

## **EXPLANATORY STATEMENT**

**Issued by the authority of the Minister for Aged Care**

*Aged Care Act 1997*

*Aged Care Quality and Safety Commission Act 2018*

*Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022*

### **Purpose**

The purpose of the *Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022* (Instrument) is to amend the *Aged Care Quality and Safety Commission Rules 2018* (Commission Rules) to make provision for the Code of Conduct for Aged Care (Code of Conduct). The Code of Conduct establishes minimum standards of conduct for approved providers and their aged care workers and governing persons.

The Instrument also makes provision for the Aged Care Quality and Safety Commissioner (Commissioner) to take action in relation to compliance with the Code of Conduct.

The Instrument amends the Commission Rules in relation to banning orders, by specifying that certain information must be included in the register of banning orders, and making provision for matters relating to accessing, correcting information in, and publication of, the register of banning orders.

The amendments strengthen safeguards for older Australians receiving aged care and aim to increase public confidence in the aged care sector and workforce.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

### **Background**

On 1 March 2021, the Royal Commission into Aged Care Quality and Safety (Royal Commission) *Final Report: Care, Dignity and Respect* (Final Report) was publicly released. The Final Report recommended that the Australian Government should establish a registration scheme for the personal care workforce comprising five key elements (Recommendation 77). One of these key elements was the establishment of a code of conduct and power for a registering body to investigate complaints into breaches of the code of conduct and take appropriate disciplinary action (Recommendation 77(1)(e)). In addition, the Final Report recommended a wider range of enforcement powers for the aged care sector, including banning orders for individuals (Recommendation 103).

In response to the recommendations of the Final Report, the Australian Government committed to implementing reforms to the aged care system, including a new code of conduct for approved providers, their workforce and governing persons and arrangements for banning orders. These measures were enacted under Schedule 3 to the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act*

2022 (Royal Commission Response Act) and implement Recommendations 77 and 103 of the Final Report in part.

The Instrument operates alongside information sharing provisions in the *Aged Care Quality and Safety Act 2018* (Commission Act) as amended by Schedule 6 to the Royal Commission Response Act, which allows protected information to be shared between the National Disability Insurance Scheme Quality and Safeguards Commission (NDIS Commission) and the Australian Health Practitioner Regulation Agency (Ahpra). These provisions will support the operation of the Instrument, in relation to banning orders where aged care workers or governing persons work across the aged care and disability support sectors.

### **Authority**

The Commission Rules are made by the Minister under section 77 of the Commission Act. Under subsection 77(1), the Minister may, by legislative instrument make rules prescribing matters required or permitted, or necessary or convenient, for carrying out or giving effect to the Commission Act.

### Commissioner's code functions

Section 18A of the Commission Act outlines the Commissioner's code functions, which includes taking action in relation to compliance with the Code of Conduct in accordance with the Commission Rules.

Subsection 21(1) of the Commission Act provides that the Commission Rules may make provision for, or in relation to, the performance of the Commissioner's functions under section 16 of the Commission Act.

Subsection 21(3A) of the Commission Act provides that, without limiting subsection 21(1), the Commission Rules may make provision for the taking of action in relation to compliance with the provisions of the Code of Conduct that apply or applied to an approved provider, an individual who is or was an aged care worker of an approved provider, or an individual who is or was a governing person of an approved provider.

Subsection 21(3B) of the Commission Act provides that, without limiting subsection 21(3A), the Commission Rules may make provision for, or in relation to, any one or more of the following:

- how information about compliance with the Code of Conduct may be given to the Commissioner;
- the actions that may be taken by the Commissioner in relation to compliance with the Code of Conduct, which may include requiring an approved provider or other relevant person to do something;
- the roles, rights and responsibilities of persons who give such information to the Commissioner, approved providers, individuals who are or were aged care workers or governing persons of approved providers, or any other relevant persons;
- the review or reconsideration of decisions made in relation to compliance with the Code of Conduct.

### Code of Conduct

Section 74AE of the Commission Act provides that the Commission Rules may make

provision for, or in relation to, a code of conduct that applies to approved providers and their aged care workers and governing persons.

#### Register of banning orders

Paragraph 74GI(1)(h) of the Commission Act allows the Commission Rules to specify any other information that must be included in the register of banning orders in relation to each individual against whom a banning order has been made at any time.

Subsection 74GI(6) of the Commission Act provides that the Commission Rules must make provision for, or relation to, the correction of information that is included in the register, including how an individual may access information about the individual that is included in the register and seek the correction of such information.

Subsection 74GI(7) of the Commission Act provides that the Commission Rules may make provision for, or in relation to, making the register (in whole or in part) publicly available, making specified information that is included in the register publicly available, and any other matter relating to the administration or operation of the register.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue an instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

#### **Commencement**

The Instrument commences on 1 December 2022.

