Parliamentary Committees

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

Report No. 20, 56th Parliament

Subordinate legislation tabled between 13 November 2018 and 11 February 2019

1 Aim of this report

This report summarises the committee's findings following its examination of the subordinate legislation within its portfolio areas tabled between 13 November 2018 and 11 February 2019. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992*.

2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
174	Health Legislation (Scope of Practice) Amendment Regulation 2018	13 November 2019	4 April 2019
175	Proclamation made under the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017*	13 November 2019	4 April 2019

3 Health Legislation (Scope of Practice) Amendment Regulation 2018

The regulation provides new authorities (regarding scheduled drugs) for certain classes of health practitioners, and streamlines the process for other health practitioners to have their nationally-recognised authorities adopted in Queensland.

The regulation also amends schedule 1 of the Hospital and Health Boards Regulation 2012, which establishes the Children's Health Queensland Hospital and Health Service and declares the Lady Cilento Children's Hospital to be one of the service areas within that Hospital and Health Service.

The amendment changes the reference to the Lady Cilento Children's Hospital to the Queensland Children's Hospital.

The regulation provides for new authorities for the following health practitioners to possess and/or administer schedule poisons and drugs:

- clinical perfusionists
- nuclear medicine technologists
- physiotherapists
- respiratory scientists, and
- speech pathologists.

The regulation also recognises national law scheduled medicines endorsement for the following professions:

- podiatrists
- optometrists, and
- midwives.

The amendments authorise nurse practitioners to:

- obtain, prescribe, administer or supply a controlled drug or restricted drug
- give someone who may administer or supply a controlled drug an oral or written instruction to administer or supply the drug
- prescribe or supply an S2 or S2 poison; and
- give someone who may administer or supply an S2 or S3 poison an oral or written instruction to administer or supply the poison.

3.1 Fundamental legislative principle issues

The regulation includes provisions (defining certain terms) which raise issues of fundamental legislative principle.

Definitions of clinical perfusionist and respiratory scientist

Clause 55 introduces new definitions of 'clinical perfusionist' and 'respiratory scientist'. A person is a clinical perfusionist if the person is either employed as a clinical perfusionist at certain named relevant facilities or is accredited or certified as a clinical perfusionist by a professional body approved by the chief executive. The definition of respiratory scientist is in somewhat analogous terms, to include a person working in certain named facilities, or a person 'recognised as a respiratory scientist by the chief executive'.

The second limb of these definitions – in effect allowing the chief executive to recognise a person as being within a category - can be seen as raising the fundamental legislative principle of whether a provision which makes rights, liberties or obligations dependent on an administrative power is sufficiently defined and subject to appropriate review.[1]

The explanatory notes provide this justification for any breach of fundamental legislative principle:

> *The majority of clinical perfusionists and respiratory scientists will be employed at facilities, and fall within the first limb of the definition. The second limb will ensure the benefits of the amendment can also be applied to those few clinical perfusionists and respiratory scientists that are not directly employed by, or do not work in, a prescribed facility. The chief executive uses an individual's qualifications and experience to determine whether to recognise a person as a clinical perfusionist or respiratory scientist on a case by case basis. As a result, any breach of the fundamental legislative principle is minor and not expected to negatively impact on any person.*[2]

1 *Legislative Standards Act 1992*, section 4(5)(e), and see the explanatory notes, p 8.

2 Explanatory notes, p 8.

Definitions of national podiatry scheduled medicines list, nurse practitioner standards, optometry guidelines, and scope of practice

The new definitions (in clause 55) of national podiatry scheduled medicines list, nurse practitioner standards and optometry guidelines refer to the scheduled list of medicines published by the relevant National Board.

Clause 55 defines 'scope of practice' to mean the nurse practitioner's scope of practice under the nurse practitioner standards. In turn 'nurse practitioner standards' is defined in clause 55 as the document called 'Nurse practitioner standards for practice' made by the Nursing and Midwifery Board of Australia under the *Health Practitioner Regulation National Law*.

In each case, the definitions are relying on or involve reference to external documents that are not subject to parliamentary scrutiny. Doing so can be seen as breaching the fundamental legislative principle that subordinate legislation must have sufficient regard to the institution of Parliament, which includes a requirement that any sub-delegation of a power delegated by an Act should only occur in appropriate cases and to appropriate persons, and if authorised by an Act.[3]

In considering whether it is appropriate for matters to be dealt with by an instrument that was not subordinate legislation, and therefore not subject to parliamentary scrutiny, it is relevant to 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.[4]

The explanatory notes state:

