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

## Report No. 21, 56th Parliament

## Subordinate legislation tabled between 3 December 2018 and 12 February 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 3 December 2018 and 12 February 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*.

## 2 Subordinate legislation examined

| No. | Subordinate legislation | Date tabled | Disallowance date |
|---|---|---|---|
| 168 | Health Practitioner Regulation National Law Regulation 2018 | 3 December 2018 | 1 May 2019 |
| 186 | Proclamation made under the Termination of Pregnancy Act 2018 | 12 February 2019 | 2 May 2019 |
| 187 | Health and Other Legislation (Nursing and Midwifery) Amendment Regulation 2018 | 12 February 2019 | 2 May 2019 |
| 215 | Health Legislation Amendment Regulation (No.1) 2018 | 12 February 2019 | 2 May 2019 |

## 3 Health Practitioner Regulation National Law Regulation 2018

The objective is to replace the Health Practitioner Regulation National Law Regulation and the Health Practitioner Regulation National Law (WA) Regulations 2010 by combining them into a single National Law Regulation that will apply in all jurisdictions.

The National Law Regulation 2018 will:

- continue the National Boards for each health profession and prescribe which National Board is to keep each public national register
- prescribe the participation day for registration of paramedics as 1 December 2018
- retain the current transition period in relation to professional indemnity insurance arrangements for midwives practising private midwifery until 31 December 2019

- modify the application of the Commonwealth AIC Act, FOI Act, Ombudsman Act and Privacy Act to ensure the application of these Acts is appropriate for the purposes of the National Scheme and reflect changes made to the legislation since the National Law was developed in 2009.

**3.1 Fundamental legislative principles**

In respect of the modification of various Acts to to ensure the application of these Acts is appropriate for the purposes of the National Scheme and reflect changes made to the legislation since the National Law was developed in 2009, the explanatory notes state:

> *In 2010, the Commonwealth Freedom of Information Amendment (Reform) Act 2010 (FOI Reform Act) made significant changes to the FOI Act and minor changes to the Privacy Act and Ombudsman Act. Due to the timing of the FOI Reform Act and the commencement of the National Law, the National Law Regulation 2010 did not reflect the amendments made by the FOI Reform Act. Instead, the National Law Regulation 2010 provided that the FOI Act, Ombudsman Act and Privacy Act applied as if the FOI Reform Act had not taken effect.*
> *…*
> *The Commonwealth also amended the Privacy Act through the Privacy Amendment (Enhancing Privacy Protection) Act 2012, which replaced the National Privacy Principles and the Information Privacy Principles with the Australian Privacy Principles.*
>
> *In November 2010, the Commonwealth Australian Information Commissioner Act 2010 (AIC Act) commenced. The AIC Act established the Commonwealth Office of the Australian Information Commissioner and set out the Office's freedom of information, privacy and information commissioner functions. The National Law Amendment Acts apply the AIC Act to the National Scheme, with any modifications made by a regulation.*[1]

Clause 11 relates to the AIC Act. Clause 11 states that the Act applies 'as if it were modified so that…' and then lists a number of specific modifications. Then, at paragraph 11(1)(d), it states, 'with any other modifications that are necessary'. Thus the effect of clause 11(d) is to state:

> *The AIC Act applies with any other modifications that are necessary*

In similar fashion:

- Clause 19 sets out specific modifications to the FOI Reform Act and at paragraph 19(e), states, 'with any other modifications that are necessary'.
- Clause 30 provides for miscellaneous modifications to the Ombudsman Act, and at paragraph 30(d), states, 'with any other modifications that are necessary'.
- Clause 38 sets out miscellaneous modifications to the Privacy Act and at paragraph 38(d), states, 'with any other modifications that are necessary'.

Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise way.

In considering whether the phrase 'applies with any other modifications that are necessary' is sufficiently clear and precise, or potentially breaches fundamental legislative principles (FLPs) as it may leave the operation of these provisions uncertain, the committee sought further information from Queensland Health (the department).

[1] Explanatory notes, p 2.

The committee also noted that section 24(1)(i) of the *Legislative Standards Act 1992* provides that explanatory notes for subordinate legislation must include:

> *a brief assessment of the consistency of the legislation with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.*

However, the explanatory notes make no mention of fundamental legislative principles, although otherwise comply with part 4 of the *Legislative Standards Act 1992*.

