



## Education, Employment and Small Business Committee

### Report No. 2, 56<sup>th</sup> Parliament

#### Subordinate legislation tabled between 14 June 2017 and 10 October 2017

##### 1 Aim of this report

This report summarises the committee's examination of subordinate legislation tabled from 14 June 2017 to 10 October 2017. It reports on any issues identified by the committee in relation to the policy to be given effect by the legislation, its consistency with fundamental legislative principles (FLPs), and its lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA).

##### 2 Subordinate legislation examined

| No. | Subordinate legislation  | Date tabled      | Disallowance date |
|-----|--|------------------|-------------------|
| 161 | Education (General Provisions) Regulation 2017   | 5 September 2017 | 8 March 2018      |
| 195 | Education Legislation (Fees) Amendment Regulation 2017                                     | 10 October 2017  | 22 March 2018     |
| 196 | Proclamation made under the <i>Education (Accreditation of Non-State Schools) Act 2017</i> | 10 October 2017  | 22 March 2018     |
| 197 | Education (Accreditation of Non-State Schools) Regulation 2017                             | 10 October 2017  | 22 March 2018     |
| 207 | Further Education and Training (Fees) Amendment Regulation 2017                            | 10 October 2017  | 22 March 2018     |

##### 2.1 Education (General Provisions) Regulation 2017 - SL No. 161

The objectives of the Education (General Provisions) Regulation 2017 (2017 Regulation) are to:

- create a new regulation that supports the *Education (General Provisions) Act 2006*
- replace the Education (General Provisions) Regulation 2006 (2006 Regulation), which expired on 1 September 2017, in accordance with section 54 of the *Statutory Instruments Act 1992*, and
- clearly and effectively communicate policy intent and reflect current regulatory and drafting practices.<sup>1</sup>

<sup>1</sup> Education (General Provisions) Regulation 2017, explanatory notes, p 1.

The 2017 Regulation, which prescribes a range of procedural and operational matters to facilitate the effective functioning of the state's education system, retains the majority of the provisions of the previous, 2006 Regulation. The explanatory notes state that the creation of the 2017 Regulation will help to 'maintain the status quo' and ensure the 'continuity of the current framework for education in Queensland'.<sup>2</sup>

Minor amendments have been made to reflect current drafting practices, changes in society and technology, and changes to the list of state schools providing education to mature age students; as well as to improve the clarity of the legislative provisions and ensure the policy intent is achieved.<sup>3</sup>

***Potential fundamental legislative principle issue***

Consistent with the 2006 Regulation, in addition to prescribing the ages at which children can be enrolled in state and non-state primary schools, the 2017 Regulation also provides principals with the discretionary power to enrol a child who does not meet the specified age requirements in a number of circumstances, including:

- enrolment in the Preparatory Year (Prep) of a child who will be at least 5 years and 5 months on 31 December in the proposed year of attendance if the principal is satisfied the child is ready for education, considering the child's attributes
- enrolment in Prep of a child 'regardless of the child's age', if the principal is satisfied the child has started education in another state or country that is equivalent to Prep and is ready for education, considering the child's attributes, and
- enrolment of a child in a year of schooling from Years 1 to 6, regardless of the child's age, if the principal is satisfied the child is ready for education in the year of schooling, considering the child's attributes.

'Attribute' is defined in schedule 6 as the child's aptitude and ability; social and emotional competence; physical development; and level of knowledge and understanding.

As is acknowledged in the explanatory notes to the 2017 Regulation, a principal's decision under these sections to enrol or not enrol a child who does not meet the age requirements, based on their assessment of the child's attributes and/or previous education, is not subject to review. This lack of a prescribed avenue for review could be considered inconsistent with FLPs, and particularly with section 4(3)(a) of the LSA, which states that an administrative power should be sufficiently defined and subject to appropriate review.

