

# HEALTH LEGISLATION AMENDMENT BILL 2024

The Bill is **not** 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*.

This explanatory statement relates to the *Health Legislation Amendment Bill 2024* (Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly. The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

## OVERVIEW AND CONSULTATION OF THE BILL

The Bill is an omnibus bill which amends a range of legislation under the health portfolio to support the efficient and effective functioning of the ACT health system. It seeks to address minor or technical issues that have been raised by stakeholders or that have been identified by the Health Directorate. The Bill amends the following legislation:

- *Assisted Reproductive Technology Act 2024*
- *Health Practitioner Regulation National Law (ACT) Act 2010*
- *Health Records (Privacy and Access) Act 1997*
- *Medicines, Poisons and Therapeutic Goods Act 2008*
- *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023*

The amendments in the Bill were developed in targeted consultation within Government and with relevant community stakeholders where appropriate. In some cases, minor and technical amendments were identified by the Government agency that administers or operates under the relevant Act, or by the Parliamentary Counsel's Office (PCO).

### ***Assisted Reproductive Technology Act 2024***

The amendment to the *Assisted Reproductive Technology Act 2024* was proposed by PCO to correct a minor drafting error by substituting an incorrect reference to the 'registrar' with the 'director general' under section 112(4) to ensure the effectiveness and consistency of the section.

### ***Health Practitioner Regulation National Law (ACT) Act 2010***

A number of amendments were introduced by the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2022* (Qld) following agreement by all Health Ministers in February 2022, and then automatically adopted in the ACT by way of section 6 of the *Health Practitioner Regulation National Law (ACT) Act 2010*. Of relevance, two new actions were introduced which allowed national regulators, in

response to a complaint or notification to: refer matters to another entity and; to issue interim prohibition orders.

The amendment to the *Health Practitioner Regulation National Law (ACT) Act 2010* was proposed by ACT Health Directorate to include the two new actions into the list of actions at section 150(4A) of the *Health Practitioner Regulation National Law (ACT)*. Section 150(4A), which is an ACT specific provision, lists the possible actions that a regulator may take in response to a notification or complaint from most to least serious. The amendment to the *Health Practitioner Regulation National Law (ACT) Act 2010* will ensure that the list of possible actions is comprehensive and hierarchical and nationally consistent.

The ACT Health Services Commissioner, being the health complaints entity under the *Health Practitioner Regulation National Law (ACT)* was consulted on the amendment to the *Health Practitioner Regulation National Law (ACT) Act 2010* and is supportive of the amendment.

### ***Health Records (Privacy and Access) Act 1997***

The amendment to the *Health Records (Privacy and Access) Act 1997* was proposed by both Canberra Health Services and ACT Health Directorate to clarify ambiguity about whether surveillance footage, such as CCTV footage, located at premises from which a health service provider provides services or in an area surrounding the premises, is captured by the storage obligations for health records. The proposed amendment will clarify that surveillance footage is excluded from the storage obligations in relation to health records, and therefore align the treatment of surveillance footage taken at premises of a health service provider with the treatment of other kinds of surveillance footage.

A range of stakeholders has been consulted in relation to this amendment, including Canberra Health Services, the Human Rights Commission (as the complaints entity under the *Health Records (Privacy and Access) Act 1997*), and targeted consultation with other health service providers in relation to usage of surveillance footage. The stakeholders were broadly supportive of the amendment, as relevant to their interests.

### ***Medicines, Poisons and Therapeutic Goods Act 2008***

The interjurisdictional operation of the real time prescription monitoring system is supported by specific provisions of the *Medicines, Poisons and Therapeutic Goods Act 2008* which allows the Territory to enter into an agreement to share information which allows real time prescription monitoring with the Commonwealth or another State.

