

## Community Support and Services Committee

### Report No. 5, 57th Parliament

### Subordinate legislation tabled between 3 December 2020 and 23 February 2021

#### 1 Aim of this report

This report summarises the Community Support and Services Committee's (committee) findings following its examination of the subordinate legislation within its portfolio areas tabled between 3 December 2020 and 23 February 2021.

It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles (FLPs) and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992 (LSA)*.<sup>1</sup> The report also outlines the committee's consideration of compliance with the *Human Rights Act 2019 (HRA)* and the human rights certificate tabled with the subordinate legislation.<sup>2</sup>

#### 2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date*
264	Disability Services and Other Legislation (Fees) Amendment Regulation 2020	23 February 2021	13 May 2021
265	Proclamation – Disability Services and Other Legislation (Worker Screening) Amendment Act 2020 (commencing remaining provisions)	23 February 2021	13 May 2021
2	Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021	23 February 2021	13 May 2021
3	Disability Services (Transitional) Regulation 2021	23 February 2021	13 May 2021

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

<sup>1</sup> LSA, Part 4.

<sup>2</sup> HRA, s 41.

### **3 Committee consideration of the subordinate legislation**

The committee identified no significant issues regarding the policy, consistency with FLPs or the lawfulness of the subordinate legislation.

The committee considered potential FLP issues and human rights implications in relation to:

- the Disability Services and Other Legislation (Fees) Amendment Regulation 2020
- the Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, and
- the Disability Services (Transitional) Regulation 2021.

However, in each instance, the committee is satisfied that the relevant provisions have sufficient regard to the rights and liberties of individuals and institution of Parliament, in the circumstances. The committee is also satisfied that any associated human rights limitations are reasonable and demonstrably justifiable.

The committee considers that the explanatory notes tabled with the subordinate legislation generally comply with the requirements of section 24 of the LSA. However, the committee brings to the attention of the House issues in relation to the content of the explanatory notes tabled with the Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021 (see section 6.2 of this report).

The committee considers that the human rights certificates tabled with the subordinate legislation provide a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.<sup>3</sup>

### **4 Disability Services and Other Legislation (Fees) Amendment Regulation 2020 (SL 264)**

The Disability Services and Other Legislation (Fees) Amendment Regulation 2020 (Amendment Regulation) amends the Disability Services Regulation 2017 to prescribe the fees for National Disability Insurance Scheme (NDIS) worker screening applications on a cost recovery basis. The Amendment Regulation also provides that the existing fees continue to apply for state disability worker screening applications.

#### **4.1 Fundamental legislative principles issues and explanatory notes**

The committee identified no issues in relation to FLPs with the Amendment Regulation. The explanatory notes tabled with the Amendment Regulation comply with part 4 of the LSA.

#### **4.2 Human rights considerations**

Section 8 of the HRA provides that a statutory provision is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of that Act.

Section 13 of the HRA provides that a human right may be subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Section 13 of the HRA sets out a range of factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

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<sup>3</sup> HRA, s 41.

#### **4.2.1 Property rights**

Under section 24 of the HRA, a person must not be arbitrarily deprived of their property. The committee notes that it may be considered that the right to property is limited by the revised fee structure provided for by the Amendment Regulation, as requiring the payment of additional fees to work in the disability sector could have the effect of depriving a person of additional money.

In relation to the fee structure, the Minister provided the following justification:

The revised fee structure will ensure that the provision of these government services is appropriately resourced and budgeted to reflect the cost of their delivery, which in turn ensures that services can continue to be delivered to Queensland individuals, including the proper functioning of the disability worker screening and blue card systems which provide important safeguards.<sup>4</sup>

#### Committee comment

In light of the Minister's explanation, the committee is satisfied that any limitation on a person's property rights is reasonable and demonstrably justified.

#### **4.3 Human rights certificate**

The committee considers that the human rights certificate tabled with the Amendment Regulation contains a sufficient level of information to facilitate understanding of the legislation in relation to its compatibility with human rights.

