

## Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee

Report No. 35, 56<sup>th</sup> Parliament

Subordinate legislation tabled between 20 August 2019 and 4 February 2020

### 1 Aim of this report

This report summarises the committee's findings following its examination of the subordinate legislation within its portfolio areas tabled between 20 August 2019 and 4 February 2020. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA).

### 2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
126	Disability Services (Transitional) Regulation 2019	20 August 2019	24 October 2019
144	Guide, Hearing and Assistance Dogs Regulation 2019	20 August 2019	24 October 2019
225	Health Legislation Amendment Regulation (No. 3) 2019	26 November 2019	2 April 2020
263	Hospital and Health Boards (Changes to Prescribed Services) Amendment Regulation 2019	4 February 2020	30 April 2020
1	Public Health (Coronavirus (2019-nCoV)) Amendment Regulation 2020	4 February 2020	30 April 2020

### 3 Disability Services (Transitional) Regulation 2019

The objective of the Disability Services (Transitional) Regulation 2019 is to ensure that the chief executive of the Department of Communities, Disability Services and Seniors is able to deal with complaints about the delivery of disability services that were made, or relate to matters that arose, before 1 July 2019.

#### Committee comment

This regulation was considered by the committee as part of its work for Report No. 28 tabled on 22 October 2019, but was not listed in the table of subordinate legislation examined.

The regulation raises no FLP issues, and the explanatory notes comply with part 4 of the LSA.

### 4 Guide, Hearing and Assistance Dogs Regulation 2019

The objective of the Guide, Hearing and Assistance Dogs Regulation 2019 is to remake the Guide, Hearing and Assistance Dogs Regulation 2009, which expired on 1 September 2019. The regulation aims to ensure that every person who relies on a certified guide, hearing or assistance dog has the same access rights as others to public places and public passenger vehicles.

The regulation supports the operation of specific provisions of the Act, including the requirements for identifying coats, records to be kept by a trainer, and the form and requirements of identity cards for handlers.

Committee comment

This regulation was considered by the committee as part of its work for Report No. 28 tabled on 22 October 2019, but was not listed in the table of subordinate legislation examined.

The regulation raises no FLP issues, and the explanatory notes comply with part 4 of the LSA.

## 5 Health Legislation Amendment Regulation (No. 3) 2019

The objectives of the Health Legislation Amendment Regulation (No. 3) 2019 are to:

- expand the current legislated minimum nurse-to-patient ratios to the acute adult mental health wards of a further 16 public hospitals
- prescribe an agreement between Queensland Health and the Commonwealth Department of Human Services (DHS), to enable sharing of patient identifying information for the BreastScreen Queensland program; and
- update the name of a prescribed tissue bank operated by the Australian Red Cross.

### Potential FLP issue

#### Section 4(2)(a) LSA – rights and liberties of individuals – privacy and confidentiality of personal information

Queensland Health and DHS have signed an agreement to facilitate sharing of confidential information to support the operation of the BreastScreen Queensland program. The agreement provides a framework for Queensland Health to provide to DHS data relating to women currently participating in the program. The agreement will allow DHS to identify eligible Queensland women who are not participating in the program and share their details with Queensland Health, enabling Queensland Health to access Medicare data and to invite eligible women to participate in the program.

The regulation raises an issue of fundamental legislative principle relating to the rights and liberties of individuals (section 4(2)(a) of the LSA), regarding an individual's right to privacy with respect to their personal information.

The explanatory notes provide the following justification:

*The BreastScreen Queensland program provides free breast cancer screening and assessment to eligible women. The policy objective is to ensure that Queensland Health can contact eligible women aged 50 to 74 to invite them to participate in the program. This requires the sharing of confidential information, as DHS holds Medicare data including names and dates of birth.<sup>1</sup>*

The explanatory notes also state:

*Given the importance of the BreastScreen program, early detection and treatment of breast cancer and the safeguards prescribed in the agreement, it is considered that any departure from fundamental legislative principles is justified.<sup>2</sup>*

Section 151(1) of the *Hospital and Health Boards Act 2011* provides that a designated person may disclose confidential information if the disclosure is, among other things, required or allowed under an agreement prescribed under a regulation. Apart from the prescribed disclosure, a person's confidential information will remain subject to all the normal protections provided under that Act.

