

# Health Legislation Amendment Regulation 2022

## Human Rights Certificate

### Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, the Honourable Yvette D’Ath MP, Minister for Health and Ambulance Services and Leader of the House provide this human rights certificate with respect to the *Health Legislation Amendment Regulation 2022* (Amendment Regulation) made under the *Hospital and Health Boards Act 2011*, *Mental Health Act 2016*, *Public Health Act 2005* and *Radiation Safety Act 1999*.

In my opinion, the Amendment Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

## Overview of the Subordinate Legislation

The purpose of the Amendment Regulation is to amend the:

- *Mental Health Regulation 2017* to allow medical practitioners with general registration from the Medical Board of Australia (the Board) and overseas qualifications in psychiatry assessed as substantially comparable to Fellowship with the Royal Australian and New Zealand College of Psychiatrists (RANZCP) to exercise the functions of a psychiatrist under the Mental Health Act;
- *Public Health Regulation 2018* to prescribe monkeypox (MPX) as a notifiable condition under the Public Health Act;
- *Public Health Regulation 2018* to prescribe a disclosure agreement between Queensland Health and Resources Safety and Health Queensland (RSHQ) to support RSHQ in performing its statutory functions; and
- *Hospital and Health Boards Regulation 2012*, the *Mental Health Regulation 2017* and the *Radiation Safety Regulation 2021* to give effect to amendments that the *Health and Other Legislation Amendment Act 2022* (Amendment Act) makes to the Hospital and Health Boards Act, Mental Health Act and Radiation Safety Act.

### Amendments to the *Mental Health Regulation 2017* to improve mental health services

The Amendment Regulation amends the Mental Health Regulation to prescribe that a *psychiatrist* includes a medical practitioner with general registration from the Medical Board of Australia and who has overseas qualifications in psychiatry that have been assessed as substantially comparable to the qualification awarded by RANZCP called ‘Fellowship of the Royal Australian and New Zealand College of Psychiatrists’, which is required for specialist registration in the specialist field of psychiatry.

### **Amendments to the *Public Health Regulation 2018* to prescribe monkeypox (MPX) as a notifiable condition**

The Amendment Regulation amends the Public Health Regulation to prescribe MPX as a notifiable condition under the Public Health Act. This will require pathologists to notify the chief executive of Queensland Health when a person has or had MPX. Queensland Health can also undertake contact tracing using the powers in part 3, chapter 3 of the Public Health Act in relation to persons who have or may have a notifiable condition. Prescribing MPX as a notifiable condition will ensure that Queensland Health is able to manage any cases or potential outbreaks of MPX in Queensland.

### **Amendments to the *Public Health Regulation 2018* to enable information sharing**

The Amendment Regulation amends the Public Health Regulation to prescribe the Agreement between Queensland Health and RSHQ to enable lawful disclosure of confidential information to RSHQ. Access to complete and up-to-date information about the incidence of occupational dust lung disease in Queensland will support the performance of RSHQ's statutory functions, including protecting the health and safety of resource industry workers.

### **Amendments relating to the *Health and Other Legislation Amendment Act 2022***

#### Amendments to the *Hospital and Health Boards Regulation 2012*

The Amendment Regulation amends the Hospital and Health Boards Act to enable additional categories of health professionals to access The Viewer and ensure they are subject to the confidentiality provisions in the Act. The Viewer is a Queensland Health read-only web-based application that displays a consolidated view of patients' clinical and demographic information from a variety of Queensland Health clinical and administrative systems. The Viewer is currently only accessible to health practitioners registered under the Health Practitioner Regulation National Law (National Law).

The Amendment Act amends the Hospital and Health Boards Act to enable allied health professionals who are regulated in ways other than the National Law to access The Viewer. To support this amendment, the Amendment Regulation prescribes the existing categories of persons who can access The Viewer, along with additional categories of persons who can gain access to The Viewer, as health professionals. These health professionals are all subject to provisions of the Hospital and Health Boards Act that prohibit the disclosure of confidential information except in limited defined circumstances.

#### Amendments to the *Mental Health Regulation 2017*

The Amendment Act makes several amendments to the Mental Health Act, including to clarify and improve the requirements for interstate transfer of patients who have been placed under a forensic or treatment support order, for authority to apprehend, detain and transport persons absent from interstate mental health services and for transport of patients under forensic or similar interstate orders. In its provisions relating to patient transfer, the Mental Health Act contains references to corresponding law in other jurisdictions. Some of these references are removed or amended by the Amendment Act.

