

HEALTH AND DISABILITY SERVICES LEGISLATION AMENDMENT BILL 2009.

EXPLANATORY MEMORANDUM

The purpose of the Health and Disability Services Legislation Amendment Bill 2009 (the Bill) is to implement amendments to the *Health Services (Conciliation and Review) Act 1995* (the Health Services Act) to ensure the continuation of the Office of Health Review as the principal independent complaints mechanism for health and disability in Western Australia.

The Bill provides for a number of changes to the *Health Services (Conciliation and Review) Act 1995* and the *Disability Services Act 1993* that will assist the operations of the Office of Health Review and provide a range of benefits to the Western Australian community. Whilst the overall intention of these changes is to make the Office more accessible, to facilitate the effective and timely resolution of customer complaints and to encourage communication between consumers and service providers, the Bill also promotes the analysis and promotion of issues, including systemic issues that may arise out of a complaint.

The Bill also amends the *Disability Services Act 1993* and other various Acts as a consequence of these amendments.

The Office of Health Review commenced operation on 16 September 1996 and was created to provide users with a formal channel for complaints about health services and since 1999 disability services in both the public and private sectors in an environment of impartiality and conciliation- and as an alternative to litigation.

The Office's function is guided by the provisions set out in section 10 of the Health Services Act and section 30A of the *Disability Services Act 1993*. These functions include:

- to undertake the receipt, conciliation and investigation of complaints about a health or disability service.
- to review and identify the causes of complaints and to suggest ways of removing and minimizing those causes.
- to assist providers in developing and improving complaints procedures and the training of staff in handling complaints.
- with the approval of the Minister, to inquire into broader issues of health care arising out of complaints received.

Pursuant to section 79 of the Health Services Act, a Review of the Office's operations and effectiveness was carried out in November 2002 by the then Minister for Health, Hon Bob Kucera MLA. The Terms of Reference were to:

- (1) Review the operations and the effectiveness of the Office of Health Review having regard to:

- (a) the desirability of the continuation of the functions of the Office;
and
- (b) such other matters as appear to be relevant to the operations and effectiveness of the Office.

(2) Make recommendations on any structural, functional or procedural changes to the Office.

A Reference Group was convened by the Minister, with Ms June Williams as Chair, to receive and consider submissions from stakeholders and the general public and to report to the Minister under the Terms of Reference by mid 2003¹.

The Executive Officer contacted in writing over 140 organisations, including consumer groups, public and private health services, registration boards, unions, professional organisations and health and disability non-government organisations. All were invited to make a submission to the Review. A total of 50 submissions were received as follows:

- Consumers/users and consumer focused organisations (26)
- Providers and provider focused organisations (19)
- Others with a professional interest in the Complaints System (5)

In addition to the Submission Form, the Review Group designed a simple, one-page questionnaire, targeting individual consumers. The questionnaire asked if consumers had ever made a complaint about a health or disability service and whether they had heard of or used the Office of Health Review, and what the outcomes of any contact were. A total of 183 questionnaires were received. They represented:

- 87 as a general response to requests through newsletters to non government health and disability organisations
- 72 as a result of discussions with indigenous groups
- 24 as a result of discussions with young people.

The consultation process included the Reference Group meeting with indigenous people, seniors, young people, people with mental health issues and people from culturally and linguistically diverse backgrounds².

With regard to people with disabilities, a full and detailed consultation process on the role of the Office in relation to complaints about disability services was undertaken as part of the Review of the *Disability Services Act 1993*, which was a separate Review process.

¹ The individuals that made up the Reference Group are listed on page 1 of the Report of the Review of the Office of Health Review dated June 2003.

² The results are documented at Appendix 3 pages 66 and 67 of the Report of the Review of the Office of Health Review dated June 2003.

In addition, representatives of the Medical, Nurses and Dental Registration Boards attended Reference Group meetings to present their respective views and respond to questions from the Review Group.

The Government at that time accepted 44 of the 47 recommendations. The three recommendations that were not accepted were:

- Recommendation 10- suggesting an Independent Complaints Review Committee for complainants who are dissatisfied with the outcome of the Office's findings. The former government was of the view that this would add another bureaucratic level to the complaints process.

