

Health Legislation Amendment Regulation (No. 2) 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 Health Legislation Amendment Regulation (No. 2) 2023 (Amendment Regulation) made under the *Health Ombudsman Act 2013*, *Hospital and Health Boards Act 2011*, *Mental Health Act 2016*, *Public Health Act 2005* and the *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 *Health Ombudsman Regulation 2014*, *Hospital and Health Boards Regulation 2023*, *Mental Health Regulation 2017*, *Public Health Regulation 2018* and the *Radiation Safety Regulation 2021*. This will implement contemporary public health advice and clinical practice in relation to notifiable conditions, clarify the application of a fee exemption and update references to agreements, published documents and interstate legislation.

Amendments to the *Public Health Regulation 2018*

The Amendment Regulation will amend the Public Health Regulation to:

- make Acute Post Streptococcal Glomerulonephritis (APSGN) a clinical diagnosis condition;
- remove haemolytic uraemic syndrome (HUS) as a pathological diagnosis notifiable condition;
- remove COVID-19 as a provisional diagnosis notifiable condition or a pathology request notifiable condition; and
- remove flavivirus infections and COVID-19 as conditions which are notified immediately.

Notifiable conditions are medical conditions which must be reported to the Notifiable Conditions Register because they pose a significant risk to public health. Schedule 1 of the Public Health Regulation prescribes notifiable conditions and designates them into one or more of the following types, depending on who notifies and when they are notified:

- clinical diagnosis notifiable condition – requires notification when diagnosed upon clinical history and symptoms following an examination of a person by a doctor;
- pathological diagnosis notifiable condition – requires notification upon pathological diagnosis;

- pathology request notifiable condition – requires notification when the request for diagnosis is received;
- provisional diagnosis notifiable condition – requires notification when provisionally diagnosed based on clinical evidence; and
- controlled notifiable condition – additional control measures may be imposed due to the much higher public health risk posed by the medical condition.

Also, schedule 2 of the Public Health Regulation prescribes those notifiable conditions which require immediate notification upon diagnosis.

Under section 64(2) of the Public Health Act, the Minister must only recommend prescribing a condition as a notifiable condition if satisfied the condition is a significant risk to public health.

APSGN is an injury to the kidneys caused by the body's immune response to an infection from a bacterium called Group A Streptococcus. This infection, and the chronic diseases arising from the immune response to infection, disproportionately affect Aboriginal and Torres Strait Islander communities, particularly children.

An expert panel of North Queensland Public Health Medical Officers, using the Communicable Diseases Network Australia criteria, assessed APSGN as posing a significant public health risk. In making this assessment, they noted:

- there is a risk of kidney damage arising from the disease;
- APSGN cases are at high risk of requiring hospitalisation;
- there are significantly higher APSGN rates occurring among Aboriginal and Torres Strait Islander communities; and
- the transmissibility of the bacteria which causes APSGN disease, particularly in vulnerable communities.

The Amendment Regulation will prescribe APSGN as a notifiable condition. This will ensure surveillance data may be utilised to inform appropriate public health action, to prevent spread and secondary cases of APSGN. The data may also be used to create a detailed baseline epidemiology of this condition.

Also, due to changes in the risks presented by several existing notifiable conditions and the public health practice protocols for managing the risks, the Amendment Regulation will redesignate the notifications for those conditions.

Amendments to the *Radiation Safety Regulation 2021*

The Amendment Regulation will amend the Radiation Safety Regulation to:

- clarify that the fee exemption for applying for an additional use licence does not apply to a prescribed licensee whose only other use licence is a deemed licence; and
- remove reference to a superseded International Commission on Radiological Protection (ICRP) document and insert a reference to its ICRP replacement.

Radiation safety is regulated under the framework established in the Radiation Safety Act. The framework is intended to protect people and the environment from the health risks associated with the inappropriate uses of radiation, while also recognising its beneficial uses.

Under the Radiation Safety Regulation, a person who is already the holder of a use licence (to use a radiation source for diagnostic or therapeutic purposes) may apply for a subsequent use licence without having to pay an application fee. The fee exemption recognises that as the department can rely on its previous consideration of the applicant's suitability, it does not incur the full cost of processing a new application.

An unintended consequence of the fee exemption is that it applies to prescribed licensees. A prescribed licensee is a person who, under section 103K of the Radiation Safety Act, is deemed to have a use licence without having to apply, be assessed or pay the associated fee.

It was not the policy intent that the fee exemption would apply persons who have obtained a use licence under the deeming provision. These persons have never applied for a use licence, paid the application fee and undergone the vetting procedures. The Radiation Safety Regulation will be amended to clarify that the fee exemption does not apply to these prescribed licensees.

The Radiation Safety Regulation will also be amended to remove reference to a superseded ICRP document and insert a reference to the replacement ICRP document.

Amendments to the *Hospital and Health Boards Regulation 2023*

Under section 151(1)(b) of the Hospital and Health Boards Act, confidential information may be disclosed to an entity of the State. This may occur where the disclosure is required or allowed under an agreement prescribed in regulation. Pursuant to this section, an information-sharing memorandum of understanding has been in place between Queensland Health and Queensland Corrective Services. The ability to share confidential information within a custodial environment is essential to ensure Queensland Health can effectively deliver health services and Queensland Corrective Services can safely manage persons in custody.

