

HEALTH AND DISABILITY SERVICES (COMPLAINTS) AMENDMENT BILL 2021

EXPLANATORY MEMORANDUM

Introduction

The purpose of this Bill is to introduce the National Code of Conduct for health care workers (National Code) in Western Australia. This Bill will amend the Health and Disability Services (Complaints) Act 1995.

The National Code will be applicable to all health care workers in Western Australia who are not registered under the National Registration and Accreditation Scheme (NRAS), or who provide services unrelated to their registration, or who are student or volunteer health care workers. The NRAS covers 15 practitioner groups. There remain a significant number of professions who provide unregistered and unregulated health services including massage therapists, doulas, social workers, psychotherapists, counsellors, certain types of cosmetic services, and other types of allied, alternative and community health services.

The National Code does not restrict entry into practice; however, it allows effective action to be taken against a health care worker who fails to comply with the proper standards as provided for under the National Code.

The Director of the Health and Disability Services Complaints Office will be able to receive complaints and undertake investigations about health care workers who have allegedly breached a provision of the National Code and issue prohibition orders for breaches of the National Code, that will require a health care worker to cease practice, or place conditions on their practice, where their conduct presents a serious risk to public health and safety.

The National Code will provide a minimum set of standards against which to assess whether a healthcare worker's conduct, in the event of a complaint or investigation, constitutes a breach of the Code and poses a serious risk to public health and safety. The National Code contains 17 clauses which set out the manner in which health care workers should undertake their practice. Amongst other things, the National Code requires health care workers to provide services in a safe and ethical manner, including not providing health care of a type outside of their experience or training or services they are not qualified to provide; not make claims to cure certain illnesses; not financially exploit clients; and not engage in sexual misconduct or improper personal relationships with a client. A healthcare worker must provide only services or treatments to clients that are designed to maintain or improve a client's health and wellbeing.

The National Code has been developed as a nationally consistent legislative model, in accordance with the policy guidance provided by the Council of Australian Governments (COAG) Health Council in the Final Report: A National Code of Conduct for health care workers 17 April 2015 (Final Report). The National Code of Conduct, or a comparable code of conduct, is already in place in New South Wales, Queensland, South Australia and Victoria.

All other jurisdictions with the National Code, or a comparable code regime, in effect, except for Victoria, prescribe the code of conduct by regulations (section 288 of the Health Ombudsman Act 2013 in Queensland; section 56AAA of the Health Complaints Amendment (Code of Conduct) Act 2018 in Tasmania; section 56A of the Health and Community Services Complaints Act 2004 in South Australia; and section 100 of the Public Health Act 2010 in New South Wales).

As the National Code of Conduct is intended to be a national scheme for the setting of minimum practice standards for health care workers, prescribing the code of conduct via regulations is consistent across Australia and provides flexibility for changes to the code clauses, or the prescribed offences that may result in a prohibition order being issued, to be more easily changed.

The code of conduct appears as Schedule 2 in the Health Complaints Act 2016 in Victoria. It is foreshadowed in section 154 (2) of the Health Complaints Act 2016 that the general code of conduct set out in Schedule 2 applies until a general code of conduct in respect of general health services is prescribed by the regulations.

Consultation

Consultation has been undertaken to develop the National Code scheme. National consultation was undertaken on behalf of the COAG Health Council by the Australian Health Ministers' Advisory Council (AHMAC) in 2011 and again in 2014. HaDSCO released a consultation paper in 2017 addressing specific policy issues associated with implementing the National Code in Western Australia. In December 2017, the Health and Disability Services Complaints Office (HaDSCO) circulated a consultation paper on specific policy issues for implementing the National Code in Western Australia to state government departments, public, private and not-for-profit health service providers, peak industry groups and professional associations. A total of 43 submissions were received in response to the consultation paper. Stakeholders gave widespread support for implementation of the National Code in Western Australia, with HaDSCO being the entity responsible for managing complaints and issuing prohibition orders. Stakeholders also noted the need for a collaborative approach with other government agencies and organisations, in terms of both co-operation during investigations and/or referral of matters.

The Deputy Premier wrote to Western Australian Ministers in December 2017. The outcome of the consultation is contained in HaDSCO's June 2018 Consultation Report on the National Code of Conduct for Health Care Workers in Western Australia.

Health care workers who are subject to a prohibition order have a right of appeal. Consultation occurred in 2017 with the Director General of the Department of Justice who advised that the President of the State Administrative Tribunal (SAT) had no objections to the appeal provisions for health care workers being conferred to SAT. In addition, when consulted through the Cabinet process for approval to draft the legislation, the Department noted that the SAT had previously agreed to the proposed referral of appeals to the jurisdiction and advised this can be managed within existing resources.

