Hospital and Health Boards Regulation 2023

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 Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services and Minister for Women, provide this human rights certificate with respect to the *Hospital and Health Boards Regulation 2023* (Regulation) made under the following Acts:

- *Hospital and Health Boards Act 2011* (Act);
- *Public Sector Act 2022*; and
- *State Development and Public Works Organisation Act 1971.*

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

Overview of the Subordinate Legislation

The objective of the Act is to establish a public sector health system that delivers high quality hospital and other health services to people in Queensland having regard to the principles and objectives of the national health system. This objective is mainly achieved by:

- strengthening local decision-making and accountability, local consumer and community engagement and local clinical engagement;
- providing for Statewide health system management including health system planning, coordination and standard setting; and
- balancing the benefits of the local and system-wide approaches.

The *Hospital and Health Boards Regulation 2012* (Existing Regulation) prescribes various matters to support the operation of the Act. The Existing Regulation was due to expire on 31 August 2022. The *Statutory Instruments Regulation 2022* exempted the Existing Regulation from expiry until 31 August 2023.

The *Hospital and Health Boards Regulation 2023* (Regulation) has been prepared to replace the Existing Regulation. The Regulation is necessary for the continued effective operation of the Act. The Regulation supports the Act by prescribing various matters including:

- the name of each Hospital and Health Service (HHS) and geographical area covered by each HHS, other than Children's Health Queensland which functions in various areas across Queensland;
- employment matters including arrangements for the movement of staff between health system employers;

- prescribed requirements for health equity strategies, clinician engagement strategies and consumer and community engagement strategies;
- matters relating to the functioning of Hospital and Health Boards (HHB) such as the requirement for a HHB to have a safety and quality committee, finance committee and audit committee;
- procedures for HHB committees, such as requirements to keep minutes and the conduct of meetings;
- setting requirements for minimum nurse-to-patient and midwife-to-patient staffing in hospitals, and minimum nurse and registered nurse percentages and minimum average daily resident care hours in State aged care facilities;
- defining a *reportable event* for which a root cause analysis may be conducted;
- listing prescribed information sharing agreements under which Queensland Health may disclose confidential information;
- listing prescribed entities that Queensland Health may disclose confidential information to for the purpose of evaluating, managing, monitoring or planning health services; and
- prescribing certain health professionals who may access confidential patient information through an information system, known as 'The Viewer'.

The Regulation is largely consistent with the Existing Regulation, with minor changes to improve operational matters, reflect contemporary drafting practices and improve clarity and readability.

The Regulation also amends the *Public Sector Regulation 2023* and *State Development and Public Works Organisation Regulation 2020* to update references from the Existing Regulation to the Regulation.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, division 2 and 3 of the Human Rights Act)

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

- Right to recognition and equality before the law (section 15);
- Privacy and reputation (section 25);
- Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (section 28); and
- Right to health services (section 37).

Consideration of human rights promoted

Recognition and equality before the law (section 15 of the Human Rights Act)

Sections 15(1) and (2) of the Human Rights Act provide that every person has the right to recognition as a person before the law and the right to enjoy the person's human rights without discrimination. Section 15(3) provides that every person is entitled to the equal protection of the law without discrimination. Section 15(4) provides that every person has a right to equal and effective protection against discrimination. These sections require positive action by the

State to remove discrimination. Section 15(5) provides that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. This section makes clear that the State's affirmative action to remove discrimination does not constitute discrimination.

Section 40(1)(c) of the Act requires each HHS to develop and publish a health equity strategy to achieve health equity for First Nations peoples. Clauses 17, 20 and 21 of the Regulation provide for greater engagement with First Nations people by listing:

- prescribed people for section 40(2)(c) of the Act who must be consulted in the design, delivery and monitoring of the HHS health equity strategy;
- requirements for the health equity strategy for section 40(3)(a) of the Act; and
- prescribed people for section 40(5) of the Act who must be consulted in giving effect to the health equity strategy.

Clauses 17, 20 and 21 of the Regulation support improved health equity outcomes for First Nations people by seeking to eliminate institutional racism and racial discrimination in the provision of the HHS health equity strategies. The provisions support greater engagement with First Nations people in the design, delivery, monitoring and review of health services. As such, I consider the Regulation promotes the human right of recognition and equality before the law by supporting the right of First Nations people to enjoy human rights without discrimination.

Right to property (section 24 of the Human Rights Act)

Section 24 of the Human Rights Act protects the right to own property, either alone or in association with others. A person must not be arbitrarily deprived of the person's property. 'Property' is interpreted to encompass economic interests in a broad sense including employee entitlements to leave and superannuation.

