

# Hospital and Health Boards (Changes to Prescribed Services) Amendment Regulation 2019

Explanatory notes for SL 2019 No. 263

made under the

*Hospital and Health Boards Act 2011*

## General Outline

### Short title

Hospital and Health Boards (Changes to Prescribed Services) Amendment Regulation 2019

### Authorising law

Sections 20 and 282 of the *Hospital and Health Boards Act 2011*.

### Policy objectives and the reasons for them

#### *Changes to health service employer arrangements*

Under section 20(3) of the *Hospital and Health Boards Act 2011* (HHB Act), all Hospital and Health Services (HHSs) may employ health executives and senior health service employees. A HHS that is prescribed as having employment powers under section 20(4) of the HHB Act (Prescribed Employer HHS) may also employ other health service employees (non-executive health service employees). In practice, if a HHS is not a Prescribed Employer HHS, its employees are employed by the Department of Health and provided to the HHS under a service agreement.

In 2014, the *Hospital and Health Boards Regulation 2012* (HHB Regulation) was amended to prescribe eight HHSs as Prescribed Employer HHSs. The eight HHSs prescribed under the HHB Regulation are Children's Health Queensland, Gold Coast, Metro North, Metro South, North West, Sunshine Coast, Townsville and West Moreton (see section 3AA and schedule 1AA of the HHB Regulation).

In early 2019, the Minister for Health and Minister for Ambulance Services requested an expert panel provide advice on Queensland Health's governance framework. The panel, comprising Mr Jim McGowan AM, Dr Pradeep Philip and Professor Anne Tiernan, provided its advice to the Minister in June 2019. The panel made 28 recommendations relating to a range of areas including human resource (HR) management and industrial relations (IR). In November 2019, a copy of the panel's advice was publicly released.

Recommendation 23 of the expert panel's advice recommended that the HHB Regulation should be amended to provide that all non-executive health service employees are employed by the Director-General as system manager of Queensland Health, rather than by Prescribed Employer HHSs.

The expert panel considered the current arrangements, where half of the HHSs are Prescribed Employer HHSs and the other half are not, are confusing and inconsistent. The panel noted that, irrespective of their employer status, all HHSs retain local responsibility for their staff and make on the ground decisions that have a direct impact on their workforce. The panel also considered that even though individuals may identify as working for a particular hospital or HHS, they should predominantly see themselves as employees of Queensland Health, with a responsibility to support the health needs of all Queenslanders that transcends HHS boundaries. The panel was unable to identify any evidence to establish a clear link between a HHS being a Prescribed Employer HHS and their performance under service agreements, and noted that all HHSs, regardless of whether they are Prescribed Employer HHSs, have a responsibility for building organisational culture and staff engagement.

The Minister has accepted the panel's recommendation.

### *Updating senior health service employee positions*

Schedule 1A of the HHB Regulation prescribes the positions that are senior health service employee positions for section 74A of the HHB Act. Part 1 of schedule 1A of the HHB Regulation currently refers to the outdated 'District Health Services – Senior Medical Officers and Resident Medical Officers' Award – State 2012' and 'Medical Superintendents with Right of Private Practice and Medical Officers with Right of Private Practice – Queensland Public Hospitals, Award – State 2012' in prescribing senior health service employee positions. It is necessary to update these outdated references to provide certainty about the positions that are senior health service employee positions.

## **Achievement of policy objectives**

### *Changes to health service employer arrangements*

To implement recommendation 23 of the expert panel's advice, the Hospital and Health Boards (Changes to Prescribed Services) Amendment Regulation 2019 (Amendment Regulation) removes the list of Prescribed Employer HHSs referred to in section 3AA and schedule 1AA of the HHB Regulation. From the commencement, non-executive health service employees employed by Prescribed Employer HHSs will be taken to be employed by the chief executive in the Department of Health. All employee rights, benefits and entitlements will be retained.

This change will apply to approximately 65,000 non-executive health service employees. Section 10(2) of the HHB Act provides that health service employees employed by HHSs and the Department of Health are employed on the same terms and conditions. As a result, there will be no impact on the terms and conditions of employment of non-executive health service employees and no adverse taxation or superannuation implications for employees.

To provide legal certainty for employees, the Amendment Regulation includes transitional provisions that put beyond doubt that the change does not affect employee entitlements, terms or conditions. These provisions are largely based on sections 80 to 80C of the HHB Act, which

provided for the continuation of employee entitlements, terms and conditions when employees were transferred to Prescribed Employer HHSs in 2014.

The change of employment arrangements will have limited practical impact on health service employees. HHSs will continue to have local responsibility for the day to day management of employees.

The change will not affect health executives or senior health service employees, such as Senior Medical Officers and Visiting Medical Officers, who will continue to be employed directly by HHSs.

The change to health service employer arrangements will take effect from 15 June 2020, after the last pay cycle for the 2019-20 financial year.

