

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

Report No. 26, 56<sup>th</sup> Parliament

Subordinate legislation tabled between 1 May and 14 June 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 1 May 2019 and 14 June 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* (LSA).

**2 Subordinate legislation examined**

| No. | Subordinate legislation  | Date tabled  | Disallowance date |
|-----|--|--------------|-------------------|
| 72  | <b>Private Health Facilities (Standards) Amendment Notice 2019</b> | 11 June 2019 | 16 October 2019   |
| 94  | <b>Adoption (Fees) Amendment Regulation 2019</b>                   | 11 June 2019 | 16 October 2019   |

**3 Private Health Facilities (Standards) Amendment Notice 2019**

The purpose of the Private Health Facilities (Standards) Amendment Notice 2019 is to notify the making of six amended standards under the *Private Health Facilities Act 1999* (the Act). The following Standards have been updated with their corresponding updated versions noted:

- Credentials and clinical privileges standard (version 5)
- Continuous quality improvement standard (version 4)
- Ethics standard (version 3)
- Information management standard (version 5)
- Patient care standard (version 6)
- Physical environment standard (version 6).

The Act states that, “The chief health officer may make standards under this Act for the protection of the health and wellbeing of patients receiving health services at private health facilities.”<sup>1</sup>

Section 12(5) of the Act provides that the notice of the making of the standard is subordinate legislation. The standards and their corresponding version numbers are then listed in Schedule 1 of the Private Health Facilities (Standards) Notice 2016.

The standards themselves are not contained in the Act or in the Private Health Facilities (Standards) Notice 2016. They are instead available for inspection from the office of the chief health officer (during business hours) and published on the Queensland Health website at: <https://www.health.qld.gov.au/system-governance/licences/private-health/legislation-standards>

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<sup>1</sup> *Private Health Facilities Act 1999*, Section 12(1)

Of the six standards that have been updated by the Private Health Facilities (Standards) Amendment Notice 2019, the only significant changes have been to the Credentials and clinical privileges standard. These changes are outlined below.

#### Credentials and clinical privileges standard

In March 2018, an Australian Senate inquiry into the number of women in Australia who have had transvaginal mesh implants and related matters recommended that the Commonwealth, state and territory health ministers require that guidance developed by the Australian Commission on Safety and Quality in Health Care (Commission) underpin credentialing processes in all public hospitals and encourage private health facilities to adopt similar processes. Queensland Health has committed to adopting the guidelines and has recommended to licensed private health facilities that they implement the guidelines in their credentialing processes. The Commission's guidelines have been included in version 5 of the Credentials Standard, giving effect to this recommendation.<sup>2</sup>

#### Changes to other standards

The explanatory notes state that changes to the remaining five standards include updates to the latest versions of reference documents, remove redundant references and make minor revisions to wording to aid understanding. "The outdated references and other minor amendments proposed do not impact significantly on the operation of the standards, however, they have been refined and modernised to enhance their relevance and use."<sup>3</sup>

### **3.1 Fundamental legislative principle issues**

As noted above, the Private Health Facilities (Standards) Amendment Notice 2019 advises of the making of a range of standards under the Act, which have been updated to reflect relevant references and to modernise formatting. The standards themselves are not included in the Amendment Notice.

This might be considered a breach of the fundamental legislative principle in section 4(5)(e) of the *Legislative Standards Act 1992*, which requires subordinate legislation to have sufficient regard to the institution of Parliament by allowing the sub-delegation of a power delegated by an Act only in appropriate cases to appropriate persons and if authorised by an Act.

The explanatory notes acknowledge this issue and provide the following response:

*The amended Standards will be tabled in the Legislative Assembly to enhance the visibility of the documents to members of the Legislative Assembly. The amended Standards are also available on the Queensland Health website.*

*In addition, the technical nature of the requirements outlined in the Standards, and their use in ensuring the safety and protection of Queenslanders receiving health care at private health facilities, justifies the need to refer to the Standards in the Notice.<sup>4</sup>*

For the purposes of the Act and the Amendment Notice, Hon Dr S J Miles MP, Minister for Health and Minister for Ambulance Services, tabled each of the six updated standards on 17 May 2019.

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:

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<sup>2</sup> Private Health Facilities (Standards) Amendment Notice 2019, Explanatory notes, p 2.

<sup>3</sup> As above.

<sup>4</sup> Explanatory notes, p 3.

- if authorised by an Act, and
- in appropriate cases and to appropriate persons.<sup>5</sup>

Part of the rationale for this issue is to ensure sufficient parliamentary scrutiny of a delegated legislative power.<sup>6</sup>

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, extrinsic documents (such as the standards) that are not reproduced in full in subordinate legislation, and where changes to those documents can be made without the content of those changes coming to the attention of the House, it may be argued that the documents (and the process by which they are incorporated into the legislative framework) have insufficient regard to the Institution of Parliament.