The Office's current process is that the outcome of a complaint would first be reviewed internally by a senior member of the Office. If the complainant remained dissatisfied then they may seek a review by the WA Ombudsman³.

- Recommendation 30- that the Director approach Watch on Health with a view to becoming an ex-officio member. Watch on Health no longer exists.
- Recommendation 23- a full time position of Information and Community Liaison Officer be established for a comprehensive information and communications strategy. This position has since been created by the Office.

Outlined below is an examination of the contents of the Bill on a clause by clause basis.

PART 1 – PRELIMINARY MATTERS

This Part contains the title of the Act and the relevant commencement provisions.

Clause 1 Short Title

This clause provides that the act is to be cited as the *Health and Disability Services Legislation Amendment Act 2009*.

Clause 2 Commencement

This clause sets out the commencement provisions.

This clause provides for the Part 1 of the Act to come into operation on the day on which this Act receives Royal Assent and the rest of the Act on a day fixed by proclamation. Different days may be fixed for different provisions.

Part 2- HEALTH SERVICES (CONCILIATION AND REVIEW) ACT 1995 AMENDED

³ Complaints made to the Ombudsman: 2002/2003 (30), 2003/2004 (11), 2004/2005 (10), 2005/2006 (5), 2006/2007 (10), 2007/2008 (Nil)

Clause 3 ***The Act amended in this part***

Health Services (Conciliation and Review) Act 1995 is amended in this part.

Clause 4 ***Long title replaced***

The long title is repealed and replaced so that it now refers to disability complaints as well as health complaints.

Clause 5 ***Section 1 amended***

“*Health Services (Conciliation and Review) Act 1995*” is deleted and replaced with “*Health and Disability Services (Complaints) Act 1995*”.

Clause 6 ***Section 3A inserted***

This clause provides that this Act is to be read with Part 6 of the *Disability Services Act 1993*

Clause 7 ***Section 3 amended***

Section 3(1) is amended by deleting the definition of “Office” and inserting instead – “**Office**” means the Health and Disability Services Complaints Office continued by section 6(1).

The change of name more accurately reflects the Office’s purpose and duties as a complaint handling body for health and disability service complaints.

Clause 8 ***Section 6 amended***

Section 6(1) is repealed and the following subsection is inserted instead -
The body called the “Office of Health Review” established previously under this Act continues under the name “Health and Disability Services Complaints Office”.

Clause 9 ***Section 10 amended***

Section 10(1) is amended by deleting subsection 1(a) and inserting instead – “to deal with complaints in accordance with Part 3”. This enables the inclusion of negotiated settlements as a means of dealing with complaints.

The amendment to 1(b) alters the second function of the Director. The Director is now required when suggesting ways of removing and minimising the causes of complaints, that it is done in collaboration with groups of providers or users.

The insertion of (1)(g)(iii) into paragraph (1)(g) expands the functions of the Director to include providing advice about removing or minimising the causes of complaints and the insertion of section 1(h) expands the function of the Director to include any other function conferred on the Director by this Act or another written law.

Clause 10 ***Section 13 amended***

Consequential amendments required because of the change of name of the Office.

Clause 11 ***Section 20 amended***

This amendment enables the Director to recognise as a user’s representative a person who is not chosen by the user and may allow that person to complain to the Director

on the user's behalf if the user has died and the representative has a sufficient interest in the subject matter of the complaint.

It has been a long standing practice for the Office of Health Review to accept complaints from persons representing a deceased consumer. Between 1 July 2007 and 30 June 2009 the Office received over 90 complaints on behalf of deceased consumers. The majority of those complainants sought answers to questions around treatment, an apology or a policy or systems change.

Clause 12 Section 22 amended

This amendment permits a provider of a Health Service to complain to the Director on the user's behalf about another provider when the user has died.

Clause 13 Section 24 amended

Time limit for making a health complaint has been increased from 12 months to 24 months.

This amendment would bring the time frame for bringing a complaint regarding a health service in line with complaints about a disability service. The amendment does not interfere with the Director's discretion to accept a complaint that is out of time where the complainant can show good reason for the delay in bringing the complaint.

