

# ***Medicines and Poisons (Poisons and Prohibited Substances) Amendment 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, Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services and Minister for Women provide this human rights certificate with respect to the *Medicines and Poisons (Poisons and Prohibited Substances) Amendment Regulation 2023* (Amendment Regulation) made under the *Medicines and Poisons Act 2019*.

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 Medicines and Poisons Act outlines who can deal with poisons and prohibited substances and what dealings they can undertake. The *Medicines and Poisons (Poisons and Prohibited Substances) Regulation 2021* (Poisons Regulation) supports the Medicines and Poisons Act by detailing how persons are authorised to deal with poisons and prohibited substances to prevent harm to public health from exposure to poisons and prohibited substances, the requirements for persons carrying out regulated activities with poisons and prohibited substances, and requirements for substance management plans.

The Amendment Regulation amends the Poisons Regulation to:

- amend the definition of portable testing device;
- clarify that a purchase order must include the name, form, strength and amount of a high-risk poison;
- clarify that a supplier invoice must include the name, form, strength and amount of a high-risk poison;
- amalgamate the dealings authorised by biosecurity officers and nature conservation officers in relation to a low-risk fluoroacetic acid bait;
- exempt biosecurity officers and nature conservation officers from the requirement to obtain a manufacturing licence for the preparation of baits;
- exempt low-risk fluoroacetic acid baits manufactured for immediate use from the requirement to keep batch records;
- amend the definition of an authorised supervisor of the disposal of a schedule 2 (S2), schedule 3 (S3) and schedule 4 (S4) poison or schedule 7 (S7) substance;

- clarify that only an approved person can fumigate burrowing invasive animals;
- update a reference to the Departmental Standard - *Competency requirements for authority holders dealing with poisons* to reflect version 2 of the Competency Standard;
- provide that the chief executive of the Department is authorised to approve training substantially equivalent to a competency in the Competency Standard;
- remove references to the Departmental Standard - *Dealing with restricted S7 poisons for invasive animal control*; and
- update references to the revised Poisons Standard.

## Human Rights Issues

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

The overall purpose of the Poisons Regulation is to regulate the manufacture, supply or possession of poisons and prohibited substances. Poisons and prohibited substances can be very dangerous to the health and safety of people working in industry, people in the vicinity and the community more broadly. By regulating poisons and prohibited substances, the State fulfils its positive obligation under section 16 of the Human Rights Act to take steps to protect human life.<sup>1</sup> That objective can be seen generally in the types of regulated poisons and the standards set for persons holding licences under chapter 2, part 2 of the Poisons Regulation.

The protection of the right to life in the Amendment Regulation can be seen more specifically, for example, by updating references to version 2 of the *Competency requirements for authority holders dealing with poisons* (Competency Standard) to ensure that persons controlling burrowing invasive animals have the appropriate skills and training to safely carry out the work.

However, in pursuit of its aim to protect human life (and other aims), the Amendment Regulation does limit or engage other human rights.

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

- rights to equality and non-discrimination (section 15(3));
- property rights (section 24);
- privacy and reputation (section 25); and
- right to access vocational education and training (section 36(2)).

### Prescribing poisons

#### *Property rights*

The Poisons Regulation references the Standard for the Uniform Scheduling of Medicines and

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<sup>1</sup> *Taşkin v Turkey [2004] X Eur Court HR 179.*

Poisons (Poisons Standard), which is a Commonwealth statutory instrument administered by the Therapeutic Goods Administration under the *Therapeutic Goods Act 1989*. It classifies medicines and poisons into ‘schedules’ of substances based on the level of regulatory control required to deal with the public health and safety risks associated with the substance. This limits who can possess and use these substances depending on its classification.

The Amendment Regulation updates the references to the Poisons Standard to align with the revised Poisons Standard published by the Therapeutic Goods Administration on 23 June 2023. By referencing the updated Poisons Standard, the Amendment Regulation engages the right to property under section 24 of the Human Rights Act. The right to property will be limited where property is deprived arbitrarily.

‘Property’ extends at least to chattels such as the poisons and substances prescribed in the Poisons Standard and Poisons Regulation.<sup>2</sup> ‘Deprivation’ also likely extends beyond a formal deprivation to de facto expropriation, which is where substantial restrictions are placed on a person’s use or enjoyment of their property.<sup>3</sup> However, a reduction in the value of commodity is not enough.<sup>4</sup> The interference needs to be so great that it effectively amounts to depriving a person of their property.

