

Health Practitioner Regulation National Law (Surgeons) Amendment Bill 2023

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Yvette D’Ath MP, Minister for Health and Ambulance Services and Leader of the House make this statement of compatibility with respect to the Health Practitioner Regulation National Law (Surgeons) Amendment Bill 2023.

In my opinion, the Health Practitioner Regulation National Law (Surgeons) Amendment Bill 2023 is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill amends the Health Practitioner Regulation National Law (National Law) to give effect to nationally agreed reforms to:

- protect the title ‘surgeon’ within the medical profession to safeguard the public and strengthen the regulation of cosmetic surgery in Australia; and
- clarify the decision-making authority of tribunals after hearing a matter about a registered health practitioner.

The Bill will ensure only those medical practitioners with significant surgical training can use the title ‘surgeon’ or hold themselves out as a surgeon. It does this by making it an offence for a medical practitioner that is not a member of a defined *surgical class* to knowingly or recklessly use the title ‘surgeon’, including ‘cosmetic surgeon’ or ‘aesthetic surgeon’, or otherwise hold themselves out as a surgeon.

To address circumstances where an employer or other person falsely claims a medical practitioner is a surgeon, the Bill also makes it an offence for other persons to knowingly or recklessly claim a medical practitioner is a surgeon, when such practitioner is not a member of a surgical class.

The Bill defines *surgical class* to include medical practitioners holding specialist registration in three recognised medical specialties: surgery, obstetrics and gynaecology, and ophthalmology. To be registered in these specialties, a medical practitioner is required to have successfully undertaken significant Australian Medical College (AMC) specialist surgical training (or equivalent training in the case of international medical graduates with specialist registration).

To accommodate potential future changes to the medical profession, the Bill also defines *surgical class* to include:

- medical practitioners holding specialist registration in another recognised specialty in the medical profession with the word ‘surgeon’ in a specialist title for the specialty; and
- other classes of medical practitioner prescribed by regulation.

Protecting the title ‘surgeon’ in this manner reflects community and professional needs and expectations.

Separately, the Bill clarifies ambiguities in section 196(4) of the National Law and amends the definition of *prohibition order* to include decisions made by a tribunal to impose restrictions on the provision of health services by a practitioner. This treats the imposition of restrictions on the provision of services the same as outright prohibitions on the provision of services, ensuring such decisions are enforceable and notified on the public register.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights that are relevant to the Bill are:

- right to life (section 16)
- right to freedom of expression (section 21(2))
- right to privacy and reputation (section 25)

For the reasons outlined below, I am of the view the Bill actively supports and promotes the right to life. Where the rights to freedom of expression and privacy and reputation are potentially limited by the Bill, I have provided an analysis and justification of the limitation below.

Human rights promoted by the Bill

Right to life (section 16, Human Rights Act)

The right to life imposes substantive and procedural obligations on the State to take appropriate steps and adopt positive measures to protect life. The protective obligation extends to requiring authorities to put in place measures that would protect an individual from real and immediate risks to their life.

Surgery, including cosmetic surgery, has the potential to result in significant and permanent harm to individuals, including loss of function, disfigurement and death. These risks are amplified if the surgery is not properly performed by an appropriately qualified, trained, and experienced medical practitioner

There is a significant information and power asymmetry between healthcare consumers and practitioners that may contribute to the risk of harm. This is evident in consumer confusion

around use of the title ‘surgeon’ within the medical profession.¹ This confusion may be contributing to serious and unacceptable risks and harm to consumers.

By protecting the title ‘surgeon’ within the medical profession, the Bill promotes the right to life by ensuring consumers are not misled about the qualifications and training of their medical practitioners. This will enable consumers to make more informed decisions about their health care.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Title protection

(a) the nature of the right

Right to freedom of expression (section 21(2) of the Human Rights Act)

The right to freedom of expression includes the freedom to seek, receive, and impart information and ideas of all kinds. It protects almost all means of expression, as long as it conveys or attempts to convey a meaning.

Freedom of expression can be limited, but only where it is reasonable and justified in a free and democratic society based on human dignity, equality and freedom. Freedom of expression is an essential part of an individual’s privacy, and state intervention is only legitimate when expressing an opinion interferes with the rights of others or is an obvious, direct threat to life in society.

The Bill limits the right to freedom of expression by restricting which medical practitioners can lawfully take or use the title ‘surgeon,’ whether in speech, advertising, or other means.

Right to privacy and reputation (section 25 of the Human Rights Act)

The right to privacy protects individuals from unlawful or arbitrary interferences and attacks upon their privacy, family, home, correspondence, and reputation. The scope is very broad, protecting privacy in the sense of personal information as well as an individual’s private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity and individual identity, including appearance, clothing and gender.

Limitations on privacy rights must be proportionate and not capricious, unpredictable, unjust or unreasonable.

¹ See *Medical practitioners’ use of the title ‘surgeon’ under the Health Practitioner Regulation National Law*, Decision Regulation Impact Statement, December 2022, p 27.

The title protection amendments included in the Bill arguably limit the right to privacy, as they could interfere with an individual's professional identity and their ability to portray themselves as a 'surgeon'.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Right to freedom of expression (section 21(2) of the Human Rights Act) and right to privacy and reputation (section 25 of the Human Rights Act)

As with the existing title protection provisions in the National Law, restricting use of the title 'surgeon' will protect healthcare consumers by ensuring they are not misled. Specifically, the Bill will allow members of the public to be confident that a medical practitioner using the title 'surgeon' has an appropriate level of surgical training to safely perform surgical procedures.

