

Public Health and Wellbeing Regulations Sunset Review regulatory impact statement

Chapter 9: Closed court orders for prescribed diseases

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The following chapter is an extract of the regulatory impact statement for the proposed Public Health and Wellbeing Regulations (2019).

Information on infringements, consultation, implementation, evaluation and the exposure draft regulations are contained in the full regulatory impact statement available on the [Engage Victoria website](https://engage.vic.gov.au) <<https://engage.vic.gov.au>>.

This extract was prepared to assist stakeholders who access the report by accessing a specific category on the Engage website.

Introduction (and invitation to comment)

Overview

The Public Health and Wellbeing Regulations 2009 (the current regulations) were made under the *Public Health and Wellbeing Act 2008* (the Act) and are due to sunset on 15 December 2019. New regulations are needed to replace them.

The remaking process provides an opportunity to revisit whether regulations are still needed and, if so, whether there are ways to improve them.

Public health regulations provide a framework for businesses, councils and individuals to protect the health and wellbeing of Victorians. Understanding how these regulations, and any proposed changes, will impact on Victorian business and the Victorian community is critical to the effective operation of the regulatory framework.

The current regulations include several regulatory areas, and the subject matter varies widely. In some ways these regulatory areas are distinct in their nature; however, their overall objective gives effect to the Public Health and Wellbeing Act.

To the extent that the regulatory areas are different, the department consulted key stakeholders to ensure any issues were understood and the impact of proposed solutions would be acceptable. This preliminary consultation has informed the proposed regulations and a summary is provided in the 'Consultation' chapter.

Purpose and objective

Victorians enjoy one of the highest standards of health and wellbeing in the developed world. This could not be achieved without laws and regulations that protect and promote public health and wellbeing.

The Act

The current regulations were made under the Public Health and Wellbeing Act. The purpose of the Act is to provide a legislative framework that promotes and protects public health and wellbeing in Victoria.

The state has a significant role in promoting and protecting the public health and wellbeing of Victorians.

Public health and wellbeing includes the absence of disease, illness, injury, disability or premature death and the collective state of public health and wellbeing. Public health interventions are one of the ways in which the public health and wellbeing can be improved and inequalities reduced.

The regulations

As set out in the Public Health and Wellbeing Act, the aim of the regulations is to achieve the highest attainable standard of public health and to prevent disease and illness while minimising costs for regulated industries.

Public health regulations provide a framework for businesses, councils and individuals in the practical application of the Act.

The regulatory impact statement

The purpose of this regulatory impact statement is to provide information and analysis to review how these regulations, and any proposed changes, will affect Victorian business and the Victorian community and contribute to the effective operation of the regulatory framework for public health.

The current regulations are due to expire on 15 December 2019. New regulations are needed to replace them.

Preparation of the new regulations

Before new regulations are made, the *Subordinate Legislation Act 1994* requires completion of the following four steps shown in Figure 1.

Figure 1: The four steps of making new regulations



Preliminary consultation

The department undertook preliminary consultation with key stakeholders to inform development of the proposed regulations. The proposed regulations address a range of matters for giving effect to the Act and therefore different stakeholders were engaged on different matters.

A summary of the preliminary consultation that has occurred is provided in the 'Consultation' chapter of this regulatory impact statement.

Public consultation: regulatory impact statement, evaluation and implementation

This regulatory impact statement has been prepared to meet the requirements of the Subordinate Legislation Act, enabling public consultation on the proposed regulations. The regulatory impact statement presents the range of matters addressed in the proposed regulations in separate chapters. Each chapter includes the regulatory objective for the matters addressed in the chapter, an assessment of the costs and benefits of the proposed regulations and possible alternatives.

In most cases the regulatory impact statement considered and analysed three regulatory options: to remove all regulation, to remake the current regulations without change, or to strengthen the requirements set out in the current regulations. The extent of the analysis of the regulatory options varies but is consistent with the need for regulatory change. In most cases the recommended option for each regulatory area is to strengthen the current regulations.

Each of the regulatory areas included within the regulatory impact statement has a specific implementation plan that will support awareness and understanding of any changes, preparedness and compliance. Information about implementing the proposed regulations can be found in the 'Implementation' chapter.

The proposed regulations will operate for up to 10 years. Evaluation has a key role in ensuring the intended improvements of the proposed regulations (appropriately effective and proportionate) are borne out and align with government objectives on an ongoing basis. Each of the regulatory areas included within the regulatory impact statement has a specific evaluation plan. Information about the evaluation, including public consultation, can be found at the end of the regulatory impact statement.

