Parliamentary Committees

Subordinate legislation tabled between 13 June 2018 and 18 September 2018

Report No. 13, 56th Parliament

Transport and Public Works Committee

October 2018

Transport and Public Works Committee

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1. Introduction

1.1 Role of the committee

The Transport and Public Works Committee is a portfolio committee established by the Legislative Assembly of Queensland on 15 February 2018. The committee's primary areas of responsibility are Transport and Main Roads, Housing, Public Works, Digital Technology and Sport.[1]

Pursuant to section 93(1) of the *Parliament of Queensland Act 2001,* the committee is responsible for examining each item of subordinate legislation within its portfolio areas and considering:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles (FLPs) to the legislation, and
- the lawfulness of the subordinate legislation.

Section 93(2)(a) of the *Parliament of Queensland Act 2001* confers responsibility on the committee to monitor the content of explanatory notes in its portfolio areas to ensure they comply with part 4 of the *Legislative Standards Act 1992*.

1.2 Aim of this report

This report advises on subordinate legislation examined and, where applicable, presents any concerns the committee has identified in respect of subordinate legislation tabled between 13 June 2018 and 18 September 2018.

1.3 Subordinate legislation examined

SL No	Subordinate Legislation	Tabled Date	Disallowance Date*
076	Transport Operations (Road Use Management—Vehicle Registration) (Heavy Vehicles) Amendment Regulation 2018	21 August 2018	1 November 2018
089	Heavy Vehicle National Legislation Amendment Regulation 2018	21 August 2018	1 November 2018
090	Heavy Vehicle (Registration) National Regulation	21 August 2018	1 November 2018
095	Housing and Public Works Legislation (Fees) Amendment Regulation 2018	21 August 2018	1 November 2018
105	Transport Infrastructure (Dangerous Goods by Rail) Regulation 2018	21 August 2018	1 November 2018
106	Transport Operations (Marine Pollution) Regulation 2018	21 August 2018	1 November 2018
107	Transport Operations (Road Use Management – Dangerous Goods) Regulation 2018	21 August 2018	1 November 2018
110	Building and Other Legislation (Cladding) Amendment Regulation 2018	21 August 2018	1 November 2018
112	Transport and Other Legislation Amendment (Postponement) Regulation 2018	21 August 2018	1 November 2018

[1] Schedule 6 – Portfolio Committees, *Standing Rules and Orders of the Legislative Assembly* as amended on 15 Feb 2018.

SL No	Subordinate Legislation	Tabled Date	Disallowance Date*
119	Transport Operations (Passenger Transport) Regulation 2018	21 August 2018	1 November 2018
136	Proclamation made under the *Housing Legislation (Building Better Futures) Amendment Act 2017*	4 September 2018	15 November 2018
137	Residential Services (Accreditation) Regulation 2018	4 September 2018	15 November 2018
138	Queensland Building and Construction Commission Regulation 2018	4 September 2018	15 November 2018
142	Proclamation made under the *Heavy Vehicle National Law and Other Legislation Amendment Act 2016* (commencing remaining provisions)	18 September 2018	6 December 2018
143	Proclamation made under the *Heavy Vehicle National Law and Other Legislation Amendment Act 2018* (commencing certain provisions)	18 September 2018	6 December 2018
144	Transport Legislation Amendment Regulation (No. 2) 2018	18 September 2018	6 December 2018

*Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. These dates are subject to change.

1.4 Recommendations

Recommendation 1

The Transport and Public Works Committee recommends that the Legislative Assembly notes the contents of this report.

2. Subordinate legislation examined

2.1 Transport Operations (Road Use Management—Vehicle Registration) (Heavy Vehicles) Amendment Regulation 2018 (SL 076)

The objective of the regulation is to amend the Transport Operations (Road Use Management – Vehicle Registration) Regulation 2010 to:

- allow the chief executive to issue a set of national heavy vehicle number plates for the nationally-agreed fee of $25.00
- recognise that national heavy vehicle number plates can remain attached to vehicles transferring registration to and from Queensland
- provide a plate fee exemption for the initial issue of heavy vehicle number plates to vehicles transitioning registration from the Federal Interstate Registration Scheme to Queensland
- remove the requirements for the chief executive to issue heavy vehicle registration labels, and for operators to display registration labels on their vehicles
- allow replacement standard number plates to be obtained without payment of a fee if the combination of letters and numbers on a number plate has been unlawfully copied.

The amendment regulation also amends the State Penalties Enforcement Regulation 2014 to reflect the removal of certain offence provisions (about heavy vehicle registration labels) from the vehicle registration regulation.

Consultation

The following consultation was undertaken on the amendments:

> *Consultation indicated that a national registration scheme for heavy vehicles is supported by key stakeholders. These stakeholders include the Australian Trucking Association, the Australian Livestock Transporters Association, NatRoads, the Australian Logistics Council, the National Farmers' Federation, the Australian Local Government Association and the Transport Workers Union. These groups represent the interests of heavy vehicle operators in Queensland.*
>
> *The proposed amendments regarding number plates and registration labels for heavy vehicles will contribute to the ongoing program of delivery for the national registration scheme.*
>
> *The National Heavy Vehicle Regulator and participating jurisdictions have agreed for the regulator to lead the development of a national engagement and communications plan about the introduction of the national heavy vehicle registration scheme. This will ensure nationally consistent messaging and a co-ordinated approach across jurisdictions. The communications plan will include information about the new national heavy vehicle number plates and the removal of the requirement to display registration labels. The communications plan will target industry, insurers, heavy vehicle operators, toll companies and local governments.*
>
> *The Queensland Police Service was consulted in relation to the proposal to replace number plates for victims of number plate cloning at no charge. It is supportive of the amendments.*[2]

Committee comment

The committee is satisfied the Transport Operations (Road Use Management—Vehicle Registration) (Heavy Vehicles) Amendment Regulation 2018 does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

[2] Explanatory notes, p 4.

2.2 Heavy Vehicle National Legislation Amendment Regulation 2018 (SL 089)

The objective of the regulation is to make a range of nationally agreed minor or technical amendments to the following Heavy Vehicle National Law regulations:

- Heavy Vehicle (General) National Regulation
- Heavy Vehicle (Mass, Dimension and Loading) National Regulation
- Heavy Vehicle (Vehicle Standards) National Regulation.

The explanatory notes advise that amendments will help clarify existing provisions and make the regulations more consistent, facilitate better understanding and compliance with legislative requirements, and contribute to the ongoing safe management of heavy vehicles.[3]

Consultation

The following consultation was undertaken on the amendments:

> *Maintenance of the HVNL is the joint responsibility of the NTC and NHVR, in consultation with jurisdictions and heavy vehicle industry associations, through the HVNL-MAG* [HVNL Maintenance Advisory Group].
>
> *Membership of the HNVL-MAG includes the NTC and NHVR, all state and territory road transport authorities and peak industry associations, including the Australian Trucking Association, the Australian Livestock and Rural Transporters Association, and the Bus Industry Confederation, as well as the Local Government Association of Queensland, and the Australia New Zealand Policing Advisory Agency.*
>
> *Stakeholders provided their support during consultation and development of the amendments during the HVNL-MAG process.*
>
> *The HVNL-MAG meets prior to Transport and Infrastructure Senior Officials' Committee meetings, which then approves HVNL-MAG amendments going forward for Council consideration.*
>
> *A public consultation process on the amendments was also undertaken by the NTC. Draft versions of the amendment regulations were posted to both the NTC's Publications and Current Projects/Vehicle Standards Maintenance webpages in December 2016, along with a paper entitled* Light and Heavy Vehicle Standards Explanation of Amendments 2016*. The public consultation period was open until 3 February 2017.*[4]

Committee comment

The committee notes that at clause 9, the fee increases from $27 to $31 – a 14.8 per cent increase. This relates to the fee for an application to add vehicles or change vehicles under either the maintenance management accreditation or mass management accreditation by an operator of a heavy vehicle.