The Commonwealth has transitioned oversight of the real time prescription monitoring system to the Australian Digital Health Agency (ADHA), which is a corporate Commonwealth entity with separate legal existence to the Commonwealth. The

amendment to the *Medicines, Poisons and Therapeutic Goods Act 2008* was proposed by ACT Health Directorate to remove any legal ambiguity that the Territory can enter into an agreement with the ADHA to share relevant information.

### ***Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023***

The *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023 (VSC Act)* establishes the Restricted Medical Treatment Assessment Board, from which members will be drawn to form Assessment Committees. The role of a committee is to review and either approve or refuse treatment plans for restricted medical treatments in line with assessment criteria. Without a treatment plan in place, restricted medical treatment cannot go ahead.

The amendment to the VSC Act was proposed by the ACT Health Directorate to clarify that decisions made by the Board, assessment committees and any internal review committees can be made by a majority of votes of all committee members. Currently, under the VSC Act, an assessment committee may conduct an assessment of an application in the way it considers appropriate (see section 18(1)), and a regulation may prescribe additional requirements about the operation of an assessment committee (see section 18(4)). However, there is legal uncertainty in relation to whether a regulation may prescribe that decisions of an assessment committee may be made by majority.

In the absence of the proposed amendment, decision making of assessment committees must occur by unanimity. Decision making by unanimity causes a number of technical and unintended consequences for the operation of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023*. Where a unanimous decision cannot be achieved in relation to an application, an assessment committee would be unable to either approve the treatment plan or refuse the treatment plan (that is, no decision could be made). This in turn leads to an unintended consequence that individuals waiting on the decision may be put at risk of continuing to suffer harm, as treatment would continue to be prohibited until such time as the committee reached a consensus. In this same circumstance, the interested parties would also be precluded from applying for an internal review of the decision or for review by ACAT.

The ACT Health Services Commissioner and the Office of LGBTIQ+ Affairs was consulted on the amendment to the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* and the stakeholders are supportive of the amendment.

## **CLIMATE IMPACT**

The amendments in the Bill are of a minor and technical nature, and do not substantively change the policy intent of any of the legislation being amended, therefore no climate impacts are anticipated under the Bill.

## CONSISTENCY WITH HUMAN RIGHTS

### Rights engaged

The Bill engages the following rights under the *Human Rights Act 2004* (Human Rights Act):

- Section 12 – Privacy and reputation (*promoted and limited*)
- Section 16 – Right to freedom of expression (*limited*)

### ***Assisted Reproductive Technology Act 2024***

The amendment to the *Assisted Reproductive Technology Act 2024* does not engage human rights.

### ***Health Practitioner Regulation National Law (ACT) Act 2010***

The amendment to the *Health Practitioner Regulation National Law (ACT) Act 2010* does not engage human rights.

### ***Health Records (Privacy and Access) Act 1997***

The amendment to the *Health Records (Privacy and Access) Act 1997* engages the right to privacy and reputation (*promoted and limited*) and the right to freedom of expression (*limited*).

### ***Medicines, Poisons and Therapeutic Goods Act 2008***

The amendment to the *Medicines, Poisons and Therapeutic Goods Act 2008* engages the right to privacy and reputation because it clarifies the types of entities for which information can be shared. However, relevant information sharing already occurs under the current legislation, the amendment will simply clarify the kind of entity that information may be shared with and does not expand information sharing powers or scope.

### ***Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023***

The *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* in its entirety, interacts with human rights in a number of ways, notably the right to not be subject to medical treatment without consent and the right to protection of the family and child.

However, the amendment to the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* (**VSC Act**) does not directly engage human rights. Currently, as set out above, there is legal uncertainty in relation to whether a regulation may prescribe that decisions of an assessment committee may be made by majority. The amendment will clarify on the face of the legislation that decision-making of assessment committees may occur by majority decision-making rather than requiring unanimity. This will clarify the nuance of how decisions in relation to treatments are made and resolve a number of technical and unintended consequences for the

operation of the VSC Act as detailed above but does not change the overall engagement or impact of the VSC Act on rights under the Human Rights Act.

