

**41ST PARLIAMENT**



## **Report 138**

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

*Health and Disability Services (Complaints) Amendment Bill 2021*

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Presented by  
Hon Donna Faragher MLC (Chair)  
August 2022

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

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## EXECUTIVE SUMMARY

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- 1 The purpose of the Health and Disability Services (Complaints) Amendment Bill 2021 (Bill) is to introduce the *National Code of Conduct for health care workers* (National Code) in Western Australia. The Bill also amends the *Health and Disability Services (Complaints) Act 1995* (Act). The Act provides a mechanism to resolve complaints made by health service recipients and providers as an alternative to litigation.
- 2 The National Code, to be made by regulation, will apply to all health care workers in Western Australia who:
  - are not registered under the National Registration and Accreditation Scheme (NRAS)
  - provide services not covered by their NRAS registration, including massage therapists; counsellors; dieticians; herbalists and homeopaths and a number of other unregistered and unregulated health services
  - are students or volunteers.
- 3 The National Code imposes minimum standards of practice on these health care workers. These include providing services in a safe and ethical manner; not making unsubstantiated claims to cure certain illnesses and not financially exploiting clients.
- 4 A breach of the National Code can result in prohibition orders preventing health care workers from practising and being named in a public health warning statement to prevent community harm.
- 5 The Bill impacts upon the Parliamentary sovereignty and law-making powers of the Western Australian Parliament in the following ways:
  - The commencement clause provides that the majority of the Bill comes into operation on a day fixed by proclamation.
  - A number of proposed sections provide for regulations to prescribe offences.
  - The Bill does not contain a review clause enabling Parliament to review the operation and effectiveness of the National Code in Western Australia.
- 6 The Committee has made four recommendations to address some of these sovereignty issues for the Legislative Council's consideration during debate on the Bill.

## Findings and recommendations

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

### **FINDING 1**

Page 4

The lack of an express commencement date in clause 2(b) of the Health and Disability Services (Complaints) Amendment Bill 2021 is an erosion of the Parliament's sovereignty and law-making powers.

**FINDING 2**

Page 7

Clause 28, proposed section 52B(3)(a)(ii) constitutes an inappropriate delegation of legislation making power. It erodes the Western Australian Parliament's sovereignty and law-making powers.

**RECOMMENDATION 1**

Page 7

The Health and Disability Services (Complaints) Amendment Bill 2021 be amended as follows:  
Page 14, after line 10 — To insert:

- (3A) An offence cannot be prescribed for the purposes of subsection (3)(a)(ii) unless the commission of the offence —
- (a) would involve harm to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public;
  - or
  - (b) is capable of giving rise to a serious risk to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public.

**FINDING 3**

Page 8

Clause 28, proposed section 52H(3)(a)(ii) constitutes an inappropriate delegation of legislation making power. It erodes the Western Australian Parliament's sovereignty and law-making powers.

**RECOMMENDATION 2**

Page 8

The Health and Disability Services (Complaints) Amendment Bill 2021 be amended as follows:  
Page 17, after line 22 — To insert:

- (4) An offence cannot be prescribed for the purposes of subsection (3)(a)(ii) unless the commission of the offence —
- (a) would involve harm to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public;
  - or
  - (b) is capable of giving rise to a serious risk to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public.

**FINDING 4**

Page 8

Clause 28, proposed section 52R(2)(a)(ii) constitutes an inappropriate delegation of legislation making power. It erodes the Western Australian Parliament's sovereignty and law-making powers.

**RECOMMENDATION 3**

Page 9

The Health and Disability Services (Complaints) Amendment Bill 2021 be amended as follows:

Page 23, after line 7 — To insert:

- (2A) An offence cannot be prescribed for the purposes of subsection (2)(a)(ii) unless the commission of the offence —
- (a) would involve harm to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public;
  - or
  - (b) is capable of giving rise to a serious risk to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public.

**FINDING 5**

Page 11

There is no requirement for a statutory review of the Health and Disability Services (Complaints) Amendment Bill 2021 if it remains unproclaimed by the time the statutory review of the *Health and Disability Services Act 1995* takes place.

**FINDING 6**

Page 11

The Health and Disability Services (Complaints) Amendment Bill 2021 may benefit from a review into its operation and effectiveness. A review, tabled in Parliament, respects parliamentary sovereignty and law-making powers.

The Health and Disability Services (Complaints) Amendment Bill 2021 be amended as follows:

Page 33, after line 17 — To insert:

**42A. Section 79A inserted**

After section 79 insert:

**79A. Review of amendments made by *Health and Disability Services (Complaints) Amendment Act 2022***

- (1) The Minister must review the operation and effectiveness of the amendments made to this Act by the *Health and Disability Services (Complaints) Amendment Act 2022*, and prepare a report based on the review, as soon as practicable after the 5<sup>th</sup> anniversary of the day on which *Health and Disability Services (Complaints) Amendment Act 2022* section 42A comes into operation.
- (2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the 5<sup>th</sup> anniversary.