This Bill incorporates the following amendments which will provide for the implementation of the National Code in Western Australia in line with the Code provisions in the Final Report:

1. Complaints about the conduct of unregistered health care workers

The Bill gives the Health and Disability Services Complaints Office the ability to receive complaints and provides powers to undertake investigations into alleged breaches of the National Code by unregistered health care workers. Complaints about the conduct of a health care worker can be made by anyone, and the Director of HaDSCO may initiate an investigation into a health care worker's conduct in the absence of a complaint if there is reasonable belief that their provision of health services is unsafe or unethical. For the National Code to apply to all the relevant health professions in Western Australia, the Bill provides for amendments to the definition of a 'health service'.

2. Protection of public health and safety

Where a health care worker has been found to have breached the code of conduct, they may be subject to a prohibition order that prevents them from providing health services, or places specific conditions on their provision of health services. These measures can only be taken where the health care worker presents a risk to the health and safety of the public.

3. Investigations into breaches of the National Code

The Bill gives the Health and Disability Services Complaints Office expanded powers to undertake investigations into the alleged breaches of the National Code. These expanded powers are required to collect the evidence necessary to determine if a health care worker is providing health

services in an unsafe or unethical manner, which may cause significant harm to members of the public.

4. Penalties for breaching prohibition orders

The Bill makes it an offence for a health care worker to provide health services if they are the subject of a prohibition order. The penalty for breaching a prohibition order is \$30,000.

5. Right of appeal

The Bill makes it a requirement of issuing a prohibition order that the health care worker is informed of their right to appeal the issuing of the order to the State Administrative Tribunal. A health care worker will have 28 days from the time they receive a prohibition order to make their appeal to the SAT.

A person who makes a complaint to the Director (the Complainant) who is not satisfied that the complaint was properly managed, may request an internal review and may seek a review by the Ombudsman Western Australia, in line with the current process.

An explanation of each clause in the Bill is provided below.

Clause 1 Short title

This clause provides that the title is the *Health and Disability Services (Complaints) Amendment Act 2021*.

Clause 2 Commencement

Sections 1 and 2 come into operation on Royal Assent, with the rest to come into operation on a day fixed by proclamation.

Clause 3 Act amended

States that this Act amends the *Health and Disability Services (Complaints) Act 1995*, except for clause 43, which makes a consequential amendment to the *Freedom of Information Act 1992*.

Clause 4 Section 3 amended

This clause amends the definition of a 'health service' and inserts definitions for the following terms: 'code of conduct', 'Director-initiated investigation', 'health care worker', 'interim prohibition order', 'Office's website', 'prohibition order', and 'public health warning statement'.

The definition of the new term 'health care worker' is of particular importance in this Bill. The National Code of Conduct will be applicable to health care workers, who are defined as an individual who provides a health service (whether or not the individual is a registered provider). This means that a health care worker includes people who are not registered under the *Health Practitioner Regulation National Law (WA) Act 2010*, or who are registered but are providing health services unrelated to their registration (for example, a registered nurse who is also providing reiki services).

The definition of a 'health care worker' does not make a distinction between individuals who have previously been, but are no longer, registered under the *Health Practitioner Regulation National Law (WA) Act 2010* and may also apply to registered practitioners if they are practicing outside the scope of their registration, for example, a midwife who also works under the title of a doula (which is not a registered profession).

The definition of a 'health service' has been amended to ensure that the National Code is applicable to the wide array of health services that are provided by health care workers in Western Australia. This definition is important as it determines what kind of health services the National Code of Conduct applies to. For this reason, the definition needs to be very broad, and cover the numerous allied health professions, as well as any alternative and emerging health service fields, such as home birthing assistants, ayurvedic medicine practitioners, and reiki practitioners.

The specific amendments to the definition of a 'health service' are detailed below.

The word 'injury' has been incorporated into the definition at paragraph (a) as health care workers often provide health services that are intended to treat an injury; for example, a massage therapist may provide treatment for a sporting or workplace injury.

The following terms have been added to the definition of a health service by inserting paragraph (ba), (bb) and (ea): 'prescribing or dispensing a drug or medicinal preparation'; 'prescribing or dispensing an aid for therapeutic use'; or a 'surgical or related service'. This ensures that health care workers who offer these types of services must practice in accordance with the National Code of Conduct. These terms are now also referenced in paragraph (g) of the definition of a health service.

The following terms have been added to the definition of a health service at paragraph (ga) to capture any complementary or emerging health service fields: 'any service that is ancillary to any other service to which this definition applies; and affects or may affect persons who are receiving any other service to which this definition applies'.

Section 3(2) has been deleted to correct an administrative error, as Schedule 1 of the Act was deleted by the *Health Practitioner Regulation National Law (WA) Amendment Act 2018*, 4 of 2018.

Section 3(3) has been amended to correct an administrative error by removing the reference to a 'subparagraph' and replacing it with a reference to 'paragraph'.

Clause 5 Section 4 amended

Section 4(2) has been amended to include a reference to 'other conduct' to ensure the application of the provision to matters concerning the National Code of Conduct.

Clause 6 Section 10 amended

Section 10(1)(a) has been amended to remove the reference to 'Part 3' and replace it with 'this Act', which reflects the fact new sections will be incorporated into the Act outside of Part 3 that relate to dealing with complaints.

