

Hospital and Health Boards Amendment Regulation (No. 3) 2016

Explanatory notes for SL 2016 No. 212

made under the

Hospital and Health Boards Act 2011

General Outline

Short title

Hospital and Health Boards Amendment Regulation (No. 3) 2016

Authorising law

Section 282 of the *Hospital and Health Boards Act 2011*

Policy objectives and the reasons for them

The *Hospital and Health Boards Amendment Regulation (No. 3) 2016* (the amendment regulation) amends the *Hospital and Health Boards Regulation 2012* (the HHB Regulation) to implement the following policy objectives:

- (a) enable a root cause analysis investigation to be conducted for a stillbirth;
- (b) enable Queensland Health to disclose patient identifying information in specified circumstances, without breaching a statutory duty of confidentiality, to:
 - (i) Alfred Health, for inclusion in the Australian Trauma Registry, to improve the quality of care and ensure better outcomes for severely injured patients;
 - (ii) the Department of Communities, Child Safety and Disability Services and the Department of Housing and Public Works, for implementing and managing a Joint Action Plan to transition younger people with disability from healthcare settings to community-based accommodation in preparation for the National Disability Insurance Scheme;
 - (iii) the Queensland Police Service for responding to mental health incidents or situations involving vulnerable persons; and
 - (iv) Queensland Corrective Services to facilitate joint management of a person for offender health services or prison mental health services; and
- (c) remove or update references to repealed sections and documents in the HHB Regulation.

Enable a root cause analysis investigation to be conducted for a stillbirth

The *Hospital and Health Boards Act 2011* (the Act) provides for the conduct of a root cause analysis (RCA) as a quality improvement technique to investigate, assess and respond to reportable events that happen during the provision of health services. An RCA is used to identify systemic factors that contributed to the happening of the event and any remedial measures that could be implemented to prevent a recurrence of a similar event.

Section 29 of the HHB Regulation prescribes the ‘reportable events’ for which an RCA can be undertaken. The prescribed list of reportable events currently includes such things as a maternal death, the wrong procedure being performed on a person, the death of a person as a result of incorrect management of medication and suspected suicide of a person receiving inpatient care. A stillbirth is not prescribed as a reportable event for RCA purposes.

An RCA is not mandatory; rather, the Act provides a legally privileged environment for this type of investigation, protecting any information gained during the RCA from use in any legal proceeding. This provides for an open, transparent and thorough investigation without the fear of blame or reprisal.

While not all stillbirths are preventable, or are the result of a systemic healthcare issue, detailed clinical investigations are recommended following all stillbirths to determine the cause. However, systemic investigations (such as an RCA) of all stillbirths may not be considered appropriate; this is particularly the case when the outcome could not have been prevented by changes to health systems or practice.

It may be appropriate to undertake investigations of a stillbirth if there may be healthcare related actions that could have been undertaken to prevent the outcome. Healthcare related stillbirth refers to stillbirths that were not reasonably expected as an outcome of the health service provided.

For these reasons, the policy objective is to prescribe stillbirth as a reportable event for which an RCA investigation can be conducted by a Hospital and Health Service. The objective seeks to allow, but not mandate, RCAs following stillbirths where changes to systems or practice may have resulted in a different outcome.

Disclosure of confidential patient-identifying information

Section 142 of the Act establishes a duty of confidentiality for all Queensland Health employees, officers and agents (‘designated persons’), which prohibits those persons from disclosing confidential information about any person receiving public sector health services, if the person receiving the treatment could be identified from that information (‘patient-identifying information’). The maximum penalty for breaching the duty of confidentiality is currently 100 penalty units (\$12,190).

The Act prescribes exceptions to the duty of confidentiality (sections 143 to 161B), in recognition of circumstances where it is necessary or unavoidable to disclose patient-identifying information. Exceptions include, for example, where the disclosure is: required or permitted by an Act or law; with consent of the patient; for the care and treatment of the patient; and for the protection, safety or wellbeing of a child.

Two exceptions to the duty of confidentiality enable patient-identifying information to be disclosed to Government and non-Government entities, as follows:

- section 150(b) – if the disclosure is to an entity prescribed under a regulation for the purposes of evaluating, managing, monitoring or planning health services; and
- section 151 – if the disclosure is to the Commonwealth or another State, or an entity of the Commonwealth or another State, and the disclosure is allowed under an agreement which is prescribed in regulation, and is authorised in writing by the Director-General of Queensland Health to be in the public interest.

Entities for the purposes of section 150(b) are prescribed under section 35 of the HHB Regulation, and agreements for the purposes of section 151 are prescribed under section 36 and schedule 3 of the HHB Regulation.