Clause 14 Section 25 amended

The amendment to paragraph (a) of section 25(1) enables a complainant to allege that any provider (not just a public provider) has acted unreasonably by not providing a health service for the user. This becomes particularly important in rural or remote areas of the State where access to services may be limited and complaints raise issues such as the refusal of service.

Amendment to paragraph (b) enables a user to make a complaint that a provider has acted unreasonably in the manner of providing a health service for the user whether or not the service was requested by the user or a third party. This amendment will enable persons who undergo an examination for the purposes of workers compensation or other insurance claims to make a complaint that a provider has acted unreasonably in the manner of providing that health service.

Clause 15 Section 26 amended

This clause removes the ability of the Director to reject a complaint that in the Director's opinion does not warrant any further action. The alternatives for the Office are to reject the complaint on the basis of it being trivial, vexatious, without substance or being outside of the jurisdiction of the Act.

Clause 16 Section 30 amended

This clause provides the Director with discretion to accept a complaint whether or not the complainant, or person acting on behalf of the complainant has taken steps to resolve the matter with the provider. The Director's discretion in these instances may be exercised in situations where directing a complainant to address the complaint with the provider in the first instance may cause stress or undue anxiety for the user, where there has been threatening behaviour on the part of the provider or where further contact may be traumatic or otherwise counterproductive to the persons wellbeing.

Clause 17 Section 34 amended

Section 34(1) is amended by referring specifically to the relevant sections under which a complaint can be rejected or referred.

Subsection (4) is repealed and a new subsection is inserted which provides that if the Director has decided to accept complaint in whole or in part the Director must attempt to negotiate a settlement with the complainant and provider or if in the Director's opinion the complaint is suitable for conciliation, refer it for conciliation or investigate it if in the Director's opinion it is not suitable for a negotiated settlement or conciliation and an investigation is warranted, taking into account the likely costs and benefits of the investigation.

Subsection 34(5) is a consequential amendment to enable the inclusion of a negotiated settlement as a means of dealing with complaints.

Section 34(6) is repealed and subsections (6) and (7) are inserted. Subsection (6) requires that the Director when rejecting a complaint or deciding that a complaint is not suitable for a negotiated settlement or conciliation and does not warrant investigation, to advise the complainant in writing of the decision and the fact that the Director will take no further action on the complaint. Subsection (7) requires the Director not attempt to settle a complaint during this preliminary assessment process.

Clause 18 Section 35 amended

Section 35(1) is amended to enable the Director to give the provider a written notice requiring the provider to give the Director a written response to the complaint in accordance with Section 36A.

The insertion of subsection 35(4) requires that a notice given under this section must include a copy or the details of the complaint.

Clause 19 Section 36A inserted

After section 35, section 36A use inserted. This section gives the provider discretion to provide a written response within 28 days to the complaint after being given notice by the director that the complaint had been accepted.

A provider who has been given notice pursuant to section 35(1)(ba) must give the Director a written response to the complaint within 28 days. The Director can extend the 28-day period for good reason. If the provider does not comply with this section, the Director may nevertheless deal with the complaint under this part.

A provider who does not comply does not commit an offence but the Director must include in the Office's annual report the details of any breach of subsection (2) that, in the Director's opinion, was committed without a reasonable excuse.

The intention of the inclusion of the timeframes is to ensure timeliness of complaint handling.

Clause 20 Division 3A inserted in Part 3 - Negotiated settlement

Section 36B Resolving complaints by negotiation (inserted)

The insertion of section 36B enables the Director after accepting a complaint to deal with the complaint through a negotiated settlement process prior to a complaint being accepted into conciliation or investigation. Timeframes have been stipulated within which this process will occur.

If within 56 days or any longer period allowed under subsection 4 after the date of the Director complying with section 35 (ie providing written notice of a complaint to a provider) a complaint has not been settled by negotiation, the Director must refer it for conciliation if the Director is of the opinion that it is suitable to be dealt with or investigate it if the Director is of the opinion that it is not suitable to be dealt with by conciliation and an investigation is warranted, taking into account the likely costs and benefits of the investigation.

