

2023

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

HUMAN RIGHTS COMMISSION AMENDMENT BILL 2023

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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HUMAN RIGHTS COMMISSION AMENDMENT BILL 2023

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

The *Human Rights Commission Amendment Bill 2023* (the Bill) will amend the *Human Rights Commission Act 2005* (HRC Act). The purpose of the Bill is to implement the National Code of Conduct for Health Care Workers (the Code) in the ACT. In 2015, the Council of Australian Governments (COAG) Health Council agreed to the terms of a National Code and to each jurisdiction using their best endeavours to enact new, or amend existing legislation and regulations, to give effect to the National Code. The Code aims to protect the public by setting minimum standards of conduct and practice for all workers providing a health service, who are not registered under a National Registration and Accreditation Scheme (NRAS). It establishes a guide for workers around safe, competent and ethical practice. As well as applying to unregistered health care workers, the Code also applies to registered health practitioners who provide health services unrelated to their registration (such as a nurse who also works as a naturopath).

The Code provides for:

- a) a 'negative licensing' regulatory regime that does not restrict entry to practice, but allows effective action to be taken against an unregistered health care worker who fails to comply with the ethical standards of conduct and minimum standards of practice; and
- b) a set of objective and clear standards (a code of conduct) against which to assess a health care worker's conduct and practice in the event of a complaint or serious adverse event. The Code requires health care workers to:
 - i) provide services in a safe and ethical manner;
 - ii) obtain consent;
 - iii) not make claims to cure cancer or terminal illnesses;
 - iv) not misinform clients or professional bodies;
 - v) provide accurate advice;

- vi) not financially exploit clients;
- vii) not engage in sexual misconduct;
- viii) take appropriate action to minimise harm to clients;
- ix) adopt standard precautions for infection control;
- x) take appropriate and timely measures to minimise harm to others if they are diagnosed with infectious medical conditions;
- xi) not practise under the influence of alcohol or unlawful substances;
- xii) not provide treatment or care to clients while suffering from a physical or mental impairment, disability, condition or disorder that places or is likely to place clients at risk;
- xiii) comply with relevant privacy laws;
- xiv) keep appropriate records;
- xv) be covered by appropriate insurance;
- xvi) report concerns about the conduct of other health care workers; and
- xvii) display the Code and information about making a complaint.

The national standards set by the Code provide transparent expectations of care and conduct against which unregistered health care workers can be objectively assessed. The Bill will facilitate the investigation of complaints regarding possible breaches of the Code by unregistered health care workers. If necessary, it will permit regulatory action in the event of, or risk of, serious harm to the community.

The Code is designed to address the gap in the regulation of health services provided by those who are not registered under the *Health Practitioner Regulation National Law* (the National Law). As such, the Code will not apply to those professions regulated by NRAS, which was established by the National Law, and which has been in operation since 2010. NRAS regulates 16 national health professions, through 15 boards (as Nursing and Midwifery is one board), and is a robust accreditation, registration and regulatory scheme for its registered health practitioners.

Teachers carrying out teaching duties are subject to a similar regulatory regime, and are registered with the ACT Teachers Quality Institute. Given this regulatory framework, to the extent that a registered teacher provides a health service while

teaching, they are also excluded from the operation of the Code.

The following table outlines the professions covered by either the Code or the NRAS. The list under the Code is illustrative, but not exhaustive.

Table 1: Health care workers and registered health practitioners

National Code of Conduct for Health Care Workers (Code)	National Registration and Accreditation Scheme (NRAS)
Allied health assistants, aromatherapists, art therapists, assistants in nursing, audiologists and audiometrists, ayurvedic medicine practitioners, bioresonance practitioners, cardiac scientists, clinical perfusionists, complementary and alternative medicine practitioners, counsellors and psychotherapists, dental assistants, dental technicians, dietitians, exercise physiologists, herbalists, homoeopaths, hypnotherapists, lactation consultants, massage therapists, medical scientists, music, dance and drama therapists, myotherapists, naturopaths, nutritionists, optical dispensers, orthoptists, orthotists and prosthetists, pharmacy assistants, phlebotomists, reflexologists, reiki practitioners, respiratory scientists, shiatsu therapists, sleep technologists, social workers, sonographers, speech pathologists.	Aboriginal and Torres Strait Islander Health Practice, Chinese Medicine, Chiropractic, Dental, Medical, Medical Radiation Practice, Nursing, Midwifery, Occupational Therapy, Optometry, Osteopathy, Paramedicine, Pharmacy, Physiotherapy, Podiatry, Psychology.

The amendments in this Bill:

- Introduce a new Human Rights Commission Regulation to give effect to the Code (Regulations).
- Include a breach of the Code as a kind of complaint which may be made to the Human Rights Commission (Commission) about a health service. It is noted

that the Health Services Commissioner (the Commissioner) will have the function of the Commission in relation to complaints in respect of breaches of the Code (see s25 of the HRC Act).

- Introduce decision-making principles for making prohibition or condition orders or public statements.
- Establish new regulatory powers of oversight for the Commission to consider complaints in relation to breaches of the Code and to take action to protect public health and safety. These powers allow the Commission to:
 - consider a complaint that an ACT health care worker has acted inconsistently with the Code under Part 4 of the HRC Act, including referring a matter for conciliation;
 - place a condition on the provision of a health service by a worker or prohibit a worker from offering, advertising, promoting or providing a health service to protect the public from a serious risk to their health and safety if the worker continues to provide a health service;
 - make a public statement in relation to a health care worker or health care service to protect the public from a serious risk to their health and safety;
 - ensure a register of prohibition or condition orders made is publicly and freely accessible;
 - correct or withdraw a public statement or vary or cancel a prohibition or condition order;
 - exchange information with an entity responsible for administering or upholding a corresponding law; and
 - recognise a prohibition or condition order made in relation to a health care worker under a corresponding law in another state where the Code has been implemented.
- Introduce two new offences for non-compliance with a prohibition or condition order or non-compliance with a corresponding prohibition or condition order issued in another state.
- Introduce a power to determine a separate process in relation to the management of complaints received by the Commission in relation to an ACT

public servant who provides a health service as part of their employment. The process determined may include that the Commission and the Public Sector Standards Commissioner may establish a relationship protocol where an agreement is made in relation to how relevant complaints will be managed to assist in avoiding delay and unnecessary duplication of the statutory functions of each office holder.