# 1 Introduction

- 1.1 On 18 May 2022 the Health and Disability Services (Complaints) Amendment Bill 2021 (Bill) was introduced into the Legislative Council.<sup>1</sup>
- 1.2 The Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Standing Order 126. The Committee is required to report by 9 August 2022, being the first Legislative Council sitting day following the expiry of the 45 day reporting period.
- 1.3 The purpose of the Bill is to introduce the *National Code of Conduct for health care workers* (National Code) in Western Australia.<sup>2</sup> The Bill also amends the *Health and Disability Services (Complaints) Act 1995* (Act). The National Code is attached as Appendix 1.
- 1.4 The Act provides a mechanism to resolve complaints made by health service recipients and providers as an alternative to litigation. The Director of the Health and Disability Services Complaints Office (Director) oversees the Act.
- 1.5 The National Code, to be made by regulation, will apply to all health care workers in Western Australia who:
  - are not registered under the National Registration and Accreditation Scheme (NRAS)
  - provide services not covered by their NRAS registration, such as massage therapists; counsellors; dietitians; herbalists; nutritionists; homeopaths; hypnotherapists and a number of other unregistered and unregulated health services
  - are students or volunteers.<sup>3</sup>
- 1.6 Health care workers will be subject to minimum standards of practice under the National Code. These include providing services in a safe and ethical manner; not making unsubstantiated claims to cure certain illnesses and not financially exploiting clients.
- 1.7 A breach of the National Code can result in prohibition orders preventing health care workers from practising and being named in a public health warning statement to prevent community harm. This is where the Director has a reasonable belief the health care worker:
  - has been convicted of a prescribed offence; or
  - has breached the National Code, and
  - the prohibition order or public health warning statement is necessary to minimise the risk to public health and safety and protect the health and safety of a person or the public.<sup>4</sup>
- 1.8 The Bill fills a regulatory gap because the health care workers listed in paragraph 1.5 are not currently subject to the same regulatory oversight as those registered under the NRAS.

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<sup>1</sup> Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 May 2022, p 2431.

<sup>2</sup> *ibid.* See also Health and Disability Services (Complaints) Amendment Bill 2021, *Explanatory Memorandum*, Legislative Council, p 1.

<sup>3</sup> Health and Disability Services (Complaints) Amendment Bill 2021, *Explanatory Memorandum*, Legislative Council, p 1.

<sup>4</sup> *ibid.*, pp 9, 10-11, 13.

## 2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its webpage.<sup>5</sup> The general public was notified of the referral via social media.
- 2.2 Under its terms of reference, the Committee is confined to investigating whether a Bill may impact upon the sovereignty and law-making powers of the Parliament of Western Australia. The Committee is not able to consider any other matter, including the policy of the Bill.
- 2.3 Given the Committee's terms of reference, the Committee did not seek further submissions.

## 3 Supporting documents

- 3.1 The Committee received copies of the Bill, its second reading speech and Explanatory Memorandum (EM) when the 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 business days after referral...
- 3.3 The Committee received the documentation required under Ministerial Office Memorandum MM 2007/01 on 1 June 2022, the 10<sup>th</sup> business day after referral.<sup>6</sup>
- 3.4 Given the Committee's time constraints, it is important the Committee receives the documentation in accordance with Standing Order 126(5).

## 4 Background

- 4.1 On 14 June 2013, the Council of Australian Governments Health Council (Health Council) agreed in principle to strengthen state and territory health complaints mechanisms via a single national code of conduct, to be made by regulation. This was in response to the Australian Health Ministers' Advisory Council's report on the national consultation *Options for regulation of unregistered health practitioners*.<sup>7</sup> Statutory powers will enforce the code by investigating breaches and issuing prohibition orders.<sup>8</sup>

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<sup>5</sup> [Uniform Legislation Committee homepage](#).

<sup>6</sup> Ministerial Office Memorandum MM 2007/01 requires the provision of information to the Committee, such as:

1. 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
2. a statement as to any timetable for the implementation of the legislation
3. the advantages and disadvantages to the State of Western Australia as a participant in the relevant scheme or agreement
4. any relevant constitutional issues
5. an explanation as to whether and by what mechanism the State can opt out of the scheme
6. the mechanisms by which the bill, once enacted, can be amended
7. if the legislation has been developed by reference to a model bill, a copy of that model bill.