The committee also notes that, while the government indexation policy sets out a 3.5 per cent maximum for annual fee increases, the Queensland Treasury *Principles for Fees and Charges* provide an exception (at 4.2) for 'nationally agreed fees (including heavy vehicle registration)'.

The committee is satisfied the Heavy Vehicle National Legislation Amendment Regulation 2018 does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

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[3] Explanatory Notes, p 2.

[4] Explanatory notes, p 4.

2.3 Heavy Vehicle (Registration) National Regulation (SL 090)

The objective of the regulation is to prescribe the information to be contained in the dataset of the database of heavy vehicles, made under section 686A of the *Heavy Vehicles National Law Act 2012*.

The information to be set out in the dataset includes:

- information about registered heavy vehicles
- information about registered operators of heavy vehicles
- information about registered heavy vehicles to be given to the National Heavy Vehicle Regulator ('NHVR')
- information about registered operators of heavy vehicles to be given to the NHVR
- information about vehicle defect notices
- changes to information in the database
- access to information in the database.

The explanatory notes advised that the regulation 'has undergone extensive consultation through the NTC's annual legislative maintenance process, including meetings of the HVNL-MAG'.[5]

Committee comment

In regards to the sharing of information and the authority to do so, it is noted that the 'registration authority' is defined in section 525 of the Act, as 'the authority responsible for the registration of heavy vehicles'. The 'regulator' is the National Heavy Vehicle Regulator under section 656 of the Act.

Section 686A of the Act provides for the creation of a database of heavy vehicles and allows the Regulator to:

- use information given by other Australian jurisdictions, and
- require a registration authority to give prescribed information.

The regulation sets out the prescribed information.

Under section 686B of the Act, the regulator may give information from the database to a registration authority or a police force. Section 686A specifically allows for the requiring of information from the registration authority. The provision also specifically contemplates the regulations would prescribe the information to be set out in the database.

The committee is therefore satisfied the Heavy Vehicle (Registration) National Regulation does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.4 Housing and Public Works Legislation (Fees) Amendment Regulation 2018 (SL 095)

The objective of the regulation is to index fees prescribed in the following regulations by 3.5 per cent in accordance with the current government indexation policy:

- Architects Regulation 2003
- Building Regulation 2006
- Building and Construction Industry Payments Regulation 2004
- Housing Regulation 2015
- Plumbing and Drainage Regulation 2003

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5 Explanatory notes, p 3.

- Professional Engineers Regulation 2003
- Queensland Building and Construction Commission Regulation 2003
- Residential Services (Accreditation) Regulation 2002
- Retirement Villages Regulation 2010.

Committee comment

The committee notes that there are some instances where the fees exceed the policy rate of 3.5 per cent (for example, 4 per cent, 3.8 per cent, 3.6 per cent, 3.75 per cent). However, these exceedances are not great and can be explained as being due to rounding of the fee.

The committee is therefore satisfied the Housing and Public Works Legislation (Fees) Amendment Regulation 2018 does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.5 Transport Infrastructure (Dangerous Goods by Rail) Regulation 2018 (SL 105)

The objectives of the regulation are to:

- prescribe the obligations of persons involved in the transport of dangerous goods by rail
- reduce as far as practicable the risks arising from the transport of dangerous goods by rail
- give effect to the standards, requirements and procedures of the Australian code for the Transport of Dangerous Goods by Road and Rail (the ADG Code) as far as they apply to the transport of dangerous goods by rail, and
- promote consistency between the standards, requirements and procedures applying to the transport of dangerous goods by rail and those applying to other modes of transport.

This regulation repeals and replaces the Transport Infrastructure (Dangerous Goods by Rail) Regulation 2008 (2008 regulation).

This regulation also incorporates the fifth package of amendments to the national model legislation approved by the Transport and Infrastructure Council in May 2018.

The regulation is substantially the same as the 2008 regulation, apart from subdivisions 5-8 of Part 20.

Consultation

The following consultation was undertaken on the regulation:

> *Consultation on the Regulation has been undertaken with rail transport operators accredited in Queensland, private siding owners and key industry stakeholders including Queensland Rail, the Australian Rail Track Corporation, the Australasian Railway Association, and the Australian Sugar Milling Council.*
>
> *The 5th package of amendments to the model legislation was developed by the NTC in consultation with each jurisdiction and industry. The NTC also released the 5th package of amendments for public comment and submissions in January and February 2018. In addition to the national consultation undertaken by the NTC, the Department of Transport and Main Roads also notified the key industry stakeholders listed above of the 5th package of amendments and invited those stakeholders to provide any comments or submissions on the amendments to either the Department or the NTC.*
>
> *No submissions from industry or the broader public were received by the Department.*

> *The Queensland Productivity Commission reviewed a Preliminary Impact Assessment of the remake of the 2008 Regulation and advised that no further regulatory analysis was required. The Commission has also advised that the 5th package of amendments is unlikely to result in significant adverse impacts on stakeholders and is excluded from further regulatory impact assessment under* The Queensland Government Guide to Better Regulation*.*[6]

Potential FLP issue

Section 4(5)(e) *Legislative Standards Act 1992 – whether the subordinate legislation has sufficient regard to the institution of Parliament – whether it allows the sub-delegation of power delegated by an Act only in appropriate cases and to appropriate persons and if authorised by an Act.*

The amendment notice replaces the 2008 regulation, which incorporated the Australian Code for the Transport of Dangerous Goods by Road and Rail (the ADG Code) and the notice also incorporates the fifth package of amendments to the national model legislation.

This potential FLP issue relates to the ADG Code not being contained in the subordinate legislation in its entirety, and as such its content does not come to the attention of the Legislative Assembly. The question arises regarding whether the regulation therefore has sufficient regard to the institution of Parliament. Whether subordinate legislation has sufficient regard to the institution of parliament depends on whether the subordinate legislation allows the sub-delegation of a power delegated by an Act only:

- if authorised by an Act
- in appropriate cases and to appropriate persons.[7]

Part of the rationale for this issue is to ensure sufficient parliamentary scrutiny of a delegate legislative power.[8]

The significance of dealing with such matters other than by subordinate legislation is that, since the relevant document is not 'subordinate legislation', it is not subject to the tabling and disallowance provisions in Part 6 of the *Statutory Instruments Act 1992.*

Where there is, incorporated into the legislative framework of the State, an extrinsic document (such as the code) that is not reproduced in full in subordinate legislation, and where changes to that document can be made without the content of those changes coming to the attention of the Legislative Assembly, it may be argued that the document (and the process by which it is incorporated into the legislative framework) has insufficient regard to the institution of Parliament.

Similarly, while a future amending notice will alert the Legislative Assembly that there has been an amendment to the document (e.g. if a future notice states that it is replacing the ADG code), it will not contain information about the changes that have been made.

Authorised by an Act

Section 442 of the *Transport Infrastructure Act 1994* provides that a regulation may make provision about dangerous goods and the transport of dangerous goods by rail. It also states that a regulation may make a provision for the recognition of laws of other jurisdictions relating to transporting dangerous goods by rail, things done under those law and giving effect to those things. In this regard, the sub-delegation of a power is authorised by the Act.

