

Health Ombudsman Regulation 2024

Explanatory notes for SL 2024 No. 148

made under the

Health Ombudsman Act 2013

General Outline

Short title

Health Ombudsman Regulation 2024

Authorising law

Section 292 of the *Health Ombudsman Act 2013*

Policy objectives and the reasons for them

The objects of the *Health Ombudsman Act 2013* (Act) are to:

- protect the health and safety of the public;
- promote professional, safe and competent practice by health practitioners and high standards of service delivery by health service organisations; and
- maintain public confidence in the management of complaints and other matters relating to the provision of health services.

The Act also establishes the Office of the Health Ombudsman (OHO) and provides a system for dealing with complaints and other matters relating to health, conduct or performance of health practitioners and services provided by health service organisations. OHO is the independent statutory body established under the Act.

The *Health Ombudsman Regulation 2014* (2014 Regulation) prescribes various matters to support the operation of the Act. The 2014 Regulation is due to expire on 1 September 2024, under section 54 of the *Statutory Instruments Act 1992*.

The *Health Ombudsman Regulation 2024* (Regulation) has been prepared to replace the 2014 Regulation. The Regulation prescribes the following matters under the Act:

- recognition of interim prohibition orders and prohibition orders made under corresponding interstate legislation to enable the orders to be mutually recognised in Queensland; and
- documents that persons, such as the health ombudsman and the Queensland Civil and Administrative Tribunal (QCAT), may have regard to when making decisions under the Act about what constitutes appropriate conduct or practice for a health service provider.

Corresponding interstate interim orders

The Act enables the health ombudsman to issue an interim prohibition order to a health practitioner. The purpose of an interim prohibition order is to immediately take action to protect public health or safety if the health ombudsman receives information that a health practitioner poses a serious risk to persons or because of the practitioner's health, conduct or performance. A person commits an offence by contravening an interim prohibition order or a corresponding interstate interim order. The Act provides that a regulation may prescribe an order to be a corresponding interstate interim order if the order is issued under a law of another State and corresponds, or substantially corresponds, to an interim prohibition order under the Act. Because health practitioners may work across jurisdictions, the intent is to recognise and apply an interim prohibition order issued for a health practitioner in another jurisdiction, to prevent or restrict that person from providing health services in Queensland.

Corresponding interstate orders

The Act provides for QCAT to make a prohibition order against a health practitioner (other than a registered health practitioner), in regard to a matter that has been referred to QCAT by the director of proceedings under section 103 of the Act. The purpose of a prohibition order is to prohibit, or restrict, a health practitioner from providing a health service in order to mitigate the serious risk the practitioner poses to persons.

A person commits an offence by contravening a prohibition order or a corresponding interstate order. The Act provides that a regulation may prescribe an order to be a corresponding interstate order if the order is issued under a law of another State and corresponds, or substantially corresponds, to a prohibition order under the Act. Again, because health practitioners may work across jurisdictions, the intent is to recognise and apply a prohibition order issued for a health practitioner in another jurisdiction, to prevent or restrict that person from providing health services in Queensland.

Prescribed conduct documents

The Act provides that a regulation may prescribe conduct documents such as a code of conduct, charter, standard or other document (a prescribed conduct document) to provide guidance to health service providers, persons receiving health services and entities performing functions under the Act, about the standard of services that should be provided by health service providers or a related matter.

The health ombudsman and QCAT may take into account a prescribed conduct document when taking action against a health practitioner, including when issuing an interim prohibition orders and prohibition orders.

Achievement of policy objectives

The Regulation is consistent with the 2014 Regulation, with minor changes to reflect contemporary drafting practices and improve clarity and readability.

As the matters prescribed in the Regulation are designed to support the operation of the Act, the 2014 Regulation must be replaced to ensure the legislative scheme can continue in effect.

The Regulation commences on 2 September 2024.

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 Regulation is the only effective means of achieving the policy objectives.

Maintaining the status quo would result in the expiration of the 2014 Regulation and the Act operating without supporting subordinate legislation. This would lead to significant gaps in the regulatory framework and prevent the objectives of the Act from being achieved.

Benefits and costs of implementation

The Regulation has been modernised to reflect contemporary drafting practices. There are no direct costs associated with the making and implementation of the Regulation to replace the existing 2014 Regulation.

Consistency with fundamental legislative principles

The Regulation is generally consistent with the fundamental legislative principles in section 4 of the *Legislative Standards Act 1992*, except for the following matter outlined below.

Institution of Parliament - Does the subordinate legislation allow for the subdelegation to appropriate persons or in appropriate cases?

The Regulation includes references to a range of external documents. These provisions potentially impact on the fundamental legislative principle that legislation must have sufficient regard to the Institution of Parliament.

Clause 5 of the Regulation references external documents, specifically the *National safety and quality health service standards* (Standards), *Australian charter of healthcare rights* (Charter) and the *National code of conduct for health care workers (Queensland)* (Code). Relying on an external document that is not subject to parliamentary scrutiny may be seen to breach section 4(5)(e) of the Legislative Standards Act, which provides that the subdelegation of a power delegated by an Act should only occur in appropriate cases and to appropriate persons, and if authorised by an Act.

The external documents incorporated into the Regulation may be amended from time to time and as such, the Department has considered whether the exercise of delegated power is sufficiently subjected to parliamentary scrutiny, as only the initial Regulation with the current version of the non-legislative documents will be subject to parliamentary review.

The Standards, Charter and Code are all publicly available and free of charge. The documents do not provide for the delegation of any administrative powers (or sub-delegation of these powers).

The Standards aim to protect the public from harm and to improve the quality of health service provision by providing a quality assurance mechanism that tests whether relevant systems are

in place to ensure that expected standards of safety and quality are met. This non-legislative document does not contain any provision or direction pertaining to the delegation of administrative power.

Similarly, the Charter provides a list of rights individuals have in all places where health care is provided in Australia. There is no provision or direction pertaining to the delegation of administrative power in this document.

Finally, the Code is a prescribed conduct document that defines what a health care worker and health care service is in Queensland and sets out responsibilities of health care workers in Queensland. The document does not delegate or sub-delegate any administrative power.

This potential breach of the fundamental principle is considered justified as it supports national consistency and makes it clear which prescribed conduct documents are being referred to. Reference to external documents throughout the framework is considered justified noting the detailed, technical and clinical nature of the matters contained in the external documents, and the flexibility this provides the scheme to remain up to date with current practices and requirements. If the matters referenced in external documents were contained in the Regulation, they would regularly be out of date and not reflect changing practices and activities.

Consultation

In April 2024, Queensland Health consulted key stakeholders, seeking feedback on the remake of the Regulation, including the Australian Commission on Safety and Quality in Health Care, Australian Health Practitioner Regulatory Agency, OHO and QCAT. All stakeholders consulted supported the Regulation.