QUEENSLAND PARLIAMENT COMMITTEES

Health, Environment and Agriculture Committee

Report No. 6, 57th Parliament

Subordinate legislation tabled between 29 November 2023 and 13 February 2024

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 29 November 2023 and 13 February 2024. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles (FLPs),[1] its compatibility with human rights,[2] and its lawfulness.[3] It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA),[4] and the compliance of the human rights certificate with the *Human Rights Act 2019* (HRA).[5]

2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date*
170	Medicines and Poisons (Medicines) Amendment Regulation (No. 4) 2023	13 February 2024	2 May 2024
172	Nature Conservation (Protected Areas) Amendment Regulation 2023	13 February 2024	2 May 2024
181	Animal Care and Protection (Code of Practice for Horses at Livestock Slaughter Facilities) Amendment Regulation 2023	13 February 2024	2 May 2024
182	Rural and Regional Adjustment (Battery Booster Rebate Scheme) Amendment Regulation 2023	13 February 2024	2 May 2024
183	Rural and Regional Adjustment (Remote Communities Freight Assistance Scheme) Amendment Regulation 2023	13 February 2024	2 May 2024
184	Rural and Regional Adjustment (Variation of Resilient Homes Assistance Scheme) Amendment Regulation 2023	13 February 2024	2 May 2024
186	Nature Conservation and Other Legislation Amendment Regulation (No. 2) 2023	13 February 2024	2 May 2024
187	Forestry and Other Legislation Amendment Regulation 2023	13 February 2024	2 May 2024
188	Waste Reduction and Recycling Amendment Regulation 2023	13 February 2024	2 May 2024

1 *Legislative Standards Act 1992,* s 4.

2 *Human Rights Act 2019*, s 8.

3 *Legislative Standards Act 1992*, Part 4.

4 *Legislative Standards Act 1992*, Part 4.

5 *Human Rights Act 2019*, s 41.

194	Fisheries and Other Legislation (Structural Reform) Amendment Regulation 2023	13 February 2024	2 May 2024

* Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. These dates are subject to change.

3 Committee consideration of the subordinate legislation

No issues with the policy or lawfulness of the subordinate legislation were identified. The committee considered potential FLP and/or human rights issues in relation to SL Nos. 170, 181, 182, 183, and 194, which are discussed in this report. In all cases the committee is ultimately satisfied that the subordinate legislation is consistent with FLPs and compatible with human rights.

All explanatory notes tabled with the subordinate legislation comply with the requirements of part 4 of the LSA and all accompanying human rights certificates provide a sufficient level of information to facilitate understanding of the subordinate legislation in relation to their compatibility with the HRA.

A brief overview of the subordinate legislation is provided in the following sections.

4 SL No. 170 – Medicines and Poisons (Medicines) Amendment Regulation (No. 4) 2023

The objective of the Medicines and Poisons (Medicines) Amendment Regulation (No. 4) 2023 (SL No. 170) is to amend the Medicines and Poisons (Medicines) Regulation 2021 (Medicines Regulation) to:

- facilitate implementation of the Queensland Community Pharmacy Scope of Practice Pilot (Pharmacy Pilot) and provide for a new extended practice authority (EPA)
- clarify that enrolled nurses and anaesthetic technicians may possess a schedule 4 (S4) or schedule 8 (S8) medicine, if the medicine is possessed under the supervision of a registered nurse, midwife, dentist, or medical practitioner
- update references to a new version of the Queensland Ambulance Service (QAS) EPA
- other miscellaneous amendments to reflect updated standards and guidelines.[6]

4.1 Consistency with fundamental legislative principles

4.1.1 Institution of Parliament – subdelegation of power – external documents

Subordinate legislation should allow for the subdelegation of a power delegated by an Act only in appropriate cases and to appropriate persons, and if authorised by the Act itself.[7] External documents, such as EPAs and guidelines, are provided for in legislation but, unlike subordinate legislation, are not subject to parliamentary scrutiny through the tabling and disallowance provisions of the *Statutory Instruments Act 1992*.[8]

Section 232 (Making extended practice authorities) of the *Medicines and Poisons Act 2019* (MPA) empowers the chief executive of Queensland Health or their delegate to make an EPA authorising an approved person to deal with a regulated substance.[9]

SL No. 170 seeks to regulate the circumstances in which a pharmacist participating in the Pharmacy Pilot may do the following, amongst other things:

- prescribe a medicine for the management of a specified acute common condition, or as part of a health and wellbeing service or a chronic disease management program
- sell, other than on prescription, to enable continued dispensing

6 SL No. 170, explanatory notes, p 2.

7 *Legislative Standards Act 1992*, s 4(5)(e). A variety of factors may be taken into account when determining what constitutes an appropriate case, including the nature of the subject matter of an external document, and whether it is tabled in Parliament or is otherwise publicly available at no cost.

8 Scrutiny of Legislation Committee, Alert Digest 1999/04, p 10, para 1.66.

9 SL No. 170, explanatory notes, p 12.

- amend a prescription without the agreement of the prescriber who made the prescription, to enable therapeutic adaptation and substitution
- dispense for the purposes of therapeutic adaptation and substitution.[10]

To support timely patient care and prevent delays in service, SL No. 170 also regulates the circumstances in which:

- QAS officers can deal with an updated list of medications as a part of the QAS EPA[11]
- enrolled nurses and anaesthetic technicians can 'possess' S4 and S8 medications, if under supervision in an anaesthetic practice setting.[12]

EPAs include details such as the route of administration, the specific dose, quantity and/or duration of delivery of the substance and the circumstances in which it may be administered.[13] The explanatory notes advise that EPAs are regularly updated, taking into account matters including 'the healthcare needs of specific patient populations' and 'how care can be provided in a timely and safe manner'.[14]

The explanatory notes state that each time an EPA is updated, the Medicines Regulation is updated to reflect the name and new version number of the EPA, and that Queensland Health ensures a copy of the updated EPA is tabled as extrinsic material each time the Medicines Regulation is amended.[15] The explanatory notes further state that the 'rigour' surrounding the development of EPAs and the level of parliamentary oversight afforded by tabling extrinsic material referenced in legislation in the Legislative Assembly is sufficient justification for the subdelegation.[16]

4.1.2 Institution of Parliament – subdelegation of power

The committee considered whether cl 18 of SL No. 170 could have the effect of amending an Act of Parliament (otherwise known as a Henry VIII clause) and whether it allows subdelegation of power in appropriate cases and to appropriate people.

Concerns were raised by stakeholders (see Appendix A of this report) that:

- 'participating pharmacist' is defined in cl 18 of SL No. 170 (s 4A of sch 9 of the Medicines Regulation) as 'a pharmacist approved by the chief executive to participate in the community pharmacy scope of practice pilot'
- this gives the chief executive a power to grant (or refuse to grant) an approval to a pharmacist, and this is a condition precedent to being an approved person under ss 30 and 54 of the MPA
- the MPA does not confer an approval power on the chief executive in relation to an approved person so cl 18 effectively amends the MPA to confer an approval power on the chief executive - representing a Henry VIII clause and not having sufficient regard to the institution of Parliament
- the requirement that a pharmacist is approved by the chief executive is inconsistent with provisions in the Medicines Regulation and previous pilot programs
- the definitions of 'participating pharmacist' and 'participating pharmacy' should be amended or omitted from the subordinate legislation.[17]

10 SL No. 170, explanatory notes, pp 3, 6.

11 SL No. 170, explanatory notes, p 5.

12 SL No. 170, explanatory notes, p 4.

13 SL No. 170, explanatory notes, p 12.

14 SL No. 170, explanatory notes, p 12.

15 SL No. 170, explanatory notes, p 12.

16 SL No. 170, explanatory notes, p 12; this also provides the Legislative Assembly with an opportunity to scrutinise the EPA simultaneously with the regulation.