## **Rights Promoted**

### ***Health Records (Privacy and Access) Act 1997***

#### Section 12 – Right to privacy and reputation (*promoted*)

Section 12 of the Human Rights Act outlines the right to privacy and reputation. It states that all persons have the right not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily, and not to have their reputation unlawfully attacked.

This Bill promotes the right to privacy and reputation for healthcare consumers and any other persons visiting a health facility by clarifying an ambiguity of the storage requirements for surveillance footage captured at health facilities. The Bill excludes surveillance footage of cameras at or in an area surrounding the premises of health service providers from the storage requirements of a health record under the *Health Records (Privacy and Access) Act 1997*, which will remedy the current uncertainty of whether some surveillance footage constitutes a health record and should therefore be stored for the same timeframes as a health record.

Currently, health records must be stored for at least 7 years, and up to 25 years if the consumer is a child.<sup>1</sup> This is a significantly longer storage requirement than the ordinary 30-day storage requirement for surveillance footage which has not been requested for law enforcement or does not involve an incident, and has been collected by agencies under the *Territory Records Act 2002*.<sup>2</sup> Further, under the Commonwealth privacy framework, which generally applies to health service providers under the *Privacy Act 1988* (Cth),<sup>3</sup> principle 11 requires that if an entity no longer needs personal information for any purpose for which the information may be used or disclosed under the Australian Privacy Principles, the entity must take reasonable steps to destroy the information or ensure that it is de-identified.

The advancement of surveillance technologies increases the risk that unlawful or arbitrary surveillance will interfere with an individual's right to privacy. Aggregation and analysis of surveillance footage can reveal a wide range of personal and sensitive information about an individual, for example, that they were present in a particular location at a certain time.

---

<sup>1</sup> *Health Records (Privacy and Access) Act 1997* (ACT), Principle 4.1.

<sup>2</sup> See: Territory Records (Records Disposal Schedule - Security Coordination Records) Approval 2009 (No 1); Territory Records (Records Disposal Schedule - Property Equipment and Fleet Records) Approval 2017 (No 1).

<sup>3</sup> Office of the Australian Information Commissioner, *Australian Privacy Principles Guidelines: Privacy Act 1988*, B80 - B81.

Due to this privacy risk, international human rights law encourages limited storage timeframes and timely disposal in relation to identifying data (such as surveillance footage), in order to promote a considered approach when balancing an individual's right to privacy and the general public's right to feel safe. For example, Article 5 of the European Union's General Data Protection Regulation outlines that data must be:

*“kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed....in order to safeguard the rights and freedoms of the data subject (‘storage limitation’)”*

This Bill promotes a person's right to privacy by ensuring that it is clear that the recorded image of a person via a surveillance device at a premises of a health service provider is treated the same way, and is subject to the same legislative requirements, as any other surveillance footage in the Territory and is not stored for longer than is required to achieve its purpose.

## **Rights Limited**

***Health Records (Privacy and Access) Act 1997*** Section 12 – Right to privacy and reputation Section 16 – Right to freedom of expression

### **1. Nature of the right and the limitation (s28(a) and (c))**

Section 12 of the Human Rights Act protects individuals from unlawful or arbitrary interference with privacy, family, home, or correspondence. The right to privacy also involves a general right for an individual to access their own personal information.

Section 16 of the Human Rights Act provides that everyone has the right to hold opinions without interference and has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds. The inclusion of the phrase ‘seek and receive’ in section 16(2) of the Human Rights Act is relevant to obligations of public authorities to provide access to government held information.

Both the right to privacy and the right to freedom of expression are limited by the Bill only to the extent that clause 7 restricts individuals from accessing their own personal information in the form of surveillance footage of themselves by way of the *Health Records (Privacy and Access) Act 1997*, as surveillance footage may have been destroyed by the time a request is made.