> *The Podiatry Board of Australia, the Nursing and Midwifery Board of Australia and the Optometry Board of Australia publish lists of classes of scheduled medicines, which are updated from time to time. To ensure the HDPR* [Health (Drugs and Poisons) Regulation 1996] *is kept up to date, the date of the most recent version of the scheduled medicines list is not included in the definition.*
>
> *There is a rigorous process to which National Registration Boards must adhere in order to amend registration standards, guidelines and lists of approved medicines. The process is governed by the Council of Australian Governments Health Council and any amendments must be approved by the Minister for Health from each jurisdiction. The Ministerial Council may, at any time, ask a National Board to review an approved or proposed registration standard for the health profession for which the National Board is established. The registration standards, guidelines and lists of approved medicines are published online under the relevant sections on the respective Board's website.*
>
> *…*
>
> *This potential breach of the fundamental legislative principle is considered justified as it will ensure the definitions in the HDPR are up to date, avoiding the need to amend the HDPR each time the scheduled list of medicines is changed.*[5]

Regarding the definition of scope of practice, the nurse practitioner standards are available on the Board's website. The standards are designed to be read in conjunction with other documents available on the website. The explanatory notes give this justification for the reliance on an external document:

> *The complex interaction between the documents and changing nature of the documents make it practicable and more cost-effective to incorporate the documents in this manner. The Board is a body established under the National law. It has an express function under the National Law*

3 *Legislative Standards Act 1992*, section 4(5)(e), and see the explanatory notes, p 9.

4 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.

5 Explanatory notes, p 9.

to 'develop or approve standards, codes and guidelines for the health profession'. As a result, any breach of the fundamental legislative principle is minor and justifiable.[6]

The committee's request for advice from Queensland Health

To assist its consideration of the potential FLP issues, the committee sought the following advice from the department:

In relation to the definitions of clinical perfusionists and respiratory scientists:

1. For clinical perfusionists and respiratory scientists who are not employed at a Hospital and Health Service, private health facility, laboratory or other facility, approved by the chief executive or by a facilities accreditation body approved by the chief executive:

    a. why does the definition for a clinical perfusionist include reference to someone accredited or certified to work as a clinical perfusionist by a professional body approved by the chief executive, however the definition of a respiratory scientist does not refer to a requirement to be accredited or certified by a professional body, only to being recognised as a respiratory scientist by the chief executive?

    b. where might a clinical perfusionist or respiratory scientist be employed if not at a Hospital and Health Service, private health facility, laboratory or other facility, approved by the chief executive or by a facilities accreditation body approved by the chief executive?

2. How would the recognition of a clinical perfusionist or respiratory scientist by a chief executive be shown/recorded?

3. In relation to the national podiatry scheduled medicines list, the nurse practitioner standards, and the optometry guidelines, and scope of practice, please advise the number of updates to these three lists over the past 5 years together with the dates on which they were updated.

4. What is the rigorous process that the National Registration Boards must adhere to in order to amend registration standards, guidelines and lists of approved medicines?

5. What does the Minister for Health take into consideration when approving amendments to the national podiatry scheduled medicines list, nurse practitioner standards and optometry guidelines?

6. Given the concerns raised by the Australian College of Nursing, will the department monitor the impact of these changes?

Advice from Queensland Health

The department provided the following advice in response to the committee's questions:

The definitions of clinical perfusionists and respiratory scientists

During development of the regulation, the Australian and New Zealand College of Perfusionists (ANZCP) advised that they provide a self-regulation function for the profession. Perfusionists who hold a post-graduate perfusion qualification and meet the requirements as set out by the by the Australasian Board of Cardiovascular Perfusion are eligible to become Certified Perfusionists. If a clinical perfusionist is certified by the ANZCP, the chief executive would have confidence that the person is a clinical perfusionist.

Although the Australian and New Zealand Society of Respiratory Science (ANZSRS) generally represents respiratory scientists, during development of the regulation, the ANZSRS did not confirm that it is responsible for certifying that a person is a respiratory scientist. As such, it was considered

[6] Explanatory notes, p 10.

appropriate for the chief executive to retain a greater level of oversight of qualifications of respiratory scientists compared to clinical perfusionists.

The ANZCP specifically uses the term certified to refer to its role in self-regulation of clinical perfusionists. However, the Health (Drugs and Poisons) Regulation 1996 defines certified to mean approved by the chief executive. Noting the existing definition in the Health (Drugs and Poisons) Regulation 1996, it was necessary to expand the definition of clinical perfusionist to include reference to accredited, which is an industry approved term that also means certified.

In relation to the employment of a clinical perfusionist or respiratory scientist

It is possible that a clinical perfusionist or respiratory scientist may be contracted to provide services either by the facility or by a medical practitioner operating at the facility rather than be employed by the facility directly. For example, the individual may be a contractor rather than an employee.

