

DISABILITY SERVICES AMENDMENT BILL 2004

EXPLANATORY MEMORANDUM MINISTER FOR DISABILITY SERVICES

The purpose of this Bill is to implement recommendations from the Ministerial Review of the Disability Services Act 1993, which was commissioned in November 2001, and its recommendations endorsed by Cabinet on 18 November 2002.

This is the second review of the Act, the first having been completed in 1998 with subsequent amendments passed in the Disability Services Amendments Act 1999.

The Disability Services Commission was established under the Disability Services Act 1993 with a broad set of responsibilities for policy and program development and service planning in all areas that affect the rights and needs of Western Australians with disabilities.

The Commission has a Board with nine members, a chief executive officer, corporate executive and operational directors. It provides a range of services to people with disabilities across the State, and funds organisations to provide disability services. The Commission also provides funds direct to people with disabilities and families so they can purchase their own services.

Section 57 of the Disability Services Act 1993 requires that a Ministerial review of the operations and effectiveness of the Act be undertaken within five years of the last review report being tabled in Parliament. The Minister for Disability Services established a steering committee chaired by the Hon Sue Ellery MLC in 2001 to oversee the review, and carry out extensive public consultations that included public forums throughout the state, production of a discussion and options paper and analysis of written submissions.

Discussions were also held with the major government stakeholders including the Board of the Commission and senior executives, the Department of the Premier and Cabinet, Office of Health Review, State Supply Commission and local government authorities. During the preparation of drafting instructions further consultation was undertaken with the Western Australian Local Government Association and Local Government Managers Australia Inc.

The Ministerial review examined:

1. the effectiveness of the operations of the Disability Services Commission and the need for its continuation;
2. the effectiveness of the Advisory Council and the need for its continuation;
3. the effectiveness of the Commission's financial assistance grants to organisations and individuals in furthering the principles in Schedule 1;
4. the effectiveness of the Act concerning complaints and conciliation processes;
5. how governance issues, reporting relationships and advisory mechanisms can best be addressed (consistent with Machinery of Government outcomes) while optimising opportunities for input from consumers.

6. how existing opportunities in the current legislation for the disability community's involvement in the directions of the Disability Services Commission could be strengthened.

At a broad level the Bill provides for:

- retention of the Disability Services Commission as a separate department;
- strengthening the composition of both the Board of the Commission and renamed Ministerial Advisory Council on Disability;
- a better alignment between health and disability complaints management procedures dealt with by the Office of Health Review;
- inclusion of an additional principle to ensure an environment free from neglect, abuse, intimidation and exploitation;
- development of the process for conducting and implementing the renamed Disability Access and Inclusion Plans required of public authorities.

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

Part 1 – Preliminary

This Part contains the title of the Act, the relevant commencement provisions, definitions of terms used within the Bill.

Clause 1: Short title and citation.

Clause 2: This clause sets out the commencement provisions. All or separate parts of the Act may come into operation on a day or days fixed by proclamation.

Clause 3: This clause clarifies that the amendments in this Act are (other than for section 35 and 36) to the Disability Services Act 1993. Section 35 and 36 concern consequential amendments.

Clause 4: This clause amends the long title of the Act made necessary by the change of title of the Ministerial Advisory Council for Disability Services to Ministerial Advisory Council on Disability.

Clause 5: This clause defines certain words and expressions used in the proposed Act.

- (a) **“disability service”** is defined to include services provided to people with disabilities, or services provided to carers. This provision recognises the importance of carers and makes it possible to direct services and support specifically to them.

“metropolitan region” is defined in accordance with section 6 of the Metropolitan Region Town Planning Scheme Act 1959 to (by exclusion) define people with recent experience/relevant to people with disabilities living in rural or remote areas.

- (b) define Council by deleting “for Disability Services” and inserting “on Disability”.

This gives the Council a broader role than that limited to disability services.

- (c) The definition of “service developer” is amended to refer to a disability service other than disability services provided by carers.

It is important to distinguish between the services provided by paid specialist disability service providers and those offered by carers. It is intended that the Disability Services Act 1993 will be consequentially amended by the proposed Carers Recognition Act 2004 to give the term carer the same meaning as in the principal Act. A carer provides ongoing care or assistance to a person with a disability other than as the result of a contract for or of service.

- (d) This paragraph amends the definition of “service provider”. “Service provider” currently means an individual, or group of individuals or a body corporate or incorporate that renders or provides services to people with disabilities excluding persons defined in Section 24 (1) (a).

