

AMA (ACT) UPDATE 3

INFORMATION ON ENGAGING WITH THE REVIEW

1. Structure of this Update

This Update is designed to be a useful guide to engaging with the Independent Review into Workplace Culture in ACT healthcare services. It provides information on several important matters but is not designed to be comprehensive or address every relevant issue.

Consequently, this Update does not constitute legal or other formal advice.

The Update comprises the following parts:

- 1. Structure of this Update**
- 2. Background to the Review**
- 3. Engaging with the Review and Submissions**
- 4. Making a Submission**
- 5. Contributing to the AMA (ACT) Submission**
- 6. Terms of Reference for Review**
- 7. Scope of the Review**
- 8. Protection for Submitters**
- 9. Procedural Fairness for Persons against Whom Allegations are Made**

Appendix 1 – AMA (ACT) Questions and Responses from Review

Information and Assistance:

- Review website - <https://www.health.act.gov.au/Culture-Review>
- Call for Submissions - <https://www.health.act.gov.au/CultureReviewSubmissions>
- FAQs - https://www.health.act.gov.au/sites/default/files/2018-10/Review%20-%20Frequently%20Asked%20Questions_v2.pdf
- Enquires: WorkplaceCultureReview@act.gov.au or ph: 02 6205 9555
- AMA (ACT) – 02 6270 5410 or wradvisor@ama-act.com.au
- Medical Defence Organisations

2. Background to the Review

On 21 September 2018, the ACT Minister for Health, Meegan Fitzharris, announced an Independent Review (Review) into workplace culture within the ACT public healthcare services. Instrumental in the Minister’s announcement was the considerable public pressure being brought to bear by AMA (ACT) regarding allegations of bullying, poor culture and sub-optimal administration.

AMA (ACT) proposed a ‘Board of Inquiry’ as the appropriate means of investigating workplace culture, primarily because of the protections for staff and community members making

submissions were known and understood, but the Minister rejected this option. Instead, the Minister announced that:

“The Independent Review will be conducted so as to protect the confidentiality and privacy of individuals who make submissions, and those who may be the subject of complaints to ensure procedural fairness.”

Parts 8 and 9 in this Update outline, and comment on, the protections available to submitters and procedural fairness for those persons against whom complaints are made. The information in this Update is based on our consideration of the materials provided by the Review, discussions with the Office of the Review and with the Chair of the Review Panel, Mick Reid.

3. Engaging with the Review and Submissions

There are several reasons a member may consider engaging with the Review:

- General queries about the Review or its processes
- Making an individual submission to the Review (Part 4 of this Update)
- Providing information to AMA (ACT) for inclusion in our submission (Part 5 of this Update)
- Meeting with a representative of the Review

We have been assured that the Review will:

- accept information and deal with process queries (where possible) over the phone on 02 6205 9555 or by email WorkplaceCultureReview@act.gov.au
- accept submissions electronically or by mail or in person
- contact you and seek your consent before releasing information from your submission or referring your submission to another authority
- provide an option for interviews in person

While we cannot assure members definitively about the effectiveness of protections for those persons providing information or making individual submissions to the Review, it does seem, on balance, that for a significant majority of submissions and information provided, there shouldn't be concerns about privacy or confidentiality or being adequately protected.

Confidentiality and Privacy and Referrals to Another Authority are dealt with in Part 8 of this Update.

Further assistance on these issues may also be available from your medical defence organisation, AMA (ACT) or the Office of the Review.

Appendix 1 to this Update contains a series of questions put to the Review by AMA (ACT) and responses from the Review.

4. Making a Submission

The Terms of Reference are discussed in Part 6 of this Update but, it's fair to say, there's reasonable scope for your submission to deal with:

- 'workplace culture' of public healthcare services
- 'inappropriate conduct and behaviours' in the delivery of public healthcare services
- 'existing workplace policies and complaints management processes'

The closing date for submissions is 30 November 2018.

