



## Education, Employment and Small Business Committee

### Report No. 4, 56<sup>th</sup> Parliament

#### Subordinate legislation tabled between 11 October 2017 and 6 March 2018

##### 1 Aim of this report

This report summarises the committee's examination of subordinate legislation tabled from 11 October 2017 to 6 March 2018. 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
224	Proclamation made under the <i>Labour Hire Licensing Act 2017</i>	15 February 2018	13 June 2018
225	Proclamation made under the <i>Work Health and Safety and Other Legislation Amendment Act 2017</i>	15 February 2018	13 June 2018
05	Safety in Recreational Water Activities (Codes of Practice) Amendment Notice 2018	15 February 2018	13 June 2018
N/A	Education and Care Services National Further Amendment Regulations 2017 <sup>1</sup>	19 February 2018	13 June 2018
019	Industrial Relations Regulation 2018	6 March 2018	14 June 2018

##### 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

<sup>1</sup> The Education and Care Services National Further Amendment Regulations 2018 are made by the Education Council under sections 201 and 324 of the Education and Care Services National Law (as applied by the law of the States and Territories, including Queensland). Under section 303 of the National Law, a parliamentary committee of a participating jurisdiction may consider and report to the Parliament about a regulation in the same way that it can consider and report on regulations and Acts of its own jurisdiction; and a regulation may also be disallowed by a House of Parliament of a participating jurisdiction in the same way as a regulation made under an Act of that jurisdiction. If a regulation is disallowed in a majority of the participating jurisdictions, it ceases to have effect in all participating jurisdictions on the day of its disallowance in the last of the jurisdictions forming the majority.

lawfulness of the subordinate legislation were identified in respect of subordinate legislation No. 224, No. 225, or No. 019, or in respect of the Education and Care Services National Further Amendment Regulations 2017.

In respect of subordinate legislation No. 05 of 2018, the committee identified a potential issue of FLP, which is discussed below.

### **3.1 Safety in Recreational Water Activities (Codes of Practice) Amendment Notice 2018**

The Safety in Recreational Water Activities (Codes of Practice) Amendment Notice 2018 (Amendment Notice) revokes the *Recreational Diving, Recreational Technical Diving and Snorkelling Code of Practice 2011* (2011 code) and approves an updated, replacement code in the *Recreational Diving, Recreational Technical Diving and Snorkelling Code of Practice 2018* (2018 code).

The development of the 2018 code followed an increase in the average rate of notified snorkelling and diving fatalities in the Great Barrier Reef Marine Park in the first half of 2016-17, prompting the Minister for Industrial Relations to commit to reviewing the existing, 2011 code, to 'identify changes that could be made to the code to maintain Queensland's high standards of safety for the recreational water activities industry'.<sup>2</sup>

The explanatory notes advise:

*Industry stakeholders support updating and remaking the Code of Practice to ensure it is responsive to industry needs, safety concerns and technological advances, and reflects current best industry and international practice in snorkeler and diver safety.*<sup>3</sup>

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

Section 4(5)(e) of the LSA provides that 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.

The significance of the sub-delegation of matters to an approved code, as opposed dealing with such matters within the subordinate legislation, is that since the code itself is not 'subordinate legislation', it is not subject to the tabling and disallowance provisions of Part 6 of the *Statutory Instruments Act 1992* (SIA).

#### **Authorisation by an Act**

Section 43 of the *Safety in Recreational Water Activities Act 2011* provides that the Minister may approve a code of practice and may vary or revoke an approved code of practice. The code of practice has no effect unless the Minister gives notice of its making. The establishing notice is considered to be subordinate legislation.

Section 23 of the SIA 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.

It would therefore appear that the sub-delegation is authorised.

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<sup>2</sup> Explanatory notes, Safety in Recreational Water Activities (Code of Practice) Amendment Notice 2018, p 1.

<sup>3</sup> Explanatory notes, Safety in Recreational Water Activities (Code of Practice) Amendment Notice 2018, p 1.