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6 Explanatory notes, pp 7-8.
7 Section 4(5)(e) of the *Legislative Standards Act 1992*
8 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook,* p170

Appropriate cases and to appropriate persons

In considering whether it was appropriate for matters to be dealt with by an instrument that was not subordinate legislation, and therefore not subject to parliamentary scrutiny, committees have considered the importance of the subject dealt with, the commercial or technical nature of the subject-matter, and the practicality or otherwise of including those matters entirely in subordinate legislation.[9]

As the ADG code includes detailed information and is 1267 pages long, the committee considers that it is appropriate for practical reasons for such detailed matters to be set out in a document other than subordinate legislation.

Availability of document and parliamentary scrutiny

Concerns about sub-delegation are reduced where the document in question could only be incorporated under subordinate legislation (which could be disallowed) and was attached to the subordinate legislation, or required to be tabled with the subordinate legislation and made available for inspection.

The ADG code is readily available on the National Transport Commission website.

The explanatory notes provide:

> *The Regulation references the ADG Code, which contains the detailed and technical requirements for classifying and transporting dangerous goods by road and rail… The technical detail contained in the ADG Code would be inappropriate to incorporate into the Regulation and would have expanded the size of the Regulation considerably. Stakeholders support the use of the ADG Code as they have a high level of understanding and familiarity with it. The ADG Code has also been adopted in each jurisdiction in Australia and is developed and maintained by the NTC in consultation with each jurisdiction and industry. The latest version of the ADG Code, and any proposed amendments to the ADG Code, are also readily accessible by the public on the NTC's website. For these reasons, it is believed that referencing the ADG Code in the Registration is appropriate and adequately takes into account fundamental legislative principles.*[10]

In these circumstances, the committee is satisfied that the notice has sufficient regard to the institution of Parliament.

Committee comment

The committee is satisfied the Transport Infrastructure (Dangerous Goods by Rail) Regulation 2018 does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.6 Transport Operations (Marine Pollution) Regulation 2018 (SL 106)

The objectives of the regulation are to:

- protect Queensland's marine and coastal environment by minimising discharges of ship-sourced pollutants into coastal waters
- give effect to relevant provisions of the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL)

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[9] See the Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, pp 155-156, and Scrutiny of Legislation Committee, *Alert Digest 1999/04,* p.10, paras 1.65-1.67

[10] Explanatory notes, p 7.

- impose obligations on ship owners and masters to exercise responsibility for the marine environment by ensuring the containment of all specified pollutants on board the ship and their proper disposal
- ensure appropriate monitoring and compliance and provide flexibility to ship owners and masters for achieving compliance with the Regulation
- provide for severe penalties on persons who pollute Queensland's marine and coastal environment in contravention of the Regulation.

The regulation replaces the *Transport Operations (Marine Pollution) Regulation 2008* ('the 2008 regulation') which automatically expired on 1 September 2018.

The regulation will continue to regulate the matters regulated under the 2008 regulation. The regulation also incorporates amendments that reflect changes to MARPOL and to Commonwealth legislation, and some minor amendments to reflect current drafting practices.

The department provided further information regarding the purpose of the Act and its relationship with the MARPOL Convention:

> *The overall purpose of the* Transport Operations (Marine Pollution) Act 1995 *(the Act) and the Regulation is to protect Queensland's marine and coastal environments by minimising deliberate and negligent discharges of ship-sourced pollutants into coastal waters. The Act and Regulation give effect to the International Convention for the* Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 *(MARPOL Convention) in Queensland coastal waters.*
>
> *The MARPOL Convention is in force in 155 countries, including Australia, and is regularly amended by the United Nation's International Maritime Organization (IMO) to take into account improvements in shipboard technologies and ship construction, as well as the need for tighter controls of discharges and emissions to meet community expectations.*
>
> *The MARPOL Convention is given effect nationally by the* Commonwealth Protection of the Sea (Prevention of Pollution from Ships) Act 1983 *and* Navigation Act 2012. *The Commonwealth legislation includes 'roll back' provisions that protect the operation of complementary state and Northern Territory legislation, such as the Act and Regulations. The Commonwealth legislation is expressed not to apply to the extent that the law of a state or territory makes provision giving effect to the MARPOL Convention.*
>
> *…*
>
> *Queensland's economy and communities rely heavily on shipping. The value of Queensland's exports was $76.7 billion over the year to August 20181. In 2017-18, 8799 ships visited Queensland ports completing 20,560 movements. This volume of ship movements is expected to continue to grow in line with the projected long-term growth in the freight task. There are approximately 8599 commercial and 260, 120 recreational registered vessels in Queensland.*
>
> *...*
>
> *The protection and sustainable access to the Queensland marine environment is essential as it contributes to vital economic sectors such as trade, tourism and fishing. A clear regulatory regime for the protection of the marine environment that contains effective deterrents against the potential high cost of ship-sourced pollution is a critical part of ensuring an equitable outcome for all stakeholders.*[11]

[11] Department of Transport and Main Roads, correspondence dated 23 October 2018, pp 1, 2.

Consultation

The following consultation was undertaken on the regulation:

> *The Queensland maritime industry and community are highly adapted to the requirements for managing and mitigating potential marine pollution from ships under both MARPOL and relevant Commonwealth legislation. This legislative framework has been in place in Australia for over 30 years. As a result, understanding of, and compliance with, the requirements under this Regulation are well embedded.*
>
> *Consultation on the legislative framework proposed under the Regulation was undertaken with the Australian Maritime Safety Authority and the Great Barrier Reef Marine Park Authority. Neither stakeholder raised any concerns about the proposed framework.*[12]

Potential FLP issues

1. Section 4(2)(a) *Legislative Standards Act 1992 - does the legislation have sufficient regard to the rights and liberties of individuals? Proportionality of penalties – are consequences of actions proportionate?*

A penalty should be proportionate to the offence. The OQPC Notebook states:

> *Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.*[13]

The regulation contains a number of penalty provisions, prescribing maximum penalties of up to 350 penalty units. [1 penalty unit = $130.55.]

According to the explanatory notes, the penalties reflect the regime under the 2008 regulation, and:

> *The high penalty levels are justifiable given the level of harm that can be caused to the marine environment and the potential impacts that offending can have on important Queensland industries such as tourism and fishing. The penalties reflect the importance of protecting and preserving Queensland's coastal waters from pollutants and serve as a deterrent to marine pollution offences. Many of the offences with high penalties relate to important record keeping requirements. Documentary offences under the Regulation are an important means of proving offences related to the discharge of pollutants under the Act.*[14]

Comment

Given the policy aims and the risks and impacts of possible harm, the committee considers that the maximum penalties are justified and proportionate to the harm that could be caused and the impact on Queensland industries.

2. Section 4(5)(c) *Legislative Standards Act 1992 - whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation … (c) contains only matter appropriate to subordinate legislation*

In considering the appropriateness of including particular offences and penalties in the subordinate legislation, it is noted that the *Transport Operations (Marine Pollution) Act 1995* contains a regulation making power in section 133. Section 133(4) specifically provides that a regulation may provide that contravention of a regulation is an offence and prescribe a maximum penalty of not more than 350 penalty units. The committee notes that the regulation adheres to this limit, prescribing up to 350 penalty units.

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[12] Explanatory notes, p 7.

[13] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook,* p 120.

[14] Explanatory notes, p 7.

The OQPC Notebook states:

> *The principal means of creating offences should always be through the Acts of Parliament rather than delegated legislation.*[15]

The former Scrutiny of Legislation Committee (SLC) adopted a formal policy on the delegation of legislative power to create offences and prescribe penalties.