However, clause 7 does not preclude access to that surveillance footage via the appropriate legislative framework whilst that information remains available. All of the

same protections around access to the information under the *Information Privacy Act*, the *Health Records (Privacy and Access) Act*, or the *Privacy Act 1988* (Cth) (as relevant to the specific type of information, and the entity that collected it) will continue to apply to protect individuals' rights to access information about themselves.

## **2. Legitimate purpose (s28(b))**

The amendment has a legitimate purpose, as it will remedy the legal ambiguity in relation to surveillance footage at premises of a health service provider, and to the extent of that ambiguity, will promote the right to privacy for health care consumers and people visiting health facilities by clarifying the appropriate storage timeframes of surveillance footage.

## **3. Rational connection between the limitation and the purpose (s28(d))**

There is a rational connection between clarifying the exclusion of surveillance footage from the storage requirements of health records and the legitimate purpose of protecting the privacy for individuals visiting health facilities. The connection is that the exclusion will clarify that surveillance footage located at premises from which a health service provider provides services, or in an area surrounding the premises (**Health Facility Surveillance Footage**) may be treated the same as surveillance footage taken elsewhere. This will allow Health Facility Surveillance Footage to be stored for 30 days (ordinarily) or in accordance with the Commonwealth privacy framework, as compared to the 7 years storage timeframe for health records.

The shorter storage timeframe will reduce the risk of arbitrary or unlawful use or access of the footage and reduce the risk that the footage is stored or distributed in an insecure way.

## **4. Proportionality (s28 (e))**

This limitation is considered reasonable and proportionate in the circumstances. Alternative options for redressing the ambiguity around the storage timeframe of Health Facility Surveillance Footage were considered. For example, excluding Health Facility Surveillance Footage directly from the definition of 'health record' under the *Health Records (Privacy and Access) Act 1997*. However, the definitional exclusion would result in the exclusion of Health Facility Surveillance Footage from both the privacy principles under the *Health Records (Privacy and Access) Act 1997*, and the privacy principles under the *Information Privacy Act 2014*. This alternative option could result in Health Facility Surveillance Footage being subject to fewer privacy protections than other forms of security footage. It was also considered whether Health Service Surveillance Footage could be excluded from the definition of "personal health information", however given the significant use of that term across the ACT statute book, there was a concern that the scope of that amendment could lead to unintended consequences.

Therefore, the amendment to the *Health Records (Privacy and Access) Act 1997* is the least restrictive means reasonably available to achieve the policy objective because it ensures that the protections and obligations in relation to storage and access offered in other privacy legislation will continue to apply to Health Facility Surveillance Footage. Health Facility Surveillance Footage will be treated in the same way as other kinds of surveillance footage and would be subject to the requirements of the *Information Privacy Act 2014* and/or the *Privacy Act 1988* (Cth) to the extent that it contains ‘personal information’.

Treating the storage of Health Facility Surveillance Footage in the same way as other kinds of surveillance footage will result in a general 30-day storage timeframe for footage collected by Territory agencies. However, under the Territory Records Disposal Schedules, longer storage timeframes will apply when the surveillance footage contains certain incidents. For example, under the *Territory Records (Records Disposal Schedule - Property Equipment and Fleet Records) Approval 2017 (No 1)*, where the footage contains incidents that have caused significant political or public reaction or relates to high profile incidents, such as murder, serious accidents, or extremely violent assaults, the footage must be kept indefinitely. Where the footage has been requested by investigative and law enforcement bodies in relation to incidents not investigated or that caused no significant political or public reaction, the footage must be kept for 12 years.

Health entities covered by the *Privacy Act 1988* (Cth) must comply with the Australian Privacy Principles when collecting personal information, including personal information collected via surveillance devices. Although there are no specific storage timeframes, Australian Privacy Principle (APP) 11 outlines that if the entity no longer needs the information for any purpose and the entity is not required by an Australian law, or a court or tribunal to retain the information, the entity must take reasonable steps in the circumstances to destroy the information or to ensure that the information is de-identified. This generally aligns with the intent of Territory specific Disposal Schedules as outlined above.

