

# EDUCATION AND CARE SERVICES NATIONAL LAW APPLICATION BILL 2024

## EXPLANATORY MEMORANDUM

### OVERVIEW

On 7 December 2009, the former Council of Australian Governments entered into the National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care 2009 (NPA). This led to the establishment and implementation in 2012 of the National Quality Framework (NQF) based on a uniform set of standards known as the National Quality Standard (NQS).

The NQF was implemented in all jurisdictions to ensure the safety, health and wellbeing of children attending education and care services and to improve educational and developmental outcomes through the provision of high-quality early childhood education and care.

Under the NQF the Ministerial Council, referred to as the Education Ministers Meeting or EMM, and made up of the Australian Government and State and Territory Government Ministers responsible for education that includes early education and care, has the function of overseeing and reviewing the operation of the NQF including its enabling legislation. The NPA required the NQF to be reviewed in 2014 and every five years thereafter.

While the NPA lapsed in 2018, the NQF continues as the national framework for regulating early childhood education and care services in all jurisdictions.

The NQF operates under an applied law system, comprising the *Education and Care Services National Law* (National Law) and the *Education and Care Services National Regulations* (National Regulations). The legislation is developed by consultation and agreement amongst all participating jurisdictions, with Victoria as the host jurisdiction which enacts and amends the *Education and Care Services National Law Act 2010* (Victoria) and which all jurisdictions other than Western Australia have adopted through an Application Act. Western Australia currently adopts the National Law through enacting legislation that mirrors or substantially corresponds to the National Law.

The Education and Care Services National Law Application Bill 2024 (the Bill) provides for an Act with the following purposes.

- Firstly, to apply the National Law set out in the Schedule to the Victorian *Education and Care Services National Law Act 2010* (Victoria), with modifications, as a law of Western Australia (WA). This Bill will change the mechanism for adopting the National Law from corresponding legislation to an applied law mechanism in line with all other jurisdictions.

The Bill will also apply the National Regulations made by the Ministerial Council under the National Law and published on the New South Wales (NSW) Legislation website as a law of WA with modifications.

- Secondly, the Bill provides for the tabling and disallowance of amendments made to the National Law and National Regulations. The Bill seeks to strike a balance between on the one hand, retaining the ability to make modifications to maintain

WA's established position as well as disallowing amendments to those laws and on the other, introducing an efficient mechanism to adopt the National Law and National Regulations.

- Thirdly, the Bill effectively brings into operation in WA amendments to the National Law to implement changes from the 2019 National Quality Framework Review. While the National Law, with modifications, is currently operational in WA by corresponding legislation, this does not include amendments made by Victorian Acts resulting from this review, those amendments having commenced in 2023.

Amendments to the National Law prior to 2022, which formed part of the reforms to the NQF identified as part of the 2014 Review of the NPA on the National Quality Agenda for Early Childhood Education and Care, were passed in Victoria in the *Education and Care Services National Law Amendment Act 2017*. WA introduced a corresponding amendment Bill which was passed and commenced on 1 October 2018.

Provisions in the *Early Childhood Legislation Amendment Act 2022* (Victoria) amended the National Law and commenced (variously) on 1 July 2023 and 1 October 2023 in all jurisdictions other than WA. Amendments to the National Law in the *Early Childhood Legislation Amendment (Premises Approval in Principle) Act 2023* (Victoria) commenced on 22 November 2023 in all jurisdictions except WA.

The key changes made to the National Law in 2022 and 2023 to give effect to these decisions that are not yet part of the WA Law and will come into effect when the national law is applied in WA are:

- strengthening the safety of children in early childhood education and care services by addressing gaps between the National Principles for Child Safe Organisations and the NQF, and requiring that all Family Day Care coordinators complete child protection training prior to commencing employment
- improving safety and oversight in family day care services by enabling improved access for Regulatory Authorities to family day care residence-level information on a service's family day care register, enabling risk-based proactive approaches to regulation and assisting in the identification of family day care educators during emergency situations
- improving oversight and compliance tools for Regulatory Authorities through minor changes to the process for transfer of services between approved providers
- providing that cancellation or refusal of provider approval under the Commonwealth Family Assistance Law for lack of fitness and propriety is to be a specific ground for cancellation or refusal of a provider approval under the National Law
- confirming that the Regulatory Authority may administer questions to an applicant for provider approval to assess the applicant's fitness and propriety and to undertake an assessment of their knowledge of the NQF
- updating maximum penalties for offences throughout the National Law by increasing those penalties by 14.9 per cent to keep up with the cumulative increase in the consumer price index since the NQF began in 2012

- reducing the burden for early childhood education and care services by aligning the definition of ‘person with management or control’ of a service with the Family Assistance Law definition of ‘person with management or control’ of a provider to better capture persons exercising significant influence over the operation of a service
- making minor and technical amendments to clarify existing provisions, such as the calculation of family day care coordinator to educator ratios.
- Fourthly, the Bill will repeal the *Education and Care Services National Law (WA) Act 2012* and the *Education and Care Services National Regulations 2012* which are made under that Act and provide for a transition to the applied legislation mechanism.

The Bill is set out as follows.

## **PROVISIONS IN THE BILL**

### **PART 1 – PRELIMINARY**

#### **Clause 1     Short title**

Once enacted, the short title of the Bill will be the *Education and Care Services National Law Application Act 2024* (**Application Act**).

#### **Clause 2     Commencement**

Clause 2 provides that Part 1, but only sections 1 and 2, come into operation on the day on which the Application Act receives Royal Assent and the rest of the Application Act on a day fixed by proclamation.

Providing for provisions of the Application Act to commence on a day fixed by proclamation will allow for subsidiary legislation to be made to facilitate the commencement of the Application Act. There are modifications to be made to the National Regulations to maintain WA established positions as well as to support aspects of the National Law, such as matters to be prescribed under the *Criminal Procedure Act 2004* for the purposes of infringement notices.

#### **Clause 3     Terms used**

Clause 3(1) defines terms used in the Application Act. These are:

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|----------------------------|--|
| <b><i>amend</i></b>        | is defined, in relation to the National Law or National Regulations to mean to add to, renumber, replace, substitute, repeal 1 or more provisions or otherwise vary, the National Law or National Regulations. |
| <b><i>amending Act</i></b> | is defined to mean a Victorian Act that receives Royal Assent after 20 June 2024 and amends the National Law or National Regulations.  |

**amending regulations** is defined to mean regulations that are made by the Ministerial Council under section 301 of the National Law after commencement day and amend the National Regulations.

**commencement day** is the day section 5 comes into operation.

**Education and Care Services National Law Regulations (WA)** is defined to mean the provisions applying as subsidiary legislation in WA because of section 11.

**Education and Care Services National Law (WA)** is defined to mean the National Law as it will apply in WA because of section 5.

**local regulations** is defined to mean the regulations made under section 74.

**National Law** is defined to mean the Education and Care Services National Law set out in the Schedule to the *Education and Care Services National Law Act 2010* (Victoria).

**National Regulations** is defined to mean the regulations made by the Ministerial Council under section 301 of the National Law.

**transitional modification regulation** is defined as having the meaning given in section 32(3) of the Application Act.

Clause 3(2) provides that terms used in the Application Act and also in the *Education and Care Services National Law (WA)* have the same meaning in the Application Act as they have in the Law.

#### **Clause 4 Act binds Crown**

Clause 4 provides for the Application Act to bind the Crown.

## **PART 2 – EDUCATION AND CARE SERVICES NATIONAL LAW**

### ***Division 1 – Application of National Law***

#### **Clause 5 Application of the National Law as a law of the State**

Clause 5(1) applies the National Law as a law of WA, which consists of:

- the National Law as in force on 20 June 2024;
- the National Law as modified in Part 3 of the Application Act, and if there are any, transitional modification regulations (explained further below at clause 32); and
- the National Law as amended by each amending Act subject to the disallowance provisions under clause 7 and the commencement provisions in

clause 8. If an amending Act is not disallowed, it will have effect under clause 7 and come into operation for the purposes of this Part as law of the State under clause 8.