### **5 Proclamation – Disability Services and Other Legislation (Worker Screening) Amendment Act 2020 (commencing remaining provisions) (SL 265)**

The proclamation fixes a commencement date of 1 February 2021 for certain provisions of the *Disability Services and Other Legislation (Worker Screening) Amendment Act 2020*.

#### **5.1 Fundamental legislative principles issues and explanatory notes**

The committee identified no issues in relation to FLPs with the proclamation. The explanatory notes tabled with the proclamation comply with part 4 of the LSA.

#### **5.2 Human rights considerations and certificate**

The committee considers that the subordinate legislation is compatible with human rights.

A human rights certificate was not tabled with the subordinate legislation. Section 41(4A) of the HRA provides that where a proclamation fixes a date for commencement of all the provisions of an Act that are not in force, a human rights certificate is not required to be prepared.

### **6 Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021 (SL 2)**

The Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021 (Amendment Regulation) supports the commencement and operation of the *Disability Services and Other Legislation Amendment Act 2020* (Amendment Act).

The Amendment Act and the Amendment Regulation implement nationally consistent worker screening under the NDIS and continue the state screening system for disability services outside the jurisdiction of the NDIS Quality and Safeguard Commission.

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<sup>4</sup> Disability Services and Other Legislation (Fees) Amendment Regulation 2020, human rights certificate, p 3.

The Amendment Regulation amends the Disability Services Regulation 2017 (Disability Service Regulation) to:

- clarify that a service related to providing care and support or protection to a forensic disability client at the forensic disability service is a disability service for the purposes of Part 5 of the *Disability Services Act 2006* (Disability Services Act)
- enable worker screening applications to be made by persons engaged by the National Disability Insurance Agency, the NDIS Quality and Safeguards Commission, service providers providing certain Commonwealth programs related to the NDIS and NDIS service providers providing Commonwealth continuity of support services
- prescribe the criteria that must be satisfied for a worker screening application to be made, namely that a person must live or work in Queensland
- enable departmental worker screening staff to apply for state disability worker screening
- prescribe matters about which a clearance holder must advise the chief executive
- prescribe entities that the chief executive may request information from to inform an assessment of whether an applicant poses a risk of harm to people with disability, and
- prescribe the Commonwealth offences that form part of the definition of disqualifying offences and serious offences and the matters that form part of the definition of a risk assessment matter.<sup>5</sup>

The Amendment Regulation also amends the Police Service Administration Regulation 2016 to allow the Queensland Police Service to exchange an expanded range of criminal history information with interstate screening units.

In addition, the Amendment Regulation enables the reproduction of a person's digital photograph and digitised signature under the *Transport Planning and Coordination Act 1994*, for the purposes of identity verification and issuing of clearance cards for state disability and NDIS worker screening.<sup>6</sup>

## **6.1 Fundamental legislative principles issues**

### **6.1.1 Rights and liberties of individuals - privacy**

Reasonableness and fairness of treatment of individuals is relevant to deciding whether legislation has sufficient regard to rights and liberties of individuals. This includes regard for a person's right to privacy, including in relation to their personal information.

The committee notes that the Amendment Regulation has the following implications for an individual's privacy:

- it enables the use of photographic identification and digitised signatures for disability worker screening
- it prescribes matters that a clearance holder must notify the chief executive of if that information changes
- it requires a person to notify the chief executive if their engagement status changes, and
- it prescribes other interstate worker screening units that the Queensland Police Service may exchange criminal history information with for the purposes of NDIS worker screening.<sup>7</sup>

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<sup>5</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, explanatory notes, p 2.

<sup>6</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, explanatory notes, p 5.

<sup>7</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, explanatory notes, pp 3-5.

The explanatory notes state the collection of photographic identification and signatures is justified:

... as it provides a robust method of identity verification for those working with people with disability which, in turn, maintains safeguards for these individuals. There are also strict requirements under the Amendment Act to maintain the confidentiality of this information.<sup>8</sup>

In relation to provisions regarding updating information with the chief executive and disclosure of a person's information, the explanatory notes state:

These proposed amendments in relation to obtaining and using information about a person are considered appropriate and justified given they ensure the most relevant and reliable information is considered when risk assessing a person. The ability to undertake an informed risk assessment strengthens the information sharing framework that underpins a national screening system. Importantly, it also increases safeguards for people with disability in Queensland.<sup>9</sup>

#### Committee comment

Following consideration of the explanation and justification set out in the explanatory notes, the committee is satisfied that the Amendment Regulation has sufficient regard to the rights and liberties of individuals.

