

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

Subordinate legislation tabled between 25 October 2017 and 6 March 2018 Report No. 6

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 25 October 2017 and 6 March 2018. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles (FLPs) and 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
227	Domestic and Family Violence Protection (Interstate and Foreign Orders) Amendment Regulation (No. 2) 2017	15 February 2018	13 June 2018
2	Proclamation made under the <i>Child Protection Reform Amendment Act 2017</i>	15 February 2018	13 June 2018
3	Youth Justice (Transitional) Regulation 2018	15 February 2018	13 June 2018
7	Youth Justice (Transitional) Amendment Regulation 2018	15 February 2018	13 June 2018
10	Proclamation made under the <i>Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017</i>	6 March 2018	14 June 2018

2.1 Domestic and Family Violence Protection (Interstate and Foreign Orders) Amendment Regulation (No. 2) 2017 – SL No. 227

The objective of the amendment regulation is to ensure the Domestic and Family Violence Protection Regulation 2012 accurately reflects Western Australia's domestic violence legislation upon commencement of the National Domestic Violence Order Scheme (NDVOS) on 25 November 2017.

On 25 November 2017, the NDVOS provisions of the *Domestic and Family Violence Protection and Other Legislation Amendment Act 2016* commenced. That Act inserts a new Part 6 into the *Domestic and Family Violence Protection Act 2012* to establish the NDVOS in Queensland. Part 6 will allow for the automatic mutual recognition of domestic violence orders made across Australian jurisdictions.

Under Part 6, sections 173 and 174 require an interstate order (an order made by a court or police officer of another state) and a registered foreign order (a New Zealand order) to be declared so by regulation.

Amendments to the regulation are required to:

- reflect Western Australia's domestic violence legislation, and
- ensure there is no gap in protection for WA victims of domestic and family violence when the NDVOS commences on 25 November 2017.

Fundamental legislative principle issues

No issues regarding consistency with FLPs or the lawfulness of the subordinate legislation were identified.

Explanatory notes

The explanatory notes tabled with the regulation comply with part 4 of the LSA. In relation to consultation, the explanatory notes state:

In accordance with the Queensland Government Guide to Better Regulation, the Office of Best Practice Regulation was not consulted in relation to the amendment regulation. The Department of Communities, Child Safety and Disability Services applied a self-assessed exclusion from further regulatory impact analysis on the basis that the Amendment Regulation is of a machinery nature – category (g).

The department advised the committee that its assessment that the Regulation was machinery in nature was because:

- no substantive policy change was made – the substantive policy changes were made by the Amendment Act (the automatic mutual recognition of domestic violence orders made across Australian jurisdictions). Consistent with the policy decision to implement the NDVOS in Queensland, Amendment Regulation No. 2 amended the DFVP Regulation to ensure WA's domestic violence orders and foreign registered orders could be recognised, and
- the regulation consists of merely declaratory provisions – per sections 173 and 174 of the Act, Amendment Regulation No. 2 amended the DFVP Regulation to declare WA's domestic violence orders and foreign registered orders which could be recognised under the NDVOS.¹

2.2 Proclamation made under the *Child Protection Reform Amendment Act 2017* – SL No. 002

The proclamation commenced sections 68(3), 69(2), 71 and 72 of the *Child Protection Reform Amendment Act 2017* (CPRA Act).

These sections of the CPRA Act provide for disclosure of information by the chief executive to:

- a person who is, or has been, in out-of-home care
- the Queensland Police Commissioner following the death of a child
- the parent/s of a deceased child, and
- the chief executive responsible for child protection in another Australian jurisdiction or New Zealand.²

Most sections of the CPRA Act have not yet commenced.

¹ Department of Child Safety, Youth and Women, correspondence, 1 June 2018, Attachment 1, p 1.

² Child Protection Reform Amendment Bill 2017, explanatory notes, p 1.

The CPRA Act implements priority legislative reforms in response to a review of the *Child Protection Act 1999*, recommended by the 2013 Queensland Child Protection Commission of Inquiry. The review was undertaken between 2015 and 2017.

The proclamation commenced sections 68(3), 69(2), 71 and 72 of the CPRA Act. These sections provide for disclosure of information by the chief executive to:

- a person who is, or has been, in out-of-home care
- the Queensland Police Commissioner following the death of a child
- the parent/s of a deceased child, and
- the chief executive responsible for child protection in another Australian jurisdiction or New Zealand.³

Fundamental legislative principle issues

No issues regarding consistency with FLPs or the lawfulness of the subordinate legislation were identified.