Clause 5(2) provides that the National Law as applying in WA will be referred to as the *Education and Care Services National Law (WA)*.

The effect of clause 5(1) is to incorporate all amendments to the National Law to 20 June 2024, with any modifications specific to WA, and also with any future amending Acts that amend the National Law.

The National Law as in force on 20 June 2024 includes amendments made by the following:

- *Children's Services Amendment Act 2011* (Victoria);
- *Education and Care Services National Law Amendment Act 2017* (Victoria);
- *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017* (Victoria);
- *Regulatory Legislation Amendment (Reform) Act 2022* (Victoria);
- *Early Childhood Legislation Amendment Act 2022* (Victoria); and
- *Early Childhood Legislation Amendment (Premises Approval in Principle) Act 2023* (Victoria).

The current *Education and Care Services National Law (Western Australia)* in the Schedule to the *Education and Care Services National Law (WA) Act 2012* incorporates the amendments made by the *Children's Services Amendment Act 2011* (Victoria) and the *Education and Care Services National Law Amendment Act 2017* (Victoria) only.

The amendment in the *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017* (Victoria) to the National Law has subsequently been superseded by an amendment included in the *Early Childhood Legislation Amendment Act 2022* (Victoria).

The following amendments to the National Law are yet to be incorporated into the WA corresponding law and will be adopted in WA once the Bill commences operation.

The amendments in the *Regulatory Legislation Amendment (Reform) Act 2022* (Victoria) to the National Law were minor technical amendments (e.g. substitute references to Commonwealth legislation where those provisions have changed). There was an amendment to the definition of Ministerial Council. The purpose of this change was for consistency in references to Ministerial Councils across various legislative instruments that did not impact the operations or structure of the Ministerial Council. The detail of the amendments made to the National Law by this Act are set out in the Explanatory Memorandum for the then Bill which provide explanations of the amendments made to each of the provisions in the National Law.

The *Early Childhood Legislation Amendment Act 2022* (Victoria) (2022 Act) amends the National Law to implement recommendations arising from the 2019 National Quality Framework Review and some additional minor policy decisions made by the Ministerial Council. These amendments are reforms that had been agreed to by all jurisdictions. The detail of the amendments made to the National Law by the 2022 Act

are set out in the Explanatory Memorandum for the then Bill which provide explanations of the amendments to each provision in the National Law.

The *Early Childhood Legislation Amendment (Premises Approval in Principle) Act 2023* (Victoria) (2023 Act) amended the National Law to establish an approval in principle process in participating jurisdictions for certain types of education and care services premises located in multi-storey buildings. These amendments relate to a recommendation from the 2019 National Quality Framework Review. The detail of the amendments made to the National Law by the 2023 Act are set out in the Explanatory Memorandum for the then Bill which provide explanations of the amendments to each provision in the National Law. However, these are opt-in provisions, which require a jurisdiction to declare in a law that these provisions apply. WA is not declaring under the Application Act that the premises approval in principle process applies in WA.

A mechanism has been inserted into the Application Act which will also incorporate future amendments to the National Law, enacted by the Victorian Parliament after 20 June 2024, to be applied in WA, subject to tabling and disallowance by either House of Parliament.

Clause 5(1)(b)(ii) is considered to be a Henry VIII clause as it gives the Executive power to amend the operation of the Application Act by regulation. This permits a transitional modification regulation to amend the operation of a provision in an amending Act that amends the National Law and therefore the adoption of the National Law in WA. The reason for a clause that permits this modification by regulation is explained in clause 32.

## **Clause 6     **Tabling amending Acts****

Clause 6 requires an amending Act (in this instance, a Victorian Act that amends the National Law) to be laid before each House of Parliament within 18 sitting days of the House after the day on which the amending Act receives the Royal Assent.

The tabling requirement in this clause and potential disallowance of amending Acts in clause 7 will ensure that an amending Act which amends the National Law will be subject to scrutiny by the WA Parliament before becoming part of the *Education and Care Services National Law (WA)*. The mechanism provides that an amending Act can be disallowed by either House of Parliament.

The effect of clauses 7 and 8 are, on the one hand, to ensure consistency is maintained between the National Law and the *Education and Care Services National Law (WA)* by enabling amending Acts to apply in a timely manner, while on the other hand, protecting parliamentary sovereignty, as an amending Act will not come into effect until it has been scrutinised by the WA Parliament.

A similar provision is provided in section 8 of the *Legal Profession Uniform Law Application Act 2022*; section 19A of the *Fair Trading Amendment Act 2022*; section 7 of the *Marine Safety (Domestic Commercial Vessel National Law Application) Act 2023*; section 7 of the *Rail Safety National Law Application Act 2024*; and section 7 of the *Health Practitioner Regulation National Law Application Act 2024*.

## **Clause 7 Disallowance of amending Acts**

Clause 7 sets out the process by which an amending Act has effect.

An amending Act will have effect if it is laid before each House of Parliament and no notice of a disallowance resolution is given in relation to the amending Act in either House of Parliament within 14 sitting days after the amending Act is tabled.

An amending Act also has effect if it is laid before each House of Parliament, a notice of a disallowance resolution is given within 14 sitting days after the amending Act is tabled and either:

- the notice is withdrawn or discharged within 30 sitting days of the House after the day on which the notice is given; or
- the disallowance resolution is lost in the House or is not agreed to within 30 sitting days of the House after the day on which the notice is given.

If a valid notice of disallowance is passed, the provisions of the amending Act will not be incorporated into the *Education and Care Services National Law (WA)*.

The time periods for tabling amending Acts (in clause 6), giving notice of resolution to disallow or a disallowance period continue to run and a notice of disallowance resolution does not lapse even if a House is prorogued, dissolved or expires.

A similar provision is provided in section 8 of the *Legal Profession Uniform Law Application Act 2022*; section 19B of the *Fair Trading Amendment Act 2022*; section 8 of the *Marine Safety (Domestic Commercial Vessel National Law Application) Act 2023*; section 8 of the *Rail Safety National Law Application Act 2024*; and section 8 of the *Health Practitioner Regulation National Law Application Act 2024*.

## **Clause 8 Commencement of provisions of amending Acts**

Clause 8 provides for when an amending Act comes into operation in WA.

If an amending Act has effect under clause 7, that is it has not been disallowed, the Governor must declare that fact by proclamation as soon as practicable.

If an amending Act has come into operation in Victoria before the proclamation is published, the proclamation must fix a day when the provisions of an amending Act come into operation in WA. Otherwise, provisions of an amending Act will commence when they come into operation in Victoria.

Once an amending Act has been tabled, and if it has not been disallowed under clause 7, the Department of Communities will instruct Parliamentary Counsel's Office to draft a proclamation notifying that the amending Act now applies in WA and when it commences.

A similar provision is provided in section 9 of the *Marine Safety (Domestic Commercial Vessel National Law Application) Act 2023*; section 9 of the *Rail Safety National Law Application Act 2024*; and section 9 of the *Health Practitioner Regulation National Law Application Act 2024*.

### **Clause 9 Amending Acts enacted after 20 June 2024 but before commencement day**

Clause 9 provides that the mechanism for incorporating provisions of an amending Act and the disallowance process in clauses 6 to 8 apply to any amending Act that receives Royal Assent after 20 June 2024 but before commencement day. Those clauses are to apply as if the amending Act received Royal Assent on commencement day.

The effect of this clause is that any amendments that have been made after this Bill has been considered by a House of Parliament but before this Bill commences will be subject to scrutiny and disallowance.

Therefore, all amendments incorporated into the *Education and Care Services National Law (WA)* will be considered by the WA Parliament, either in the course of the consideration of this Bill, or via the disallowance process.

A similar provision is provided in section 264 of the *Legal Profession Uniform Law Application Act 2022*; section 19D of the *Fair Trading Amendment Act 2022*; section 10 of the *Marine Safety (Domestic Commercial Vessel National Law Application) Act 2023*; section 10 of the *Rail Safety National Law Application Act 2024*; and section 10 of the *Health Practitioner Regulation National Law Application Act 2024*.