Coronial findings delivered in relation to a death in custody recommended consideration be given to including more contextual information in the memorandum of understanding. This would better support effective sharing of relevant information between the agencies.

As a result, Queensland Health and Queensland Corrective Services executed a new information-sharing agreement to replace the memorandum of understanding. The agreement, which is in similar terms to the memorandum of understanding, allows the sharing of confidential information between the agencies in relation to persons in custody in correctional facilities.

The agreement will be supported by Operating Guidelines which provide practical guidance about how to apply the new agreement, including scenario-based examples to assist officers to share relevant information. This will facilitate the sharing of information which is reasonably required to support the delivery of client-focused health services by Queensland Health and the safe, secure and effective supervision and management of persons in custody by Queensland Corrective Services.

The Amendment Regulation will amend the *Hospital and Health Boards Regulation 2023* to prescribe the new agreement in place of the previous memorandum of understanding.

Amendments to Health Ombudsman Regulation 2014

Under the Health Ombudsman Act, the Health Ombudsman may issue a health practitioner with an interim prohibition order or a prohibition order. These orders prohibit or impose restrictions on the health practitioner's ability to provide any health service or a stated health service.

States have their own health legislation to protect the public when accessing health care services. Where a health practitioner working in Queensland is subject to an interstate order which prohibits or restricts their ability to provide health services, it is important for the Health Ombudsman to be able to enforce that order in Queensland.

On 27 July 2023, amendments to the *Health and Disability Services (Complaints) Act 1995* (WA) commenced, empowering Western Australia's Director of Health and Disability Services to issue an interim prohibition order or a prohibition order. These orders are very similar to an interim prohibition order and a prohibition order, respectively, made under the Health Ombudsman Act.

The Health Ombudsman Act allows for the recognition in Queensland of orders issued in another State. The Amendment Regulation will amend the Health Ombudsman Regulation to prescribe an interim prohibition order made under the *Health and Disability Services (Complaints) Act 1995* (WA) as corresponding interstate interim order. The Regulation will also be amended to prescribe a prohibition order made under the *Health and Disability Services (Complaints) Act 1995* (WA) as a corresponding interstate order.

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 in the Human Rights Act which are relevant to the Amendment Regulation are:

- property rights (section 24);
- privacy and reputation (section 25); and
- cultural rights—Aboriginal and Torres Strait Islander people (section 28).

Consideration of human rights promoted

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

Section 28 of the Human Rights Acts provides that Aboriginal and Torres Strait Islander people hold distinct cultural rights. This right includes the right to enjoy, maintain, control and develop their identity and cultural heritage, including traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings.

The Amendment Regulation makes APSGN a notifiable condition. APSGN has been identified as a condition which disproportionately impacts Aboriginal and Torres Strait Islander communities. One of the reasons for this is the health inequity common in Aboriginal and Torres Strait Islander communities, particularly in remote areas. The causative factors for this health inequity include inadequate housing and gaps in health service availability.

Making APSGN a notifiable condition will increase awareness of both the condition and the Group A Streptococcus infection which causes the condition. This will assist in ensuring a timely and effective public health response to any notified cases. It will also raise community awareness of the condition and facilitate the implementation and assessment of programs aimed at preventing the social and environmental factors giving rise to the condition.

By implementing these reforms, the Amendment Regulation promotes the cultural rights of Aboriginal peoples and Torres Strait Islander people.

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

Amendments to the Public Health Regulation 2018 to make APSGN a notifiable condition and amendments to the Hospital and Health Boards Regulation 2023 to allow the disclosure of confidential information to Queensland Corrective Services

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

(a) the nature of the right

Section 25 of the Human Rights Act provides that every person has a right to their privacy. However, this right is subject to limitations. Section 25 itself provides that this right is limited to interferences which are unlawful or arbitrary. Also, section 13 of the Act provides that any right may be subject to reasonable limits which may be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The Amendment Regulation limits this right by making APSGN a clinical diagnosis notifiable condition, meaning it must be reported when diagnosed. A patient's confidential information will be reported to the Chief Executive of Queensland Health and recorded. A notification may trigger a public health response, including contact tracing and intervention with household contacts.

The Amendment Regulation also limits this right by prescribing an information-sharing agreement between Queensland Health and Queensland Corrective Services which allows the disclosure of confidential information to in relation to persons in custody.

(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 making APSGN a notifiable condition is to prevent further cases through intervention. Notification of APSGN facilitates public health responses to cases and outbreaks. It is also known that APSGN cases are at high risk of hospitalisation, there are significantly higher APSGN rates occurring among Aboriginal and Torres Strait Islander communities and responses to outbreaks in vulnerable communities require early recognition to be effective.

The purpose of the agreement between Queensland Health and Queensland Corrective Services is to share information within a custodial environment to enable the timely delivery of health services to persons in custody and the safe, secure, and effective supervision and management of those persons.