17 See Appendix A: A Calabro and D Calabro, correspondence, 12 February 2024.

The committee requested advice from Queensland Health in relation to these issues. Queensland Health advised that the definitions in cl 18 of 'participating pharmacist' as a person approved by the chief executive to participate in the Pharmacy Pilot, and 'participating pharmacy' as a community pharmacy approved by the chief executive as a place to which the Pharmacy Pilot applies, 'are necessary to define the class of persons who, under section 54 of the Medicines and Poisons Act, will be authorised to deal with an expanded range of regulated substances in connection with the Pharmacy Pilot'.[18]

Queensland Health further advised that the clause is consistent with the head of power established under the MPA and FLPs, because:

- the legislative authority for this regulation is established under s 54(2) of the MPA which gives guidance on how the regulation power may be exercised,[19] i.e. –

  > …the regulated activity with the regulated substance for the class of persons may be prescribed by reference to—
  >
  > (a) the circumstances in which the regulated activity may be carried out by the class of persons; or
  >
  > (b) the purposes for which the regulated activity may be carried out by the class of persons; or
  >
  > (c) the direction or supervision under which the regulated activity may be carried out by the class of persons; or
  >
  > (d) an extended practice authority that applies to the class of persons[20]

  Queensland Health noted that the list of examples contained at s 54(2) of the MPA are not exhaustive and 'do not preclude a regulation from prescribing a class of persons by reference to other relevant circumstances or considerations',[21] and further that the definitions of 'participating pharmacist' and 'participating pharmacy' in cl 18 are used to specify the 'circumstances in which' and 'purposes for which' regulated activities under the Pharmacy Pilot may be carried out by members of the prescribed class[22]
- cl 18 amends the Medicines Regulation; it does not insert a new chief executive power into the MPA and is not an example of a Henry VIII clause[23]
- cl 18 does not subdelegate a power to prescribe a class of persons to the chief executive. Rather the regulation prescribes a class of persons by reference to their participation in the Pharmacy Pilot, and states that a person's participation in the Pharmacy Pilot is to be approved by the chief executive if they meet the specific participation requirements[24]
- this approach is well established under the MPA and the Medicines Regulation
- the chief executive's role in approving participants is 'purely administrative in nature'.[25]

Committee comment

The committee considers that SL No. 170 has sufficient regard to the institution of Parliament.

We are satisfied that any breach of FLP arising from the use of EPAs is justified, having regard to the detail in the documents and that a level of parliamentary oversight will be provided because an EPA must be approved by regulation and a copy of the updated EPA was tabled.

The committee is satisfied that clause 18 of SL No. 170 is not a Henry VIII clause and that legislative authority is established under the MPA and there is no inappropriate subdelegation of power.

18 See Appendix A: Queensland Health, correspondence, 22 March 2024, p 1.

19 See Appendix A: Queensland Health, correspondence, 22 March 2024, p 2.

20 *Medicines and Poisons Act 2019*, s 54 (2).

21 See Appendix A: Queensland Health, correspondence, 22 March 2024, p 2.

22 See Appendix A: Queensland Health, correspondence, 22 March 2024, p 3.

23 See Appendix A: Queensland Health, correspondence, 22 March 2024, p 3.

24 See Appendix A: Queensland Health, correspondence, 22 March 2024, p 3.

25 See Appendix A: Queensland Health, correspondence, 22 March 2024, p 3.

5 SL No. 172 – Nature Conservation (Protected Areas) Amendment Regulation 2023

The Nature Conservation (Protected Areas) Amendment Regulation 2023 (SL No. 172) increases the area of 11 national parks, one conservation park and 2 nature refuges, namely:

- Bowling Green Bay National Park, near Townsville
- Brampton Islands National Park, near Mackay
- Broad Sound Islands National Park, near Rockhampton
- Eurimbula National Park, near Gladstone
- Gloucester Island National Park, near Bowen
- Goodedulla National Park, near Rockhampton
- Main Range National Park, near Warwick
- Northumberland Islands National Park, near Mackay
- Repulse Islands National Park, near Mackay
- Smith Islands National Park, near Mackay
- South Cumberland Islands National Park, near Mackay
- Main Range Conservation Park, near Warwick
- Helios Hills Nature Refuge, near Yeppoon (and redescribes the entirety of the nature refuge)
- Milky Pine Nature Refuge, near Port Douglas (and redescribes the entirety of the nature refuge).[26]

In addition, SL No. 172 declares the following 5 new nature refuges:

- Coopooroo Creek Nature Refuge, near Malanda
- Dundas Nature Refuge, near Fernvale
- Rangemoore Nature Refuge, near Proserpine
- Turangawaewae Nature Refuge, near Malanda
- Wonarro Creek Nature Refuge near Malanda.[27]

SL No. 172 also revokes part of the Gyetvay Park Nature Refuge, near Tamborine, to exclude former agricultural and domestic zones, and redescribes the entirety of the nature refuge.

6 SL No. 181 – Animal Care and Protection (Code of Practice for Horses at Livestock Slaughter Facilities) Amendment Regulation 2023

The Animal Care and Protection (Code of Practice for Horses at Livestock Slaughter Facilities) Amendment Regulation 2023 (SL No. 181) aims to establish a compulsory code of practice and give effect to the findings of the 'Martin Inquiry' which was established to report on matters including the welfare and management of retired racehorses held at Queensland based livestock slaughter facilities.[28]

The compulsory code of practice provides for the specific needs of horses in livestock slaughter facilities which are not currently found within the current Model Code of Practice for the Welfare of Animals: Livestock Slaughtering Establishments, Standing Committee on Agriculture and Resource Management Report 79 (Model Code),[29] including to:

- prescribe general responsibilities of owners and animal welfare officers at livestock slaughter facilities

26 SL No. 172, explanatory notes, pp 2-3.

27 SL No. 172, explanatory notes, pp 3-4.

28 SL No. 181, explanatory notes, pp 1, 2.

29 SL No. 181, explanatory notes, p 2.

- prescribe the requirements for the design, construction and maintenance of facilities and equipment used in relation to horses while held at a facility
- prescribe the handling of horses throughout a facility and the process for humane slaughter of horses
- place an obligation on facility owners to establish, implement and maintain a management system, policies and procedures to minimise risk to the welfare of horses, and to report any non-compliance to the Department of Agriculture and Fisheries (DAF).[30]

6.1 Consistency with fundamental legislative principles

6.1.1 Rights and liberties of individuals - ordinary activities should not be unduly restricted

Whether legislation unduly restricts ordinary activities is relevant in deciding whether legislation has sufficient regard to the rights and liberties of individuals.[31] The concept of liberty requires that an activity (including a business activity) should be lawful unless there is a sufficient reason to declare it unlawful by an appropriate authority.[32]

The specific requirements that owners must implement in relation to the design of the facility[33] (such as the lairage[34] and stunning box[35]) have the potential to unduly restrict the right to conduct business without interference.[36]

The explanatory notes indicate that SL No. 181 has been drafted to limit the impact on business activities by minimising the cost to the relevant businesses. During consultation on the proposed amendments, it was identified that the key cost for the facilities will arise from the requirement to ensure that horses cannot see, hear, or smell other horses being slaughtered. The code of practice does not stipulate exactly how this will occur, providing an intentional degree of latitude for businesses, with a view to minimising their costs.[37]

Committee comment

The committee considers any interference with ordinary business activities is reasonably justified on the basis that SL No. 181 addresses the significant animal welfare concerns identified during the Martin Inquiry, specifically in relation to the humane treatment and slaughter of horses at livestock slaughter facilities. Therefore, having regard to expected benefits in the welfare of horses processed at slaughtering businesses, and the flexibility in the regulation regarding the method of meeting certain requirements, we are satisfied that any breach of FLP is justified.

6.1 Compatibility with human rights

6.1.1 Property rights

SL No. 181 limits a facility owner's property rights because it prescribes minimum requirements in relation to design and construction of their facility.[38] For example, a stunning box is required to have

30 SL No. 181, explanatory notes, p 2.

31 *Legislative Standards Act 1992*, s 4(2)(a); Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental legislative principles: the OQPC notebook* (OQPC, *Notebook*), p 118.

32 OQPC, *Notebook*, p 118.

33 SL No. 181, s 6.

34 'Lairage' is defined at SL No. 181, s 1. It means a pen or yard in a livestock slaughter facility that is designated for holding a horse before the horse is slaughtered.