Some matters you may wish to consider for your submission:

- Have you witnessed or experienced workplace bullying, sexual harassment, discrimination?
- Have you sought to fix a problem, or been subject to a process, governed via ACT Health or Calvary Public Hospital policies and procedures but then found the process ultimately unsafe for your career or found the outcomes (or lack of outcomes) to be unfair or unreasonable?
- Do you know about fraud occurring within your workplace or organisation? This could involve financial or professional or other types of fraud that may or may not constitute criminal fraud.
- Are you aware of unfair promotion or recruitment practice?

Of course, there may be a range of other matters or issues you wish to raise. Getting initial advice from AMA (ACT) or your MDO or a private lawyer or other trusted advisor is a good start. Your advisor should be able to assist you:

- To frame your thoughts in way that accurately reflect your experience and then be persuasively explained
- By giving you the confidence and insight to understand that your lived experience is unacceptable (not normal)
- In understanding how your intended submission might interact with the terms of reference / interact with the Review
- Manage or obtain advice about possible risks arising from making a submission

It is also possible to request a private meeting with the Review to discuss information you may wish to put forward or a submission you have made.

5. Contribution to AMA (ACT) Submission

AMA ACT will be making a submission that will concentrate on highlighting examples of inappropriate conduct and behaviours and proposing a high-quality system for dealing with bullying and harassment in the workplace.

We encourage input from members (and non-members) and from medical practitioners currently working or having previously worked in the ACT healthcare system. For those who would prefer it, we will include a selection of de-identified examples of inappropriate behaviour and conduct in the workplace.

In addition, we welcome other contributions that deal with personal experience of poor workplace culture including administrative and disciplinary issues and other broader, system-based issues.

Given the limited powers granted to the Review (compared to our preferred Board of Inquiry), the Review will be unable to ascertain with any reliability the extent of inappropriate conduct and behaviours in the workplace. While it might be said that this is the way of such reviews, we do expect the Review to identify recurring themes and issues and make recommendations to deal with those matters.

Given this, AMA (ACT) believes that there remains an opportunity to contribute to improving the current culture, policies and processes by which workplace complaints – and other matters - are dealt with.

For further information on contributing to the AMA (ACT) submission, please contact the office on 02 6270 5410 or wradvisor@ama-act.com.au

6. Terms of Reference for Review

The Minister announced the Review's Terms of Reference (TORs) on 21 September:

- a) *Examine and report on the workplace culture of public health care services in the ACT and provide advice on any systemic and institutional issues. This examination should take into account any examples of best practice workplace culture and professional conduct in the delivery of public health care in the ACT, nationally and internationally.*
- b) *Examine any claims made in relation to inappropriate conduct and behaviours related to the delivery of public health care services in the ACT and provide advice on:*
 - i. *best practice responses to such complaints;*
 - ii. *whether referral of such complaints should be made to any other authority; and*
 - iii. *what support services should be provided to complainants.*
- c) *Examine and report on the existing workforce policies and complaints management practices to ensure their relevance and appropriateness in achieving satisfactory outcomes for all parties.*
- d) *Provide findings and recommendations for:*
 - i. *further improving workforce culture across the ACT public health system;*
 - ii. *additional support systems required for staff and management engaged in the delivery of public health services in the ACT, including processes, training and professional development.*

AMA (ACT)'s Comments on TORs

TORs a), c) and d) are broad and focus on the larger, systemic issues.

TOR b) suggests more of a focus on individual instances of poor workplace culture and it is this TOR that many VMOs, senior salaried staff and junior doctors may wish to refer to in their submission. When considering TOR b) and any possible submission, please note the following:

‘Examine’ – the Review has no power – or resources - to ‘investigate’ complaints. It has been tasked to ‘examine’ complaints, that is ‘look at or consider a person or thing carefully and in detail in order to discover something about them.’

Consequently, do not expect the Review to ‘investigate’ your complaint.