This clause inserts a new section 10(1)(aa) that gives the Director the authority to conduct investigations into alleged breaches of the National Code of Conduct, an interim prohibition order, or a prohibition order by health care workers, whether the investigation occurs because of a complaint made to the Health and Disability Services Complaints Office; or the investigation is initiated by the Director; or the investigation is initiated at the request of the Minister for Health, a House of Parliament, or a committee of either or both Houses.

Clause 7 Section 17A inserted

Clause 6 inserts a new section 17A that allows the Director to give a staff member an identity card. The identity card must be produced by a staff member for inspection if they are entering a premise under warrant. This section includes a penalty (a fine of \$2,500) if the identity card is not returned when a staff member ceases their employment.

Clause 8 Part 3 heading amended

This clause amends the heading to be Part 3 - Complaints generally

Clause 9 Section 19 amended

Section 19(1) is being amended to apply only to those complaints that do not concern the National Code of Conduct.

This clause inserts a new section 19(3) that allows a complaint about an alleged breach of the National Code of Conduct or a prohibition order to be made to the Health and Disability Services Complaints Office by any person. This means that a complaint can be made by the person receiving the health service, their representative, a carer, another service provider, or any other person that believes that the National Code of Conduct or a prohibition order has been breached by a health care worker.

The intention of section 19(3) is to ensure that there are no restrictions on who can make complaints about the National Code of Conduct, as the National Code of Conduct is being established to protect the health and safety of the public from health care workers who do not

provide services in a safe and ethical manner.

Clause 10 Section 23 amended

Section 23(1)(a) is being amended to apply only to those complaints that do not relate to the National Code of Conduct.

Clause 11 Section 25 amended

The new sections 25(1)(i), (j) and (k) insert new grounds for making a complaint. The new grounds for making a complaint are a health care worker failing to comply with a code of conduct that applies to them; failing to comply with an interim prohibition order; or failing to comply with a (permanent) prohibition order.

This will allow the Health and Disability Services Complaints Office to receive complaints about alleged breaches of the National Code of Conduct by health care workers, as well as complaints about alleged breaches of prohibition orders (whether interim or permanent).

Clause 12 Section 29 amended

Section 29 (2) has been inserted to allow the Director to continue dealing with a complaint about a breach of the National Code of Conduct or a prohibition order even if the complaint is withdrawn.

In such cases where the Director continues to deal with a complaint about a breach of the National Code of Conduct or a prohibition order, the Director does not have to provide notice to the health care worker that the complaint has been withdrawn, as per the new section 29 (3)(a). Furthermore, the Director does not have to provide any further information to the person who made the complaint under any other provision in the Act, as per the new section 29 (3)(b).

As investigations into breaches of the National Code of Conduct or a prohibition order concern whether the health care worker is endangering public health and safety by providing a health service, notification to the health care worker on withdrawal of the instigating complaint is not relevant to proceedings.

An example of this provision in operation would be a client withdrawing their complaint that their counsellor had engaged in an improper personal relationship with them. This individual may withdraw their complaint under pressure or coercion from the counsellor. In such a situation, the Director may continue to deal with this complaint to determine if the counsellor has breached the specific clauses of the National Code of Conduct that prevent a health care worker from engaging in an improper relationship with their client(s).

Clause 13 Section 31 amended

This is an administrative amendment to remove the reference to 'Part' and replace it with a reference to 'Act'.

Clause 14 Section 32A amended

This amendment adds a reference to 'the person who complained to the Director' to ensure consistency with the language used at other sections of the Act.

Clause 15 Section 33 amended

Section 33 has been amended to include a reference to referring a complaint 'to a person or body',

which ensures consistency with the language used at section 32 of the Act.

Paragraph (a) has been amended to include a reference to 'the person who complained to the Director' to ensure consistency with the language used at other sections of the Act. An administrative amendment has also been made to insert the word 'the' before 'provider'.

Paragraph (b) has been amended to include a reference to 'the person who complained to the Director' to ensure consistency with the language used at other sections of the Act.

Clause 16 Section 34 amended

Section 34(4) has been amended to apply only to those complaints that do not concern the National Code of Conduct.

Administrative amendments have been made to sections 34(4)(a), (4)(b) and (4)(c)(i) to update the references to specific Parts of the Act.

The insertion of section 34(5) allows the Director to decide on the most appropriate manner to resolve a complaint about an alleged breach of the National Code of Conduct. If the Director decides to accept a complaint relating to the National Code of Conduct, it can be investigated, or settled by means of alternative dispute resolution (negotiated settlement or conciliation).

Complaints that suggest there is a threat to public health and safety will be investigated. Complaints of a more minor nature, for example isolated issues with fees or charges, may be better dealt with by alternative dispute resolution (negotiated settlement or conciliation).

The insertion of section 34(5A) mandates that if a complaint relating to a breach of a prohibition order is accepted by the Director, then this complaint must be investigated. This is because the breach of a prohibition order would put the health and safety of the public at immediate risk, and the breach of a prohibition order is an offence.