The director may extend the 56 day negotiation period if it is to the benefit of the person who made the complaint to do so.

If the Director decides that the complaint is not suitable for conciliation and does not warrant investigating, the Director must, advise the complainant in writing of the decision and that the Director will take no further action on the complaint.

Section 36C Protection of statements made

Evidence of anything said or admitted during any negotiations is not admissible in proceedings before a court or tribunal. However, evidence arising through the negotiation process may be disclosed to the Parliamentary Commissioner for Administrative Investigations for the purposes of an investigation under that Act.

Clause 21 Section 41 amended

Consequential amendment to enable the inclusion of negotiated settlements.

Clause 22 Section 44 amended

Section 44(1) is repealed. Section 44(2) is amended so that within 14 days of commencing an investigation the Director must in writing notify the provider of the investigation, including if it is of a complaint.

Clause 23 Section 48 amended

Consequential amendment to enable the inclusion of negotiated settlements

Clause 24 Section 52A inserted

If a notice given to a provider (under section 50- subsequent to an investigation) includes any action that the Director considers ought to be taken by the provider to remedy a matter and the provider does not provide the Director with a report on the actioning of those matters (in accordance with section 51), the Director must give the Minister a copy of the notice and a written report about the refusal or failure by the provider to so report.

After receiving the notice and a report the Minister may lay both before each house of Parliament. The Director is not to include the complaint's name in the material given to the Minister unless authorised to do so by the complaint.

Clause 25 Section 59 amended

Consequential amendment to enable the inclusion of negotiated settlements

Clause 26 Section 61 amended

Consequential amendment to enable the inclusion of negotiated settlements

Clause 27 Section 64 amended

Consequential amendment to enable the inclusion of negotiated settlements

Clause 28 Section 80 replaced

Transitional provisions added so that a reference in any written law or other document to the Director of the Office of Health Review is to be taken to be a reference to the Director.

A reference in any written law or other document to the Office of Health Review is to be taken to be a reference to the Office.

PART 3 – DISABILITY SERVICES ACT 1993 AMENDED.

Clause 29 *The Act amended in this Part.*

The Disability Services Act 1993 is amended in this part

Clause 30 *Section 3 amended*

The definition of “Director” is amended. “Director” means the Director of the Health and Disability Services Complaints Office appointed under the *Health and Disability Services (Complaints) Act 1995*.

Clause 31 *Section 3A amended*

Child Welfare Act is deleted and replaced by *Children and Community Services Act 2004*

Clause 32 *Section 30 amended*

The definitions of “member of staff” and “OHR” are deleted and definitions for “Complaints Office” and “member of staff” inserted.

“Complaints Office” means the Health and Disability Services Complaints Office continued by section 6(1) of the *Health and Disability Services (Complaints) Act 1995*.

Member of staff has the meaning given to the term by section 3(1) of the Health and Disability Services (Complaints) Act 1995.

Clause 33 *Section 30AA inserted*

This clause provides that this part is to be read with the *Health and Disability Services (Complaints) Act 1995*

Clause 34 *Section 30A amended*

The deletion and replacement of subsection 1(a) enables the inclusion of negotiated settlements as a means of dealing with complaints.

The amendment to 1(b) alters the second function of the Director. The Director is now required when suggesting ways of removing and minimising the causes of complaints, to collaborate with groups of service providers or groups of persons to whom disability services are provided. As noted in relation to the *Health Services (Conciliation and Review) Act* above, the Office of Health Review has no objection to retaining “and bringing them to the notice of the public” in section 30A(1)(b).

Subsection 1(f) is amended by deleting “OHR” and inserting instead “complaints office”.

The insertion of (1)(g)(iii) into paragraph to (1)(g) expands the functions of the Director to include the providing advice about removing or minimising the causes of complaints.

Clause 35 *Section 31 amended*

Consequential amendment to include all the processes for settling a complaint.

Clause 36 Section 32 amended

This amendment enables the Director to recognize as a user's representative a person who is not chosen by the user and may allow that person to complain to the Director on the user's behalf, if the user has died and in the Director's opinion the prospective advocate is a person who has a sufficient interest in the subject matter of the complaint.