The standards are not contained in the subordinate legislation in their entirety and as such their contents do not come to the attention of the House. Similarly, while a future amending notice will alert the House that there has been an amendment to the document (e.g. if a future notice states that it is replacing the standards), it will not contain information about the changes that have been made.

To aid its consideration of the potential breach of Fundamental Legislative Principles, the committee requested the Department of Health to clarify whether:

- there are practical or other considerations that prevent the department from including the relevant standards in subordinate legislation so as to ensure sufficient parliamentary scrutiny of regulations, and
- the reference in the Regulation to the standards, whilst it remains an extrinsic document, has sufficient regard to the Institution of Parliament.

Queensland Health in its advice to the committee stated:

*Standards set out matters of technical detail for the protection of the health and wellbeing of patients receiving health services at private health facilities. Standards are monitored and updated when necessary, align with Australian and international standards and are published on the Queensland Health website ([www.health.qld.gov.au](http://www.health.qld.gov.au)).*

*The main policy objective of the amendment notice is to ensure that only experienced, suitably trained and qualified medical practitioners provide particular types of health care services as outlined in the updated *Credentials and Clinical Privileges Standard (Credentials Standard)*.*

*The *Credentials Standard* reflects the Chief Health Officer's credentialing requirements for licensed private health facilities and requires them to have a *Credentials and Clinical Privileges Committee* to evaluate, monitor and review the credentials of medical practitioners practicing at the facility.*

*The *Credentials Standard* requires a *Credentials and Clinical Privileges Committee* to have regard to advice received from clinical colleges and health professional registration authorities about standards and best practice. Version 4 of the *Credentials Standard* does not include advice received from the Australian Commission on Safety and Quality in Health Care (Commission) as information that a *Credentials Committee* should have regard to when performing its functions.*

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<sup>5</sup> Section 4(5)(e) of the *Legislative Standards Act 1992*

<sup>6</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 170.

*It is considered that the rigour surrounding the development of standards, their use in ensuring Queenslanders receive health care based on best clinical practice and the detailed nature of the documents, justifies the need to subdelegate by referring to external documents. It is common practice for technical and scientific information to be included in external documents, as it is not always possible to include this level of detail in the legislation itself.*

*Queensland Health considers the subdelegation is appropriate and justified as Private Health Facilities Standards set out matters of technical detail and are based on minimum requirements for private health facilities. It is common practice for technical and scientific information to be included in external documents, as it is not always possible to include this level of detail in the legislation itself. This enables flexibility for dealing with emerging public health or safety risks.*

*When making or amending a Standard, relevant individuals or organisations with expertise in, or experience of, the matters under consideration are consulted, or the Standard is amended to reflect the most up-to-date content from Australian or international Standards, reflecting best practice. A copy of each Standard made by the chief executive is published on the Queensland Health website.*

*The Standards are named in a statutory instrument. Each time a standard is updated, an amendment to the Private Health Facilities (Standards) Notice 2016 is required to prescribe the new version of the Standard, and to table the updated standard in the Legislative Assembly. This provides the Legislative Assembly with an opportunity for appropriate scrutiny of each standard.*

*Given the rigour around the review and approval process for documents referenced in the Standards such as the Australian Commission on Safety and Quality in Health Care credentialing requirements, it is considered that the reference in the Amendment Notice to the Standards has sufficient regard to the institution of Parliament.<sup>7</sup>*

#### **Committee comment**

The committee notes the department's advice and is satisfied the Amendment Notice has sufficient regard to the institution of Parliament and that it is appropriate for practical reasons for such matters to be set out in a document other than subordinate legislation.

The explanatory notes tabled with the regulations comply with the requirements of section 24 of the LSA.

## **4 Adoption (Fees) Amendment Regulation 2019**

The objective is to increase fees in the Adoption Regulation 2009 by 2.25 per cent in line with the Queensland government principles for fees and charges.<sup>8</sup> Adoption fees have increased annually since 2009 and the new fees commence on 1 July 2019. The fees will increase between 2.2 and 2.3 per cent (due to rounding).

The *Adoption Act 2009* provides for the payment of fees at various stages of the adoption process, including application, assessment and supervision. The fees are set out in the Adoption Regulation 2009.<sup>9</sup>

### **4.1 Fundamental legislative principle issues**

No issues of fundamental legislative principle were identified.

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<sup>7</sup> Queensland Health, correspondence dated 26 August 2019, attachment, pp 2-4.

<sup>8</sup> Adoption (Fees) Amendment Regulation 2019, Explanatory notes, p 2.

<sup>9</sup> Explanatory notes, p 2.

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**

**October 2019**

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

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|---------------------|--|
| <b>Chair</b>        | Mr Aaron Harper MP, Member for Thuringowa, Chair       |
| <b>Deputy Chair</b> | Mr Mark McArdle MP, Member for Caloundra, Deputy Chair |
| <b>Members</b>      | 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                    |