Clause 13 of the Regulation supports the right to property by ensuring a health service employee's entitlements accrued during their employment with a health service employer are transferred when they commence with a new health system employer, provided there has been no break in their service.

Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (section 28 of the Human Rights Act)

Section 28(1) of the Human Rights Act recognises that First Nations peoples hold distinct cultural rights. Cultural rights protect the rights of all people with particular cultural, religious, racial and linguistic backgrounds to enjoy their culture, declare and practice their religion, and use their language in the community. It promotes the right to practise and maintain shared traditions and activities and recognises that enjoying one's culture is intertwined with the capacity to do so in connection with others from the same cultural background.

In addition to general cultural rights, the Human Rights Act recognises that First Nations peoples hold distinct cultural rights as Australia's first people. They have the right to enjoy, maintain, control, protect and develop their culture, language and kinship ties with other members of their community. The right also protects First Nations peoples' right to maintain

and strengthen their distinct spiritual relationship with the land, territories, waters, coastal seas and other resources, and to conserve and protect the environment.

Section 40(1)(c) of the Act requires each HHS to develop and publish a health equity strategy. Clause 20(a) of the Regulation lists the requirements for the health equity strategy for section 40(3)(a) of the Act. The health equity strategy must include key performance measures that relate to improving health equity and wellbeing outcomes for First Nations people, including measures relating to:

- working with First Nations people, First Nations communities and other organisations to design, deliver, monitor and review health services;
- influencing the social, cultural and economic determinants of health; and
- ensuring the delivery of sustainable, culturally safe and responsive health services.

Clause 20(b) of the Regulation provides that a HHS's health equity strategy must set out the actions the HHS will take to:

- improve the representation of First Nations peoples within the health workforce;
- ensure a greater level of integration with other parts of the health sector; and
- work with prescribed stakeholders to ensure greater collaboration and strengthen decision-making with First Nations people.

Clause 20(c) of the Regulation provides that the HHS's health equity strategy must state how the strategy aligns with other HHSs' health equity strategies, national, state and local strategies, policies and agreements and standards relevant to promoting shared decision-making, shared ownership and working in partnership with First Nations peoples, such as the National Agreement on Closing the Gap (2020).

Clause 20 supports the cultural rights of First Nations peoples protected by section 28 of the Human Rights Act. Clause 20 of the Regulation ensures First Nations peoples must be involved in the design, development and implementation of each HHS health equity strategy. First Nations health equity strategies support improved delivery of healthcare to First Nations peoples to assist them to reach their full health potential and in doing so promotes First Nations peoples' cultural rights.

Right to health services (section 37 of the Human Rights Act)

Section 37 of the Human Rights Act provides that every person has the right to access health services without discrimination and must not be refused emergency medical treatment that is necessary to save the person's life or to prevent serious impairment.

Clauses 16 to 22 of the Regulation relate to health equity and stakeholder engagement strategies for HHSs. Clause 17 of the Regulation prescribes the persons who are to be consulted when developing health equity strategies for section 40(2)(c) of the Act. These prescribed persons include the First Nations HHS staff, First Nations health service consumers in the HHS, First Nations community members in the HHS and traditional custodians and native title holders of land and waters in the HHS. Clause 20 of the Regulation prescribes the key performance measures that must be included in a health equity strategy. This list of measures includes

actively eliminating racial discrimination and institutional racism within a HHS. These provisions clearly promote First Nations people being able to access the human right to health services without discrimination.

Consideration of reasonable limitations on human rights (section 13 of the Human Rights Act)

Privacy and Reputation (section 25 of the Human Rights Act)

(a) the nature of the right

Every person has the right to their privacy, family, home and correspondence, which must not be unlawfully or arbitrarily interfered with. 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 or disproportionate. Further, the right to privacy can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Disclosure of information between health service employers

Clause 15 of the Regulation allows a health system employer to transfer or disclose particular personal information of an individual to another health service employer. The information permitted to be disclosed is restricted to information the first health system employer collected or held in relation to the person's employment or appointment with the employer. The information may only be disclosed to the second health system employer where the person who the information is about is being considered for appointment or is appointed by a second health system employer.

This could be considered to breach the right to privacy because it will allow personal information of an employee to be disclosed from one health service employer to another.

Quality assurance committee

Section 82 of the Act provides for the establishment of Quality Assurance Committees by the chief executive (that is, the Director-General), HHSs and private health facilities. The role of a Quality Assurance Committee is to assess and evaluate the quality of health services, report and make of recommendations concerning those services and monitor the implementation of its recommendations.