The Amendment Regulation gives effect to these amendments by updating the list of corresponding laws in schedule 1 of the Mental Health Regulation to ensure that it incorporates relevant amendments to the Mental Health Act, including changes to references to section numbers that use the term corresponding law. The Amendment Regulation also makes a minor change to a heading in the Mental Health Regulation, for clarity.

#### Amendments to the *Radiation Safety Regulation 2021*

The Amendment Act amends the Radiation Safety Act to remove the requirement to prescribe identity verification documents by regulation for particular applications, and replaces it with a requirement for applications that are prescribed by regulation to be accompanied by proof of an applicant's identity to the satisfaction of the chief executive.

The Amendment Regulation supports these amendments by removing a list of specific identification documents, and prescribing applications for licences, accreditation certificates and radiation safety officer certificates as applications that require identity to be proven to the satisfaction of the chief executive.

## Human Rights Issues

### Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights that are relevant to the Amendment Regulation are:

- Freedom of movement (section 19)
- Privacy and reputation (section 25)
- Right to health services (section 37)

### Human rights promoted by the Amendment Regulation

#### **Amendments to the *Mental Health Regulation 2017***

##### *Right to health services*

The right to health services under section 37 of the Human Rights Act is a right to access health services (not a right to health, or to health services). It protects the right to access health services and the right not to be discriminated against in the provision of that access. 'Access' carries a particular human rights meaning, incorporating underlying principles of non-discrimination, physical accessibility, economic accessibility and information accessibility.<sup>1</sup> Health services has a broad meaning, including mental health treatment.

The amendments to the Mental Health Regulation engage this right. The Amendment Regulation will extend the definition of psychiatrist to include to medical practitioners with general registration whose specialist qualification in psychiatry has been assessed by RANZCP as *substantially comparable*. This recognition reflects the highest comparability to Fellowship with the RANZCP and enables these medical practitioners to be employed by Hospital and

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<sup>1</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14

Health Services to practise in staff specialist positions in the field of psychiatry while they complete a 12-month pathway to full fellowship with the RANZCP.

Like other categories of registrants currently prescribed in the regulation these medical practitioners have the necessary qualifications to practice in staff specialist positions in psychiatry and to provide specialist psychiatric treatment and care. The amendments will ensure that there is no barrier to this suitability qualified cohort exercising powers of a *psychiatrist* under the Mental Health Act to provide psychiatric treatment and care.

As noted above, the right to health services protects the right to access health services. The Amendment Regulation removes a barrier to the delivery of involuntary psychiatric care and improves the availability and quality of public sector mental health treatment to ensure people can access the treatment they may need. The Amendment Regulation therefore supports and promotes the right to health services under the Human Rights Act.

### *Freedom of movement*

The right to freedom of movement under section 19 of the Human Rights Act provides that every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live.

The Amendment Act promotes the right to freedom of movement by removing barriers in the Mental Health Act to patients being transferred to Queensland, within Queensland or interstate because of some other jurisdictions' legislation not meeting the threshold to be prescribed as *corresponding law*. It also updates transfer requirements to clarify processes. These amendments better support patients to obtain mental health care in locations close to support networks.

As the Amendment Regulation makes consequential amendments to the Mental Health Regulation to support these amendments to the Mental Health Act, the Amendment Regulation supports the right to freedom of movement.

### **If human rights may be subject to limitation – consideration of whether the limitations are reasonable and demonstrably justified (section 13 Human Rights Act 2019)**

#### **Amendments to the *Public Health Regulation 2018* to prescribe monkeypox (MPX) as a notifiable condition**

##### Privacy and Reputation

Section 25 of the Human Rights Act provides that a person has the right not to have the person's privacy unlawfully or arbitrarily interfered with.

The Amendment Regulation limits this human right by prescribing MPX as a notifiable condition, as this will require pathologists to disclose confidential information such as patient details to the notifiable conditions register for patients with MPX. The approved form for notifying a notifiable condition includes details such as the patient's name, address, date of birth, and phone number. It also requires the patient's workplace, school, childcare or other

institution to be provided, the country where the condition was acquired and the likely source of exposure.