Classifying poisons and substances under the Poisons Standard and Poisons Regulation does not interfere with the right to own those things to such an extent that property is deprived. As there is no deprivation of property, the Amendment Regulation engages, but does not limit, the right to property in section 24(2) of the Human Rights Act.

#### Amendments impacting work or carrying out an occupation

The Amendment Regulation may engage rights associated with work and carrying on a profession or occupation, including the rights to equality and non-discrimination (section 15(3)), property (section 24) and privacy (section 25(a) of the Human Rights Act) by:

- providing that only a primary producer or person with a burrowing invasive animal competency can possess, apply and dispose of a gaseous poison used to control a burrowing invasive animal (clause 17);
- clarifying the approved persons authorised to manufacture, possess, supply, apply and dispose of low-risk fluoroacetic acid baits (clause 17); and
- referencing version 2 of the Departmental Standard - *Competency requirements for authority holders dealing with poisons* (Competency Standard), which prescribes competency requirements for persons fumigating burrowing invasive animals (clause 18).

#### *Right to equality and non-discrimination*

The Amendment Regulation prescribes classes of persons who are authorised to carry out a

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<sup>2</sup> *Acts Interpretation Act 1954*, sch 1 (definition of ‘property’).

<sup>3</sup> *Sporrong and Lönnroth v Sweden* [1982] ECHR 5; (1982) 5 EHRR 35, [63]; *Zwierzynski v Poland* [2001] ECHR 401; (2004) 38 EHRR 6, [69].

<sup>4</sup> *Lough v First Secretary of State* [2004] EWCA Civ 905; [2004] 1 WLR 2557, 2575 [51].

regulated activity with a regulated substance and sets limitations on the activity. In doing so, the Amendment Regulation applies to people differently depending on their occupation, such as biosecurity officers, nature conservation officers, primary producers, or a person with a burrowing invasive animal competency.

Under section 15(3) of the Human Rights Act, every person has a right to equal protection of the law without discrimination. Discrimination is defined to include direct and indirect discrimination on the basis of the attributes protected in section 7 of the *Anti-Discrimination Act 1991*. Employment status or occupation is not one of those attributes.

However, because the definition is inclusive, discrimination under the Human Rights Act may extend to other analogous grounds of discrimination. That is the approach that is taken to the right to equality and non-discrimination in the Canadian Charter of Rights and Freedoms, which also has an inclusive meaning of discrimination. The Canadian Supreme Court has held that professional status, occupational status, or employment by a particular organisation is not an analogous ground of discrimination.<sup>5</sup> I consider that the same approach applies in Queensland.

A person who is not an approved person authorised to manufacture, possess, supply, apply and dispose of low-risk fluoroacetic acid baits, a primary producer, or person with a burrowing invasive animal competency certificate do not generally suffer from disadvantage or stereotyping, and the distinction drawn by the Amendment Regulation does not have the effect of devaluing or marginalising them within our society. The differential treatment of people according to their occupation does not involve discrimination under section 15(3) of the Human Rights Act.

### *Property rights*

The right to property in section 24 of the Human Rights Act may be engaged by impacts on a person's employment. The authority to control burrowing invasive animals or an authority to manufacture, possess, supply, apply and dispose of low-risk fluoroacetic acid baits is not transferrable, so it is not itself property.

However, the equivalent right in the European Convention on Human Rights has been held to cover:

- the right to practise a profession;<sup>6</sup>
- a right to seek a particular kind of employment;<sup>7</sup> and

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<sup>5</sup> *Delisle v Canada (Deputy Attorney General)* [1999] 2 SCR 989; *Baier v Alberta* [2007] 2 SCR 673; *Health Services and Support-Facilities Subsector Collective Bargaining Association v British Columbia* [2007] 2 SCR 391.

<sup>6</sup> *Van Marle v The Netherlands* (1986) 8 EHRR 483, [41]-[42]; *Karni v Sweden* (1988) 55 DR 157, 165; *R (Abrahaem) v General Medical Council* [2004] EWHC 279, [5].

<sup>7</sup> *Legal and General Assistance Ltd v Kirk* [2002] IRLR 124, [41].

- a licence to carry out an economic activity.<sup>8</sup>

As such, these amendments may engage or limit the right to property in section 24 of the Human Rights Act. For example, the updated competency requirements in the Competency Standard will require persons to obtain a competency to control burrowing invasive animals, by undertaking training that is subject to a fee.

