

Public Health (Infection Control) Amendment Bill 2017

Explanatory Notes

Short title

The short title of the Bill is the Public Health (Infection Control) Amendment Bill 2017.

Policy objectives and the reasons for them

The Bill amends the *Public Health Act 2005* (the PH Act) to strengthen the statutory infection control framework for health care facilities (HCFs).

Chapter 4 of the PH Act provides a regulatory framework for controlling infection risks at HCFs, such as public hospitals, medical and dental practices and acupuncture clinics. The PH Act requires persons involved in the delivery of declared health services at an HCF to take reasonable precautions and care to minimise infection risks, and requires the operator of the facility to develop and implement an infection control management plan (ICMP), and to train staff in operation of the ICMP. A declared health service is any service provided to a person which is intended to maintain, improve or restore the person's health and which involves the performance of an invasive procedure or an activity which exposes the person or another person to blood or another bodily fluid.

A recent incident involving substandard infection control practices at a Brisbane dental clinic highlighted shortcomings in the framework that potentially limit the ability of Queensland Health as a regulator to minimise unsatisfactory and unsafe infection control practices, or to identify and subsequently take swift remedial action in response to such practices. In that case, a documented pattern of substandard infection control practices, such as inadequate staff training and sterilisation procedures, was found to be placing staff and patients at risk of coming into contact with infectious, blood-borne diseases.

The incident revealed the following shortcomings in the statutory infection control framework:

- While it requires HCFs to take reasonable care to minimise infection risks, the framework does not provide guidance about the substantive standards which HCFs are expected to meet in satisfying this obligation. This weakens the effectiveness of the framework in preventing infection control risks from arising.
- The framework does not adequately support compliance monitoring and investigation. The framework does not include a direct power to compel HCFs to disclose information about their infection control practices, including by requiring the operator of an HCF to provide Queensland Health a copy of the ICMP they must develop and implement under the PH Act.

- The framework is not directly enforceable, with no penalties for non-compliance and no specific power to order HCFs to take particular remedial action.

Ultimately, Queensland Health, with the agreement of the Brisbane City Council as a co-regulator, was able to issue a public health order under chapter 2 of the PH Act closing the Brisbane dental clinic until specified remedial measures had been implemented to the satisfaction of Queensland Health. However, while the issuing of a public health order is an effective measure for controlling a particular infection risk once it has occurred, and for preventing its recurrence, it is not a suitable means of preventing infection control risks from arising, promoting ongoing improvements in HCF infection control practices and identifying and minimising emergent infection risks. Further, coupled with the shortcomings in the statutory framework, the need to negotiate the issue of a public health order with the relevant local government as co-regulator could result in significant delays to future incident responses.

To better protect the staff and patients of HCFs from the risk of exposure to infectious conditions, the Bill makes necessary improvements to the infection control framework. These improvements will equip Queensland Health with the regulatory tools to address deficiencies in the management of infection risks by HCFs arising from their provision of declared health services. This involves empowering Queensland Health to effectively and efficiently manage complaints about HCFs, and to act appropriately where it becomes aware of non-compliance.

Complementary amendments will also be made to the *Public Health Regulation 2005*, empowering Queensland Health to act urgently in response to an identified public health risk arising from deficient infection control practices without first seeking agreement to do so from the relevant local government.

Achievement of policy objectives

The Bill implements the following enhancements to the infection control framework under chapter 4 of the PH Act:

- The PH Act will be amended to better enable guidance to be provided to the operators and staff of HCFs to minimise infection risks. Appropriate adjustments will be made to the regulation-making head of power in the Act, supported by amendments to the *Public Health Regulation 2005*, to allow mandatory training, competency and infection control standards to be prescribed by regulation.
- The Bill will enhance the ability of the department to monitor compliance by the operators and staff of HCFs with their infection control obligations and, where necessary, investigate possible breaches. Heads of power will be inserted into the framework to allow Queensland Health to require the operator of an HCF to produce a copy of their ICMP or to amend an ICMP. Authorised persons will be empowered to enter premises to investigate infection risks without prior notice.
- The power of Queensland Health to enforce compliance by the operators and staff of HCFs with the infection control framework, and to prosecute breaches, will be strengthened. The Bill imposes penalties for non-compliance, and empowers Queensland Health to direct the operator of an HCF to take particular remedial action or to cease performing a particular health service where that service involves a risk to public health from poor infection control practices.

Alternative ways of achieving policy objectives

As the Bill deals with the operation of existing legislation, a legislative response is the only feasible option for achieving the intended policy objectives.

Estimated cost for government implementation

The Bill affects existing statutory processes, and will not involve additional costs outside those already funded through existing budget allocations.