Part 5 of the Regulation prescribes a number of matters relating to the procedures of Quality Assurance Committees. Clause 33 requires a Quality Assurance Committee to make certain information available to the public. This includes the full name and qualifications of each committee member, their office or position in the committee and a summary of their experience as relevant to the committee.

Prescribed entities

Part 7 of the Act imposes a general duty of confidentiality in relation to information that could identify a person who is receiving or has received a public sector health service (confidential information). Under section 142, a designated person, which includes public service employees of the department and health service employees, must not disclose, directly or indirectly, confidential information to another person unless the disclosure is required or permitted under the Act. The maximum penalty for non-compliance is 100 penalty units.

Part 7 of the Act contains several exceptions to the general of duty of confidentiality, including section 150 of the Act, which provides that a designated person may disclose confidential information to an entity prescribed under a regulation for evaluating, managing, monitoring or planning health services.

Clause 51(1) of the Regulation prescribes certain entities who a designated person may disclose confidential information to, for particular purposes relevant to evaluating, managing, monitoring or planning health services. This includes, for example:

- Services Australia for maintaining the Australian Immunisation Register;
- Australian Orthopaedic Association for collecting data about joint replacement surgery for use in the Australian Orthopaedic Association National Joint Replacement Registry; and
- Florey Institute of Neuroscience and Mental Health for collecting data about eligible stroke and transient ischaemic attack patients for use in the Australian Stroke Clinical Registry and for community-based follow-up.

Clause 51(2) of the Regulation lists the National Disability Insurance Agency and certain Queensland Government agencies as prescribed entities for evaluating, managing, monitoring or planning health services relating to the implementation and management of the National Disability Insurance Scheme.

Prescribing entities under section 150(b) of the Act may be seen to infringe upon the privacy of individuals because it will allow personal information about individuals who have received public sector health services to be disclosed to the entities. The information disclosed may include sensitive health information.

Prescribed agreements

Section 151(1)(a) of the Act provides a further exception to the general duty of confidentiality in part 7 of the Act. This section allows a designated person to disclose confidential information to the Commonwealth or another State, or an entity of the Commonwealth or another State if the disclosure is required or allowed under a prescribed agreement and considered by the Director-General to be in the public interest. Section 151(1)(b) of the Act applies a similar exception in relation to Queensland entities.

Clause 52 of the Regulation provides that schedule 8 prescribes agreements for the purposes of section 151 of the Act. Part 1 of schedule 8 lists prescribed agreements between Queensland and other jurisdictions including, for example, bilateral agreements relating to funding of

admitted patient services provided to each other's residents, an intergovernmental agreement relating to the Electronic Donor Record and an agreement between the Queensland and Commonwealth government regarding the Rheumatic Fever Strategy. Similarly, part 2 of schedule 8 prescribes particular agreements and memorandums of understanding between Queensland Health and other Queensland Government entities.

Prescribing particular agreements which allow information sharing may be seen to infringe upon the privacy of individuals because this will allow for the disclosure of information that will identify individuals as past or current recipients of public sector health services, and in doing so, disclose their personal information, including their sensitive health information.

Prescribed information system

Section 161C of the Act provides that a prescribed health professional may access a prescribed information system.

Clause 48 and schedule 7 of the Regulation replicate section 34A and schedule 2C of the Expired Regulation by prescribing the health professionals that may access the prescribed information system under section 161C. This includes health professionals registered under the Health Practitioner Regulation National Law (National Law), from Aboriginal and Torres Strait Islander health practice, dental practice, medical practice, midwifery and nursing, occupational therapy, optometry, pharmacy, and psychology practices. It also includes a range of other health professions that are not registered under the National Law, but are accredited by other professional bodies, such as dieticians, social workers and speech pathologists.

Clause 49 of the Regulation replicates section 34B of the Expired Regulation by prescribing 'The Viewer' as a prescribed information system. The Viewer is a 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.

Replicating these provisions of the Expired Regulation may be seen to infringe upon the privacy of individuals because it will allow prescribed health professionals to continue to access The Viewer and the personal information contained within.

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

Disclosure of information between health service employers

The purpose of the employee privacy limitations is to support the hiring of the best available employees for the public sector health system, which ultimately promotes safe and competent health care for the community. The provision of high-quality health care is consistent with a free and democratic society based on human dignity, equality and freedom.

Quality assurance committee

The purpose of the provisions requiring the disclosure of the names, qualifications and experience of quality assurance committee members is to promote transparency and accountability and ensure that the public can have confidence that individuals making recommendations likely to impact on system-wide health care have the necessary skills and experience. This is consistent with a free and democratic society based on human dignity, equality and freedom.