<sup>7</sup> Department of Health, Government of Victoria. See: [Options for regulation of unregistered health practitioners](#) . Viewed 9 June 2022.

<sup>8</sup> Council of Australian Governments Health Council, *A National Code of Conduct for health care workers*, Final Report, 17 April 2015. See [7356 \(aasw.asn.au\)](#). Viewed 18 July 2022.

- 4.2 In a Communique issued on 17 April 2015, the Health Council agreed to the National Code as a nationally consistent legislative model and to give it legislative effect in states and territories.<sup>9</sup>
- 4.3 In Western Australia, the Government released a consultation paper to obtain feedback on the National Code from health care workers and other interested stakeholders.<sup>10</sup> Feedback received informed the development of the Bill.
- 4.4 Currently, the National Code or a previously existing code of conduct has been prescribed by regulations in New South Wales, South Australia, Queensland and Tasmania. In Victoria, a code of conduct covering health care services appears in Schedule 2 of the *Health Complaints Act 2016*.<sup>11</sup>

## Structure of Uniform Legislation

- 4.5 The Bill most closely resembles ‘model’ legislation. This involves enacting Western Australian legislation reflecting national policy and, as far as possible, the laws of other jurisdictions, but with variations accommodating local requirements.
- 4.6 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>12</sup>
- 4.7 This structure of uniform legislation does not, by itself, compromise Parliamentary sovereignty. The Western Australian Parliament can amend the Bill, once enacted, to suit the State’s requirements.

## 5 Clauses that may impact upon Parliamentary sovereignty and law-making powers

### Clause 2(b) – Commencement

- 5.1 Clause 2 of the Bill states:

#### **Commencement**

This Act comes into operation as follows —

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation.

- 5.2 Clause 2(b) provides that the entirety of the Act apart from sections 1 and 2 will come into operation on a day fixed by proclamation. The Committee’s well established position is that

<sup>9</sup> Council of Australian Governments Health Council, Communique 15 April 2015. See: [Australian Health Practitioner Regulation Agency - Ministerial communications \(ahpra.gov.au\)](https://www.ahpra.gov.au/Regulation-Agency-Ministerial-communications/ahpra.gov.au). Viewed 18 July 2022.

<sup>10</sup> Government of Western Australia, Health and Disability Services Complaints Office. See: [HaDSCO National-Code-Consultation-Paper December-2017.pdf](#). Viewed 9 June 2022.

<sup>11</sup> *Public Health Act 2010* (New South Wales) s 100; *Community Services Complaints Act* (South Australia) s 56A; *Health Ombudsman Act 2013* (Queensland) s 288; *Health Complaints Amendment (Code of Conduct) Act 2018* (Tasmania) s 56AAA.

<sup>12</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.

this is an erosion of Parliamentary sovereignty because the Executive controls the commencement date, not Parliament. The Committee has previously stated there should be sound reasons for Parliament to permit commencement by proclamation.<sup>13</sup>

- 5.3 The EM provides no justification for the lack of a specific commencement date.
- 5.4 The Minister has stated that proclamation will take place on the day regulations are tabled<sup>14</sup> and that:

The legislation cannot be implemented until the regulations prescribing the clauses of the National Code, under section 77 of the *Health and Disability Services (Complaints) Act 1995*, are gazetted.<sup>15</sup>

- 5.5 The Minister also referred to the Legislative Assembly Education and Health Standing Committee inquiry into The Esther Foundation and unregulated private health facilities and believes:

there would be benefit if the timetable for implementation of the legislation aligns with the date the Inquiry is to report (1 December 2022).<sup>16</sup>

#### *Committee comment*

- 5.6 The Committee notes the Minister's position in relation to clause 2(b). The lack of an express commencement clause in a bill is an erosion of Parliamentary sovereignty. However, the Committee considers that the Minister has provided some clarification about when the Bill will become operational.
- 5.7 The Committee draws the lack of an express commencement date to the attention of the Legislative Council for consideration during debate on the Bill.

#### **FINDING 1**

The lack of an express commencement date in clause 2(b) of the Health and Disability Services (Complaints) Amendment Bill 2021 is an erosion of the Parliament's sovereignty and law-making powers.

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<sup>13</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, p 12; Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 136, *Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application (Levy) Bill 2021*, 12 October 2021, p 6; Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 137, *Mutual Recognition (Western Australia) Amendment Bill 2021*, 15 February 2022, p 4.

<sup>14</sup> Hon Amber-Jade Sanderson MLA, Minister for Health, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 7 April 2022, p 1818.

<sup>15</sup> Hon Amber-Jade Sanderson MLA, Minister for Health, Information provided pursuant to Standing Order 126(5), 1 June 2022, p 2.