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<sup>1</sup> Explanatory notes, p 3.

<sup>2</sup> Explanatory notes, p 5.

Both Queensland Health and DHS are obliged to collect, use and disclose data in accordance with relevant privacy principles and legislation related to the use of confidential personal information (including the *Information Privacy Act 2009* and the *Privacy Act 1988* (Cwlth)).

Committee comment

Given the safeguards and the policy objective of increasing participation in the BreastScreen program to help in the early detection and treatment of breast cancer, the committee is satisfied that the disclosure is justified.

The regulation raises no FLP issues. The explanatory notes comply with part 4 of the LSA.

## **6 Hospital and Health Boards (Changes to Prescribed Services) Amendment Regulation 2019**

The objective of the Hospital and Health Boards (Changes to Prescribed Services) Amendment Regulation 2019 is to have non-executive health service employees employed by the chief executive in the Department of Health rather than by a 'prescribed employer' Hospital and Health Service (HHS), following the recommendation of an expert panel advice on Queensland Health's governance framework.

All employee rights, benefits and entitlements will be retained. This change will not affect health executives of senior health service employees, such as Senior Medical Officers and Visiting Medical Officers, who will continue to be employed directly by a HHS.

Committee comment

The regulation raises no FLP issues. The explanatory notes comply with part 4 of the LSA.

## **7 Public Health (Coronavirus (2019-nCoV)) Amendment Regulation 2020**

The objective of the Public Health (Coronavirus (2019-nCoV)) Amendment Regulation 2020 (the amendment regulation) is to include coronavirus 2019-nCoV as a notifiable condition and also to prescribe it as a condition requiring immediate notification. This will have the effect of:

- requiring doctors and persons in charge of hospitals to immediately notify the chief executive of Queensland Health when an examination of a person by a doctor indicates the person may have or has coronavirus 2019-nCoV
- requiring directors of pathology laboratories to immediately notify the chief executive of Queensland Health when a laboratory receives a request for pathological examination of a specimen of human origin for coronavirus 2019-nCoV or a pathological examination indicates that a person may have or has coronavirus 2019-nCoV, and
- prescribing coronavirus 2019-nCoV as a controlled notifiable condition meaning that the additional powers in the Act are available as part of managing any potential outbreak.

Chapter 3 of the *Public Health Act 2005* (the Act) provides for additional powers to respond to controlled notifiable conditions, including:

- the chief executive may order the detention of a person reasonably suspected of having a controlled notifiable condition for an initial 24 hour period
- allowing a magistrate to, on application from the chief executive, make orders relating to initial examination of a person, behaviour of a person (such as restricting the person from visiting certain places), and detention of a person with a controlled notifiable condition.

The conditions that are required to be notified in Queensland are listed in Schedule 1 of the Public Health Regulation 2018.

### Potential FLP issue

The amendment regulation raises two FLP issues.

Section 4(2)(a) LSA – rights and liberties of individuals – -right to liberty and right to pursue ordinary activities without undue restriction

#### Compulsory detention and examination

The effect of naming coronavirus 2019-nCoV as a notifiable condition is that a number of powers in the Act apply to an individual who has, suspects they might have, or who is at risk of contracting coronavirus 2019-nCoV.

These powers include the compulsory detention and examination of these persons. The provisions also provide for behavioural orders to be made by a magistrate, which could require a person to:

- undergo counselling by a stated person
- refrain from specified conduct
- refrain from visiting specified places, or
- submit to supervision and monitoring by another person.

Section 66 of the Act sets out the guiding principles for the provisions in Chapter 3 relating to controlled notifiable conditions. These include:

- Preventing or minimising the spread of notifiable conditions should not unnecessarily infringe the liberty or privacy of individuals.
- A person who has or suspects they might have a notifiable condition, or who is at risk of contracting a notifiable condition has the right:
  - o to be protected from unlawful discrimination
  - o to have their privacy respected, and
  - o to make informed decisions about their medical treatment.

The right to personal liberty is the most elemental and important of all common law rights.<sup>3</sup>

Legislation should not, without sufficient justification, unduly restrict ordinary activities.