An administrative amendment has been made to section 34(6)(b) to update the reference to specific Parts of the Act.

Clause 17 Section 36A amended

This is an administrative amendment to section 36A(5) to remove the reference to 'Part' and replace it with a reference to 'Act'.

Clause 18 Part 3A heading inserted

This clause inserts a new heading Part 3A - Settlement and conciliation of certain complaints.

Clause 19 Part 3 Division 3 heading replaced

This clause replaces the existing heading with Division 1 - Negotiated settlement.

Clause 20 Section 36B amended

Section 36B(1A) prevents complaints that allege a breach of a prohibition order being resolved by the negotiated settlement or conciliation process; these complaints, if they are accepted following preliminary assessment, must be investigated due to the risk to public health and safety of a health care worker providing health services in violation of a prohibition order.

Administrative amendments have been made to sections 36B(3)(a) and 36(3)(b)(i) to update the references to specific Divisions of the Act.

An administrative amendment has been made to section 36B(5) to update the reference to specific Divisions of the Act.

Clause 21 Part 3 Division 3 heading replaced

This clause replaces the existing heading with Division 2 - Conciliation

Clause 22 Section 40 amended

Section 40(3)(a) has been amended to include a reference to 'the person who made the complaint' to ensure consistency with the language used at other sections of the Act.

Clause 23 Part 3 Division 4 heading deleted

This clause deletes the heading to Part 3 Division 4.

Clause 24 Part 3B heading inserted

This clause inserts a new heading Part 3B - Investigations generally

Clause 25 Section 44A inserted

This inserts a new section that gives the Director the authority to conduct an investigation into a breach of the National Code of Conduct or a prohibition order, without a complaint having been made. This section also allows for a Director-initiated investigation into the breach of a prohibition order issued in another jurisdiction (an interstate order).

The authority for Director-initiated investigations currently exists in all jurisdictions except for Western Australia and the Northern Territory.

The authority provided by section 44A(a) is required for the Director to investigate matters where a health care worker may be practicing in an unsafe or unethical manner, but no one has made a formal complaint. This allows the Director to investigate a potential breach of the National Code of Conduct based on information received through means other than a complaint; for example, information may be provided by other regulatory agencies, the police, or media coverage.

Section 44A(b) allows the Director to investigate whether an offence has been committed under section 52G, 52N or 52Q(2), which are the offences associated with breaching an interim prohibition order, a prohibition order, or an interstate order.

For example, the director may initiate an investigation under section 44A(b), if monitoring activities, such as a review of social media, indicates that a health care worker subject to a prohibition order is continuing to provide health services.

Information about the breach of an interstate order would likely be provided by a Health Complaints Entity in another jurisdiction (the jurisdiction that issued the prohibition order against the health care worker). If it is suspected that a health care worker has relocated to Western Australia to provide health services that they are banned from providing in another state or territory, section 44A(b) allows the Director to commence an investigation.

Clause 26 Section 48 amended

Section 48(1) has been amended to include a reference to 'other conduct', which ensures the

application of the provision to investigations that concern alleged breaches of the National Code of Conduct or a prohibition order.

Section 48(2) has been amended to include a reference to 'a Director-initiated investigation', which ensures the application of the provision to investigations that are initiated by the Director (in the absence of a complaint).

Clause 27 Part 3C heading inserted

This clause inserts a new heading Part 3C - Remedial action

Clause 28 Parts 3D and 3E inserted

This clause inserts two new Parts into the Act: Part 3D - Interim prohibition orders, prohibition orders and interstate orders and Part 3E - Public health warning statements relating to health care workers.

Division 1 - Interim prohibition orders

52B Director may make interim prohibition order

This clause inserts a new section that gives the Director the authority to make an interim prohibition order that prohibits a health care worker from providing health services for up to 12 weeks. Alternatively, the interim prohibition order may impose specific restrictions on the provision of health services by the health care worker. For example, a massage therapist may be restricted from providing services to female clients.

An interim prohibition order can only be issued to allow for an investigation into the conduct of a health care worker.

In accordance with subsection (3) the Director can only make an interim prohibition order if there is reasonable belief that the health care worker has breached the National Code of Conduct, or the health care worker has been convicted of a prescribed offence, and the interim prohibition order is necessary to protect the health and safety of a person or the public.

The thresholds for issuing an interim prohibition order at subsection (3) are necessary to ensure that such an order is only issued where the continuing provision of health services by a health care worker is likely to lead to harm.

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.

Subsection (4) allows the Director to issue more than one interim prohibition order. This subsection is included in the Bill because investigations into alleged breaches of the National Code of Conduct may take longer than 12 weeks to complete. Information provided by other jurisdictions confirms that investigations typically exceed 12 weeks due to the complexity of the investigations.

52C Notice of prohibition order

This inserts a new section that requires the Director to give written notice of an interim prohibition order to the health care worker. The notice must be provided as soon as possible. The notice must

also contain a statement informing the health care worker that they can apply for a review of the decision to the State Administrative Tribunal.