35 SL No. 181, s 7.

36 SL No. 181, explanatory notes, p 4 and human rights certificate, p 2.

37 SL No. 181, explanatory notes p 5.

38 SL No. 181, s 6 and 7.

solid sides to prevent a horse from looking out of the box and must be equipped to prevent a horse from lowering its head.[39]

A person's right to property is also affected by various provisions including those which concern the routine handling and slaughter and the emergency killing of horses. This results from the horse being considered as property, so regulation of the way in which they must be handled and killed places a restriction on the horse owner's use of their property.[40]

The human rights certificate states that the purpose of the limitation on property rights is to ensure the humane welfare and treatment of horses being processed at livestock slaughter facilities and to meet community expectation in relation to an appropriate response to issues in the media and the Martin Inquiry.[41] In addition, placing the requirements in a compulsory code of practice rather than a voluntary code is important because it provides certainty for animal industries into the future given the 'possibility of new entrants into the industry in future, whose willingness to engage and voluntarily provide adequate standards of welfare for horses is unknown'.[42] The findings of the Martin Inquiry indicated that the status quo is failing to prevent poor welfare outcomes for horses.[43]

6.1.2 Privacy rights

SL No. 181 potentially limits the privacy of those employed at the facility because of the requirement for an Animal Welfare Officer at a horse slaughter facility to report non-compliance to the owner, and where the non-compliance adversely affects the welfare of the horse, the owner must then report the non-compliance to the department.[44] This includes the reporting of any corrective action taken against a person and performance assessments during their employment at the facility which may include personal details or information.[45]

The human rights certificate provides similar justification for the potential limitation on privacy rights as provided for the potential breach of property rights: that the provisions are required to ensure compulsory adherence to the code of practice (given the gaps identified throughout the Martin Inquiry) and to meet community expectations in relation to the findings of the Martin Inquiry.[46]

The human rights certificate also identifies safeguards including those which already exist within the *Animal Care and Protection Act 2001* and the *Information Privacy Act 2009,* and the fact that the requirements in the code of practice have been developed under the guidance of an expert panel.[47]

Committee comment

The committee notes the findings of the Martin Inquiry that the status quo is failing to prevent poor welfare outcomes for horses and agrees that the implementation of mandatory requirements in circumstances where voluntary improvement has been limited is important.

We further note that an expert panel considered the issues raised by the Martin Inquiry and guided the department on the development of the code of practice, and therefore consider SL No. 181 strikes

39 SL No. 181, s 7.

40 SL No. 181, human rights certificate, p 3.

41 SL No. 181, human rights certificate, p 4.

42 SL No. 181, human rights certificate, p 5.

43 SL No. 181, explanatory notes, p 3.

44 The department responsible for enforcing the code of practice is currently the Department of Agriculture and Fisheries.

45 SL No. 181, s 20.

46 SL No. 181, human rights certificate, pp 4-5.

47 SL No. 181, human rights certificate, p 5. The limitations on property rights have been carefully designed by an expert panel to target the risks to animal welfare in the handling and killing of horses. The limitation on privacy rights through the reporting of details of a non-compliance will only arise where an individual's act or omission has led to a non-compliance with the code of practice that adversely affects a horse's welfare, that is, there is no routine reporting required to the department.

an appropriate balance between the purpose of the limitation and a person's property and privacy rights. The committee is satisfied that SL No. 181 is compatible with human rights.

7 SL No. 182 – Rural and Regional Adjustment (Battery Booster Rebate Scheme) Amendment Regulation 2023

The Rural and Regional Adjustment (Battery Booster Rebate Scheme) Amendment Regulation 2023 (SL No. 182) aims to establish the Battery Booster Rebate Scheme (the Scheme) which will provide 'financial support and incentive to domestic residential households in moving towards renewable energy by offsetting the upfront cost of purchasing and installing a residential solar battery'.[48]

7.1 Consistency with fundamental legislative principles

7.1.1 Institution of Parliament - subdelegation of power

Subordinate legislation should allow for the subdelegation of a power delegated by an Act only in appropriate cases and to appropriate persons, and if authorised by the Act itself.[49]

SL No. 182 provides for the Department of Energy and Public Works (DEPW) to approve and list installers for the purpose of the scheme as 'approved installers' on its website.[50] This potentially breaches the principle that legislation should have sufficient regard to the institution of Parliament because DEPW is able to amend this list without parliamentary oversight.[51]

The explanatory notes justify the potential breach of FLPs by stating that the list would not be suitable for inclusion in the regulation because of the technical nature of the credentials required by an installer for inclusion on the list, and need for frequent, minor updates.[52]

Committee comment

Given the expertise of the DEPW in relation to the subject matter, and the reasons identified in the explanatory notes for not including the list in a regulation, the committee is satisfied that the provision is an appropriate delegation of legislative power and that SL No. 182 has sufficient regard to the institution of Parliament.

8 SL No. 183 – Rural and Regional Adjustment (Remote Communities Freight Assistance Scheme) Amendment Regulation 2023

The Rural and Regional Adjustment (Remote Communities Freight Assistance Scheme) Amendment Regulation 2023 (SL No. 183) aims to provide financial assistance to retailers in the Northern Peninsula, Torres Strait and Gulf Regions to enable them to discount essential goods to provide cost-of-living relief for people in those communities.[53]

8.1 Consistency with fundamental legislative principles

8.1.1 Institution of Parliament - subdelegation of power

Subordinate legislation should allow for the subdelegation of a power delegated by an Act only in appropriate cases and to appropriate persons, and if authorised by the Act itself.[54]

48 SL No. 182, explanatory notes, p 1.

49 *Legislative Standards Act 1992*, s 4(5)(e).

50 SL No. 182, explanatory notes, p 3; SL No. 182, new sch 55, part 3.

51 *Legislative Standards Act 1992*, s 4(2)(b); SL No. 182, explanatory notes, p 3.

52 SL No. 182, explanatory notes, p 4.

53 SL No. 183, explanatory notes, p 1; Essential goods are food, drink, or a household item for domestic use other than those items listed at s 5 of SL No. 182 which includes, but is not limited to, items such as alcohol, confectionary and certain appliances or utensils.

54 *Legislative Standards Act 1992*, s 4(5)(e).

SL No. 183 enables the Queensland Rural and Industry Development Authority (QRIDA)[55] to determine the day on which the discount assistance or compliance assistance period ends[56] and determine what evidence is required to make an application for assistance[57] outside of a regulation. However, the extent of QRIDA's legislative power is narrow, being limited to dates and matters relating to the Remote Communities Freight Assistance Scheme application form and accompanying documents.

Committee comment

Given the extent of the subdelegation of power to QRIDA is limited to dates and matters relating to an application form and accompanying documents, the committee is satisfied that any inconsistency with FLPs is appropriate in this instance.

9 SL No. 184 – Rural and Regional Adjustment (Variation of Resilient Homes Assistance Scheme) Amendment Regulation 2023

The Rural and Regional Adjustment (Variation of Resilient Homes Assistance Scheme) Amendment Regulation 2023 (SL No. 184) aims to increase participation and improve the operation and administration of the Resilient Homes Assistance Scheme (RHA Scheme) by amending the definition of eligible works. It would allow QRIDA to provide grants to a greater number of Queensland homeowners who were impacted by recent floods and/or are at risk of being affected by future events.[58] The grants would allow homeowners to either 'raise', 'demolish and replace' or 'relocate' their homes.[59]

10 SL No. 186 – Nature Conservation and Other Legislation Amendment Regulation (No. 2) 2023

The Nature Conservation and Other Legislation Amendment Regulation (No. 2) 2023 (SL No. 186) amends the Nature Conservation (Animals) Regulation 2020 and the Nature Conservation (Plants) Regulation to update 31 flora species and 8 fauna species classifications to reflect current scientific knowledge.[60] It also clarifies matters relating to sick, injured and orphaned protected animals and certain dead animals, and makes a consequential amendment to the Environmental Offsets Regulation 2014 to prescribe a new version of the Queensland Environmental Offsets Policy which reflects updates to classification and taxonomy of species.[61]

11 SL No. 187 – Forestry and Other Legislation Amendment Regulation 2023

The objective of the Forestry and Other Legislation Amendment Regulation 2023 (SL No. 187) is to alter the areas of the following conservation parks, timber reserves, state forests and national parks:

- Wickham Timber Reserve and Plunkett Conservation Park, near Brisbane
- Beerwah State Forest and the new Mooloolah River Conservation Park, near Brisbane
- West Cooroy State Forest and the new West Cooroy Conservation Park, near Noosa
- Passchendaele State Forest, near Stanthorpe
- Deer Reserve State Forest and the new Deer Reserve Conservation Park, near Brisbane

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55 The *Rural and Regional Adjustment Act 1994* (RRA Act) establishes the Queensland Rural and Industry Development Authority (QRIDA) as an authority to administer approved assistance schemes which foster the development of a more productive and sustainable rural and regional sector in Queensland. RRA Act, s 3; pt 2, div 1.

