

# Mining Safety and Health Legislation (Health Surveillance) Amendment Regulation 2020

## 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, Dr Anthony Lynham, Minister for Natural Resources, Mines and Energy provide this human rights certificate with respect to the Mining Safety and Health Legislation (Health Surveillance) Amendment Regulation 2020 made under the *Mining and Quarrying Safety and Health Act 1999* and *Coal Mining Safety and Health Act 1999*.

In my opinion, the Mining Safety and Health Legislation (Health Surveillance) Amendment Regulation 2020 (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 Amendment Regulation amends the Mining and Quarrying Safety and Health Regulation 2017 and the Coal Mining Safety and Health Regulation 2017.

The Mining and Quarrying Safety and Health Regulation 2017 and the Coal Mining Safety and Health Regulation 2017 are consistent with the policy objectives of their authorising law – the *Mining and Quarrying Safety and Health Act 1999* and *Coal Mining Safety and Health Act 1999* respectively. These Acts require the achievement of an acceptable level of risk, through the management of hazards and risks to the safety and health of workers at mineral mines and quarries.

The objective of the Amendment Regulation is to provide for mandatory respiratory health surveillance for current and former mineral mine and quarry workers. The amendments to the Mining and Quarrying Safety and Health Regulation 2017, places an obligation on the Site Senior Executive (SSE), the person responsible for the mine or quarry, to arrange respiratory health surveillance for workers who are not low risk, to undertake prescribed medical examinations by an appropriate doctor prior to commencing work, and then at least once every five years. It does not amend the SSEs existing obligations relating to health surveillance.

The prescribed medical examination includes a chest examination, spirometry test and a chest X-ray that is reviewed by specialist readers. This approach is consistent with the existing mandatory medical program under the Coal Mine Workers' Health Scheme prescribed under the Coal Mining Safety and Health Regulation 2017.

The Amendment Regulation also provide for the appropriate doctor to delay a prescribed medical examination by up to 12 months. This delay can only occur if the appropriate doctor considers the examination will pose a higher risk to the worker, or an unborn child, when compared to the risk of not doing the medical examination. For example, performing a chest X-ray on a pregnant worker.

The appropriate doctor, through statutory guidance, will be defined as medical service providers that have been accredited by the department to provide this service for coal mine workers. The appropriate doctor will be able to determine if one or more examination should be undertaken more frequently.

The Amendment Regulation also places an obligation on the department to arrange and pay for respiratory health surveillance for former workers. This is an existing policy and service provided by the department.

The Amendment Regulation also amends the Coal Mining Safety and Health Regulation 2017 to allow the appointed medical adviser to delay a medical examination by 12 months. This aligns with the amendments to Mining and Quarrying Safety and Health Regulation 2017 and addresses an operational issue that has arisen since the implementation of the Coal Mine Workers' Health Scheme.

## Human Rights Issues

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

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

- I. Right to privacy and reputation: this right is protected by section 25 of the *Human Rights Act 2019* (HR Act). This right is engaged by sections 145B, 145C, 145D, 145E, 145F, 145G, 145I, and 145J.
- II. Right to health services: this right is protected by Section 37 of the HR Act. This right is engaged by schedule 7. The regulations also promote the right to life for workers, Section 16 of the HR Act, by ensuring early detection of lung disease.

Section 17(c) of the HR Act provides that a person must not be subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.

The Amendment Regulation places an obligation on the SSE to arrange the respiratory health surveillance rather than requiring a relevant worker to undergo the examinations. New workers will be aware of the need to have these regular medical examinations before they commence employment, and existing and former workers will be informed why these examinations are desirable to protect their health. As the Amendment Regulation does not make it an offence for the worker to not have the medical examinations, nor impose any other negative consequences on a worker who does not agree to have the examinations, it is clear that the examinations can only occur with the person's consent. Also, the purpose of the medical examinations are for diagnostic purposes to assist the worker to know if they are at risk of developing lung disease, and so an employer may take remedial action, rather than for the purposes of medical or scientific experimentation or treatment. For these reasons, I consider that the Amendment Regulation does not engage the human right to protection from medical or scientific experimentation or treatment without consent.

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

#### A. Content of respiratory health surveillance

- (a) the nature of the right

The right to privacy and reputation in section 25 of the HR Act is broad as it protects the person's privacy, family, home or correspondence and extends to an individual's private life. It includes the data and information collected following a medical examination. Only lawful and non-arbitrary intrusions may occur upon a person's privacy and reputation.

