relation to what further conditions may need to be applied to the offences listed in Schedules 1 and 2 of the Bill in order to ensure ongoing national consistency in offence categorisation, where appropriate.

**1.5 How do you contemplate the prescription of conditions by regulation for the purposes of clauses 6(1)(a) and 6(2)(a) will operate?**

The IGA sets out an intention for nationally consistent worker screening, and provides:

- At its clause 7 that:  
*"In entering into this Agreement, the Commonwealth, and the States and Territories recognise that they have a shared responsibility for the design and implementation of the national policy on NDIS worker screening. The Commonwealth will lead the development and oversight of the broad policy design, and the States and Territories will be responsible for the operational elements of the policy."*
- At its clause 16(b), that the Parties to the IGA share the roles and responsibilities to  
*"b) work collaboratively to implement and refine the policy settings for NDIS worker screening and settle and improve operational matters as needed;*  
*c) work collaboratively to achieve national consistency in application, including consulting with Parties before submitting legislation that may affect national consistency;"*
- At its clause 62 in relation to disqualifying offences and presumed disqualifying offences, that  
*"The Parties agree to work collaboratively to identify the specific criminal offences that fall within the categories specified in clause 61 as a policy document to be maintained by the (National Worker Screening Steering Committee) and hosted by the (NDIS) Commission."*

The various conditions currently applied for the offences listed in Schedules 1 and 2 to the Bill have been agreed to nationally and are set out in a policy document hosted by the NDIS Commission. Western Australia will be part of national discussions on any future changes in policy on offence categorisation. Any proposed changes to offence categorisation nationally, which require additional or amended conditions to the offences listed in Schedules 1 or 2 to the Bill, would be considered by Western Australia and relevant additional or amended conditions would be proposed only as appropriate in the best interests of people with disability.

Given the IGA's intent for nationally consistent worker screening and the requirement for continued development and refinement of the national policy, adjustments to the conditions applied to the offences in Schedules 1 or 2 to the Bill may be necessary and appropriate in the future consideration of offence categorisation. A degree of flexibility is required as the national policy develops.

**1.6 Why are clauses in this form necessary, whether any alternatives have been considered and why have they been rejected?**

The national policy for NDIS worker screening will continue to develop as the legislation across jurisdictions is implemented. The clauses in their current form will provide the necessary flexibility and allow Western Australia to

respond quickly and appropriately to introduce new or amended conditions attached to offences listed in Schedules 1 and 2 to the Bill by regulation. This will assist in achieving and maintaining national consistency in the decision-making framework applied across jurisdictions, over time, to best protect people with disability from harm from those who work with them.

The regulations which may be made under clauses 6(1)(a) and 6(2)(a) will be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by the Parliament.

The only other alternative option identified would be to require such national reclassification of offences, by the addition or amendment of conditions to existing Schedule 1 and 2 offences, to be implemented by the preparation and passage through the Parliament of formal amendment Bills, each time a new or amended condition is proposed to apply nationally to the offences, or offences of a kind to those, currently listed in Schedules 1 or 2.

Because nationally consistent worker screening for the NDIS is yet to commence, it is not currently possible to estimate the likely volume of such additional or amended conditions, which may be required to ensure ongoing national consistency in offence categorisation where appropriate.

The clauses were included in the Bill in their current form to ensure that any such new or amended conditions are implemented in Western Australia, in a sufficiently timely manner to provide for national consistency in the decision-making frameworks applied across Australia for the purposes of NDIS worker screening.

#### **Clauses 6(1)(c) and 6(2)(c) – Class 1 offence and Class 2 offence**

##### **1.7 Why clauses 6(1)(c) and 6(2)(c) were not identified as Henry VIII clauses in the Explanatory Memorandum for the Bill?**

As with item 1.3, Communities did not identify through Parliamentary guidance documents, any requirement that Henry VIII clauses be identified in the Explanatory Memorandum for a Bill. The Committee's expressed preference for this to occur is acknowledged and an amended Explanatory Memorandum can be provided for the Bill, if preferred.

##### **1.8 Why were clauses 6(1)(c) and 6(2)(c) included in the Bill?**

###### **In relation to offences under a law of another jurisdiction**

Criminal offences against Commonwealth legislation, and criminal offences in other States and Territories that are unable to be classified as of a kind to offences in Western Australia, are intended to be prescribed in regulations in accordance with proposed clauses 6(1)(c) and 6(2)(c).

The following informed this proposal.

- Such offences were not listed in the Bill as it was considered inappropriate to list in an Act of Western Australia, offences against Acts of other jurisdictions including the Commonwealth.

- Legislation in other jurisdictions may amend or introduce new criminal offences which should appropriately be captured as Class 1 or Class 2 offences
  - The necessity to reflect all such new criminal offences by amendments to the Act resulting from the Bill may produce significant delays, resulting in workers with criminal records which include offences of concern remaining in NDIS work, without the appropriate level of scrutiny agreed necessary under the national policy
  - Western Australia may more rapidly and appropriately respond to such legislative changes in other jurisdictions by the making of regulations, to assist in achieving and maintaining national consistency in the decision-making framework applied across jurisdictions, over time. Future changes to, for example, Commonwealth legislation may be reflected reasonably quickly by changes to the regulations rather than by having to amend the Schedules to the Bill

To the extent that offences against laws of another jurisdiction are intended to be prescribed, this is equivalent to provisions in the WWC Act (subsections 7(1)(c) and 7(2)(c))

In relation to offences under a law of Western Australia

When changes are made to Western Australia laws which affect Western Australian offence provisions (for example, introducing new offence provisions to the *Criminal Code Act Compilation Act 1913* or the *Animal Welfare Act 2002*), the usual process would be for consequential amendments to be made to the Schedules of this Act. Reliance will largely be placed on this process

Clauses 6(1)(c) and 6(2)(c) provide the capacity to ensure that if such consequential amendments are inadvertently overlooked, appropriate and necessary regulations referencing the relevant new Western Australian offences as Class 1 or 2 offences may be proposed, to best protect people with disability by quickly reflecting such offences in the CEO's decision-making framework

In addition, the capacity to prescribe Western Australian offences by regulation will account for any future circumstances when new Western Australian offences are created by urgent legislation

**1.9 What offences, if any, are intended to be prescribed?**

Commonwealth offences, for example those under Commonwealth *Criminal Code 1995* and *Crimes Act 1914*, are currently intended to be prescribed in the Regulations made under clauses 6(1)(c) and 6(2)(c).