- Allow the enforcement of prohibition and interim prohibition orders issued in other states or territories.

A key driver underpinning the intent of the Bill is the Territory's commitment to continue efforts to harmonise the Territory's health system legislation with other jurisdictions. There is a positive need for the Code in the Territory as patients are exposed to gaps in the professional regulation, skills and credentialling of workers. Currently, there is minimal and inconsistent regulation of unregistered health care workers. For example, some health care workers currently operate without reference to any mandatory codes of professional conduct.

The adoption of this Bill will enable health services provided by unregistered health care workers to be subject to complaint and regulatory mechanisms, therefore capturing a broader ambit of workers that are required to act according to a minimum set of standards of practice and conduct, and thus protects the consumer/persons receiving the health service or care.

CONSULTATION ON THE PROPOSED APPROACH

In June 2013, the Standing Council on Health, the precursor to the COAG Health Council, agreed in principle to strengthen state and territory health complaints mechanisms, by the implementation of:

- a. a single national code of conduct for unregistered health practitioners in each jurisdiction;
- b. a nationally accessible register of prohibition orders, and
- c. mutual recognition arrangements between states and territories to support national enforcement of the Code.

National Consultation

To give effect to these decisions, Health Ministers requested the Australian Health Ministers' Advisory Council (AHMAC) to undertake national consultations on what should be in a national code of conduct and the proposed policy parameters to underpin nationally consistent implementation of a national code of conduct, for consideration by Ministers.

In March 2014, a consultation paper titled A National Code of Conduct for health care workers was released publicly¹. Consultation forums were held in all states and territories in March-April 2014, in conjunction with local health departments, to seek public comment on the terms of a draft code for health care workers. Over 100 submissions were received.

On 17 April 2015, the COAG Health Council agreed to the terms of the Code.² The COAG Health Council decision required each jurisdiction to enact new, or amend existing, legislation and regulations to give effect to the Code.

Code regulation regimes have been implemented in New South Wales, Victoria, South Australia and Queensland. Legislation has been passed in Western Australia, however is awaiting commencement. Consultation on the Code is underway in the Northern Territory, and the Code has been partially implemented in Tasmania.

ACT Specific Consultation

Multiple rounds of community consultations have been conducted in the ACT. The first round of ACT public consultation occurred in 2018 and a second in 2019. There has also been more recent targeted consultations with unions, consumer representatives and the Human Rights Commission, with the most recent consultation conducted in January 2023.

First public consultation

The first round involved targeted consultation to more than 60 stakeholders outside government, including non-government providers in the ACT whose workers are captured under the Code, professional associations representing health care occupations, national offices for professions without an ACT office, health consumer

¹ <https://www.coaghealthcouncil.gov.au/NationalCodeOfConductForHealthCareWorkers> (Document 2)

² <https://www.coaghealthcouncil.gov.au/NationalCodeOfConductForHealthCareWorkers> (Document 3)

bodies, and educational institutions. Information about the consultation was also posted to the ACT Health website, following advice from Chief Minister, Treasury and Economic Development Directorate (CMTEDD) Communications that the Your Say site was not available for this consultation. A consultation paper was released and a submission template for responses was made available.

Eight submissions were received during the consultation, from the following organisations: Dietitians Association of Australia, Speech Pathology Australia, Reiki Australia, Congress of Aboriginal and Torres Strait Islander Nurses and Midwives, AIDS Action Council of the ACT, Massage and Myotherapy Australia, Australian Nursing and Midwifery Federation ACT, and Health Care Consumers' Association Inc.

Submissions were generally supportive of the Code and its proposed implementation. A number of minor legislative and implementation issues were raised in these submissions, however after examination it was determined these matters were addressed under existing legislation.

Second public consultation

The second round of public consultation occurred in early 2019. Three submissions were received, from the Community and Public Sector Union (CPSU), Australian Education Union (AEU) and one individual.

The advent of the COVID-19 global pandemic delayed continued development and consideration of the feedback, due to the diversion of resources across Government to responding to the public health emergency. However, consultations with CMTEDD, Justice and Community Safety Directorate, Education Directorate, AEU and the CPSU continued subsequently to resolve the final model for implementation of the Code in the Territory, resulting in changes and amendments to the Bill in 2022 and early 2023.

Input and feedback from all stakeholders have been used to inform the amendments proposed in this Bill.

CONSISTENCY WITH HUMAN RIGHTS

The proposed amendments have been carefully considered in the context of the objects of the *Human Rights Act 2004* (HR Act). Any limitations on human rights are justifiable as reasonable limits set by laws in a free and democratic society, as required by section 28 of the HR Act. Importantly, the Bill also supports and strengthens protection of several rights under the HR Act. The human rights limitations that this Bill

creates are proportionate to and the least restrictive approach to achieve the overall policy objective of this Bill.

Rights Promoted

This Bill engages and promotes the following rights under the HR Act:

- Section 9 – Right to life
- Section 10 – Protection from torture and cruel, inhuman, or degrading treatment etc.
- Section 12 – Privacy and reputation
- Section 27 – Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

Section 9 of the HR Act provides that everyone has the right to life. In some circumstances, the right to life may give rise to a positive obligation on government to protect those within its jurisdiction from identifiable risks to life. The duty to protect life also implies that government should take measures to address the general conditions of society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.