Recognition of a clinical perfusionist or respiratory scientist and how that is recorded

In deciding whether to recognise a respiratory scientist, the chief executive considers whether an individual's qualifications and experience are consistent with the role requirements of a respiratory scientist employed by a Hospital and Health Service.

A respiratory scientist seeking recognition under this part of the definition would need to apply to the chief executive and provide the required evidence, which would then be assessed against an example Hospital and Health Service role requirement document. If deemed eligible, the individual would be advised in writing by the chief executive. The Department of Health keeps records about persons approved as respiratory scientists under this part of the definition.

Recognition as a clinical perfusionist by the chief executive occurs by the chief executive approving either a laboratory or other facility where a clinical perfusionist is employed or by approving a facility accreditation body that employs a clinical perfusionist. As outlined in the previous answer, a clinical perfusionist may also be recognised by the chief executive approving a professional body that accredits or certifies an individual to work as a clinical perfusionist. The Department of Health keeps records about persons approved as clinical perfusionists under these parts of the definition.

Updates of the national podiatry scheduled medicines list, the nurse practitioner standards, and the optometry guidelines, and scope of practice

The review cycle for registration standards is approximately every three to five years. However, under section 12 of the Health Practitioner Regulation National Law, the Ministerial Council may, at any time, ask a National Board to review an approved or proposed registration standard for the health profession for which the National Board is established.

The relevant Ministerial Council is the Council of Australian Governments (COAG) Health Council.

In the last five years, the relevant registration standards and guidelines for the Podiatry Board of Australia, Nursing and Midwifery Board of Australia and the Optometry Board of Australia have been updated as follows:

- The Podiatry Board of Australia's Registration Standard for the endorsement of scheduled medicines (including the National podiatry scheduled medicines list) was updated on 1 August 2018.
- The Nursing and Midwifery Board of Australia's Registration Standard for Endorsement as a Nurse Practitioner was revised on 1 June 2016.
- The Nursing and Midwifery Board of Australia's Nurse practitioner standards for practice were revised on 1 March 2018. The standards were previously updated on 1 January 2014.
- The Nursing and Midwifery Board of Australia's Registration standard: Endorsement for scheduled medicines for midwives was revised on 1 January 2017.
- The Optometry Board of Australia's Guideline for use of scheduled medicines (including the

approved list of medicines) was updated on 10 September 2018. The guideline was previously updated on 7 December 2014.

The process that the National Registration Boards must adhere to in order to amend registration standards, guidelines and lists of approved medicines

The process is governed by the COAG Health Council and the Health Practitioner Regulation National Law. National Boards must submit proposals to amend registration standards and guidelines, including lists of approved medicines, to the COAG Health Council through the Australian Health Ministers' Advisory Council.

The submission process includes significant consultation with each State, Territory and the Commonwealth as well as a public consultation process. Registration standards and guidelines are then approved by the COAG Health Council under section 12 of the Health Practitioner Regulation National Law.

For the approval of an endorsement for scheduled medicines, section 14 of the Health Practitioner Regulation National Law provides that the Ministerial Council may, on the recommendation of a National Board, decide that the Board may endorse the registration of health practitioners as being qualified to administer, obtain, possess, prescribe, sell, supply or use a scheduled medicine or class of scheduled medicines.

The Minister for Health's consideration of amendments to the national podiatry scheduled medicines list, nurse practitioner standards and optometry guidelines

The Queensland Minister for Health is a member of the COAG Health Council.

Section 16 of the Health Practitioner Regulation National Law provides that the Ministerial Council gives approval by a resolution of the Council.

The Ministerial Council considers public interest, implications for workforce, legislative and regulatory issues, the impact in rural and/or remote areas and the outcomes of the consultation process in making their decision.

Departmental monitoring of the impact of these regulations

Ongoing monitoring of safe and effective delivery of health services will be undertaken by the Department of Health. The department will continue to monitor patient safety, including any incidents related to medication errors, through existing reporting and audit mechanisms and to monitor compliance with the Health (Drugs and Poisons) Regulation 1996.

The Amendment Regulation addresses governance concerns by ensuring administration is only undertaken by appropriately trained persons, within a suitable clinical setting and only within the scope of practice of the health professional.

The Australian College of Nursing does not support unregistered health practitioners administering medicines citing professional governance concerns with unregistered health professions. However, the COAG Health Council has issued a Ministerial Communique on the purpose of the National Registration and Accreditation Scheme (NRAS), available at:

https://www .coaghealthcouncil.gov .au/Portals/O/CHC%20Communique%20110918 1.pdf.

The communique states that NRAS is one of a number of forms of regulating health practitioners within a fit for purpose regulatory system. The purpose of NRAS is to protect the public from harm. It is not intended as a means to protect the interests of health professions or to confer standing or credibility on individual professions.