(a) the nature of the right

The nature of the right to privacy and reputation is very broad but contains internal limitations. The protection against interference with privacy is limited to unlawful or arbitrary interference. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The limitation of right to privacy and reputation under the Public Health Act and Amendment Regulation is for the purpose of protecting the health of the public by managing any cases or potential outbreaks of MPX.

MPX is a disease caused by the monkeypox virus. The virus can infect people of all ages and people diagnosed with MPX are infectious to others while they have symptoms. MPX is usually a mild, self-limiting illness and most people recover within a few weeks. However serious disease outcomes such as bronchopneumonia, encephalitis, secondary bacterial infection and blindness from corneal scarring can occur.

As of 26 May 2022, the World Health Organization (WHO) had reported that MPX has spread to 20 countries, with approximately 300 cases detected in countries where MPX does not normally circulate. A small number of cases have been detected in Australia. As of 3 June 2022, no cases of MPX have been detected in Queensland. Given that MPX has not previously circulated in Australia, it is considered a novel disease within Australia. As an affected country, Australia has an obligation to contribute to the WHO outbreak risk assessment through MPX surveillance and reporting which will inform understanding of who is most at risk.

The Australian population lacks natural immunity acquired from past infection to MPX, and a large proportion of Australians do not possess cross-protection from smallpox vaccination, which was ceased in Australia in 1979 following the eradication of smallpox. Newborns, children and people with some underlying medical conditions or weakened immune systems may be at risk of more serious disease outcomes. In Africa a case fatality rate of 3-6% has been reported in association with previous outbreaks, although given Australia's tertiary health care system it is anticipated that the case fatality rate would be much lower.

A timely public health response is dependent on rapid notification from the laboratories which will be required by including MPX as a notifiable condition under the Public Health Act. MPX needs to be notifiable under the Act to enable appointed contact tracing officers to undertake timely contact tracing. This includes source investigation and management of transmission risk. In non-endemic countries, prompt identification and isolation of human cases is paramount to preventing spread of the virus.

Protecting the health of the public is a purpose consistent with a free and democratic society based on human dignity, equality and freedom.

It is reasonable, necessary and proportionate to limit the privacy of a person who has or is suspected of having MPX in order to protect the health of the public. The interference with privacy is not unlawful or arbitrary, as it must be done in compliance with the Public Health Act.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Restricting the right to privacy and reputation of a person who has or is suspected of having MPX will assist in protecting the public's health as it will ensure that Queensland Health is aware of all cases of MPX, able to undertake contact tracing to minimise further transmission, better understand the epidemiology of the condition, develop strategies to protect public health and manage any cases or potential outbreaks.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no other less restrictive or reasonably available ways to achieve the purposes identified above.

If MPX is not prescribed as a notifiable condition, it will significantly hinder Queensland Health's ability to manage any cases or potential outbreaks and to reduce potential health impacts on Queenslanders.

Appropriate safeguards ameliorate the impact of the limitation on human rights. Under section 64 of the Public Health Act, a condition may only be prescribed as a notifiable condition if the Minister is satisfied that it is a significant risk to public health. MXP is a significant risk to public health for the reasons outlined above under (b).

Section 66 of the Public Health Act sets out guiding principles relating to the management of notifiable conditions. These principles include that the spread of notifiable conditions should be prevented or minimised without unnecessarily infringing the liberty or privacy of individuals. Section 66 provides that a person at risk of contracting, who suspects he or she may have, or who has a notifiable condition has a right: to be protected from unlawful discrimination; to have his or her privacy respected; and to make informed decisions about his or her medical treatment.

Section 77 of the Public Health Act provides a general duty of confidentiality for persons who are or were involved in the administration or enforcement of the notifiable conditions register. A maximum penalty of 50 penalty units applies for disclosing confidential information. Sections 78 to 88 of the Public Health Act allows for disclosure of confidential information in limited circumstances.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The benefits to public health and to individuals of prescribing MPX as a notifiable condition in order to minimise transmission and manage any cases or potential outbreaks outweigh the impact on the right to privacy and reputation of individual citizens who are suspected to have or have been diagnosed with MPX.

## **Amendments to the Public Health Regulation to enable information sharing**

Section 25 of the Human Rights Act provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

Clause 7 of the Amendment Regulation prescribes the agreement called 'Agreement pursuant to section 279AO of the *Public Health Act 2005* (Qld) between the State of Queensland acting through Queensland Health and Resources Safety and Health Queensland' (Agreement) in Schedule 3 of the Public Health Regulation.