The proposed regulations are included as an attachment to this document.

Consideration of submissions

Public comments and submissions will be considered before the new regulations are made.

Final decision

The decision to make or not to make the proposed regulations will be informed by the public comments and submissions received. Notice of the decision will be published as soon as practicable after the decision has been made.

Small business impact and competition assessment

Small businesses may disproportionately experience the impacts from regulatory requirements for a range of reasons, including relatively limited resources to interpret compliance requirements or to keep pace with regulatory changes, and the cumulative effect of different requirements.

Most of the proposed regulations propose simplified and streamlined regulatory definitions and requirements compared with the current regulations, particularly where stakeholder feedback has raised issues about ambiguity of the intention of regulations. Any regulatory proposal needs to be scrutinised carefully to assess whether it is having an adverse impact on the ability of firms or individuals to enter and participate in the market. In line with the *Victorian guide to regulation*, new legislation (both primary and subordinate) needs to demonstrate that it will not restrict competition, unless benefits of the restriction outweigh the costs and the objectives of the legislation can only be achieved by restricting competition.

In instances where restrictions on competition have been identified, the benefits of the restriction outweigh the costs and the objectives of the legislation can only be achieved by restricting competition. For example, the registration of a premises by local government for the purposes of infection control standards creates an additional cost for starting a health and beauty service business. However, this cost is offset by the reduced risk of disease in the community and the reduced risk of an infectious disease outbreak.

Structure of the regulatory impact statement and the proposed regulations

This regulatory impact statement and the proposed regulations have grouped the regulations according to either how the regulations are administered or the regulation's purpose in the Act. These are broadly grouped into:

- regulations administered by councils
- regulations administered by the department
- regulations related to managing and controlling infectious diseases, micro-organisms and medical conditions
- other regulations.

Regulations administered by councils

- Vector-borne infectious disease control
- Registered premises – infection control
- Aquatic facilities

Regulations administered by the Secretary to the Department of Health and Human Services

- Cooling tower systems

- Legionella risks in certain premises (water delivery systems)
- Pest control

Management and control of infectious diseases, micro-organisms and medical conditions

- Notifications of infectious diseases, micro-organisms and medical conditions
- Closed court orders for prescribed diseases
- Immunisation and exclusions – schools and childcare
- Escort agencies providing information to sex workers and clients

Other regulatory provisions

- Prescribed senior officers (Chief Health Officer delegations)
- Tissue donations
- Consultative councils.

What isn't included in this regulatory impact statement

The Public Health and Wellbeing Act

The Public Health and Wellbeing Act is the legislation under which these regulations are made. The matters that can be set out in the regulations are confined to what is required under the Act. The requirements under the Act are not the subject of this review, only the details set out in the regulations. During the process of the review and consultation it is likely that potential improvements to the Act may be identified, but that is not the focus of this regulatory impact statement.

Public Health and Wellbeing Regulations relating to prescribed accommodation

Regulations relating to prescribed accommodation will not be considered within this regulatory impact statement (rr. 13 to 27). Separate new regulations relating to prescribed accommodation will be made in 2020. In the interim, the operation of the prescribed accommodation regulations will be extended in their current form for 12 months to allow further time for review and consultation.

The extension of the prescribed accommodation regulations provides an opportunity to separate regulations relating to prescribed accommodation from the other regulations made under the *Public Health and Wellbeing Act 2008*. It is intended that the extended prescribed accommodation provisions will be contained in the renamed 'Public Health and Wellbeing (Prescribed Accommodation) Regulations 2009' and will operate separately from the proposed Public Health and Wellbeing Regulations 2019.

Public Health and Wellbeing Regulations relating to HIV testing

The Public Health and Wellbeing Act prescribes special requirements for HIV testing and these requirements are included in the 2009 regulations. The need to review and modernise these requirements is an issue that a range of sector stakeholders have been raising for some years. Overwhelmingly, the sector has supported a repeal of relevant sections of the Act relating to pre and post HIV testing. The Victorian Parliament recently passed the Public Health and Wellbeing Bill 2019 to repeal the HIV testing specific provisions (ss. 131 and 132) on the basis that they stigmatise people with HIV and are outdated. As a result, the prescribed regulations will not need to be made.