#### **Consultation**

The Department of Health and Aged Care (Department) has undertaken the following consultation in relation to the Code of Conduct and banning orders.

Between November and December 2021, public consultation was undertaken across the aged care, veterans' care and disability support sectors (together, the care and support sector) on a draft care and support sector code of conduct, which was based on the existing National Disability Insurance Scheme (NDIS) Code of Conduct. In total, the Department received sixty submissions in response to the consultation. The Department also hosted five targeted online stakeholder forums, including a forum specifically for care recipients.

Parliamentary submissions regarding Schedule 3 to the Royal Commission Response Act, received as part of the parliamentary consultation process for the Royal Commission Response Act in November 2021, were also reviewed by the Department.

Across all consultation processes, there was broad stakeholder support for the Code of Conduct and for it to be based on the NDIS Code of Conduct, given that the NDIS Code of Conduct has been operating successfully within the disability support sector since 2018. The Department has implemented this feedback. The Code of Conduct and banning orders largely mirror the existing NDIS Code of Conduct. Differences

between the NDIS Code of Conduct and the Code of Conduct reflect the different nature of support provided in these sectors.

The Department also consulted with the Aged Care Quality and Safety Commission (Commission), Department of Social Services and the NDIS Commission. This was to ensure alignment of the Instrument with the NDIS regulatory framework where appropriate and that the Instrument includes appropriate detail and powers to enable the Commission to fulfill its regulatory responsibilities relating to the Code of Conduct and banning orders.

An exposure draft of the Instrument was published on the Department's website and open for public consultation for a period of 14 days from 4 to 18 October 2022. The consultation responses received through this process again indicated that there was broad support for the introduction of the Code of Conduct based on the NDIS Code of Conduct.

Feedback on the exposure draft of the Instrument highlighted some common queries and concerns, in particular requests for clarification regarding the application of procedural fairness and the meaning of the terms "approved provider", "aged care worker" and "governing person" under the Instrument. In response to this feedback, the Department amended the Instrument to address these points. A new note, under both section 23AA and Schedule 1 clause 2, was included to refer to section 7 of the Commission Act for the definitions of "approved provider", "aged care worker" and "governing person". New section 23BG was also added and requires the Commissioner to have due regard to procedural fairness.

### **Regulation Impact Statement (RIS)**

Consistent with the Office of Best Practice Regulation's (OBPR) RIS requirements, the Department has certified that the Productivity Commission's report *National Disability Insurance Scheme Costs* and the report *A Matter of Care – Australia's Aged Care Workforce Strategy* have undertaken similar processes and analyses to that required for a RIS. The OBPR assessed that the options analysed in the independent reviews are sufficiently relevant to the regulatory proposal.

The certification and independent reviews are available on the OBPR's website: <https://obpr.pmc.gov.au/published-impact-analyses-and-reports/national-care-and-support-worker-regulation>.

## **Details of the Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022**

**Section 1** provides that the name of the Instrument is the *Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022*.

**Section 2** provides that the whole of the Instrument commences on 1 December 2022.

**Section 3** states that the authority for making the Instrument is under the Commission Act.

**Section 4** provides that each instrument that is specified in a Schedule to the Instrument is amended or repealed as set out in the applicable items in that Schedule, and any other item in that Schedule has effect according to its terms.

### **Schedule 1 – Code of Conduct, Commissioner’s Code of Conduct functions and banning orders**

#### ***Aged Care Quality and Safety Commission Rules 2018***

**Item 1** inserts a new definition of “register of banning orders” in section 4 of the Commission Rules. The “register of banning orders” means the register established in section 74GI of the Commission Act.

**Item 2** inserts new Parts 2A (Code of Conduct), 2B (Commissioner’s Code of Conduct functions) and 2C (Register of banning orders), after Part 2 of the Commission Rules.

#### **Part 2A – Code of Conduct**

##### **Section 23AA – Simplified outline of this Part**

New section 23AA sets out a simplified outline of new Part 2A, which makes provision for the Code of Conduct that applies to approved providers and their aged care workers and governing persons. This is a consequential amendment to new sections 23AB and 23AC discussed below.

The note clarifies that the definitions of “approved provider”, “aged care worker” and “governing person” are set out in section 7 of the Commission Act.

##### **Section 23AB – Purpose of this Part**

New section 23AB provides this new Part 2A is made for the purposes of section 74AE of the Commission Act. Section 74AE outlines that the Commission Rules may make provision for a Code of Conduct that applies to approved providers and their aged care workers and governing persons.

##### **Section 23AC – Code of Conduct**

New section 23AC sets out that the Code of Conduct applies to approved providers, aged care workers of approved providers and governing persons of approved providers.

The effect of this provision is that the Code of Conduct applies to approved providers and their aged care workers and governing persons equally.