Prescribed entities

The purpose of facilitating information sharing with prescribed entities is to ensure those entities have the information required to evaluate, manage, monitor or plan health services, in order to promote safe and competent health care for individuals and the community as a whole.

Prescribed agreements

The purpose of the provisions relating to prescribed agreements is to ensure that relevant State and Commonwealth government departments and entities can access Queensland Health information for particular purposes relating to health care, to ensure appropriate treatment of individuals and improved care for the community.

Prescribed information system

The purpose of the provisions enabling prescribed health professionals to access The Viewer is to provide these health professionals with a greater ability to understand the care that has been provided to their patient and assess their patient's future care requirements, which improves the health outcomes for patients.

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

Disclosure of information between health service employers

The employee privacy limitations help to achieve the purpose of hiring of the best available employees for the public sector health system, by ensuring that employers have all relevant information about an employee's past performance, skills and areas requiring development. This allows for a more fulsome assessment of the suitability of potential employees.

Quality assurance committee

The limitation of privacy imposed by the provisions requiring the disclosure of the names, qualifications and experience of quality assurance committee members helps to achieve the purpose of ensuring confidence in the skills and experience of those members by requiring those details to be made public. This supports the public's confidence in the recommendations and activities of the committee.

Prescribed entities

Limiting privacy to facilitate information sharing with prescribed entities assists to achieve the purpose of promote safe and competent health care by ensuring that those entities have the information required to evaluate, manage, monitor or plan health services.

Prescribed agreements

Limiting the right to privacy by allowing personal information to be shared with the parties to prescribed agreements helps to achieve the purpose of improving health care on an individual and community level by ensuring that the relevant parties have the health information required to provide proper care. For example, the Rheumatic Fever Strategy prescribed in schedule 8, part 1, item 10 of the Regulation supports the delivery of improved detection, monitoring, and management of acute rheumatic fever and rheumatic heart disease in First Nations people through a coordinated disease register and control programs. Maintaining the Australian Immunisation Register contributes to improving the health of the public.

Prescribed information system

Limiting the right to privacy by allowing personal information to be shared with prescribed health professionals through The Viewer directly assists to achieve the purpose of improving health outcomes for patients by ensuring that those health professionals understand the medical history of their patients. This in turn allows the health professional to better assess future care requirements for the benefit of their patient.

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

Disclosure of information between health service employers

There is no less restrictive way to provide health system employers with all relevant information required to assist them to make appropriate human resources decisions. Enabling a health system employer to receive personal information about a new employee to assess their suitability or ongoing suitability for employment to a position ensures that a public health system employer has all relevant information about prospective employees available to consider. This enables the health system employer to make informed decisions for the responsible management of the public health system workforce. This will promote a high-quality workforce that in turn supports better public sector health system outcomes for patients.

Quality assurance committee

Quality Assurance Committees are established for the purpose of improving and promoting safe and effective care for patients and enhancing health outcomes. They play an important and trusted role in the health system. Making Committee members' details, including qualifications and experience relevant to the Committee's functions, available to the public helps to enhance transparency and instil public confidence in the Committee's decisions. There is no less restrictive way of achieving this transparency and public confidence in the Quality Assurance Committee process.

Prescribed entities

The information shared with prescribed entities is necessary for the entities to perform their functions of evaluating, managing, monitoring or planning health services. If this information were not provided, there would be flow-on effects to the quality of health care available to individuals and the community.

Providing de-identified information would be a less restrictive imposition on the right to privacy. However, this option would not achieve the intended purpose as de-identifying patient information requires not just the removal of a person's name but also information that could reasonably be used to identify them such as their sex or location. This information is often critical to the evaluation, management, monitoring and planning of health services.

Therefore, there is no less restrictive but reasonably available way to achieve the purpose of ensuring these entities can access the required information.

Prescribed agreements

The level of detail of patient information provided under information sharing agreements directly effects the quality of insights that can be derived from the data. The sharing of confidential patient information is necessary to ensure the information provides meaningful insights into health care needs.

A less restrictive imposition on the right to privacy would be to provide de-identified information. However, this option would not achieve the desired purpose as de-identifying patient information requires not just the removal of a person's identity but also information that could reasonably be used to identify them such as their sex or location. Without sufficient information, the information shared under clause 51 and the agreements contained in schedule 8 of the Regulation would not achieve the intended outcomes to support improved provision of health services in the public sector health system.