**The committee's request for advice from Queensland Health**

The committee sought the following advice from the department:

1. Whether having an Act apply 'with modifications that are necessary' is vague and uncertain and leaves the operation of these provisions uncertain, and

2. Why the explanatory notes to the regulation make no mention of fundamental legislative principles as required by s 24(1)(i) of the *Legislative Standards Act 1992*.

**Advice from Queensland Health**

The department provided the following advice in response to the committee's questions.[2] A letter from the Parliamentary Counsel dated 9 January 2019 included with the department's advice to the committee is enclosed as an Appendix to this report:

> *As you are aware, the Regulation was made by COAG Health Council on 12 October 2018 and is in effect in all States and Territories that participate in the National Registration and Accreditation Scheme for health professions (National Scheme). The Regulation replaces the Health Practitioner Regulation National Law Regulation and the Health Practitioner Regulation National Law (WA) Regulations 2010 and combines them into a single regulation that applies in all participating jurisdictions. As host jurisdiction for the Health Practitioner Regulation National Law, Queensland led the development of the Regulation, which was drafted by the Office of the Queensland Parliamentary Counsel on behalf of the Australasian Parliamentary Counsel's Committee.*
>
> *To assist the Committee's review, you have requested the Department's advice about whether the Regulation is unambiguous and drafted in a sufficiently clear and precise way as to have sufficient regard to rights and liberties of individuals, as contemplated by section 4(3)(k) of the Legislative Standards Act 1992. In particular, you have inquired about clauses 11, 19, 30 and 38 of the Regulation, which modify how certain Commonwealth Acts apply as laws of participating jurisdictions for purposes of the National Scheme.*[1]
>
> *The Department considers the Regulation is clear, precise and unambiguous. This accords with advice provided by the Queensland Parliamentary Counsel in response to similar issues raised by the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament. A copy of that advice is attached for the Committee's information. As the advice explains, the clauses cited by the Committee make minor and technical modifications to the operation of Commonwealth Acts for the purpose of applying those Acts as laws of participating jurisdictions. The modifications are clearly defined and precisely limited by reference to other provisions of the Regulation that specify in detail how the Commonwealth Acts are to apply for purposes of the National Scheme.*

[2] Queensland Health 2019, Correspondence, 26 April 2019.

*As noted by the Queensland Parliamentary Counsel, the ordinary construction of the meaning of legislation is taken primarily from its text, and also from its context and purpose. It is inevitable that, with the specific modifications, the Commonwealth Acts will require some minor or technical adaptation in their application to the scheme. The legislative intention is to permit such adaptation of the Commonwealth provisions. Having regard to that intention, the words in clauses 11, 19, 30 and 38 can and should be limited to any non-substantive modifications necessary for the Commonwealth Acts to sensibly apply in that context.*

*Separately, you have asked why the explanatory notes to the Regulation do not discuss fundamental legislative principles as required by section 24(1)(i) of the Legislative Standards Act 1992. Before the Regulation was tabled in Parliament, the Department determined that the Regulation was consistent with fundamental legislative principles. A statement to this effect should have been included in the Explanatory Notes. However, it appears that this statement was inadvertently omitted. The Department will explore options to amend the Explanatory Notes.*

**Committee comment**

The committee is satisfied given the department's advice received in correspondence on 26 April 2019 and the advice from the Parliamentary Counsel that the regulation is sufficiently clear and unambiguous.

## 4 Proclamation made under the Termination of Pregnancy Act 2018

The objective is to fix a commencement date of 3 December 2018 for the *Termination of Pregnancy Act 2018.*

The explanatory notes comply with part 4 of the *Legislative Standards Act 1992.*

## 5 Health and Other Legislation (Nursing and Midwifery) Amendment Regulation 2018

The objective is to make consequential amendments to a number of Queensland regulations, following the separation of nursing and midwifery as two separate health professions.

In 2014, an independent review of the Health Practitioner Regulation National Law (National Law) recommended that the National Law be amended to reflect that nursing and midwifery are two separate health professions regulated by one National Board. *The Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017* amended the National Law to recognise nursing and midwifery as two separate health professions.

The amendments in the regulation do not make any policy changes to the roles of nurses and midwives and have no effect on scope of practice issues for the two professions.[3]

The *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017* amended the National Law to recognise nursing and midwifery as two separate health professions.[4]

The explanatory notes comply with part 4 of the *Legislative Standards Act 1992.*

## 6 Health Legislation Amendment Regulation (No.1) 2018

The objectives are to:

- update references to prescribed agreements between entities to reflect the current versions

[3] Explanatory notes, p 2.

[4] Explanatory notes, p 1.

