

Australian Capital Territory

# University of Canberra (Medical Leave) Statute 2017

**Disallowable instrument DI2017–307**

made under the

**University of Canberra Act 1989, s 40 (Statutes)**

## EXPLANATORY STATEMENT

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Section 40 of the *University of Canberra Act 1989* gives the University Council the power to make Statutes and Rules.

Section 42 of the *University of Canberra Act 1989* requires that a Statute, once made by Council, must be submitted by the Chancellor to the Executive for approval.

This instrument is made under sections 40(2)(a), 40(2)(k) and 40(3) and authorises the University Council to make Rules that allow for a student to be placed on involuntary medical leave in prescribed circumstances.

The University's existing Statutes and Rules provide a limited range of options to intervene where a student's serious health condition inhibits their ability to complete their studies and where this condition is manifesting in behaviours which put members of the University community at risk.

Presently where a student is unfit to attend the University or pursue a program or course of study due to a serious health condition, the University may impose involuntary leave pursuant to the *University of Canberra (Student Conduct) Rules 2015*. However, where the unfitness is caused by a serious health condition, the punitive and adversarial nature of student conduct processes under those Rules may risk exacerbating a student's serious health condition and, potentially, represent an exercise of power in a manner inconsistent with the *Human Rights Act 2004*.

The objective of this new Statute and Rules is to provide authority for the University to intervene where a student's unfitness is caused by a serious health condition in a human rights positive framework rather than a punitive adversarial misconduct framework. The Rules do authorise limits on human rights, but within reasonable limits allowed by the *Human Rights Act 2004* in order to facilitate beneficial therapeutic interventions.

## **Human Rights considerations**

This Statute and the Rules limit the following rights contained in the *Human Rights Act 2004* (ACT):

- Section 8 – Recognition and equality before the law;
- Section 27A – Right to education;
- Section 12 – Privacy and reputation;
- Section 13 – Freedom of movement.

## **Limitations on human rights– Section 28 (2) of the HRA**

The preamble to the Human Rights Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HRA contains the framework that is used to determine the acceptable limitations that may be placed on human rights. Section 28 requires that any limitation on a fundamental right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality, and an assessment thereof, has been characterised in *R v Oakes*:

*First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.<sup>1</sup>*

## **Recognition and equality before the law, Right to education**

Section 8 of the HRA states that –

- (1) *Everyone has the right to recognition as a person before the law.*
- (2) *Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.*
- (3) *Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.*

Section 27A of the HRA states –

- (1) *Every child has the right to have access to free, school education appropriate to his or her needs.*

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<sup>1</sup> *R v Oakes* [1986] 1 S.C.R. 103.

- (2) *Everyone has the right to have access to further education and vocational and continuing training.*
- (3) *These rights are limited to the following immediately realisable aspects:*
- (a) *everyone is entitled to enjoy these rights without discrimination;*

...

**Nature of the limitation:**

Under the Rules enabled by this Statute, an Authorised Officer is authorised to impose restrictions on the enrolment of a student on the basis of that student having a serious health condition.

**Least restrictive:**

Subrule 14(3) of the Rules requires that in making a decision about whether to place a student on involuntary medical leave or to impose reasonable conditions on the student's enrolment, the Authorised Officer must impose the least restrictive conditions reasonably available and proportionate to achieve the objective of these Rules.

**Reasonably Necessary:**

The nature of the right to life and integrity of the body which this Statute and Rules seek to protect are preeminent, relative to the right to education.

**Safeguard:**

Authorised Officers and members of the Medical Appeals Panel are limited to senior University staff, legal practitioners and independent mental health consumer advocates, who provide transparency and a student focus.

**Safeguard:**

Decisions of an Authorised Officer are subject to internal and external review. The Medical Appeals Panel is the point of internal appeal. It is comprised of highly skilled individuals, namely an independent Chair with special knowledge in psychology, psychiatry or medicine, a Professor of the University with knowledge of the academic discipline being studied or proposed to be studied by the appellant and a legal practitioner.

**Safeguard:**

Decisions and processes of an Authorised Officer and the Medical Appeals Panel are subject to the rules of natural justice. Further, decisions of these bodies are restricted to a limited period of time.

**Safeguard:**

Following a period of medical leave of absence, the time to meet academic standards for completion of the student's course can be extended. This allows a student to be restored to the level of academic standing they achieved before the imposition of leave.

**Safeguard:**

The Statute does not permit Rules inconsistent with *Discrimination Act 1991*, *Disability Discrimination Act 1992* or Human Rights Act.