‘Inappropriate conduct and behaviours’ – that is, conduct and behaviours ‘not suitable or proper in the circumstances’ in a workplace. These are very broad categories and allow considerable scope for framing a submission.

‘Referral’ – dependent on the nature of the ‘inappropriate conduct and behaviours’ described in a submission, the Review may refer a complaint to ‘any other authority’. Submissions making allegations of criminal behaviour or describing conduct of a criminal nature would be the most obvious example of matters to be referred.

Please refer to Part 8 of this Update for further information on this issue.

‘Any other authority’ – these could include, amongst others, the ACT Public Service Commissioner, the ACT Police, the Australian Federal Police, AHPRA and Worksafe ACT.

Please refer to Part 8 of this Update for further information on this issue.

7. Scope of the Review

The scope of the review is limited to the following publicly funded services:

- Canberra Hospital
- Calvary Public Hospital
- ACT Health Directorate
- Health Protection Service
- Canberra Health Services

8. Protections for Submitters

The Review has posted information online listing the legislation they say covers the staff of the ‘Office of the Review’ and their obligations and duties as public servants:

https://www.health.act.gov.au/sites/default/files/2018-10/Review%20-%20Frequently%20Asked%20Questions_v2.pdf

The list of legislation includes Public Sector Management Act, Fair Work Act 2009, Information Privacy Act, Health Records (Privacy and Access) Act 1997, Health Act 1993, Public Interest Disclosure Act 2012, Freedom of Information Act 2016, Enterprise Agreements.

The Review gives no further details in regard to the manner in which the various pieces of legislation operate to provide protections but, for example, the general protections part of the Fair Work Act operates to remedy or prevent adverse action being taken against a staff member who makes a submission.

In addition, the Review has published additional material, available at <https://www.health.act.gov.au/CultureReviewSubmissions>, that deals with Privacy and Confidentiality and Referral of Submissions to Another Party.

Privacy and Confidentiality

The Review states that submission will be ‘accepted and kept in the strictest confidence’ but that ‘[the Review] must comply with all relevant legislation.’ The Review also states that, ‘[i]f you do not consent, your submission will remain completely confidential.’

This means that, a submission you make may be released to another party or referred to an appropriate authority where there is a legal requirement to do so or you consent to that course of action.

In our view it is not within the Review’s powers or means to maintain complete confidentiality of every submission.

However, it is also important to remember that, absent the consent of the submitter, there are very few circumstances where a submission could be released to a third party.

If you are in any doubt about these matters, please contact your medical defence organisation or AMA (ACT) or the Office of the Review.

Further information about these matters is contained in Appendix 1 to this Update. Appendix 1 contains a series of questions put to the Review by AMA (ACT) and responses received from the Review.

Referrals of Submissions to an Appropriate Authority

In this part, the Review states, ‘[i]f you’ve included complaints in your submission the [Review] may wish to refer those matters to an appropriate authority for investigation, . . . [i]n these cases, your consent will be sought.’

Appropriate authority

There are a wide range of organisations that may be an ‘appropriate authority’ in these circumstances including – the ACT Public Service Commissioner, the ACT Police, the Australian Federal Police, AHPRA, Worksafe ACT, The ACT Human Rights Commissioner, the Fair Work Ombudsman, the Canberra Hospital or Calvary Public Hospital (the latter two regarding disciplinary matters, for example).

Investigation

The Review has no power to investigate complaints nor does it have the resources to do so.

Your consent will be sought

While we acknowledge the good intentions of the Review in this regard, if the Review is required by law to refer a submission, it will do so regardless of whether your consent has been sought or gained.

Of course, if a submitter consents to a referral that may be made to a range of authorities including AHPRA and ACT Health itself, in the case of misconduct matters. It is for these reasons that AMA (ACT) has asked the Review to develop and publish a 'Referral Protocol'; thus far they have declined to do so.

Despite these matters, it is important to remember that, absent the consent of the submitter, there are very few circumstances where a submission could be released to a third party.