Invitation to comment

In accordance with the *Victorian guide to regulation*, the Victorian Government seeks to ensure that proposed regulations are well-targeted, effective and appropriate, and impose the lowest possible burden on Victorian businesses and the community.

The regulatory impact statement process involves assessing regulatory proposals and allows members of the community to comment on proposed regulations before they are finalised. Such public input provides valuable information and perspectives and improves the overall quality of regulations.

The Public Health and Wellbeing Regulations 2019 (the proposed regulations) will replace the Public Health and Wellbeing Regulations 2009 (the current regulations). A copy of the proposed regulations is published with this regulatory impact statement.

Public comment is invited on the regulatory impact statement and the proposed regulations.

The consultation period is 60 days. Please note that all comments and submissions received will be treated as public documents.

Submission deadline

Comments and submissions should be received by the Department of Health and Human Services no later than 5.00 pm, Monday 30 September 2019.

How to make a submission

Preferred method

The [Engage Victoria website](https://engage.vic.gov.au) <https://engage.vic.gov.au> is the preferred method for receiving submissions. The website includes specific questions for each regulatory area and allows for additional feedback to be provided.

Email

If you are unable to use the preferred method above, submissions can be received by [emailing the department](mailto:phwa.enquiries@dhhs.vic.gov.au) <phwa.enquiries@dhhs.vic.gov.au>.

Post

If you are unable to use the preferred method above, submissions can be received by post marked 'Submission to the Review of the Public Health and Wellbeing Regulations 2009' and addressed to:

Chief Health Officer
Regulation, Health Protection & Emergency Management
Department of Health and Human Services
GPO Box 4057
Melbourne VIC 3001

Where can I obtain copies of this regulatory impact statement and the proposed regulations?

Copies of this regulatory impact statement and the proposed regulations can be obtained from the [Engage Victoria website](https://engage.vic.gov.au) <https://engage.vic.gov.au>.

How can I be updated on the progress of the review?

The [Engage Victoria website](https://engage.vic.gov.au) <https://engage.vic.gov.au> enables you to register to receive updates on the progress of the review of the current regulations.

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Chapter 9: Closed court orders for prescribed diseases

Problem analysis

The regulations enable closed court orders (that is, suppression of a person's identity) for those who might be stigmatised if it becomes public that they have a particular disease.

Certain diseases are associated with stigma and discrimination, which can then result in poor physical and mental health outcomes for those affected. Stigma may cause affected people to purposefully avoid situations where their diagnosis may be revealed. Such situations may include legal proceedings that relate to their diagnosis, such as medical negligence claims where the alleged negligence resulted in infection. As a result, stigma may create a barrier to people accessing the justice system due to fears that their diagnosis will be revealed.

Closed court orders are made by Victorian courts or tribunals to protect the privacy of individuals living with either human immunodeficiency virus (HIV) or other prescribed (infectious) diseases from adverse social and economic consequences that may result from disclosing their diagnosis. HIV is provided for under the *Public Health and Wellbeing Act 2008*, and the only disease prescribed by the regulations is hepatitis C.

One of several policy priorities under the *Victorian hepatitis C strategy 2016–2020* is to address stigmatisation and discrimination associated with hepatitis C in the community. The strategy recognises the right to privacy and that stigma may prevent people with hepatitis C from making legitimate complaints about care or treatment received, or about discrimination experienced at places such as work. Closed court orders can reduce the barrier for people living with hepatitis C to access complaint systems and allow these people to address concerns about their healthcare treatment or other rights such as discrimination or claims for damages due to negligence.

Closed court orders for hepatitis C were used during a negligence case against a medical practitioner where approximately 50 women were infected with hepatitis C. In this case, the judge made orders under both the *Public Health and Wellbeing Act* and the *Supreme Court Act 1986* (the previous form of the provisions now included in the *Open Courts Act 2013*).

Objective of the regulations

The objective of the regulations is to protect people with hepatitis C, or other prescribed diseases, from having their identity and diagnosis publicly disclosed and enable them to pursue legal action pertaining to their diagnosis without fear of stigmatisation or discrimination that can be associated with hepatitis C (or other prescribed diseases).

Requirements of the regulations

The *Public Health and Wellbeing Act* allows for a court or tribunal to order that the identify of a person with a prescribed disease is kept private, and fines apply to those who contravene this order.

The regulations prescribe the diseases the Act applies to. For the purposes of s. 133 of the Act, hepatitis C is a prescribed disease.