As the term carer will replace a person defined in section 24 (1) (a) it is necessary that the provision be amended.

Part 2 – Disability Services Commission

Clause 6: This clause ensures that the Disability Services Commission’s status as a department established under Section 35 of the Public Sector Management Act 1994 is secured by legislative provision. The review of the Act identified extensive support for the retention of the Commission as a separate agency directly responsible to a Minister.

Clause 7:

Sub clause (1) provides for at least two members of the Board to have recent experience in matters relevant to people with disabilities living in rural and remote locations.

Sub clause (2) ensures that the Minister will publicly seek nominations for appointment to the Board from which he/she may select.

Clause 8: Sub clause (1) amends the functions of the Act (Section 12) by broadening policy development and service provision to disability services which includes services to people with disabilities and their carers. The sub clause replaces the term ‘disability service plans’ with ‘disability access and inclusion plans’ and amends Section 12 (1) (i) of the Act replacing the term ‘services to people with disabilities’ with the term ‘disability services other than disability services provided

by carers'. The change in nomenclature is made necessary by the recognition of carers as separate and distinct from people with disabilities.

Sub clause (2) corrects a longstanding anomaly in the Act. Currently Section 24 (2) ensures that any grant of assistance made by the Commission will further the principles and meet the objectives of the Act. However, Section 12 (3) is currently worded so that in carrying out its functions the Commission is only required to further the meeting of the objectives. Sub clause (2) required the Commission to further the principles (of Schedule 1) and meet the objectives (of Schedule 2).

Clause 9: This clause extends the matters that the Commission must consult the Minister on to include those of significant interest to carers.

Part 3 – Ministerial Advisory Council on Disability

Clause 10: This clause changes the name of the Ministerial Advisory Council for Disability Services to the Ministerial Advisory Council on Disability. Restricting advice to the Minister to matters concerning formal services is considered inappropriate when most assistance to people with disabilities is provided by family and friends, and quality of life is most influenced by community inclusion and societal conditions.

Clause 11: Sub clause (1) provides for the Minister to seek nominations for membership of the Council (in accordance with regulations) and for at least two members of the Council to have recent experience in matters relevant to people with disabilities living in rural or remote locations.

Sub clause (2) provides for the continuity of the Council as constituted on the day before this amendment bill commences.

Clause 12: Sub clause (1) amends the Ministerial Advisory Council's function by replacing the former narrowly defined "services for people with disabilities" with the new term "disability services other than disability services provided by carers".

Sub clause (2) requires the Council to undertake public consultation before it advises the Minister or makes a recommendation.

Part 4 – Financial assistance for matters relating to people with disabilities.

Clause 13: This clause maintains the Commission's capacity to provide a grant of financial assistance to a person with a disability, service provider and service developer, while changing the definition of others to be funded to 'carer'. The Commission has been restricted by the provisions of Section 24 (1) (a) which narrowly required others to be funded as "related (by blood or marriage)" or "a guardian" and who resides with the person with a disability. The use of the term carer will (following consequential amendment by the proposed Carers Recognition Act) allow defacto partners and carers not resident with the person with a disability to be funded to arrange support services for their family member.

Clause 14: This clause clarifies that only service providers and developers are required to report to the Commission's Board any death, physical or psychological harm, assault or neglect of a person with a disability. This continues the practices of the current Act but adopts the nomenclature of the amendment bill by referring to carers.

This clause also adds the requirement that service providers or developers must report the matters specified within 7 days of their occurrence.

Part 4A – Contracts to provide services for people with disabilities

Clause 15: This clause describes the application of the Part as being services delivered by a service provider. It is not appropriate that the Minister approve the means of procuring a service when that service is provided or arranged by a carer. By definition such services are individual and voluntarily undertaken by carers. They cannot therefore be procured by tender and fall outside the purview of "supply policies" to which this Part refers.

Clause 16: This clause limits the application of the Part to disability services that do not include services provided by a carer.

Clause 17: This clause clarifies that it is only when the Commission wishes to contract with a service provider that it must apply to the Minister for approval as to the means of procurement (which includes by means of a tender, expression of interest or direct negotiation).

Clause 18: This clause simplifies the provision that prevents the assignment of any contract for a disability service without the consent of the Commission.

It does not change the application of the Act in this matter.

Part 5 – Disability access and inclusion plans by public authorities.

Clause 19: This clause replaces "Disability service plans" with the term "Disability access and inclusion plans" which more appropriately describes the intent of such plans.