Explanatory notes

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

2.3 Youth Justice (Transitional) Regulation 2018 – SL No. 003

The Youth Justice (Transitional) Regulation 2018 provides transitional arrangements for the transfer of 17-year-olds from the adult criminal justice system into the youth justice system on the commencement of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (the Amendment Act). The policy objective of the Amendment Act is that, where it is safe and appropriate to do so, 17-year-olds who are in the adult criminal justice system should be transferred to the youth justice system.

The policy objectives of the Amendment Act are to increase the upper age of who is a child for the purposes of the *Youth Justice Act 1992*, from 16 years to 17 years; and establish a regulation-making power to provide transitional arrangements for the transfer of 17-year-olds from the adult criminal justice system to the youth justice system.⁴

The regulation was made in support of the Amendment Act, to transfer 17-year-olds who are in the adult criminal justice system to the youth justice system, where it is safe and appropriate to do so.⁵

The Amendment Act commenced on 12 February 2018, and the regulation commenced immediately afterwards. The regulation will expire 2 years after its commencement (February 2020).⁶

The regulation affects three groups of 17-year-olds who are currently in the adult criminal justice system:

- those alleged to have committed an offence as a 17-year-old, who are subject to current adult court proceedings (whether on bail or remanded in custody)
- those serving a current adult community-based order (eg probation or community service), and
- those serving a current sentence of imprisonment.

³ Child Protection Reform Amendment Bill 2017, explanatory notes, p 1.

⁴ Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Bill 2016, explanatory notes, p 1.

⁵ Youth Justice (Transitional) Regulation 2018, explanatory notes, p 1.

⁶ Youth Justice (Transitional) Regulation 2018, s 3.

Practical effects of the changes made by the regulation include:

- a change in processes and decision making, such as when police officers are questioning a 17-year-old and taking DNA samples from a 17-year-old, and
- outstanding charges of breaching a bail condition are to be withdrawn as a child (which will now include a 17-year-old) cannot be subject to a proceeding relating to a breach of a bail condition.⁷

Fundamental legislative principle issues

The committee identified potential FLP issues with parts 2, 3 and 5 of the regulation.

Part 2 (Current proceedings for offences by 17-year-olds) of the regulation provides that if there is a current proceeding against a person who is 17 years old at the time of commencement and who committed an offence as a 17-year-old before commencement, the proceeding must be transferred to the appropriate Children's Court as constituted by a judge or magistrate.

This part could be seen as potentially adversely affecting the rights and liberties of individuals, section 4(2)(a) of the *Legislative Standards Act 1992*, as, prior to the commencement, the person would have been expecting to be dealt with as an adult.

Part 3 (Persons subject to terms of imprisonment or parole orders) of the regulation provides that a person who committed an offence as a 17-year-old before commencement, may be dealt with under the regulation so that the provisions of the Act or another Act will apply as if the adult sentence or order were a corresponding child order.

Additionally, Part 5 (Persons subject to other uncompleted sentences or orders) provides that if a person, who was 17 years old at the time, was sentenced to an adult order, then an obligation, permission or requirement under that order is taken to be an order, an obligation, permission or requirement under a corresponding child order.

These parts could be seen as potentially adversely affecting the rights and liberties of individuals (section 4(2)(a) of the *Legislative Standards Act 1992*) as, prior to the commencement, the person was sentenced as an adult and would have been expecting the sentence or order to be administered as an adult order.

The explanatory notes state:

*... any breach of this FLP is considered to be justified as the legal rights of the person are preserved and the person is afforded the same position as all other 17 year olds post commencement in that the proceeding will now be conducted in the appropriate children's jurisdiction.*⁸

Committee comment

The committee considers that, on balance, the Regulation has sufficient regard to the rights and liberties of individuals.

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.

The explanatory notes set out details of consultation on the draft regulation but do not provide an outline of the results of that consultation nor do they provide an explanation of any changes made to

⁷ Youth Justice (Transitional) Regulation 2018, explanatory notes, p 3.

⁸ Youth Justice (Transitional) Regulation 2018, explanatory notes, p 6.

the legislation as a result of consultation. Accordingly, the explanatory notes do not fully comply with section 24(2)(a) of the LSA.

The committee requested that the department provide information about the outcomes of consultation, in accordance with section 24(2)(a) of the LSA, to which the department advised:

Due to time constraints, no consultation was undertaken external to government on the Amendment Regulation during its development. Key non-government stakeholders were advised of the nature of the amendments prior to the Amendment Regulation being made.