The explanatory notes provide a number of justifications for this inconsistency:

- the provisions are consistent with the 2006 Regulation
- a principal is best placed to make such a decision, as they understand the school environment and can make a judgement based on relevant assessments of the student
- a refusal to allow a child to enrol early into a year level does not impact on the child's right to an education – they are still entitled to be enrolled under the Act once they reach the appropriate age, and a parent aggrieved by a decision of a principal to refuse early or accelerated enrolment could seek enrolment at another state or non-state school
- making legislative provision for a review of a principal's decision to refuse early or accelerated enrolment contradicts the expectation that principals are best placed to make such decisions

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<sup>2</sup> Education (General Provisions) Regulation 2017, explanatory notes, p 3.

<sup>3</sup> Education (General Provisions) Regulation 2017, explanatory notes, p 2.

- providing for review might increase the burden on state and non-state schools, delay enrolment decisions, and impact on the school's ability to effectively plan school resources, set class composition and determine teacher allocation, and
- providing for review could also potentially impact the learning outcomes of students (for example, if a review body overturned a principal's decision after the commencement of the school year, the child could then commence schooling later than other students, and miss out on aspects of the curriculum).<sup>4</sup>

In addition, the explanatory notes advise that the Department of Education (department) also provides 'a clear guideline' to assist state school principals in assessing whether a child should be accepted for early enrolment in Prep:

*The guideline requires that the principal consider what is in the child's best interests in order to achieve a positive and successful start to school. Principals consider evidence provided by the parent to support the application and discuss the child's attributes with relevant school staff such as the Head of Curriculum, Prep teachers, guidance officer and/or support staff in regional offices where appropriate. Principals provide parents with formal written advice regarding the reasons for the decision.*<sup>5</sup>

### **Committee comment**

In light of the justifications provided in the explanatory notes, the committee considers that any inconsistency with FLPs is justified in the circumstances. In reaching this view, the committee also had regard to the guidelines provided by the department to assist principals in making decisions about early enrolment.

### **Explanatory notes**

Under section 24 of the LSA, explanatory notes are required to include information on consultation undertaken on the subordinate legislation if it occurred. A brief statement is required on the way consultation was carried out, the results of the consultation, and any changes made to the legislation as a result of consultation. If no consultation is undertaken, a statement of the reason for no consultation being undertaken is required.

The explanatory notes set out the consultation that occurred in relation to the 2017 Regulation, as well as outlining some of the results of the consultation that occurred. However, the explanatory notes do not include the results of consultation with the Queensland Teachers' Union (QTU) and the Independent Education Union (IEU) – Queensland and Northern Territory Branch.

The committee requested that the department provide information about the outcomes of consultation with these stakeholders, in accordance with section 24(2)(ii) of the LSA:

In response to the committee's request, the department advised:

*... both unions were generally supportive of the new Regulation, with the IEU requesting no changes.*

*The QTU sought clarification or provided comment on a number of sections in the Regulation, which were responded to by the department. Additionally, the QTU sought a minor change to the drafting of section 7 so that the new Regulation reflected the previous wording of the Education (General Provisions) Regulation 2006 (previous Regulation), to ensure there was no ambiguity as to requirements*

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<sup>4</sup> Education (General Provisions) Regulation 2017, explanatory notes, pp 4-5.

<sup>5</sup> Education (General Provisions) Regulation 2017, explanatory notes, p 4.