- update references to Australian Standards to reflect the current versions
- remove the need for Hospital and Health Services to seek approval from the Treasurer when granting and taking leases in certain circumstances.

**6.1 Fundamental legislative principle issues**

As acknowledged in the explanatory notes, there are two broad aspects in which the regulation might breach the fundamental legislative principles:

- rights and liberties of individuals - regarding privacy of personal information
- regard for the institution of Parliament – sub-delegation and reference to external standards.

Rights and liberties of individuals – privacy of information

The following aspects of the regulation raise issues of fundamental legislative principle relating to privacy of information:

- An agreement between Queensland Ambulance Service ('QAS') and the Department of Veterans' Affairs ('DVA'), the Repatriation Commission and the Military Rehabilitation and Compensation Commission to authorise QAS to disclose confidential information to DVA
- An MOU between the Office of Industrial Relations ('OIR') and QAS which authorises QAS to record and provide data on emergency ambulance transportations to OIR
- An agreement between the DVA and the Repatriation Commission and the Military Rehabilitation Commission and the Military Rehabilitation and Compensation Commission and the State of Queensland. This deals with disclosure of information for the provision of, and payment for, the treatment of veterans and their dependants in Queensland public hospitals.
- An MOU between Queensland Health and the Queensland Police Service ('QPS'), authorising Queensland Health and its staff to disclose confidential, patient-identifying information to QPS which may relate to suspected criminal conduct, a risk to the community and missing persons.

Previous committees have shown concern regarding the disclosure of private or confidential information.[5]

The explanatory notes provide the following justifications for these various categories of disclosure:

- Disclosure by QAS of disclose confidential information to DVA

*… the sharing of information is intended to inform DVA's acceptance and discharge of financial liability for the ambulance services provided by QAS to veterans. The agreement requires QAS to obtain the informed consent of an individual to the disclosure to, or access by, DVA of personal information…*[6]

- MOU between OIR and QAS

*OIR will use the information to data match workers' compensation claim details and determine the extent of liability to pay QAS for the provision of pre-hospital patient care and ambulance transport services. QAS and OIR are obliged to collect, use and disclose all data in accordance*

5 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook,* p 113.

6 Explanatory notes, p 7.

*with relevant privacy principles and legislation related to the use of confidential personal information* [7]

- disclosure of information regarding the treatment of veterans

*The parties will only share confidential information to make and discharge claims for the treatment of veterans and their dependants or to resolve complaints by a veteran or dependant, regarding the treatment received at a Queensland Health facility. The agreement requires the parties to the agreement, and their officers, employees, agents and subcontractors, to comply with the Commonwealth Privacy Act and relevant state privacy legislation. Each party is obliged to report any breaches or possible breaches [of] privacy legislation to the other party.*[8]

- MOU between Queensland Health and QPS:

*Under the MOU, in the first instance, it is preferable for confidential information to be shared by obtaining the consent of the individual concerned. In certain circumstances where it is not possible or reasonable to obtain consent, information can still be shared for the purposes of the MOU. Under the MOU, Queensland Health and QPS are required to ensure that appropriate loss and unauthorised access, modification or disclosure. The MOU operates subject to all applicable Queensland government policy and legislation, including but not limited to the* Information Privacy Act 2009, Police Powers and Responsibilities Act 2000 *and* Hospital and Health Boards Act.[9]

Institution of Parliament – sub-delegation and external standards

The regulation refers to a number of external standards:

- Australia/NZ ISO 14644 *Cleanrooms and associated controlled environments*
- AS 2252.5 *Controlled environments Cytotoxic drug safety cabinets – Design, construction, installation, testing and use*
- AS 2252.6 *Controlled environments Clean workstations – design, installation and use*
- AS 2604:2012 *Sunscreen products – Evaluation and Classification*

Whether subordinate legislation has sufficient regard to the institution of parliament depends on whether the subordinate legislation allows the sub-delegation of a power delegated by an Act only:

- if authorised by an Act, and
- in appropriate cases and to appropriate persons.[10]

Part of the rationale for this issue is to ensure sufficient parliamentary scrutiny of a delegated legislative power.[11]

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, an extrinsic document that is not reproduced in full in subordinate legislation, and where changes to that document can be made without the content of those changes coming to the attention of the House, it may be argued that the

7 Explanatory notes, p 7.

8 Explanatory notes, p 8.

9 Explanatory notes, p 8.

10 Section 4(5)(e) of the *Legislative Standards Act 1992*

11 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook, p 170.*

document (and the process by which it is incorporated into the legislative framework) has insufficient regard to the institution of Parliament.