52D When interim prohibition order takes effect

This inserts a provision that an interim prohibition order takes effect when the health care worker receives written notice of the order.

52E Variation of interim prohibition order

This section allows the Director to vary an interim prohibition order in instances where it is appropriate to reduce, or remove, the restrictions in the order. This may occur if during the course of an investigation into an alleged breach of the National Code of Conduct it is determined that the restrictions contained in an interim prohibition order are not necessary to protect public health and safety.

This section mandates the information that must be included in a variation of an interim prohibition order under subsection (2); requires the varied order to be provided to the health care worker as soon as possible under subsection (3); and has the varied order take effect when the health care worker receives the written notice of the variation under subsection (4).

52F Revocation of interim prohibition order

This inserts a new section that requires the Director to revoke an interim prohibition order if it is determined that the order is no longer required to protect the health or safety of a person or the public. Such a determination may be made during an investigation if it is found that a health care worker has not breached the National Code of Conduct.

This section also mandates the information that must be included in a revocation of an interim prohibition order under subsection (2); requires the revoked order to be provided to the health care worker as soon as possible under subsection (3); and has the revoked order take effect when the health care worker receives the written notice of the revocation under subsection (4).

52G Offence for failure to comply with interim prohibition order

This section makes it an offence for a health worker to breach an interim prohibition order. The penalty for failing to comply with an interim prohibition order is \$30,000. This penalty is comparable to the penalty for breaching similar orders under the *Health Practitioner Regulation National Law (WA) Act 2010*.

Division 2 - Prohibition orders

52H Director may make prohibition order

This section gives the Director the authority to make a prohibition order that prohibits a health care worker from providing health services. A prohibition order can only be made at the conclusion of an investigation into the possible contravention of the National Code of Conduct by a health care worker. A prohibition order can be made permanently or for a period of time specified in the order.

Alternatively, a prohibition order may impose specific restrictions on the provision of health services by the health care worker. For example, a massage therapist may be restricted from providing services to female clients.

In accordance with subsection (3), the Director can only make a prohibition order if there is reasonable belief that the health care worker has breached the National Code of Conduct, or the

health care worker has been convicted of a prescribed offence, and a prohibition order is necessary to protect the health and safety of a person or the public.

The thresholds for issuing a prohibition order at subsection (3) are necessary to ensure that such an order is only issued where the continuing provision of health services by a health care worker is likely to lead to harm.

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.

52I Show cause process for prohibition orders

This inserts a section that requires the Director to give the health care worker an opportunity to make a submission relating to the decision to issue a prohibition order. Given the consequences for the health care worker of a prohibition order being issued, the show cause process allows the health care worker an opportunity to provide information that is to be considered in the decision to issue a prohibition order.

Subsection (1) requires the Director to give the health care worker written notice of the proposed prohibition order being made against them.

Subsection (2) requires the notice given to the health care worker to invite a written or oral submission about the proposed prohibition order within a reasonable period of time.

Subsection (3) requires the Director to have regard to any submission from a health care worker in deciding whether to make the proposed prohibition order.

52J Notice of prohibition order

This section requires the Director to give written notice of a prohibition order to the health care worker. The notice must be provided as soon as possible. The notice must also contain a statement informing the health care worker that they can apply for a review of the decision to the State Administrative Tribunal.

52K When prohibition order takes effect

This inserts a provision that a prohibition order takes effect when the health care worker receives written notice of the order.

52L Variation of prohibition order

This section allows the Director to vary a prohibition order in instances where it is appropriate to reduce the restrictions in the order. This may occur, for example, if a health care worker completes training or acquires additional qualifications that remove the risk their provision of health services presents to the health and safety of the public.

This section mandates the information that must be included in a variation of a prohibition order under subsection (2); requires the varied order to be provided to the health care worker as soon as possible under subsection (3); and has the varied order take effect when the health care worker receives the written notice of the variation under subsection (4).

52M Revocation of prohibition order

This section requires the Director to revoke a prohibition order if it is determined that the order is no longer required to protect the health or safety of a person or the public.

This section also mandates the information that must be included in a revocation of a prohibition order under subsection (2); requires the revoked order to be provided to the health care worker as soon as possible under subsection (3); and has the revoked order take effect when the health care worker receives the written notice of the revocation under subsection (4).

52N Offence for failure to comply with prohibition order

This section makes it an offence for a health worker to breach a prohibition order. The penalty for failing to comply with a prohibition order is \$30,000. This penalty is comparable to the penalty for breaching similar orders under the *Health Practitioner Regulation National Law (WA) Act 2010*.

Division 3 - Publication of information about orders

52O Publication of information about interim prohibition orders, prohibition orders

This inserts a section that requires the Director to publish on the Office's website specific information about each interim prohibition order or prohibition order that is made. This information must be published as soon as practicable after making the order.

Subsection (1) lists the specific information that is to be published on the Office's website.