## **Part 2B – Commissioner’s Code of Conduct functions**

### **Division 1 – Introduction**

#### Section 23BA – Simplified outline of this Part

New section 23BA sets out a simplified outline of new Part 2B, which states that under Part 2B, the Commissioner may take action and do other things in relation to compliance by an approved provider, or an individual who is or was an aged care worker or governing person of an approved provider, regarding a Code of Conduct matter. It also makes clear that new Part 2B does not affect the existing powers that the Commissioner has separate to this part. This is a consequential amendment to new sections 23BB, 23BC, 23BD, 23BE, 23BF, 23BG, 23BH and 23BI discussed below.

### **Division 2 – Purpose of this Part**

#### Section 23BB – Purpose of this Part

New section 23BB provides that new Part 2B is made for the purposes of subsections 21(1), (3A) and (3B) of the Commission Act.

### **Division 3 – Taking action**

#### Section 23BC – Purpose of this Division

New section 23BC explains the purpose of new Division 3, which is to set out the different types of actions that the Commissioner may take in relation to compliance with the provisions of the Code of Conduct by approved providers and their aged care workers and governing persons.

The note makes clear that the Commissioner may also take other action (as discussed below) and refers to new section 23BI of the Commission Rules.

Compliance with the provisions of the Code of Conduct includes alleged or suspected non-compliance with the Code of Conduct and information or matters relating to such alleged or suspected non-compliance.

This new division is not intended to limit actions the Commissioner may take in relation to compliance with the Code of Conduct. The intention is to allow the Commission to rely on its existing regulatory powers and processes in relation to approved providers to complement and strengthen actions in relation to compliance with the Code of Conduct where appropriate. This recognises that the Commissioner may become aware of issues relating to compliance with the Code of Conduct through a range of different mechanisms, for example, complaints processes. As such, it may be more appropriate to address these issues through those other functions.

#### Section 23BD – Actions the Commissioner may take

##### *General*

New subsection 23BD(1) sets out the general actions the Commissioner may take in

relation to compliance with the Code of Conduct and includes:

- discussing the matter in person or by other means with a person, who may be the approved provider or aged care worker the subject of the compliance or any other person. Any other person could include, for example, the complainant, the care recipient, family carers or any other person relevant to the matter. The discussion can occur in person or by other means including the telephone;
- requesting information or documents from any person and considering information or documents. For example, this could include requesting progress notes, worker schedules, medical reports or other information or documents relevant to the compliance;
- carrying out an investigation;
- referring information about the matter to another person or body. This may include referring information to the approved provider or, in the case of a registered health practitioner (as defined under the Health Practitioner Regulation National Law), referring information to Ahpra; and
- taking any other action that the Commissioner considers reasonable in the circumstances. For example, the Commissioner may attend the relevant aged care service (with the consent of the approved provider) using its monitoring or other entry powers. Another example may be the issuing of a letter to an aged care worker or a governing person where appropriate, which would notify the individual that the Commission is aware of alleged or suspected non-compliance and bring the matter to the individual's attention for them to address.

The examples given above are not intended to be exhaustive and there may be additional examples that fit within each of the above categories.

The note makes clear that the Commissioner may also require a person to appear before an authorised officer to answer questions or give information or documents that are relevant to compliance with the Code of Conduct and refers to section 74FA of the Commission Act (the Commissioner's power to issue a notice to a person to attend and answer questions).

New subsection 23BD(2) clarifies that the Commissioner may carry out an investigation under 23BD(1)(d) independently of any other person or body, or jointly with another person or body such as another regulatory or registration body, for example, Ahpra or the NDIS Commission. This allows for situations where alleged or suspected non-compliance may involve a health practitioner, or where an aged care worker may be employed in more than one care and support sector. This section also allows for the Commissioner to carry out an investigation jointly with an expert (for example, a clinical expert).

#### *Requiring action by approved providers*

New subsection 23BD(3) outlines the actions that the Commissioner can require an approved provider to do in relation to compliance by the approved provider or an individual who is or was an aged care worker or governing person of the approved provider. That is, to:

- carry out an internal investigation in a specified manner and give the Commissioner a written report on the investigation within a specified period;

- engage an appropriately qualified and independent expert, at the approved provider's expense, to carry out an investigation into the compliance in a specified manner and provide the Commissioner with a written report on the investigation within a specified period;
- undertake specified action in relation to the compliance within a specified period. Examples of specified action under this section may include requiring an approved provider to engage an appropriately qualified person to deliver relevant staff training.

The phrase “within a specified period” is purposely broad. Prescribed timeframes for actions have not been included to enable the Commission to require approved providers to undertake suitable action in a time period that is proportionate to the compliance. Similarly, it is intended that the period provided to the approved provider will reflect the complexity of the investigation required and the nature of the compliance being investigated.