Section 10 of the HR Act provides that everyone is entitled to protection from torture and cruel, inhuman, or degrading treatment. Section 10(2) provides, amongst other things, that no-one may be subjected to medical treatment without their free consent.

The Bill promotes these rights by enhancing the quality of health services by promoting adherence to a minimum set of standards of practice and conduct for unregistered health care workers. In particular, health care workers will have an obligation to:

- not promise to cure cancer or another terminal illness (s10, Regulations);
- not give false, misleading, or deceptive information, or information which has not been substantiated (s11, Regulations); and
- provide accurate information and allow a client to make informed choices, to co-operate with other entities in the clients' best interests, and not attempt to dissuade a client from seeking or continuing medical treatment (s12, Regulations).

The amendments will provide a complaints mechanism for consumers and allow the Commission to educate unregistered health care workers in the first instance, as well as having power to issue prohibition and condition orders, and make public statements.

Section 12 of the HR Act provides that everyone has a right to not have their privacy interfered with arbitrarily. This right is promoted by the Bill as the amendments enshrine a standard for unregistered health care workers to comply with relevant privacy laws and keep appropriate records (ss20, 21, Regulation). This amendment is a significant advancement of the s12 right and will provide additional protection to members of the community when seeking treatment and will potentially encourage people to seek treatment knowing that they can do so with an expectation that their privacy be maintained, along with a redress mechanism if it is not.

The Bill also strengthens the cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities (HR Act, s27) by requiring, in Regulation s8(i), that a health care worker must provide health services in a manner that is culturally sensitive to the needs of their clients.

Rights Limited

This Bill limits the following rights:

- Section 8 – Recognition and equality before the law
- Section 11 – Right to protection of the family and children
- Section 12 – Privacy and reputation
- Section 14 – Freedom of thought, conscience, religion, and belief
- Section 16 – Freedom of expression
- Section 21 – Fair trial
- Section 27B – Work and other work-related rights

Right to recognition and equality before the law

Nature of the right (s28(2)(a), HR Act)

Section 8(3) of the HR Act provides that everyone is equal before the law and is entitled to the equal protection of the law without discrimination on any ground.

The amendments proposed by the Bill engage and may limit the right to recognition and equality before the law in a number of ways.

ACT Public Servants and excluded professions

Nature of the limitation (s28(2)(c), HR Act)

Section 94D of the Bill provides for the Executive to determine a specific process for the Commission to follow in dealing with complaints in relation to public servants who deliver a health service as part of their employment. Public servants will be subject to the same substantive provisions of the Code, as set out in the Regulation at Schedule 1, as any other person.

Section 94B excludes health practitioners, and registered teachers carrying out teaching duties from operation of the Code. Such workers are already subject to registration requirements which regulate their specific profession.

Legitimate purpose (s28(2)(b), HR Act)

The objective of the Bill is to protect the public by setting minimum standards of conduct and practice for all health care workers not registered under a national registration or accreditation scheme as well as a formalised process for complaints. This objective must be considered against the unique features of the jurisdiction such as size, existing schemes, and resource allocation.

The Territory has robust regulatory frameworks in place to maintain standards of conduct of public servants, including a Code of Conduct and entrenched mechanisms for managing breaches of the Code of Conduct and performance issues. Where there is a breach of the Code by a public servant, that public servant may also breach their obligations under the *Public Sector Management Act 1994* and/or the relevant enterprise agreement. The separate process which may be determined under s94D will enable the Territory to leverage the existing framework and mechanisms for the investigation of breaches by public servants who perform health care services as part of the duties of their employment. This will help to streamline consideration of the various issues forming the basis of the complaint and minimise any unnecessary duplication in consideration of a public servant complaint by the Commission and consideration of similar substantive issues as part of a misconduct procedure.

If a separate process for public servants is determined, the process will be made by disallowable instrument. This will allow the detailed operational requirements for

management of complaints in relation to public servants, to be updated as necessary to respond to issues as they arise.

Similarly, to practice in the professions excluded at section 94B, individuals are required to be registered and are therefore already subject to robust regulatory regimes.

Rational connection between the limitation and the purpose (s28(2)(d), HR Act)

Section 94D ensures the public continues to be protected in relation to the conduct and practice of health care workers who are public servants, whilst also allowing for the opportunity to minimise duplication of actions in relation to a complaint.

Similarly, the exclusion of specific professions from application of the Code under section 94B responds to the robust regulatory environment already in place in respect of those professions.

Proportionality (s28(2)(e), HR Act)

The Code will apply to public servants, and therefore public servants will be subject to all the requirements described in the Regulation. Section 94D simply allows a separate process to apply to complaints in relation to public servants, in light of the likely interaction between breaches of the Code, and a misconduct process which is already robustly regulated. Accordingly, the ability to determine a separate process for public servants is the least restrictive approach to achieving the objectives of the Bill in relation to the conduct of public servants.

Similarly, the exclusion of the professions in section 94B is necessary to not limit the conduct of those professions further – given they are already subject to robust regulatory frameworks.

Other provisions which engage the right to recognition and equality before the law

Nature of the limitation (s28(2)(c), HR Act)

Sections 17 and 19 of the Regulations, place specific requirements upon health care workers with a transmissible condition (s17, Regulation) or an impairment, disability, condition, or disorder (s19, Regulation). Health care workers are not automatically excluded from work but are required to seek the advice of a health practitioner, and to follow that advice.

Legitimate purpose (s28(2)(b), HR Act)

Where a person has a transmissible condition, there may be a risk of transmission of that condition to clients, which causes a public health or safety risk. Also, certain conditions may affect a health care worker's capacity to deliver a health service in a way which is safe for the client.