The standards are not contained in the subordinate legislation in its entirety, and as such their content does not come to the attention of the House. Similarly, while a future amending regulation 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.

*Authorised by an Act*

Section 133 of the *Health Act 1937* provides that the regulation may prescribe standards for certain things.

The sub-delegation is authorised. Further, any concerns the Parliament might have about the content might be met by the ability to move disallowance of the regulation.

*Appropriate cases and to appropriate persons*

In considering whether it is appropriate for matters to be dealt with by an instrument that is not subordinate legislation, and therefore not subject to parliamentary scrutiny, it is appropriate to consider:

- the importance of the subject dealt with
- the commercial or technical nature of the subject-matter
- the practicality or otherwise of including those matters entirely in subordinate legislation.[12]

The explanatory notes include these statements regarding the various standards:

> *… Australia/New Zealand ISO Standards are recognised and accepted industry standards, developed by technical experts with industry and government consultation. The Standards are accredited by Standards Australia, Standards New Zealand and the International Standards Organisation, which are the nationally and internationally recognised peak bodies for standards.*
>
> *The Standards are detailed and technical in nature and apply to a specialist area, justifying the need to prescribe them. The proposed approach ensures HHSs* [Hospital and Health Services] *and pharmacies continually keep up with industry expectations and standards, while removing the need to amend the Regulation each time the Standards change.*
>
> *There are costs involved with accessing the Standards. However, the users of the Standards are HHSs and compounding pharmacies, who are expected to comply with the Standards to meet their obligations under professional regulations.*[13]

Here, the standards involve detailed information and range from 19 pages to 37 pages. It can be accepted that it is appropriate for practical reasons for such detailed matters to be set out in a document other than subordinate legislation.

*Availability of document and parliamentary scrutiny*

Concerns about sub-delegation are reduced where the document in question could only be incorporated under subordinate legislation (which could be disallowed) and was attached to the subordinate legislation, or required to be tabled with the subordinate legislation and made available for inspection. Neither of these features are present here.

The standards are available for purchase at the SAI global website.

---

12 See the Office of the *Queensland Parliamentary Counsel, Fundamental Legislative Principles: the OQPC Notebook,* pp 155-156, and Scrutiny of Legislation Committee, *Alert Digest 1999/04,* p.10, paras 1.65-1.67.

13 Explanatory notes, p 9.

**The committee's request for advice from Queensland Health**

To assist its consideration of the potential FLP issues, the committee sought the following advice from the department.

In relation to the rights and liberties of individuals, and the privacy of information in particular, the committee asked:

1. Have there been any reported breaches or possible breaches under these agreements and MoUs during the life of these agreements and MoUs?

2. If yes, can the department provide details of these incidents and what actions were taken as a result of any breaches?

In relation to the references to standards in the Health Legislation Amendment Regulation (No.1) 2018 and the noted issues of sub-delegation, the committee asked:

3. What costs will be incurred by compounding pharmacies in accessing the standard and are those costs reasonable?

4. Will the Minister be tabling these standards?

**Advice from Queensland Health**

The department provided the following advice in response to the first question:

> *The QAS is not aware of any reported breaches or possible breaches under these agreements and MoUs during the life of these agreements and MoUs.*
>
> *The department provided the following advice in response to the third question:*
>
> *The standards referenced in the Health Legislation Amendment Regulation No.1 2018 (the Amendment Regulation) either refer to an Australian Standard (AS), a joint Australia and New Zealand Standard (AS/NZS) or an International Standard developed by the International Standardization Organization (ISO).*
>
> *The ISO is an independent international organisation that coordinates the development of unified global standards. These standards are developed by technical and subject experts with industry and government consultation.*
>
> *International standards ensure that products are safe and of high quality. Worldwide consistency and standardisation also facilitates international trade. Similarly, joint AS/NZS Standards are developed through a rigorous process for mutual economic benefit and frequently adopt international standards.*
>
> *The Standards referenced in sections 6, 7 and 8 of the Amendment Regulation apply to compounding pharmacies that dispense sterile or antineoplastic (tumour inhibiting) drugs. This type of speciality dispensing is not common in most standard compounding pharmacies. It generally occurs in pharmacies operated by large businesses or located in larger public and private hospitals. The cost of purchasing the required standards is negligible when compared to the costs of purchasing and maintaining the equipment used in this type of dispensing. The cost is also not recurrent annually as a standard may remain current for many years.*
>
> *The standards for cleanrooms (AS/NZS ISO 14644) referred to in sections 6 and 7 of the Amendment Regulation are also required to be complied with by pharmacists to meet their professional registration obligations.*
>
> *The standards for cleanrooms are referenced in the Pharmacy Board of Australia's Guidelines on Compounding of Medicines references. The Guidelines on Compounding of Medicines references and requires compliance with the Australian Pharmaceutical Formulary and Handbook. The Australian Pharmaceutical Formulary and Handbook in turn requires compliance with relevant*