### *Updating senior health service employee positions*

The Amendment Regulation also replaces outdated references to 2012 awards in schedule 1A of the HHB Regulation to refer to the current 'Medical Officers (Queensland Health) Award – State 2015'.

## **Consistency with policy objectives of authorising law**

The Amendment Regulation is consistent with the policy objectives of the HHB 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**

There are no alternative ways of achieving the policy objectives.

## **Benefits and costs of implementation**

The Amendment Regulation will mean the employer arrangements for all non-executive health service employees across Queensland Health will be the same. The implementation of the Amendment Regulation is administrative in nature and will be met from existing budget allocations.

## **Consistency with fundamental legislative principles**

The Amendment Regulation is consistent with fundamental legislative principles in section 4 of the *Legislative Standards Act 1992*. No potential breaches of fundamental legislative principles have been identified.

## **Consultation**

Queensland Health consulted HHSs and unions on the Amendment Regulation and no issues were raised about the proposed amendments to the HHB Regulation.

The Amendment Regulation was assessed by Queensland Health, in accordance with *The Queensland Government Guide to Better Regulation*, as meeting category (c), regulatory proposals for the internal management of the public sector. Therefore, consultation with the Queensland Productivity Commission was not required.

## Notes on provisions

### Short Title

*Clause 1* provides the short title of the regulation.

### Commencement

*Clause 2* provides for the commencement of the regulation. Section 7 of the regulation commences on notification of the regulation in accordance with section 32 of the *Statutory Instruments Act 1992*. The remaining provisions of the regulation commence on 15 June 2020.

### Regulation amended

*Clause 3* provides that the regulation amends the *Hospital and Health Boards Regulation 2012* (HHB Regulation).

### Omission of s 3AA (Employment power – Act, s20(4))

*Clause 4* omits section 3AA of the HHB Regulation. Section 3AA provides that, for section 20(4) of the *Hospital and Health Boards Act 2011* (HHB Act), Hospital and Health Services (HHSs) stated in schedule 1AA may employ health service employees.

Under section 20(3) of the HHB Act, all HHSs may employ health executives and senior health service employees. A HHS that is prescribed as having employment powers under section 20(4) of the HHB Act (Prescribed Employer HHS) may also employ other health service employees (non-executive health service employees).

*Clause 6* omits schedule 1AA. The omission of section 3AA and schedule 1AA means Prescribed Employer HHSs listed in schedule 1AA will no longer have power to employ non-executive health service employees.

### Insertion of new pt 8, div 3

*Clause 5* inserts a new part 9, division 3 in the HHB Regulation to make transitional arrangements for the Hospital and Health Boards (Changes to Prescribed Services) Amendment Regulation 2019 (Amendment Regulation).

New section 43 (Definitions for division) inserts definitions for part 9, division 3.

New section 44 (Purpose of division) provides the purpose of part 9, division 3 is to make provision about matters that are necessary or convenient to facilitate the transition of a HHS from being a Prescribed Employer HHS to a HHS that is no longer prescribed under section 20(4) of the HHB Act.

New section 45 (Particular health service employees to be employed by chief executive) applies to non-executive health service employees who are employed by Prescribed Employer HHSs immediately before the commencement (section 45(1)). From the commencement, non-executive employees are taken to be employed by the chief executive, in the Department of Health, on the same terms, conditions and entitlements, as applied immediately before the commencement (section 45(2)).

Without limiting section 45(2), section 45(3) provides that:

- employees retain all rights, benefits and entitlements that have accrued to them as an employee of a Prescribed Employer HHS;
- the employee's accruing rights, including to superannuation or recreation, sick, long service or other leave, are not affected;
- the employee's continuity of service is not interrupted;
- the change to the employee's employment does not constitute a termination of employment or a retrenchment or redundancy;
- the employee is not entitled to a payment or other benefit because the employee is no longer employed by the Prescribed Employer HHS.

The chief executive may issue a direction to a non-executive health service employee to facilitate the transition of the employee's employment from the Prescribed Employer HHS to the Department of Health (section 45(4)).

If a non-executive health service employee is employed by a Prescribed Employer HHS under a contract, the employee is taken to be employed by the chief executive, in the Department of Health, under the contract (section 45(5)).

New section 46 (Appointment to perform functions or do other things not affected by becoming employees in the department) provides that if a non-executive health service employee was appointed to perform a function or do anything under the HHB Act before the commencement, the appointment continues and the employee may complete the function or thing as an employee of the Department of Health after the commencement. For example, an employee appointed as a clinical reviewer or a member of a root cause analysis team would continue in the role in their employment with the Department of Health.

New section 47 (Proceedings and other things not affected by persons becoming employees in the department) provides for proceedings and things related to non-executive health service employees before the commencement. The term 'proceeding' is defined in schedule 1 of the *Acts Interpretation Act 1954* as meaning a legal or other action or proceeding.