Subsection (2) requires any interim prohibition order or prohibition order that is varied or revoked to be published on the Office's website as soon as practicable.

Division 4 - Review by State Administrative Tribunal

52P Review of decisions to make interim prohibition orders and prohibition orders

This inserts a new section that gives a health care worker the right to apply to the State Administrative Tribunal for a review of a decision to issue an interim prohibition order or a prohibition order.

Division 5 - Interstate orders

52Q Offence for failure to comply with interstate order

This section makes it an offence for a health worker to breach an interim prohibition order or a prohibition order that is issued in another jurisdiction. This section gives the Director the authority to investigate a health care worker who relocates to Western Australia and provides health services while they are the subject of an order in another state or territory.

Subsection (1) defines the following terms: 'corresponding law', 'interstate interim prohibition order', 'interstate order', and 'interstate prohibition order'.

The interstate interim prohibition orders and interstate prohibition orders will be prescribed by regulations, ensuring there is no ambiguity about the interstate orders that are the subject of these provisions in the Act.

Under subsection (2) a person commits an offence if an interstate order made against them is in force, and the person engages in conduct in Western Australia that would constitute a failure to comply with an order in the jurisdiction where the order is in force.

The penalty for failing to comply with an interstate order is \$30,000 for an individual, and \$60,000

for a body corporate. The penalty for a body corporate has been included in the Bill as other jurisdictions are intending in the near future to make prohibition orders against corporations, in addition to individual health care workers.

Part 3E - Public health warning statements relating to health care workers

52R Public health warning statements

Subsection (1) gives the Director authority to publish a statement publicly at the commencement of an investigation into an alleged breach of the National Code of Conduct by a health care worker. The warning statement includes the name of the health care worker and provides warning to members of the public that the health care worker may have been providing health services in an unsafe or unethical manner.

The Director can only publish such a statement if there is reasonable belief that the health care worker has failed to comply with the National Code of Conduct, and the warning statement is necessary to minimise the risk to public health and safety.

An example of a warning statement published under these provisions would be a statement noting that a health care worker has been prescribing supplements that are not recognised by the Therapeutic Goods Administration and may cause harm if used.

Subsection (2) gives the Director authority to publish a similar statement, but at the conclusion of an investigation into an alleged breach of the National Code of Conduct by a health care worker.

The Director can only publish a statement if the investigation has proved that the health care worker has failed to comply with the National Code of Conduct or has been convicted of a prescribed offence, and the warning statement is necessary to minimise the risk to public health and safety.

Subsection (3) allows the Director to include any information in a public health warning statement that is relevant to advise the public of the risk associated with the services provided by the health care worker. Such information may include the types of treatment offered by the health care worker, the timeframe that they offered services, and any aliases or pseudonyms used by the health care worker.

Subsection (4) requires a public health warning statement to be published on the Office's website. The statement may also be published in any other manner that is considered appropriate by the Director. For example, if a health care worker has been providing health services in a regional area, the public health warning statement may be published in an appropriate regional newspaper.

52S Revoking public health warning statements

This section allows the Director to revoke a public health warning statement.

Subsection (1) requires that a revoked public health warning statement advises the public that the risk presented by services offered by the health care worker no longer exists and explains the reasons for the public health warning statement being revoked.

Subsection (2) requires the Director to revoke a public health warning statement made at the commencement of an investigation in cases where the investigation finds that the health care worker did not contravene the National Code of Conduct.

Subsection (3) requires the Director to publish an explanation as to why a public health warning statement has been revoked under subsection (2).

Subsection (4) requires the statements published under subsection (1) or (3) to be published on the Office's website and in any other manner the Director considers appropriate.

52T Correcting public health warning statements

This section allows the Director to correct a public health warning statement.

Subsection (1) gives the Director authority to publish a correction to a public health warning statement, setting out the reason for the correction.

Subsection (2) requires the statements published under subsection (1) to be published on the Office's website and in any other manner the Director considers appropriate.

Clause 29 Part 3 Division 5 heading deleted

This clause deletes the heading to Part 3 Division 5.

Clause 30 Part 3F heading inserted

This clause inserts a new heading Part 3F - Miscellaneous provisions relating to complaints, investigations and report to Parliament.

Clause 31 Section 52 amended

This clause inserts a new section 52 (1A) that ensures section 52 of the Act does not apply to complaints relating to the National Code of Conduct or prohibition orders.

This section will not apply to matters relating to the National Code of Conduct or prohibition orders as the Director should not be bound to stop proceedings in situations where a health care worker is believed to be providing health services in an unsafe or unethical manner, due to the risk this presents to public health and safety.

Clause 32 Section 59 amended

Section 59 has been amended to include a reference to 'a Director-initiated investigation', which ensures the application of the provision to investigations that are initiated by the Director (in the absence of a complaint).

Clause 33 Section 60 amended

This clause includes a number of amendments that strengthen the Director's powers for the purposes of conducting an investigation into an alleged breach of the National Code of Conduct or a prohibition order (interim or permanent).