*for teachers to undertake duties allocated by the principal and take an active interest in extracurricular activities. The department agreed to this request, as the proposed difference between the previous Regulation and the new Regulation for this section were a consequence of drafting practice, not changes in policy.*

*The QTU also sought that the inclusion of religious instruction and Bible lessons during school time be removed from the new Regulation. The department advised the QTU that Government policy currently remains unchanged in relation to religious instruction, and therefore the relevant sections of the new Regulation would substantially reflect the provisions of the previous Regulation.*

*The QTU also sought suggestions from the department for amendments that provide principals with additional support and greater capacity to resolve matters in relation to students involving contraband in a timely manner. The department clarified the power within the previous and proposed Regulation and provided the QTU with an appropriate contact from State School Operations to liaise with in relation to this matter.*

*In response to the QTU's request, the department provided clarification in relation to the operation of section 63 of the new Regulation about the ability of the principal to enrol overseas students.*

*The QTU raised no further issues.<sup>6</sup>*

## **2.2 Education Legislation (Fees) Amendment Regulation 2017 – SL No. 195**

The Education Legislation (Fees) Amendment Regulation 2017 seeks to index the fees prescribed in the following regulations, according to the government's policy of a 3.5 per cent increase per year:

- Education (General Provisions) Regulation 2017
- Education (Overseas Students) Regulation 2014
- Education (Queensland College of Teachers) Regulation 2016, and
- Education (Queensland Curriculum and Assessment Authority) Regulation 2014.

The Regulation also aims to increase fees in the Education and Care Services Regulation 2013 (ECS Regulation) in line with the indexation of fees prescribed under the National Law. The indexation rate under the National Law for the 2017-18 financial year is 1.5 per cent (rounded down to the nearest whole dollar).<sup>7</sup>

The committee did not identify any issues regarding consistency with FLPs or the lawfulness of the Regulation.

Fee increases for the respective regulations are in line with their enounced indexation rates, other than three exceptions due to rounding (for example, a rise from \$30.85 to \$31.95, making an increase of 3.6 per cent).

The explanatory notes tabled with the Regulation comply with part 4 of the LSA.

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<sup>6</sup> Department of Education, correspondence, 1 March 2018.

<sup>7</sup> Education Legislation (Fees) Amendment Regulation 2017, explanatory notes, p 2.

### **2.3 Proclamation made under the *Education (Accreditation of Non-State Schools) Act 2017* – SL No. 196**

The proclamation fixed a commencement date of 1 January 2018 for provisions of the *Education (Accreditation of Non-State Schools) Act 2017* that were not in force.

The proclamation raised no FLP issues and the explanatory notes tabled with the proclamation comply with part 4 of the LSA.

### **2.4 Education (Accreditation of Non-State Schools) Regulation 2017 – SL No. 197**

The Education (Accreditation of Non-State Schools) Regulation 2017:

- prescribes matters under the *Education (Accreditation of Non-State Schools) Act 2017* (the Accreditation Act) to uphold the standards of, and maintain public confidence in, Queensland's non-state schools
- prescribes accreditation criteria to ensure that non-state schools:
  - provide a quality educational program in a safe and secure environment
  - are effectively governed in a transparent and accountable manner
  - are financially viable
  - provide for student welfare, including that of boarders
  - provide appropriate and sufficient resources to deliver the education program and maintain the welfare of students and staff, and
  - have a demonstrable, systematic approach to improvement strategies, and
- prescribes additional operational and procedural matters to support the Accreditation Act, such as matters concerning temporary sites, the provision of school survey data, and fees.<sup>8</sup>

#### ***Potential fundamental legislative principle issue***

Section 9(4)(b) of the Regulation provides that the Queensland Curriculum and Assessment Authority (QCAA) may endorse a program or syllabus as appropriate for senior secondary education. This enables non-state schools that wish to implement alternate education programs for senior secondary education to seek QCAA endorsement and, if endorsed, deliver the program while still complying with the accreditation criteria.

There is no ability to review a decision by the QCAA under this section.

This is potentially inconsistent with section 4(3) of the LSA, which provides that administrative power should be sufficiently defined and subject to appropriate review.

The explanatory notes state:

*The QCAA is the only body in Queensland with the curriculum expertise to make an informed decision on the appropriateness of education programs. Given this, there is no body that can effectively review the QCAA's decisions. ACARA currently makes decisions on alternative education programs for Prep to Year 10, but not for senior secondary education. Additionally, they are a Commonwealth institution, and do not have the required functions or powers to review decisions made under Queensland law.*

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<sup>8</sup> Education (Accreditation of Non-State Schools) Regulation 2017, explanatory notes, p 6.