Consistency with fundamental legislative principles

The following potential, but justifiable, issues have been identified in relation to consideration by the Bill for the rights and liberties of individuals.

Interference with lawful business activities

The Bill empowers authorised persons to take a range of actions necessary to address an immediate infection risk. These include entering premises without notice (clause 13), requiring a copy of the ICMP for the facility (clause 9) and issuing an improvement notice (clause 10). The Bill further empowers the chief executive to issue a directions notice requiring an HCF to temporarily cease performing a declared health service while remedial actions are undertaken (clause 10). As exercise of these powers may impact on the otherwise lawful business activities of an HCF, the question arises as to whether the Bill has sufficient regard to the rights and liberties of individuals.

For the following reasons, it is considered any possible commercial detriment to the owner or operator of an HCF arising from exercise of these powers is justified:

- Any action by an authorised person, and any directions notice issued by the chief executive, will relate to an identified, immediate infection risk, and will only authorise those acts reasonably necessary to effectively address that risk. Before the chief executive may issue a directions notice or before an authorised person may enter premises without notice, they must be reasonably satisfied an HCF is breaching its infection control obligations and this breach is causing an immediate infection risk.
- An improvement or directions notice may detail the remedial action which, if taken by the operator of the HCF, would be considered sufficient to obviate the relevant infection risk. The inclusion of this detail in a notice would minimise its detrimental impact on the business of an HCF.
- These powers reflect existing powers in the PH Act for addressing public health risks. For example, an authorised person may issue a public health order requiring a person to cease using a place for a particular purpose until stated remedial action is taken. Accordingly, the Bill is consistent with the existing regulatory framework under the PH Act.
- In recognition of the significant potential impact the issuing of a directions notice may have on the capacity of an HCF to engage in otherwise lawful business activities, the Bill limits delegation of the chief executive's power to issue such a notice. This power

may only be delegated to the Chief Health Officer or a departmental employee who is a member of the health executive service, the body of senior executives responsible for leading the delivery of public sector health services.

Creation of offences

The Bill creates a number of new offences in relation to the infection control obligations of the operators and staff of HCFs (clauses 5 to 10), which also gives rise to the question of whether the Bill has sufficient regard to the rights and liberties of individuals. For the following reasons, these new offences are justified:

- The offences are well defined. The Bill details the circumstances in which particular actions by an owner or operator of an HCF or person engaged in the provision of a declared health service at an HCF may constitute an offence, and the steps required to comply with the legislation. For example, the proposed offences relating to maintaining and disclosing an ICMP are supported by detailed existing guidance in the PH Act about the required form, content and implementation of an ICMP.
- The penalties for the offences are proportionate and relevant. The penalties have been benchmarked against existing penalties in public health legislation with a similar purpose of protecting the public from harm arising from unsafe practices. For example, the new offence for failing to take reasonable precautions and care to minimise an infection risk attracts the same maximum penalty as the analogous offences of handling and selling unsafe food under the *Food Act 2006* (1000 penalty units).

Further, the Bill includes mechanisms for supporting HCFs to improve their infection control practices, rather than simply relying on penalties to enforce compliance. For example, the Bill provides for an improvement notice to be issued detailing the practices of an HCF which are contravening its infection control obligations and the steps which could be taken to rectify this non-compliance.

- The offence provisions do not impose strict liability. For example, it will be a defence to a charge of failing to take precautions and care to minimise an infection risk arising from the provision of a declared health service for the person charged to establish that the precautions and care they took were reasonable in the circumstances.

Privilege against exposure to penalty

The Bill makes it an offence for the operator of an HCF to not have a documented ICMP (clause 7), or to refuse to provide the ICMP or other information about their infection control practices to an authorised person on request (clause 9). The PH Act requires the ICMP to contain certain information, and any document failing to do so would consequently not be considered an ICMP for the purposes of the Act. As such, where an operator of an HCF is required to provide an ICMP to an authorised person, this may inadvertently involve them being compelled to disclose their failure to comply with the PH Act to the extent the document purporting to be their ICMP is deficient. A similar effect could occur where the operator of an HCF is required to provide other information about their infection control practices, which may inadvertently involve the person being compelled to disclose evidence of an offence against the Act. These situations thereby give rise to the question of whether the Bill has sufficient regard to the rights and liberties of individuals by reason of potentially abrogating the privilege against exposure to penalty.

However, it is essential for the State as regulator to have access to details of the infection control practices of HCFs, which are crucial to identifying whether infection risks at particular HCFs are being properly managed, or whether improvements or compliance action by the State are warranted. As these details are peculiarly within the knowledge of the operator of an HCF, as documented in the ICMP and other materials within the operator's control, and cannot be authoritatively sourced from any other source, any potential abrogation of the privilege against exposure to penalty is justifiable.