Options

- Option 1: Retain the current regulations without changes
- Option 2: Amend some aspects of the current regulations
- Option 3: Remove or reduce the requirements of the current regulations

Option 1: Retain the current regulations without changes

Maintain hepatitis C as a prescribed disease

To evaluate the options to remove, maintain or expand the diseases included in the regulations, it is necessary to consider both of the essential conditions for an order in the Act:

- social and economic consequences – there must be adverse social or economic consequences for an individual because of disclosure
- prejudice to the administration of justice – the consequences from disclosure may deter an individual from either initiating (or defending) a legal proceeding.

While there are other examples of stigmatised infectious diseases that could satisfy the conditions above, their inclusion must be balanced with the move towards open justice (where justice is both done and seen to be done). Principles of open justice are enshrined in the Open Courts Act and promote transparency of the judicial process; they limit the settings in which suppression or closure orders can be requested. The Act stipulates that closure or suppression orders can be made:

- to prevent a real and substantial risk of prejudice to the proper administration of justice
- to protect the safety of any person
- in the case of the Victorian Civil and Administrative Tribunal (VCAT), for any reason in the interests of justice
- in other specific circumstances including those related to sexual offences, family violence or criminal proceedings involving children.

Infectious disease is another of these specific circumstances.

Frequency of use

Compared with the number of closure or suppression orders made under other legislative provisions, closed court orders under the Act are rare. Given that information about the proceedings is not public, it is difficult to review which condition the closed court order relates to, with the exception of the high-profile case mentioned previously.

However, there have been two reviews of suppression orders that provide context for the use of closed court orders under the Act. Before the Open Courts Act was enacted, a study of suppression orders made by Victorian courts over a five-year period (2008–2012) found that of the 1,501 suppression orders considered in the study, only 12 were made under the Act (one per cent of all suppression orders). It is likely that most of these orders were for HIV because hepatitis C was not prescribed until 2011.

In the 2016 review of the Open Courts Act, the majority of court orders made under other legislation between 2014 and 2016 were made under the *Serious Sex Offenders (Detention and Supervision) Act 2009* or the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. Only one order was made under the Public Health and Wellbeing Act in relation to an infectious disease diagnosis.

In summary, orders under the Act for closed courts are not often made. Based on data above for the 2008–2012 and 2014–16 periods, only 13 closed court orders were issued under the Act. Compared

with other types of closure or suppression orders, this is infrequent; however, relative frequency does not reduce the importance of these provisions for people engaged in the legal action involved.

Additional protections not available from general provisions

A range of protections are available to people living with hepatitis C who wish to make a formal complaint within a community or a healthcare setting. For example, confidentiality applies to any health condition and is commonly used in healthcare complaint systems.

For example, if a person makes a complaint against a registered health practitioner and the matter proceeds to VCAT for determination, the person's health information remains confidential. VCAT decisions or appeals use pseudonyms and other anonymising methods to protect the confidentiality of notifying parties or patients involved.

However, where a person brings a legal proceeding such as a negligence claim to a court, the individuals are named as plaintiffs and are identifiable. Closed court orders can be used if justified in the circumstances.

Relative to seeking an order under the general processes of the Open Courts Act, an order under the Public Health and Wellbeing Act is based on specific grounds (social or economic consequences of disclosure) that are linked to hepatitis C stigma. 'Social and economic consequences' has been given a wide meaning in the context of the Public Health and Wellbeing Act and can include stigma associated with infection as well as stress, anxiety and potential for unlawful discrimination associated with possible disclosure.

This option continues the existing regulation and maintains hepatitis C as a prescribed disease for these closed court orders. In general, the existing regulations have been effective because they have been used, although infrequently, and provide additional protections to people living with hepatitis C for closed court orders.

There is now effective treatment available for hepatitis C, but this does not necessarily affect the arguments for or against maintaining hepatitis C as a prescribed disease. The reason to include hepatitis C as a prescribed disease – stigmatisation – may eventually be alleviated by the availability of treatment in the future. While stigmatisation persists, the rationale for including hepatitis C remains.

Option 2: Amend some aspects of the current regulations

Add more prescribed diseases

Disease-related stigma extends to a range of other infectious diseases – for example, hepatitis B, tuberculosis and sexually transmitted infections. Efforts to reduce stigma are often priorities in strategies for these infectious diseases as well.