The SLC accepted that legislative power to create offences and prescribe penalties may be delegated in limited circumstances, provided certain safeguards were observed:

- rights and liberties of individuals should not be affected by the delegation of the power
- the obligations imposed on a person under the delegated power be limited
- the maximum penalties generally ought not to exceed 20 penalty units.[16]

The former Agriculture, Resources and Environment Committee (AREC) considered this issue in the context of the Waste Reduction and Recycling and Other Legislation Amendment Regulation (No. 1) 2013. One effect of that regulation was that every waste disposal site operator was required to provide a waste data return detailing the amount of waste deposited, and the operation of the weighbridge, at the site. The maximum penalty for failure to provide the waste data return was 300 penalty units.

AREC reiterated the SLC's view that the principal means of creating offences should be through an Act and concluded:

> ... on the basis of this principle, it is preferable for an entire offence to be contained in an Act, and not have aspects of an offence provision prescribed by regulation. This is especially the case where breach of a provision has a significant penalty.[17]

The explanatory notes for this regulation state:

> *The Regulation contains a number provisions prescribing a maximum penalty that is considered high for subordinate legislation. These penalties reflect the regime under the 2008 Regulation and are authorised under section 133 of the Act. This section allows for penalties of up to 350 penalty units for the contravention of a regulation.*[18]

Comment

Although the provisions of section 133(4) of the Act provide authority for prescribing such high penalties within the subordinate legislation and noting that the new regulation compares with the 2008 regulation it replaces, the committee sought further clarification from the Department of Transport and Main Roads on why such high penalties are contained within the subordinate legislation and not within the Act, and whether any breach of fundamental legislative principle is justified.

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[15] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook,* pp 150-151.

[16] Policy No. 2 of 1996—AD 1996 No 4 pp 6-7 para 1.30-1.32.

[17] AREC report No 36, *Subordinate legislation tabled between 11 September and 29 October 2013* (2014) p 3. See *Principles of good legislation: OQPC guide to FLPs - The institution of Parliament - subordinate legislation*, p 15 at www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Institution_of_Parliamentsubordinate_legislation.pdf

[18] Explanatory notes, p 7.

The department advised:

> *It is essential for Queensland to continue to have robust regulation that protects our marine and coastal environment by minimising deliberate and negligent discharges of ship-sourced pollutants into coastal waters. The legislative regime governing marine pollution necessarily contains strict obligations and correspondingly high penalties for breaching these obligations. The Act imposes severe penalties that range from a maximum of 100,000 penalty units for corporations to 5000 penalty units for individuals. Offences in the Act commonly have a maximum penalty of 850 penalty units.*
>
> *The Regulation contains a number of offences that, while still very significant, are of a relatively less serious nature than those dealt with in the Act. It is in this context that penalties for some of those Regulation offences are set at 350 penalty units. These penalties reflect the penalties that existed under the 2008 Regulation and are specifically authorised by section 133 of the Act. This section allows for penalties of up to 350 penalty units for the contravention of a regulation.*
>
> *…*
>
> *The Regulation contains a number of exemptions from the discharge offences under the Act. The Act authorises a regulation to exempt ships from the discharge prohibitions. The exemptions in the Regulation reflect the exemptions that are allowed under the MARPOL Convention and many of these are technical in nature. As the MARPOL Convention is amended from time to time to reflect changes in pollution standards, ship construction, and shipboard technologies it is considered that this technical nature is more suited to a regulation.*
>
> *The Regulation is critical for providing guidance and flexibility to the maritime industry and boating community to achieve the objectives of the Act. As the MARPOL Convention regime is international in nature, the maritime industry can plan and conduct its operations with the benefit of a substantially uniform approach to minimising marine pollution. The objective is to maintain consistency with international instruments and national legislation and ensure consistency with modern environmental standards and community expectations.*
>
> *The protection of the marine environment from ship-sourced pollutants is in the interests of all stakeholders. Without regulations that can readily be updated in line with international conventions, the protection of the marine environment would be at risk and could have adverse economic and social implications for the state, particularly for the fishing and tourism industries.*[19]

Committee comment

The committee notes the department's justifications for incorporating these offences in the subordinate legislation instead of the Act, including:

- the categorising of these offences as being 'less serious in nature' compared with much higher penalty offences in the Act
- the level of harm that can be caused to the marine environment and the potential impact on Queensland industries
- the exemptions provided within the regulation that reflect the exemptions allowed under the MARPOL Convention and that these are technical in nature and amended from time to time, which is generally more appropriate for subordinate legislation.

[19] Department of Transport and Main Roads, correspondence dated 23 October 2018, pp 2-3.

Given that the Act authorises the regulation to prescribe penalties up to 350 penalty units, the aim of the Act and regulation and the need for flexibility and consistency across jurisdictions within the regulatory environment for marine pollution, the committee is satisfied the Transport Operations (Marine Pollution) Regulation 2018 does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.7 Transport Operations (Road Use Management – Dangerous Goods) Regulation 2018 (SL 107)

The objectives of the regulation are to:

- prescribe the obligations of persons involved in the transport of dangerous goods by road
- reduce as far as practicable the risks arising from the transport of dangerous goods by road
- give effect to the standards, requirements and procedures of the Australian Code for the Transport of Dangerous Goods by Road and Rail ('the ADG Code') as far as they apply to the transport of dangerous goods by road, and
- promote consistency between the standards, requirements and procedures applying to the transport of dangerous goods by road and those applying to other modes of transport.

This regulation repeals and replaces the Transport Operations (Road Use Management – Dangerous Goods) Regulation 2008, which automatically expires on 1 September 2019.

Committee comment

The committee is satisfied the Transport Operations (Road Use Management – Dangerous Goods) Regulation 2018 does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.8 Building and Other Legislation (Cladding) Amendment Regulation 2018 (SL 110)

The objectives of the regulation are to:

- determine the extent of the use of potentially combustible cladding on existing private buildings in Queensland
- raise awareness in building owners of the risks associated with potentially combustible cladding.

The Department of Housing and Public Works (DHPW) further advised:

> *The aim of the Cladding Regulation is to assist building owners to better understand the prevalence of combustible cladding on existing private buildings in Queensland. It is expected that this will encourage building owners to take any necessary action to address associated risks where combustible cladding has been identified.*
>
> *As stated in the Explanatory Notes to the Cladding Regulation, certain types of cladding can significantly contribute to the propagation of flame and facilitate rapid fire spread to other areas of a building. Unfortunately, this understanding has developed as a result of a number of building fires across the world which were exacerbated by the inclusion of cladding on the building, including the Lacrosse apartment fire in Melbourne and the Grenfell fire tragedy, where 72 persons lost their life.*[20]

[20] Department of Housing and Public Works, correspondence dated 23 October 2018, p 1.

The regulation will compel owners of buildings considered 'in scope' to complete an online checklist to identify which buildings are affected by combustible cladding. This information will ensure:

- building owners have the necessary information to make informed decisions about the fire safety risks associated with their buildings
- future policy decisions will be informed by evidence-based data to determine community need and benefits, and
- Queensland Fire and Emergency Services can operationalise resources to respond to identified high risk buildings and clusters of affected buildings.

In terms of buildings that are considered 'in scope', the explanatory notes advise:

> *The policy objectives of the* Building and Other Legislation (Cladding) Amendment Regulation 2018 *will be achieved by requiring owners of particular buildings to undertake an assessment of the material on the external walls of their building. The buildings that are captured are class 2-9 buildings (this includes a range of buildings from multi-residential to shopping centres and private health facilities) of Type A or Type B construction. Class 1 and 10 buildings, detached houses and sheds, will not be captured.*
>
> *Buildings that are in-scope are those that received a building development approval after 1 January 1994 to construct the building or to alter the external wall assembly of the building. This will result in buildings which may be older than 1 January 1994 having to undertake rectification work if an alteration has been undertaken.*[21]

Penalties of up to 165 penalty units have been set to encourage compliance. There is also provision for the ability to issue penalty infringement notices.