#### **6.1.2 Institution of Parliament – subdelegation of legislative power**

Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether the subordinate legislation allows the subdelegation of a power delegated by an Act only in appropriate cases and to appropriate persons and if authorised by an Act.<sup>10</sup>

Section 6 of the Amendment Regulation inserts a new section 5 into the Disability Services Regulation. The new section expands the scope of NDIS and state disability worker screening scheme, by enabling additional people to apply for a NDIS worker screening application.

By expanding the scope of NDIS worker screening scheme, the Amendment Regulation is allowing for applicants who were not initially considered in the Disability Services Act. This raises the issue as to whether these matters would more appropriately be dealt with in primary legislation, rather than in regulation.

According to the explanatory notes, this provision is justified:

... given that expanding the scope of who may apply for an NDIS worker screening check is required to implement clauses 32-34 of the IGA [Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme] and give effect to changes that occur at the national level contemporaneously. The amendments made to the state worker screening scope are also justified given they are clarifying the scope of departmental functions that constitute a disability service, as well as those that enable a person to make a State disability worker screening application.<sup>11</sup>

Section 6 also inserts a new section 6 into the Disability Services Regulation, which introduces the requirement for an applicant to either live or work, or propose to live or work, in Queensland in order to make an NDIS worker screening application. The committee notes that this new requirement was not considered in the implementation of the Disability Services Act. The question, therefore, arises as to whether this would be a matter appropriately dealt with in primary legislation, rather than in regulation.

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<sup>8</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, explanatory notes, p 8.

<sup>9</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, explanatory notes, p 8.

<sup>10</sup> LSA, s 4(5)(e).

<sup>11</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, explanatory notes, p 7.

According to the explanatory notes, this provision is justified:

... given this amendment gives effect to the status quo for how laws normally apply in Queensland (Section 35(1)(b), *Acts Interpretation Act 1954* – i.e. only to people in Queensland for example). The proposed approach puts it beyond doubt that this is the intended operation of NDIS worker screening in Queensland.<sup>12</sup>

Section 6 also inserts a new section 6AD into the Disability Services Regulation, which provides that certain Commonwealth offences will be prescribed to be either a serious offence or a disqualifying offence in Queensland. Again, the issue arises whether this matter should be dealt with in principal legislation, rather than in regulation.

The explanatory notes state:

This is authorised under the Bill and justified given that prescribing Commonwealth offences by regulation provides the necessary flexibility to properly administer a nationally consistent screening system. It also ensures Queensland can be responsive in maintaining the highest level of safeguards where Commonwealth offences are introduced or changed and requires consistency in screening to manage risk of harm.<sup>13</sup>

#### Committee comment

From the explanation provided in the explanatory notes, the committee is satisfied that the Amendment Regulation has sufficient regard to the institution of Parliament.

### **6.2 Explanatory notes**

The explanatory notes tabled with the Amendment Regulation, in relation to potential breaches of FLPs, includes the following statement:

The potential breach is also justified given that this Amendment Regulation will be subject to parliamentary committee scrutiny and to disallowance by Parliament.<sup>14</sup>

The committee considers that such assertions are not supported by the scheme for parliamentary scrutiny of legislation, and do not have any basis in law. The committee notes that where there is an inconsistency with FLPs the explanatory notes should, in the context of each issue and the specific relevant provisions, provide the reader with reasons for the identified inconsistency.

Due to its concerns, the committee wrote to the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (Department), advising that the assertion contained in the explanatory notes is not supported by the committee and requesting further information.

In response, the Director-General of the Department stated:

I agree with the Committee's position that departments should not rely on the fact that legislation is subject to scrutiny by a Parliamentary Committee and (in the case of subordinate legislation) disallowance by Parliament to justify FLP breaches. In the case of the explanatory notes for the Amendment Regulation, the reference to scrutiny and disallowance is intended to note that this additional procedural safeguard exists. However, the Committee feedback on this issue is noted and appreciated and the department will ensure no reference of this nature is included in future explanatory notes.