#### *Requiring action by individuals*

New subsection 23BD(4) provides that the Commissioner can require an individual who is or was an aged care worker or governing person of an approved provider to take specified action in relation to the compliance within a specified period. For example, the Commissioner may require an individual to undertake relevant training on a specific aspect of care provision within a specified time that is proportionate to the nature of the compliance.

#### *Referring information and requiring action by approved providers*

New subsection 23BD(5) provides that the Commissioner may refer information in writing about the compliance of an individual who is or was an aged care worker or governing person of an approved provider to the approved provider and require the approved provider to take appropriate action.

In referring information and requiring action by an approved provider under this new section, the Commissioner may not necessarily identify the specific action the approved provider must take. Rather, the Commissioner could refer the information for the approved provider to consider and develop its own action(s) that are appropriate having regard to the nature of the compliance. The intent of this section is to require the approved provider to identify the most appropriate action in relation to the compliance by a current or former aged care worker or governing person of that approved provider.

This recognises that there may be circumstances where it is more appropriate for the approved provider to consider the specified action because of their proximity to and understanding of the compliance situation. For example, the compliance issue is a lower-level matter that is more appropriately and effectively dealt with as an employer-employee relationship matter.

New subsections 23BD(3), (4) and (5) apply to current and former aged care approved providers, aged care workers and governing persons of approved providers. Investigations into alleged or suspected non-compliance with the Code of Conduct can commence following an individual resigning from an approved provider or



leaving the aged care sector altogether. This ensures that any necessary safeguards can be put in place if the individual re-engages with the aged care sector later.

*Referring information does not prevent Commissioner taking other action*

New subsection 23BD(6) makes clear that whilst the Commissioner may refer information related to compliance with the Code of Conduct to another person or body, including the relevant approved provider under new subsection 23BD(5), the Commissioner can continue to take other actions related to the compliance.

*Oral requirements to also be given in writing*

New subsection 23BD(7) provides that the Commissioner can give a requirement to an approved provider orally in the first instance, and as soon as practicable after the oral requirement, provide the same requirement in writing. This provision applies in respect of new subsections 23BD(1), (3), (4) or (6) discussed above.

This allows the Commissioner to act promptly and provide an urgent oral direction which may be required to address immediate risks to the health, safety or wellbeing of care recipients. For example, the Commissioner can contact an approved provider by phone and follow up with written notice as soon as practicable afterwards.

Section 23BE – Actions dealing with outcomes of investigations

New section 23BE provides that following an investigation as outlined in new paragraph 23BD(1)(d) or 23BD(3)(a) or (b), the Commissioner may proceed to take any action to deal with the outcome of the investigation that the Commissioner considers appropriate. For example, following an investigation, the Commissioner may:

- communicate the outcome of a Code of Conduct investigation to a care recipient or their carer(s);
- take action under Part 7B or 8A of the Commission Act;
- ultimately issue a banning order to an individual who is or was an aged care worker or governing person of an approved provider after following the appropriate processes set out in Division 4 of Part 8A of the Commission Act;
- request an approved provider to update human resources policies and procedures to address any issues identified in the Code of Conduct investigation.

This section is intended to ensure the outcome of any investigation can be dealt with appropriately and proportionately. It is not intended that the Commissioner be restricted in relation to the types of actions they may take to deal with the outcome of an investigation.

Section 23BF – Further investigations

New section 23BF provides that if an investigation is carried out in relation to compliance with the Code of Conduct under new paragraphs 23BD(1)(d) and 23BD(3)(a) or (b), this does not prevent the Commissioner from carrying out further investigations under new paragraph 23BD(1)(d) or requiring further investigations under new paragraphs 23BD(3)(a) or (b) on the basis of new information. This has the effect that the Commissioner could undertake multiple investigations in relation to the same compliance matter.

The intent of this section is to enable the Commissioner to undertake further investigations as appropriate if new information becomes available. For example, the Commissioner may undertake an investigation and determine an outcome based on the information available at that point in time. However, at any later date, further information may become available, which may require further investigation.

#### Section 23BG – Procedural fairness

New section 23BG provides that the Commissioner must have due regard to procedural fairness in taking action under Division 3 of the Instrument.

New section 23BG is intended to give visibility to the existing common law duty to afford procedural fairness in administrative decision making, without limiting, excluding or otherwise affecting or interfering with the common law principles of procedural fairness in any way.

“Procedural fairness” has its ordinary common law meaning. It is noted that “the fairness of the procedure depends on the nature of the matters in issue, and what would be a reasonable opportunity for parties to present their cases in the relevant circumstances” (see *Content of procedural fairness* in Australian Law Reform Commission Report 129). As such, the nature and extent of any duty to afford procedural fairness by the Commissioner may be impacted by relevant contextual factors such as the level of urgency and/or risk of serious harm to care recipients or others.