Clause 37 Section 33 amended

Section 33(2) is amended to enable people with a disability to complain that a provider has acted unreasonably in the manner of providing a disability service whether the complainant or a third party requested the service.

Subsections (g), (h) and (i) are inserted into section 33(2) to enable people with disabilities to make a complaint that a provider acted unreasonably in respect to not properly investigating a complaint or causing it to be properly investigated or not taking or causing to be taken proper action on a complaint.

People with disabilities will now be able to make a complaint when a provider has acted unreasonably by charging an excessive fee or otherwise acting unreasonably with respect to a fee.

Clause 38 Section 33A amended

'*Health Services (Conciliation and Review) Act 1995*' is deleted and replaced with '*Health and Disability Services (Complaints) Act 1995*'

Clause 39 Section 36 amended

Consequential amendment

Clause 40 Section 37 amended

The amendment to Section 37(1) is a consequential amendment to enable the inclusion of a negotiated settlement in the processes for settling a complaint.

The insertion of 4A after section 37(3) enables the Director once a complaint is accepted to give the respondent a written notice requiring the respondent to provide the Director a written response to the complaint in accordance with Section 39A.

Section 4B is inserted after 4A. This amendment will require that once a complaint is accepted, the Director must then attempt to settle the complaint by negotiating with the complainant and the respondent or referring it for conciliation, if in the Director's opinion it is suitable for conciliation, or investigate it if in the Director's opinion it is not suitable for a negotiated settlement or conciliation and an investigation is warranted taking into account the likely costs and benefits of the investigation.

Section 37 is amended by adding subsections (6) and (7) requiring the Director, if the complaint is not suitable to dealt with by a negotiated settlement or conciliation and does not warrant investigation to advise the complainant in writing of the decision and that no further action will be taken in relation to the complaint.

While performing functions under this section the Director must not try to settle the complaint.

Clause 41 Section 38 amended

The amendment removes the ability of the Director to reject a complaint that in the Director's opinion does not warrant any further action.

Clause 42 Section 39A and 39B inserted
39A Response by respondent

This section gives the provider discretion to provide a written response to a complaint within 28 days after being given notice by the Director that the complaint had been accepted.

A provider who has been given notice pursuant to section 37(4A) must give the Director a written response to the complaint.

The Director can extend the 28-day period for good reason. If the provider does not comply with this section, the Director may nevertheless deal with the complaint under this part of the Act. The Director must include in the Office's annual report the details of any breaches that, in the Director's opinion, were committed without a reasonable excuse.

39B Resolving complaints by negotiation

After having accepted a complaint, section 39B enables the Director by negotiating with the person who made the complaint and the provider to bring about a settlement of the complaint that is acceptable to the parties. The Director may make any enquiries that he or she considers appropriate.

If within 56 days or any longer period allowed under subsection 4 after the date of complying with section 35 a complaint has not been settled by negotiation, the Director must refer the complaint for conciliation if the Director is of the opinion it is suitable to be dealt with or investigate it if the Director is of the opinion that it is not suitable to be dealt with by conciliation and an investigation is warranted, taking into account the likely costs and benefits of the investigation.

The director may extent the 56-day period if it is to the benefit of the person who made the complaint to do so.

If the director decides that the complaint is not suitable for conciliation and does not warrant investigating, the director must, advise the complainant in writing of the decision and that the Director will take no further action on the complaint.

Evidence of anything said or admitted during any negotiations is not admissible in proceedings before a court or tribunal except evidence may be disclosed to the Parliamentary Commissioner for administrative investigations for the purposes of an investigation under that act.

Clause 43 Section 39 amended

Section 39(1) (refers to the conciliation of complaints) is repealed and replaced so that when referring a complaint for conciliation the Director must assign the task of

conciliating the complaint to a member of staff whose duties consist of or include the conciliation of complaints.

If the conciliation process fails to result in a settlement of a complaint the Director must investigate the complaint unless of the opinion that an investigation is not warranted due to the likely costs and benefits of the investigation. (Section 39(5) Disability Services Act).