Treating the storage of Health Facility Surveillance Footage in the same way as other kinds of surveillance footage will still require Territory health facilities to store surveillance footage for longer timeframes where that footage contains an incident. Excluding Health Facility Surveillance Footage from the storage requirements of health records would therefore only result in a shorter storage timeframe of that footage for when it does not involve an incident or has not been requested by investigative bodies. Given that health consumers and people visiting a health facility would generally only seek surveillance footage of themselves where an incident has occurred, the limitation on access to information arising from the amendment to the *Health Records (Privacy and Access) Act 1997* is reasonable.



Safeguards have also been incorporated into the amendment to minimise the limitations on human rights, by ensuring that the amendment is carefully targeted. The amendment to the *Health Records (Privacy and Access) Act 1997* to exclude surveillance footage from the storage requirements of health records only applies to surveillance footage captured at the premises from which a health service provider provides services or in an area surrounding the premises. The excluded footage will also not include a video recording made for the purposes of a clinical procedure or investigation, to ensure that a clinical recording, such as automated Magnetic Resonance Imaging (MRI) are not captured within the amendment. This type of recording would still constitute a health record and be subject to the storage requirements of a health record.

## HEALTH LEGISLATION AMENDMENT BILL 2024

### *Human Rights Act 2004 - Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Health Legislation Amendment Bill 2024**. 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*.

.....  
Shane Rattenbury  
MLA Attorney-  
General

## CLAUSE NOTES

### Part 1 Preliminary

#### Clause 1 Name of Act

This is a technical clause and provides that the title of the Act will be the *Health Legislation Amendment Act 2024* (the **Act**).

#### Clause 2 Commencement

This clause provides for the commencement of different provisions in the Act.

The provisions in the Act, except for those outlined below, commence on the day after the Act's notification day.

Part 2 commences on the later of the commencement of the *Assisted Reproductive Technology Act 2024*, division 8.6 and the commencement of this Act, section 3.

Section 5 commences on the later of the commencement of the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2022* (Qld), chapter 3, part 21 (Interim prohibition orders) and the commencement of this Act, section 3.

#### Clause 3 Legislation amended

This is a formal clause identifying that the Act amends the following legislation:

- *Assisted Reproductive Technology Act 2024*
- *Health Practitioner Regulation National Law (ACT) Act 2010*
- *Health Records (Privacy and Access) Act 1997*
- *Medicines, Poisons and Therapeutic Goods Act 2008*
- *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023*

### Part 2 Assisted Reproductive Technology Act 2024

#### Clause 4 Return of seized things – Section 112 (3)

This clause substitutes section 112(3). This amendment is intended to address a technical error which occurred in the drafting of the *Assisted Reproductive Technology Act 2024* in relation to who may direct a seized thing to be sold, destroyed, or disposed. It replaces an incorrect reference to the 'registrar' with the 'director-general'.

### Part 3 Health Practitioner Regulation National Law (ACT) Act 2010

#### Clause 5 Modifications – Health Practitioner Regulation National Law - Schedule 1, modification 1.3 – New section 150 (4A) (aa)

This clause amends section 150(4A) to insert an additional action that may be taken by a regulator in relation to a notification or complaint, or part of a notification or complaint. The new action that may be taken is to deal with the notification or complaint through an interim prohibition order.

This amendment aligns the *Health Practitioner Regulation National Law (ACT) Act 2010* with the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2022* (Qld) which introduces two new actions for national regulators when dealing with a notification or complaint.

Given that section 150(4A) lists all the possible actions a regulator may take in response to a notification or complaint (from most to least serious), this amendment to incorporate the two new actions will allow the list at section 150(4A) to be complete and up to date.