### **Clause 10 Tabling of amending Act taken to be publication for Standing Orders**

Clause 10 provides that an amending Act tabled before each House of Parliament under clause 6 will be taken to be “published” for the purpose of any Standing Orders which provide that, on publication of an instrument under a written law it is to stand referred to a committee that is established by either or both Houses of Parliament.

If the Standing Orders of the House provide specifically for an amending Act to be considered by a parliamentary committee, then clause 10 will not apply.

This clause is ensuring that an amending Act is referred to a parliamentary committee for consideration.

A similar provision is provided in section 11 of the *Legal Profession Uniform Law Application Act 2022*; section 19E of the *Fair Trading Amendment Act 2022*; section 11 of the *Marine Safety (Domestic Commercial Vessel National Law Application) Act 2023*; section 11 of the *Rail Safety National Law Application Act 2024*; and section 11 of the *Health Practitioner Regulation National Law Application Act 2024*.

## ***Division 2 – Application of National Regulations***

### **Clause 11 Application of National Regulations as subsidiary legislation of the State**

Clause 11(1) applies the National Regulations as a law of WA, which consists of:

- the National Regulations as in force on commencement day;
- the National Regulations as modified by regulations made in WA under clause 74; and



- the National Regulations as amended by:
  - each set of amending regulations, subject to the disallowance provisions under clause 13 and the commencement provisions in clause 14. If amending regulations are not disallowed, they will have effect under clause 13 and come into operation for the purposes of this Part as a law of the State under clause 14;
  - and
  - each amending Act, subject to the disallowance provisions under clause 7 and the commencement provisions in clause 8. If an amending Act is not disallowed, it will have effect under clause 7 and come into operation for the purposes of this Part as law of the State under clause 8.

The effect of clause 11(1) is to incorporate all amendments to the National Regulations as in force on commencement day with any modifications specific to WA to be provided for in WA regulations. Amending regulations made by the Ministerial Council after commencement day will be subject to scrutiny and disallowance by the WA Parliament, similar to the provisions in the Application Act for an amending Act.

The current corresponding WA regulations (*Education and Care Services National Regulations 2012*) incorporate amendments, with modifications to suit WA requirements, made to the National Regulations up to and including those made by the Ministerial Council and published on the NSW Legislation website in 2023 other than a small number of amendments that depend upon WA bringing into force the 2019 NQF Review National Law amendments. Each of the WA amending regulations have been tabled and subject to consideration by the Joint Standing Committee on Delegated Legislation.

The *Education and Care Services National Amendment Regulations 2024* [SL 143] (Regulations 2024) and the *Education and Care Services National Further Amendment Regulations 2024* [SL 144] (Regulations 2024 (No 2)) have been made by the Ministerial Council under section 301 of the National Law and published on the NSW Legislation website. These amendments are yet to be incorporated into the WA corresponding regulations and will be applied in WA once the Bill commences operation, subject to any modification under local regulations necessary to make them suitable to WA.

The amendments in Regulations 2024:

- support the premises approval in principle process for those education and care premises in multi-stored buildings. The premises approval in principle process will not be applying in WA;
- amend the prescribed information to be displayed in a family day care service and other education and care services;
- make minor technical amendments regarding fees; and
- make amendments specific to the Australian Capital Territory.

The amendment in Regulations 2024 (No 2) is specific to South Australia and will have no application in WA.

There are provisions in the National Regulations that are due to expire on 31 December 2024 which provide flexibility for services and providers during a time of workforce shortages. These regulations currently apply in WA and are of particular importance to education and care services in remote and very remote areas. The application of these provisions have previously been extended. Should the Ministerial Council make amending regulations to extend the period these particular provisions apply and they are published on the NSW Legislation website before commencement day, they will be adopted in WA.

A mechanism has been inserted into the Application Act which will also incorporate future amendments to the National Regulations, made by the Ministerial Council and published on the NSW Legislation website after commencement day, to be applied in WA, subject to tabling and disallowance by either House of Parliament.

Clause 11(2) provides that the National Regulations as applying in WA will be referred to as the *Education and Care Services National Law Regulations (WA)*.

The *Education and Care Services National Law Regulations (WA)* will come into operation when clause 11 and clause 74(2) are proclaimed.

Clause 11(1)(b) is considered to be a Henry VIII clause as it gives the Executive power to amend the operation of the Application Act by regulation. This permits regulations to modify the National Regulations as they are to be adopted in WA. The reason for a clause that permits this modification by regulation is explained in clause 74 regarding the power to make regulations.

### **Clause 12    Tabling amending regulations**

Clause 12 requires amending regulations (being regulations that are made by the Ministerial Council under section 301 of the National Law which amend the National Regulations) to be laid before each House of Parliament within 18 sitting days of the House after the day on which the amending regulations are published on the NSW Legislation website in accordance with section 302 of the National Law.

The tabling requirement and potential disallowance of amending regulations will ensure that amending regulations which amend the National Regulations will be subject to scrutiny by the WA Parliament before they apply in WA. The mechanism provides that amending regulations can be disallowed by either House of Parliament.

### **Clause 13    Disallowance of amending regulations**

Clause 13 sets out the process by which amending regulations have effect.

Amending regulations will have effect if they are laid before each House of Parliament and no notice of a disallowance resolution is given in relation to the amending regulations in either House of Parliament within 14 sitting days after the amending regulations are tabled.

Amending regulations also have effect if they are laid before each House of Parliament under clause 12, a notice of a disallowance resolution is given within 14 sitting days after the amending regulations are tabled and either:

- the notice is withdrawn or discharged within 30 sitting days of the House after the day on which the notice is given; or

- the disallowance resolution is lost in the House or is not agreed to within 30 sitting days of the House after the day on which the notice is given.

If a valid notice of disallowance is passed, the provisions of the amending regulations will not apply in WA and will not be incorporated into the *Education and Care Services National Law Regulations (WA)*.

Clause 7(3) provides that the time periods for tabling amending regulations (in clause 12), giving notice of resolution to disallow or a disallowance period continue to run and a notice of disallowance resolution does not lapse even if a House is prorogued, dissolved or expires.

Clause 67 modifies section 303 of the National Law by deleting section 303(2), (3) and (4) as they relate to the scrutiny and disallowance of regulations by a House of Parliament in a participating jurisdiction. The Application Act is providing a mechanism for tabling and disallowance of amending regulations and clauses 13 and 15 are providing for the consideration by a parliamentary committee and possible disallowance by a House of Parliament in WA.

#### **Clause 14 Commencement of provisions of amending regulations**

Clause 14 sets out when amending regulations come into operation in WA.

Clause 14(1) provides that if amending regulations have effect under clause 13(2), that is they have not been disallowed, the Governor must declare that fact by proclamation as soon as practicable.

Clause 14(2) provides that if amending regulations have come into operation before the proclamation is published, the proclamation must fix a day when the amending regulations come into operation in WA. Otherwise, provisions of amending regulations will commence when they come into operation under the National Law, which will be the day or days specified in the regulation for their commencement (section 302(2) of the National Law).

Once amending regulations have been tabled, and if they have not been disallowed under clause 13, the Department of Communities will instruct Parliamentary Counsel's Office to draft a proclamation notifying that the amending regulations now apply in WA and when they commence.

Clause 66 modifies section 302 of the National Law by deleting section 302(2) as it relates to the commencement of regulations. The Application Act is providing a mechanism for tabling and disallowance of amending regulations and if not disallowed, clause 14 is providing for when those amending regulations will commence in WA.

#### **Clause 15 Tabling of amending regulations taken to be publication for Standing Orders**

Clause 15 provides that amending regulations tabled before each House of Parliament under clause 12 will be taken to be "published" for the purpose of any Standing Orders which provide that on publication of an instrument under a written law it is to stand referred to a committee that is established by either or both Houses of Parliament.