*Ultimately, it is not considered likely that the QCAA will be required to make many decisions under this section. It is anticipated that only a small number of schools may seek endorsement of an alternative program. All Queensland non-state schools may seek endorsement of an alternative program. All Queensland non-state schools are currently accredited to provide QCAA approved syllabi in their senior secondary education programs, and so will be able to operate without QCAA endorsement of an alternative program.*

*It is intended that the endorsement process will be iterative, enabling schools to work with the QCAA to take necessary steps to ensure their program is appropriate for senior secondary education.<sup>9</sup>*

### **Committee comment**

The committee considers the lack of review under section 9(4)(b) to be justified in the circumstances, recognising that it is important that decisions about whether an education program is appropriate are made by a body with the necessary expertise to make such a decision, and thereby ensure the quality of the education provided to our children and young people.

The committee understands that some stakeholders have expressed a preference for requiring all schools to adopt the QCAA syllabus, rather than having an option to seek QCAA endorsement of an alternative program. In entrusting the QCAA with sole decision-making power in this regard, the Regulation addresses stakeholder concerns about the quality of such offerings, whilst also providing flexibility for non-state schools to be innovative in their approach to education.

The committee also notes the intention for non-state schools to be able to work with the QCAA towards endorsement of an alternative program.

## **2.5 Further Education and Training (Fees) Amendment Regulation 2017 – SL No. 207**

The Education Legislation (Fees) Amendment Regulation 2017 indexes the fees prescribed in the Further Education and Training Regulation 2014 by 3.5 per cent, in line in with the government's policy on the annual indexation of fees and charges. The explanatory notes state that the Regulation will charge fees prospectively from commencement.<sup>10</sup>

The committee did not identify any issues regarding consistency with FLPs or the lawfulness of the Regulation.

### **Explanatory notes**

The explanatory notes do not list any consultation with stakeholders in relation to the Education Legislation (Fees) Amendment Regulation 2017. A reason for not conducting consultation, as required by section 24(2)(b) of the LSA, was not provided.

The committee asked the department to provide a response addressing this issue. The department advised:

*The Queensland Government Principles for Fees and Charges requires agencies to have processes in place to ensure that fees maintain their value over time. The Government indexation rate of 3.5 per cent was published in the Financial Circular 2016-17 by Queensland Treasury for increases in fees from 1 July 2017 to 30 June 2018. The Regulation increased fees in accordance with this indexation rate.*

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<sup>9</sup> Education (Accreditation of Non-State Schools) Regulation 2017, explanatory notes, p 6.

<sup>10</sup> Further Education and Training (Fees) Amendment Regulation 2017, explanatory notes, p 2.

*The increase in fees is consistent across multiple Government departments, and occurs on an annual basis. Stakeholders are aware of the annual process of fee increases. Therefore no consultation was considered necessary.*<sup>11</sup>

### 3 Committee consideration of the subordinate legislation

The committee has examined the policy to be given effect by the subordinate legislation, the application of FLPs, and its lawfulness. No significant issues regarding consistency with FLPs or the lawfulness of the subordinate legislation were identified.

The explanatory notes tabled with the regulations broadly comply with the requirements of section 24 of the LSA. Where issues of compliance were noted, the committee sought and received information from the department that addressed those issues. The department's advice has been incorporated into this report.

### 4 Recommendation

The committee recommends that the Legislative Assembly notes this report.



Leanne Linard MP

Chair

March 2018

#### Education, Employment and Small Business Committee

|              |  |
|--------------|--|
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|              | Mr Nick Dametto, Member for Hinchinbrook     |

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<sup>11</sup> Department of Education, correspondence, 1 March 2018.