#### **Clause 6      Schedule 1, modification 1.3 – New section 150 (4A) (ca)**

This clause amends section 150(4A) to insert an additional action that may be taken by a regulator in relation to a notification or complaint, or part of a notification or complaint. The new action that may be taken is to refer the notification or complaint to another entity.

As above in clause 5, this amendment aligns the *Health Practitioner Regulation National Law (ACT) Act 2010* with the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2022* (Qld) which introduces two new actions for national regulators when dealing with a notification or complaint.

Given that section 150(4A) lists all the possible actions a regulator may take in response to a notification or complaint (from most to least serious), this amendment to incorporate the two new actions will allow the list at section 150(4A) to be complete and up to date.

### **Part 4            Health Records (Privacy and Access) Act 1997**

#### **Clause 7      Storage, security and destruction of personal health information – safekeeping requirement - Schedule 1, principle 4.1, new clauses 3 (d) and 4**

This clause amends schedule 1, principle 4.1 and inserts new clauses 3(d) and 4.

New clause 3(d) inserts a new exception to the requirement at principle 4.1, clause 2 of the *Health Records (Privacy and Access) Act 1997* to keep and not destroy a health record about a consumer. The new exception excludes surveillance footage located at premises from which a health service provider provides services or in an area surrounding the premises from this requirement. New clause 3(d) also inserts an example of what constitutes surveillance footage.

New clause 4 clarifies what is and is not included in the term *surveillance footage*, for the purposes of principle 4.1. New clause 4 also inserts two examples of recordings which are made for the purposes of a clinical procedure or investigation and would therefore not be included in the term *surveillance footage*.

The purpose of this clause is to exclude surveillance footage captured at health facilities from the storage requirements which usually apply to health records under the *Health Records (Privacy and Access) Act 1997*.

**Clause 8 Storage, security and destruction of personal health information – register of destroyed or transferred records - Schedule 1, principle 4.2, new clauses 4 and 5**

This clause amends schedule 1, principle 4.2 and inserts new clauses 4 and 5.

New clause 4 inserts a new exception to the requirement at principle 4.2, clause 1 of the *Health Records (Privacy and Access) Act 1997* to keep a register of records that have been destroyed or transferred to another entity. The new exception excludes the destruction of surveillance footage located at premises from which a health service provider provides services or in an area surrounding the premises from this requirement to keep a record.

New clause 5 inserts a definitional reference of the term *surveillance footage* and links it to principle 4.1, clause 4.

The purpose of this clause is to exclude the destruction of surveillance footage captured at health facilities from the record-keeping requirements which usually apply to the destruction of health records under the *Health Records (Privacy and Access) Act 1997*.

**Part 5 Medicines, Poisons and Therapeutic Goods Act 2008**

**Clause 9 Definitions – ch 6A – Section 97B, definition of *another jurisdiction* and note**

This clause substitutes the definition of *another jurisdiction* to include an entity established under a law of the Commonwealth or State.

The Commonwealth is proposing to transition real time prescription monitoring data to the Australian Digital Health Agency (ADHA), which is a corporate Commonwealth entity. This amendment will ensure that the Territory can enter into an agreement with the ADHA to share relevant information.

**Part 6 Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023**

**Clause 10 Deciding the application – general treatment plan – New section 23 (1A)**

This clause inserts new subsection (1A) which clarifies that a decision in relation to a general treatment plan under existing subsection (1) is decided by a majority of votes of all assessment committee members.

**Clause 11 Deciding the application – individual treatment plan – New section 26 (1A)**

This clause inserts new subsection (1A) which clarifies that a decision in relation to an individual treatment plan under existing subsection (1) is decided by a majority of votes of all assessment committee members.

**Clause 12 Decision of internal review committee – New section 39 (2A)**

This clause inserts new subsection (2A) which clarifies that a decision by the internal review committee in relation to an internally reviewable decision under the existing section 39 (apart from a decision taken to be confirmed under existing subsection (3)) is decided by a majority of votes of all internal review committee members.