The rights of privacy and reputation are engaged in the first instance by the obligation for workers to undertake specific medical examinations at least once every five years. This limits a person's privacy of their body.

In addition, the Amendment Regulation places an obligation on the appropriate doctor to provide information regarding the medical examination, other than the medical record, to the SSE, and in the case of former workers, to the department. The Amendment Regulation also maintains the current requirement for the SSE to store this information for 30 years, since many respiratory diseases have a cumulative and / or delayed effect.

- (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 regulation requires an SSE to arrange a respiratory examination, prior to commencement and at least once every five years or more frequently if determined by an appropriate doctor. The purpose of this limitation on their right to privacy is to ensure that workers' respiratory health is monitored to identify any anomalies or changes in lung function, so action can be taken to prevent it from progressing to a point where it has an impact on the person's quality of life.

The Queensland Mineral Mines and Quarries Inspectorate are responsible for administering Queensland's resources safety and health regulatory framework. The inspectors will monitor compliance and take appropriate action, such as education, remedial action notices, compliance directives or prosecution. The actions will be dependent on risk, type of offence and nature of non-compliance of the SSE, or employer, to comply with their statutory obligations.

The appropriate doctor will also prepare a health surveillance report that is provided to the SSE for the mine. A health surveillance report will provide information about the effect on a person's health related to the person's exposure to a hazard at a mine and the need, if any, for remedial action. Whilst this report will not include the medical record of the examination it does contain personal information, such as their name and date of birth, and date examinations were undertaken, which may potentially limit the worker's right of privacy.

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

The IARC (International Agency for Research on Cancer) has classified many potential respiratory hazards in mining and quarrying as Group 1 human carcinogens including several mineral dusts from production and refining processes (like silica, aluminium, beryllium, iron, and cadmium) in addition to welding fumes and diesel engine exhaust.

In addition to risk of lung cancer, workers are also at risk of nodular diseases that cause scarring of the lungs, such as silicosis, and obstructive diseases like emphysema.

The medical examinations specified in the regulations are aligned with the Coal Mine Workers' Health Scheme. These were developed and implemented based on the recommendations by the Monash Centre for Occupational and Environmental Health in its Review of Respiratory Component of the Coal Mine Workers' Health Scheme (Monash Review).

Limiting the right to privacy by requiring workers to have medical examinations and to have their results provided to SSEs enables early detection of lung function abnormality, increasing the opportunity to minimise hazard to workers and prevent disease progression. These limitations are required to deliver on the purpose of the *Mining and Quarrying Safety and Health Act 1999*.

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

No other less restrictive and reasonably available ways to achieve the purpose have been identified. The new requirements are complemented by other measures which also serve to protect these workers from the identified hazards to their lungs. This includes ongoing education about the potential hazards of their workplaces, along with accessible, plain English information on symptoms of lung disease.

In July 2017, the Queensland Government introduced statutory guideline for the management of respirable crystalline silica (QGL02) to support SSEs to achieve an acceptable level of risk. Now updated to cover respirable dusts generally, the guideline provides guidance on how to manage the monitoring of workers and their health surveillance for respirable crystalline silica. However, a review undertaken by the Queensland Mines Inspectorate identified that evaluation of risk is not often completed, and earlier studies indicate that medical examinations are not aligned to best practice. The obligations imposed by the Amendment Regulation will only be imposed for workers who are not considered low risk, with the risk being self-assessed by the operator.

The provisions stipulate the minimum content of the respiratory health surveillance as a chest examination, spirometry, and chest X-ray that is dual read. Further or additional examinations are to be determined by the doctor in consultation with the worker and not the employer or SSE. In a case where the doctor considers the medical examination may pose a higher risk to the worker, or an unborn child, when compared to the risk of not doing the medical examination, the examination may be deferred for 12 months. This protects the worker's privacy by limiting the scope of mandatory examinations.

Worker representative organisations were provided a copy of the draft Amendment Regulation as part of the targeted consultation undertaken by the department. The workers' union that responded to the consultation was supportive of the amendments as it aligned with the Coal Mine Workers' Health Scheme. Most employers and employer organisations who were consulted about the draft regulations were generally supportive of these measures. Employers will bear the cost of these examinations.