The communique notes that other forms of regulating health practitioners include professional codes and standards; membership of professional organisations and associations; consumer protection legislation; and statutory codes of conduct administered by governments, including the National Code of Conduct for health care workers.

The Australian Medical Association (Queensland) was concerned that the removal of the requirement for nurse practitioners to practise under the Nurse Practitioner Drug Therapy Protocol would increase the nurse practitioner's scope of practice. However, as outlined in the explanatory notes, this change does not increase the scope of practice of nurse practitioners. The Nurse Practitioner Drug Therapy Protocol does not provide a formulary of medicines for nurse practitioners. The Drug Therapy Protocol only requires that nurse practitioners publish their scope of practice area on the Department's website. The scope of practice is self-declared by the nurse practitioner. Accordingly, publishing the scope of practice on the Department's website provides no greater public protection than the self-regulation already required by the National Law and does not increase the scope of practice of the nurse practitioner.

Committee comment

The committee identified inconsistencies with fundamental legislative principles (FLPs) in relation to the Health Legislation (Scope of Practice) Amendment Regulation 2018. Specifically, these inconsistencies were with matters to be delegated to an administrative power and matters dealt with by an instrument that was not subordinate legislation. The committee considered the justification for the inconsistencies with FLPs provided in the explanatory notes and further advice provided by the Department of Health. The committee is satisfied that there is sufficient justification for the delegation to an administrative power and the incorporation, by reference, of the external documents and for any breach of fundamental legislative principle.

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

4 Proclamation made under the Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017

The objective is to fix a commencement date of 1 December 2018 for certain provisions of the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017.* Section 78(1) and (3) are set to commence on 1 April 2019.

Committee comment

The proclamation raises no FLP issues. The explanatory notes comply with part 4 of the *Legislative Standards Act 1992*.

5 Recommendation

The committee recommends that the House notes this report.

Aaron Harper MP

Chair

April 2019

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

Chair	Mr Aaron Harper MP, Member for Thuringowa
Deputy Chair	Mr Mark McArdle MP, Member for Caloundra
Members	Mr Michael Berkman MP, Member for Maiwar
	Mr Marty Hunt MP, Member for Nicklin
	Mr Barry O'Rourke MP, Member for Rockhampton
	Ms Joan Pease MP, Member for Lytton

DISSENTING REPORT

of the LNP Members of the

Health Communities Disability Services and Domestic and Violence Prevention Committee

with respect to Subordinate Legislation No. 174 as far as it relates to

the removal of the name "the Lady Cilento Childrens Hospital"

The LNP members of the Committee dissent with respect to Subordination Legislation No. 174 insofar as it removes the name of "the Lady Cilento Children's Hospital" and replaces it with the name "Queensland Children's Hospital."

Lady Cilento epitomised the role of a medical practitioner who cared for children and women. She graduated as a practitioner in 1918 becoming a prominent member of the Queensland Women's Health movement and a leading advocate in both children's and women's health.

Her accolades are many and her qualifications numerous, including obstetrician, paediatrician, columnist, broadcaster and women's activist. Her medical work in relation to women and children incorporated good nutrition, family planning and child care. Her role contributed to the development of family planning and childcare which were instrumental in developing this State being seen as having a world class health service aimed at the care and treatment of children.

Her awards are too numerous to mention in this document and even if they were they would do little to identify or adequately outline the status in which she was and is held.

She was not afraid to tackle issues that were at the forefront of paediatric medicine and naming Queensland pre-eminent children's hospital the "Lady Cilento Children's Hospital" was a tribute, not

to just a pioneering spirit but to a women who had foresight, vision and drive resulting in our current status as a renowned clinical centre for the treatment and protection of children.

It is noted that the government has spent $500,000 in having any trace of her removed from the building that bore her name.

This philistine and most appalling action was taken at a time when this government espouses and continues to espouse the protection and support of women. The Government's actions run contrary to the rhetoric, particularly, given the Premier, Deputy Premier, Leader of the House and Minister for Women are all women. At a time when the government would move, one would think, to enshrine the heritage and reputation of such a pioneering woman, they have turned their back on her with not one standing to protect either her reputation or the heritage she left to this State.

The LNP members of the Committee are not prepared to endorse the subordinate legislation that is at odds with what any decent government should stand for, that is, accolading the best and the brightest. In this regard Lady Cilento qualifies under both headings and we are appalled and shocked that any government would move to dishonour and indeed tear down the reputation of such a woman.

Dated this 2nd day of April 2019

Mark McArdle
Deputy Chair and Member for Caloundra

Marty Hunt
Member for Nicklin