If the Standing Orders of the House provide specifically for amending regulations to be considered by a parliamentary committee, then clause 15 will not apply.

This clause is ensuring that amending regulations are referred to a parliamentary committee for consideration.

### **Clause 16 Amendment of National Regulations by amending Act provision**

Clause 16(1) provides that National Regulations amended by a provision of an amending Act have effect for the purposes of their application in WA under clause 11, if the amending Act has been subject to the disallowance provision in clause 7 and there has been no disallowance, and the provision of the amending Act has come into operation under clause 8 (commencement of provisions in amending Acts).

Clause 16(2) provides that the tabling and disallowance mechanism in clauses 12 and 13 do not apply to amendments to the National Regulations that are made by an amending Act. This is because the amending Act will be subject to the tabling and disallowance mechanism applicable to amending Acts and avoids duplication of process.

If a valid notice of disallowance is passed under clause 7, the amending Act provision that amends the National Regulations will not apply in WA and will not be incorporated into the *Education and Care Services National Law Regulations (WA)*.

A similar provision is provided in section 13 of the *Health Practitioner Regulation National Law Application Act 2024* and section 13 of the *Rail Safety National Law Application Act 2024*.

### ***Division 3 – Jurisdiction-specific matters for National Law***

### **Clause 17 Commencement of National Law as law of the State**

Clause 17 provides that the *Education and Care Services National Law (WA)* comes into operation on commencement day.

### **Clause 18 Meaning of generic terms in *Education and Care Services National Law (WA)* for purposes of this jurisdiction**

Clause 18 provides for the meaning of jurisdiction-specific terms used in the *Education and Care Services National Law (WA)*. This clause substantially corresponds with section 6 of the *Education and Care Services National Law (WA) Act 2012*.

### **Clause 19 Children's services law**

Clause 19 declares the *Child Care Services Act 2007* and the regulations made under that Act to be the children's services law for the purposes of the *Education and Care Services National Law (WA)*.

This clause replicates section 9(1) of the *Education and Care Services National Law (WA) Act 2012*.

### **Clause 20 Children's services regulator**

Clause 20 declares the chief executive officer of the Department of Communities, being the department principally assisting in the administration of the *Child Care Services Act 2007* to be the children's services regulator for the purposes of the *Education and Care Services National Law (WA)*.

This clause replicates section 9(2) of the *Education and Care Services National Law (WA) Act 2012*.

#### **Clause 21 Education law**

Clause 21 declares the *School Education Act 1999* and the *Teacher Registration Act 2012* and the regulations made under each of those Acts to be the education law for the purposes of the *Education and Care Services National Law (WA)*.

This clause replicates section 10 of the *Education and Care Services National Law (WA) Act 2012*.

#### **Clause 22 Former education and care services law**

Clause 22 declares that each of the *Child Care Services Act 2007* and the regulations made under that Act and the *Education and Care Services National Law (Western Australia)* and the regulations made under that Law are a former education and care services law for the purposes of the *Education and Care Services National Law (WA)*.

This clause is similar to section 11 of the *Education and Care Services National Law (WA) Act 2012* with the addition of reference to the *Education and Care Services National Law (Western Australia)* that is in the Schedule to the *Education and Care Services National Law (WA) Act 2012* which is to be repealed.

#### **Clause 23 Infringements law**

Clause 23 declares the *Criminal Procedure Act 2004* Part 2 and the regulations made under that part of the Act to be the infringements law for the purposes of the *Education and Care Services National Law (WA)*.

This clause replicates section 12 of the *Education and Care Services National Law (WA) Act 2012*.

#### **Clause 24 Public sector law**

Clause 24 declares the *Public Sector Management Act 1994* and the regulations made under that Act to be the public sector law for the purposes of the *Education and Care Services National Law (WA)*.

This clause replicates section 13 of the *Education and Care Services National Law (WA) Act 2012*.

#### **Clause 25 Regulatory Authority**

Clause 25 declares the chief executive officer of the Department of Communities, being the department principally assisting in the administration of the *Child Care Services Act 2007*, to be the Regulatory Authority for the purposes of the *Education and Care Services National Law (WA)*.

This clause replicates section 8 of the *Education and Care Services National Law (WA) Act 2012*.

## **Clause 26 Relevant tribunal or court**

Clause 26 declares the State Administrative Tribunal to be the relevant tribunal or court for the purposes of the *Education and Care Services National Law (WA)*.

This clause replicates section 7 of the *Education and Care Services National Law (WA) Act 2012*.

## **Clause 27 Working with children law**

Clause 27 declares the *Working with Children (Screening) Act 2004* and the regulations made under that Act to be the working with children law for the purposes of the *Education and Care Services National Law (WA)*.

This clause replicates section 14 of the *Education and Care Services National Law (WA) Act 2012*.

### ***Division 4 – Relationship with other laws***

## **Clause 28 Interaction between *Education and Care Services National Law (WA)* and this Act**

Clause 28 provides that, in the event of an inconsistency between this Act and the *Education and Care Services National Law (WA)*, this Act prevails to the extent of the inconsistency.

## **Clause 29 Exclusion of legislation of this jurisdiction**

Clause 29(1) provides that the *Interpretation Act 1984* does not apply to the *Education and Care Services National Law (WA)* or the *Education and Care Services National Regulations (WA)*. Interpretation matters are provided for in the *Education and Care Services National Law (WA)* section 6 and Schedule 1. The *Interpretation Act 1984* will apply to the Application Act.

Clause 29(2) further provides that specified Acts that generally apply to WA legislation do not apply to the *Education and Care Services National Law (WA)*, or to the instruments made under the Law, except as applied under the Law. The excluded Acts relate to matters that are provided for in the National Law ensuring that the same law applies in relation to each jurisdiction that adopts the National Law.

Acts dealing with freedom of information, financial matters, the role of the Ombudsman, state records, and the employment of persons in the public sector will also not apply to the *Education and Care Services National Law (WA)*, or instruments made under that Law.

However, clause 29(3) provides that an Act mentioned in subclause (2) applies to a public sector body as defined in the *Public Sector Management Act 1994* (PSMA) section 3 and an employee of a body performing a function under the *Education and Care Services National Law (WA)*. The effect is that the Department assisting the Minister for Early Childhood Education and employees of the Department continue to be subject to the PSMA and the other Acts mentioned.

This clause is based on section 5 of the *Education and Care Services National Law (WA) Act 2012*.

### **Clause 30 Application of *Public Sector Management Act 1994* to specific entities**

This clause applies for the purposes of the *Education and Care Services National Law (WA)* and any other Act or law.

Clause 30(2) sets out specified bodies that are not an agency as defined in the PSMA section 3(1), as follows:

- the Ministerial Council as defined in the *Education and Care Services National Law (WA)* section 5;
- Australian Children's Education and Care Quality Authority (the National Authority) established under the *Education and Care Services National Law (WA)* section 244;
- the Australian Children's Education and Care Quality Authority Board (the Board) established under the *Education and Care Services National Law (WA)* section 230;
- a committee established by the Board under the *Education and Care Services National Law (WA)* section 247;
- a person declared by a law of a participating jurisdiction to be the Regulatory Authority for that jurisdiction or for a class of education and care services for that jurisdiction;
- the Ratings Review Panel established under the *Education and Care Services National Law (WA)* section 146.

Clause 30(3) clarifies that to the extent a person is any of the following under the *Education and Care Services National Law (WA)*, the person is not a public service officer as defined in the PSMA section 3(1) –

- (a) a member of the Board;
- (b) the chief executive officer of the National Authority;
- (c) an employee of a body mentioned in subsection (2);
- (d) a person engaged by the National Authority as a consultant or contractor.

## **PART 3 – MODIFICATION OF NATIONAL LAW**

### **Clause 31 Modification of National Law**

Clause 31(1) provides that for the purposes of the definition of *Education and Care Services National Law* in clause 5(1) of the Application Act, the National Law applies in WA as if modified by the amendments set out in Part 3 of the Application Act. These are the modifications in clauses 33 to 73.