<sup>16</sup> *ibid.*

## Clause 28, proposed section 52B(3)(a)(ii)

5.8 Clause 28 proposes section 52B(3)(a)(ii). It states:

### Director may make interim prohibition order

(3) The Director must not make an interim prohibition order in relation to a health care worker unless –

(a) either –

(i) the Director reasonably believes that the health care worker has failed to comply with a code of conduct applying to the health care worker; or

(ii) the health care worker has been convicted of a prescribed offence;

5.9 Proposed section 52B(3)(b) provides the following additional threshold for issuing an interim prohibition order:

(b) the Director is satisfied that it is necessary to make the interim prohibition order to avoid a serious risk to —

(i) the life, health, safety or welfare of a person; or

(ii) the health, safety or welfare of the public.

5.10 Proposed section 52B(3)(a)(ii) does not specify which offences a health care worker must be convicted of before the Director can make an interim prohibition order. This includes whether they are existing or new, or even the type of offence.

5.11 This raises Fundamental Legislative Principle 12, an important principle when considering whether the Bill gives sufficient regard to the institution of Parliament. It asks:

Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?

5.12 There is a general principle that delegated legislation should contain only matters appropriate for it. An example of an inappropriate matter are provisions creating offences imposing significant criminal penalties. These should only be implemented through Acts of Parliament.<sup>17</sup>

5.13 The Committee has previously cautioned against the prescription of offences by regulation due to its impact on Parliament's sovereignty and law-making powers.<sup>18</sup> In this case, Parliament cannot authorise appropriate offences for the Director making an interim prohibition order before they are prescribed by the Executive. Parliament will also be unaware what penalties will apply before the Bill is passed.

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<sup>17</sup> Australian Government, Department of the Prime Minister and Cabinet, *Legislation Handbook*, Canberra, February 2017, p 2. See also Stephen Argument, *Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation*, Paper for Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26 - 28 July 2011, p 1.

<sup>18</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 69, *Criminal Investigation (Covert Powers) Bill 2011*, 6 March 2012, pp 22-9; Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 96, *Co-operatives Amendment Bill 2015*, 25 February 2016, p 11.

5.14 The Committee notes the EM specifies the type of offences the Executive contemplates will be prescribed:

The prescribed offences at subsection (3)(a)(ii) will include offences under the *Criminal Code Act Compilation Act 1913* and the *Medicines and Poisons Act 2014*, among others. The prescribed offences will be those that indicate that a health care worker is not a fit and proper person to be providing health services to the public. An example would be if a massage therapist or a counsellor is convicted of sexual assault.<sup>19</sup>

#### *Minister's position*

5.15 The Committee asked the Minister:

- Why the offences are left to be prescribed rather than included in the Bill (on the basis there is some certainty about what these offences will be, as stated in the EM)?
- Was it intended that the offences be prescribed in regulations and, if so, can this be stated in the Bill?

5.16 The Minister stated:

The ability to change the offences prescribed is needed for the effective operation of the National Code. The offences are to be prescribed by regulations as this provides flexibility to add or remove offences in response to changes in the National Code scheme, or in response to other regulatory or legislative changes that may have an impact on the operation of the National Code. If the offences are included in the Bill, the *Health and Disability Services (Complaints) Act 1995* (the Act) will need to be amended each time a change to the offences is required.

Other jurisdictions have adopted the same legislative approach with regards to offences; offences are prescribed by regulations under the *Health and Community Services Complaints Act 2004* (South Australia) and are intended to be prescribed by regulations under the *Health Complaints Act 2016* (Victoria).

It is intended the offences will be prescribed in regulations.<sup>20</sup>

#### *Committee comment*

5.17 The Committee acknowledges the need for some flexibility in the prescription of offences given the broad range of occupations the Bill captures and the possibility of evolving regulation. Any offences prescribed should be existing, not new. The latter is more appropriate for primary legislation.<sup>21</sup>

5.18 The Committee also notes the Joint Standing Committee on Delegated Legislation will consider under its term of reference 10.6(d) whether any offences prescribed in regulations made under proposed section 52B(3)(a)(ii) are appropriate for subsidiary legislation.

5.19 However, the Committee considers that the absence of criteria governing which offences may be prescribed constitutes an inappropriate sub-delegation of legislation-making power. The Parliament's lack of control over Executive power to prescribe offences by delegating this to the Executive erodes parliamentary sovereignty.

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<sup>19</sup> Health and Disability Services (Complaints) Amendment Bill 2021, *Explanatory Memorandum*, Legislative Council, p 9.

<sup>20</sup> Hon Amber-Jade Sanderson MLA, Minister for Health, letter, 20 June 2022, p 1.