56 SL No. 183, new sch 56, s 11(3)

57 SL No. 183, new sch 56, s 12(1)

58 SL No. 184, explanatory notes, p 1.

59 SL No. 184, explanatory notes, p 1; SL No. 184, new sch 44, s 4 (definition of eligible works).

60 SL No. 186, human rights certificate, p 1; explanatory notes, p 1.

61 SL No. 186, explanatory notes, p 3.

- Luttons State Forest and the Glass House Mountains Conservation Park, near Brisbane
- Mount Mee State Forest and the D'Aguilar National Park, near Brisbane
- Daintree National Park, near Cairns
- Kamerunga Conservation Park, near Cairns
- Tallebudgera Creek Conservation Park, near Gold Coast.

The reasons for the changes include accommodating the upgrade of the Cairns Western Arterial Road (Kamerunga Conservation Park), resolving a historic access issue for residential properties in Burleigh (Tallebudgera Creek Conservation Park), enabling land to be used as a tourism facility (Passchendaele State Forest), recognising a change to ambulatory boundaries of the Daintree River and to allow the grant of Aboriginal freehold land (Daintree National Park), and supporting several local and threatened species in other areas.[62]

12 SL No. 188 – Waste Reduction and Recycling Amendment Regulation 2023

The Waste Reduction and Recycling Amendment Regulation 2023 (SL No. 188) creates a definition of residue waste, namely 'residue waste from a glass beneficiation plant or a material recovery facility', and exempts it from the application of the waste disposal levy.[63]

13 SL No. 194 – Fisheries and Other Legislation (Structural Reform) Amendment Regulation 2023

The objective of the Fisheries and Other Legislation (Structural Reform) Amendment Regulation 2023 (SL No. 194) is to implement a fisheries structural adjustment to phase out large-mesh commercial gillnet fishing in the Great Barrier Reef (GBR) World Heritage Area and manage changes to the Great Sandy Marine Park (GSMP) Zoning Plan.[64] SL No. 194 removes fishing authorities associated with commercial gillnet fishing within the GBR and areas within the GSMP, prohibits the commercial take of hammerhead sharks in Queensland, and establishes a financial assistance scheme for holders of eligible fishing authorities.[65] The removal of fishing authorities will restrict the type of species and maximum volume allowed to be fished and the manner in which that fishing is allowed to take place.[66]

There were short timeframes involved in the implementation of the structural adjustment package, with key reforms due in place for 1 January 2024. The consultation period which DAF undertook during August 2023 prior to the tabling of this amendment regulation was only three weeks long.[67]

13.1 Consistency with fundamental legislative principles

13.1.1 Institution of Parliament - delegation of legislative power

SL No. 194 provides for the chief executive of DAF to assess and issue the new fishery symbols[68] on primary commercial fishing licences.[69] This raises an FLP issue relating to subdelegation of legislative power because the chief executive has been afforded the power to prescribe the majority of detail

62 SL No. 187, explanatory notes, pp 1-2.

63 SL No. 188, human rights certificate, p 1.

64 SL No. 194, human rights certificate, p 1.

65 SL No. 194, explanatory notes, pp 3-4. The fishing authorities are licences, fishery symbols and eligible individual transferable quota (ITQ) units.

66 SL No. 194, explanatory notes, pp 4-7.

67 SL No. 194, explanatory notes, p 9.

68 That is N15 and NX. The N15 fishery symbol is a modified N1 symbol and allows the take of the same regulated fish as the N1 symbol, with the addition of barramundi. The explanatory notes advise that the purpose of the NX fishery symbol is 'to maintain seafood supply to some degree while allowing for a pathway towards alternative, more sustainable gear'; SL No. 194, explanatory notes, p 5.

69 SL No. 194, cl 7.

under which the holder of a symbol would operate (through the imposition of conditions on the licence).[70] The justification provided by the explanatory notes is that it will be temporary and is required to allow for a transition phase in which licence holders can trial alternative methods and gear, with the intention of finding more sustainable fishing methods.

Committee comment

Noting the temporary nature of the powers and that new methods or apparatus may become available that could be included within a condition imposed by a licence, it appears appropriate to delegate power to the chief executive to impose conditions on the relevant fishing authorities. The committee is therefore satisfied that the subdelegation of power is made to an appropriate person and in an appropriate case in this instance.

13.1.2 Rights and liberties of individuals - Aboriginal tradition and Island custom

Legislation should have sufficient regard to Aboriginal tradition and Island custom.[71]

The explanatory notes state that Aboriginal peoples and Torres Strait Islander peoples 'have had limited engagement and input' into the legislation and 'there was insufficient time' for respectful consultation to take place with Reef Traditional Owners and other First Nations peoples because of the limited timeframe for the Future Fishing Taskforce report.[72] The explanatory notes also observe that SL No. 194 will limit cultural rights and beliefs[73] (see also Section 13.2.2 below). The explanatory notes add that consultation is recommended to occur subsequently to the making of SL No. 194.[74]

13.1.2.1 Consultation with First Nations peoples

The committee sought information from DAF about the processes for current and future consultation with Aboriginal and Torres Strait Islander peoples affected by the changes implemented by SL No. 194.

The department advised that 'engagement and consultation with First Nations peoples on fisheries structural adjustment has now been undertaken and is ongoing in accordance with FLPs and Human Rights requirements'.[75] DAF provided the following table of information about consultation undertaken with First Nations peoples about the legislation:

Consultation undertaken with First Nations peoples by the Department of Agriculture and Fisheries

Who was consulted?	Dates	Communication process/mechanism	Communication products
Cape York Special Fisheries Working Group (consists of First Nations community representatives from Cape York)	22-23 Nov 2023 28-29 Feb 2024	Cape York Special Fisheries Working Group meetings	Verbal discussions as part of the working group agenda on the removal of gillnets in the Great Barrier Reef and consultation on potential gillnet free areas and general reforms in the Gulf of Carpentaria and how these initiatives could potentially benefit Indigenous fishing businesses ready to address the potential reduction in seafood supply. The meeting summary is available at: https://www.daf.qld.gov.au/business-priorities/fisheries/sustainable/fishery-working-groups/cape-york

70 SL No. 194, explanatory notes, p 13.

71 *Legislative Standards Act 1992*, s 4(3)(j).

72 SL No. 194, explanatory notes, p 16.

73 SL No. 194, explanatory notes, p 16.

74 SL No. 194, explanatory notes, pp 16, 19.

75 Department of Agriculture and Fisheries, correspondence, 24 April 2024.

Traditional Owners in the Gulf of Carpentaria	12 Oct 2023 to 10 Dec 2023	Public consultation on four candidate gill net free areas for the Gulf of Carpentaria	Discussion Paper and opportunity to submit hard copy or web based submissions. Link to discussion paper is available at: https://daf.engagementhub.com.au/gulf-of-carpentaria-fishery Submissions were received from: • Carpentaria Land Council Aboriginal Corporation • Kowanyama Aboriginal Shire Council • Mapoon Aboriginal Shire Council • Arukun Shire Council • Two individual Traditional fishers
Kowanyama Aboriginal Shire Council	7 Mar 2024	Targeted consultation	On-line discussions to guide the design and locations of gillnet free areas in the Gulf of Carpentaria
Pormpuraaw Aboriginal Shire Council	8 Mar 2024	Targeted consultation	On-Country discussions to guide the design and locations of gillnet free areas in the Gulf of Carpentaria
Gulf of Carpentaria Inshore Fishery Working Group (Includes Traditional Owner representatives)	12 Mar 2024	Gulf of Carpentaria Inshore Fishery Working Group meeting	Verbal discussions as part of the working group agenda https://www.daf.qld.gov.au/business-priorities/fisheries/sustainable/fishery-working-groups/gulf-of-carpentaria-inshore-fishery-working-group/gulf-of-carpentaria-inshore-fishery-working-group/communique-12-march-2024

Source: Department of Agriculture and Fisheries, correspondence, 24 April 2024.