### **Division 4 – Doing other things**

#### Section 23BH – Notices about investigations carried out by Commissioner that are closed

New section 23BH requires that where the Commissioner has undertaken an investigation under new paragraph 23BD(1)(d) discussed above, and the investigation has been closed and no further immediate action in relation to the compliance is to be taken under the Commission Act or the Commission Rules, the Commissioner must issue a written notice to the approved provider or the individual and the approved provider. The written notice must set out the outcomes of the investigation.

This ensures that the relevant approved providers and individuals are formally notified of the outcome of an investigation under new paragraph 23BD(1)(d) where that the investigation has been closed.

#### Section 23BI – Taking of other action not prevented by this Part

New section 23BI provides that nothing in new Part 2B prevents the Commissioner from taking other action under the Commission Act or the Commission Rules in relation to compliance with the Code of Conduct. For example, issuing sanctions under Part 7B of the Commission Act where appropriate.

The note sets out the other provisions under the Commission Act, Aged Care Act and the Commission Rules under which regulatory action can be taken in relation to compliance with the Code of Conduct.

## **Part 2C – Register of banning orders**

### **Division 1 – Simplified outline of this Part**

#### Section 23CA – Simplified outline of this Part

New section 23CA sets out a simplified outline of new Part 2C. It provides that:

- certain information must be included in the register of banning orders;
- an individual may request access to and/or correction of information about themselves that is included in the register of banning orders;
- the Commissioner may correct information that is included in the register of banning orders; and
- the register of banning orders may be published on the Commission’s website.

### **Division 2 – Information in register of banning orders**

#### Section 23CB – Information that must be included in the register of banning orders

New section 23CB provides that for the purposes of paragraph 74GI(1)(h) of the Commission Act, the following information must be specified in the register of banning orders:

- the State or Territory, suburb and postcode of the individual’s last known residential address; and
- if the Commissioner considers that further information is necessary to identify the individual – further information, including personal information, that the Commissioner considers is sufficient to identify the individual.

This information must be included about an individual whether the banning order is currently in force or not, in accordance with subsection 74GI(2) of the Commission Act. As outlined under subsection 74GI(3), subsection 74GI(1) does not apply if the banning order has been revoked under section 74GG or the decision regarding the banning order has been set aside on reconsideration under Part 8B or on review.

New paragraph 23CB(b) allows further identifying information to be published on the register of banning orders in the circumstances described above. It is intended that this paragraph only be relied up on where it would not otherwise be possible to correctly identify an individual. For example, where two individuals who work in aged care have the same name, live in the same suburb, and a banning order is made in relation to one of those individuals. In these circumstances, the Commissioner can include additional personal information in the register to correctly identify the individual in relation to whom the banning order relates. It is not intended that any information beyond that which is reasonably necessary to enable correct identification of an individual would be included. The additional personal information would not extend to include, for example, sensitive information (as defined in the *Privacy Act 1988* (Privacy Act)).

Note 1 makes clear that the information in new section 23CB is in addition to the information already required to be included in the register of banning orders specified in subsection 74GI(1) of the Commission Act.

Note 2 makes clear that the application of subsection 74GI(1) of the Commission Act to banning orders is outlined in subsections 74GI(2) and (3) of the Commission Act, as explained above.

The information referred to in new section 23CB of this Instrument and subsection 74GI(1) of the Commission Act is intended to align with the approach taken under the NDIS in relation to information published about banned individuals on the NDIS Provider Register (see section 73ZS of the *National Disability Insurance Scheme Act 2013* (NDIS Act)). It also aligns with Ahpra's approach to publishing information about health practitioners on Ahpra's register of health practitioners.

### **Division 3 – Accessing and correcting information**

#### Section 23CC – Purpose of this Division

New section 23CC makes clear that new Division 3 is made for the purposes of subsection 74GI(6) of the Commission Act. Section 74GI(6) provides that the rules must make provision for, or in relation to, the correction of information contained in the register of banning orders, including how an individual may access information about the individual that is included in the register and seek correction of such information.

#### Section 23CD – Accessing information in the register

New section 23CD outlines that an individual against whom a banning order has been made may request that the Commissioner provide access to them to any information that is included in the register of banning orders relating to them. This is consistent with Australian Privacy Principle (APP) 12 in Schedule 1 to the Privacy Act, and consistent with the provisions of the *Freedom of Information Act 1982*. It is intended that guidance will be produced by the Commission to assist individuals make this request. APP 12 sets out obligations when an individual requests access to personal information.

#### Section 23CE – Seeking correction of information in the register

New section 23CE provides that an individual against whom a banning order has been made may request that the Commissioner correct information contained in the register of banning orders in relation to the individual.