<sup>21</sup> Australian Government, Department of the Prime Minister and Cabinet, *Legislation Handbook*, Canberra, February 2017, p 2.

- 5.20 Further, the position taken by other jurisdictions has no bearing on the impact of proposed section 52B(3)(a) on Western Australian parliamentary sovereignty. The Committee must look to the provision itself to assess this impact.
- 5.21 The Committee considers the Bill should contain some criteria governing the types of offences that may be prescribed. This should ensure these offences are relevant to determining whether a health care worker is a fit and proper person to be providing health services to the public. Linking the types of offences to the additional criteria in proposed section 52B(3)(b) should achieve this purpose.

## **FINDING 2**

Clause 28, proposed section 52B(3)(a)(ii) constitutes an inappropriate delegation of legislation making power. It erodes the Western Australian Parliament's sovereignty and law-making powers.

## **RECOMMENDATION 1**

The Health and Disability Services (Complaints) Amendment Bill 2021 be amended as follows:

Page 14, after line 10 — To insert:

- (3A) An offence cannot be prescribed for the purposes of subsection (3)(a)(ii) unless the commission of the offence —
- (a) would involve harm to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public;
  - or
  - (b) is capable of giving rise to a serious risk to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public.

## **Clause 28, proposed section 52H(3)(a)(ii)**

- 5.22 Clause 28, proposed section 52H(3)(a)(ii) replicates proposed section 52B(3)(a)(ii) in applying to prohibition orders. It states:

### **52H. Director may make prohibition order**

- (3) The Director must not make a prohibition order in relation to a health care worker unless —
- (a) either —
    - (i) the Director is satisfied that the health care worker has failed to comply with a code of conduct applying to the health care worker; or
    - (ii) the health care worker has been convicted of a prescribed offence;
- 5.23 Proposed section 52H(3)(b) provides the same additional threshold as set out in paragraph 5.9.
- 5.24 The Committee repeats its commentary at paragraphs 5.17 to 5.21.

### FINDING 3

Clause 28, proposed section 52H(3)(a)(ii) constitutes an inappropriate delegation of legislation making power. It erodes the Western Australian Parliament's sovereignty and law-making powers.

### RECOMMENDATION 2

The Health and Disability Services (Complaints) Amendment Bill 2021 be amended as follows:

Page 17, after line 22 — To insert:

- (4) An offence cannot be prescribed for the purposes of subsection (3)(a)(ii) unless the commission of the offence —
  - (a) would involve harm to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public;
  - or
  - (b) is capable of giving rise to a serious risk to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public.

### Clause 28, proposed section 52R(2)(a)(ii)

5.25 Clause 28, proposed section 52R(2)(a)(ii) replicates proposed section 52B(3)(a)(ii) in applying to public health warning statements. It states:

#### 52R. Public health warning statements

(2) The Director may publish a statement setting out the name of a health care worker if —

(a) either —

(i) after completing an investigation under this Act, the Director is satisfied that the health care worker has failed to comply with a code of conduct applying to the health care worker; or

(ii) the health care worker has been convicted of a prescribed offence;

5.26 Proposed section 52R(2)(b) provides the same additional threshold as set out in paragraph 5.9.

5.27 The Committee repeats its commentary paragraphs 5.17 to 5.21.

### FINDING 4

Clause 28, proposed section 52R(2)(a)(ii) constitutes an inappropriate delegation of legislation making power. It erodes the Western Australian Parliament's sovereignty and law-making powers.



### RECOMMENDATION 3

The Health and Disability Services (Complaints) Amendment Bill 2021 be amended as follows:

Page 23, after line 7 — To insert:

- (2A) An offence cannot be prescribed for the purposes of subsection (2)(a)(ii) unless the commission of the offence —
- (a) would involve harm to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public;
  - or
  - (b) is capable of giving rise to a serious risk to —
    - (i) the life, health, safety or welfare of a person; or
    - (ii) the health, safety or welfare of the public.

### Review clause

- 5.28 The Bill does not contain a review clause. The Committee has previously commented on the importance of review clauses in uniform legislation.<sup>22</sup> This raises Fundamental Legislative Principle 16, an important principle when considering whether the Bill gives sufficient regard to the institution of Parliament. It asks:

In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

- 5.29 The Act provides for only one review of its operation and effectiveness. Section 79 states:

#### **79. Review of Act**

- (1) The Minister must carry out a review of, and prepare a report on, the operation and effectiveness of —
- (a) this Act; and
  - (b) the *Disability Services Act 1993* Part 6,
- as soon as practicable after 5 years after the date on which the *Health and Disability Services Legislation Amendment Act 2010* section 29 comes into operation.
- (2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared.