The department further advised that during the remainder of 2024, DAF, the Department of Environment, Science and Innovation, and relevant federal government agencies 'intend to engage in partnership with Great Barrier Reef Traditional Owners to jointly implement the fisheries related actions in the Reef 2050 Traditional Owner Implementation Plan'.[76]

Committee comment

The committee notes the information provided by DAF about the department's efforts to advise Aboriginal peoples and Torres Strait Islander peoples of the fisheries changes which affect them, and we acknowledge that attempts have been made since November 2023 to consult with Reef Traditional Owners and other First Nations peoples.

We urge DAF to continue good faith engagement with the fishing industry and relevant First Nations stakeholders on the implementation of the fisheries structural adjustment package.

13.1.3 Rights and liberties of individuals - ordinary activities should not be unduly restricted

The rights and interests of commercial fishers will be affected by SL No. 194 due to the further restrictions it imposes on them, such as the prohibition on commercially taking hammerhead shark and being unable to use a gillnet in certain areas.[77] However, to achieve the policy objective of reducing impacts on threatened and endangered species within the GBR and GSMP, the explanatory notes state that it was considered necessary to introduce the restrictions.[78]

[76] Department of Agriculture and Fisheries, correspondence, 24 April 2024; see also Reef 2050 Traditional Owner Implementation Plan, https://reefto.au/wp-content/uploads/2023/02/DES_GBR_TO-Report_WEB_0223.pdf.

[77] See SL No. 194, human rights certificate, p 17.

[78] See SL No. 194, explanatory notes, pp 7-10.

The explanatory notes state that more than 100 submissions were received as part of the consultation process, the majority from commercial fishers who had concerns relating to the loss of income to their businesses, the need to buy back fishing assets, flow on impacts to seafood related businesses, and effort shift into other fisheries or species of recreational importance.[79] To mitigate the impact on individuals, monetary compensation will be available to affected fishers.[80]

Committee comment

Taking into account the purpose of SL No. 194, to implement a fisheries structural adjustment to reduce impacts on threatened and endangered species within the GBR and GSMP, and the financial assistance available to affected individuals, the committee considers that the impacts on individual rights and liberties are sufficiently justified.

13.2 Compatibility with human rights

The committee could be satisfied that SL No. 194 is compatible with human rights. The right to property, cultural rights of Aboriginal and Torres Strait Islander peoples, and the right to a fair hearing are discussed below.

13.2.1 Property rights

SL No. 194 limits the right to property because fishing symbols, which are required to commercially fish in particular areas, have property-like characteristics for the licence-holder.[81] The purpose of the limitation on the property rights of a licence-holder is to sustainably manage the species in the GBR and GSMP and reduce 'the interaction with threatened, endangered and protected species'.[82]

The human rights certificate contends that sustainable management of Queensland fisheries resources and threatened sites like the GBR outweighs the impact on commercial fishers. The human rights certificate draws attention to the remuneration and structural adjustment support for the licence as mitigating the impact on commercial fishers.[83]

13.2.2 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

The cultural rights of Aboriginal peoples and Torres Strait Islander peoples are engaged by SL No. 194, although the limitation is in a commercial fishing context only, with the purpose of SL No. 194 being to transition to more sustainable fishing practices and improving the ecological sustainability of the GBR region.[84] The human rights certificate observes that 'this limitation helps to ensure Aboriginal peoples and Torres Strait Islander peoples can continue to enjoy their traditional relationship with waters and coastal seas through traditional fishing'.[85]

Further, the human rights certificate states that the rights of Aboriginal peoples and Torres Strait Islander peoples to maintain and strengthen their distinctive relationships with their territories, waters, coastal seas and other resources, and to conserve and protect the environment and productive capacity of these places, 'are enhanced because of the netting restrictions being introduced in Dugong Protection Areas'[86] by SL No. 194:

> … the subordinate legislation positively protects Aboriginal peoples' and Torres Strait Islander peoples' rights as the netting restrictions and removal of net fishery symbols will reduce the number of

79 SL No. 194, explanatory notes, p 19.

80 SL No. 194, explanatory notes, pp 3-4.

81 SL No. 194, human rights certificate, p 6.

82 SL No. 194, human rights certificate, p 7.

83 SL No. 194, human rights certificate, p 7.

84 SL No. 194, human rights certificate, p 9.

85 SL No. 194, human rights certificate, p 9.

86 SL No. 194, human rights certificate, p 9.

interactions and deaths of dugongs which in turn will increase the availability and security of the species for cultural harvest.[87]

The human rights certificate notes, however, that the 'limited timeframe' for the Future Fishing Taskforce report 'particularly impacted the ability to undertake consultation with First Nations peoples, resulting in a recommendation to ensure future engagement and partnership with Reef Traditional Owners as the reforms are implemented'.[88] The human rights certificate concludes that 'the limitation on the cultural rights of Aboriginal and Torres Strait Islander peoples is justified, such that the benefits of preserving Queensland's fisheries resources from overfishing and providing ecological protection for the GBR outweighs the limitation'.[89]

13.2.3 Right to a fair hearing

A person who is a party to a civil proceeding has the right to have the proceeding decided after a fair and public hearing.[90]

SL No. 194 limits the right to a fair hearing in that it does not provide licence holders with the opportunity to appeal the removal of net fishery symbols from their licences.[91]

In addition, the standard process of releasing a Regulatory Impact Statement was waived (and with it, the consultation that would have occurred) due to the urgency of the reforms required to comply with the United Nations Educational, Scientific and Cultural Organization (UNESCO) recommendations. On this issue, the explanatory notes report that instead a Summary Impact Analysis Statement was approved by the Director-General, DAF, and the Minister for Agricultural Industry Development and Fisheries and Minister for Rural Communities, with the request that DAF 'continue to engage with the fishing industry and relevant stakeholders on the policy changes'.[92]

The human rights certificate states that the limitation on the right is justified because it directly achieves the purpose of SL No. 194 in ensuring the removal of destructive fishing methods and the preservation of particular species.[93] The impact of failing to comply with the UNESCO recommendation would threaten the World Heritage Listing status of the GBR, which the human rights certificate asserts far outweighs the limitation on the human right.

Committee comment

While SL No. 194 limits licence holder's property rights and the right to appeal, the committee also notes the urgency of reforms required to achieve the protection of species and Queensland's fisheries resources from continued unsustainable fishing practices. We are satisfied that the limitations are reasonable and demonstrably justified in each case and that SL No. 194 is compatible with human rights.

87 SL No. 194, human rights certificate, p 9.

88 SL No. 194, human rights certificate, p 9.

89 SL No. 194, human rights certificate, p 9.

90 *Human Rights Act 2019*, s 31.

91 SL No. 194, human rights certificate, p 10.

92 SL No. 194, explanatory notes, p 20.

93 SL No. 194, human rights certificate, p 10.

14 Recommendation

The committee recommends that the Legislative Assembly notes this report.

Aaron Harper MP
Chair

April 2024

Health, Environment and Agriculture Committee

Chair	Mr Aaron Harper MP, Member for Thuringowa
Deputy Chair	Mr Samuel (Sam) O'Connor MP, Member for Bonney
Members	Mr Stephen (Steve) Andrew MP, Member for Mirani
	Hon Craig Crawford MP, Member for Barron River
	Mr James Martin MP, Member for Stretton
	Mr Robert (Rob) Molhoek MP, Member for Southport

Appendix A Correspondence regarding SL No. 170

Committee Secretary
Health, Environment and Agriculture Committee
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21/02/2024

By email: heac@parliament.qld.gov.au

Dear Sir/Madam

Re: Ongoing Committee inquiry into the Examination of Portfolio Subordinate Legislation

Authors: Andrew Calabro and Daniel Calabro*

I INTRODUCTION

The *Medicines and Poisons (Medicines) Amendment Regulation (No. 4) 2023* (Qld) ('Amendment Regulation') was notified on 1 December 2023. The Amendment Regulation was tabled in the Legislative Assembly on 13 February 2024. The purpose of the Amendment Regulation is to amend the *Medicines and Poisons (Medicines) Regulation 2021* (Qld) ('MPMR') to 'facilitate implementation of the Queensland Community Pharmacy Scope of Practice Pilot (Pharmacy Pilot) and provide for a new extended practice authority'.[1]

The authors believe there are issues of fundamental legislative principles and of lawfulness requiring the Committee's attention. Section 93(1) of the *Parliament of Queensland Act 2001* (Qld) provides that 'a portfolio committee is responsible for examining…subordinate legislation in its portfolio area to consider': the fundamental legislative principles and lawfulness.[2] The authors provide this submission for the Committee's consideration.