Disclosure to Alfred Health and Monash University for the Australian Trauma Registry

Queensland has agreed to participate in the establishment of an Australia-wide trauma registry known as the Australian Trauma Registry (ATR). The ATR comprises trauma data from authorised third parties throughout the States and Territories of Australia.

In 2010 there were approximately 7,400 major trauma admissions in Australia based on data collected from most States and Territories. Queensland Major Trauma Centres (comprising Royal Brisbane and Women's Hospital, Townsville Hospital, Princess Alexandra Hospital, Lady Cilento Children's Hospital and Gold Coast University Hospital) account for approximately 19% of the major trauma cases.

The aim of the ATR is to improve the safety and quality of patient care to ensure better outcomes for severely injured patients through the analysis of Australia-wide trauma data. Combining trauma information from across Australia will make the information statistically more meaningful, and help make the information more usable in monitoring and improving quality of trauma care. Currently, access to high quality national data on trauma is not readily available nor is there any standardised approach in benchmarking the quality or care given to major trauma patients and systems.

Data collected for the ATR will be used primarily for surveillance of injuries sustained from major trauma and improving the care given to these patients by trauma service providers. It will provide evidence for identifying gaps or issues in clinical care and patient management and address quality of care issues based on established principles for quality improvement.

Access to confidential de-identified data will highlight key areas for essential improvement as part of a feedback cycle. The data will be used to generate:

- standard reports on trauma activity and quality indicators, including risk adjusted comparison data in which individual trauma services or States will not be identifiable;
- customised reports to meet local trauma services requirements for governance reporting and quality improvement;
- customised reports for shared quality improvement initiatives;
- annual national reports of trauma activity and quality indicators.

The use of confidential de-identified data for specific research projects or record linkage will be subjected to a separate governance approvals process. Such requests will require approvals from the relevant Human Research Ethics Committee/s.

The policy intent is to prescribe Alfred Health and Monash University as entities, which will allow Queensland Health to share patient-identifying information about persons who have been severely injured, for the purposes of improving, evaluating, managing, monitoring or planning health services relating to trauma health services at a national level.

Disclosure to state departments to implement a Joint Action Plan

Queensland Health (including Hospital and Health Services), the Department of Communities, Child Safety and Disability Services and the Department of Housing and Public Works are collaborating under a Joint Action Plan, to support the transition of younger people with disability from healthcare settings to community-based accommodation, where possible, until mid-2019. The Joint Action Plan also supports younger people with a disability who are long-stay patients in Queensland public health facilities, and their families, in preparation for, and implementation of, the National Disability Insurance Scheme (NDIS) in Queensland.

Implementation of the Joint Action Plan requires Queensland Health employees to provide confidential patient-identifying information to the Department of Communities, Child Safety and Disability Services and the Department of Housing and Public Works. This disclosure is not currently authorised under the Act or the HHB Regulation.

Therefore, the policy objective is to prescribe these departments as entities to which patient-identifying information can be disclosed for the purposes of evaluating, managing, monitoring or planning health services.

Disclosure to the Queensland Police Service

In 2011, Queensland Health signed a Memorandum of Understanding (MoU) for Mental Health Collaboration between Queensland Health and the Queensland Police Service. The MoU permits the disclosure of patient-identifying information between the two agencies in mental health crisis situations (now referred to as mental health incidents or situations involving vulnerable persons) to support the safe resolution of these situations.

The 2011 MoU is currently prescribed in schedule 3, part 2 of the HHB Regulation but has recently been reviewed and a new 2016 MoU has been made. The 2016 MoU reflects current legislation and better supports the proactive and collaborative work that has been undertaken by Queensland Health and the Queensland Police Service to help reduce the likelihood of a mental health incident from occurring and to strengthen responses when a mental health incident does occur.

The policy intent is to prescribe the new 2016 MoU to continue the authorisation to share confidential information between Queensland Health and the Queensland Police Service for the purpose of establishing effective mental health intervention strategies and when responding to a mental health incident or situation involving a vulnerable person.

Disclosure to Queensland Corrective Services

In 2011, Queensland Health signed an MoU for Offender Health Services with Queensland Corrective Services to provide for information sharing in lieu of consent or other legislative authority in circumstances where joint management of a person across Queensland Corrective Services and Queensland Health is required for offender health services or prison mental health services.

The 2011 MoU is currently prescribed in schedule 3, part 2 of the HHB Regulation but has recently been reviewed and a new 2016 MoU has been made. The 2016 MoU includes changes to ensure consistency with the Act and to update references to operational and clinical practices to ensure the MoU reflects current management practices across Queensland Corrective Services and Queensland Health.