Improving the health of the public is a purpose which is consistent with a free and democratic society based on human dignity, equality and freedom. It is reasonable, necessary and proportionate to share confidential information to improve public health and deliver health services to individuals. The interference with privacy is not unlawful or arbitrary, as it must be done in compliance with the various Acts.

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

Restricting the right to privacy for a person with APSGN is appropriate to promote the health of people suffering this condition and to protect the health of the community.

Restricting the right to privacy for persons in custody in the correctional system is appropriate to promote the health of such persons where they require medical assistance. This is because the agreement assists Queensland Health to provide persons in custody with necessary health services.

In both instances, the information is only being disclosed for specific, very limited purposes. Also, the new information-sharing agreement with Queensland Corrective Services will be supported by operating guidelines, to ensure only information which assists with health service delivery and the safe management of persons in custody is disclosed.

(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 identified purposes. Making APSGN a notifiable condition is consistent with the way other conditions which pose a significant risk to public health are managed. The new information-sharing agreement with Queensland Corrective Services is in similar terms to the previous memorandum of understanding between Queensland Health and Queensland Corrective Services and will also be supported by the new Operating Guidelines.

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

It is considered that promotion of the health and wellbeing of the community, particularly for people with APSGN and persons in custody, outweighs the restrictions placed on an affected individual's right to privacy.

Amendments to the Radiation Safety Regulation 2021 to remove fee exemption and amendments to the Health Ombudsman Regulation 2014 to empower the Health Ombudsman to enforce interim prohibition orders and prohibition orders issued in Western Australia

Property rights (section 24 of the Human Rights Act)

(a) the nature of the right

Section 24 of the Human Rights Act provides that every person has a right to own property and must not be arbitrarily deprived of their property. Again, this right is subject to limitations. The second limb of section 24 only applies to a ‘deprivation’ of a person’s property which is ‘arbitrary’. Also, section 13 of the Act provides that any right may be subject to reasonable limits which may be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The term ‘deprived’ is not defined by the Human Rights Act. However, deprivation in this sense is considered to include a substantial restriction on a person’s use or enjoyment of their property, including not having exclusive possession of the property or the ability to dispose, transfer or derive profits from it.

Removing the fee exemption for a prescribed licensee for an additional use licence will mean affected licensees will be required to pay an application fee in circumstances where they were previously exempt.

Recognising in Queensland an order issued interstate, which prohibits or restricts a health practitioner’s ability to provide health services, will restrict that person’s ability to practise their profession in Queensland. The European Court of Human Rights has accepted property rights extend to a person’s right to practise their profession, particularly given the many years of study and practice involved in acquiring a profession.

(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

A key reason why Queensland Health levies licence fees is to help fund the operation of the licensing scheme and support compliance monitoring of licensees. Accordingly, the purpose of the limitation to property, which will increase licence fee revenue, is to support the licensing scheme under the Radiation Safety Act. Also, by removing this fee exemption, the Amendment Regulation will ensure the law operates according to the policy intent.

States have each enacted their own health legislation to protect the public when accessing health services. The purpose of the limitation is to ensure that where a health practitioner working in Queensland is subject to an interstate order which prohibits or restricts their ability to provide health services, the Health Ombudsman is able to enforce that order in Queensland.

The new Western Australian interim prohibition order and prohibition order are very similar to an interim prohibition order and a prohibition order, respectively, made under the Health Ombudsman Act. The Western Australian Director of Health and Disability Services may only issue an order if they suspect a health practitioner has contravened a relevant code of conduct or been convicted of certain offences. Also, the Director must be satisfied it is necessary to issue the order to avoid a serious risk to the life, health, safety or welfare of a person or the public.

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

Removal of the fee exemption will help cover the costs to Queensland Health arising from receiving, assessing and making a decision on a licensee's application and their suitability to hold a licence for the additional radiation source and/or radiation practice. The additional revenue will also assist Queensland Health to protect the public and the environment from the harmful effects of particular sources of ionising radiation and harmful non-ionising radiation.

Recognising orders issued interstate will empower the Health Ombudsman to take enforcement action against a health practitioner who contravenes a Western Australian order while they are working in Queensland. This ability to enforce interstate orders will protect the health and safety of Queenslanders.

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

There are no less restrictive ways to achieve the purpose of the Amendment Regulation.

(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

It is considered that the overall need to protect the public and the environment from the harmful effects of particular sources of ionising radiation and harmful non-ionising radiation outweighs the limitations on property rights affecting particular individuals who no longer will be eligible for the fee exemption.

It is also considered that the need to protect the health and safety of Queenslanders who receive health services outweighs the limitations on a health practitioner's right to practise their profession in Queensland. Given the high threshold required before an order may be issued in Western Australia and the equivalence of the new Western Australian orders to orders which may also be issued in Queensland, the limitations on the rights of an affected health practitioner are not unjust or unreasonable.

Conclusion

I consider that the Health and Other Legislation Amendment Regulation (No. 2) 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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MINISTER FOR HEALTH, MENTAL HEALTH AND
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