It is important that healthcare consumers seeking to undergo surgery, including cosmetic surgery, are empowered to make informed choices about the medical practitioner that they choose and trust to perform their surgery.

Cosmetic surgery, if not properly performed by an appropriately qualified, trained, and experienced medical practitioner, has the potential to result in significant and permanent avoidable harm to individuals, including loss of function, disfigurement and death. Thus, prospective patients are advised to consider whether a practitioner has undertaken appropriate training in a given field when they are considering having a procedure.

However, it can be difficult for the public to obtain information from neutral and informed sources, particularly as most cosmetic surgery consumers obtain information about prospective procedures directly from the practitioners that perform those procedures and from social media. There is a significant information and power asymmetry between healthcare consumers and practitioners that may contribute to the risk of harm to consumers.

A variety of harms have been caused by poor cosmetic surgery and post-surgery practices in cases where practitioners have performed cosmetic surgery outside their area of competence. Some of these harms include cyanosis (deoxygenation of the skin), split wounds, fevers and infections, excruciating pain, haemorrhage, excessive tissue trauma, scarring, local anaesthetic toxicity, sepsis, pneumothorax (collapsed lung), central nervous depression, cardiac arrest, and death. These risks are amplified if cosmetic surgery is not performed by an appropriately qualified, trained, and experienced medical practitioner.

The purpose of limiting the use of the title 'surgeon' is to lessen the confusion about use of the title and to provide assurance to the public that a person claiming to have relevant qualifications or training is in fact appropriately qualified and competent to practice.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Right to freedom of expression (section 21(2) of the Human Rights Act) and right to privacy and reputation (section 25 of the Human Rights Act)

The title protection provisions in the Bill will mitigate confusion and the information asymmetry between healthcare consumers and medical practitioners by restricting who can take or use the title ‘surgeon’ to those with appropriate surgical training. It is critical for public safety that consumers are fully informed and understand the skills and qualifications held by healthcare practitioners.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Right to freedom of expression (section 21(2) of the Human Rights Act) and right to privacy and reputation (section 25 of the Human Rights Act)

The Bill’s title protection amendments are the least restrictive, reasonably available means of achieving the policy objective.

A Decision Regulation Impact Statement released on 20 December 2022 assessed multiple options for addressing concerns related to use of the title ‘surgeon.’ The title protection amendments in the Bill align with the preferred option of restricting the title to medical practitioners that have significant surgical training. This option was informed by submissions to the Consultation Regulation Impact Statement: *Use of the title ‘surgeon’ by medical practitioners in the Health Practitioner Regulation National Law*, submissions to the *Independent review of the regulation of medical practitioners who perform cosmetic surgery*, and expert advice provided to Health Ministers by the Medical Board.

As supported by the Decision Regulation Impact Statement, the title protection amendments in the Bill will have the greatest impact in addressing consumer confusion and reducing risks and harms to the public, while appropriately balancing the legislative burden of restricting a title.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Right to freedom of expression (section 21(2) of the Human Rights Act) and right to privacy and reputation (section 25 of the Human Rights Act)

Members of the public should reasonably be able to assume that a registered medical practitioner using the title ‘surgeon’ has the appropriate surgical training and qualifications to do so. The Bill strikes the right balance between protecting the public and respecting professional interests.

- (f) any other relevant factors

Nil.

Tribunal decision-making

(a) the nature of the right

Right to privacy and reputation (section 25)

As explained above, the right to privacy protects individuals from unlawful or arbitrary interferences and attacks upon their privacy, family, home, correspondence, and reputation. The scope is very broad, protecting privacy in the sense of personal information as well as an individual's private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity and individual identity, including appearance, clothing and gender.

Limitations on privacy rights must be proportionate and not capricious, unpredictable, unjust or unreasonable.

The Bill amends the definition of *prohibition order* in the National Law to include tribunal-imposed restrictions on practice made under section 196(4)(c). This has the effect of requiring these decisions to be recorded in public national registers (see sections 222, 223, and 227 of the National Law). The requirement to publish this information is a limitation on the right to privacy of the relevant practitioners.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Choosing a healthcare practitioner is one of the most important and often complex decisions patients make about their healthcare. Many patients consider this choice to impact the course of their treatment, and ultimately, their health outcomes. It is important that healthcare consumers have adequate information available about potential practitioners to help them make informed decisions.

The amendments will make information available to consumers about tribunal-imposed restrictions on a practitioner's provision of services. Such information is important to inform consumer choice. Publishing the information will also help prevent practitioners from performing health services for which they have been restricted.

(c) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Consumers have the right to be fully informed of restrictions that have been applied to health practitioners. The purpose of the amendment allows consumers to make informed decisions about who they choose as their health care provider.

(d) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The amendment allows consumers to access information about tribunal-imposed restrictions on the provision of services by a health practitioner. Access to this information will help consumers make informed choices about their healthcare providers. It will also encourage and support public confidence in the healthcare system.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

There are no reasonably available, less restrictive alternatives to achieve the identified purpose. The amendment treats tribunal-imposed restrictions the same as tribunal-imposed prohibitions, which are already required to be published on the national registers.

(f) any other relevant factors

Nil.

Conclusion

In my opinion, the Health Practitioner Regulation National Law (Surgeons) Amendment Bill 2023 is compatible with human rights under the *Human Rights Act 2019* because it limits the identified human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

YVETTE D'ATH MP
MINISTER FOR HEALTH and AMBULANCE SERVICES
and LEADER OF THE HOUSE

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