No changes were made to the regulation during its development as a result of consultation.⁹

On 11 June 2018, the Minister tabled an erratum to the explanatory notes that provides information on the outcomes of the department's consultation. It also explains that the consultation resulted in the inclusion of section 9 of the Regulation.¹⁰

The explanatory notes tabled with the Regulation and erratum tabled on 11 June 2018 comply with part 4 of the LSA.

2.4 Youth Justice (Transitional) Amendment Regulation 2018 – SL No. 007

The Youth Justice (Transitional) Amendment Regulation 2018 amends the Youth Justice (Transitional) Regulation 2018 to introduce a requirement that any 17-year-old in the transitional cohort who enters into custody will in the first instance be placed in an adult correctional facility. The explanatory notes provide that the objective is:

... to ensure that the only pathway into detention for a 17-year-old to whom the Transitional Regulation applies is via the safety and best interests assessment set out in part 4 of the Transitional Regulation.¹¹

The amendments direct that if a 17-year-old is subject to a sentence order or court proceedings for an offence at commencement, and subsequently enters custody in connection with that offence, they will be detained in an adult corrective services facility (unless they are already being held in a youth detention centre).¹²

The amendments omit current provisions that direct 17-year-olds to detention centres in a range of circumstances – for example, when remanded in custody (s 17), on resentencing following revocation of a community-based order (s 64), or when an appeal court substitutes a new sentence (s 72). In these circumstances, the person will first go to a corrective services facility, where an assessment under part 4 will be conducted and the person transferred to a detention centre if it is safe and in the person's best interests to do so. This will ensure that this transitional cohort will only enter into detention when it is safe and in their best interests to do so through the operation of part 4 of the transitional regulation.

Fundamental legislative principle issues

The committee identified as a potential FLP issue, that any 17-year-old in the transitional cohort who enters into custody will in the first instance be placed in an adult correctional facility. This could be seen as adversely affecting the rights and liberties of individuals as, prior to the commencement, the person would have been expecting to serve a period of detention or otherwise be placed in a youth detention centre under a custodial order. The explanatory notes state:

⁹ Department of Child Safety, Youth and Women, correspondence, 1 June 2018, Attachment 1, p 3.

¹⁰ Youth Justice (Transitional) Regulation 2018, erratum to the explanatory notes.

¹¹ Youth Justice (Transitional) Amendment Regulation 2018, explanatory notes, p 1.

¹² Youth Justice (Transitional) Amendment Regulation 2018, explanatory notes, p 1.

... any inconsistency with this FLP is considered to be justified as the Regulation is limited in application to the transitional cohort of 17 year olds who were charged as adults and without the Transitional Regulation would remain entirely in the adult justice system. Any breach needs to be balanced with the imperative to provide for the best interests of the transitional cohort, and the safety of that cohort and of others who may be impacted.

It should also be noted that there will be an opportunity to transfer to youth detention under part 4 of the Transitional Regulation.¹³

The committee requested that the department provide further information about the justification of this FLP issue, to which the department advised:

The explanatory notes for the Amendment Regulation provides that the provisions of the Amendment Regulation could be seen as potentially adversely affecting the rights and liberties of individuals under section 4(2)(a) of the Legislative Standards Act 1992. Page 3 of the explanatory notes explicitly refer to the Amendment Regulation expanding the provisions of the Transitional Regulation to provide that any 17-year-old in the transitional cohort who enters into custody will in the first instance be placed in an adult correctional facility.

The explanatory notes also provide that any breach needs to be balanced with the imperative to provide for the best interests of the transitional cohort, and the safety of that cohort and of others who may be impacted. The scope of any breach is limited to those 17-year-olds subject to a sentence order or court proceedings for an offence at commencement, and subsequently enters custody in connection with that offence. The Amendment Regulation provisions do not apply to any 17-year-olds charged and dealt with under the Youth Justice Act 1992 after the date of commencement of the Amendment Act.

The explanatory notes explain that the potential breach of fundamental legislative principles is mitigated by there being an opportunity to transfer to youth detention under part 4 of the Transitional Regulation.¹⁴

Committee comment

The committee considers that, on balance, the Amendment Regulation has sufficient regard to the rights and liberties of individuals.

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.

The explanatory notes for the Youth Justice (Transitional) Amendment Regulation 2018 set out details of consultation on the draft regulation but do not provide an outline of the results of that consultation nor do they provide an explanation of any changes made to the legislation as a result of consultation. Accordingly, the explanatory notes do not fully comply with section 24(2)(a) of the LSA.

The committee requested that the department provide information about the outcomes of consultation, in accordance with section 24(2)(a) of the LSA, to which the department advised:

The YJSAG (Youth Justice Stakeholder Advisory Group) was engaged early in the policy development process, with the aim of developing fair and efficient transitional processes.