Clause 31(2) provides that if a *transitional modification regulation* under clause 32 is in effect, the National Law applies as if modified as set out in Part 3, other than any sections disapplied by the regulation and as set out in the regulation.

This clause is linked to clause 5 being the definition of *Education and Care Services National Law*, clause 32 that provides for the circumstances in which a transitional

modification regulation may be made and clause 74 being the power to make local regulations.

### **Clause 32 Transitional modification regulations**

Clause 32(1) sets out the circumstances when the clause will apply, being if:

- an amending Act has effect under section 7 (it has not been disallowed); and
- a modification of the National Law set out in Part 3 of the Application Act cannot be given effect because of an amendment of the National Law made by the amending Act (the *affected modification*).

Clause 32(2) provides that local regulations made under clause 74 may:

- disapply the section of the amending Act that is affecting the Part 3 modification; or
- to the extent necessary set out a modification of the National Law so the Part 3 modification can be given effect; or
- provide for a matter of a transitional nature that arises as a result of the operation of the amending Act or a regulation modifying the National Law; or
- provide for a matter or issue of a saving or application nature regarding the Part 3 modification impacted by the provision of the amending Act.

Clause 32(3) provides that the transitional modification regulation expires 12 months after the day it comes into operation. However, clause 32(4) provides that the transitional modification regulation that disapplies or modifies the National Law in order to give effect to the Part 3 modification will expire sooner than 12 months if an amendment Act commences which addresses the matter (e.g. amends the Part 3 modification).

Clause 32 is a Henry VIII clause as it seeks to modify by way of regulations, albeit temporarily, provisions in the Application Act. WA has been modifying provisions of the National Law via the current corresponding legislation mechanism, where it has been necessary to do so to ensure the relevant provision suits WA requirements allowing recognition of WA's unique context to other jurisdictions. For the purposes of this Bill, which is changing the mechanism for adopting the National Law to an applied law mechanism, clauses 33 to 73 contain modifications to the National Law to maintain WA established positions that have been in effect since 2012. These include modifications to the recent amendments of the National Law set out in the *Early Childhood Legislation Amendment Act 2022* (Victoria).

The effect of this clause is to enable, as a short-term measure, an amendment by regulation to remedy a circumstance where a provision of an amending Act impacts a modification to the National Law in any of clauses 33 to 73 of the Application Act. A provision of an amending Act may add to, renumber, replace or otherwise vary provisions in the National Law. That change may affect the modification to a provision in the National Law set out in clauses 33 to 73 of the Application Act so that the modification does not have effect.

Any transitional modification regulation expires 12 months after the day the regulation comes into operation, or when an amendment to the section in the Application Act that sets out the modification comes into operation, whichever is the sooner.



This clause provides a temporary measure to quickly ensure that a modification to the National Law continues to apply in WA as is necessary and appropriate to suit WA's requirements. This will provide time in which to draft and introduce necessary amendments in a Bill for introduction and passage through Parliament to amend the particular clause or clauses in Part 3 of this Application Act. Also, the transitional modification regulation will be subject to the provisions of *the Interpretation Act 1984*, in particular sections 41 and 42. The regulations must therefore be tabled in each House of Parliament, are considered by the Joint Standing Committee on Delegated Legislation and are disallowable by either House of Parliament.

### **Clause 33 Section 3 modified**

The National Law refers to “rights and best interests” of the child because Victoria has enacted a *Charter of Human Rights and Responsibilities Act 2006* under which any Act must be accompanied by a statement of compatibility. WA does not have a comparable Act. The inclusion of “and rights” has a clear function and meaning in the Victorian context, but not in the WA context.

Clause 33 modifies the National Law to remove “rights and” and thereby make it consistent with the *Children and Community Services Act 2004 (WA)* section 7 that the paramount consideration is the best interests of the child.

### **Clause 34 Section 5 modified**

The National Law provides for several definitions related specifically to interactions with the school education system. These are based on the definition of ‘grade 1’ under the National Law being the first year of compulsory full-time schooling. These definitions apply both in the National Law and regulations made under the National Law.

The National Law definitions are problematic in WA due to the first year of compulsory schooling being earlier than other jurisdictions (i.e. pre-primary). As a result, in WA ‘pre-school’ definitions capture children who are 3 years and under, rather than 4 years and under as is the NQF intent.

The current *WA Education and Care Services National Law (WA) Act 2012* has different definitions that dovetail with the operation of the *WA School Education Act 1999*. The Application Act provides for modifications to the National Law that will preserve WA's established legislative provisions that maintain the intent of the NQF in WA.

Subclause (1) deletes the definition of preschool program as this does not apply in WA and is to be captured in the *Education and Care Services National Regulations (WA)*.

Subclause (2) modifies the National Law by inserting the following definitions in section 5(1) –

- community kindergarten means a kindergarten registered under the *School Education Act 1999*.
- disciplinary action means disciplinary action under Part 7 Division 3A of the *Education and Care Services National Law (WA)*.
- educational programme means an educational program as defined in the *School Education Act 1999*.

- executor means, in relation to an approved provider, one of the recognised forms of administration of a deceased estate in WA including an executor named in a valid will and a person entitled to a grant of letters of administration in relation to the estate.
- parent means a person who has responsibility for the long term care, welfare and development of the child or the day-to-day care, welfare and development of the child.
- school children includes students as defined in the *School Education Act 1999*, attending school before Grade 1.

### **Clause 35 Section 10 modified**

This clause is consequential to clause 36 and relates to information requested by the Regulatory Authority, rather than to all prescribed information. Further explanation is provided in clause 36.

This modification retains the wording under the current section 10(3)(a) in the *Education and Care Services National Law (Western Australia)*.

### **Clause 36 Section 11 modified**

Section 11 of the National Law is a provision that provides for a person to apply for, and be granted or refused, a service provider approval.

Section 11(c) in the National Law requires that an application must include the “prescribed information”.

The clause modifies the wording in section 11 of the National Law to maintain the current wording in the *Education and Care Services National Law (Western Australia)* section 11(c), which includes the additional words ‘requested by the Regulatory Authority’. These words were included so that the WA Regulatory Authority could decide to ‘not’ request some of the prescribed information.

The grant or refusal of service approval is not always dependent upon the provision of the prescribed information. The Regulatory Authority must consider the criteria in section 47 of the National Law and the grounds for grant or refusal in section 49. Information is prescribed to assist the Regulatory Authority in deciding whether or not those criteria are satisfied. Maintaining the wording that currently applies in WA in section 11 provides the Regulatory Authority with flexibility to accept and process an application in circumstances, including emergency re-locations, where not all the information prescribed in regulation 25 is immediately available or required.

Section 14 of the WA (and National) Law also provides the Regulatory Authority with the power to request further information and undertake inquiries.

Other clauses of the Bill that provide for the consequential inclusion of the modified phrase are clauses 35, 38, 40 - 43, 45 - 47 and 50 - 54.

### **Clause 37 Section 17 replaced**

Clause 37 deletes section 17 of the National Law and inserts a provision that provides that a provider approval granted under section 15 continues in force until it is either

cancelled or suspended under this Law or this Law as applying in a participating jurisdiction or if the provider approval is granted to an individual, the individual dies.

This modification expressly provides for the provider approval to come to an end where the persons dies, whereas the National Law is silent on the issue.

This modification retains the current section 17 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 38 Section 22 modified**

This clause modifies section 22 of the National Law which relates to an application to amend a provider approval. Similar to clause 36, the modification is to the information that is required to be provided as part of the application. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 22(2)(b) in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 39 Section 25 modified**

Clause 39 deletes paragraphs (a) and (g) in section 25 of the National Law and replaces those paragraphs. The clause therefore amends the circumstances in which a provider approval may be suspended.

The modification provides for the broadening of the effectiveness of the provision to include a person with management or control of an education and care service operated by the approved provider and inserts additional grounds on which a service approval may be suspended to include an amount payable under an order relating to disciplinary proceedings under section 188AB or prescribed fees are unpaid and outstanding.