Proportionality (s28(2)(e), HR Act)

The requirements of section 17 and 19 of the Regulations are limited to and directed at managing the risk of the health care worker causing transmission of a condition to a client, or of harm to a client (as relevant) in the provision of a health service.

The requirements are therefore proportionate to the health and safety risk posed by the delivery of a health service in these circumstances.

Right to protection of the family and children

Nature of the right and limitation (s28(2)(a) and s28(2)(c), HR Act)

Section 11 provides that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind. The Code is generally supportive of the right of a child to be protected, as the Code will protect children (in the same way it protects all people) by enhancing the quality of health services by promoting adherence to a minimum set of standards of practice and conduct for unregistered health care workers.

However, the exclusion of registered teachers carrying out teaching duties at section 94B of the Bill, also engages and potentially limits this right, as the protection of the Code will not extend to children within schools. It is noted that the Bill only engages with the right of children to the protection needed, to the extent that a teacher might be delivering a health service, and may therefore fall within the definition of a health care worker.

Legitimate purpose (s28(2)(b), HR Act)

Teachers are already subject to a robust regulatory regime, which supports the right of children to the protection needed. Therefore, to the extent that teachers might provide a health service under the HRC Act, their conduct is already subject to regulatory requirements as a teacher.

Under the provisions of the *ACT Teachers Quality Institute Act 2010* (TQI Act), teachers must satisfy various requirements to be eligible for registration. This includes compliance with a code of practice set out in the *ACT Teacher Quality Institute (Code of Practice) Approval 2014 (No 1)*. Teachers are also required to comply with the *ACT Teacher Quality Institute (Australian Professional Standards for Teachers) Determination 2013 (No 1)* as a condition of their registration.

It is also relevant that teachers are also required to be registered under the *Working with Vulnerable People (Background Checking) Act 2011*.

It is noted that in providing care to young children, the role of early childhood teachers may have a closer connection to the provision of a “health service” than other kinds of teachers.

Early childhood teachers will only be excluded from operation of the Code to the extent they are practicing their profession and are registered in accordance with the requirements of the TQI Act. At the time of introduction of this Bill, early childhood teachers are only subject to the TQI Act if they are teaching in a school.

The early childhood education sector, which includes early childhood teachers, is regulated under the *Education and Care Services National Law Act 2010* (the ECS National Law). The Education Directorate Children’s Education and Care Assurance (CECA) performs the functions of the ACT Early Childhood Education and Care (ECEC) Regulator. This provides a strict regulatory framework to provide children the protection needed. This regulatory framework includes powers to place a prohibition order on an individual, if CECA considers that there may be an unacceptable risk of harm to a child or children posed by that individual.

Some early childhood teachers (currently those teaching in schools) are therefore already subject to regulation through both the TQI Act, and the ECS National Law.

Given the robust regulatory processes already in place, registered teachers (including early childhood teachers) carrying out teaching duties are therefore excluded from the operation of the Code, so as not to add an additional regulatory burden given the extensive regulatory requirements already applying to teachers. Teachers who are not regulated and registered under the TQI Act are not excluded from application of the Code.

Rational connection between the limitation and the purpose (s28(2)(d), HR Act)

A comprehensive regulatory regime already applies to teachers, which protects the right of children to the protection needed, to the extent those teachers might provide a health service.

The exclusion of registered teachers carrying out teaching duties responds to the robust regulatory environment already in place. This exclusion also acknowledges that the provision of a health service would not ordinarily form the core nature of a teacher's role. For early childhood teachers there may be a somewhat closer connection between their role and the provision of a health service, however, these teachers are also subject to an additional layer of regulation via the ECS National Law.

Therefore, teachers carrying out teaching duties are most effectively regulated via the TQI Act (and the ECS National Law, for early childhood teachers), which is specifically tailored to teachers.

Proportionality (s28(2)(e), HR Act)

Teachers will only be excluded from the Code to the extent they are a registered teacher carrying out teaching duties. These teachers are already subject to the TQI Act. Some early childhood teachers are subject to both the TQI Act and the ECS National Law.

Teachers who are not registered teachers under the TQI Act, for example any early childhood teachers not required to be registered under the TQI Act, will remain subject to the Code.

This approach is the least restrictive approach to ensure that children continue to have the necessary protection, whilst also avoiding limiting the conduct of teaching further given the robust regulatory framework already in place.

Right to privacy and reputation

Nature of the right and limitation (s28(2)(a) and s28(2)(c), HR Act)

Section 12 of the HR Act provides for the right for a person not to have their privacy interfered with, or reputation unlawfully attacked. Various provisions, particularly Division 5.3 of the Bill engage with and may limit the rights in section 12 of the HR Act.

The Bill will enable the Commission, in the interests of the health or safety of the public, to make an interim prohibition or condition order under s94G, a final prohibition or

condition order under s94H, a public statement under s94I, a statement of reasons under s94J, to correct, vary or cancel an order under ss94K-M, to keep a register of orders under s94Q, and to exchange information with various other entities relevant to the complaint under ss94E, 94N and 94R.

Section 94E allows for the sharing of information in relation to a public servant complaint between the Commission, the Public Sector Standards Commissioner and a public service entity defined in the section.

To the extent to which these provisions require the disclosure of personal information, they will inherently interfere with the privacy and reputation of individuals.

Legitimate purpose (s28(2)(b), HR Act)

Where a health care worker poses a serious risk to the health and safety of the public, it is important that information can be shared in the interests of public health and safety – for example, the employer of a health care worker can be made aware that a person is prohibited from delivering a health service.