Further, an individual would also normally expect to be able to have freedom of movement and any removal of this right must be fully justified and should be only done with the authority of the court.<sup>4</sup>

The explanatory notes provide the following justification:

*It is considered that any potential impact that the Amendment Regulation makes upon the rights and liberties of individuals in this context is justified, given the need to protect the health of the public by managing any potential outbreak of coronavirus 2019-nCoV. The powers of the chief executive and magistrates are discretionary and are only expected to be exercised if there are significant risks to public health as a result of the coronavirus 2019-nCoV.<sup>5</sup>*

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<sup>3</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 96

<sup>4</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 99.

<sup>5</sup> Explanatory notes, p 4.

Committee comment

The committee acknowledges the need to protect the health of the public by managing any potential outbreak of coronavirus 2019-nCoV. The committee accepts that the ability to compulsorily detain and examine individuals who have, suspect they might have or are at risk of contracting coronavirus 2019-nCoV are necessary for this to occur.

The committee notes that the powers of the chief executive and magistrates to compulsorily detain and examine individuals are already contained within the Act, and their application to coronavirus 2019-nCoV are triggered by it being named as a notifiable condition. The committee also notes these powers are discretionary and are only expected to be exercised if there are significant risks to public health as a result of the coronavirus 2019-nCoV.

The committee also notes the exercise of these powers is subject to a number of guiding principles set out in the Act that seek to protect individuals from discrimination and unnecessary breaches of their privacy.

Based on these factors, the committee considers that the breach of the rights and liberties of individuals with the amendment regulation is justified.

Disclosure of confidential information

Including coronavirus 2019-nCoV as a notifiable condition triggers a number of notification requirements under the Act. The Act requires clinicians and pathologists to disclose confidential information, such as patient details, to the notifiable conditions register. In doing so, the legislation involves a breach of fundamental legislative principle, in relation to privacy.

Reasonableness and fairness of treatment of individuals is relevant to deciding whether legislation has sufficient regard to rights and liberties of individuals. This includes having regard for an individual's right to privacy in respect of their personal information.

In terms of safeguards, section 77 of the Act imposes a general duty of confidentiality on persons 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 Act allow for disclosure of confidential information in limited circumstances.)

The explanatory notes give this justification:

*It is considered that any potential impact that the Amendment Regulation makes upon the rights and liberties of individuals in terms of access to confidential information is justified, given the existing protections in the Act and the important protections for public health that the Amendment Regulation will provide.<sup>6</sup>*

Committee comment

Given the need to protect public health and the safeguards in the Act relating to the administration or enforcement of the notifiable conditions register, the committee is satisfied that the breach of a person's rights and liberties relating to privacy, as a consequence of the amendment regulation, is reasonable and justified.

**Human right considerations**

Section 8 of the *Human Rights Act 2019* (HRA) provides that a statutory provision is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with Section 13 of that Act.

Section 13 of the HRA provides that a human right may be subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and

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<sup>6</sup> Explanatory notes, p 4.

freedom. Section 13 sets out a range of factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

In the human rights certificate accompanying the amendment regulation, the minister states his opinion that the amendment regulation is compatible:

- with the human rights protected by the HRA, and
- with the HRA because it does limit, restrict or interfere with human rights, but the limitations are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>7</sup>

The amendment regulation raises two human rights issues.

#### Section 25 HRA— right to privacy and reputation

The amendment regulation requires clinicians and pathologists to disclose, to the notifiable conditions register, confidential information for patients with coronavirus 2019-nCoV. This includes patients' details such as: their name, address, date of birth and phone number; their workplace, school, childcare or other institution; the country where the condition was acquired; and the likely source of exposure.

Under section 25 of the HRA, a person has the right not to have their privacy unlawfully or arbitrarily interfered with.

The disclosure of information to the notifiable conditions register affects or limits a person's human right to privacy.