This modification retains the wording under the current section 25(a) and (g) in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 40 Section 37 modified**

Clause 40 modifies section 37 of the National Law which relates to an application for voluntary suspension of provider approval. Similar to clause 36, the modification is to the information that is required to be provided as part of the application. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 37 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 41 Section 39 modified**

Clause 41 modifies section 39 of the National Law which relates to the death of an approved provider and where the executor of the estate of the approved provider may apply for a provider approval. Similar to clause 36, the modification is to the information that is required to be provided as part of the application. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 39 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 42 Section 40 modified**

Clause 42 modifies section 40 of the National Law which relates to the incapacity of an approved provider and where the legal personal representative or guardian of an approved provider may apply for a provider approval. Similar to clause 36, the modification is to the information that is required to be provided as part of the application. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 40 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 43 Section 44 modified**

Clause 43 modifies section 44 of the National Law which relates to an application for a service approval. Similar to clause 36, the modification is to the information that is required to be provided as part of the application. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 44 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 44 Section 51 modified**

Clause 44 modifies section 51 of the National Law which relates to conditions on service approval. The clause amends the section to provide increased flexibility for services and families, broadening the circumstances where up to two children may be cared for in an emergency at certain services by deleting the requirement that the two children must be from the same family.

This modification retains the wording under the current section 51 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 45 Section 54 modified**

Clause 45 modifies section 54 of the National Law which relates to an application by an approved provider for amendment of a service approval. Similar to clause 36, the modification is to the information that is required to be provided as part of the application. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 54 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 46 Section 56 modified**

Clause 46 modifies section 56 of the National Law which relates to notice of addition of a nominated supervisor. Similar to clause 36, the modification is to the information that is required to be provided as part of the notice. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 56 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 47 Section 59 modified**

Clause 47 modifies section 59 of the National Law which relates to the giving of notice of a transfer by a transferring approved provider and the receiving approved provider. Similar to clause 36, the modification is to the information that is required to be provided as part of the notice. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 59 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 48 Section 62 modified**

Clause 48 modifies the way in which the Regulatory Authority is to give notice of intervening in a transfer of a provider approval by requiring that the notice is to be given in writing.

This modification retains the wording under the current section 62(4) in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 49 Section 70 modified**

Clause 49 deletes paragraph (i) in section 70 of the National Law. The clause inserts additional grounds on which a service approval may be suspended to include where an amount payable under an order relating to disciplinary proceedings under section 188AB or prescribed fees are unpaid and outstanding.

This modification retains the wording under the current section 70(i) in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 50 Section 85 modified**

Clause 50 modifies section 85 of the National Law which relates to an application for voluntary suspension of service approval. Similar to clause 36, the modification is to the information that is required to be provided as part of the application. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 85 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 51 Section 88 modified**

Clause 51 modifies section 88 of the National Law which relates an application for a waiver. Similar to clause 36, the modification is to the information that is required to be provided as part of the application. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 88 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 52 Section 95 modified**

Clause 52 modifies section 95 of the National Law which relates to application for a temporary waiver. Similar to clause 36, the modification is to the information that is

required to be provided as part of the application. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 95 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 53 Section 139 modified**

Clause 53 modifies section 139 of the National Law which relates to an application for a reassessment and re-rating of an approved education and care service. Similar to clause 36, the modification is to the information that is required to be provided as part of the notice. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 139 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 54 Section 141 modified**

Clause 54 modifies section 141 of the National Law which relates to an application for review of ratings levels. Similar to clause 36, the modification is to the information that is required to be provided as part of the notice. The explanation provided in clause 36 is applicable.

This modification retains the wording under the current section 141 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 55 Section 165A inserted**

This clause retains the current offence in section 165A of the *Education and Care Services National Law (Western Australia)* being an offence relating to children leaving the education and care service premises unauthorised.

Clause 55 inserts a section relating to the requirement for an education and care service to ensure that a child only leaves the service premises in specific ways, for example into the care of a parent of the child. This is a significant policy and legislative difference between WA and other jurisdictions and relates to the consequences of breaching the requirement:

- under current section 165A in the *Education and Care Services National Law (Western Australia)* the maximum penalty for breaching the requirement is \$10,000 for an individual and \$50,000 in any other case
- in all other jurisdictions the maximum penalty is \$2,200 in any case and this offence is in the National Regulations and not the National Law.

The Application Act modifies the National Law to retain WA's specific provision and penalties in the National Law instead of the National Regulations.

All penalties under the National Law were recently increased by the NQF Review amendments to account for the effect of cumulative inflation and the need to maintain the effective deterrent nature of all penalties. The modification in the Application Act therefore provides for penalties for contravening this WA-specific provision in the amounts of \$11,400 for an individual and \$57,400 in any other case, consistently with the national implementation of the NQF Review.

#### **Clause 56 Section 179A modified**

Clause 56 provides for a person to voluntarily and pre-emptively approach the Regulator about entering an undertaking without admitting they have breached the National Law.

This modification retains the wording under the current section 179A(1)(a) in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 57 Part 7 Division 3A inserted**

Clause 57 inserts Part 7 Division 3A into the *Education and Care Services National Law (WA)* which will retain the current sections 188AA to 188AC in the current *Education and Care Services National Law (Western Australia)*. These are provisions specific to WA and are not contained in the National Law.

These sections provide the regulatory authority with further enforcement options in respect of a person linked to a WA education and care service. Where a person has failed to comply with the law, the regulatory authority may make allegations to the State Administrative Tribunal which may make a range of orders including a reprimand or a compliance order.

#### **Clause 58 Section 197 modified**

Clause 58 inserts into section 197(1) of the *Education and Care Services National Law (WA)* an additional power for monitoring compliance with a working with children law by specified persons in relating to the provision of an education and care service.

This modification retains the wording under the current section 197(1) in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 59 Section 204 modified**

Clause 59 modifies section 204 of the *Education and Care Services National Law (WA)* to extend the power to require a person to give their name and address to circumstances relating to offences against working with children laws.

This modification retains the wording under the current section 204(1) in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 60 Section 206 modified**

Clause 60 modifies section 206 to insert an additional power for monitoring compliance with a working with children law by specified persons in relating to the provision of an education and care service.

This modification retains the wording under the current section 206(1) in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 61 Section 215 modified**

Clause 61 removes the term 'specified' so that the requirement to provide evidence, information, documents is broadened to apply to a person.

This modification retains the wording under the current section 215 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 62 Section 216 modified**

Clause 62 removes the term 'specified' so that the requirement to provide evidence, information, documents is broadened to apply to a person.

This modification retains the wording under the current section 216 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 63 Section 219 modified**

Clause 63 inserts 'disciplinary proceedings' in addition to criminal and civil proceedings where disclosed information is not admissible.

This modification retains the wording under the current section 219 in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 64 Section 225 modified**

After the *Education and Care Services National Law (WA) Act 2012* and the *Education and Care Services National Regulations 2012 (WA)* commenced on 1 August 2012 the Joint Standing Committee on Delegated Legislation (JSCDL) considered the regulations and sought undertakings from the responsible Minister relating to amending the legislation to include reference to 'family members' in addition to 'parents'. The JSCDL 2012 Report discusses the policy purpose of giving respect to Aboriginal and Torres Strait Islander parenting practices.

Both the *Education and Care Services National Law (WA) Act 2012* and the *Education and Care Services National Regulations 2012 (WA)* were amended to include reference to 'family members' in appropriate places.

This clause preserves this WA-specific position. Modifications to the National Regulations will also be required.

This modification retains the wording under the current section 225(1)(l) in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 65 Section 270 modified**

Clause 65 modifies section 270 to broaden the publication of information to include people subject to disciplinary action, not just offences. This is as a result of the insertion of Part 7 Division 3A inserted in clause 57.

This modification retains the wording under the current section 270(6) in the *Education and Care Services National Law (Western Australia)*.