Clause 20: This clause delineates the requirements of public authorities to meet disability access and inclusion plans.

Sub clause (1)

- (1) extends the requirement for public authorities to ensure that any functions that involve dealing with the general public should be performed to further the principles of the Act and to meet the objectives of the Act.
- (2) allows for the introduction (by way of regulation) of prescribed standards for disability access and inclusion plans. This will ensure that plans address such matters as access to public

authorities' services and buildings, provision of information to people with disabilities in appropriate formats, staff awareness and opportunities for people with disabilities to be consulted.

- (3) merely updates the provisions concerning lodgement of plans subsequent to the commencement of this Act. The Act currently provides for a public authority established after the Disability Services Amendment Act 1999.
- (4) repeats the existing provision allowing a public authority to amend its plan at any time.
- (5) allows a public authority to review its plan at any time.
- (6) requires a public authority which has conducted a review to lodge a report of the review with the Commission.
- (7) stipulates the maximum time periods between an initial plan and review and subsequent reviews (being 5 years). This provision ensures that a public authority maintains the relevance of its plan.
- (8) provides for the amendment of a plan or preparation of a new plan after a review.
- (9) ensures that all new or amended disability access and inclusion plans are forwarded to the Commission as soon as is practicable.
- (10) requires public consultation to be undertaken when each public authority prepares, reviews, or amends its disability access and inclusion plan.

Sub clause (2)

allows for the continuance of existing disability services plans following the commencement of section 20 of the proposed Disability Services Amendment Act 2004 requiring disability access and inclusion plans.

Clause 21: This clause replaces the term “disability services plan” with “disability access and inclusion plan” and provides for regulations that may prescribe the information that must be included in an implementation report.

Clause 22: This clause provides for three new requirements being:

- Section 29A: publication of any disability access and inclusion plan in the prescribed manner.
- Section 29B: An obligation that a public authority takes all practical measures to ensure that the plan is implemented by its officers, employees, agents or contractors.

The intention of this provision is to ensure that where a public authority by contract, funding or lease, arranges for a body to provide, on its behalf a service or have dealings with the public then the provisions of any disability access and inclusion plan has application to any contractor, grantee or lessee. That is a public authority should take cognisance of both the public services it provides and those it contracts (or intends to contract) when preparing disability access and inclusion plans and when reporting on the plans' implementation.

- Section 29C: This clause also provides a requirement that the Minister lay before both Houses of Parliament a report on the effectiveness of disability access and inclusion plans and the extent of compliance. This is to be undertaken as soon as is practicable after July each year.

Part 6 – Complaints about services provided to people with disabilities.

Clause 23: This clause signals that complaints may only be lodged with the Office of Health Review in respect of some disability services. This change to the heading of Part 6 is made necessary by the definition of disability service incorporating services by and for carers. In the current Act complaints could not be lodged by service recipients when the service received was funded under Section 24 (1) (a). That is, a relative or guardian was funded to provide or arrange a service to the individual with a disability. The change reflects a different definition of disability service rather than a policy change on who may complain.

Clause 24: This clause clarifies that complaints may only be lodged with the Office of Health Review in respect of some disability services. This change to the heading of Part 6 is made necessary by the definition of disability service incorporating services by and for carers. In the current Act complaints could not be lodged by service recipients when the service received was funded under Section 24 (1) (a). That is a relative or guardian was funded to provide or arrange a service to the individual with a disability. The change reflects a different definition of disability service rather than a policy change on who may complain.

Clause 25: This clause provides the Director of the Office of Health Review with functions identical to those exercised by the Director under Section 10 (1) of the Health Services (Conciliation and Review) Act 1995. The Disability Services Act 1993 was drafted with separate complaint provisions that could be assigned to a designated agency for operation. From 1993 to 1998 the Equal Opportunity Commission provided the independent complaints service. The Disability Services Amendment Act 1999 changed complaint provisions administration to the Office of Health Review, which administers complaint conciliation and investigation under the Health Services (Conciliation and Review) Act 1995. The function of the Director of the Office of Health Review has been limited in respect of disability complaints and the clause gives the Director equivalent powers and functions.

Clause 26:

Sub clause (1) repeals the obligation of the Director to investigate complaints referred by the Minister. The referral of complaints by the Minister and the Director's responsibility in respect of investigating such complaints is now more appropriately expressed in proposed Sections 42, 44A, 44B and 46 of the Act.

Sub clause (2) replaces the term "disability service plan" with "disability access and inclusion plan".