To protect the worker's right to privacy the regulation restricts the information provided by the appropriate doctor to the SSE so that it does not include a medical record. In addition, the appropriate doctor can only share this limited information to the SSE, the worker, and if requested by the worker, another doctor nominated by the worker. This

protects the worker's privacy by limiting the scope of information and persons with whom information may be shared by the appropriate doctor.

The SSE must ensure records are kept in the appropriate way and that medical records must not be disclosed to anyone, other than the worker or someone with the worker's written consent.

- (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

Any potential impact on privacy and reputation is outweighed by the benefits to the worker and their families, SSE and wider community in ensuring that respiratory diseases are identified early so that the worker's ongoing exposure to hazards can be effectively managed.

- (f) any other relevant factors

Nil.

## **B. Obligation to undertake respiratory health surveillance by an appropriate doctor**

- (a) the nature of the right

The right to health service in section 37 of the HR Act protects the right of an individual to access health services without discrimination. This right reflects the individual's need to access services necessary to be healthy. This right encompasses the key elements of availability, accessibility, acceptability and adequacy. This right does not mean the right to be healthy.

In addition, Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), provides for measures and steps that improve environmental and industrial hygiene, and supports the prevention, treatment and control of epidemic, endemic, occupational and other diseases. This right is promoted by the Amendment Regulation through the early detection of lung disease.

The Amendment Regulation requires the SSE to arrange a health surveillance report with an appropriate doctor. The Amendment Regulation will change the definition of an appropriate doctor by removing the requirement for the doctor to have attained a specific qualification in occupational medicine. Statutory guidance supporting the regulation will require SSEs to use the register of providers to carry out functions under the Coal Mine Workers' Health Scheme. By providing that only doctors who have particular skills and experience can conduct these medical examinations will limit the right to access these health services.

- (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 register of approved providers contains doctors, spirometry practices and X-ray imaging practices. The accreditation system for service providers includes standards and experience that they must meet on entry and on an ongoing basis. Not all medical providers across Australia are registered, as many do not meet these standards. There are currently nearly 280 doctors registered with the department under the Coal Mine Workers' Health

Scheme. This includes supervising doctors and examining medical officers. As a result, some workers may have to travel to their nearest medical provider that is able to undertake the relevant medical examination.

The purpose of the limitation on the right of access to health services is to ensure that workers are examined by suitably qualified and experienced doctors to ensure appropriate detection of abnormalities or changes in lung functions that may lead to a diagnosis of lung disease. The elements of availability and accessibility are balanced against the elements of acceptability and adequacy.

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

The limitation on the right of access to health services is to ensure that workers in mineral mines and quarries undertake regular respiratory health surveillance performed by specialist doctors who have relevant training and experience to identify lung disease early. Early detection enables workers, SSEs and employers to manage ongoing exposure and prevent progression of the disease.

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

The amendments are the least restrictive way of achieving the policy intent of ensuring that workers in mineral mines and quarries undertake regular respiratory health surveillance performed by expert doctors who have the relevant skills to identify lung disease early.

The recommendations by the Monash Review highlighted the importance of the qualification and experience of service providers. The department has developed an accreditation and audit process to improve the quality of assessments and examinations undertaken by service providers. The department will recommend that SSEs use the list of medical providers registered under the Coal Mine Workers' Health Scheme to undertake the medical examinations. The list of medical providers is published on the Queensland Government's website. This will reduce the availability and access, however it will improve the quality of service provided.

The department is implementing a new mobile health service that will provide end-to-end respiratory health surveillance across regional Queensland. The mobile health service will frequently visit small-scale mining regions to allow workers to access these services without travelling to major regional centres. In addition, employers will be required to bear the costs so that workers can access these services.

(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

Any potential impact on the right of access to health services is outweighed by the benefits to the worker, SSE and wider community in ensuring that the medical examinations are undertaken by medical providers with the necessary skills and experience to be able to identify early signs of respiratory disease.

(f) any other relevant factors

Nil.

## **Conclusion**

I consider that the Mining Safety and Health Legislation (Health Surveillance) Amendment Regulation 2020 is compatible with the *Human Rights Act 2019* because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

**DR ANTHONY LYNHAM**  
MINISTER FOR NATURAL RESOURCES, MINES AND ENERGY

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