If a proceeding was taken by or against a relevant employee as an employee of a Prescribed Employer HHS before the commencement, and the proceeding was not completed at the commencement, the chief executive of the Department of Health is taken to be a party for the proceeding instead of the Prescribed Employer HHS and the proceeding may be continued and completed by or against the chief executive instead of the Prescribed Employer HHS (section 47(1)(a) and (2)).

However, as with all matters involving the Department of Health, the Director-General of Queensland Health has power under the HHB Act to delegate their functions (see section 46 of the HHB Act and the note included in section 47(2)(a) of the Amendment Regulation). Depending on the nature of the proceedings, it may be appropriate for the Director-General to delegate the management of the proceedings to a delegate, including a HHS.

If a thing, other than a proceeding, was done in relation to a non-executive health service employee as an employee of a Prescribed Employer HHS before the commencement, the thing is not affected by the change in the employee's employment (section 47(1)(b) and (3)). For example, if a recruitment and selection process involving an employee was started before the commencement, the recruitment and selection process continues after the commencement and

remains effective. Similarly, if an employee's annual leave is approved before the commencement, the approval is effective after the commencement and does not need to be approved again.

New section 48 (Application of *Public Service Act 2008*, s 149 to particular relevant employees) provides that if a non-executive health service employee was continuously employed as a temporary employee by a Prescribed Employer HHS for a period that had not ended immediately before the commencement, the employee is taken to have been continuously employed as a temporary employee by the chief executive in the Department of Health for that period for the purposes of section 149 of the Public Service Act. This ensures the change of employment from a Prescribed Employer HHS to the Department of Health will not affect an employee's potential eligibility for conversion to permanent employment under the directive titled *Temporary Employment* (Directive 08/17).

New section 49 (Application of *Public Service Act 2008*, s 149A to particular relevant employees) provides that if a non-executive health service employee was employed as a casual employee by a Prescribed Employer HHS on a regular and systemic basis for a period that had not ended immediately before the commencement, the employee is taken to have been employed as a casual employee on a regular and systemic basis by the chief executive in the Department of Health for that period for the purposes of section 149A of the Public Service Act. This ensures the change of employment from a Prescribed Employer HHS to the Department of Health will not affect an employee's potential eligibility for conversion to permanent employment under the directive titled *Conversion of casual employees to permanent employment* (Directive 01/17).

New section 50 (Application of *Industrial Relations Act 2016*, s 320 to relevant employees) applies if the dismissal of a non-executive health service employee after the commencement relates to the employee's conduct, capacity or performance as an employee of a Prescribed Employer HHS before the commencement. Section 50(2) provides that, for section 320 of the Industrial Relations Act, it is declared that the dismissal of the employee was not harsh, unjust or unreasonable only because the dismissal related to the employee's conduct, capacity or performance as an employee of the Prescribed Employer HHS. This is a technical provision to clarify that an employee's conduct, capacity or performance in their role in a Prescribed Employer HHS can be the basis for dismissal, despite the change of employment. This prevents an employee from being able to claim unfair dismissal only because their conduct, capacity or performance arose with a 'previous employer'.

New section 51 (Other matters relating to *Industrial Relations Act 2016*) clarifies that from the commencement, for non-executive health service employees who were employed by a Prescribed Employer HHS before the commencement:

- the chief executive of the Department of Health is the employer for chapters 3 to 6 of the Industrial Relations Act instead of the Prescribed Employer HHS; and
- schedule 4 of the Industrial Relations Act no longer applies in relation to the Prescribed Employer HHS.

### **Omission of sch 1AA (Services with employment power)**

*Clause 6* omits schedule 1AA of the HHB Regulation which lists Prescribed Employer HHSs. The omission of section 3AA and schedule 1AA means Prescribed Employer HHSs listed in schedule 1AA will no longer have power to employ non-executive health service employees.

**Amendment of sch 1A (Senior health service employee positions – Act, s 74A)**

*Clause 7* amends schedule 1A of the HHB Regulation. Schedule 1A of the HHB Regulation lists the positions and classifications that are ‘senior health service employees’ for section 74A of the HHB Act. Items 1 and 2, part 1, schedule 1A currently refer to positions and classifications listed in the *District Health Services - Senior Medical Officers and Resident Medical Officers' Award - State 2012* and the *Medical Superintendents with Right of Private Practice and Medical Officers with Right of Private Practice - Queensland Public Hospitals, Award - State 2012*.

These awards were merged into a single award known as the *Medical Officers (Queensland Health) Award - State 2015*. Clause 7 omits items 1 and 2, part 1, schedule 1A and replaces it with references to the equivalent positions and classifications in the *Medical Officers (Queensland Health) Award - State 2015*. This change will provide certainty about which employees are ‘senior health service employees’, who will remain employed directly by HHSs.