However, the Amendment Regulation does not prevent a person from practising their profession, nor from seeking any particular kind of employment. The status of being an ‘approved person’ under the Poisons Regulation is not transferrable, so it is not itself property. Chapter 1, part 3 and schedule 2 of the Poisons Regulation sets out limitations on authorisations of approved persons. Even if the conditions and limitations in the Poisons Regulation have the practical effect of depriving some people of a right to their occupation, that limit on section 24 of the Human Rights Act is very minor.

The right not to be deprived of property in section 24(2) is the right not to be ‘arbitrarily’ deprived of property. In a human rights context, ‘arbitrary’ means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.<sup>9</sup> Because the human rights meaning of arbitrary is, among other things, disproportionate, I address whether the deprivation to property is arbitrary when considering whether it is proportionate under section 13 of the Human Rights Act below.

#### *Privacy and reputation*

Finally, aspects of the right to work may also be comprehended by the right to privacy in section 25(a) of the Human Rights Act.<sup>10</sup> The right to privacy and reputation ‘protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world’.<sup>11</sup> In Europe, that has been found to include a right to establish and develop ‘relationships of a professional or business nature’.<sup>12</sup> ‘It is, after all, in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world’.<sup>13</sup> On this basis, work restrictions have been held to involve an interference with privacy and reputation.

Even if clauses 17 and 18 of the Amendment Regulation have the practical effect of interfering with a person’s work as an aspect of their privacy (for example, because the person does not satisfy the competency requirements to fumigate burrowing invasive animals), any impact on the right to privacy in section 25(a) of the Human Rights Act would be minor.

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<sup>8</sup> *Tre Traktörer Aktiebolag v Sweden* (1989) 13 EHRR 309, [53]; *Crompton v Department of Transport North Western Traffic Area* [2003] RTR 517, [19]; *R (Quark Fishing Ltd) v Secretary of State for Foreign Commonwealth Affairs* [2003] EWHC 1743 (Admin), [35]-[37].

<sup>9</sup> Explanatory note, Human Rights Bill 2018 (Qld) 22; *PJB v Melbourne Health* (2011) 39 VR 373, 395 [85].

<sup>10</sup> *ZZ v Secretary, Department of Justice* [2013] VSC 267, [82]-[95].

<sup>11</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1, 36 [61].

<sup>12</sup> *C v Belgium* (2001) 32 EHRR 2, 33-4 [25].

<sup>13</sup> *Volkov v Ukraine*[2013] ECHR 32, [165].

The right to privacy in section 25(a) is a right not to have one's privacy interfered with 'unlawfully' or 'arbitrarily'. Because questions of lawfulness and proportionality arise when considering justification of limits on human rights under section 13, I consider these questions in that context below.<sup>14</sup>

### Competency Standard – Competency Requirements

#### *Right to access vocational education and training*

Section 36(2) of the Human Rights Act provides for a right to access, based on the person's abilities, further vocational education and training that is equally accessible to all. The right to education under the Human Rights Act is a right to access education (not a right to education).<sup>15</sup> Access in this context carries a particular human rights meaning, incorporating underlying principles of non-discrimination, physical accessibility and economic accessibility.<sup>16</sup>

The version 2 of the Competency Standard will require a person, other than a primary producer, who uses a gaseous poison to control fox dens and rabbit burrows to successfully complete a competency unit. Clause 18 approves the updated Competency Standard, which gives effect to the additional training and competency requirements.

The version 2 of the Competency Standard will require persons to successfully undertake a unit of competency offered by a recognised training provider to be deemed 'competent' in the specific unit. If they successfully complete the unit of competency, they will be eligible to receive a burrowing invasive animal competency certificate to undertake those activities. These units are subject to a fee, which may prevent or hinder a person from obtaining new competencies. Further, existing vocational education and training providers may not meet the requisite standards to offer training courses on the new competencies, which may reduce vocational education and training services offered.

However, the right to education protected by section 36(2) of the Human Rights Act is intended to be interpreted in line with the *Education (General Provisions) Act 2006* and to provide rights in relation to aspects of Queensland's responsibilities for education service delivery. It is likely to be considered a systemic right, similar to the equivalent right under the European Convention of Human Rights.<sup>17</sup> This means the right is likely to be limited only where there is a systemic breakdown of the provision of education resulting in a person not having access to a minimum level of education.

As the right to access vocational education and training is not an unfettered right, and the State of Queensland is not responsible for delivering poisons and prohibited substance competency training, the right of access to vocational education and training in section 36(2) is engaged but not limited by clause 18 of the Amendment Regulation

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<sup>14</sup> Following the approach in *Minogue v Thompson* [2021] VSC 56, [86], [140].

