Legislation Review Committee

PARLIAMENT OF NEW SOUTH WALES

Volume III: 2022 COVID-related reports

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Membership

Chair	Mr Dave Layzell MP, Member for Upper Hunter (8 June 2021 – current)
Deputy Chair	Mr Lee Evans MP, Member for Heathcote (19 June 2021 – current)
Members	The Hon. Scott Barrett MLC (30 March 2022 – current) Ms Abigail Boyd MLC (23 September 2020 – current) The Hon. (Wes) Wesley Fang, MLC (23 June 2021 - 30 March 2022) Mr David Mehan MP, Member for the Entrance (19 June 2021 – current) The Hon. Shaoquett Moselmane MLC (18 November 2020 – current) Mr Peter Sidgreaves MP (31 March 2022 – current) Mr Nathaniel Smith MP, Member for Wollondilly (24 February 2022 – current) The Hon. Leslie Williams MP, Member for Port Macquarie (19 June 2019 – 31 March 2022)
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Guide to the Compilation of reports on COVID-19 Bills and Regulations

Since the advent of the COVID-19 pandemic, a number of bills have now been passed and regulations made in NSW, to respond to its health and economic impacts. In accordance with its functions under section 8A and 9 of the *Legislation Review Act 1987* (the Act), the Committee has reviewed each of these bills and regulations against the criteria set down in the Act, and in particular, for their impact on personal rights and liberties, and reported.
The Committee's reports are spread across a number of its Legislation Review Digests. Here, for ease of reference, all the Committee's reports on bills and regulations to do with COVID-19 have been compiled into the one document. Where a bill or regulation has not warranted comment from the Committee, this has also been recorded.

The Committee hopes this will improve the access and utility for members of parliament and the public. It may also prove a useful resource for researchers and commentators in the future.

The document will be updated and re-released as more bills or regulations are reported upon by the Committee.

> Volume 1 – is the compilation of the Committee's conclusions on each bill or regulation. It is a summary and a quick reference for readers.
>
> Volume 2 – is a reproduction of the Committee's full report on each bill or regulation and is much more detailed examination of the bill and regulation.

While the Committee must report on every bill, it only produces a report on regulations that attract a comment by the Committee. If the Committee determines that a report is not needed on a regulation, the regulation is placed on a "no papers" list. Appendix Two of the document lists all the regulations relating to COVID-19 that the Committee considered but did not report on (no papers) and the date of the meeting at which the Committee considered the regulation.

Comment on Bills

1.1 This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in section 8A(1)(b) of the *Legislation Review Act 1987* (**LRA**).

Comment on Regulations

1.2 This section contains the Legislation Review Committee's reports on Regulations in accordance with section 9 of the *Legislation Review Act 1987* (**LRA**).

Summary of Conclusions

PART ONE – BILLS

1. COVID-19 AND OTHER LEGISLATION AMENDMENT (REGULATORY REFORMS) BILL 2022

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Procedural fairness – mental health examination by AVL

The Bill amends the *Mental Health Act 2007* to enable accredited persons under the Act to conduct mental health examination of involuntarily admitted persons by audio visual link, the determination of which may subject the person to ongoing detention. This would, in effect, permanently implement existing temporary provisions enacted in response to the COVID-19 pandemic, which were due to automatically repeal on 31 March 2022.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57, and when they were further extended, in its Digest No. 28/57. It notes that the Committee's previous reporting considered the broader context of the COVID-19 pandemic at the time, and that the current context has changed as New South Wales transitions to post-pandemic life.

Consistent with the Committee's previous comments, the conduct of mental health examinations by AVL may impact the extent to which individuals can fully participate in which concern their involuntary detention. It also may impact the accuracy of the examination process if the use of AVL reduces the ability of examiners to assess a person's demeanour, particularly where the examination is conducted by an accredited person who may not have any formal medical or psychological health training.

However, the Committee notes that the conduct of mental health examinations by AVL and/or by individuals who are not psychiatrists are subject to certain safeguards, including requirements to seek psychiatric advice where reasonably practicable and to ascertain that the examination can be sufficiently conducted by AVL to ascertain the required opinion. It further acknowledges that the operation of these provisions is intended to reduce waiting times to obtain such an assessment, particularly in rural and regional areas where relevantly qualified medical practitioners are scarcer, and thereby to minimise the period of time during which individuals are involuntarily detained. In these circumstances, the Committee makes no further comment.