The policy intent is prescribe the new 2016 MoU to continue the authorisation to share confidential information between Queensland Health and Queensland Corrective Services for the purposes of providing health services or prison mental health services to offenders in circumstances where other legislative avenues of obtaining information have been exhausted.

Ensure section and document references in the HHB Regulation are correct

A number of minor and technical amendments are required to update references in the HHB Regulation to repealed sections or repealed documents.

Achievement of policy objectives

The only way the policy objectives can be effectively achieved is through amending the HHB Regulation. Therefore, the amendment regulation:

- prescribes ‘stillbirth’ as a reportable event for which an RCA investigation can be conducted;
- prescribes Alfred Health and Monash University as entities to which Queensland Health can provide patient-identifying information for the purposes of evaluating, managing, monitoring or planning health services relating to trauma health services;
- prescribes the Department of Communities, Child Safety and Disability Services and the Department of Housing and Public Works as entities to which patient-identifying information can be disclosed for the purposes of evaluating, managing, monitoring or planning health services in relation to the transition of younger people with disability from healthcare settings to community-based accommodation and implementation of the NDIS;
- prescribes the 2016 MoU between Queensland Health and the Queensland Police Service for the purpose of establishing effective mental health intervention strategies and when responding to a mental health incident or situation involving a vulnerable person;
- prescribes the 2016 MoU between Queensland Health and Queensland Corrective Services for the purposes of providing health services or prison mental health services to offenders; and
- removes references to repealed sections of the HHB Regulation and updates references to the September 2011 ‘National Safety and Quality Health Service Standards’ to refer to the September 2012 version of these Standards.

Consistency with policy objectives of authorising law

The regulation is consistent with the policy objectives of the Act.

Inconsistency with policy objectives of other legislation

No inconsistencies with the policy objectives of other legislation have been identified.

Alternative ways of achieving policy objectives

The only way in which patient-identifying information can be disclosed, without breaching the statutory duty of confidentiality, is to utilise an exception under part 7 of the Act. Furthermore, in order for an RCA investigation of a stillbirth to be undertaken under the Act, the stillbirth must be prescribed in regulation as a 'reportable event'. Therefore, amending the HHB Regulation is the most effective and lawful means of achieving the policy objectives.

Benefits and costs of implementation

The costs of the implementation of the proposals will be met within existing budgets.

Consistency with fundamental legislative principles

The amendments to enable disclosure of confidential patient-identifying information to certain State and non-Government entities are potentially in breach of the fundamental legislative principle that legislation has sufficient regard to the rights and liberties of individuals under section 4(2)(a) of the *Legislative Standards Act 1992*.

Disclosure to Alfred Health and Monash University for the Australian Trauma Registry

The proposed exception to the duty of confidentiality is justified to enable the information to be used to improve the survival of severely injured (trauma) patients, enhance quality for trauma care, and optimise recovery for patients.

Disclosures of patient-identifying information to Alfred Health and Monash University are underpinned by an agreement with Queensland Health. The agreement takes effect when the amendment regulation commences, and will operate alongside the Act, the *Information Privacy Act 2009* and National Privacy Principles to provide safeguards for the security and use of patient-identifying information provided for use in the Australian Trauma Registry. The agreement also includes provisions about dealing with breaches of confidentiality and the action that the entities and Queensland Health must take to address a breach.

Disclosures to the Queensland Police Service and Queensland Corrective Services

The MoUs with the Queensland Police Service and Queensland Corrective Services will operate alongside the Act, the *Information Privacy Act 2009* and the National Privacy Principles to provide safeguards for the security and use of patient-identifying information. The MoUs will operate in cases where it is not practicable or possible to obtain consent from the person to whom the information relates. The MoUs also contain protections and security measures for the confidentiality of the information disclosed, including actions to address a breach of the MoU.

The disclosure of patient-identifying information is made if the information is necessary to assist in safely resolving the mental health incident or situation involving a vulnerable person, in order to reduce the risk to the life, health or safety of the person to whom the information relates and/or to public safety. A mental health incident or situation involving a vulnerable person is a situation that:

- (i) involves a series of events or a combination of circumstances in which a person is demonstrating behaviour that is indicative of a mental health problem;
- (ii) may involve a serious risk to the life, health or safety of the person or of another person; and
- (iii) requires communication and coordination between the parties (Queensland Health and the Queensland Police Service) at the earliest opportunity and ongoing communication is required.