Penalties may apply to such actions as failing to complete each part of the checklist by the required time, failing to advise occupants of certain buildings about the existence of combustible cladding, and failure to retain documentation.

Consultation

The following consultation was undertaken on the amendments:

> *Consultation occurred with the Queensland Building and Construction Commission, Board of Professional Engineers of Queensland, Board of Architects of Queensland, Engineers Australia, Australian Institute of Building Surveyors, Master Builders Queensland, National Fire Industry Association, Construction, Forestry, Mining and General support was received for the amendments to the* Building Regulation 2006 *and the intent to understand the prevalence of potentially combustible cladding on Queensland buildings. A period of approximately 2 months from the date the Regulation is made, to commencement, has been provided for. This allows for building owners and building industry professionals to understand their obligations, provide further education to the industry and increase industry and community awareness. This additional time allows for building owners, and where necessary their agents, to prepare and comply with the Regulation.*
>
> *The Queensland Productivity Commission was consulted on the development of the regulation.*[22]

Potential FLP issues

1. Section 4(2)(a) *Legislative Standards Act 1992 - does the legislation have sufficient regard to the rights and liberties of individuals? Proportionality of penalties – are consequences of actions proportionate?*

[21] Explanatory notes, p 2.

[22] Explanatory notes, pp 3-4.

A penalty should be proportionate to the offence. The OQPC Notebook states:

> *Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.*[23]

The regulation contains a number of penalty provisions, prescribing maximum penalties of up to 165 penalty units. Most penalties are less. The maximum penalty of 165 penalty units applies to a breach of the new section 16X, requiring an owner to give Queensland Building and Construction Commission, by using an online system, a copy of each of the following documents for the owner's private building:

- a completed combustible cladding checklist
- a report … about the cladding forming part of, or attached or applied to, an external wall or another external part of the building other than the roof (a *building fire safety risk assessment*)
- a statement … about the building fire safety risk assessment (a *fire engineer statement*).

DHPW provided further advice about the level of this penalty:

> *The penalty in question applies at the final stage (Part 3) of the combustible cladding checklist process. At this point, a qualified fire engineer has:*
>
> - *determined that combustible cladding exists on the building;*
> - *assessed the extent and type of product on the building; and*
> - *identified mitigation options for a building owner.*
>
> *The clear risk identified to both person and property at Part 3 warrants the maximum penalty available under the* Building Regulation 2006 *of 165 penalty units. It is also important to note that at this final stage of the self-assessment process, the majority of buildings will have exited the process and therefore it is anticipated that only a small number of buildings will be subject to Part 3 assessment. A reasonable period of time is provided to comply with part 3 with completion required by 3 May 2021. Further a private building owner may apply under section 16X for an extension of the period to comply with Part 3 requirements. The penalty can be avoided if the requirements and timeframes are complied with.*
>
> *The application of the maximum penalty available under the Building Regulation 2006 was a deliberate decision. The high penalty reflects the significant fire safety risk faced by building occupants, the community and emergency responders to a fire event at that building. The Department of Housing and Public Works collaborated closely with other agencies and consulted with external stakeholders in the development of the Cladding Regulation, including in determining the maximum penalty units.*
>
> *As noted in your correspondence, the head of power for this penalty is at section 261 of the* Building Act 1975*. The* Building Regulation 2006 *imposes penalties for other serious building safety matters, including pool safety, false or misleading documents from a competent person in giving design I specification work or inspection help and proceeding with building work without the previous stage being certified. Penalties also apply for administrative matters such as a builder providing a notice for inspection to a building certifier and arranging building inspections.*

[23] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook,* p 120.

> *The Explanatory Notes for the Cladding Regulation noted that regard was had to, and there is consistency with, the fundamental legislative principles. This statement was made on the basis that any potential breach is justified by the safety risks posed to occupants, the community and emergency responders by the failure to identify where combustible cladding is installed.*[24]

Given the policy aims and the risks and impacts of possible harm, the committee considers that the maximum penalty being applied in this circumstance is justified and proportionate to the offence.

2. Section 4(5)(c) *Legislative Standards Act 1992 - whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation … (c) contains only matter appropriate to subordinate legislation*

Appropriateness of including particular offences and penalties in subordinate legislation.

Section 261(2)(j) of the *Building Act 1975* allows for a regulation to prescribe a penalty of up to 165 penalty units. The regulation adheres to this limit, prescribing up to 165 penalty units. [1 penalty unit = $130.55.]

Refer to the discussion regarding high levels of penalties being prescribed by regulation rather than Acts in the above consideration of the Transport Operations (Marine Pollution) Regulation 2018.

While prescribing a maximum of 165 penalty units is authorised under section 261(2)(j) of the *Building Act 1975*, the committee notes that the explanatory notes do not provide any advice regarding the reasons why the penalty is included in the subordinate legislation and not the Act. In this regard, the committee sought clarification from the Department of Housing and Public Works on why such a high penalty is contained within the subordinate legislation and not within the Act, and whether any breach of fundamental legislative principle is justified.

The department advised:

> *The Building Fire Safety Risk Assessment is an administrative process, which the Cladding Regulation enables. As an administrative process, it was determined that the procedure be contained within the* Building Regulation 2006 *rather than the* Building Act 1975*. Consequently, it was appropriate the penalties associated with this administrative process were also contained within the* Building Regulation 2006*.*
>
> *In relation to your second question about why there was no specific comment in the explanatory notes about the high penalty, upon review of the Explanatory Notes, I would agree that they may have been enhanced by including this additional clarification. I would note, as per the Director-General's response, that the Act allows for a penalty of 165 penalty units in the* Building Regulation 2006*.*[25]

Committee comment

The committee is satisfied with the response from the Department of Housing and Public Works and considers that the Building and Other Legislation (Cladding) Amendment Regulation 2018 does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.9 Transport and Other Legislation Amendment (Postponement) Regulation 2018 (SL 112)

The objective of the regulation is to postpone the automatic commencement of photo identification card provisions in the *Transport and Other Legislation Amendment Act 2017*. The amendment Act reduces the age of eligibility for an adult proof of age card from 18 to 15 years.

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[24] Department of Housing and Public Works, correspondence dated 23 October 2018, pp 1-2.

[25] Department of Housing and Public Works, email correspondence dated 25 October 2018.

By virtue of section 15DA(2) of the *Acts Interpretation Act 1954*, the postponed law would have automatically commenced on 26 August 2018 unless the commencement was postponed under subsection 15DA(3) of that act.

The Department of Transport and Main Roads has made the decision to postpone the commencement of the amendment Act to align with the introduction of a new card production service contract in 2019.

Committee comment

The committee is satisfied the Transport and Other Legislation Amendment (Postponement) Regulation 2018 does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.10 Transport Operations (Passenger Transport) Regulation 2018 (SL 119)

The objective of the regulation is to remake the Transport Operations (Passenger Transport) Regulation 2005 which expired on 31 August 2018.

The supplementary objectives are to:

- ensure passenger transport regulations are of the highest standard
- reduce the regulatory burden as much as possible without compromising law and order
- simplify passenger transport regulations so they can be better understood by the general public and applied more easily
- modernise passenger transport regulations so that they are relevant.