I would like to reassure the Committee that the department is absolutely committed to producing explanatory notes which are clear and cogent, and which comply fully with the requirements of the *Legislative Standards Act 1992*. In response to your correspondence, I will reinforce for my senior executive staff our statutory obligations with respect to adequately assessing and justifying potential FLP

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<sup>12</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, explanatory notes, p 7.

<sup>13</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, explanatory notes, p 8.

<sup>14</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, explanatory notes, p 8.

breaches and ask all officers to ensure compliance, including adequate consideration of the Queensland Legislation Handbook and the Office of the Queensland Parliamentary Counsel's Principles of good legislation: OQPC guide to FLPs, when preparing explanatory notes in the future.<sup>15</sup>

The committee is satisfied with the Department's response and considers that, in general, the explanatory notes tabled with the subordinate legislation comply with the requirements of section 24 of the LSA.

### **6.3 Human rights considerations**

#### **6.3.1 Privacy and reputation**

Under section 25 of the HRA, a person has the right not to have their privacy unlawfully or arbitrarily interfered with.

The committee notes that collecting, using and sharing a person's information may interfere with an applicant and clearance holder's right to privacy. Enabling the use of photographic identification and requiring clearance holders to disclose any change in a risk assessment matter, or a change in engagement (such as moving from one employer to another) may also limit an individual's right to privacy and reputation.

The Minister provided the following justification:

Limiting the right to privacy by collecting and using information about a person is necessary to achieve the purpose of delivering a nationally consistent worker screening system. For example, it is necessary for the chief executive to meet robust identification verification requirements and use the person's photograph as a part of the screening process, with the ultimate purpose being to protect people with disability from risk of harm. It also reduces the risk of a person fraudulently using another person's clearance card. The ability for QPS [Queensland Police Service] to exchange criminal history information with screening units in every jurisdiction will support ongoing national criminal history monitoring, which is a significant safeguard under the NDIS [National Disability Insurance Scheme] worker screening system.

In the same way, requiring a person to update the chief executive if there is a change to their assessable information ensures the chief executive has all relevant information about a person to make a fully informed risk assessment.<sup>16</sup>

#### Committee comment

The committee considers that any limitation on a person's right to privacy is reasonably and demonstrably justified in the circumstances.

#### **6.3.2 Recognition and equality before the law**

Under section 15 of the HRA, every person is equal before the law and is entitled to the equal protection of the law without discrimination.

The Amendment Regulation introduces the requirement for an applicant to either live or work, or propose to live or work, in Queensland in order to make an NDIS worker screening application.

The Minister provided the following justification:

The purpose of requiring an applicant to have a nexus to Queensland is to clarify, beyond doubt, that only a person who is already living or working, or proposes to live or work, in Queensland may make an NDIS worker screening application under the DSA [*Disability Services Act 2006*]. This confirms the presumption at common law and under the *Acts Interpretation Act 1954* (Qld) that the DSA applies within the

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<sup>15</sup> Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships, correspondence, 30 March 2021.

<sup>16</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, human rights certificate, p 5.

jurisdiction of Queensland, and not elsewhere. Whilst an NDIS clearance and exclusion remains portable across roles in the NDIS and other jurisdictions, the ability to apply in Queensland is restricted.<sup>17</sup>

*Committee comment*

The committee is satisfied that any impact on a person's recognition and equality before the law is reasonable and justified.

**6.3.3 Cultural rights – Aboriginal and Torres Strait Islander peoples**

Section 28 of the HRA recognises that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights.

The Amendment Regulation requires that people disclose certain information to the chief executive and provide valid photographic identification. The Minister stated:

Aboriginal people and Torres Strait Islander people may experience unique barriers when seeking to enter and maintain continuous employment.