Consultation

Due to the urgency of the required amendments, affected HCFs have not been consulted specifically on the proposed amendments. However, the department is already engaged in a range of activities to raise awareness by HCFs of their existing infection control obligations.

As part of implementation of the Bill, communication and engagement with affected HCFs will occur primarily through peak industry groups and, where particular stakeholders are members of health professions registered under the *Health Practitioner Regulation National Law (Queensland)*, the relevant National Boards. These industry groups and boards will be asked to disseminate information to their members and registrants about the obligations imposed by the PH Act on the owners and operators of HCFs and on persons involved in the provision of declared health services, and about the changes introduced in the Bill.

Where a complaint or compliance action reveals infection risks which are not being adequately controlled at an HCF, the Bill also equips authorised persons to provide assistance to the operator of the HCF to understand and comply with their statutory obligations. For example, the Bill provides for an authorised person to issue an improvement notice detailing how an HCF is failing to comply with its obligations and the steps it needs to take to rectify this non-compliance. The Bill also provides for an authorised person to direct the operator of an HCF to disclose their ICMP, and to subsequently amend the ICMP to address any deficiencies in that document.

Consistency with legislation of other jurisdictions

The amendments contained in the Bill are specific to Queensland.

Notes on provisions

Short title

Clause 1 states that, when enacted, the Bill will be cited as the *Public Health (Infection Control) Amendment Act 2017*.

Commencement

Clause 2 states that the Act commences on a day to be fixed by proclamation.

Act amended

Clause 3 provides that the Act amends the *Public Health Act 2005* (the PH Act).

Amendment of s 61A (Definitions for chapter)

Clause 4 omits the definition of *health service chief executive* for the purpose of chapter 2A. As a result of this definition appearing twice in different parts of the Act, clause 16 relocates the definition to the schedule 2 dictionary.

Replacement of ch 4, pt 2 (Obligations to minimise infection risks for declared health services)

Clause 5 replaces chapter 4, part 2 with an updated part 2, and updates the title to the part.

Part 2 consists of one provision, section 151. Replacement section 151 provides that breach of the existing obligation on persons involved in the provision of a declared health service to take reasonable precautions and care to minimise the risk of infection to other persons (known for the purposes of chapter 4 as the ‘infection risk’) is an offence, punishable by a penalty of up to 1000 penalty units.

The clause also inserts an example into section 151 to assist persons involved the provision of such services to better understand and comply with their obligations. This example provides that a person may take reasonable precautions and care, for the purposes of discharging their obligation to minimise an infection risk, by complying with the ICMP for the facility at which they are engaged and any other requirements prescribed by regulation.

This example does not limit what may constitute reasonable precautions and care. In addition to complying with any ICMP for the HCF and any further applicable requirements prescribed by regulation, a person must also take any other precautions and care which may be reasonably necessary in the circumstances to discharge their obligation under section 151. This may be relevant where the requirements under the Act or regulation do not deal exhaustively with the precautions which may be reasonably necessary to minimise an infection risk in a particular circumstance, the HCF is exempted from having an ICMP, or no standards are prescribed for particular practices employed at the HCF.

Amendment of s 153 (Obligation of owner for ICMP)

Clause 6 replaces section 153(2), which requires the owner of an HCF who is not also its operator to ensure an ICMP for the HCF is developed, implemented, resourced and periodically reviewed, and that staff and agents of the HCF are appropriately trained in relation to the ICMP. The clause reframes these existing obligations to enhance their clarity. Additionally, the clause requires the person to ensure the ICMP is reviewed at appropriate intervals of not more than one year.

The clause makes it an offence for the owner of an HCF to breach section 153(2), punishable by a penalty of up to 500 penalty units.

Amendment of s 154 (Obligation of owner/operator for ICMP)

Clause 7 replaces section 154(2), which requires the operator of an HCF who is also its owner to develop, implement, resource and periodically review an ICMP for the HCF, and to provide appropriate training for staff and agents of the HCF in relation to the ICMP. The clause reframes these existing obligations to enhance their clarity. Additionally, the clause requires the person to review the ICMP for the HCF at appropriate intervals of not more than one year.

The clause makes it an offence for the operator of an HCF to breach section 154(2), punishable by a penalty of up to 500 penalty units.