The ability to make a public statement will help to improve community awareness, and enables consumers to inform themselves about health care service providers who are prohibited or may only provide services subject to conditions.

This will benefit public safety, as it will minimise risks of a prohibited health care provider delivering services to a client who is unaware of the serious health and safety concerns associated with the delivery of health services by that health care worker.

In relation to s94E, information sharing is necessary to streamline the consideration of issues arising from a complaint in relation to a health service provided by a public servant as part of their employment, and the effective administration of the various functions of the relevant information sharing entities.

Rational connection between the limitation and the purpose (s28(2)(d), HR Act)

The sharing of information contemplated in ss94G-94M, as well as ss94N, 94Q and 94R, is necessary to notify relevant individuals, and the public, and minimise the risk that a health care worker subject to an order will continue delivering the services. Therefore, the limitation of the right to privacy is directly linked to the policy objective of enhancing public health and safety.

In relation to s94E, the sharing of information in relation to public servant complaints will enable more effective and efficient management of issues in relation to a complaint, as information can be provided to the party best placed to take appropriate action in response to a complaint.

Proportionality (s28(2)(e), HR Act)

With the exception of s94E, information will only be shared in relation to a health care worker whom the Commission reasonably believes, or is satisfied (depending on the provision), has breached the Code, and in relation to whom there is a serious risk to the health or safety of the public if the health service continues to be provided.

In relation to section 94E, the sharing of information is limited only to circumstances where the information is relevant to the exercise of the other entities functions, and the entity sharing the information considers it is appropriate to share. This limits the kind of information that can be shared to the role of each entity, but also allows flexibility to consider the information to be shared in each case as appropriate in the circumstances.

The sharing of information contemplated is therefore considered proportionate and the least restrictive approach necessary to protect public safety.

Right to freedom of thought, conscience, religion and belief and right to freedom of expression

Nature of the right and limitation (s28(2)(a) and s28(2)(c), HR Act)

Section 14 of the HR Act provides that everyone has the right to freedom of thought, conscience, and religion. Section 16 of the HR Act provides for the right to freedom of opinion and expression.

The Regulations engage with and may limit these rights. Some health services which might be the subject of a complaint under the Code, may be provided within the context of, or pursuant to the requirements of a specific set of beliefs or religion.

Where a health service is interlinked with the belief system of a health care worker (or a client), the expression or communication of this belief system may be limited by obligations on a health care worker set out in the Regulations. In particular, the Regulations require the health care worker to:

- provide health services in the manner sensible to the cultural needs of a client (s.8(i), Regulations);
- not promise to cure cancer or another terminal illness (s10, Regulations);
- not give false, misleading or deceptive information, or information which has not been substantiated (s11, Regulations); and
- allow a client to make informed choices, to co-operate with other entities in the clients' best interests, and not attend to dissuade a client from seeking or continuing medical treatment (s12, Regulations).

Legitimate purpose (s28(2)(b), HR Act)

This limitation promotes the right to life (s10, HR Act) and the right to be protected from medical treatment without consent (s11, HR Act). The limitation is also necessary to protect public health and safety.

Rational connection between the limitation and the purpose (s28(2)(d), HR Act)

The limitation relates to conduct by health care workers which would pose a clear health and safety risk to the public. Accordingly, there is a rational connection between the limitation and the purpose.

Proportionality (s28(2)(e), HR Act)

The impact of the Regulations on the relevant rights is quite limited. The nature of the Regulations is to provide minimum requirements, which are targeted towards conduct which is inherently unsafe. Accordingly, the rights at section 14 and 16 of the HR Act are only limited to the extent necessary to protect other rights in section 9 and 10 of the HR Act, and to protect public health and safety.

Right to fair trial

Nature of the right and limitation (s28(2)(a) and s28(2)(c), HR Act)

Section 21 of the HR Act provides a right to all individuals for a fair and public hearing decided by a competent, independent, and impartial court or tribunal. Various provisions, particularly Division 5.3 of the Bill engage the rights in section 21 of the HR Act. The right to a fair trial also includes an obligation that a matter must be heard expeditiously.

The decision maker in relation to the making of a prohibition or condition order or a public statement is the Commission, with that function exercised by the Commissioner. In making such a decision, section 94F of the Bill provides that the Commission is bound by the rules of natural justice and must, before making a decision that affects a person, give the person an opportunity to make a submission to the Commission about the decision. However, the Commission must act with as little formality as possible and is not bound by the rules of evidence.

This approach has not been universally adopted by other jurisdictions. For example, the model in Queensland is that the Health Ombudsman is empowered to issue interim prohibition orders only, and it is the Queensland Civil and Administrative Tribunal (QCAT) which issues the ongoing prohibition orders, following a tribunal hearing.

There are several safeguards in place to protect against any risk of arbitrary decision making in addition to those in section 94F. For example, the Commission is not subject to the direction of anyone else in relation to the exercise of a function under the *Human Rights Commission Act* (section 16, HRC Act). There is provision to allow public statements to be corrected (s94K, Bill), for the variation of prohibition or condition orders if there is a material change (s94L, Bill), and the cancellation of prohibition or condition orders (s94M, Bill).

Further, Division 5.4 provides that prohibition or condition orders and the issuing of public statements are subject to review, on application of a relevant party to the ACT Civil and Administrative Tribunal.

Legitimate purpose (s28(2)(b), HR Act)

The strengths of the ACT model include that it allows the Commission to respond quickly and effectively to public health risks presented by health care workers, more quickly than if required to prepare and prosecute the case before a tribunal or court to obtain a prohibition order.

This is particularly important given that it is only significant breaches of the Code where there is a serious risk to health and safety that can give rise to a prohibition or condition orders. Where there is a serious risk to the health and safety of the public, it is important to ensure the risk is minimised or resolved quickly and efficiently.