Clause 27: This clause replaces Section 42 with a new Section 42 and 42A. Section 42 (1) (a) and (b) are retained from the current Act with Section 42 (1) (c) being made necessary by the new provision Section 46A (1) which empowers either House of Parliament or any committee of either or both Houses to refer an investigation to the Director.

Section 42 (2) provides a new time limit for the issuing of a written notice (being 14 days after a decision is made or within any time limit set out by the House or committee). Section 42 (3) is retained from the current Act and sets out a requirement that the Director include reasons for a decision in a written notice and if unreasonable conduct has occurred set out the action that is recommended. Section 24 (4) is a new provision which requires the Director in a written notice not to identify an individual or enable a person to be identified unless that person has consented to that disclosure. This is a standard provision found in many statutes governing reporting to Ministers or third parties.

Section 42A is a new provision providing the Director with the power to report matters arising out of a complaint or investigation or in the performance of the Director's functions to Parliament. This mirrors the provision in the Health Services (Conciliation and Review) Act 1995, with the exception that the Disability Services Amendment Bill does not permit the disclosure of the identity of the person with a disability or enable the identity to be ascertained.

Clause 28: This clause reflects a change in drafting style replacing the expression "table" (before each House of Parliament) with "lay" (before each House of Parliament).

Clause 29: This clause establishes the relationship of the Director with the Minister for Disability Services in a manner identical with that provided in the Health Services (Conciliation and Review) Act 1995 for the relationship between the Director and the Minister for Health. The provisions concern the Minister's capacity to direct the Director, the limitations of that power with respect to particular persons or complaints and the requirement for the Director to lay before both Houses the text of any direction and to include such direction in the annual report of the Office. Similarly Section 44B provides for Ministerial access to information and the limits of access being in respect of information that discloses the identity of an individual or enables their identity to be ascertained. Both Sections 44A and B are standard provisions used to govern the relationship of Ministers to statutory boards, entities, or offices.

Clause 30: This clause replaces the existing Section 46, which gave the Minister the power to refer individual complaints to the Director with a broader provision. The new Section 46 is expanded to allow matters of public interest of general importance to disability services to be referred to the Director. This is required as not all issues of importance arise from specific individual complaints being made to the Minister.

Clause 31: This clause provides the Parliament with an equivalent power to that contained in Section 56 (3) (4) of the Health Services (Conciliation and Review) Act 1995 that allows either House or a committee of either or both Houses, to refer a matter to the Director to be investigated. This provision allows any matter relating to the provision of a disability service or a particular disability service to be referred for investigation and for the Director to be required to do so immediately. It is important that there be equivalent provisions for health and disability complaints.

Schedule 1

Clause 32: This clause repeals the Schedule 1 and replaces it with a new schedule that provides for some minor rewording of Principles 1, 4, 7,8 and 9 that has no substantive change to their meaning and includes one new principle (10); People with disabilities have a right to an environment free from neglect, abuse, intimidation and exploitation.

Schedule 2

Clause 33: This clause replaces Schedule 2 with a revised Schedule that includes all the same objectives with minor changes to the wording reflecting stylistic rather than substantive changes to meaning.

Schedule 5

Clause 34: This clause inserts a new sub clause into Schedule 5 of the Act providing the Minister with the option of appointing to the Ministerial Advisory Council on Disability a member for a third consecutive term but only if that member is to be appointed Chairperson. It has been common practice for the Minister to appoint a member of Council to the position of Chairperson after they have served at least an initial two year term. As members may only serve a maximum of two, two year terms the position of Chairperson has lacked continuity. The amendment provides a third term which will overcome this problem.

Consequential Amendments.

Clause 35: This clause deletes from Schedule V Part 3 of the Constitutions Act Amendment Act 1899 reference to “the Ministerial Advisory Council for Disability Services” and insets instead the new title of the Council: “The Ministerial Advisory Council on Disability” established under the Disability Services Act 1993.

Clause 36: This clause clarifies the responsibilities of the Director Office of Health Review who may be directed by the Minister responsible for the Health Services (Conciliation and Review) Act 1995. In Section 11 (1) of that Act the

Minister may give directions “with respect to the performance of the functions of the Director”.

This clause makes it clear that functions subject to direction by that Minister do not include the functions of the Director under the Disability Services Act 1993. This situation arises from the unusual (although not unprecedented) situation of the Director of the Office of Health Review being subject to direction from two Ministers.

29 June 2004

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