Important dates to note:

- Part 3 of the Amendment Regulation commenced 1 February 2024. This part contains amendments relating to the implementation of the Pharmacy Pilot.
- The Pharmacy Pilot is due to commence early March 2024.

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[1] Explanatory Notes, *Medicines and Poisons (Medicines) Amendment Regulation (No. 4) 2023* (Qld) 2 ('Amendment Regulation').
[2] *Parliament of Queensland Act 2001* (Qld) s 93(1)(b), (c).

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II ISSUES WITH THE AMENDMENT REGULATION

A *Brief overview of the problematic provision*

Part 3 s 18 of the Amendment Regulation inserts a new Div 2A into the MPMR. The class of persons are prescribed under s 4B as 'a participating pharmacist who is practising at a participating pharmacy'. The terms 'participating pharmacist' and 'participating pharmacy' are defined in s 4A of the division. This new division essentially requires the chief executive to grant an approval to a person. The issue with this division is the chief executive does not have the legislative authority under the *Medicines and Poisons Act 2019* (Qld) ('MP Act') to grant such an approval.

B *Relevant background*

It is first necessary to understand how a person is authorised under the MP Act to deal with medicines and poisons. Section 30 of the MP Act sets out how a person is authorised. There are two parts to this legislative test. Firstly, a person must *be authorised* by one of four mechanisms listed in s 30(1)(a)-(d). Secondly, a person must act in the *authorised way*. For present purposes, the two relevant mechanisms for a person to *be authorised* are: 1) an approved person; 2) the holder of a substance authority.[3]

1 *Approved persons*

An approved person is defined in s 54 of the MP Act as a member of a class of persons prescribed by regulation. The MPMR prescribes classes of persons under reg 13. These classes are set out in separate schedules of the MPMR. The relevant schedule is sch 9 Pharmaceutical professions. Essentially, the schedule prescribes pharmacists and pharmacy assistants as approved persons.

It is important to note that an approved person may be prescribed by reference to a document known as an Extended Practice Authority. An Extended Practice Authority is a document setting out certain criteria pertaining to authorising an activity under the MP Act.[4] In practical terms, it provides an alternative method for authorising the activities of an approved person.[5] The Parliament has explained that the intent of the Extended Practice Authority is to provide 'an extension to what an approved person is able to do under this Act'.[6]

2 *Substance authorities*

The holder of a substance authority is defined in ss 61-2. A substance authority is essentially a term used to describe a type of licence or approval.[7] A licence may relate to, for example, a wholesale licence or manufacturing licence. An approval may relate to either a prescribing approval or a general approval. A person must make an application to the Chief Executive for

[3] *Medicines and Poisons Act 2019* (Qld) s 30(1)(a), (c) ('MP Act').
[4] Ibid s 232(1).
[5] See ibid s 54(2)(d).
[6] Explanatory Notes, Medicines and Poisons Bill 2019 (Qld) 164.
[7] See MP Act (n3) ss 61-8.

a substance authority.[8] The Chief Executive then has the power to grant or refuse to grant a substance authority.[9]

C Henry VIII clauses and breaches of fundamental legislative principles

1 ***Requiring a pharmacist participating in the pilot to hold an approval as a condition precedent to being an approved person within the meaning of ss 30(1)(a), 54 MP Act***

An issue arises with the definition of 'participating pharmacist' in s 4A of sch 9 MPMR. As discussed, sch 9 of the MPMR prescribes the requirements for a pharmacist to be authorised as an approved person. This means that the dealings listed in sch 9 s 4C of the MPMR are the foundation of the approved person's authorisation for the purpose of s 54 MP Act. However, the class of person prescribed is a *participating pharmacist*. This term is defined to mean 'a pharmacist **approved by the chief executive** to participate in the community pharmacy scope of practice pilot'.[10] The phrase 'approved by the chief executive' confers a power of approval on the chief executive to grant (or refuse to grant) an approval to a pharmacist. This is clearly a condition precedent to being an approved person under ss 30, 54 MP Act. In practical terms, it means a pharmacist cannot fall within the class of person that is prescribed until they have been approved by the chief executive.

The MP Act does not confer an approval power on the chief executive in relation to an approved person. Section 54(1) only provides for a regulation making power to prescribe a class of persons. It does not provide legislative authority for the chief executive to grant (or refuse to grant) an approval to an approved person. Therefore, s 18 of the Amendment Regulation, which inserts a new div 2A into the MPMR effectively amends the MP Act to confer an approval power on the chief executive. A legislative provision in a Regulation which amends an Act of Parliament is known as a Henry VIII clause and is contrary to constitutional law principles. The constitutional principle of sovereignty of Parliament provides that Parliament has the power to 'make or unmake' legislation which cannot be overridden.[11] Therefore, only Parliament can amend an Act. Henry VIII clauses also infringe the constitutional principle of the separation of powers. The separation of powers doctrine provides that the power to make laws, exercise laws and adjudicate laws are performed by separate institutions. Therefore, the requirement for a participating pharmacist to be approved by the chief executive represents a Henry VIII clause and is contrary to constitutional law principles.

The Amendment Regulation also breaches fundamental legislative principles as it does not have sufficient regard to the institution of Parliament. Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether the subordinate legislation 'amends statutory instruments only'.[12] As discussed, the MP Act only provides for a regulation making power, not a legislative authority for the chief executive to grant an approval to an approved person. Therefore, s 18 of the Amendment Regulation has the practical effect of amending s 54(1) MP Act to confer an approval power on the chief executive. This is in breach of the fundamental legislative principles.

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[8] Ibid s 75(a).
[9] Ibid s 76(1).
[10] *Medicines and Poisons (Medicines) Regulation 2021* (Qld) sch 9 s 4A ('MPMR').
[11] George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018) 64.
[12] *Legislative Standards Act 1992* (Qld) s 4(5)(d).

2 ***Evidence of the Department's intention to require an approval as a condition of being an approved person***

The Department of Health held a webinar on 7 February 2024 to update pharmacists on the Pharmacy Pilot. During the webinar, the Chief Allied Health Officer explained that the Department intends to issue an approval number to pharmacists participating in the pilot. Both the pharmacist and the pharmacy will need to apply to Queensland Health for an approval to participate in the pilot. The aim of issuing an approval number was described as allowing for the public or other practitioners to verify a pharmacist who is writing prescriptions under the pilot. The Chief Allied Health Officer also explained that the Department intends to issue a prescriber number to pharmacists participating in the pilot. This suggests that the Department favours a regulatory approach of granting a Substance Authority (either a prescribing approval or a general approval) to participating pharmacists. However, the explanatory notes state that the granting of a Substance Authority would be overly burdensome on the Department's resources.[13] As a result, the regulatory approach adopted by the Amendment Regulation was to utilise the approved person mechanism rather than a Substance Authority. The problem that now arises is the Department also wants to issue a licence/approval (effectively a Substance Authority), to a pharmacist and pharmacy already prescribed under sch 9 MPMR as approved persons.

3 ***Comparison of legislative provisions***

(a) Other classes of approved persons prescribed under the MPMR

Other classes of approved persons are listed in schs 3-15 MPMR. It is important to note that no other class of approved persons are required to hold approval from the chief executive. Generally, a person is only required to hold registration in their profession or have appropriate qualifications to fall within the prescribed class of persons. Therefore, the requirement in div 2A that a pharmacist is approved by the chief executive is inconsistent with comparative provisions in the MPMR.

