

Australian Capital Territory

Human Rights Commission (Public Servant) Process 2024 (No 1)

Disallowable instrument DI2024–24

made under the

Human Rights Commission Act 2005, section 94D (Code of conduct breach by public servants)

EXPLANATORY STATEMENT

OVERVIEW

Section 94D of the *Human Rights Commission Act 2005* (Act) allows for the Executive to determine a separate process for the ACT Human Rights Commission (the Commission) to follow when dealing with complaints made about a public servant who is a health care worker acting inconsistently with the National Code of Conduct for Health Care Workers (the Code) as part of their employment (public servant complaints). This is done through a disallowable instrument (the instrument).

The purpose of establishing the separate process determined in the instrument is to 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.

The Territory has robust regulatory frameworks in place to maintain standards of conduct for public servants, including the ACT Public Service (ACTPS) Code of Conduct and entrenched mechanisms for managing breaches and performance issues. Where there is a breach of the Code in the *Human Rights Commission Regulation 2023* 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 process determined in the instrument is intended 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.

The Commission has been consulted with in relation to process determined in the instrument. The Executive is reasonably satisfied that the process determined in the instrument gives no less protection than that given to a health care worker who is the subject of a prohibition or condition order, or public statement, to which section 94F applies.

Detailed Explanation

Clause 1 of the process provides for the information sharing arrangements to support the consideration of the complaint by a relevant information sharing entity.

Specifically, the Commission must provide relevant information in relation to a complaint to the relevant information sharing entity. The Commission is also required to consult with the relevant information sharing entity in relation to the process of each entity for considering the complaint, this is intended to streamline the management of complaints, and provide an opportunity for duplications to be minimised.

Clause 2 of the process provides that the Commission must not issue a final order in relation to a public service complaint until the process for preliminary assessment and investigation (if any) of any alleged inappropriate behaviour or misconduct under relevant Enterprise Agreement and the *Public Sector Management Act 1994* is complete. However, a final order can be issued with the agreement of the public sector standards Commissioner.

Clause 3 clarifies that interim orders are not affected by the instrument, and allows for the extension of interim orders in accordance with sections 94D (5) (e) and 94G (3).

Clause 4 provides that the Commission and the public sector standards Commissioner may agree to a relationship protocol to further streamline the exercise of their respective functions.

Clause 5 sets out relevant definitions to clarify the effect of the instrument.

CONSISTENCY WITH HUMAN RIGHTS

This instrument has 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. The human rights limitations that this instrument creates are proportionate to achieve the overall policy objective of section 94D of the Act under which this instrument was made, and the least restrictive approach has been adopted.

Rights engaged

The instrument engages the following rights:

- Section 8 – Recognition and equality before the law (limited)
- Section 21 – Fair Trial

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. This instrument may limit the right to recognition and equality before the law.

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

Section 94D of the Act 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. This instrument provides for that process. This process outlined in this instrument does not change the fact that public servants are still subject to the same substantive provisions of the Code, as set out in the *Human Rights Commission Regulation 2023*, as any other health worker.

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

The objective of the Act 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 establishing a formalised process for complaints.

The purpose of this instrument is to ensure that there is a clear process to follow where a complaint is made against a public servant (who is subject to obligations under the *Public Sector Management Act 1994*) who is also a health worker subject to the Code. The Territory already has robust regulatory frameworks in place to maintain standards of conduct of public servants, including a Code of Conduct for public servants and entrenched mechanisms for managing breaches of the public servant 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 this instrument enables 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.

The operational requirements outlined in this instrument for the management of complaints in relation to public servants may be updated as necessary to respond to issues as they arise.

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

The separate process outlined in this instrument ensures that 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.

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. This instrument simply allows for 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 Act in relation to the conduct of public servants.

The right to a fair trial

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

The right to a fair trial and fair hearing applies to the determination of rights or obligations recognised by law. This may include complaint procedures in relation to a public servant for breaches of the Code.

This right encompasses the right to a fair hearing which is concerned with procedural fairness and includes the right that a matter be heard expeditiously within a reasonable period and without undue delay.

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

This instrument provides for 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 instrument 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, Item 2 of the Schedule for the instrument provides that unless otherwise agreed by the public sector standards Commissioner, a final order must not be issued in relation to a complaint until the process for preliminary assessment and investigation (if any) of any alleged inappropriate behaviour or misconduct under the relevant enterprise agreement and the *Public Sector Management Act 1994* is complete. Item 3 of the Schedule for the instrument also allows the Commission to extend an interim order for any period of time required by the public sector standards Commissioner to complete the consideration of the complaint.

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

A power 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 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 Act, 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.

The instrument provides that the timeframes for making prohibition and condition orders, and the duration of interim orders, may be extended as needed. Delay or deferral of a final prohibition or condition order is necessary to lever existing mechanisms for dealing with misconduct issues. Accordingly it may be necessary for interim orders to be extended by the Commission (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 this instrument to document such a procedure.

The Executive is also reasonably satisfied that a health care worker subject to a public servant complaint has no less protection under the procedures outlined in this instrument than that given to another health care worker who is the subject of a prohibition or condition order, or public statement, to which section 94F applies. This is because the process outlined in this instrument does not make provision in relation to the matters outlined section 94F and so those matters apply equally to public servants who are health workers as well as health workers who are not public servants.

The procedure put in place by this instrument allows for more effective and efficient management of complaints which intersect with a misconduct procedure, whilst maintaining safeguards to ensure fair and transparent decision making.