The information disclosed under the MoU with Queensland Corrective Services is necessary to enable the effective and efficient provision of coordinated health services to prisoners in Queensland corrective services facilities. These services include the Prison Mental Health Service and the Prison Health Service and Offender Health Service, which provides primary health care such as medical, nursing, dental, optometry, radiology, pathology, dietary and sexual health care.

Disclosure to state departments to implement a Joint Action Plan

The proposed exception to the duty of confidentiality is justified to enable relevant Queensland Government agencies to exercise their responsibilities under the Joint Action Plan for the benefit of the patients concerned and their families. Disclosure of the confidential patient information to the prescribed agencies is required to enable the necessary evaluating, managing monitoring and planning to be undertaken to assist younger people with disability who have been in public health facilities for an extended period, to transition to more appropriate accommodation in the community, where the reason they have been unable to do so previously was the lack of access to the necessary disability, health and housing supports in the community.

While the practice of seeking individual patient or guardian consent for disclosure of confidential patient information will continue to be the standard practice, including in respect of disclosure for Joint Action Plan purposes where possible, this will not be practicable in all cases. The proposed amendment will enable relevant information to be disclosed to prescribed agencies for Joint Action Plan purposes in those cases where it is not practicable to obtain consent from the individual concerned or their guardian. The proposed authority is strictly limited to disclosure only to the relevant prescribed agencies and only for the purposes of the Joint Action Plan.

Consultation

The Office of Best Practice Regulation was consulted on the amendment regulation and advised that a Regulatory Impact Statement was not required for any of the proposals.

Notes on provisions

Part 1 Preliminary

Short Title

Clause 1 provides the short title of the regulation.

Regulation amended

Clause 2 provides that the amendment regulation amends the *Hospital and Health Boards Regulation 2012*.

Amendment of s 11A (Senior health service employees—Act, s 74A)

Clause 3 amends section 11A to update a reference to section 74A of the Act, as that section was amended in 2015.

Amendment of s 12 (Prescribed requirements for clinician engagement strategies)

Clause 4 amends an example in section 12(b) to update a reference to the September 2011 version of the National Safety and Quality Service Standards as those standards have since been updated in September 2012.

Amendment of s 13 (Prescribed requirements for consumer and community engagement strategies)

Clause 5 amends an example in section 13(1)(b) to update a reference to the September 2011 version of the National Safety and Quality Service Standards as those standards have since been updated in September 2012.

Amendment of s 29 (Reportable events)

Clause 6 amends section 29(1) to insert new paragraph (j) to prescribe ‘stillbirth’ as a reportable event for which a root cause analysis can be undertaken. Section 29(3) is also amended to insert a definition of stillbirth, to assist with interpretation of the amendment to section 29(1)(j).

Amendment of s 32 (Functions of a safety and quality committee)

Clause 7 amends an example in section 32(a)(iv) to update a reference to the September 2011 version of the National Safety and Quality Service Standards as those standards have since been updated in September 2012.

Amendment of s 35 (Disclosure of confidential information for purposes relating to health services)

Clause 8 amends section 35(1)(a) to omit a prescribed entity which is now redundant, and prescribe Alfred Health and Monash University as entities for the purpose of collecting data about a relevant trauma patient for use in the Australian Trauma Registry.

Clause 8 also amends section 35(1) by inserting new paragraph (g) to prescribe the Department of Communities, Child Safety and Disability Services and the Department of Housing and Public Works, for the purposes of the Joint Action Plan. Section 35(3) is also amended to insert a definition of 'Joint Action Plan' to assist with the interpretation of the amendment in section 35(1)(g).

In accordance with current drafting practice, clause 8 corrects capitalisation in sections 35(2)(b)(i) and (ii).

Amendment of sch 3 (Agreements)

Clause 9 amends:

- item 10 of schedule 3 to omit the current prescribed agreement and prescribe the agreement called 'Memorandum of Understanding between the State of Queensland acting through Queensland Health and the State of Queensland acting through the Queensland Police Service, Mental Health Collaboration 2016' to permit the disclosure of patient-identifying information between the two agencies in mental health crisis situations; and
- item 11 of schedule 3 to omit the current prescribed agreement and prescribe the agreement called 'Memorandum of Understanding between the Chief Executive of Queensland Health and the State of Queensland acting through the Department of Justice and Attorney-General, Queensland Corrective Services, confidential information disclosure' to permit the disclosure of patient-identifying information for joint management of offender health services.

Amendment of sch 4 (Health service districts under repealed Act and Hospital and Health Services)

Clause 10 amends schedule 4 to omit a reference to section 43, which expired on 30 June 2013.