#### **Clause 66 Section 302 modified**

The National Law sections 301 to 304 provide for the making of *Education and Care Services National Regulations* and their publication and disallowance. However, the Application Act modifies some of these provisions.



Section 302 provides for the publication of National Regulations on the NSW Legislation website and that a regulation commences on the day or days specified in the regulation for its commencement. Clause 66 modifies section 302 by deleting section 303(2) regarding when regulations commence. This has been deleted as a result of the mechanism inserted by the Application Act for tabling, disallowance and commencement of amending regulations in clauses 12 to 15.

### **Clause 67 Section 303 modified**

The National Law section 303 provides for Parliamentary scrutiny of National Regulations by way of tabling, scrutiny by a Parliamentary committee, and disallowance.

Clause 67 modifies section 303 by deleting the National Law subsections 303(2), (3) and (4). These subsections are to be deleted as a result of the mechanism inserted by the Application Act for tabling, disallowance and commencement of amending Regulations in clauses 12 to 15.

### **Clause 68 Part 15 Divisions 1 to 6 deleted**

Clause 68 deletes Divisions 1 to 6 of Part 15, being sections 305 to 335 that are transitional provisions. These included transitional arrangements from the State and Territory jurisdiction specific laws to the National Law, which in WA was the transition from the *Child Care Services Act 2007* (WA), to the *Education and Care Services Law (Western Australia)* and also as a result of amendments made to the National Law by a Victorian Act in 2017 and in WA were amendments made in the *Education and Care Services National Law (WA) Amendment Act 2018*.

Transitional provisions as a result of moving from the corresponding law mechanism to the applied law mechanism are provided for in Part 5 of the Application Act.

### **Clauses 69 to 72 Sections 336 to 339 modified**

Clauses 69 to 72 amend sections 336 to 339 of the National Law. This is to delete the definition of commencement day in those sections and to replace with a definition that defines **commencement day** as the day the *Education and Care Services National Law (WA)* section 5 comes into operation.

Sections 336 to 339 are transitional provisions resulting from amendments to the National Law introduced by the *Early Childhood Legislation Amendment Act 2022* (Victoria) which commenced (variously) on 1 July 2023 and 1 October 2023. The amendments in that Victorian Act have not been incorporated into the legislation in WA, but following commencement of the Application Act will be incorporated into the *Education and Care Services National Law (WA)* by reason of section 5 of the Application Act.

Sections 336, 337, 338 and 339 provide for transitional provisions in relation to —

- the expanded definition of "person with management or control" of an education and care service, so that a person who is a person with management or control on commencement day (other than a person who already satisfied that definition before commencement day) is taken to be appointed as a person with management or control on that day; and

- assessment of provider approval applications currently being considered by the Regulatory Authority, so that the amended section 14 of the National Law applies to a pending application for a provider approval and a pending reassessment;
- service waivers currently in force before commencement day continue to have effect until they are revoked by the Regulatory Authority; and
- temporary waivers currently in force before commencement day continue to have effect until the waiver expires or it is revoked by the Regulatory Authority, whichever is the sooner.

### **Clause 73 Schedule 1 modified**

Schedule 1 provides for miscellaneous provisions relating to interpretation of the National Law that may be displaced wholly or partly by a contrary intention appearing in the Law.

Schedule 1 has been modified by inserting a provision being section 11A in the *Education and Care Services National Law (WA)* whereby a penalty specified at the end of a provision indicates that a contravention of the provision is an offence, the penalty on conviction for which is the penalty specified.

## **PART 4 – OTHER MATTERS**

### **Clause 74 Local regulations**

Clause 74 provides that the Governor may make regulations prescribing all matters that are required or permitted under the Application Act to be prescribed, or necessary or convenient to be prescribed for giving effect to the Application Act.

The types of matters the regulations may provide for include:

- modifications to the National Regulations for the purpose of applying the National Regulations in WA; or
- provisions of a saving or transitional nature for the purpose of accommodating differences between the National Regulations and the *Education and Care Services National Law Regulations (WA)*; or
- matters to be prescribed under the *Criminal Procedure Act 2004*, Part 2 for the purposes of the *Education and Care Services National Law (WA)*; or
- fees for things to be done under the Application Act or the *Education and Care Services National Law (WA)*.

This regulation-making power may also be used for the purpose of making any transitional modification regulations under clause 32 (explained at clause 32).

Clause 74 is a Henry VIII clause as it permits modifications to be made to the National Regulations which are to apply in WA and will also give power to make “transitional modification regulations” as described in clause 32.

Currently, WA makes corresponding regulations under the *Education and Care Services National Law (WA) Act 2012* which modify aspects of the National Regulations to make them suitable for WA requirements. Regulations will provide sufficient flexibility to maintain WA established positions that have been in effect since 2012 and modify the National Regulations appropriate to WA conditions.

This will also allow flexibility for WA to independently modify the National Regulations quickly to address circumstances applicable and specific to WA.

In adopting the National Law, for the purposes of serving infringement notices under section 291 of the National Law, this requires the *Education and Care Services National Law (WA)* to be prescribed under the *Criminal Procedure Act 2004*, this being the infringement law applicable in WA (under clause 23). Provisions in the *Criminal Procedure Act 2004* allow (or require) regulations to be made under a “prescribed Act” (i.e., this Application Act) which prescribe relevant offences, modified penalties and the appointment of relevant officers/forms etc. in respect of the issuing of infringement notices. To maintain continuity in issuing infringement notices which occurs currently under the current WA Act, this requires that regulations are made to support the operation of section 291 of the National Law.

Regulations that are made under this clause will be subject to *the Interpretation Act 1984*, in particular sections 41 and 42. The regulations must therefore be tabled in each House of Parliament, are considered by the Joint Standing Committee on Delegated Legislation and are disallowable by either House of Parliament.

### **Clause 75 Review of Act**

Clause 75 provides for a review of the operation and effectiveness of the Application Act 5 years from commencement and prepare a report based on that review to be laid before each House of Parliament within 12 months.

## **PART 5 – REPEALS AND TRANSITIONAL PROVISIONS**

### ***Division 1 – Repeals***

#### **Clause 76 Written laws repealed**

Clause 76 repeals the *Education and Care Services National Law (Act) 2012* and the *Education and Care Services National Regulations 2012*.

### ***Division 2 – Transitional provisions***

#### **Clause 77 Terms used**

Clause 77 defines terms for the purposes of transitioning from the repealed corresponding legislation framework to the applied legislation framework. Terms defined include ***former law, former regulations, new Law, new regulations*** and ***repealed Act***. terms used in this Division.

Clause 77(2) provides that a provision of the Application Act, new Law or new regulations, corresponds to a provision of the repealed Act, former Law or former regulations, and vice versa, if they are substantially the same.

#### **Clause 78 Application of the *Interpretation Act 1984***

Clause 78(1) provides that the *Interpretation Act 1984* provisions, regarding repeal and substitution of other enactments applies as if the provision of the repealed Act and the former Law were repealed by the Application Act and a provision of the repealed Act were re-enacted as the corresponding provisions of the Application Act and a

provision of the former Law were re-enacted as the corresponding provision of the new Law.

Clause 78(2) provides that the *Interpretation Act 1984* sections 36(d) (to the extent it relates to subsidiary legislation) and 38 do not apply in relation to the repealed Act or the former Law.

Clause 78(3) provides that except to the extent this Division or regulations made for the purposes of this of this Division provide differently, the *Interpretation Act 1984* applies to and in relation to the repeals effected by clause 76.

### **Clause 79 References to the Law and this Law**

Clause 79(1) provides that in the *Education and Care Services National Law (WA)* unless the context provides otherwise:

- (a) a reference to the Law or this Law includes a reference to the former Law; and
- (b) a reference to something done under the Law includes a reference to the thing being done under the corresponding provision of the former Law.

Clause 79(2) provides that in the *Education and Care Services National Law Regulations (WA)* unless the context provides otherwise:

- (a) a reference to the Law or this Law includes a reference to the former Law; and
- (b) a reference to something done under the Law includes a reference to the thing being done under the corresponding provision of the former Law or former regulations.