(b) Mechanisms used to regulate other Pilot Programs in Queensland

The pharmacy profession in Queensland has been involved in two other pioneering pilot programs over the last decade. In 2014, pharmacists participated in a pilot to administer influenza vaccinations. More recently, in 2020 pharmacists participated in a pilot to supply antibiotics for urinary tract infections ('UTI'). Both pilot programs were successful and have translated into a vaccination service and UTI service being offered as part of standard pharmacy practice.

These pilot programs were regulated under the former regulatory framework: *Health Act 1937* (Qld); *Health (Drugs and Poisons) Regulation 1996* (Qld); *Drug Therapy Protocol*. To put this framework into context:

- The *Health Act 1937* has been replaced with the *Medicines and Poisons Act 2019*;
- The *Health (Drugs and Poisons) Regulation 1996* has been replaced with the *Medicines and Poisons (Medicines) Regulation 2021*;
- The *Drug Therapy Protocol* has been replaced with the *Extended Practice Authority*.

[13] Explanatory notes, Amendment Regulation (n 1) 10.

As an example, the *Drug Therapy Protocol – Pharmacist UTI Trial* provided the authority for pharmacists to participate in the UTI pilot program. A lawful condition of the *Drug Therapy Protocol* required a pharmacist to have:

> 1(i) 'Registered and been accepted into, the UTIPP-Q…';
> 1(ii) 'Completed the requisite training to participate in the UTIPP-Q'; and
> 1(iii) 'Access to the…UTIPP-Q recording module, to record data for the research evaluation'.[14]

Clearly, a pharmacist was not required to gain approval from the chief executive to participate in the UTI pilot program. The requirement was simply one of registering for, and being accepted into, the pilot program. If historical pilot programs did not require an approval from the chief executive, then it is unnecessary and inconsistent to have such a legislative requirement for the current Pilot.

4 ***Approval of Community Pharmacies***

There is an issue with the definition of *participating pharmacy* in sch 9 s 4A MPMR. A *participating pharmacy* forms part of the prescribed class of person listed in sch 9 s 4B MPMR. This provision was also inserted by s 18 of the Amendment Regulation. The phrase *participating pharmacy* is defined to mean 'a community pharmacy **approved by the chief executive** as a place to which the community pharmacy scope of practice pilot applies'.[15] Again, there is a requirement for the chief executive to grant an approval.

The MP Act does not confer a power on the chief executive to approve a community pharmacy business. Section 54(1) MP Act provides a regulation making power to prescribe a class of persons. The *Acts Interpretation Act* states that a 'reference to a person generally includes a reference to a corporation as well as an individual'.[16] However, s 54(1) MP Act refers to a *class of persons*, not *a person* in the general sense. The Macquarie Dictionary defines the word *class* as 'a number of people, regarded as forming one group through possession of similar qualities'.[17] This definition suggests that the word *class*, when it appears before the word *person*, refers to an individual not a corporation. Given the surrounding context of s 54 MP Act; the fact that the types of approved persons prescribed in reg 13 MPMR are all natural persons; and use of the preceding words *class of* (persons) in s 54 MP Act, the provision is likely to be interpreted as referring to a natural person. This means that s 54(1) MP Act does not permit a regulation making power to prescribe a corporation as an approved person. Therefore, prescribing a class of person in sch 9 s 4B by reference to the definition of *participating pharmacy* in sch 9 s 4A represents a Henry VIII clause.

5 ***Sub-delegation of a power***

If the regulation making power in s 54(1) MP Act could be interpreted as granting a power of approval, this power has been sub-delegated to the chief executive by subordinate legislation. The fundamental legislative principles require that legislation has sufficient regard to the institution of Parliament.[18] Whether subordinate legislation has sufficient regard to the

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[14] *Drug Therapy Protocol – Pharmacist UTI Trial 2020* (Qld).
[15] MPMR (n 10) sch 9 s 4A.
[16] *Acts Interpretation Act 1954* (Qld) s 32D(1).
[17] *Macquarie Dictionary* (2nd ed, 2017) 'class' (def 1).
[18] *Legislative Standards Act 1992* (Qld) s 4(2)(b).

institution of Parliament depends on whether the sub-delegation is a) appropriate and b) authorised by an Act.[19] It is argued that the regulation making power in s 54(1) MP Act does not authorise for that power to be sub-delegated. Therefore, the Amendment Regulation breaches the fundamental legislative principle.

III RECOMMENDATION

A *Omit the definitions of participating pharmacist and participating pharmacy*

The preferred option would be to omit the infringing definitions. The definitions of *participating pharmacist* and *participating pharmacy* in sch 9 s 4A should be omitted. The reference to Class of Person in sch 9 s 4B should then be amended to read: 'a pharmacist participating in the community pharmacy scope of practice pilot'. This clearly defines a pharmacist as the subject of the class and utilises the existing definition of 'community pharmacy scope of practice pilot'.

B *Amend the definition of participating pharmacist and omit the definition of participating pharmacy*

An alternative option would be to make the following changes:

- ***Participating pharmacist*** means a pharmacist participating in the community pharmacy scope of practice pilot.
- ***Participating pharmacy*** — omit.

The definition of *participating pharmacy* must be omitted as the MP Act does not permit the MPMR to prescribe a corporation —such as a community pharmacy business—as an approved person. The Class of Person would then need to be amended as per the recommendation above.

C *Disallow the legislative instrument*

The Parliament has a power of disallowance under s 50 *Statutory Instruments Act 1992* (Qld). Given that the amendments to the MPMR are constitutionally uncertain and breach fundamental legislative provisions, the Legislative Assembly should disallow the instrument to uphold democracy and the rule of law. However, this option is the least preferred as it would derail an important public health initiative and there are alternative options to rectify the issues raised.

[19] Ibid s 4(5)(e).

IV Conclusion

The authors are pharmacist proprietors and are currently undertaking training as part of the Pharmacy Pilot. Consequently, they are supportive of the Pharmacy Pilot. However, the authors, as graduates of a law degree, wish to uphold the rule of law. The authors thank the Committee for their time in reading this submission.

Yours Sincerely,

Andrew Calabro and Daniel Calabro

Ph: [redacted]

Queensland Government

Queensland Health

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Mr Aaron Harper MP
Chair
Health, Environment and Agriculture Committee
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Dear Mr Harper

Thank you for your letter dated 13 March 2024 regarding the Health, Environment and Agriculture Committee's examination of the *Medicines and Poisons (Medicines) Amendment Regulation (No. 4) 2023* (Amendment Regulation), which was tabled in Parliament on 13February 2024.

As you are aware, the Amendment Regulation amended the *Medicines and Poisons (Medicines) Regulation 2021* (Medicines Regulation) to:

- facilitate implementation of the Community Pharmacy Scope of Practice Pilot (Pharmacy Pilot); and
- provide for a new extended practice authority.

To assist the Committee's examination of the Amendment Regulation, you have requested the Department's advice in relation to correspondence received from Daniel and Andrew Calabro questioning the validity of the Amendment Regulation. Key issues raised in the correspondence included:

- do the definitions of *participating pharmacist* and *participating pharmacy* confer a power of approval on the chief executive;
- does the conferral of such a power breach fundamental legislative principles or put the regulation beyond power;
- why is Queensland Health issuing a licence or approval to a pharmacist who is already prescribed in the Medicines Regulation; and
- why is it necessary for the chief executive to approve a pharmacist under the Pharmacy Pilot, when this wasn't a requirement under previous pilots.

Definition of participating pharmacist and participating pharmacy

Clause 18 of the Amendment Regulation inserts the definitions of *participating pharmacist* and *participating pharmacy*. These definitions are necessary to define the class of persons who, under section 54 of the Medicines and Poisons Act, will be authorised to deal with an expanded range of regulated substances in connection with the Pharmacy Pilot. Specifically, the amendments provide that the prescribed class comprises participating pharmacists who are practising at participating pharmacies.

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The definitions of 'participating pharmacist' and 'participating pharmacy' contemplate that the chief executive will approve the pharmacists that participate in the Pharmacy Pilot and the community pharmacies at which the activities of the Pharmacy Pilot will be conducted. The Explanatory Notes state that to 'be authorised to participate in the Pharmacy Pilot, a pharmacist must meet all participation requirements and be authorised by Queensland Health.' The Explanatory Notes explain the objective criteria that pharmacists and pharmacies must meet to be authorised by Queensland Health to participate in the Pharmacy Pilot.