Under subsection 74GI(4) of the Commission Act, the Commissioner must ensure that the register of banning orders is kept up to date. This means that, in certain circumstances, where an individual has requested correction to the register of banning orders, the Commissioner must take steps to correct information about the individual that is wrong or misleading so that the information is accurate, up to date, complete, and relevant, consistent with APP 13 in Schedule 1 to the Privacy Act. APP 13 sets out minimum procedural requirements for correcting personal information.

#### Section 23CF – Corrections on the Commissioner's initiative

New section 23CF provides that an individual against whom a banning order has been made may request the Commissioner to correct information contained in the register of banning orders in relation to that individual. For example, if the information is inaccurate, out of date, incomplete, irrelevant or misleading. This section is consistent

with APP 13 in Schedule 1 to the Privacy Act. APP 13 sets out minimum procedural requirements for correcting personal information.

#### **Division 4 – Publication of register of banning orders**

##### Section 23CG – Making the register of banning orders publicly available

New section 23CG is made for the purposes of subsection 74GI(7) of the Commission Act and provides that the register of banning orders may be published on the Commission’s website. The effect of this provision is that information on the register of banning orders will be publicly available.

The note to new subsection 23CG(2) makes clear that the information to be included on the register of banning orders is outlined in subsection 74GI(1) of the Commission Act and new section 23CB of this Instrument, discussed above.

New subsection 23CG(3) states that, despite new subsection 23CG(1), the Commissioner can choose not to publish part of the register of banning orders if publication of that part would be contrary to public interest or the interests of one or more care recipients. An example of this would be where the part of the register relates to a vulnerable person against whom a banning order has been made and the detriment to this individual in publishing the information would outweigh any public benefit. A second example may be where a person against whom a banning order has been made is subject to existing protection arrangements in relation to domestic violence matters.

**Item 3** adds new Schedule 1 – Code of Conduct at the end of the Commission Rules.

#### **Schedule 1 – Code of Conduct**

New Schedule 1 sets out the Code of Conduct and how it applies to approved providers and their aged care workers and governing persons.

##### Clause 1 – Code of Conduct

Clause 1 of new Schedule 1 sets out the Code of Conduct, which provides the standards of conduct for approved providers, aged care workers and governing persons. The Code of Conduct is based on the NDIS Code of Conduct with amendments to ensure that the Code of Conduct is relevant and applicable to the aged care sector.

New clause 1 of new Schedule 1 sets out conduct that a relevant person (approved providers and their aged care workers and governing persons as outlined in new clause 2 of new Schedule 1 discussed below) must comply with when providing care, supports and services (including aged care as outlined in new clause 2 of new Schedule 1 discussed below) to people (care recipients, as outlined in new clause 2 of new Schedule 1 discussed below).

New subclause 1(a) requires that approved providers and their aged care workers and governing persons act with respect for people’s rights to freedom of expression, self-

determination and decision-making in accordance with applicable laws and conventions. This means that these persons must:

- support care recipients to determine how they live and what happens to them. This includes supporting care recipients to exercise choice and control over their care, supports and services they are provided with and to exercise dignity of risk where they wish; and
- support care recipients to make decisions, including upholding their right to involve persons they have chosen in making decisions, and to use supported decision making (where appropriate or required).

This list is not meant to be exhaustive.

New subclause 1(b) requires that approved providers and their aged care workers and governing persons must treat care recipients with dignity and respect, and value their diversity. This includes:

- recognising care recipients' strengths;
- empowering care recipients to be as independent as possible;
- communicating respectfully to care recipients; and
- recognising and appreciating a care recipient's individuality and diverse needs in all aspects of care, supports and services.

New subclause 1(c) requires that approved providers and their aged care workers and governing persons must act with respect for the privacy of care recipients. This includes:

- handling personal information carefully;
- respecting a care recipient's personal and physical privacy; and
- ensuring care recipients are not unnecessarily subjected to embarrassment or discomfort during service delivery.

New subclause 1(d) requires that approved providers and their aged care workers and governing persons must provide care, supports and services in a safe and competent manner, with care and skill. This means that:

- care should be provided with attention, kindness and empathy;
- aged care workers and governing persons should be sufficiently competent in their roles and be able to work in a safe manner;
- aged care workers should be appropriately qualified when delivering certain care services; and
- continuity of care to a care recipient is supported through accurate record keeping and information sharing between aged care workers and with governing persons.

New subclause 1(e) requires that approved providers and their aged care workers and governing persons act with integrity, honesty and transparency. This aims to promote trust-based relationships with care recipients.

New subclause 1(f) requires that approved providers and their aged care workers and governing persons must take prompt steps to raise and act on concerns about matters that may impact the quality and safety of care, supports and services. This is intended to safeguard against unsafe or poor quality care through the early identification and notification of risks that may impact the delivery of care to care recipients.