Infectious disease-related stigma has been noted in relation to severe acute respiratory syndrome (SARS) and H1N1 influenza; however, these are not chronic infections and so are unlikely to have long-term social or economic consequences.

An infectious disease that could be included in the remade regulations is tuberculosis. In global terms, there is increasing recognition of tuberculosis-related stigmatisation and how it contributes to the current epidemic throughout the world. In low-incidence countries such as Australia, tuberculosis incidence is higher in population groups that are already marginalised due to homelessness, imprisonment, substance misuse or recent migration from countries with a high incidence of tuberculosis.

There is limited guidance on how courts or tribunals view tuberculosis in relation to closed court orders. An Open Courts Act order was made in 2014 for a plaintiff with tuberculosis, but this was based on multiple grounds (not specific to the stigmatisation of tuberculosis). As such, it is unclear whether it is necessary to include tuberculosis as a prescribed disease.

Option 3: Remove or reduce the current regulations

Remove hepatitis C as a prescribed disease

Removing hepatitis C orders would mean that only closed court orders under the Act relating to HIV can be considered because HIV is specified in the Act, whereas hepatitis C is prescribed by the regulations.

While these closed court orders are infrequently made compared with other closed court orders, frequency of use is not necessarily proportionate to the level of stigmatisation in the community. The fact that the orders are granted at all indicates that the adverse social or economic consequences of disclosure were sufficient for the court or tribunal to overcome the general presumption of for open justice.

Not remaking hepatitis C as a prescribed disease is inconsistent with the *Victorian hepatitis C strategy 2016–2020*. Removing this specific protection afforded to people living with hepatitis C is contrary to the efforts under the hepatitis C strategy to promote the use of complaint systems. People living with hepatitis C would still be able to apply for an order under the Open Courts Act, but the conditions for making these orders are different and may not place the same priority on the social and economic consequences of disclosure (compared with orders under the Act).

Impact analysis

This type of closed court order is a small subset of the suppression orders used by courts and tribunals in Victoria. This makes specific costs and benefits difficult to quantify.

Maintaining hepatitis C is expected to positively affect people living with the hepatitis C due to preventing the possible social or economic consequences arising from disclosure.

Removing hepatitis C from the regulations will potentially:

- *negatively* impact on the administration of justice by deterring these people from proceeding with claims (by negatively impacting on these people through possible social and economic impacts)
- *positively* impact to the principles of open justice by increasing the threshold to make a suppression court order (greater transparency of judicial proceedings).

In options 1, maintaining hepatitis C would be expected to create a positive effect on people living with prescribed diseases by reducing stigmatisation and associated social and economic impacts.

In option 2, expanding the regulations to include other stigmatised infectious diseases (such as hepatitis B) would be expected to create a positive effect on people living with prescribed diseases. However, the department does not have enough data to justify expanding the scope of the regulations at this stage to include other diseases.

Removing hepatitis C as a prescribed disease would be expected to create a negative effect on people living with hepatitis C and is inconsistent with the Victorian hepatitis C strategy.

Proposed approach

Option 1: Retain the current regulations without changes

The preferred option is to maintain the current regulations and not expand the prescribed diseases that may access the use of court suppression orders under the Public Health and Wellbeing Act. Maintaining the existing arrangements is simpler and provides certainty for stakeholders.

Accessing the full regulatory impact statement

Information on infringements, consultation, implementation, evaluation and the exposure draft regulations are contained in the full regulatory impact statement available on the [Engage Victoria website](https://engage.vic.gov.au) <https://engage.vic.gov.au>.

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Making a submission to the review

Public comment is invited on the proposed regulations and RIS. Please note that all comments and submissions received will be treated as public documents.

Comments and submissions should be received by the Department of Health and Human Services no later than **5.00 pm, Monday 30 September 2019**.

The Engage Victoria website is the preferred method for receiving submissions. Submissions can also be received by [emailing the department](mailto:phwa.enquiries@dhhs.vic.gov.au) <phwa.enquiries@dhhs.vic.gov.au>, or post, marked 'Submission to the Review of the Public Health and Wellbeing Regulations 2009' and addressed to:

Chief Health Officer
Regulation, Health Protection & Emergency Management
Department of Health and Human Services
GPO Box 4057
Melbourne VIC 3001

Copies of the RIS and proposed regulations can also be obtained from the [Engage Victoria website](https://engage.vic.gov.au) <https://engage.vic.gov.au/>.