

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Aged Care

Aged Care Quality and Safety Commission Act 2018

Aged Care Quality and Safety Commission Amendment (Code of Conduct) Rules 2023

Purpose

The purpose of the *Aged Care Quality and Safety Commission Amendment (Code of Conduct) Rules 2023* (Instrument) is to amend the *Aged Care Quality and Safety Commission Rules 2018* (Commission Rules) to clarify that the actions the Aged Care Quality and Safety Commissioner (Commissioner) may take following an investigation into compliance with the Code of Conduct for Aged Care (Code of Conduct) (under subsections 23BD(1)(d) or 23BD(3)(a) or (b) of the Commission Rules) are limited to the Commissioner's regulatory powers available under the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) and the Commission Rules.

This Instrument should be read in conjunction with the *Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022* (Code of Conduct Rules) and its associated Explanatory Statement.

This Instrument clarifies that the Commissioner's discretionary power to take action to deal with the outcome of a Code of Conduct investigation is limited to actions available under the Commission Act and Commission Rules.

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

Background

The Code of Conduct Rules, which came into force on 1 December 2022, amended the Commission Rules to set out details of the Commissioner's code functions, including the actions the Commissioner can take in relation to compliance with the Code of Conduct.

The Senate Standing Committee for the Scrutiny of Delegated Legislation (Senate Standing Committee) raised concerns that section 23BE of the Commission Rules (as inserted by the Code of Conduct Rules) confer a broad discretionary power on what actions the Commissioner may take to deal with the outcome of an investigation into compliance with the Code of Conduct (see Delegated Legislation Monitors 2, 3 and 4 of 2023).

This Instrument amends section 23BE of the Commission Rules in response to the matters raised by the Senate Standing Committee.

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.

Section 18A of the Commission Act outlines the code functions of the Commissioner, 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.

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.

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 the day after the Instrument is registered.

Consultation

The Department of Health and Aged Care (Department) undertook public consultation on the Code of Conduct as outlined in the Explanatory Statement for the Code of Conduct Rules. The Department did not undertake further consultation on this

Instrument given the amendment is minor in nature and aimed at providing clarity to existing arrangements.

The Department has consulted the Aged Care Quality and Safety Commission (Commission) in relation to this Instrument to ensure that the amendment is operationally effective.

Impact Analysis

Consistent with the requirements of the Office of Impact Analysis (OIA), 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 an Impact Analysis. The OIA 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 OIA's website: <https://oia.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) Rules 2023*

Section 1 provides that the name of the Instrument is the *Aged Care Quality and Safety Commission Amendment (Code of Conduct) Rules 2023*.

Section 2 provides that the whole of the Instrument commences the day after the Instrument is registered.

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

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

Schedule 1 – Amendments commencing the day after the instrument is registered

Aged Care Quality and Safety Commission Rules 2018

Item 1 amends section 23BE of the Commission Rules by omitting the words “take any action to deal with the outcome of the investigation that” and substitutes “exercise any of the Commissioner’s powers under the Commission Act or this instrument to deal with the outcome of the investigation, as”.

The effect of this amendment is to make clear that the Commissioner’s discretionary power under section 23BE of the Commission Rules to take action to deal with the outcome of a Code of Conduct investigation is limited to actions available under the Commission Act and Commission Rules. For example, the Commissioner may issue a sanction under Part 7B of the Commission Act, use its investigation powers under Part 8A of the Commission Act, or request an approved provider to update their policies and procedures to address any issues identified in the Code of Conduct investigation under section 23BD of the Commission Rules.

The specific action taken by the Commissioner under section 23BE to deal with outcomes of investigations, and whether the action is appropriate in the circumstances, will be determined by, and in proportion to, the level of severity and immediacy of the risk to care recipients. The actions will be informed by an assessment of:

- the nature and/or seriousness of the non-compliance with the Code of Conduct;
- actions that would likely mitigate or remove the harm to aged care recipients;
- the consequence of harm arising;
- the likelihood of the harm being managed by an approved provider. This would include consideration of whether the approved provider:
 - demonstrates effective leadership and governance to prevent and manage risks to aged care recipients;
 - has a history of providing quality and safe care; and

- monitors its effectiveness in preventing and managing risks to aged care recipients and resolves any quality and safety issues, including non-compliance with aged care responsibilities.

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) Rules 2023

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) Rules 2023* (Instrument) is to amend the *Aged Care Quality and Safety Commission Rules 2018* (Commission Rules) to clarify that the Aged Care Quality and Safety Commissioner (Commissioner) is limited to exercising the Commissioner's powers under the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) and the Commission Rules when dealing with the outcome of an investigation concerning compliance with the Code of Conduct for Aged Care (Code of Conduct) under subsections 23BD(1)(d) or 23BD(3)(a) or (b) of the Commission Rules.

The amendment is in response to matters raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the *Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022* (Code of Conduct Rules) (see Delegated Legislation Monitors 2, 3 and 4 of 2023).

The Instrument makes a clarifying minor amendment to section 23BE of Commission Rules (as inserted by the Code of Conduct Rules) to specify that the actions the Commissioner may take when dealing with the outcome of an investigation into compliance with the Code of Conduct are limited to the Commissioner's powers under the Commission Act and Commission Rules.

Human rights implications

The Instrument does not directly engage any of the applicable rights or freedoms.

To the extent that the Instrument incidentally engages human rights, the Statement of Compatibility with Human Rights in the Code of Conduct Rules sets out the rights that are engaged by the Code of Conduct provisions and the Commissioner's regulatory powers in relation to the Code of Conduct in the Commission Rules.

Conclusion

The Instrument is consistent with human rights as it does not directly raise any applicable human rights issues.

Minister the Hon Anika Wells MP
Minister for Aged Care