As the national policy on NDIS worker screening develops, current or new criminal offences may be identified as appropriate for prescribing as Class 1 or Class 2 offences. The proposed clauses will provide necessary flexibility to adapt the legislation and appropriately prescribe offences



**1.10 How do you contemplate the prescription of offences by regulation for the purposes of clauses 6(1)(c) and 6(2)(c) will operate?**

As at 1.5 above, the IGA sets out an intention for nationally consistent worker screening, including collaboration in relation to the specific criminal offences that fall within the categories of Class 1 and 2 offences.

Existing Commonwealth offences have been the subject of national discussion and agreement as to categorisation as Class 1, 2 or 3 offences

New offences of the Commonwealth and of other jurisdictions will be notified to all jurisdictions by the NDIS Commission, and subject to national discussion and agreement as to their categorisation

Relevant additional offences would be proposed by regulation in accordance with clauses 6(1)(c) and 6(2)(c) as appropriate in the best interests of people with disability.

**1.11 Will regulations which may be made under clauses 6(1)(c) and 6(2)(c) be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by the Parliament?**

Yes.

**Clause 82 – Transitional Regulations**

**1.12 Why clause 82(3) was not identified as a Henry VIII clause in the Explanatory Memorandum for the Bill?**

As with item 1.3 and 1.7, Communities did not identify through Parliamentary guidance documents, any requirement that Henry VIII clauses be identified in the Explanatory Memorandum for a Bill. The Committee's expressed preference for this to occur is acknowledged and an amended Explanatory Memorandum can be provided for the Bill, if preferred.

**1.13 Why is a clause in this form necessary, whether any alternatives have been considered and why have they been rejected?**

Arrangements for the transition of existing NDIS workers into the NDIS worker screening scheme proposed by the Bill are still under consideration, including in negotiation with the Commonwealth. A clause has been included in this form, to allow arrangements for the transition of workers to be finalised

The Bill does not require workers to apply for an NDIS clearance, but rather, proposes that workers who are engaged in NDIS work by registered providers in risk assessed roles, without having made an application for a clearance or while subject to an interim bar, suspension or exclusion, commit an offence for which the penalty is \$60,000 and 5 years imprisonment



Transitional arrangements are required to ensure the orderly and appropriate transition of workers to compliance under the Bill, without overwhelming the NDIS worker screening unit with applications on the first day of its commencement, or unnecessarily subjecting all workers to the clause 68 offence provision immediately upon commencement of the Bill

The Commonwealth *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018* (the Rules), made under section 73T(1) of the *National Disability Insurance Scheme Act 2013*, contain requirements for registered NDIS providers which must be complied with by those providers, as a condition of their registration. These Rules contain transitional arrangements for all State and Territories except Western Australia, in relation to what constitutes an “acceptable check” which may be held by a worker in place of an NDIS clearance, for a period following the intended commencement of nationally consistent NDIS worker screening on 1 February 2021.

Discussion remain ongoing at a national level in relation to the transitional requirements on registered providers in Western Australia, to apply under the Rules. It will be important for the purposes of consistency and ease of interpretation and compliance with the Bill and the NDIS Act, for both providers and workers, that the transitional arrangements in relation to the Bill, mirror the arrangements determined to apply under the Rules. This is why the transitional arrangements have not been included as clauses in the Bill

A similar provision to clause 82(3) is contained within Western Australia’s *Biodiversity Conservation Act 2016*, *Waste Avoidance and Resource Recovery Act 2007*, and *Residential Tenancies (COVID-19 Response) Act 2020*

**1.14 Will regulations made under clause 82(3) be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by the Parliament?**

Yes

## GLOSSARY

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Term	Definition
<b>Act</b>	<i>National Disability Insurance Scheme (Worker Screening) Act 2020</i>
<b>CEO</b>	Chief Executive Officer of the Department of Communities
<b>COAG</b>	Council of Australian Governments
<b>Committee</b>	Standing Committee on Uniform Legislation and Statutes Review
<b>Framework</b>	National Disability Insurance Scheme Quality and Safeguarding Framework
<b>IGA</b>	<i>Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme</i>
<b>Minister</b>	Minister for Disability Services
<b>NDIA</b>	National Disability Insurance Agency
<b>NDIS</b>	National Disability Insurance Scheme
<b>NDIS Commission</b>	National Disability Insurance Scheme Quality and Safeguards Commission
<b>Worker Screening Bill</b>	National Disability Insurance Scheme (Worker Screening) Bill 2020

## **Standing Committee on Uniform Legislation and Statutes Review**

### **Date first appointed:**

17 August 2005

### **Terms of Reference:**

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

#### **'6. Uniform Legislation and Statutes Review Committee**

- 6.1 *A Uniform Legislation and Statutes Review Committee is established.*
- 6.2 The Committee consists of 4 Members.
- 6.3 The functions of the Committee are –
  - (a) to consider and report on Bills referred under Standing Order 126;
  - (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
  - (c) to review the form and content of the statute book; and
  - (d) to consider and report on any matter referred by the Council.
- 6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.'



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