## ***Right to Privacy and Reputation***

Section 12 of the HRA states that –

*Everyone has the right:*

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and*
- (b) Not to have his or her reputation unlawfully attacked.*

Nature of the right:

The right to privacy and reputation in the HRA reflects the right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR). To determine where a person's privacy or private life is being subject to interference, in that context the European Court of Human Rights asks whether a person has a reasonable expectation of privacy.<sup>2</sup>

The right to privacy is not absolute and may be reasonably limited by laws which can be demonstrably justified in a free and democratic society. Interferences with privacy by 'competent authorities' must therefore be essential in the interests of society.

Limitation:

The Statute permits an Authorised Officer to determine whether a student has a serious health condition (encompassing a notifiable disease, mental illness or disorder) within the meaning of the *Public Health Act 1997* and the *Mental Health Act 2015* which renders the student unfit to attend the University or pursue a program or course of study.

Limitation:

Under the Rules enabled by this Statute, any person who considers that a student has a serious health condition may report the student to an authorised officer. An Authorised Officer may then make any enquiries necessary to ascertain a student's condition. There is potential for infringement of a person's right to reputation being impacted by the unconstrained use of this authority.

Safeguard:

To achieve the objective, enquiries and reporting are required. To prevent abuse and restrict reports to only those that are genuine and based upon concern for the student's welfare, and malicious reporting is misconduct.

The Rules provide a Non-Disclosure requirement, whereby no information or record of any inquiries, reports, minutes, notices, hearings or decisions may be disclosed by the University other than to the student or their representative or as required by a law of the Commonwealth or the Australian Capital Territory. Effective compliance with this provision will limit the extent to which a student's right to reputation is limited by these Instruments.

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<sup>2</sup> *Halford v United Kingdom* (1997) 24 EHRR 523 at [45].

Safeguard:

The persons allowed to be delegated the role of Authorised Officer is limited to a select class of senior staff of the University. This safeguard will ensure minimal dissemination of information within the University as well as ensuring high level focus is given to powers exercised under these Rules.

### ***Freedom of movement***

Section 13 of the HRA states that –

*Everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT.*

Nature of the right:

The right to freedom of movement in the HRA is premised on the right to freedom of movement in Article 12 of the ICCPR. Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and the State must ensure that right is not only protected from public but also private interference.<sup>3</sup>

Article 12 of the ICCPR recognises that a person’s free and unhindered movement may be justifiably limited where necessary for purposes of national security, public order, public health or morals or the rights and freedoms of others. In this respect, the right to freedom of movement is necessarily relative. Any application of limits should use precise criteria and may not confer unfettered discretion on those charged with their execution.<sup>4</sup>

Limitation:

Under the Rules enabled by this Statute, an Authorised Officer will be empowered to impose a period of involuntary medical leave on a student who is unfit to attend the University due to an established or reasonably suspected serious health condition. This includes the ability to impose restrictions on the student’s movement to enter the physical campus of the University or parts thereof. Deputy Vice-Chancellors are authorised in urgent or emergency situations to impose restrictions on a student’s or applicant’s movement to enter the physical campus of the University or parts thereof without notice.

Limitation:

An overseas student placed on a period of involuntary medical leave may have indirect implications for the student’s ability to remain in Australia on a student visa.

Safeguard:

The Statute recognises serious implications may flow from the University’s decision to place a student on involuntary leave or otherwise vary their full-time enrolment. The Rules requires that an Authorised Officer and Medical Appeals Panel must have regard to the student’s visa status and impose the least restrictive condition or conditions reasonably necessary to give effect to the objective. As such options

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<sup>3</sup> General Comment No. 27, paras 4-6, in CCPR/C/21/Rev. 1/Add.9, 1 November 1999.

<sup>4</sup> General Comment No. 27, paras 4-6, in CCPR/C/21/Rev. 1/Add.9, 1 November 1999.

subjecting the student's enrolment to reasonable conditions, including distance or online learning are available options to authorised decision makers.

At present, where an overseas student is suffering from a serious health condition, Part D Standard 13 of the *National Code of Practice for Providers of Education and Training to Overseas Students 2007* allows the University to defer or temporarily suspend a student. However, the Standards are reactive in that the onus is on the student to make an application to the University stating they are unwell. This is not appropriate where the student may not accept or be aware of their serious health condition. Such a situation can arise in relation to serious health conditions which often go unnoticed or unrecognised, for example where the person has a mental illness or mental health issue.

This Statute and Rules will enable the University to take a proactive approach and to take the lead in facilitating therapeutic student-centred outcomes where an overseas student is suffering from a serious health condition.

**Safeguard:**

All decisions taken by an Authorised Officer are reviewable internally as well as all decisions taken by a Deputy Vice Chancellor in emergency situations being automatically referred for determination pursuant to the Rules.