Section 60(1)(b) has been amended to include a reference to 'record or other thing'. This ensures consistency with the language used at other sections of the Act and ensures the application of the Director's powers to obtain information apply to any thing that is relevant to an investigation.

The inserted section 60(1A) gives the Director authority to direct a person to provide information that is requested or answer a question put to the person. This section would be applicable to situations where the Director has required a person, by written notice, to attend a specific place at a specific time, or to produce a book, document, record or other thing that is in their possession or under their control (as per section 60(1) of the Act).

Section 60(3) has been amended to include a reference to 'other thing'. This ensures consistency with the language used at other sections of the Act and ensures the application of the Director's

powers to obtain information apply to any thing that is relevant to an investigation.

Section 60(4) has been amended to include a reference to 'other things'. This ensures consistency with the language used at other sections of the Act and ensures the application of the Director's powers to obtain information apply to any thing that is relevant to an investigation.

The inserted section 60(5) requires that any notice that is given to a person under section 60(1) of the Act, must inform the person that they are required to comply with the notice under this Act, and that refusal to comply with the notice may constitute an offence.

The inserted section 60(6) requires that the Director inform a person who is attending in person under notice that they are required to comply with a direction to provide information or answer a question under this Act, and that refusal to comply with the direction may constitute an offence.

Clause 34 Section 61 amended

Section 61 has been amended to include a reference to 'a Director-initiated investigation', which ensures the application of the provision to investigations that are initiated by the Director (in the absence of a complaint).

An administrative amendment has also been made to specify that the penalty for making false statements is 'a fine'.

Clause 35 Section 62 amended

Section 62(1)(b) has been amended to include a reference to 'record or other thing', which allows for a penalty to be applied to a person who, without lawful excuse, refuses or fails to provide a 'record or other thing' during the course of an investigation. In order to determine if a breach of the National Code of Conduct or a prohibition order has occurred, the Director may need to examine different types of records associated with service provision, or potentially medicines or substances sold or distributed by the health care worker.

The insertion of section 62(1)(c) makes it an offence if a person, without lawful excuse, refuses or fails to give information or answer a question (under the direction of the new section 60(1A) at Clause 32).

Section 62(1) has been amended to include a reference a notice 'or a direction' that is provided to a person under section 60 of the Act. The language describing the penalty for failure to comply with a notice or direction has also been amended to include a reference to 'this subsection' and 'a fine'.

Section 62(2) has also been amended to include a reference to 'this subsection' and 'a fine'.

Clause 36 Section 64 amended

Section 64(1) has been amended to include a reference to 'a Director-initiated investigation', which ensures the application of the provision to investigations that are initiated by the Director (in the absence of a complaint).

This clause adds several paragraphs to section 64(2) of the Act. The new paragraphs expand the powers available to the Director for the purposes of collecting evidence under a warrant. The additional powers are necessary to allow for the necessary evidence to be collected to determine with certainty that a health care worker has breached the National Code of Conduct or a prohibition order.

Paragraph (aa) gives the Director the authority to inspect any thing at the premises (of a health

care worker's practice). This may include records, equipment, and/or substances and medicines. Given the varied nature of the health services that may be provided by health care workers, the Director needs the authority to inspect any thing on the premises that is relevant to the provision of health services.

Paragraph (ab) gives the Director the authority to search the premises or any thing at the premises.

Paragraph (ac) gives the Director the authority to examine, measure, test, photograph or film any part of the premises or any thing at the premises. This paragraph is required to allow for an investigation into a health care worker's conduct to include a thorough examination of any equipment or substances and medicines that are found at the health care worker's premises.

Paragraph (ad) gives the Director the authority to operate any equipment, including a computer, or facilities at the premises or direct a person at the premises to do so. The authority to require the operation of a computer may be needed to access health or other records.

Paragraph (ae) gives the Director the authority to take any thing, or sample of or from a thing, at the premises for analysis and testing. This paragraph has been included in the Bill to allow for a sample of a substance or medicine to be taken from the premises for testing to determine the contents of the substance.

Section 64(2)(c) has been amended to include a reference to 'equipment and materials'. This amendment is necessary to allow any equipment and materials used in the provision of health services by a health care worker to be examined during an investigation.

Section 64(2)(e) has been amended to include a reference to 'download or print out' and 'any other documents at the premises that may be relevant to the investigation'. These amendments are necessary to allow for any document relevant to an investigation, such as health records, to be downloaded or printed from a computer at the premises of the health care worker's practice.

Clause 37 Section 65 amended

The insertion of section 65(1A) requires a member of the staff of the Office, when executing a warrant, to produce an identity card issued under section 17A (see clause 6) for inspection by the occupier or person in charge of the premises, and to display the identity card so it is clearly visible to the occupier or person in charge of the premises.

Clause 38 Section 67 amended

This clause makes amendments to paragraphs (a) and (b) at section 67(1) to include references to 'document' or 'record or other thing'. This ensures consistency with the language used at other sections of the Act and ensures that health care workers may refuse to produce a document, record or thing that contains information associated with legal professional privilege, or which would incriminate them or render them liable to a penalty.