This enhancement of public safety also serves to promote the right to life (s9, HR Act) and the right to be protected from torture and cruel, inhuman, or degrading treatment (s10, HR Act).

Empowering the Commission to issue interim and final prohibition orders and allowing for matters to be heard informally and not be bound by the rules of evidence, also promotes the right to have the relevant matter heard expeditiously.

Rational connection between the limitation and the purpose (s28(2)(d), HR Act)

The model provides protections for people who may be the subject of action being taken by the Commission, but also ensures the public is protected by allowing the Commission to respond to concerns about public safety in a timely manner.

The powers of the Commission to make a prohibition or condition order, or a public statement, are limited only to circumstances where there is (or the Commission believes on reasonable grounds there is) a serious risk to the health or safety of the public. The more efficiently complaints can be actioned by the Commission, the greater the benefit to public health and safety.

Proportionality (s28(2)(e), HR Act)

The safeguards described above ensure the Commission cannot make arbitrary decisions, but equally allow the Commission to efficiently make orders which are least restrictive of human rights, but which ensure the protection of the public.

As a public authority, and as provided in section 15 of the HRC Act, the Commission is obliged to make decisions that are least restrictive of human rights, in accordance with the obligations under the *Human Rights Act 2004*. Importantly, the Commission's decisions are reviewable by the ACT Civil and Administrative Tribunal, which provides an accessible avenue for merits review of these decisions.

The decision-making process contemplated in the Bill in relation to prohibition or condition orders, and public statements balances the need to protect health consumers' rights to recourse and enhancing public safety against the right of health care workers to a fair and public hearing.

Specific issues in relation to public servants and the right to a fair trial

Nature of the limitation (s28(2)(c), HR Act)

Section 94D allows a determination to be made which establishes a separate process for consideration of public servant complaints. Such a determination will relate to the process for consideration of a complaint, rather than altering the requirements of the Code set out in the Regulations. As the determination relates to process, it will not create additional remedies in relation to public servants but may vary the timing within which the Commission may exercise various powers in relation to public servant complaints.

For example, s94D(5)(d) contemplates that a determination may require the Commission not to make a final prohibition or condition order in relation to a public servant complaint while a misconduct procedure is being conducted, without the agreement of the Public Sector Standards Commissioner. Sections 94D(4)(e) and 94G(3) of the Bill allow a determination to give power to the Commission to extend the period an interim order is in force.

Legitimate purpose (s28(2)(b), HR Act)

A power to make a determination to delay final prohibition or condition orders being made, is necessary to facilitate the streamlining of the investigation and consideration of public servant complaints, and the minimisation of any duplication in consideration of a public servant complaint by the Commission and consideration of similar substantive issues as part of a misconduct procedure. This is discussed above in relation to the s8 right to recognition and equality before the law.

Rational connection between the limitation and the purpose (s28(2)(d), HR Act)

Providing for the power to make a determination to vary the process for consideration of a public servant complaint, including the timeframes for exercise of particular powers, will facilitate implementing a more efficient and effective process for managing such complaints.

Accordingly, there is a rational connection between the purpose, and the proposed power to make a determination affecting the process for handling public service complaints.

Proportionality (s28(2)(e), HR Act)

Public servant complaints will have the benefit of the same safeguards as other complaints (as set out above). For example, the decision-making principles in section 94F, which require that the decision maker is bound by the rules of natural justice, will continue to apply, as will the rights in Division 5.4 of the Bill, to review of prohibition or condition orders, and the issuing of public statements, on application of a relevant party, to the ACT Civil and Administrative Tribunal.

It is specifically contemplated that the timeframes for making prohibition and condition orders, and the duration of interim orders, may be varied by the determination. Delay or deferral of a final prohibition or condition order may be necessary to lever existing mechanisms for dealing with misconduct issues. Where a determination is made requiring deferral of such orders, it may be necessary for interim orders to be extended. This is so that, where the delivery of a health service by an individual is reasonably believed to pose a serious public health or safety concern, the public would continue to be protected for the duration of the misconduct process.

The interaction between complaints to the Commission in respect of breaches of the Code, and the process required for a misconduct procedure is likely to be complex, varied and may require significant operational detail.

The procedure for dealing with such complaints may need to be adapted over time to respond to the operational requirements of the relevant public sector entities, the Public Sector Standards Commissioner and the Commission. Accordingly, it is necessary for such a procedure to be documented in a separate legislative instrument. The determination will be a disallowable instrument so as to allow scrutiny by the Legislative Assembly.

Any determination which is made pursuant to section 94D of the Bill must be made consistently with the HR Act, and proper consideration will need to be given to the interaction of the determination with human rights, including the right to a fair trial (s40B, HR Act). In determining a process, the Executive must also be reasonably satisfied that a health care worker subject to a public servant complaint has no less protection than another public servant under section 94F.

The power to make a determination at section 94D of the Bill allows for procedural arrangements to be put in place to more effectively and efficiently manage complaints which intersect with a misconduct procedure, whilst maintaining safeguards to ensure fair and transparent decision making.

Right to work and other work-related rights.

Nature of the right and limitation (s28(2)(a) and s28(2)(c), HR Act)

Section 27B of the HR Act provides that everyone has the right to work, including the right to choose their occupation or profession freely and that the practice of a trade, occupation or profession may be regulated by law.

The Bill engages with and potentially limits this right because, if a prohibition or condition order is issued in respect of a health care worker, then s94O of the Bill provides that the person will commit an offence if they do not comply with the prohibition or condition order. In some circumstances this may prevent a health care worker from practicing their profession entirely, or it may limit the extent to which they may practice their profession. A similar offence is provided at s94P in relation to a corresponding order, which is a prohibition or condition order made by another jurisdiction in Australia, defined in the Regulations. The maximum penalty for each offence is 100 penalty units, 12 months' imprisonment, or both.