*Australian Standards when undertaking complex compounding activities. Consequently, the cost of accessing and complying with the standards is not unique to the Health Regulation.*

*For some businesses, the cost of accessing and complying with the standards under the Health Regulation 1996 does not impose an additional financial burden. Some compounding pharmacies may hold a manufacturing licence under the Therapeutic Goods Act 1989 (Cth). Manufacturers licensed under the Therapeutic Goods Act are also required to observe the manufacturing principles under the Act. This includes compliance with relevant standards. Similarly, most sunscreen manufacturers are required to comply with AS/NZS 2604:2012 under the Therapeutic Goods Act.*

*Compliance with these standards is critical for ensuring health and safety of manufacturing personnel and the public. The use of cytotoxic drugs (drugs that are toxic to living cells) creates special problems in their preparation, manipulation and compounding. Many cytotoxic drugs have been demonstrated to be mutagens. Cell DNA and chromosomal studies in animal models and experience with treated patients have demonstrated that some cytotoxic drugs are carcinogens or teratogens. AS 2252.5:2017, which is referenced in section 8 of the Amendment Regulation, provides the best measures for operator protection when manufacturing and dispensing antineoplastic drugs which are cytotoxic. AS 2252.5:2017 is designed to ensure both an aseptic environment and provides for the containment of cytotoxic materials to protect both the personnel and immediate surrounding environment. It also ensures that products are fit for their intended purpose.*

*The costs of accessing and complying with the relevant standards are justified and reasonable when weighed against the potential cost to the health system and the potential cost to human health or life due to non-compliance. Compounding dispensers and manufacturers that do not comply with relevant standards, or do not have adequate facilities to perform the necessary manufacturing and dispensing processes, or do not properly maintain those facilities place consumers at a significant risk of harm. For example, in the United States of America a recent meningitis outbreak resulted in 76 deaths and injury to 800 individuals. This outbreak was traced back to steroid injections that were contaminated with a fungus due to the use of improper sterilisation techniques by the manufacturer. The incident exemplifies the potential for widespread significant harms to be caused by unsafe manufacturing practices.*

*The standards referenced in the Regulation and the cost of accessing each standard is listed below:*

| **Standard** | **Cost (as indicated on SAI Global)** |
|---|---|
| **Applies to sections 27 and 29 (dispensing drugs or poisons for therapeutic use using an aseptic technique or a process in which sterilisation happens as the last stage of dispensing the drugs or poisons)** | |
| *AS 2252.6-2011 'Controlled environments, Part* 6: *Clean workstations - Design, installation and use'* | $128.19 |
| *AS ISO 14644.1:2017 - 'Cleanrooms and associated controlled environments, Part 1: Classification of air cleanliness by particle concentration'* | $181.96 |
| *ASAVZS 14644.3:2009 - 'Cleanrooms and associated controlled environments, Part 3: Test methods'* | $248.14 |

| | |
|---|---|
| *AS/ICS ISO 14644.4:2002 - 'Cleanrooms and associated controlled environments, Part 4: Design, construction and start-up'* | $248.14 |
| *ASAVZS ISO 14644.5:2006 - 'Cleanrooms and associated controlled environments, Part 5: Operations'* | $218.75 |
| ***TOTAL COST*** | **$1025.18** |
| **Applies to section 32 (dispensing antineoplastic drugs)** | |
| *AS 2252.5:2017 - 'Controlled environments, Part 5: Cytotoxic drug safety cabinets (CDSO) - Design, construction, installation, testing and use'* | $152.66 |
| **Applies to section 178 (sunscreen manufacturing)** | |
| *ASAVZS 2604:2012 — 'Sunscreen products - Evaluation and classification'* (not used by compounding pharmacies) | $128.19 |

The department provided the following advice in response to the fourth question:

> *The standards referenced in the Amendment Regulation are protected by copyright and not appropriate for tabling. The perceived breach of fundamental legislative principles relating to the sub delegation of a power has been addressed in the explanatory notes to the Amendment Regulation and in the response to question 3 above.*

**6.2 Committee comment**

The committee is satisfied the regulation has sufficient regard to the institution of Parliament and that the disclosures of information are sufficiently justified in the circumstances.