Amendment of s 155 (What an ICMP must contain)

Clause 8 provides it is an offence, punishable by a penalty of up to 100 penalty units, for the operator of an HCF to fail to keep a copy of the ICMP for the HCF at a place within the facility which is readily accessible to its employees, contractors and other agents. There is no penalty for failure to comply with other ICMP requirements in section 155, because such failure would invalidate a document from being an ICMP, thereby constituting a more significant offence under sections 153 or 154.

Insertion of new ss 156A and 156B

Clause 9 inserts new sections 156A and 156B into chapter 4 of the Act.

New section 156A (Giving copy of ICMP and information to authorised person) empowers an authorised person to give the operator of an HCF a notice requiring them to provide the authorised person a copy of the ICMP for the HCF, or other information about procedures for preventing or minimising infection risks at the HCF. The section provides it is an offence, punishable by a penalty of up to 200 penalty units, for the operator to fail to comply by the date stated in the notice, unless they have a reasonable excuse for their non-compliance.

New section 156B (Amending ICMP) empowers an authorised person to give the operator of an HCF a notice requiring them to amend an ICMP which the authorised person is satisfied does not comply with the requirements of chapter 4, part 3 of the PH Act. The notice must specify the amendment to be made and the date by which it must be made and a copy provided to the authorised person. The section provides it is an offence, punishable by a

penalty of up to 500 penalty units, for the operator to fail to comply with the notice, unless they have a reasonable excuse for their non-compliance.

Insertion of new ch 4, pt 3A

Clause 10 inserts a new part 3A (Improvement notices and directions notices), consisting of new sections 156C to 156I, into chapter 4 of the PH Act. Part 3A provides for the issuing of improvement and directions notices in relation to contravention of the infection control obligations under chapter 4.

New section 156C (Improvement notice) applies where an authorised person becomes aware that any of the following contraventions is occurring or has occurred and is likely to continue or be repeated:

- contravention by the operator of an HCF of the requirement under section 151 to take reasonable precautions and care to prevent an infection risk;
- contravention by either the owner or operator of an HCF of the requirements under sections 153(2) or 154(2) respectively in relation to ensuring an ICMP which complies with section 155(1) and (2) is in place for the HCF and is reviewed at least annually, and that declared health services performed at the HCF are performed in accordance with that ICMP; or
- contravention by the operator of an HCF of the obligation under section 155(5) to ensure a copy of the ICMP is accessible to staff, contractors and other agents within the HCF.

If the authorised person reasonably believes the contravention is occurring, or has occurred and is likely to continue or be repeated, is reasonably capable of being remedied, and the operator or owner should be given an opportunity to remedy the contravention, the authorised person may issue the owner or operator (as the case may be) an improvement notice requiring that steps be taken to this end. As well as providing details of the alleged contravention, the improvement notice must give a reasonable timeframe within which remedial action must be taken, and may outline the reasonable steps the authorised person considers necessary to remedy the contravention or prevent its continuation or repetition.

The section provides it is an offence for the operator or owner of an HCF to fail to comply with an improvement notice, unless they have a reasonable excuse. An offence under this section is punishable by a penalty of up to the maximum penalty which would have applied had the person been prosecuted for contravention of the substantive obligation to which the improvement notice relates. This means the following maximum penalties apply:

- if the improvement notice relates to a contravention of section 151—1000 penalty units;
- if the improvement notice relates to a contravention of section 153(2) or 154(2)—500 penalty units; and
- if the improvement notice relates to a contravention of section 155(5)—100 penalty units.

An authorised person who becomes aware of a relevant contravention is not required by section 156C to issue an improvement notice, but may instead prosecute the owner or operator without first having issued an improvement notice.

New section 156D (Record of compliance with improvement notice) permits an owner or operator who is given an improvement notice by an authorised person and who reasonably believes they have complied with the notice to inform the authorised person to that effect. If the authorised person is satisfied of the person's compliance, they must record the date of that compliance on a copy of the notice and, if requested, provide a copy of the dated notice to the owner or operator.

New section 156E (Directions notice) applies where the chief executive is satisfied the operator of an HCF is contravening the obligation under section 151 to take reasonable precautions and care to prevent an infection risk, or has contravened the obligation under section 151 and is likely to continue or repeat the contravention, and that there is a serious risk of harm to a person's health because of the contravention or likely contravention. The chief executive may issue a directions notice, requiring the operator of the HCF to cease providing a stated declared health service at that HCF for a stated period of up to 30 days. As well as providing details of the alleged contravention and the risk of harm it is causing, the directions notice must give a reasonable timeframe within which action must be taken to remedy the contravention, and may outline the reasonable steps the chief executive considers necessary to remedy the contravention or prevent its continuation or repetition.