Prescribed information system

There are no less restrictive and reasonably available ways to achieve the purpose of ensuring health professionals have a full understanding of the medical history of their patients in order to provide appropriate treatment and care. Health professionals could manually apply to have the information released to them. However, this takes time and resources and impedes the health professional's ability to provide immediate patient care. As such allowing access through The Viewer is the least restrictive way of achieving the purpose.

(e) <u>the balance between the importance of the purpose of the Regulation which imposes a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation</u>

Disclosure of information between health service employers

The information shared between health service employers is limited to information held by the first health system employer in relation to the person's employment with that employer. It may only be disclosed to the second employer if the person is being considered for employment with the second employer or is being transferred to that employer. The disclosure permitted under clause 15 of the Regulation is justified because it helps to ensure the suitability of those appointed within the public sector health system, which in turn supports the health and safety of the community.

Quality assurance committee

The infringement on the Committee members' privacy is considered minor, as the information being shared relates to their professional capacity and is information that the individual may already make publicly available in different contexts.

The sharing of information helps to enhance transparency and instil public confidence in the Quality Assurance Committee, which in turn supports continual improvement in public sector health service outcomes for all patients. The limitation of the right to privacy for the quality assurance members is justified in supporting improved outcomes for the public sector health system.

Prescribed entities

The disclosure of personal information to prescribed entities is justified to support those entities in performing their functions of evaluating, managing, monitoring or planning health services. These functions ensure the effective operation of the public sector health system and promote the health and wellbeing of Queenslanders. The Act contains safeguards to ensure that any infringement of privacy is as limited as possible. This includes the requirement in section 150 of the Act that the disclosure must be for the specific purpose of evaluating, managing, monitoring or planning health services as stated in the regulation. The limitation on the right to privacy is reasonable as it minimises the risks to public health and promotes the human right to life recognised in section 16 of the Human Rights Act.

Prescribed agreements

The Act contains a number of safeguards to ensure that any infringement of privacy is as limited as possible, and to prevent further disclosure of personal information shared under prescribed agreements. This includes the requirement in section 151 of the Act that the Director-General must also consider the disclosure is in the public interest. Section 151(2) also restricts how the recipient of the confidential information may deal with it. The recipient must not give it to anyone else unless allowed to do so by the agreement or in writing by the Director-General. The recipient must also ensure the confidential information is used only for the purpose for which it was given under the agreement. Additionally, the prescribed agreements contain confidentiality protocols that restrict the use of the information to only the prescribed entity for the prescribed purpose.

Allowing limited disclosure of information under information sharing agreements is justified because it supports the health and wellbeing of individuals and the community and promotes the human right to life recognised in section 16 of the Human Rights Act. For example, the agreement between the Queensland Government and Commonwealth Government in relation to breast screening prescribed in schedule 8, part 1, item 10 of the Regulation supports the operation of the BreastScreen Queensland program, which in turn improves early detection and treatment of breast cancer.

Prescribed information system

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. Prescribed 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 prescribed health professionals to access The Viewer will also reduce the administrative burden associated with making individual requests for the release of confidential information, allowing the health professionals to focus on providing patient care.

The limitation of the right to privacy is mitigated by the significant legislative and operational safeguards in place that protect personal information from being inappropriately accessed. For example, each person is required to prove their identity to obtain system access to The Viewer and a person must provide their credentials on each log in to The Viewer. Every user's access to and activity on The Viewer is recorded in audit files, allowing for regular usage checks by Queensland Health. Health practitioners can only access The Viewer through a read-only secure access portal known as the Health Provider Portal. Health practitioners must go through a stringent registration process to register for the Health Provider Portal. This includes confirmation of personal identity information, qualifications, and professional registrations. Patient searches can only be undertaken in The Viewer based on a set of unique patient identifiers, ensuring the patient is known to the health practitioner in a healthcare context, before their information can be accessed. Importantly, a patient can opt out of having their information shared with health professionals through The Viewer.

Under the Act, it is an offence for a practitioner health professional to inappropriately access information in The Viewer that is not directly related to the provision of care or treatment to the person. The maximum penalty for breaching this requirement is 600 penalty units. Queensland Health conducts audits to ensure patient information is being used appropriately and investigates and acts on any inappropriate use of information. Any privacy breaches would also be dealt with under the *Information Privacy Act 2009*.

The limitation to privacy is justified because it ensures individuals receive the most suitable health care and treatments, promoting the right to life. The limitation is appropriately mitigated by the relevant legislative and operational safeguards relating to The Viewer.

Conclusion

I consider that the *Hospital and Health Boards Regulation 2023* 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.

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