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<sup>22</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 134, *Transport Legislation Amendment (Identity Matching Services) Bill 2021*, 10 August 2021, pp 13-5; Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 95, *Co-operatives Amendment Bill 2016*, 25 February 2016, p 17; Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 91, *Rail Safety National Law (WA) Bill 2014*, 24 March 2015, p 24.

5.30 The Committee notes the Western Australian 2022-23 State Budget has allocated \$318,000 towards a statutory review of the Act in 2022-23 and \$134,000 in 2023-24.<sup>23</sup> This will be the first review of the Act.<sup>24</sup>

*Minister's position*

5.31 Given the uncertain timeframe for the proclamation of the Bill, the Committee asked the Minister:

- Whether the review referred to in the budget papers will encompass the operation and effectiveness of the introduction of the National Code in proposed new section 77A.
- If not, will a further review that assesses the operation and effectiveness be undertaken and within what timeframe?
- If a further review is to be undertaken, can this be reflected in an amendment to section 79 of the Act?

5.32 The Minister stated:

The extent to which the review referred to in the budget papers would encompass the operation and effectiveness of the introduction of the National Code will be determined by the date that the National Code comes into operation in Western Australia. This is dependent on the Bill being proclaimed and the necessary regulations taking effect.

If the National Code is not implemented before the current review is finalised, the provisions relating to the National Code will be reviewed during of [sic] the next statutory review of the Act. This will provide an opportunity to consider all provisions in the Act after they have operated for an appropriate period of time.

Due to the commencement of the current statutory review, and the requirement for the Bill to be proclaimed and regulations to be made before the National Code can be implemented in Western Australia, there is no intention to undertake a further review specific to the provisions in the Bill.<sup>25</sup>

5.33 The Committee sought clarification about whether there is legislative or other authority for 'the next statutory review of the Act' considering section 79 provides for only one review. The Health and Disability Services Complaints Office clarified that:

It is expected that the current review of the *Health and Disability Services (Complaints) Act 1995* will result in an Amendment Bill being introduced to Parliament that replicates (or renews) the existing section 79. This will in turn require the *Health and Disability Services (Complaints) Act 1995* to be reviewed again at a later date. It is therefore assumed that this subsequent review will consider the effectiveness of the provisions in the *Health and Disability Services Complaints Amendment Bill 2021*.<sup>26</sup>

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<sup>23</sup> See [2022-23 Budget Statements. Budget Paper No. 2 - Volume 1 \(ourstatebudget.wa.gov.au\)](https://ourstatebudget.wa.gov.au), p 354.

<sup>24</sup> Rachel Beard, Deputy Director, Health and Disability Services Complaints Office, email, 27 June 2022.

<sup>25</sup> Hon Amber-Jade Sanderson MLA, Minister for Health, letter, 20 June 2022, p 3.

<sup>26</sup> Rachel Beard, Deputy Director, Health and Disability Services Complaints Office, email, 27 June 2022.

*Committee comment*

- 5.34 The statutory review's timeframe in the 2022-23 State Budget and the uncertain timing of the Bill's proclamation means there will be insufficient time for the National Code's operation and effectiveness to be examined.
- 5.35 Further, whether the statutory review recommends an amendment bill will be at the Minister's discretion. An assumption of a subsequent review provides no guarantee it will occur. This diminishes sovereignty.
- 5.36 Regardless of when it is proclaimed, a statutory review clause in the Bill will respect parliamentary sovereignty and provide legislative certainty, enabling the Parliament to assess matters such as:
- how the uniform scheme is being implemented in Western Australia
  - the operation and effectiveness of the National Code in Western Australia
  - whether the legislation is serving the State's interests
  - whether the Bill has resulted in any unintended or undesirable consequences
  - any complaints and concerns about the Act and the scheme's operation.

**FINDING 5**

There is no requirement for a statutory review of the Health and Disability Services (Complaints) Amendment Bill 2021 if it remains unproclaimed by the time the statutory review of the *Health and Disability Services Act 1995* takes place.

**FINDING 6**

The Health and Disability Services (Complaints) Amendment Bill 2021 may benefit from a review into its operation and effectiveness. A review, tabled in Parliament, respects parliamentary sovereignty and law-making powers.

## RECOMMENDATION 4

The Health and Disability Services (Complaints) Amendment Bill 2021 be amended as follows:

Page 33, after line 17 — To insert:

### **42A. Section 79A inserted**

After section 79 insert:

### **79A. Review of amendments made by *Health and Disability Services (Complaints) Amendment Act 2022***

- (1) The Minister must review the operation and effectiveness of the amendments made to this Act by the *Health and Disability Services (Complaints) Amendment Act 2022*, and prepare a report based on the review, as soon as practicable after the 5<sup>th</sup> anniversary of the day on which *Health and Disability Services (Complaints) Amendment Act 2022* section 42A comes into operation.
- (2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the 5<sup>th</sup> anniversary.