Clause 79(3) provides that this section does not limit, and is not limited by, any other provision in this Division.

### **Clause 80 New Law operates as continuation of former Law**

Clause 80 provides for the continuation of the former Law as the new Law and that matters commenced or arising under the former Law must be dealt with under the new Law.

Subclause (1) defines terms used in the section, which includes ***administrative processes, compliance measure, conduct, disciplinary action, notice, rating level, review, voluntary suspension*** and ***waiver***.

Subclause (2) provides that the new Law operates as a continuation of the former Law specifically regarding administrative processes and proceedings, rights accrued and obligations incurred.

Without limiting subsection (2), subclause (3) sets out various matters providing that those matters under the former Law continue to operate under the new Law, including:

- anything done or omitted to be done;
- conduct engaged in before commencement day;
- compliance with a provision;
- a requirement made of an entity that has not been complied with;
- a notice given;

- an administrative process or proceeding commenced but not concluded;
- a rating level for an education and care service in effect;
- an application made in accordance with a provision;
- the right of a person to apply for a review under a provision;
- any amount payable or recoverable under a provision;
- a provider approval or service approval in force;
- a person who was a nominated supervisor immediately before commencement day in relation to an education and care service;
- a waiver in effect;
- a compliance measure imposed under a provision and in force;
- a pending or unresolved disciplinary action;
- a voluntary suspension in force;
- a search warrant issued by a magistrate; and
- context permitting, a reference in a document to the former Law.

Subclause (4) provides that if a thing is continued in force or effect under clause 80(2) or (3), it is taken to have been made or granted under the new Law and may be dealt with under the new Law.

Subclause (5) provides to the extent a thing continued under clause 80(2) or (3) is subject to terms and conditions, the thing continues to be subject to the same terms and conditions and they may be amended or removed under the new Law

### **Clause 81 New regulations operate as continuation of former regulations**

Clause 81(1) defines the term conduct of a person which includes an act done or omitted to be done or a failure to comply with a direction or requirement applying under a provision of the former Law or former regulations or inadequately providing an education and care service.

Subclause (2) provides that the new regulations operate as a continuation of the former regulations regarding rights accrued and obligations incurred.

Without limiting subsection (2), subclause (3) sets out various matters providing that those matters under the former regulations continue to operate under the new regulations, including:

- anything done or permitted to be done for the purposes of a provision;
- conduct engaged in by a person before commencement day;
- compliance with a provision;
- a requirement made of an entity that has not been complied with; and
- context permitting, a reference in a document to the former regulations.

Clause 81(4) provides that the *Interpretation Act 1984* sections 36 (except for section 36(d) to the extent it relates to subsidiary legislation) and 37 apply and have

effect as if the former regulations were repealed and re-enacted as the new regulations.

Clause 81(5) provides that subsection (2) does not affect the operation of clause 11.

### **Clause 82 Transitional regulations**

Clause 82 is a standard provision which enables the making of regulations prescribing any matters relating to transitional issues which have not already been sufficiently provided for in Division 2 of Part 5. The provision is intended to ensure that there is a smooth transition from the corresponding law mechanism to the applied law mechanism.

Clause 82(3) is a Henry VIII clause authorising transitional regulations to modify a provision of the Application Act or the National Law. The clause provides the ability to make any necessary regulations to deal with transitional matters. The provision is limited in its application, allowing only a two year period from commencement day to address any transitional matters.

## **PART 6 – CONSEQUENTIAL AMENDMENTS**

### ***Division 1 – Amendments consequential to enactment of Children and Community Services Amendment Act 2021***

#### **Clause 83 Children and Community Services Amendment Act 2021 amended**

Clause 83 amends the *Children and Community Services Amendment Act 2021* (CCS Amendment Act) being a provision that has not yet commenced operation and when it does commence will amend the *Children and Community Services Act 2004*.

Section 52(2) of the CCS Amendment Act amends section 124A of the *Children and Community Services Act 2004* to extend the child sexual abuse mandatory reporting groups in WA. Section 52(2) of the CCS Amendment Act introduces a definition of “early childhood worker” and in paragraph (a) captures adults who are specified persons under the former *Education and Care Services National Law (Western Australia)*.

Clause 83(2) changes the reference to the former *Education and Care Services National Law (Western Australia)* to the *Education and Care Services National Law (WA)*.

#### **Clause 84 Children and Community Services Act 2004 amended**

Clause 84 amends the *Children and Community Services Act 2004* if section 52(2) of the CCS Amendment Act has commenced.

Clause 84(2) amends the definition of “early childhood worker” in section 124A of the *Children and Community Services Act 2004* to delete the reference to the former *Education and Care Services National Law (Western Australia)* to the *Education and Care Services National Law (WA)*.

### **Clause 85 Repeal of s 83 or s 84**

Clause 85 repeals either clause 83 or clause 84 depending on whether section 52(2) of the CCS Amendment Act has come into operation on or before this clause.

Clause 85(1) provides that if section 52(2) of the CCS Amendment Act comes into operation before this clause, then the amendment in clause 83 is repealed. In which case, the amendment in clause 84 will apply.

Clause 85(2) provides that if this clause comes into operation on or before section 52(2) of the CCS Amendment Act, then clause 84 is repealed. In that case, the amendment in clause 83 will apply.

### ***Division 2 – Parliamentary Commissioner Act 1971 amended***

#### **Clause 86 Act amended**

Clause 86 provides that Division 2 amends the *Parliamentary Commissioner Act 1971*.

#### **Clause 87 Section 19D amended**

Clause 87 amends section 19D(1)(e) of the *Parliamentary Commissioner Act 1971* which defines an employee of a relevant entity for the purposes of the reportable conduct scheme. This refers to the definitions of a family day care educator or family day care educator assistant in section 5(1) of the *Education and Care Services National Law (Western Australia)*.

Section 87 changes the reference to the former *Education and Care Services National Law (Western Australia)* to the *Education and Care Services National Law (WA)*.

#### **Clause 88 Schedule 2 amended**

Clause 88 amends Schedule 2 of the *Parliamentary Commissioner Act 1971* which lists the relevant entities to which the reportable conduct scheme applies. In column 1 there is reference to providers of child care services which refers to an education and care service as defined in the former *Education and Care Services National Law (Western Australia)*.

This clause changes the reference to the former *Education and Care Services National Law (Western Australia)* to the *Education and Care Services National Law (WA)*.

### ***Division 3 – Spent Convictions Act 1988 amended***

#### **Clause 89 Act amended**

Clause 89 provides that Division 3 amends the *Spent Conviction Act 1988*.

#### **Clause 90 Schedule 3 amended**

Clause 90 amends Schedule 3 of the *Spent Convictions Act 1988* – Exceptions to Part 3.

The clause changes the reference to the former *Education and Care Services National Law (Western Australia)* to the *Education and Care Services National Law (WA)*.

#### ***Division 4 – Working with Children (Screening) Act 2004 amended***

##### **Clause 91 Act amended**

Clause 91 provides that Division 4 amends the *Working with Children (Screening) Act 2004*.

##### **Clause 92 Section 4 amended**

Clause 92 amends the definition of “*child care service*” in section 4 of the *Working with Children (Screening) Act 2004*. The clause changes the reference to the former *Education and Care Services National Law (Western Australia)* to the *Education and Care Services National Law (WA)*.

##### **Clause 93 Section 5 amended**

Clause 93 amends the definition of “*managerial officer*” in section 5(1) of the *Working with Children (Screening) Act 2004*. The clause changes the reference to the definition of “a person with management or control” in section 5(1) of the former *Education and Care Services National Law (Western Australia)* to the new definition in section 5A of the National Law that will be applied in WA.

#### ***Division 5 – Other amendments***

##### **Clause 94 References to “*Education and Care Services National Law (Western Australia)*” amended**

Clause 94 includes a Table of relevant Acts that require amendment to change reference to the former *Education and Care Services National Law (Western Australia)* to the *Education and Care Services National Law (WA)*.