<sup>15</sup> As noted in the Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (Report No. 26, February 2019) 51.

<sup>16</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13*.

<sup>17</sup> European Convention of Human Rights, article 2.

## **Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)**

### *Impacts on work and carrying out an occupation*

The Amendment Regulation may impose minor impacts on the right to property and the right to privacy by interfering with a person's work and occupation.

#### (a) the nature of the right

The right to property is not only a valuable component of human dignity, but it also has strategic value. Property, including property in the legitimate expectation or goodwill of one's profession or occupation, is 'crucial to the economic development necessary to ensure that human beings can supply themselves with food and otherwise support themselves.'<sup>18</sup>

The right to privacy and reputation protects the individual from all interferences and attacks upon their privacy, including the protection of personal information. The scope of this right is subject to an internal limitation as the right provides that a person has the right to protection from unlawful and arbitrary interferences with their privacy. An interference with a person's privacy will be arbitrary if it is capricious, unpredictable, or unjust, or if the interference is not proportionate to a legitimate aim.

The purpose of the right to privacy is 'to protect and enhance the liberty of the person – the existence, autonomy, security and well-being of every individual in their own private sphere.'<sup>19</sup> One of the values underlying the right to privacy is personal development, which includes the development of relationships with the outside world through one's work.<sup>20</sup>

#### (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

Poisons and prohibited substances are inherently hazardous, and the risk to human health and the environment depends on how safely they are handled and used. They can pose significant risks to humans when conditions of safe use are not observed. The purpose of prescribing persons who can undertake various activities relevant to the Poisons Regulation is to ensure the safety of people working in the industry, of people in the vicinity, as well as the broader community. The objective of the Poisons Regulation is to protect the public from the health risks associated with inappropriate access to, and use of, poisons. This purpose ultimately protects the right to life and is clearly consistent with the values of a free and democratic society based on human dignity, equality, and freedom.

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<sup>18</sup> Rhoda E Howard-Hassmann, 'Reconsidering the Right to Own Property' (2013) 12(1) *Journal of Human Rights* 180, 181.

<sup>19</sup> *Director of Housing v Sudi* (2010) 33 VAR 139, 145 [29] (Bell J).

<sup>20</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1, 36 [61]; *C v Belgium* (2001) 32 EHRR 2, 33-4 [25].

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

By setting standards, conditions and limitations, the Amendment Regulation helps to achieve the purpose of promoting the safety and wellbeing of the community and industry. It does this by ensuring that:

- only a primary producer or person with a burrowing invasive animal competency certificate can possess, apply and dispose of the gaseous poison used to control a burrowing invasive animal (clauses 17 and 18); and
- only approved persons are authorised to manufacture, possess, supply, apply and dispose of low-risk fluoroacetic acid baits (clause 17).

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

The standards, conditions and limitations provided for by the Amendment Regulation are necessary to achieve their safety purpose. Any alternative which might have a lesser impact on work and the carrying out of an occupation would carry a greater risk to safety. For example, allowing persons other than approved persons to control burrowing invasive animals poses a clear risk to public health and safety. The purpose of promoting safety and wellbeing can only be achieved if appropriate restrictions are placed on the activities specified in clauses 17 and 18.

(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 impact on human rights from the clauses 17 and 18 of the Amendment Regulation is minor. While a person's work and occupation can be critical to their sense of self and their ability to live a dignified life, the standards and conditions set by the Amendment Regulation regulate rather than prevent a person from obtaining those benefits.

The need to ensure safe use of poisons is important for the people using them and the community as a whole. Taking into account the State's obligation to protect the right to life, and the minor and incidental nature of any interference with a person's work or pursuit of an occupation, the Amendment Regulation strikes a fair balance between protecting public safety and protecting the rights to property and privacy.

As the Amendment Regulation's impacts on property and privacy rights are proportionate and strike a fair balance, they are not 'arbitrary' or 'unlawful' and therefore fall within the internal limitations on the scope of the rights to property and privacy discussed above. Accordingly, while the Amendment Regulation engages those rights, it does not limit them. Alternatively, even if those rights are limited, the limits are reasonable and demonstrably justified.



## Conclusion

I consider that the *Medicines and Poisons (Poisons and Prohibited Substances) Amendment 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.

**SHANNON FENTIMAN MP**  
MINISTER FOR HEALTH, MENTAL HEALTH AND  
AMBULANCE SERVICES AND  
MINISTER FOR WOMEN

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