¹³ Youth Justice (Transitional) Amendment Regulation 2018, explanatory notes, p 3.

¹⁴ Department of Child Safety, Youth and Women, correspondence, 1 June 2018, Attachment 1, p 3.

Consultation began in the first half of 2017 with discussion about the general approach to be taken.

Feedback from the YJSAG and the Childrens Court Committee was incorporated into the Transitional Regulation prior to it being made. This included providing options in section 9 to enable a judicial officer who presided over a hearing for a young person to sentence a young person under the YJ Act in certain circumstances to provide efficiency and flexibility in each case.

Feedback received during consultation was included in the Transitional Regulation prior to it being made.¹⁵

On 11 June 2018, the Minister tabled an erratum to the explanatory notes. The erratum states that, due to time constraints, no consultation was undertaken on the Regulation.¹⁶

The explanatory notes tabled with the Amendment Regulation and erratum tabled on 11 June 2018 comply with part 4 of the LSA.

2.5 Proclamation made under the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017* – SL No. 010

The proclamation commences various sections of the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017* (the Act). The Health Practitioner Regulation National Law and Other legislation Amendment Bill 2017 was considered by the former HCDSDFVPC of the 55th Parliament which recommended that the Bill be passed. The Bill was passed on 6 September and received assent on 13 September 2017, and has progressively commenced since assent, with various sections not yet proclaimed into force.

The Act amends the *Health Practitioner Regulation National Law (National Law)* and other related legislation and includes the following reforms:

- national regulation of paramedics, including the establishment of a Paramedicine Board of Australia
- enabling the COAG Health Council to make changes to the structure of National Boards by regulation following consultation
- recognition of nursing and midwifery as two separate professions, rather than a single profession, with the professions continuing to be regulated by the Nursing and Midwifery Board of Australia
- improvements to the complaints (notifications) management, disciplinary and enforcement powers of National Boards to strengthen public protection and ensure fairness for complainants (notifiers) and practitioners, and
- technical amendments to improve the efficiency and effectiveness of the National Law.¹⁷

Some of these reforms have already commenced.

The proclamation commences sections 9, 17(2), 18(2), 19, 23, 24, 30(1), 32-34, 35(1), 38, 52 (to the extent it inserts sections 318 and 319), 62, 63, 65, 66, 69-71, 72 (other than to the extent it inserts the note), and 75. The effect of these commenced provisions include: the establishment and operation of a health panel under the *Health Practitioner Regulation National Law Act 2009* if the suspension of a

¹⁵ Department of Child Safety, Youth and Women, correspondence, 1 June 2018, Attachment 1, p 2.

¹⁶ Youth Justice (Transitional) Amendment Regulation 2018, erratum to the explanatory notes.

¹⁷ Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2017, explanatory notes, p 1.

practitioner's or student's registration is to be reconsidered under that legislation;¹⁸ and amendments to the *Health Ombudsman Act 2013* regarding the health ombudsman's ability to take immediate registration action.¹⁹ The changes to the Health Ombudsman Act include some of the amendments to the Act proposed by the former health ombudsman and recommended by the former committee in its report No. 31 from the *Inquiry into the performance of the Queensland Health Ombudsman's functions pursuant to section 179 of the Health Ombudsman Act 2013*.

Fundamental legislative principle issues

No issues regarding consistency with FLPs or the lawfulness of the subordinate legislation were identified.

Explanatory notes

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

3 Committee consideration of the subordinate legislation

An issue regarding consistency with fundamental legislative principles of the subordinate legislation was identified with the Youth Justice (Transitional) Amendment Regulation 2018 – which was the possibility that some 17-year-olds who enter into custody will in the first instance be placed in an adult correctional facility.

The committee sought and received information from the department on the inconsistency with fundamental legislative principles. The department's advice and the committee's comment has been incorporated into this report.

4 Recommendation

The committee recommends that the House notes this report.



Aaron Harper MP
Chair

June 2018

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

Chair

Mr Aaron Harper MP, Member for Thuringowa, Chair

Deputy Chair

Mr Mark McArdle MP, Member for Caloundra, Deputy Chair

Members

Mr Michael Berkman MP, Member for Maiwar

Mr Martin (Marty) Hunt MP, Member for Nicklin

Mr Barry O'Rourke MP, Member for Rockhampton

Ms Joan Pease MP, Member for Lytton

¹⁸ Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017, ss 30(1), 32 to 34, 35(1) and 38.

¹⁹ Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017, ss 62, 63, 65 and 66.