The explanatory notes advise that the Department of Transport and Main Roads has reviewed every provision of the 2005 regulation. A number of minor amendments were identified as part of the review, which aim to achieve both the objectives of the Act and the supplementary objectives of the statutory expiry remake.[26]

Potential FLP issues

Section 4(2)(a) *Legislative Standards Act 1992*

Section 155(2) of the *Transport Operations (Passenger Transport) Act 1994* allows for a regulation to prescribe a penalty of up to 80 penalty units.

Former committees have accepted that legislative power to create offences and prescribe penalties may be delegated in limited circumstances, provided certain safeguards were observed. This included that maximum penalties in regulations should be limited, generally, to 20 penalty units. The OQPC Notebook states:

> *The principal means of creating offences should always be through the Acts of Parliament rather than delegated legislation.*[27]

A penalty should be appropriate to the offence. The OQPC Notebook states:

> *Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.*[28]

New offences and increases in penalties – alcohol and selling, seeking business or conducting a survey, feet on seats

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26 Explanatory notes, p 2.

27 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook,* pp 150-151.

28 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook,* p 120.

The regulation introduces a new offence and increases the penalty for several offences as detailed below.

Clause 307 increases the penalty for drinking alcohol on a railway or rolling stock from 10 penalty units to 20 penalty units. The explanatory notes identify this as a potential breach of FLP as it may not have sufficient regard to the rights and liberties of individuals.

The explanatory notes also advise, however, that this increase aligns the penalties with the same offence on a regulated area. By way of justification, the explanatory notes state that this amendment will improve amenity and attractiveness of passenger transport for all users and protects other passengers from potential harm from alcohol users.[29]

Clause 248 increases the penalty for selling, seeking business, or conducting a survey on a busway, busway transport infrastructure or light rail platform from 10 penalty units to 20 penalty units. This is to align the penalty with an offence conducted on a railway or rolling stock.

The explanatory notes recognise this possible breach of fundamental legislative principle but sees it as justified:

> *… on the basis it provides consistency within legislation and across the public passenger transport network, and improves the amenity and attractiveness of public passenger transport for all users. Retaining inconsistent penalties would also result in a potential FLP breach.*[30]

Clause 233 creates a new offence of putting a person's feet on a seat or occupying more than one seat of a vehicle. This aligns with the offence of putting a person's feet on a seat of a train.

The explanatory notes state that, while a potential issue of fundamental legislative principle might arise due to a failure to have sufficient regard to the rights and liberties of an individual, the new offence is justified:

> *… as it provides a consistent approach for passenger conduct across the public passenger transport network and improves the amenity and attractiveness of public passenger transport for all users.*[31]

Committee comment

Given that the increases in penalty units (all from 10 penalty units to 20 penalty units) achieve their aim of consistency within the legislation, potentially improve the amenity of public passenger transport for all users and are within the previously acceptable maximum limit of 20 penalty units, the committee is satisfied that any breaches of fundamental legislative principles involved in the introduction of the new offence and increase in penalties are justified.

In regard to clause 233 and the offence for occupying more than one seat of a vehicle, the committee sought further information regarding how this applies to an obese passenger. The department advised:

> *Section 233 was introduced in response to growing internal reports of anti-social behaviour on public transport services, in particular light rail services. Feet on seats reduces passenger amenity, vehicle cleanliness and accessibility to services for other passengers. The wording of the offence aligns with section 5(3) of the Transport Infrastructure (Rail) Regulation 2017 (Rail Regulation) which makes it an offence for people to put their feet on seats or occupy more than one seat on rolling stock. The new offence extends this prohibition to other public transport vehicles excluding those used for taxi and booked hire services, as these services are provided in smaller vehicles under a commercial relationship between the parties.*

[29] Explanatory notes, p 12.

[30] Explanatory notes, p 12.

[31] Explanatory notes, p 12.

> *The intention of the offence is not to capture obese passengers who require additional space to travel. The offence is designed, however, to capture the use of other objects to defeat the purpose of the legislation, for example, if the provision merely provided for the placing of feet on a seat, passengers using a towel to cover a seat and then placing their feet on the towel, or the use of a bag or luggage could not be considered to be in breach. Therefore, the offence is cast in wider terms to capture the occupation of more than one seat.*
>
> *The offence mirrors the offence in the Rail Regulation to ensure consistent application and is enforceable by Translink senior network officers and authorised persons for the Gold Coast Light Rail who are trained in the appropriate application of this offence. Additionally, the driver or operator of the service can exempt a person from the application of this offence, such as where people with a medical condition must place their feet on an adjacent seat.*[32]

The committee is therefore satisfied the Transport Operations (Passenger Transport) Regulation 2018 does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.11 Proclamation made under the *Housing Legislation (Building Better Futures) Amendment Act 2017* (SL 136)

The objective of the proclamation was to fix a commencement date of 1 September 2018 for certain provisions of the *Housing Legislation (Building Better Futures) Amendment Act 2017.*

Committee comment

The committee is satisfied the Proclamation made under the *Housing Legislation (Building Better Futures) Amendment Act 2017* does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.12 Residential Services (Accreditation) Regulation 2018 (SL 137)

The objective of the regulation is to regulate residential services to protect the health, safety and basic freedoms of residents, encourage service providers to continually improve the way they conduct residential services and to support fair trading in the residential services industry.

Residential services are privately-owned boarding houses, aged rental complexes and supported accommodation, and house some of Queensland’s most vulnerable people. Residential services are registered only if the service provider and associates are found suitable and the premises are safe and otherwise suitable.

Various provisions of the *Residential Services (Accreditation) Act 2002* provides the authority to prescribe certain matters in Regulations.

Consultation

The following consultation was undertaken:

> *In July 2018, the department sought feedback from peak bodies and community advocates on a draft of the Residential Services (Accreditation) Regulation 2018. These stakeholders include the Association of Residents of Queensland Retirement Villages; Community Legal Centres Queensland; COTA; Law Right; Leading Age Services Australia; Micah Projects; National Disability Services; National Seniors Australia; Property Council of Australia; Queensland Council of Social Services; Queensland Advocacy Incorporated; Queensland Alliance for Mental Health; Queensland Disability Network; Queensland Law Society;*

[32] Department of Transport and Main Roads, correspondence dated 23 October 2018, pp 1-2.

Supported Accommodation Providers Association; Tenants Queensland; and the Urban Development Institute of Australia.

The department also sought feedback about the appropriateness of fee levels, and whether the draft 2018 Regulation represented a significant barrier to the establishment of new residential services.

Feedback included suggested improvements to provisions relating to residents' privacy and confidentiality, the prevention of abuse and neglect, right of access to external providers of professional services, and residents' independence and freedom of choice. This feedback has been reflected in the 2018 Regulation.[33]

Potential FLP issues

Section 4(5)(e) *Legislative Standards Act 1992 – whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether the subordinate legislation allows the sub-delegation of a power delegated by an Act only in appropriate cases and to appropriate persons and if authorised by an Act*

The amendment notice inserts into the Residential Services (Accreditation) Regulation 2018 a best practice guide (the best practice guide for healthy eating in supported accommodation published by the Metro South Hospital and Health Service) and two food standard codes (standard 3.2.3 and 3.2.2 under the *Food Standards Australia New Zealand Act 1991* (Cth)). In this regard, the best practice guide and food standards are not contained in the subordinate legislation in their entirety, and as such their content does not come to the attention of the Legislative Assembly.