The committee considers that the explanatory notes comply with part 4 of the *Legislative Standards Act 1992.*

## 7 Recommendation

The committee recommends that the House notes this report.

Aaron Harper MP

**Chair**

**April 2019**

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

| | |
|---|---|
| Chair | Mr Aaron Harper MP, Member for Thuringowa |
| Deputy Chair | Mr Mark McArdle MP, Member for Caloundra |
| Members | Mr Michael Berkman MP, Member for Maiwar |
| | Mr Marty Hunt MP, Member for Nicklin |
| | Mr Barry O'Rourke MP, Member for Rockhampton |
| | Ms Joan Pease MP, Member for Lytton |

**Appendix: Letter dated 9 January 2019 to Queensland Health regarding the Health Practitioner Regulation National Law Regulation 2018 (SL 168)**

Queensland
Government

Office of the
**Queensland Parliamentary Counsel**

9 January 2019

James Liddy
Manager
Legislative Policy
Queensland Health
james.liddy@health.qld.gov.au

Dear Mr Liddy

**Health Practitioner Regulation National Law Regulation 2018**

You have asked me to advise in relation to the *Health Practitioner Regulation National Law Regulation 2018* (the ***regulation***) made by the COAG Health Council under s 245 of the *Health Practitioner Regulation National Law (Western Australia)* (the ***WA national law***). Issues about the validity of the provisions are raised in a letter dated 28 November 2018 from the Chair of the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament to the Deputy Premier and Minister for Health of Western Australia.

The Committee has considered the regulation and is of the preliminary view that ss 11(1)(d), 19(e), 30(d) and 38(d) may be invalid on the basis that they sub-delegate the legislative power given to the ministerial council by the WA national law, ss 212A, 213, 215 and 235. The committee considers that the provisions may also be invalid on the basis that their application will provide uncertain outcomes.

You have sought my view as to the validity of the provisions and, if they are invalid, whether they could be severed. In my opinion, for the reasons that follow, the relevant provisions of the regulation are valid, but even if they were not, they would be severable.

The States and self-governing territories have each enacted a version of the national law. Although each jurisdiction's version is substantially similar, the WA national law is a law of Western Australia (*Health Practitioner Regulation National Law (WA) Act 2010* (WA), s 4(1)). I do not presume to give advice on the meaning and effect of Western Australian legislation as such; rather, I advise on the basis that this office drafted the national law provisions and the regulation.

***The relevant provisions***

The WA national law, pt 10 (Information privacy) includes divs 1A (Australian Information Commissioner), 1 (Privacy) and 2 (Disclosure of information and confidentiality). Those divisions include ss 212A, 213 and 215 which apply the *Australian Information Commissioner Act 2010* (Cwlth), the *Privacy Act 1988* (Cwlth) and the *Freedom of Information Act 1982* (Cwlth) respectively as laws of a participating jurisdiction for the purposes of the national registration and accreditation scheme. Similarly, pt 11 (Miscellaneous)

Level 18 111 George Street
PO Box 15185 City East
Queensland 4002 Australia
**Telephone** +61 7 300 39600
**Facsimile** +61 7 323 54513
**Website** www.legislation.qld.gov.au
ABN 81 465 361 060

includes s 235 which applies the *Ombudsman Act 1976* (Cwlth) as a law of a participating jurisdiction for the purposes of the scheme.[1]

Those provisions provide that the Commonwealth laws apply:

- as if references to the Australian Information Commissioner and the Commonwealth Ombudsman were references to the National Health Practitioner Privacy Commissioner and the National Health Practitioner Ombudsman respectively, and
- 'with any other modifications made by the regulations' (ss 212A(2)(c), 213(2)(b), 215(2)(c) and 235(2)(b)).

In reliance on that modification power, pts 3-6 of the regulation make detailed provision modifying the application of the AIC Act, the FOI Act, the Ombudsman Act and the Privacy Act respectively. Each part includes a miscellaneous provision that the relevant Act applies 'with any other modifications that are necessary' (ss 11(1)(d), 19(e), 30(d) and 38(d)).

Like the committee I will refer primarily to the WA national law, s 212A and the regulation, s 11(1)(d). But the issues raised by the committee apply to each of those miscellaneous provisions in the same way, so my advice about s 11(1)(d) applies equally to the other provisions.