If, before the end of the stated period, the chief executive is satisfied of the continuation of the matters of which they had to be satisfied under section 156E to issue the directions notice, they may, under new section 156F (Chief executive may extend directions notice), extend its effect by another stated period of up to 30 days.

New section 156G (Court order may extend directions notice) empowers the chief executive to apply to a magistrate for an order extending the effect of a directions notice for a stated period. The application must be made while a directions notice issued by the chief executive under section 156E is in effect, including a notice which has been extended under section 156F. If satisfied of the matters of which the chief executive must have been satisfied before issuing the directions notice under section 156E, a magistrate may make the order sought. A magistrate may also refuse to consider an application until the chief executive provides all required information. If a magistrate to whom an application has been made under section 156G has not decided the application before expiration of the directions notice, the direction notice continues in effect until the magistrate decides the application.

New section 156H (Offence to fail to comply with a directions notice) provides it is an offence, punishable by a penalty of up to 3000 penalty units, to contravene a directions notice. This includes a notice whose effect has been extended by court order. The significance of this proposed penalty reflects the aggravated circumstances in which this offence arises, with an offence only committed where the operator of an HCF wilfully persists in providing particular services unsafely despite knowing of the specific risk created by identified deficiencies in their particular infection control practices, and in spite of an express, lawful direction to cease those services until appropriate measures are put in place to remediate the risk.

New section 156I (Record of compliance with directions notice) permits an operator who is given a directions notice by the chief executive and who reasonably believes they have complied with the notice to inform the chief executive to that effect. If the chief executive is satisfied of the operator's compliance, they must record the date of that compliance on a copy of the notice and, if requested, provide a copy of the dated notice to the operator. A directions notice, including a notice whose period has been extended by a court order, stops having effect on the date of compliance recorded on the copy of the notice.

Amendment of s 213AA (Definitions for part)

Clause 11 omits the definition of *health service chief executive* for the purpose of part 4, chapter 5. As a result of this definition appearing twice in different parts of the Act, clause 16 relocates the definition to the schedule 2 dictionary.

Amendment of s 388A (Power to enter places to check compliance with improvement notice)

Clause 12 amends existing section 388A, which empowers an authorised person to enter premises to check a water service provider's compliance with an improvement notice, to expressly specify that that section only applies in relation to an improvement notice issued under section 57A. Section 57A provides for an improvement notice to be issued in relation to contravention by water service providers of their obligations in relation to the supply of unsafe drinking water or recycled water which is not fit for use.

Entry to check compliance with an improvement notice issued under new section 156C in relation to infection control practices will be effected under existing section 390.

Amendment of s 390 (Power to enter health care facility)

Clause 13 amends existing section 390, under which an authorised person may enter an HCF to monitor compliance with the infection control obligations under chapter 4. The clause provides that the existing requirement under section 390(3), being an authorised person must give 24 hours notice before effecting entry, does not apply where the authorised person reasonably believes immediate entry is required to prevent or minimise an imminent infection risk at the HCF.

The clause further amends section 390 to clarify the advice which the authorised person is required under subsection (3) to give the person in charge of the HCF they intend to enter must be about the intended entry. This is a clarifying amendment only, intended to make clearer an existing obligation borne by authorised persons.

Amendment of s 455 (Delegations)

Clause 14 amends the delegations power under section 455 to provide that the chief executive may only delegate their power to issue a directions notice under new section 156E to the Chief Health Officer or to an appropriately qualified member of the health executive service employed in the department. The health executive service is the body of senior executives established under the former *Health Services Act 1991* to lead the delivery of public sector health services, and continued under the *Hospital and Health Boards Act 2011*. Limiting

delegation to members of this group ensures the power to issue a directions notice will only be exercisable by suitably senior public servants.

The clause also omits the definition of ‘appropriately qualified’, as this term is already defined in the *Acts Interpretation Act 1954*.

Amendment of s 461 (Regulation-making power)

Clause 15 amends the existing regulation-making head of power in section 461 to permit a regulation to be made about the training and qualifications required of a person who is providing a declared health service at an HCF. It is intended to employ this power, together with the existing power to make a regulation prescribing standards for the provision of any service, to prescribe a range of competency, training and practice standards which different categories of HCFs must achieve in order to meet their infection control obligations under chapter 4.

Amendment of sch 2 (Dictionary)

Clause 16 amends the schedule 2 (Dictionary) to insert definitions of *directions notice* and *improvement notice* for the purpose of the infection control framework under chapter 4, and adjusts the existing definition of *declared health service*. The clause also inserts a definition of *health service chief executive* to replace two chapter- and part-specific definitions of that term provided in different locations in the Act which are omitted by the Bill.