Where a health care worker has a transmissible condition (s17, Regulation), or an impairment (s19, Regulation), they will be subject to additional requirements, which may engage the right at section 27B(5) to enjoy the right to work without discrimination. These requirements are limited and directed to managing the risk of transmission of a condition to a client, or of harm to a client (as relevant) in the provision of a health service to the client. The human rights compatibility assessment in relation to this is as above (regarding the right to equality before the law).

Legitimate purpose (s28(2)(b), HR Act)

It is important to ensure that where a health care worker poses a serious risk to the health and safety of the public and is subject to a prohibition or condition order, there will be an appropriate penalty for breach of such an order. The penalty for offences at sections 94O and 94P provides a disincentive to individuals from continuing to provide health services in contravention of a prohibition or condition order.

The offence at section 94P in relation to corresponding orders is necessary to address the risk of a health care worker simply moving jurisdictions so as to avoid a prohibition or condition order in their state. This is particularly important for the Territory, as it is anticipated that there will be some cross border movement of persons providing health services across the ACT and New South Wales border.

Rational connection between the limitation and the purpose (s28(2)(d), HR Act)

The power to make prohibition or condition orders, and the offences for contravention of the order are directly linked to the purpose of promoting the health and safety of the community, as well as the various human rights promoted by the Bill as set out above.

Proportionality (s28(2)(e), HR Act)

Importantly, a prohibition or condition order can only be issued where there would be a serious risk to the health or safety of the public if the health care worker continued to deliver the health services. The Bill does not include an offence for simple non-compliance with the Code. The prohibition and condition orders, and the offences for non-compliance with those orders, aim to protect the community from health care workers who pose a danger to the community and the individuals they treat. The limitation of the health care workers' ability to work is therefore balanced against and is proportionate to the health and safety risk posed by that health care worker to the public.

Therefore, these limitations are in proportion and apply only to the extent necessary to protect the community from the public safety risk posed by delivery of the health service.

Human Rights Commission Amendment Bill 2023

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Human Rights Commission Amendment Bill 2023**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This is a technical clause and sets out the name of the Act as the Human Rights Commission Amendment Act 2023 (the Act).

Clause 2 Commencement

The clause enables the Act to commence on a date fixed by the Minister by written notice.

Clause 3 Legislation amended

This clause identifies that the Act amends the *Human Rights Commission Act 2005*.

Clause 4 New Human Rights Commission Regulation – sch 1

The clause makes the provisions in schedule 1 a regulation made under the *Human Rights Commission Act 2005* from the date of commencement. The clause sets out technical details of the nature of the regulation.

Clause 5 New section 39(1)(b)(iia)

This clause inserts new section 39(1)(b)(iia) which adds the health care worker code of conduct (the Code) as the basis for a complaint to the Commission if a person believes the provider of a service has acted inconsistently with the Code.

Clauses 6 and 7 Purpose of considering complaints

These clauses include consideration of whether an action should be taken by the Commission in respect of a health care worker under Division 5.3, as a purpose for consideration of complaints.

Clauses 8 and 9 Correct Note

These clauses correct an issue with the Notes in sections 73(4) and 74(7).

Clause 10 – Preserve privilege against self-incrimination and exposure to civil penalty

In the event that the Commission exercises its powers to ask for information (s73 HRC Act) and to require attendance to answer questions (s74, HRC Act), the common law privileges against self-incrimination and exposure to the imposition of a civil penalty are preserved in respect of the consideration of a complaint under Division 5.3.

Clause 11 Substitute heading

This clause provides a new heading ‘Additional matters for health service complaints’ for Part 5 that more concisely articulates the matters contained in that part.

Clause 12 New Divisions 5.3 and 5.4

This clause inserts new Divisions 5.3 and 5.4 with new sections 94A-U. The intention of this amendment is to define matters pertaining to the Code and provide a framework for the regulatory scheme associated with the Code, including the power to determine a separate process for consideration of public servant complaints.

Section 94A Definitions – div 5.3

New section 94A adds definitions for terms relating to the Code. These definitions are limited to Division 5.3.

Section 94B Meaning of health care worker – div 5.3

New section 94B adds definitions for “health care worker”, “registered teacher”, “school”, and “teaching”.

The intention of this section is to exclude health practitioners, and registered teachers, from operation of the Code, when practicing the profession they are registered for. Such workers are already subject to robust registration requirements which regulate their specific profession, and this exclusion is intended to not create further limitations on the conduct of these professions.

Section 94C Code of conduct may be prescribed

New section 94C provides that a code of conduct may be prescribed through a regulation.

Section 94D Code of conduct breach by public servants

New section 94D provides for the Executive to determine a separate process for the commission to follow in dealing with complaints in relation to public servants.

Any determination will relate to the process for consideration of a complaint, rather than altering the requirements of the Code. The new section 94D does not intend to create additional remedies but may vary the timing within which the Commission may exercise various powers in relation to public servant complaints.

For example, subsection(5)(d) provides that a determination could be made so that a final prohibition or condition order is not made without the agreement of the Public Sector Standards Commissioner while a misconduct procedure is being conducted.

The standards of conduct of public servants in the Territory are regulated by existing robust frameworks, including a Code of Conduct and entrenched mechanisms for managing breaches of the Code of Conduct and performance issues.

Where there is a breach of the Code by a public servant, that public servant may also breach their obligations under the *Public Sector Management Act 1994* and/or enterprise agreement. Section 94D will enable a separate process to be determined to leverage the existing framework and mechanisms to minimise any unnecessary duplication in consideration of a public servant complaint and any similar substantive issues as part of a misconduct procedure.