If you are in any doubt about these matters, please contact your medical defence organisation or AMA (ACT).

Further information about these matters is contained in Appendix 1 to this Update. Appendix 1 contains a series of questions put to the Review by AMA (ACT) and responses from the Review.

9. Procedural Fairness for Persons against Whom Allegations are Made

Minister Fitzharris' media release of 21 September states:

'The Independent Review will be conducted so as to protect the confidentiality and privacy of individuals who make submissions, and those who may be the subject of complaints to ensure procedural fairness.

Similarly, the Review has stated its proceedings will be conducted so as to afford procedural fairness to those against whom allegations are made.

What is 'Procedural Fairness' in these circumstances?

Given the inability of the Review to investigate or make decisions about a complaint, the relevant aspects of procedural fairness are disclosure of the allegations against a person and a reasonable time to respond to those allegations.

At a minimum, procedural fairness should include:

- clearly informing the person concerned of the allegations made against them in a way that allows them to properly respond. This does not necessarily mean giving the person concerned all the information contained in a submission, it must be enough to allow a proper response, given the nature of the allegations.
- Giving the person against whom the allegations are made sufficient time and opportunity to consider and respond to the allegations commensurate with the seriousness of the allegations.

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We think it is unlikely, given that the Review has been tasked, under its Terms of Reference to '[e]xamine' rather than 'investigate' or 'decide' matters, that allegations will formally be put to, and a response sought from, persons against those allegations are made. The practical effect will be that any such allegations will be held confidentially by the Review and not acted on.

If you are in any doubt about these matters, please contact your medical defence organisation or AMA (ACT).

Further information about these matters is contained in Appendix 1 to this Update. Appendix 1 contains a series of questions put to the Review by AMA (ACT) and responses from the Review.

Appendix 1 – AMA (ACT) Questions and Responses from Review

Q1: Given the absence of reference to the Health Practitioner Regulation National Law in the documents published by the Review on Monday, please confirm that the Review (and its staff) are not bound by mandatory reporting obligations and, additionally, do not intend to make voluntary notifications to AHPRA.

A: The Review will deal with submissions that it receives in accordance with the requests made by the person who has made the submission, and also in accordance with the confidentiality provisions of Territory and Commonwealth legislation. It is not the intention of the Review to use a submission other than in accordance with the consent of the person making the submission.

Notwithstanding the foregoing, the Review has stated it will not make voluntary notifications to AHPRA.

Q2: Referrals to other parties. In passing, I note AMA (ACT) has previously suggested that the Review should develop and publish a ‘referral protocol’ and that remains our preferred position. We have previously stated in regard to criminal offences that are alleged or the facts of which are set out in submissions:

‘Referral protocols need to be known by potential submitters in order to inform both their decision to make a submission and the submission itself. As you know, a voluntary submission may contain information or facts that are indicative of the commission of a criminal offence by the submitter or another person or persons. I assume, from [previous discussions], it is likely that the Review will refer such matters to the relevant authorities. Criminal offences that come readily to mind are those under the local and Cth criminal codes, however, many other offences come to mind [i]ncluding those under the ACT Mental Health Act, the ACT Health Act, work health and safety legislation, workers compensation, the Fair Work Act and numerous other pieces of legislation.’

It remains AMA (ACT)’s position that the Review should publish a comprehensive referral protocol. Please confirm the intentions of the Review in regard to whether they will develop and publish a referral protocol.

A: The focus of this Review is on understanding, documenting, and making recommendations in relation to, the Workplace Culture of ACT Public Health services. The review was not setup to investigate specific workplace conduct or potential legal matters.

As such the panel may, where appropriate, consider referring workplace conduct related matters under existing arrangements such as those included in relevant Enterprise Agreements. These referrals will be made on a case-by-case basis by the Panel in accordance with the requests of the person who made the submission and the confidentiality provisions of Territory and Commonwealth legislation.