***Section 11(1)(d): Interpretation***

Whether s 11(1)(d) of the regulation is beyond power depends primarily on the proper construction of the provision itself.[2] Generally, the principles of interpretation of primary legislation are applicable to subordinate legislation.[3] Those principles require consideration first of the language of the relevant provisions, and then of the context and purpose of the relevant enactment.[4]

Section 11(1) does not in terms sub-delegate any legislative power. Paragraphs (a)-(c) provide that the AIC Act applies 'as if it were modified' in specific respects. Paragraph (d) simply provides that the AIC Act applies 'with any other modifications that are necessary'.

The words of s 11(1)(d), if read in isolation, could be construed as having so broad an application as to amount to a sub-delegation of the legislative power given by s 212A(2)(c) of the WA national law. However, in my opinion, their ordinary natural meaning is simply to modify the application of the AIC Act as a law of a participating jurisdiction for the purposes of the national scheme, but only as an adjunct to, and only so far as necessary for, the purpose of s 212A.

That understanding of the text of s 11(1)(d) is confirmed by reference to the purpose of s 212A of the WA national law – to apply the AIC Act to a new set of circumstances in the national scheme – and to the context of the specific modifications made by s 212A(2)(a) and (b) of the national law and s 11(1)(a)-(c) of the regulation. This interpretation is supported by the common law principle *ejusdem generis*, that a word or phrase of wide meaning may be limited by its context.

It is inevitable that, with these specific modifications, the AIC Act will require some minor or technical adaptation in its application to the scheme. The legislative intention is to permit such adaptation of the AIC Act provisions. Having regard to that intention, the words in s 11(1)(d) can and should be limited to any non-substantive modifications necessary for the AIC Act to sensibly apply in that context. In my opinion, the text, context and purpose of s 11(1)(d) all indicate that in

---

[1] I adopt the abbreviations of the Commonwealth laws used in the WA national law and the regulation.
[2] *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, 756.
[3] *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 398.
[4] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 45-47 [47].

applying the AIC Act to the operation of the national scheme, administrators are to make necessary practical adaptations, but not otherwise modify the AIC Act.

***Section 11(1)(d): No impermissible sub-delegation***

It is uncontroversial that the plenary legislative power of a State Parliament includes, subject to presently inapplicable constitutional exceptions, the power to delegate that power itself.[5] A person to whom legislative power is delegated cannot sub-delegate the power unless the delegating legislature authorises sub-delegation. In Australia that issue is resolved not by reference to any free-standing prohibition against sub-delegation, but simply by construing the principal empowering provision. That process involves two questions: was the statutory power exercised by the delegate, and was it exercised in the manner and within the limits prescribed by the empowering provision?[6]

The first question may be answered shortly: the making of s 11(1)(d) did involve an exercise of power by the ministerial council as the delegate of the Western Australian Parliament. The second question then is whether that exercise of power was in the manner and within the limits prescribed by s 212A(2)(c). That issue depends upon the proper construction of s 11(1)(d) and s 212A(2)(c).

The same process of ordinary construction applied above to s 11(1)(d) applies to primary legislation such as s 212A(2)(c). That is, its meaning is taken primarily from its text, and also from its context and purpose.

Section 212A(2)(c) does not in terms set out limits on the power, but it does prescribe a manner for its exercise at least in the sense that any other modifications are to be 'made by the regulations'. The committee makes the point that the decision as to what other modifications may be necessary in a particular situation are left to be determined administratively by whoever happens to be applying the Commonwealth Act.

There is some force in that point, but in my opinion, the better view is that the 'modifications that are necessary' are made not by the person applying the laws with the modifications, but by the regulation itself. There is a degree of artificiality in that statement, but the entire scheme of s 212A is an artifice, premised as it is on the application of a Commonwealth law as a State law. Moreover, s 11(1)(d) in terms operates in the abstract. It makes whatever modifications are objectively necessary, independently of the subjective view of any administrator. When construed in the way I propose above, it does not make 'modifications that *an administrator considers* are necessary'.

That understanding of the manner and limits imposed by s 212A(2)(c) is supported by consideration of its context and purpose. For similar reasons to those set out in relation to s 11(1)(d), the context and purpose of s 212A evince a clear legislative intention to facilitate the application of the AIC Act as a law of Western Australia, but not to open it up to unlimited amendment. Section 212A(2) recognises that the AIC Act cannot be rigidly applies as a State law, and that some modification is necessary. Section 212A(2)(c) in particular recognises that the legislature cannot foresee every modification that may be necessary for the application as a State law, and delegates the ministerial council to prescribe further modifications.