The Code will apply to public servants, and public servants will still be subject to all the requirements described in the Regulation. The intention of new section 94D is to establish a separate process to apply to complaints in relation to public servants, in light of the likely interaction between breaches of the Code and a misconduct process which is already robustly regulated.

Section 94E Code of conduct breach by public servants – information sharing

New section 94E provides for the sharing of information in relation to a public servant complaint between the Commission, the Public Sector Standards Commissioner and a public service entity defined in the section.

The sharing of information is limited only to circumstances where the information is relevant to the exercise of the other entity's functions, and the entity sharing the information considers it is appropriate to share.

The intention is to limit the kind of information that can be shared to the role of each entity, but also allow flexibility to share information to streamline the consideration of issues arising from a public servant complaint.

Section 94F Principles for making prohibition or condition order or public statement

New section 94F introduces decision-making principles which require the Commission is bound by the rules of natural justice and must, before making a decision affecting a person, give the person an opportunity to make a submission to the Commission about the decision. The Commission must act with as little formality as possible and is not bound by the rules of evidence.

The purpose of this provision is to introduce safeguards against any risk of arbitrary decision making.

Section 94G Interim prohibition or condition order

New section 94G provides that the Commission, in the interests of the health or safety of the public, may make an interim prohibition or condition order.

Subsection (1) outlines when and on what grounds the Commission may make an interim order.

Subsection (2) provides reasonable limitations on the length of the interim order.

Subsection (3) provides that a determination may give power to the Commission to extend the period an interim order is in force for a public servant complaint.

Subsection (4) provides that a copy of the interim order must be given to the health care worker as soon as practicable.

Subsection (5) outlines which parties a copy of an interim order may be shared with. The intention of new subsection (5) is to allow for appropriate information sharing to notify relevant individuals, and the public, and minimise the risk that a health care worker subject to an order will continue delivering the services.

Section 94H Final prohibition or condition order

New section 94H provides that the Commission, in the interests of the health or safety of the public, may make a final prohibition or condition order. The subsections outline when and on what grounds the order can be made, limitations on the length of orders, an opportunity to respond if the health care worker is a health practitioner, and who may be provided a copy of the order.

Section 94I Public statement about health care worker or health service

New section 94I provides that the Commission, in the interests of the health or safety of the public, may make a public statement in relation to a health care worker. The subsections outline when and on what grounds the statement can be made, what form the statement may be in, what the statement may include, and that the Commission may vary or withdraw a public statement.

Section 94J Statement of reasons for prohibition or condition order or public statement

New section 94J provides that if the Commission makes a prohibition or condition order or a public statement, the Commission must give a statement of reasons. The subsections outline that the Commission may make the statement of reasons publicly available, may give a copy to certain bodies or persons, and may remove confidential information.

Section 94K Correction of public statement

New section 94K provides that a Commission must make a statement setting out the correct information or withdraw the public statement if they are made aware a public statement is incorrect.

Section 94L Variation of prohibition or condition order

New section 94L provides that the Commission must vary a prohibition or condition order under specific circumstances and include on the register the reason for variation.

Section 94M Cancellation of prohibition or condition order

New section 94M provides that the Commission must cancel a prohibition or condition order if they are satisfied that the order is no longer required to protect the health or safety of the public and include on the register the reason for cancellation.

Section 94N Health care worker must give notice of registration as health practitioner

New section 94N provides that during the period of a prohibition or condition order, the health care worker must provide written notice to the Commission about becoming a registered health practitioner. This provision provides that the Commission may exchange information with the relevant registration board.

Section 94O Non-compliance with prohibition or condition order

New section 94O provides that a person will commit an offence if they do not comply with the prohibition or condition order.

This may prevent a health care worker from practicing their profession entirely, or it may limit the extent to which they may practice their profession.

The intention of this provision is to provide a disincentive to individuals from continuing to provide health services in contravention of a prohibition or condition order.

Section 94P Non-compliance with corresponding prohibition or condition order

New section 94P provides that a person will commit an offence if they perform a health service in the ACT with a corresponding prohibition or condition order in force in another State.

The provision in relation to corresponding orders is intended address the risk of a health care worker moving jurisdictions to avoid a prohibition or condition order in their state. This is notable for the Territory, as it is anticipated that there will be cross border movement of persons providing health services across the ACT and New South Wales border.

Section 94Q Commission to keep register

New section 94Q provides that the Commission must keep a register of prohibition or condition orders made and ensure current orders be accessible at all times free on charge on a website.

Section 94R Exchange of information

New section 94R provides that the Commission may exchange information with a specified type of entity.

The intention of this provision is to allow for appropriate information sharing in order to notify relevant individuals and bodies and to minimise the risk that a health care worker subject to an order will continue delivering the services.

Section 94S Meaning of reviewable decision – div 5.4

New section 94S adds a definition for “reviewable decision”. This definition is limited to Division 5.4.

Section 94T Reviewable decision notices

New section 94T provides that the Commission must give notice to specific entities if the Commission makes a reviewable decision.

Section 94U Applications for review

New section 94U provides that certain entities may apply to the ACAT for review in relation to a reviewable decision.

Clause 13 New schedule 1

This clause provides a table of reviewable decisions and identifies the scope of review for particular decisions and the entities that have standing to seek review of a decision.

Clause 14 Expanded terms

This clause adds several terms to Note 2 of the Dictionary of the Act that are defined by the Legislation Act.

Clause 15 New definition

This clause adds “code of conduct” to the Dictionary of the Act.

Clause 16 Expanded definition

This clause expands the definition of “complaint” in the Dictionary of the Act to include the code of conduct pursuant to section 94A.

Clause 17 New definitions

This clause adds definitions to the Dictionary of the Act for terms related to the Code, linking the relevant term with the relevant section of the Act.