Clause 44 Section 40 amended

The Director may at any time during an investigation try to encourage the settlement of a complaint.

Clause 45 Section 41 amended

After section 41(7), section 41(8) is inserted. This new section requires that a person who has been given a notice under this section (investigation notice) must not, without reasonable excuse, proof of which is on the person, furnish relevant information or produce a relevant record that the person knows is false or misleading in a material respect. Penalty of \$2,500.

Clause 46 Section 42A inserted

A person who conciliated a complaint or attempted to do so must not investigate that complaint. This amendment brings the Disability Services Act in line with the *Health Services (Conciliation and Review) Act*.

Clause 47 Section 44A amended

Consequential amendment because of the change of name of the Office of Health Review.

Clause 48 Section 44B amended

Consequential amendment because of the change of name of the Office of Health Review.

Clause 49 Section 46B inserted

This new section requires that if a person makes a statement in a complaint, statement or report given to the Director under this part (investigation at the request of Parliament) knowing it to be false in a material respect they will incur a penalty of \$2,500.

Clause 50 Section 50 amended

Consequential amendment because of the change of name of the *Health Services (Conciliation and Review) Act*.

PART 4 – OTHER ACTS AMENDED

Division 1 – Amendments to existing Acts

Clause 50 Carers Recognition Act 2004 amended

Consequential amendments.

Part 5 repealed- Division 1 (Amendments to the *Disability Services Act 1993*) and Division 2 (Amendments to the *Health Services (Conciliation and Review) Act 1995*).

Clause 51 *Chiropractors Act 2005 amended*

Consequential amendment by deleting and replacing the definition of “Director” and deleting and “Health Services (Conciliation and Review) Act 1995 with “*Health and Disability Services (Complaints) Act 1995*”.

Clause 52 *Constitution Acts Amendment Act 1899 amended*

Consequential amendment to reflect the change of name of the Act.

Clause 53 *Financial Management Act 2006 amended*

Consequential amendment to reflect the change of name of the Office.

Clause 54 *Freedom of Information Act 1992 amended*

A consequential amendment to extend the exemption to cover both the conciliation and the negotiated settlements processes of health and disability complaints.

Consequential amendment to effect the change of name of the Act

Clause 55 *Health Professionals (Special Events Exemption) Act 2000 amended*

Consequential amendment to reflect the change of name of the Act.

Clause 56 *Medical Practitioners Act 2008 amended*

Consequential amendment to reflect the change of name of the Act and the Office

Clause 57 *Medical Radiation Technologists Act 2006 amended*

Consequential amendment to reflect the change of name of the Act, the Office and the definition of the Director.

Clause 58 *Nurses and Midwives Act 2006 amended*

A Consequential amendment to reflect the change of name of the Act, the Office and the definition of the Director.

Clause 59 *Occupational Therapists Act 2005 amended*

Consequential amendment to reflect the change of name of the Act, the Office and the definition of the Director.

Clause 60 *Optometrists Act 2005 amended*

Consequential amendment to reflect the change of name of the Act, the Office and the definition of the Director.

Clause 61 *Osteopaths Act 2005 amended*

Consequential amendment to reflect the change of name of the Act, the Office and the definition of the Director.

Clause 62 *Physiotherapists Act 2005 amended*

Consequential amendment to reflect the change of name of the Act, the Office and the definition of the Director.

Clause 63 Podiatrists Act 2005 amended

Consequential amendment to reflect the change of name of the Act, the Office and the definition of the Director.

Clause 64 Psychologists Act 2005 amended

Consequential amendment to reflect the change of name of the Act, the Office and the definition of the Director.

Division 2 - Amendments to proposed Acts

Clause 65 Dental Act 2008[113-2B] amended

Consequential amendment to reflect the change of name of the Act, the Office and the definition of the Director.

Clause 66 Information Privacy Act 2008[193-1] amended

Consequential amendment to reflect the change of name of the Act, the Office and the definition of the Director.

Clause 67 Pharmacists Act 2008[185-2] amended

Consequential amendment to reflect the change of name of the Act, the Office and the definition of the Director.