Whether subordinate legislation has sufficient regard to the institution of parliament depends on whether the subordinate legislation allows the sub-delegation by an Act only:

- if authorised by an Act, and
- in appropriate cases and to appropriate persons.[34]

One rationale for this approach is to ensure sufficient parliamentary scrutiny of a delegated legislative power.[35]

The significance of dealing with such matters other than by subordinate legislation is that, since the relevant document is not 'subordinate legislation', it is not subject to the tabling and disallowance provisions in Part 6 of the *Statutory Instruments Act 1992.*

Where there is, incorporated into the legislative framework of the State, an extrinsic document (such as the best practice guide and food standards) that is not reproduced in full in subordinate legislation, and where changes to that document can be made without the content of those changes coming to the attention of the Legislative Assembly, it can be argued that the document (and the process by which it is incorporated into the legislative framework) has insufficient regard to the institution of Parliament.

Authorised by an Act

Section 43 of the *Residential Services (Accreditation) Act 2002* provides that a matter relevant to a food service provided in the course of the residential service may be provided for under a regulation, although it does not specifically mention referral to an external code.

It is arguable that the sub-delegation is authorised, at least in that it provides the power to make a regulation in relation to food service.

[33] Explanatory notes, pp 4-5.

[34] Section 4(5)(e) of the *Legislative Standards Act 1992.*

[35] Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principle: the OQPC Notebook,* p 170.

Appropriate cases and to appropriate persons

In considering whether it is appropriate for matters to be dealt with by an instrument that is not subordinate legislation, and therefore not subject to parliamentary scrutiny, committees consider the importance of the subject dealt with, the commercial or technical nature of the subject-matter, and the practicality or otherwise of including those matters entirely in subordinate legislation.[36]

The best practice guide and food standards 3.2.2 and 3.2.3 are 95 pages, 18 pages and 62 pages long respectively. The committee is satisfied that it is appropriate for practical reasons for such detailed matters to be set out in a document other than subordinate legislation.

Availability of document and parliamentary scrutiny

Concerns about sub-delegation are reduced where the document in question could only be incorporated under subordinate legislation (which can be disallowed) and was attached to the subordinate legislation, or required to be tabled with the subordinate legislation and made available for inspection.

The best practice guide is published by the health department on the website of the Metro South Hospital and Health Service. The food standards are accessible on the food standards website.

Committee comment

Given that the Act authorises that matters relevant to a food service provided in the course of the residential service, which would include the best practice guide and food standards, may be provided for under a regulation, the consultation undertaken, the length of the guide and food standards, and the availability of the documents on websites, the committee considers the notice has sufficient regard to the institution of Parliament.

The committee therefore is satisfied the Residential Services (Accreditation) Regulation 2018 does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.13 Queensland Building and Construction Commission Regulation 2018 (SL 138)

The objective of the regulation is to remake the Queensland Building and Construction Commission Regulation 2003 which expired on 31 August 2018.

The regulation will continue to prescribe, among other things:

- licence classes, including scopes of work and qualification requirements
- matters for owner-builder permits
- statutory insurance scheme
- demerit offences and demerit points
- matters for domestic building contracts
- fees, and
- work that is not building work.

Potential FLP issue

Section 4(5)(e) *Legislative Standards Act 1992 - whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether the subordinate legislation allows the sub-delegation of a power delegated by an Act only in appropriate cases and to appropriate persons and if authorised by an Act.*

[36] See the Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook,* pp 155-156, and Scrutiny of Legislation Committee, *Alert Digest 1999/04,* p10, paras 1.65-1.67.

The amendment regulation inserts technical qualification documents for various licence classes. These cover a number of licences and are set out in Schedule 2 of the regulation. For example, under bricklaying and blocklaying licence requirements, the technical qualifications required for the licence are set out as:

> *The technical qualifications stated in the technical qualifications document for the licence class applied for.*

Whether subordinate legislation has sufficient regard to the institution of parliament depends on whether the subordinate legislation allows the sub-delegation of a power delegated by an Act only:

- if authorised by an Act, and
- in appropriate cases and to appropriate persons.[37]

One rationale for this approach is to ensure sufficient parliamentary scrutiny of a delegated legislative power.[38]

The significance of dealing with such matters other than by subordinate legislation is that, since the relevant document is not 'subordinate legislation', it is not subject to the tabling and disallowance provisions in Part 6 of the *Statutory Instruments Act 1992.*

Where there is incorporated into the legislative framework of the State an extrinsic document (such as the technical qualifications documents) that is not reproduced in full in subordinate legislation, and where changes to that document can be made without the content of those changes coming to the attention of the House, it may be argued that the document (and the process by which it is incorporated into the legislative framework) has insufficient regard to the institution of Parliament.

Currently, the technical qualification document is not contained in the subordinate legislation in its entirety, and as such its content does not come to the attention of the Legislative Assembly.

Authorised by an Act

Section 261 of the *Building Act 1975* provides that a regulation may make provision for the licensing of building certifiers and pool safety inspectors. Section 210 of the *Electrical Safety Act 2002* provides for the making of regulations in relation to electrical licences, including requirements as to qualifications. Section 116 of the *Queensland Building and Construction Commission Act 1991* provides for the making of regulations in relation to licences under the Act.

However, the committee notes that while the Acts provide a broad regulation making power to provide for the making of licences in subordinate legislation, none of the provisions in the Acts specifically refer to the approval of an external document for the purposes of the Acts. In other words, it may be considered arguable that the sub-delegation is authorised as, although the Acts allow licensing requirements to be made in regulations, they do not specifically provide for the referral to external documents. By way of comparison, section 274 of the *Work Health and Safety Act 2011* provides that the minister may approve a code of practice for the purposes of the Act and may vary or revoke an approved code of practice.

In considering this matter, the committee notes that the provision to provide for the technical qualifications in an external document was introduced in subordinate legislation no. 5 of 2016 (Queensland Building and Construction Commission and Other Legislation Amendment Regulation (No. 1) 2016). At that time, the former Infrastructure, Planning and Natural Resources Committee (IPNR Committee) considered the subordinate legislation and the potential FLP issue, and concluded:

> *Section 116(2)(aa) of the QBCC Act provides that the Governor-in-Council may make regulations to prescribe the procedure for, and other matters relating to, the application for, or renewal of, licences under the QBCC Act.*

[37] Section 4(5)(e) *Legislative Standards Act 1992*.

[38] Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook,* p170.

> *Section 23 of the* Statutory Instruments Act 1992 *provides that if an Act authorises the making of a statutory instrument with respect to a matter, the statutory instrument may make provision for the matter by applying, adopting or incorporating another document. The committee, therefore, concludes that it appears that the sub-delegation is authorised.*[39]

Appropriate cases and to appropriate persons

In considering whether it is appropriate for matters to be dealt with by an instrument that is not subordinate legislation, and therefore not subject to parliamentary scrutiny, committees consider the importance of the subject dealt with, the commercial or technical nature of the subject matter, and the practicality or otherwise of including those matters entirely in subordinate legislation.[40]

The committee notes the technical qualifications document contains licensing requirements for over 50 licences and is 39 pages long. The IPNR Committee also considered this matter, stating:[41]

> *The committee notes that the Document is highly technical in nature and likely to be subject to regular change and it has been argued that it is appropriate for practical reasons that such detailed matters be set out in a document other than subordinate legislation. The department provided the following evidence in support of this argument:*
>
>> Licences under the QBCC Regulation are divided into classes which restrict the scope of work a licensee can perform according to their skills and training. Each licence includes technical qualifications and experience requirements. The course codes for these technical qualifications regularly change meaning that prior to the QBCCOLAR, the QBCC Regulation frequently became out of date. The change to include the technical course codes in the Department published TQ document rather than the QBCC Regulation itself will greatly streamline the approval process and ensure the course codes remain current.[42]
>
> *The department has also noted that the approach to not including the highly-technical Document in subordinate legislation is not unique to the QBCC Regulation and referred the committee to the example of a similar model used for setting out the requirements for gas work licences/authorisations under the Petroleum and Gas (Production and Safety) Regulation 2004. The relevant information is published on the department's website and is approved for release by the Deputy Chief Inspector Petroleum and Gas.*[43]

Availability of document and parliamentary scrutiny

The regulation defines the technical qualifications document as the document called 'Technical Qualifications for Licensing' made by the chief executive and that it be published on the department's website. The committee notes that the technical qualifications document is available on the department website[44] but that it is not a requirement under the Act. The committee also notes as an example of where this is provided for under the authorising Act in section 14 of the *Plumbing and Drainage Act 2018*.