Hon Donna Faragher MLC  
**Chair**

# APPENDIX 1

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## NATIONAL CODE OF CONDUCT FOR HEALTH CARE WORKERS

### *Attachment 1*

#### *National Code of Conduct for health care workers*

##### *Definitions*

In this code of conduct:

**health care worker** means a natural person who provides a health service (whether or not the person is registered under the Health Practitioner Regulation National Law).

**health service** has the same meaning as in [insert reference to agreed definition or relevant state or territory Act]

##### *Application of code of conduct*

This code of **conduct** applies to the provision of health services by:

- (a) health care workers who are not required to be registered under the Health Practitioner Regulation National Law (including de-registered health practitioners), and
- (b) health care workers who are registered health practitioners under the Health Practitioner Regulation National Law and who provide health services that are unrelated to their registration.

##### *1. Health care workers to provide services in a safe and ethical manner*

- 1) A health care worker must provide health services in a safe and ethical manner.
- 2) Without limiting subclause 1, health care workers must comply with the following:
  - a. A health care worker must maintain the necessary competence in his or her field of practice
  - b. A health care worker must not provide health care of a type that is outside his or her experience or training, or provide services that he or she is not qualified to provide
  - c. A health care worker must only prescribe or recommend treatments or appliances that serve the needs of clients
  - d. A health care worker must recognise the limitations of the treatment he or she can provide and refer clients to other competent health service providers in appropriate circumstances
  - e. A health care worker must recommend to clients that additional opinions and services be sought, where appropriate
  - f. A health care worker must assist a client to find other appropriate health care services, if required and practicable
  - g. A health care worker must encourage clients to inform their treating medical practitioner (if any) of the treatments or care being provided
  - h. A health care worker must have a sound understanding of any possible adverse interactions between the therapies and treatments being provided or prescribed and any other medications or treatments, whether prescribed or not, that he or she is, or should be, aware that a client is taking or receiving, and advise the client of these interactions.
  - i. A health care worker must provide health services in a manner that is culturally sensitive to the needs of his or her clients.

##### *2. Health care workers to obtain consent*

Prior to commencing a treatment or service, a health care worker must ensure that consent appropriate to that treatment or service has been obtained and complies with the laws of the jurisdiction.

##### *3. Appropriate conduct in relation to treatment advice*

- 1) A health care worker must accept the right of his or her clients to make informed choices in relation to their health care.

- 2) A health care worker must not attempt to dissuade a client from seeking or continuing medical treatment.
- 3) A health care worker must communicate and co-operate with colleagues and other health service providers and agencies in the best interests of their clients.

#### *4. Health care workers to report concerns about the conduct of other health care workers*

A health care worker who, in the course of providing treatment or care, forms the reasonable belief that another health care worker has placed or is placing clients at serious risk of harm must refer the matter to [Insert name of relevant state or territory health complaints entity].

#### *5. Health care workers to take appropriate action in response to adverse events*

- 1) A health care worker must take appropriate and timely measures to minimise harm to clients when an adverse event occurs in the course of providing treatment or care.
- 2) Without limiting subclause (1), a health care worker must:
  - a. ensure that appropriate first aid is available to deal with any adverse event
  - b. obtain appropriate emergency assistance in the event of any serious adverse event
  - c. promptly disclose the adverse event to the client and take appropriate remedial steps to reduce the risk of recurrence
  - d. report the adverse event to the relevant authority, where appropriate.

#### *6. Health care workers to adopt standard precautions for infection control*

- 1) A health care worker must adopt standard precautions for the control of infection in the course of providing treatment or care.
- 2) Without limiting subclause (1), a health care worker who carries out skin penetration or other invasive procedure must comply with the [insert reference to the relevant state or territory law] under which such procedures are regulated.

#### *7. Health care workers diagnosed with infectious medical conditions*

- 1) A health care worker who has been diagnosed with a medical condition that can be passed on to clients must ensure that he or she practises in a manner that does not put clients at risk.
- 2) Without limiting subclause (1), a health care worker who has been diagnosed with a medical condition that can be passed on to clients must take and follow advice from a suitably qualified registered health practitioner on the necessary steps to be taken to modify his or her practice to avoid the possibility of transmitting that condition to clients.

#### *8. Health care workers not to make claims to cure certain serious illnesses*

- 1) A health care worker must not claim or represent that he or she is qualified, able or willing to cure cancer or other terminal illnesses.
- 2) A health care worker who claims to be able to treat or alleviate the symptoms of cancer or other terminal illnesses must be able to substantiate such claims.