New subclause 1(g) requires an approved provider and their aged care worker and governing persons to provide care, supports and services to care recipients free from all forms of violence, discrimination, exploitation, neglect, abuse and sexual misconduct. This includes:

- physical and verbal violence, including threats of violence;
- coercive and controlling behaviours;
- any sexual act between a care recipient and an aged care worker or governing person;
- unlawful use of a restrictive practice;
- financial abuse or exploitation;
- physical and emotional neglect; and
- passive neglect and wilful deprivation.

New subclause 1(h) requires approved providers and their aged care workers and governing persons to take all reasonable steps to prevent and respond to all forms of violence, discrimination, exploitation, neglect, abuse and sexual misconduct.

The meaning of “sexual misconduct” in subclauses 1(g)(ii) and 1(h)(ii) is intended to be consistent with the meaning of “unlawful sexual contact or inappropriate sexual conduct” referred to in section 54-3(2)(b) of the Aged Care Act and section 15NA(4) of the *Quality of Care Principles 2014*. This includes any unwelcome acts or behaviours that are sexual in nature. Both physical and verbal actions that are sexual in nature, committed without consent, including by force, intimidation, coercion or manipulation, are considered sexual misconduct.

#### Clause 2 – Application to approved providers and aged care workers and governing persons of approved providers

New subclause 2(1) of new Schedule 1 provides that the provisions of the Code of Conduct set out in new clause 1 above apply as if the references to:

- “care, supports and services” means care, including aged care;
- “people” refers to care recipients; and
- “I” refers to an approved provider and aged care workers and governing persons of approved providers.

Subclause 2(2) makes clear that the Code of Conduct applies to a governing person of an approved provider in relation to the governing person’s performance in their capacity as a governing person and in respect of their responsibilities and functions as a governing person in relation to the provision of care, supports and services.

A note is included at the end of new clause 2 to clarify that the definitions of “approved provider”, “aged care worker” and “governing person” are set out in section 7 of the Commission Act.

## Schedule 2 – Other amendments

### *Aged Care Quality and Safety Commission Rules 2018*

**Item 1** inserts “or documents” after “information” in paragraph 15(3)(c) of the Commission Rules. This amendment clarifies that the Commissioner can specifically request documents from any person when taking action under subsection 15(2) of the Commission Rules when participating in a complaints resolution process. This amendment has been made for clarity and consistency.

**Item 2** omits the words “information that is” from paragraph 95H(4)(b) of the Commission Rules, and substitutes “information or documents that are” in its place. This amendment will clarify that the Commissioner can request documents from any person that are relevant to an inquiry being carried out in relation to reportable incidents under section 95H of the Commission Rules. This amendment has been made for clarity and consistency.



## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022***

This legislative instrument is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Instrument**

The purpose of the *Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022* (Instrument) is to amend the *Aged Care Quality and Safety Commission Rules 2018* (Commission Rules) to make provision for the Code of Conduct for Aged Care (Code of Conduct). The Code of Conduct establishes minimum standards of conduct for approved providers and their aged care workers and governing persons.

The Instrument also makes provision for the Aged Care Quality and Safety Commissioner (Commissioner) to take action in relation to compliance with the Code of Conduct.

The Instrument amends the Commission Rules in relation to banning orders, by specifying that certain information must be included in the register of banning orders, and making provision for matters relating to accessing, correcting information in, and publication of, the register of banning orders.

The amendments strengthen safeguards for older Australians receiving aged care and aim to increase public confidence in the aged care sector and workforce.

#### **Human rights implications**

The Instrument engages the following human rights:

- the right to protection from discrimination, hostility, exploitation, violence and abuse in Article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 16(1) of the *Convention on the Rights of Persons with Disabilities* (CRPD);
- the right to health in Article 12 of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) and Article 25 of the CRPD;
- the right not to be subjected to cruel, inhuman or degrading treatment in Article 7 of the ICCPR, Article 15 of the CRPD and Articles 1 and 2 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT);
- the right to privacy in Article 17 of the ICCPR and Article 22 of the CRPD; and
- the right to freedom of opinion and expression in Article 19 of the ICCPR and Article 21 of the CRPD.

### Right to protection from exploitation, violence and abuse

The right to protection from discrimination, hostility, exploitation, violence and abuse in Article 20(2) of the ICCPR and Article 16(1) of the CRPD is engaged by the Instrument.

The Instrument promotes this right by implementing the Code of Conduct, which sets standards of conduct for approved providers and their aged care workers and governing persons. This includes providing care, supports and services free from all forms of violence, discrimination, exploitation, abuse and neglect (see new clause 1(g)(ii) of new Schedule 1).

The Instrument further promotes this right by introducing new functions for the Commissioner to take action in relation to compliance with the Code of Conduct. This aims to improve the safety, health and wellbeing of care recipients, including those with disability, through regulating compliance with the Code of Conduct (see new section 23BD).