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, the Parliament's former Scrutiny of Legislation Committee (SLC) suggested regard should be given to issues such as:

- the importance of the subject matter, and
- the practicality or otherwise of including those matters entirely in subordinate legislation.<sup>4</sup>

The 2018 Code includes 63 pages of technical and detailed information, including various forms incorporated in appendices. It is therefore arguable that for practical reasons, it is appropriate for such detailed matters to be set out in a document other than subordinate legislation.

Availability of documents and parliamentary scrutiny

The SLC also considered that concerns about sub-delegation might be lessened where the statutory document in question could only be incorporated under (disallowable) subordinate legislation and was attached to the subordinate legislation, or was required to be tabled with the subordinate legislation, making it available for inspection.

Here, the 2018 code is incorporated by the Amendment Notice and can only be changed or replaced through a further amendment notice to prescribe a new or amended version of the code.

However, while the 2018 code is available on the Office of Industrial Relations' website,<sup>5</sup> it is not attached or included within the subordinate legislation in its entirety, and has not been tabled in the Parliament. As such, its content does not directly come to the attention of the House. Similarly, while any (future) amendment notice would alert the House that there has been an amendment to the document, it will not contain information about the changes that have been made.

The committee wrote to the Office of Industrial Relations (OIR) seeking advice on these matters.

OIR advised in response:

*...the content of a code of practice is not suitable to include as a Regulation since it provides flexibility for duty holders to cope with technological changes and to implement measures most appropriate for individual workplaces.*

*A code of practice provides practical guidance for persons who have duties under the Act, offering information on how they can achieve the standards required and effective ways to identify and manage risks. There is no requirement for duty holders to comply with a code of practice since they are not binding or prescriptive in character. If a person can otherwise show they have complied with duties under the Act in a different way, then compliance with a code of practice is not required.*

*The Recreational Diving, Recreational Technical Diving and Snorkelling Code of Practice 2018 is consistent with these principles, providing guidance to business operators on how to discharge their obligations under the Act and Regulation, and not imposing any additional mandatory obligations.*

*Codes of practice have been used under the Work Health and Safety Act 2011(WHS Act) for many years, and are used in all Australian jurisdictions. As part of implementing the*

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<sup>4</sup> See for example, Scrutiny of Legislation Committee, *Alert Digest* 1999/04, p. 10, paras 1.65-167.

<sup>5</sup> See: Office of Industrial Relations, *Recreational Diving, Recreational Technical Diving and Snorkelling Code of Practice* 2018, 8 February 2018, available at: [https://www.worksafe.qld.gov.au/\\_data/assets/pdf\\_file/0004/152329/rec-diving-rec-tech-diving-snorkelling-COP-2018.pdf](https://www.worksafe.qld.gov.au/_data/assets/pdf_file/0004/152329/rec-diving-rec-tech-diving-snorkelling-COP-2018.pdf).

*national model work health and safety laws in 2011, Queensland approved 20 national model codes of practice, and retained 18 codes of practice that are specific to Queensland. During previous processes of remaking or amending codes, the Office of Industrial Relations (OIR) has not been required to table a code along with the subordinate legislation notice that makes it.*

#### Committee comment

Where an extrinsic document (such as the 2018 code) is incorporated into the legislative framework of the State but 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 might 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.

In this instance, however, the committee is satisfied with OIR's explanation regarding the detailed and technical nature of the information contained in the 2018 Code, and notes the extensive consultation and broad stakeholder support for the changes, to improve safety in recreational diving and snorkelling.


The committee also notes that the Minister has provided some information about the changes to the 2018 code in the explanatory notes (including the reasons for, and the nature of, the changes), to help inform the House.

## **4 Explanatory notes**

The explanatory notes tabled with each of the items of subordinate legislation generally comply with the requirements of section 24 of the LSA.

## **5 Recommendation**

The committee recommends that the Legislative Assembly notes this report.



Leanne Linard MP

**Chair**

**May 2018**

### **Education, Employment and Small Business Committee**

Chair	Ms Leanne Linard MP, Member for Nudgee
Deputy Chair	Mrs Jann Stuckey MP, Member for Currumbin
Members	Mr Bruce Saunders MP, Member for Maryborough
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