#### *9. Health care workers not to misinform their clients*

- 1) A health care worker must not engage in any form of misinformation or misrepresentation in relation to the products or services he or she provides or the qualifications, training or professional affiliations he or she holds.
- 2) Without limiting subclause (1):
  - a. a health care worker must not use his or her possession of a particular qualification to mislead or deceive clients or the public as to his or her competence in a field of practice or ability to provide treatment
  - b. a health care worker must provide truthful information as to his or her qualifications, training or professional affiliations

- c. a health care worker must not make claims either directly to clients or in advertising or promotional materials about the efficacy of treatment or services he or she provides if those claims cannot be substantiated.

*10. Health care workers not to practise under the influence of alcohol or unlawful substances*

- 1) A health care worker must not provide treatment or care to clients while under the influence of alcohol or unlawful substances.
- 2) A health care worker who is taking prescribed medication must obtain advice from the prescribing health practitioner or dispensing pharmacist on the impact of the medication on his or her ability to practise and must refrain from treating or caring for clients in circumstances where his or her capacity is or may be impaired.

*11. Health care workers with certain mental or physical impairment*

- 1) A health care worker must not provide treatment or care to clients while suffering from a physical or mental impairment, disability, condition or disorder (including an addiction to alcohol or a drug, whether or not prescribed) that places or is likely to place clients at risk of harm.
- 2) Without limiting subclause (1), if a health care worker has a mental or physical impairment that could place clients at risk, the health care worker must seek advice from a suitably qualified health practitioner to determine whether, and in what ways, he or she should modify his or her practice, including stopping practice if necessary.

*12. Health care workers not to financially exploit clients*

- 1) A health care worker must not financially exploit their clients.
- 2) Without limiting subclause (1):
  - a. a health care worker must only provide services or treatments to clients that are designed to maintain or improve clients' health or wellbeing
  - b. a health care worker must not accept or offer financial inducements or gifts as a part of client referral arrangements with other health care workers
  - c. a health care worker must not ask clients to give, lend or bequeath money or gifts that will benefit the health care worker directly or indirectly.

*13. Health care workers not to engage in sexual misconduct*

- 1) A health care worker must not engage in behaviour of a sexual or close personal nature with a client.
- 2) A health care worker must not engage in a sexual or other inappropriate close personal, physical or emotional relationship with a client.
- 3) A health care worker should ensure that a reasonable period of time has elapsed since the conclusion of the therapeutic relationship before engaging in a sexual relationship with a client.

*14. Health care workers to comply with relevant privacy laws*

A health care worker must comply with the relevant privacy laws that apply to clients' health information, including the *Privacy Act 1988* (Cth) and the [insert name of relevant state or territory legislation]

*15. Health care workers to keep appropriate records*

- 1) A health care worker must maintain accurate, legible and up-to-date clinical records for each client consultation and ensure that these are held securely and not subject to unauthorised access.
- 2) A health care worker must take necessary steps to facilitate clients' access to information contained in their health records if requested.
- 3) A health care worker must facilitate the transfer of a client's health record in a timely manner when requested to do so by the client or their legal representative.

*16. Health care workers to be covered by appropriate insurance*

A health care worker should ensure that appropriate indemnity insurance arrangements are in place in relation to his or her practice.

*17. Health care workers to display code and other information*

- 1) A health care worker must display or make available a copy of each of the following documents at all premises where the health care worker carries on his or her practice:
  - a. a copy of this Code of Conduct
  - b. a document that gives information about the way in which clients may make a complaint to [insert name of state or territory health complaints entity].
- 2) Copies of these documents must be displayed or made available in a manner that makes them easily visible or accessible to clients.
- 3) This clause does not apply to any of the following premises:
  - a. the premises of any entity within the public health system (as defined in the [insert name of relevant state or territory legislation])
  - b. private health facilities (as defined in [insert name of relevant state or territory legislation])
  - c. premises of the [insert name of ambulance service] as defined in ([insert name of relevant state or territory legislation])
  - d. premises of approved aged care service providers (within the meaning of the *Aged Care Act 1997* (Cth)).



## GLOSSARY

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<b>Term</b>	<b>Definition</b>
<b>Bill</b>	Health and Disability Services (Complaints) Amendment Bill 2021
<b>Committee</b>	Standing Committee on Uniform Legislation and Statutes Review
<b>Director</b>	Director of the Health and Disability Services Complaints Office
<b>EM</b>	Explanatory Memorandum
<b>Health Council</b>	Council of Australian Governments Health Council
<b>National Code</b>	National Code of Conduct for health care workers
<b>NRAS</b>	National Registration and Accreditation Scheme



## 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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