The aim of the Amendment Regulation is to improve equitable access to medicines and health services for persons living across Queensland, while still ensuring safe and effective health outcomes. To ensure public health and safety is not compromised, it is necessary for the chief executive to approve a pharmacist or pharmacy to participate in the Pharmacy Pilot by ensuring they meet the specific participation requirements.

The pharmacist must:
- hold general registration with the Pharmacy Board of Australia with no conditions on practice;
- hold appropriate professional indemnity insurance to cover the services provided as part of the Pharmacy Pilot;
- hold, for the duration of the Pilot, certification for First Aid and CPR;
- demonstrate successful completion of an approved training program that covers the knowledge and skills required to deliver Pharmacy Pilot services;
- demonstrate completion of an approved foundation course for working with Aboriginal and Torres Strait Islander communities;
- agree to the rules and conditions of the Pilot, including providing services in accordance with the clinical practice guidelines and clinical protocols, adherence to the specified Pilot fee schedule, use of the specified Clinical Information System to record clinical consultations and collect data for the evaluation of the Pilot, and participation in other activities that are required to enable evaluation of the Pilot.

For pharmacy owners these requirements include:
- the pharmacy must hold current Quality Care Pharmacy Program (QCPP) accreditation, including QCPP accreditation for relevant professional services offered by the pharmacy;
- the pharmacy owner must:
  - demonstrate compliance with appropriate infrastructure requirements as set out in the Pharmacy Pilot Handbook;
  - demonstrate implementation of the specified Clinical Information System software onto a computer in the consultation room to record clinical consultations and collect data for the evaluation of the pilot;
  - hold, for the duration of the Pilot, professional indemnity insurance that explicitly covers the pharmacy's involvement in the Pilot;
  - provide access for participating pharmacists to the required resources and reference materials;
  - provide access for participating pharmacists to the current online version of the Therapeutic Guidelines.

Consistency with head of regulation-making power and fundamental legislative principles

Section 54(1) of the *Medicines and Poisons Act 2019* (Act) provides a broad head of power to make regulations prescribing classes of persons who are authorised to carry out a regulated activity with a regulated substance.

Section 54(2) of the Act gives guidance on how this regulation-making power may be exercised. Relevantly, a regulation may prescribe a class of persons by reference to the **circumstances** in which, or **purposes** for which, they are authorised to carry out a regulated activity. The examples in section 54(2) are not exhaustive and, by the express terms of that section, do not preclude a regulation from prescribing a class of persons by reference to other relevant circumstances or considerations. This includes prescribing a class of persons by reference to a person's qualifications (e.g., registered nurses and midwives) or other eligibility criteria, such as completing an approved training program.

Pursuant to this head of power, the Amendment Regulation defines a participating pharmacist as a person approved by the chief executive to participate in the Pharmacy Pilot, and a participating pharmacy as a community pharmacy approved by the chief executive as a place to which the Pharmacy Pilot applies. These definitions are used to specify the 'circumstances in which' and 'purposes for which' regulated activities under the Pharmacy Pilot may be carried out by members of the prescribed class (see section 54(2)(a) and (b) of the Act).

Legislation is consistent with fundamental legislative principles if it has regard to the institution of Parliament. For subordinate legislation, this means it must only amend statutory instruments, not primary legislation. Clause 18 of the Amendment Regulation amends the Medicines Regulation. It does not insert a new chief executive power into the Act. As such, clause 18 is not an example of a regulation purporting to amend an Act (also known as an 'Henry VIII clause').

Subordinate legislation may also have sufficient regard to the institution of Parliament if it only allows a power delegated under an Act to be subdelegated if the Act authorises that subdelegation. Under section 54(1) of the Act, a regulation may prescribe a class of persons to be authorised to carry out a regulated activity with a regulated substance.

Clause 18 of the Amendment Regulation does not subdelegate this power to prescribe a class of persons to the chief executive. Rather, the Amendment Regulation itself prescribes a class of persons by reference to their participation in the Pharmacy Pilot, and clarifies that a person's participation in the Pilot is to be determined by the chief executive. This provides an objective basis for ascertaining which individual pharmacists have been accepted into the Pilot and are therefore members of the prescribed class.

This approach to prescribing classes of persons authorised to carry out regulated activities is well established under the Medicines and Poisons Act and Medicines Regulation. For example, the Medicines Regulation prescribes classes of registered health practitioners who are authorised to deal with certain medicines in specified circumstances. To be a member of the prescribed class, a registered health practitioner must have had their registration approved by the relevant National Board for their profession. In this sense, a National Board must 'approve' a person's membership in a prescribed class. To characterise this approval as a sub-delegation of legislative power would be fundamentally misconceived.

Finally, it should be emphasised that the chief executive's role in approving participants and participating pharmacies under the Pharmacy Pilot is purely administrative in nature. The chief executive will give approval if satisfied that the relevant objective criteria have been met, as outlined in the previous section of this response.

For these reasons, Queensland Health considers that clause 18 of the Amendment Regulation is within the power of section 54 of the Act and is consistent with fundamental legislative principles.

Requirement to gain chief executive approval

On 7 February 2024, Queensland Health held a webinar, which provided pharmacists and pharmacy owners with information regarding relevant legislation and operational processes for the Pharmacy Pilot. The webinar outlined that participating pharmacists would be issued with a prescriber number so that other pharmacists, who are not participating in the Pharmacy Pilot, can verify the authenticity of the prescription prior to dispensing any medication. There is no requirement to be issued a licence or approval number.

Participating pharmacists will be required to generate a printed or electronic prescription using the Pharmacy Pilot clinical information system. This way the prescription will be linked with a clinical record for a consultation. The Pharmacy Pilot clinical information system uses a prescribing platform that will allow participating pharmacists to generate a prescription.

For services where prescribing is involved, the consultation record must contain a complete history for the patient, assessment of the condition for which the patient was treated, a management plan for the patient's condition including details of the medicines prescribed.

For non-participating pharmacists who might be dispensing a prescription made by a participating pharmacist, the legitimacy of the authorised prescriber will be able to be verified through the electronic prescription exchange.

Requirement to obtain approval under the Pharmacy Pilot

Daniel and Andrew Calabro stated that under the Queensland Pharmacist Immunisation Pilot and the Urinary Tract Infection (UTI) Pilot that chief executive approval was not required to participate. However, the Immunisation Pilot required a section 18 approval under the now repealed *Health (Drugs and Poisons) Regulation 1996*. A section 18 approval required the chief executive to consider to either grant or refuse to grant an application for an endorsement. This process was considered overly burdensome for both the applicant and the Department.

The UTI pilot was run by QUT in conjunction with the Department. The qualifications and competencies of the participants were verified by the university and confirmed by the Department. The Pharmacy Pilot is being run solely by the Department. Therefore, verifying the qualifications and competencies of the participants rests solely with the Department. This is achieved through the 'approval' of the chief executive, which is in effect a confirmation process to validate that participation requirements have been met, including the required qualifications and competencies.

The Explanatory Notes state that an alternative approach could have been to grant an approval under section 68 of the Act. This would require each pharmacist applying to partake in the Pharmacy Pilot to apply for an individual approval to conduct regulated activities, including prescribing. Each application would need to be considered on a case-by-case basis by the chief executive. The approach taken by Queensland Health is less burdensome as the participating pharmacist (and the pharmacy they will be practicing at) will not be individually applying to conduct regulated activities participate, they will be advising Queensland Health that they have met the relevant participation requirements.

Once Queensland Health has verified that all relevant participation requirements have been met, the pharmacist (or pharmacy) is approved to participate in the Pharmacy Pilot. In the absence of a national approach to pharmacist prescribing, Queensland Health will also issue each participating pharmacist with a prescriber number so that pharmacists who are not participating in the Pharmacy Pilot can verify the authenticity of a prescription made by a participating pharmacist.

Should you require further information, Queensland Health's contact for the Committee's inquiry is Mr Karson Mahler, Director, Legislative Policy Unit, on telephone [redacted].

Yours sincerely

Michael Walsh
Director-General

22/03/2024