In some cases, people may face genuine difficulty in providing the necessary evidence to identify themselves to the required level of assurance. Exceptional cases are those where a person does not possess and is unable to obtain the necessary evidence of identity.<sup>18</sup>

The Minister expanded on the impacts these difficulties might have:

The barriers for Aboriginal people and Torres Strait Islander people in accessing working with children checks have been well examined. This included the barriers incurred by imposing limited methods to respond to requests for information (including rigid timeframes, requiring submissions in writing and requiring proof of identification).

This can have negative impacts on already thin markets for disability services in rural and remote areas and can increase the risk of unsafe supports or services for people with disability. It may also exacerbate existing problems with sourcing culturally appropriate supports.<sup>19</sup>

The Minister noted the purpose of the limitation on these rights:

... is ultimately to protect people with disability from risk of harm posed by unsafe supports and services. It also reflects the paramount consideration under the Amendment Act which is the right of people with disability to live life free from abuse, violence, neglect or exploitation, including financial abuse and exploitation.<sup>20</sup>

The Minister concluded:

On balance, it is considered that the importance of protecting participants from harm outweighs the potential limitations to the cultural rights of Aboriginal people and Torres Strait Islander people from the amendments.<sup>21</sup>

*Committee comment*

In light of the detailed explanation provided by the Minister, the committee is satisfied that any limitation on Aboriginal and Torres Strait Islander peoples' cultural rights is reasonable and demonstrably justified.

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<sup>17</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, human rights certificate, p 6.

<sup>18</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, human rights certificate, p 7.

<sup>19</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, human rights certificate, p 7.

<sup>20</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, human rights certificate, p 8.

<sup>21</sup> Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021, human rights certificate, p 8.



#### **6.4 Human rights certificate**

A human rights certificate was tabled with the subordinate legislation, as required by section 41 of the HRA. The committee considers that it provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

### **7 Disability Services (Transitional) Regulation 2021 (SL 3)**

The Disability Services (Transitional) Regulation 2021 (the Regulation) provides transitional arrangements for worker screening requirements for relevant residential aged care providers and workers providing supports or services under the NDIS to participants that are also receiving residential care from the provider.

The Regulation reflects the transitional arrangements for residential aged care providers under the National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018, ensuring that residential aged care providers that comply with existing screening obligations under the *Aged Care Act 1997* (Cth) are exempt from Queensland’s offences and penalties for NDIS worker screening under the Disability Services Act for a specified period.

#### **7.1 Fundamental legislative principle issues and explanatory notes**

The committee identified no issues in relation to FLPs with the Regulation. The explanatory notes tabled with the Regulation comply with part 4 of the LSA.

#### **7.2 Human rights considerations - recognition and equality before the law**

Under section 15 of the HRA, every person is equal before the law and is entitled to equal protection of the law without discrimination.

The Regulation will impose different screening requirements for workers in residential aged care settings, as some workers will come under the transitional arrangements.

The Minister states in the human rights certificate that the regulation is compatible with the right to recognition and equality before the law, commenting:

As the Transitional Regulation is made to correspond with transitional arrangements under the WS Rules [National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018], it ensures RAC [residential aged care] providers that meet existing screening obligations are subject to a smooth transition to NDIS worker screening and does not impose permanent changes to the scope of screening. Therefore I believe that the Transitional Regulation is compatible with the right to recognition and equality before the law and that further analysis is not required.<sup>22</sup>

#### **Committee comment**

The committee is satisfied that these provisions are compatible with a person’s right to recognition and equality before the law.

#### **7.3 Human rights certificate**

A human rights certificate was tabled with the Regulation, as required by section 41 of the HRA. The committee considers that it provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

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<sup>22</sup> Disability Services (Transitional) Regulation 2021, human rights certificate, p 2.

## 8 Recommendation

The committee recommends that the House notes this report.



Corrine McMillan MP

**Chair**

**April 2021**

### **Community Support and Services Committee**

**Chair**

**Deputy Chair**

**Members**

Ms Corrine McMillan, Member for Mansfield

Mr Stephen Bennett, Member for Burnett

Mr Michael Berkman, Member for Maiwar

Mr Jon Krause, Member for Scenic Rim

Ms Cynthia Lui, Member for Cook

Mr Robert Skelton, Member for Nicklin