The Panel has a duty of care when acting toward others and the public, they must comply with all relevant legislation to which they are subject. In the unlikely event that

a potential legal matter was raised in a submission, it would be considered on a case-by-case basis taking into account the requests of the person who made the submission, and the confidentiality provisions of Territory and Commonwealth legislation. The panel must comply where a matter is required by law to be referred to an authority. Having said this, it is not the intention of the Review to use a submission other than in accordance with the consent of the person making the submission.

Q3: The second to last page of the Review's FAQ document contains a reference to potentially referring 'complaints' to 'an appropriate authority for investigation'. Given the use of the word 'claims' in the initial part of TOR b) ['claims made in relation to inappropriate conduct and behaviours'] vis-a-vis the use of the word 'complaints' in Tor b)ii), could you provide a useful guide as to how the Review will determine when a 'claim' becomes a 'complaint' and hence potentially referable?

A: Please see the response to question 2 in relation to referrals.

There was no intention when drafting the communication material to draw a legal meaning by using the words complaint and claim. These words are used to provide context and illustrate the relevant points. Each submission will be considered on its merits and in accordance with the requests of the person who made the submission and the confidentiality provisions of Territory and Commonwealth legislation.

Q4: Further in the referral section of the FAQs, it's stated that consent of the submitter will be sought before a referral is made with no specific reference being to consent being gained. Please confirm whether a referral will only be made after the consent of the submitter is sought – and gained? AMA (ACT) had previously understood that submissions containing allegations of criminal conduct would be referred to the appropriate authorities and assumed that this would be regardless of whether the 'consent' of the submitter had been either sought or gained. Please confirm whether the Review will refer allegations of criminal conduct to the appropriate authorities regardless of whether the consent of the submitter is gained?

Of course, this was the point of urging the Review to develop and publish a comprehensive referral protocol in order to clarify the situation for submitters and assist in the transparent discharge of the duty to act in the public interest.

A: The submission form asks if the submitter consents for the Panel to share the submission. Where consent is not provided on the form, that consent will be sought and gained prior to the referral taking into account any legislative requirements (see response to Question 2). As noted earlier and in the existing communication material, the Review will operate within the requirements of relevant legislation.

Q5: The third page of the FAQ document contains a section dealing with privacy and confidentiality. We are particularly interested in the sentence 'If you do not consent [to the release of] your submission, it will remain completely confidential.' While part of our interest in this statement will be determined by your response to some of the earlier

matters raised, others do not. I am not certain as to how it is the Review could claim 'complete' confidentiality for submissions? Can you inform me of the privilege or other complete protections attaching to submission that would enable the Review (or a successor taking custody of the submissions) to successfully resist court process including subpoenae or any other legal access?

While I believe I understand the intent of making a statement similar to this, in my view, this is a very bold claim indeed.

A: It is difficult to conceive a situation where some form of court proceedings could be instituted such as to provide a basis for a subpoena to be issued seeking access to submissions made to the Review. To allow me to answer your question more specifically, can you please set out what form of court proceedings you consider to be possible which might give rise to the issue of a subpoena.

Q6: Turning to the last issue, I would welcome your clarification of how it is that procedural fairness can be afforded to individuals against whom allegations are made when such allegations, as part of a confidential submission, are to remain completely confidential? How does the Review plan to balance the competing objectives of confidentiality for submitters who so choose and procedural fairness for those against whom allegations have been made? As part of this response I invite you to outline the process and procedures for retaining submissions in confidence.

As per the response to Question 1, the Review will deal with submissions that it receives in accordance with the requests made by the person who has made the submission and the confidentiality provisions of Territory and Commonwealth legislation. It is not the intention of the Review to use a submission other than in accordance with the consent of the person making the submission.

The review is designed to consider the workplace culture of public ACT Health Services to identify opportunities for improving the culture, examples of best practice, and to put forward recommendations that support ACT Health improve support systems for staff and management. Procedural fairness is usually used in the context of an investigation or legal matter and the response to Question 2 covers these matters.