The minister expresses the view that any potential impact upon the rights and liberties of individuals in this context is justified, given the need to protect the health of the public, and explains how this human right may be subject to reasonable limits in this instance:

*The limitation of this human right under the Act and Amendment Regulation is for the purpose of protecting the health of the public by managing any potential outbreak of coronavirus 2019-nCoV. It is reasonable, necessary and proportionate to limit the privacy of a person who has or is suspected of having coronavirus 2019-nCoV 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.<sup>8</sup>*

The certificate further states:

*Restricting the right to privacy and reputation of a person who has or is suspected of having coronavirus 2019-nCoV would assist in protecting the public's health as it would ensure that Queensland Health is able to understand the epidemiology of coronavirus 2019-nCoV, which can be used to develop strategies to protect public health. There are no other less restrictive ways to achieve this purpose.*

*The benefits of the Amendment Regulation associated with protecting public health outweigh the impact on the right to privacy and reputation of individual citizens.<sup>9</sup>*

#### Committee comment

The committee is satisfied that the limitation of the right to privacy and reputation by requiring clinicians and pathologists to disclose patients' confidential information to the notifiable conditions register, as a result of the inclusion of coronavirus 2019-nCoV as a notifiable condition, is reasonable and demonstrably justifiable in accordance with Section 13 of the HRA.

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<sup>7</sup> Human rights certificate, p 1.

<sup>8</sup> Human rights certificate, p 3.

<sup>9</sup> Human rights certificate, p 4.

### Section 29 HRA – right to liberty and security of person

The amendment regulation allows the chief executive and magistrates to make orders about persons who have, or are suspected of having, coronavirus 2019-nCoV, including:

- orders for the compulsory detention and examination of persons who have or are suspected of having a controlled notifiable condition, and
- behavioural orders which can require a person to undergo counselling by a stated person/s, refrain from stated conduct, refrain from visiting stated places, or submit to supervision and monitoring by another person.

Under section 29 of the HRA, every person has the right to liberty and security, must not be subject to arbitrary detention, and must not be deprived of liberty except on grounds, and in accordance with procedures, established by law.

The minister states:

*The limitation of these human rights under the Act and Amendment Regulation is for the purpose of protecting the health of the public by managing any potential outbreak of coronavirus 2019-nCoV.<sup>10</sup>*

The minister concludes:

*Restricting the liberty and freedom of movement of a person who has or is suspected of having coronavirus 2019-nCoV is designed to protect overall public health. There are no other less restrictive or reasonably available ways to achieve this purpose.*

*The benefits to public health associated with the Amendment Regulation outweighs any impact on the rights to liberty and security of person and freedom of movement. Any potential limitation of a person's right to liberty and security would be undertaken under an established legislative framework and is outweighed by the need to protect public health.<sup>11</sup>*

The human rights certificate provides the following further explanation regarding orders to detain persons:

*The process to detain a person who has or is suspected of having coronavirus 2019-nCoV is set out in Chapter 3, parts 4 and 5 of the Act. The detention is not inappropriate, unjust or unpredictable and follows due process of the law. The provisions allow the chief executive of Queensland Health to detain a person for a maximum period of 24 hours. A magistrate can order a maximum detention of 28 days, with another order from a magistrate required to extend the order for 28 days. A detention order from a magistrate can only be extended once. A magistrate's decision is subject to normal legal appeal processes.<sup>12</sup>*

Additionally, orders can only be made if the person making the order is satisfied the person has a controlled notifiable condition and the person's condition, or the person's condition and likely behaviour, may constitute an immediate risk to public health.<sup>13</sup>

### Committee comment

The committee is satisfied that the limitation of human rights by allowing the chief executive and magistrates to make orders about persons who have, or are suspected of having, coronavirus 2019-nCoV, is reasonable and demonstrably justifiable.

The explanatory notes comply with part 4 of the LSA.

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<sup>10</sup> Human rights certificate, p 4.

<sup>11</sup> Human rights certificate, p 5.

<sup>12</sup> Human rights certificate, p 4.

<sup>13</sup> See sections 113 (chief executive) and 129 (magistrates) of the Act.

A human rights certificate was tabled with the subordinate legislation, as required by section 41 of the HRA. It provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

## **8 Recommendation**

The committee recommends that the House notes this report.



Aaron Harper MP

**Chair**

**March 2020**

### **Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee**

**Chair** Mr Aaron Harper MP, Member for Thuringowa, Chair

**Deputy Chair** Mr Mark McArdle MP, Member for Caloundra, Deputy Chair

**Members** Mr Michael Berkman MP, Member for Maiwar

Mr Martin (Marty) Hunt MP, Member for Nicklin

Mr Barry O'Rourke MP, Member for Rockhampton

Ms Joan Pease MP, Member for Lytton