In addition, the committee notes the IPNR Committee's comments on this during its consideration of the technical qualifications document in 2016:[45]

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39 Infrastructure, Planning and Natural Resources Committee, Report No. 25, Subordinate legislation tabled between 2 December 2015 and 16 February 2016, tabled May 2016, p 5.

40 See the Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook,* pp 155-156, and Scrutiny of Legislation Committee, *Alert Digest 1999/04,* p.10, paras 1.65-1.67.

41 Infrastructure, Planning and Natural Resources Committee, Report No. 25, Subordinate legislation tabled between 2 December 2015 and 16 February 2016, tabled May 2016, p 5.

42 Department of Housing and Public Works, correspondence dated 22 April 2016.

43 Department of Housing and Public Works, correspondence dated 22 April 2016.

44 Queensland Government, Department of Housing and Public Works, *Technical Qualifications for Licensing,* http://www.hpw.qld.gov.au/SiteCollectionDocuments/TechnicalQualificationsForLicensing.pdf.

45 Infrastructure, Planning and Natural Resources Committee, Report No. 25, Subordinate legislation tabled between 2 December 2015 and 16 February 2016, tabled May 2016, pp 5-6.

The committee notes that the Document and any amendments to the Document must be approved by the chief executive of the department in which the QBCC Act is administered. The Document is available on the department's website. As stated above, the potential FLP issue arises as the Document will not be incorporated into the legislative framework of the State and, as such, changes can be made to the Document without the content of those changes coming to the attention of the House, which may be argued as having insufficient regard to the institution of Parliament.

The department advised the committee that it had considered the FLP breached and concluded the following:

> As the TQ document must be approved by a high level public service officer, this would maintain the appropriate amount of rigour in the process. While this approach means the TQ document will not be subject to the tabling and disallowance provisions under the Statutory Instruments Act 1992, it will still require thorough review and approval by high level Departmental officers before new versions can be published.[46]

Committee comment

In its committee comment on the above matters, the IPNR Committee found:

In considering whether it was appropriate for matters to be dealt with by an instrument that was not subordinate legislation, the committee considered the highly technical nature of the Document and the likelihood that it will be subject to regular change. Importantly, the committee also notes that the approach to include the technical course codes in the Document, rather than in subordinate legislation, will streamline the approval process while ensuring the course codes for the relevant technical qualifications remain current. Additionally, the committee is reassured that high level department officers will be responsible for ensuring that the review and approval process for any amendments to the Document will be thorough.

For these reasons, the committee is satisfied that the potential FLP breach is justified in the circumstances.[47]

The committee agrees with the IPNR Committee that the approach to including the lengthy technical qualifications in an external document provides for currency, flexibility and a streamlined approval process, and that it is reasonable for a document which is 39 pages long to be contained in an external document.

However, the committee notes that, while the authorising Acts provide broad regulation making powers in relation to licences, they do not provide a) specifically for the use of an external document, b) that the external document be published on the department's website as required in other Acts such as the *Plumbing and Drainage Act 2018*, or c) for the minister to have the power to approve a code of practice (technical qualifications document) as required in other Acts such as the *Work Health and Safety Act 2011*.

The committee acknowledges the stance of the former SLC that best practice is achieved when these matters are legislated in the primary legislation. In this regard, the committee is of the view that best practice could be achieved by amending the relevant Acts to provide a) specifically for the use of an external document, b) that the external document be published on the department's website, and c) for the minister to have the power to approve a code of practice (technical qualifications document).

The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

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[46] Department of Housing and Public Works, correspondence dated 22 April 2016.

[47] Infrastructure, Planning and Natural Resources Committee, Report No. 25, Subordinate legislation tabled between 2 December 2015 and 16 February 2016, tabled May 2016, p 6.

2.14 Proclamation *made under the Heavy Vehicle National Law and Other Legislation Amendment Act 2016* – commencing remaining provisions (SL 142)

The objective of the proclamation is to fix a commencement date of 1 October 2018 for Chapter 2 of the *Heavy Vehicle National Law and Other Legislation Amendment Act 2016.*

Chapter 2 represents the first of three phases to introduce reform to the chain of responsibility and executive officer liability provisions within the *Heavy Vehicle National Law Act 2012*.

Committee comment

The committee is satisfied the Proclamation made under the *Heavy Vehicle National Law and Other Legislation Amendment Act 2016* does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.15 Proclamation made under the *Heavy Vehicle National Law and Other Legislation Amendment Act 2018* – commencing certain provisions (SL 143)

The objective of the proclamation is to fix a commencement date of 1 October 2018 for uncommenced provisions (that are not already in force) of the *Heavy Vehicle National Law and Other Legislation Amendment Act 2018.*

The only provision not to commence will be section 47, which will commence at a later date.

Committee comment

The committee is satisfied the Proclamation made under the *Heavy Vehicle National Law and Other Legislation Amendment Act 2018* does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

2.16 Transport Legislation Amendment Regulation (No. 2) 2018 (SL 144)

The objective of the regulation is to enhance the operation of transport legislation by:

- clarifying when an entity will be suitable for approval to provide training programs for the operation of recreational ships and personal watercraft
- exempting an emergency worker (for example, an ambulance officer) riding a bicycle from complying with the road rules when responding to an emergency
- allowing motorbike riders to edge filter on roads when the normal speed limit of 90km/h or more has been reduced to less than 90km/h by a variable illuminated message sign, and prohibiting motorbike riders from edge filtering in tunnels and on roads subject to roadworks
- clarifying when a safety certificate is required to register a vehicle that has never previously been registered
- facilitating the introduction of online registration certificates
- allowing the owner of personalised number plates to notify the chief executive when the personalised number plates are sold or disposed of
- allowing the chief executive to determine a reasonable fee, if any, to be paid by statutory entities for the release of vehicle registration information
- providing that safety recall agencies are not required to pay a fee for the release of vehicle registration information required to conduct a national vehicle safety recall program.[48]

[48] Explanatory notes, p1.

Consultation

In regards to consultation on the above amendments, the explanatory notes advise the following:

> *The Royal Automobile Club of Queensland and the Motorcycle Riders' Association of Queensland were consulted on, and support, the motorbike edge filtering amendments. Personalised Plates Queensland was consulted on, and supports, the amendments to allow the owner of personalised number plates to notify the chief executive when the personalised number plates are sold or disposed of.*
>
> *The remaining amendments are administrative in nature and clarify or enhance existing policy positions and practice as outlined below. Given the administrative nature of these amendments, external stakeholders have not been consulted.*[49]

Committee comment

The committee is satisfied the Transport Legislation Amendment Regulation (No. 2) 2018 does not raise any significant issues relating to policy, fundamental legislative principles or lawfulness. The explanatory notes tabled with the regulation comply with part 4 of the *Legislative Standards Act 1992*.

Mr Shane King MP
Chair

[49] Explanatory notes, p 6.