This amendment engages the right of privacy and reputation as the Agreement allows Queensland Health to disclose the confidential information of patients with a notifiable dust lung disease to RSHQ at regular intervals. This confidential information is relevant to the performance of RSHQ's statutory functions.

### (a) the nature of the right

The nature of the right to privacy and reputation protects the individual from all interferences and attacks upon their privacy, family, home, correspondence and reputation. It protects privacy in the sense of personal information, data collection and correspondence, and extends to an individual's private life more generally. Only lawful and non-arbitrary intrusions may occur upon privacy, family, home, correspondence and reputation. 'Arbitrary' in the human rights context refers to conduct that is capricious, unpredictable or unjust and refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought.

### (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

In 2019, the Queensland Notifiable Dust Lung Diseases Register (NDLD Register) was established in response to the re-identification and emergence of occupational dust lung diseases, including coal workers' pneumoconiosis and silicosis. The NDLD Register was established for the purposes of monitoring and analysing the incidence of notifiable dust lung disease, and enabling information about notifiable dust lung diseases to be exchanged with an entity of the State or corresponding entity. Information-sharing between entities of the State enables the government to take a coordinated approach to managing occupational dust lung disease cases.

The purpose of the limitation is to allow RSHQ access to confidential information in order to perform its statutory functions. These functions include, but are not limited to, protecting the safety and health of persons in the resources industry, regulating safety and health in the resources industry, and monitoring compliance with legislative obligations in the resources industry. Supporting the prevention, control and early detection of occupational dust lung disease in Queensland is a purpose consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The amendment ensures that RSHQ has access to a complete record of the number and type of notifiable dust lung diseases in Queensland.

RSHQ's performance of its statutory functions is affected by the quality of the data it collects about respiratory diseases caused by occupational exposure to inorganic dust. Access to the comprehensive and up-to-date information from the NDLD Register will assist RSHQ to understand and respond to occupational dust lung diseases as part of the performance of its statutory functions. As such the potential limitation will achieve the purpose.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There is no less restrictive and reasonably available way to achieve the purpose. If the Agreement is not prescribed in the Public Health Regulation, there is no lawful way for RSHQ to access information about notifications to the NDLD Register.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

There are appropriate legislative and administrative safeguards for a person's confidential information.

Queensland Health and RSHQ are obliged to collect, store, use and disclose confidential information in accordance with relevant privacy principles and legislation including the *Information Privacy Act 2009*, Public Health Act and Resources Safety and Health Queensland Act.

The Agreement outlines the obligations on RSHQ relating to the disclosure and use of confidential information. It provides that confidential information must be used for the purpose of facilitating RSHQ's statutory functions and prohibits the disclosure of confidential information by RSHQ unless expressly allowed by the Agreement, authorised in writing by the chief executive of Queensland Health, or where required or permitted under an Act or other law.

The Agreement requires that the disclosure of confidential information under the agreement be subject to targeted audits conducted by Queensland Health at regularly defined intervals; the aim of which is to ensure that confidential information is only disclosed within the scope and terms of the Agreement. If concerns are raised about RSHQ's compliance with the Agreement, Queensland Health or its nominated auditor may enter RSHQ's premises and inspect records kept by RSHQ to audit RSHQ's compliance with the Agreement.

Given the important role RSHQ plays in monitoring, regulating and protecting the health and safety of workers in the resources industry, and the safeguards prescribed in the agreement, it is considered that the benefits gained by prescribing the agreement outweigh any adverse impacts on the right to privacy and reputation.



## **Amendments to the *Hospital and Health Boards Regulation 2012***

Section 25 of the Human Rights Act provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

Clause 5 of the Amendment Regulation amends schedule 2C of the Hospital and Health Boards Regulation to list the existing categories of health workers who can access The Viewer, and the following new categories (subject to specific accreditation or membership requirements), as prescribed health professionals: audiologists, dietitians, exercise physiologists, orthoptists, orthotists/prosthetists, social workers and speech pathologists. Together with amendments to section 161C of the Hospital and Health Boards Act made by the Amendment Act, this authorises more categories of health professionals to be given access to The Viewer and view patient healthcare information. The right to privacy and reputation is engaged because confidential patient information will be accessible by a greater number of health workers without express patient consent.