When s 11(1)(d) is construed in the way set out above, in my opinion the answer to the second question is that s 11(1)(d) *is* made within the manner and limits prescribed by s 212A(2)(c). It follows that s 11(1)(d) is not invalid as a sub-delegation of delegated legislative power.

---

[5] *Cobb & Co Ltd v Kropp* [1967] 1 AC 141; *Pauls Ltd v Elkington* (2001) 189 ALR 551, 553-555 [7]-[9].
[6] *Racecourse Co-operative Sugar Association Ltd v Attorney-General (Qld)* (1979) 142 CLR 460, 480; *Dainford Ltd v Smith* (1985) 155 CLR 342, 349.

In keeping with that analysis, the courts have held that, in appropriate circumstances, it is permissible for a provision of a regulation to make specific prescription for a matter while leaving its operation in a limited field to be determined by a person administering the law. For example, in *Owen v Turner* the Federal Court of Australia held that:[7]

> … the principle that a delegate may not validly delegate a legislative power does not preclude the making of regulations which confer, on a subordinate body or official, authority to make decisions and exercise discretionary powers within the limits prescribed by the regulations, and the restriction against delegation does not extend to a case where delegated legislation confers administrative or executive power on another person or body.

Other case law supports the proposition that, if the matters left to be carried out by an official are questions of detail which merely fill the gaps left in the legislation, the official is exercising administrative powers only (the delegation of administrative functions being valid).[8]

***Section 11(1)(d): No uncertainty producing invalidity***

The case law does not strongly support uncertainty as a distinct ground for finding a regulation to be invalid. There are instances of delegated legislation being invalid in particular circumstances where it failed to adequately establish objective criteria as required by the empowering Act.[9]

However, in my view, if s 11(1)(d) is read as providing only for the limited operation discussed above, in connection with the other particular modifications made by the regulation, its wording adequately describes the extent and nature of the adaptations to be made by a person applying the AIC Act to the national scheme.

***Interpretation producing validity to be preferred***

My construction of s 11(1)(d) is supported by the common law principle that, if different constructions of a provision are available, a construction is to be selected which, so far as the language of the provision permits, would avoid, rather than result in, invalidity.[10]

In keeping with that principle, schedule 7, s 2(1) of the WA national law provides that the national law is to be construed as operating to the full extent of, but so as not to exceed, the legislative power of the Western Australian Legislature. We are not concerned here with the validity of any provision of the WA national law. However, sch 7, s 2 also applies to the WA regulation in the same way it applies to the national law except so far as the context or subject matter otherwise indicates or requires (national law sch 7, s 37).

***Severability***

Schedule 7, s 2(2) of the WA national law effectively provides for the severance of any provision of the national law that would otherwise be construed as being in excess of the legislative power of the Legislature of Western Australia. That provision also applies to statutory instruments (including regulations) made under the WA national law (sch 7, s 37).

Accordingly, if contrary to my construction of s 11(1)(d) of the regulation, it were invalid, it would be severable by virtue of sch 7, s 2(2).

---

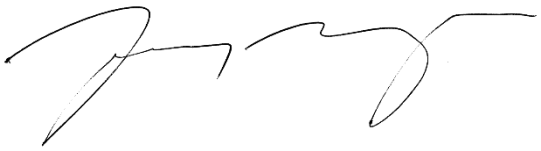
[7] (1989) 19 ALD 550, 552. This conclusion was affirmed on appeal, even though the ultimate decision was reversed: *Turner v Owen* (1990) 26 FCR 366; 96 ALR 119, 127-128, 141-143.
[8] Pearce, D and Argument, S, *Delegated Legislation in Australia*, 4th ed (2012), [23.13].
[9] *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184, 194-5. See also the discussion in *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300, [426]-[461].
[10] *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, 216 [229], 271 [408]; *New South Wales v Commonwealth* (2006) 229 CLR 1, 163 [361].

***Sections 19(e), 30(d) and 38(d)***

As mentioned, the same issues apply equally to ss 19(e), 30(d) and 38(d) in contexts that are not materially distinguishable, and my conclusions about s 11(1)(d) apply equally to them.

I trust this advice is of assistance. Please do not hesitate to contact me if you have any further queries.

Yours sincerely



A D Keyes
Parliamentary Counsel