Clause 39 Sections 68A and 68B inserted

This clause inserts sections 68A and 68B into the Act.

68A Disclosure of information to other Commonwealth, State or Territory entities

This section allows for the Director to share information with relevant regulatory bodies to ensure that the public are not placed at risk by a health care worker who has been found to have breached, or is suspected of breaching, the National Code of Conduct.

Subsection (1) defines the terms relevant to this section, which are 'protected information' and

'relevant entity'. The relevant entities for the purposes of disclosing information are the Australian Health Practitioner Regulation Agency; a registration board (for a registered health profession); and entities in other jurisdictions that have similar functions to the Health and Disability Services Complaints Office and would therefore be responsible for administering the National Code of Conduct in their state or territory.

Subsection (2) permits the sharing of protected information only in circumstances where the Director is satisfied that the information will be collected, stored and used in a way that maintains the privacy of the persons to whom the information relates, and where the provision of the information is necessary to allow the relevant entity to exercise their functions.

The functions of a relevant entity that may require the disclosure of protected information are the regulation of health care workers and the protection of public health and safety from a health care worker who does not practice in a safe and ethical manner.

Subsection (3) allows the Director to provide a copy of an interim prohibition order or prohibition order to a relevant entity. This will ensure that other regulatory bodies are made aware when a health care worker is found to have breached the National Code of Conduct or a prohibition order in Western Australia.

68B Disclosure to protect health or safety of users

This section allows for the Director to provide specific information to a broad range of entities if a provider, which includes a health care worker, is believed to present a risk to the health and safety of the public.

Subsection (1) limits the provision of information to situations where the Director reasonably believes that a provider poses, or may pose, a risk to public health, or the health and safety of a person(s) is at risk because of the provision of health services by the provider.

Subsection (2) allows the Director to give written notice of the risk and any other relevant information about the provider to an entity of this State, another State, a Territory or the Commonwealth, if the Director considers the entity may be required to act in relation to the risk.

This section refers to a 'provider' instead of a 'health care worker' as the section is intended to apply to a health care worker who is a registered provider but is providing services unrelated to their registration. In such a situation, information may be provided to regulators about the risk the person presents in their capacity as a health care worker and a registered provider.

In addition, the reference to a provider is necessary in circumstances where a prohibition order is issued against a body corporate in another jurisdiction, and the Director reasonably believes that the body corporate presents a risk to public health and safety in Western Australia and wishes to disclose this risk to an entity.

Clause 40 Section 70 amended

This is an administrative amendment to remove the reference to 'Part' and replace it with a reference to 'Act'.

Clause 41 Section 71A inserted

This section allows the Director to request information from the Commissioner of Police regarding a health care worker's criminal record. This information may be used during an investigation to determine if a health care worker has been convicted of a prescribed offence, which indicates that they are not a fit and proper person to be providing health services.

Section 71A(1) defines the terms relevant to this section, which are 'Commissioner of Police', 'criminal record', and 'relevant decision'.

The definition of 'relevant decision' is particularly important, as it limits the circumstances in which the Director can request this information from the Commissioner of Police. The Director can only request information on a health care worker's criminal record if the information is required to make a decision to make an interim prohibition order in relation to the health care worker; make a prohibition order in relation to the health care worker; or publish a health warning statement in relation to a health care worker.

These limits ensure that sensitive personal information associated with a health care worker's criminal record is only able to be requested when the Director has reasonable grounds to believe that the health care worker presents a risk to public health and safety, and relevant action needs to be taken.

Section 71A(2) allows the Director, for the purposes of making a relevant decision, to request that the Commissioner of Police give the Director information concerning any criminal record of the health care worker, and allows the Director to give the Commissioner of Police any information concerning the health care worker that is necessary to conduct the criminal record check. Such information may include the health care worker's name and any aliases.

Section 71A(3) gives the Commissioner of Police discretion in providing the information sought by the Director in section 71A(2).

Clause 42 Section 77A inserted

This inserts a section that provides for regulations made under section 77 of the Act to prescribe one or more codes of conduct relating to the provision of health services by health care workers who are not registered providers, and health care workers who are registered providers and who provide health services that are unrelated to their registration.

This National Code of Conduct will become operational in Western Australia once it is prescribed by regulations. If amendments are required to the clauses of the National Code of Conduct to maintain uniformity with other jurisdictions the change can be made and implemented quickly in the regulations.

Clause 43 Consequential amendment to *Freedom of Information Act 1992*

This clause makes a consequential amendment to the *Freedom of Information Act 1992*. Under Schedule 1 of the *Freedom of Information Act 1992*, anything said or admitted during negotiated settlement or conciliation (HaDSCO's dispute resolution processes) is an exempt matter.

The reference in Schedule 1 of the *Freedom of Information Act 1992* to the Part of the *Health and Disability Services Complaints Act 1995* that deals with negotiated settlement and conciliation has been updated by clause 43 of the Bill.