The right to privacy and reputation is also engaged because the Amendment Act applies the confidentiality provisions in part 7 of the Hospital and Health Boards Act to a prescribed health professional. Part 7 prohibits the disclosure of confidential information except for in limited defined circumstances relevant to providing health care and regulating the public health sector. Examples of authorised disclosure include disclosure with consent, disclosure to the Health Ombudsman and, as inserted by the Amendment Act, disclosure to a person performing functions under the *Mental Health Act 2016*.

### (a) the nature of the right

The right to privacy and reputation covers the use of personal data. The right to privacy is subject to an internal limitation in that it applies only to interferences with privacy that are *unlawful* or *arbitrary*, including interferences that are unreasonable, unnecessary, unjust, disproportionate or unpredictable. The right to privacy and reputation can also be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

### (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of expanding access to The Viewer to additional categories of health workers is to improve the quality and continuity of healthcare in Queensland. Access to The Viewer supports better health outcomes for patients, particularly patients moving from hospital settings to the community or residential facilities, as health workers are able to efficiently obtain information about their patients' relevant public healthcare interactions. This purpose is consistent with a free and democratic society based on human dignity, equality and freedom. It also supports the right to life (section 16, Human Rights Act) and the right to health services (section 37, Human Rights Act). Without these rights, it is difficult to enjoy other rights.

The purpose of ensuring that a prescribed health professional is authorised to disclose information from The Viewer in limited circumstances is to support the disclosure of information that is relevant to ensure patient treatment and safety, lawful functions under other legislation and communication with regulatory bodies. These purposes are also consistent with the right to life and the right to access health services.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Expanding access to The Viewer to appropriately qualified audiologists, social workers, dietitians, exercise physiologists, orthoptists, orthotists/prosthetists, social workers and speech pathologists will improve the quality and continuity of patient care because these categories of allied health professionals routinely work with Queensland Health during the transfer of patient care from acute settings to community settings. They work in areas such as primary health services, domiciliary care, non-hospital rehabilitation, private practice and disability support. The Viewer can enable them to efficiently consider accurate and recent records about public healthcare interactions that will enable them to tailor their care and treatment in accordance with the needs of their patients. Applying the Hospital and Health Board Act's confidentiality framework to these professionals ensures that the disclosure of confidential information from The Viewer is generally prohibited other than for specific purposes, as outlined above.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no less restrictive and reasonably available ways to achieve the purpose. The additional categories of allied health professionals cannot be granted access to The Viewer without legislative amendment. At present, these allied health professionals must manually apply to have the information released to them, which takes time and resources and impedes their ability to provide immediate patient care. Authorising access to The Viewer will improve patient outcomes by enabling the option of on-the-spot viewing access to relevant records. Similarly, it is necessary for limited exceptions to confidentiality requirements to apply to these professionals so that they can lawfully disclose information in appropriate circumstances.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Allowing the prescribed categories of allied health professionals access to The Viewer will have significant benefits for the health of the persons whose information is accessed or shared. Allied health professionals will have timely access to relevant health information, such as information about the condition of the person, previous treatment provided and discharge summaries, that supports them to consider and deliver the most appropriate care for their patient. Allowing them to gain access to The Viewer will also reduce the impact of administrative burdens associated with processing individual requests for the release of the confidential information on the timeliness of healthcare.

The Hospital and Health Boards Act contains strict safeguards to protect confidential information, including by making it an offence subject to a maximum penalty of 600 penalty units for a practitioner with access to The Viewer to inappropriately access information that is not necessary for the provision of care or treatment to the person, or to inappropriately disclose confidential information from The Viewer.

There are also operational safeguards. Health professionals do not automatically gain access to The Viewer because of the Amendment Regulation. Rather, they are eligible for access subject to stringent registration requirements. They must comply with terms and conditions of access and their access may be queried and investigated through regular audits of access to application. While the amendments to the Hospital and Health Boards Regulation impact a person's right to privacy, it is considered this is outweighed by the benefits outlined above, which promote

fundamental human rights such as the right to life and the right to health services, ensure necessary communication in health care, and are subject to safeguards and limits. Any impacts on human rights are only to the extent that are reasonable and demonstrably justifiable in accordance with section 13 of the Human Rights Act.

## **Conclusion**

I consider that the *Health Legislation Amendment Regulation 2022* is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

**YVETTE D'ATH MP**  
MINISTER FOR HEALTH and AMBULANCE SERVICES  
and LEADER OF THE HOUSE

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