The provisions regarding the register of banning orders further promotes this right by ensuring that aged care workers and governing persons who have been prohibited from working or otherwise being involved in the aged care sector, whether in whole or in part, are appropriately identified.

### Right to health

The right to health contained under Article 12 of the ICESCR and Article 25 of the CRPD is engaged by the Instrument. These articles refer to the right of individuals, including persons with disability, to the highest attainable standard of physical and mental health.

The Instrument promotes this right setting out ways in which the Commissioner can take action to regulate inappropriate conduct by those providing aged care services.

Specific clauses include s23BD which introduces new functions for the Commissioner to take action in relation to compliance with the Code of Conduct. This aims to improve the safety, health and wellbeing of care recipients, including those with disability, through regulating compliance with the Code of Conduct (see new section 23BD).

The provisions regarding the register of banning orders further promotes this right by ensuring that aged care workers and governing persons who have been prohibited from working or otherwise being involved in the aged care sector, whether in whole or in part, are appropriately identified.

### Right not to be subjected to cruel, inhuman or degrading treatment

The right not to be subjected to cruel, inhuman or degrading treatment contained under Article 7 of the ICCPR, Article 15 of the CRPD and Articles 1 and 2 of the CAT is engaged by the Instrument.

The Instrument promotes this right by imposing responsibilities on approved providers, aged care workers and governing persons who are engaged in aged care

services through the Code of Conduct, and by allowing for appropriate regulation by the Commissioner through their code functions.

The Instrument gives the Commission powers to monitor and enforce compliance in accordance with new section 23BD. The provisions regarding the register of banning orders further promotes this right by ensuring that aged care workers and governing persons who are unsuitable are prohibited from working or otherwise being involved in the aged care sector are appropriately identifiable.

The Code of Conduct also promotes this right by requiring approved providers and their aged care workers and governing persons to provide care in a safe and competent manner, free from all forms of violence, discrimination, exploitation, neglect, abuse and sexual misconduct.

#### Right to privacy

The right to privacy contained under Article 17 of the ICCPR and Article 22 of the CRPD, which state that no person should be subject to interference with their privacy, is engaged by the Instrument.

The Instrument requires the Commissioner to maintain a register of banning orders, with the register to contain personal information of individuals who have had a banning order made against them. The register of banning orders will include information, including personal information, about individuals against whom a banning order has been made, including their suburb and postcode. This information will generally be made publicly available.

The engagement of the right is limited as the Instrument (in new sections 23CD, 23CE and 23CF) ensures that the named individuals can request corrections to the register, that additional information can be published to ensure that the information does not unintentionally and incorrectly implicate another person, and that the Commissioner has the power not to publish information if in the public interest. Engagement of the right is also limited as the information on the register will be limited to personal information and will not include sensitive information.

The Instrument also allows for an individual to request the correction of information about them in the register of banning orders. This is consistent with an Australian Privacy Principle 13, under which an individual can request correction of their personal information.

All personal information, including sensitive information, acquired under or for the purposes of the Commission Act or the Aged Care Act is protected information. It is an offence, punishable by 2 years imprisonment, to use or disclose protected information other than as authorised by law, including in accordance with the *Privacy Act 1988*.

To the extent that the Instrument engages the right to privacy, the engagement is limited and is reasonable and proportionate as the collection, use and disclosure of personal information will be in accordance with the permissions set out under the relevant secrecy provisions.

The limitation of privacy rights in limited circumstances and for limited purposes is directly connected to the Instrument's legitimate purpose in promoting the rights of aged care recipients to be protected from violence, exploitation and abuse, and their right to the highest attainable standard of health and an adequate standard of living.

#### Right to freedom of opinion and expression

Article 19 of the ICCPR provides that everyone shall have the right to hold opinions without interference and the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds. This right extends to a right to seek, receive and impart information and the Human Rights Committee in its General Comment 34 has outlined that article 19(2) embraces a right of access to information held by public bodies, regardless of the form in which the information is stored, its source and the date of production.

Under article 19(3), to constitute a permissible limitation on article 19(2), this interference must be according to law and necessary (that is, reasonable, necessary and proportionate) for one of the purposes set out in article 19(3).

Article 19(3) of the ICCPR provides that this right may be subject to certain restrictions by law that are necessary for the respect of the rights and reputation of others, the protection of national security, public order or of public health or morals. Any interference would be 'lawful' because it is provided for in legislation.

#### **Conclusion**

The Instrument is consistent with human rights because it promotes the protection of the human rights of aged care recipients. To the extent that aspects of the Instrument may limit the right to privacy, these measures are reasonable, necessary and proportionate.

**Minister the Hon Annika Wells  
Minister for Aged Care**