Procedural fairness – compulsory interview by AVL

The Bill repeals certain time limiting provisions in various environmental protection legislation. This would permanently enable authorised officers to require mandatory questioning of individuals occur by video link rather than in person in the course of investigating possible contraventions under those Acts. The Committee previously reported on these provisions when they were first introduced, in its Digest No. 28/57.

Consistent with the Committee's previous comments, the permanent implementation of these provisions may impact the extent to which individuals are able to meaningfully participate in the investigation process of contraventions under the relevant Act. This impact a person's right to procedural fairness, particularly where environmental protection legislation provides that

individuals are not excused from answering questions that may tend to incriminate them, contravening the common law privilege against self-incrimination.

The Committee acknowledges that the permanent implementation of these measures is intended to continue delivering economic benefits by reducing administrative costs associated with the investigation of environmental offences. However, it notes that the provisions were introduced as an extraordinary measure in response to the COVID-19 public health emergency at the time, and that context has since changed in New South Wales as the State transitions to post-pandemic life. For these reasons, the Committee refers this matter to Parliament for its consideration.

Civic engagement – meaningful participation in planning hearings

The Bill amends the *Environmental Planning and Assessment Act 1979* to enable the Independent Planning Commission to electronically conduct public hearings it is required to hold under the Act on environmental and planning matters. This may impact the ability of individuals to meaningfully participate and be heard on matters of public concern which might affect their local environment by reason of the person's technological proficiency. Therefore, these provisions may limit a person's civic engagement in local public decision-making. This is of particular concern in circumstances where a person may be liable for an offence of failing to attend an electronic hearing.

The Committee acknowledges that the provisions are intended to provide flexibility to planning bodies and provide administrative costs-saving in the conduct of such public hearings. It further notes that the provisions allow for individuals to make written submissions on matters relevant to the public hearing. However, the provisions do not require a public hearing conducted electronically be widely accessible, so long as a member of the public can view or hear it at the time, which may disadvantage individuals without internet access or technological proficiency. Given the potential penalties for failing to attend if required and possible technological disadvantages, the Committee refers this matter to Parliament for its consideration.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 8A(1)(b)(v) of the LRA

Henry VIII clauses

The Bill inserts section 89 into the *Retail Leases Act 1994* to provide that savings or transitional provisions in the regulations consequent on the making or repeal of COVID-19 legislative provisions will have effect despite anything contrary in the Act. The Committee notes that these provisions allow for regulations to alter the operation of provisions contained in their parent Act by overriding contrary statutory provisions.

The Bill also inserts sub-section 88(1A) to extend the operation of the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* beyond its repeal. In its Digest No. 28/57, the Committee commented on the *COVID-19 Recovery Bill 2021* which introduced provisions similarly extending the application of the *Retail and Other Commercial Leases (COVID-19 Regulation (No 3) 2020* beyond its repeal. Consistent with those comments, the Committee notes that these provisions also allows for regulations to alter the effect of provisions contained in the parent Act.

The Committee notes that these provisions amount to Henry VIII clauses, allowing the Executive to legislate and amend any Act by way of regulation without reference to the Parliament. In ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers.

However, the Committee acknowledges that the provisions are intended to preserve the protections enacted in the extraordinary circumstances created by the COVID-19 pandemic. It notes that the provisions provide consistency to retail tenants in respect to lease matters arising during the COVID-19 pandemic. In the circumstances, the Committee makes no further comment.

Commencement by proclamation

Parts of the Bill commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments to the State's legislative regimes in respect to the management of community land and strata schemes, accessing long service leave and mental health examinations for possible detainees. In the circumstances, the Committee makes no further comment.

2. HEALTH LEGISLATION (MISCELLANEOUS) AMENDMENT BILL 2022

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Enforcement powers and COVID-19 penalty notice offences

The Bill amends section 135 of the *Public Health Act 2010* to extend the operation of provisions authorising police officers to exercise the powers under sections 112 and 118. These official powers include requiring a person suspected of contravening the Act or regulations to give their full name and address, and the power to issue penalty notices.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57, and when they were initially extended, in its Digest No. 27/57. Consistent with those comments, the extended expansion of 'officers' who can demand identification information to include police officers may impact on a person's right to privacy and privilege against self-incrimination.

In conjunction with the extended authorisation of police officers to issue penalty notices, the extended operation of these enforcement powers enables police officers to issue on-the-spot fines for suspected contraventions of the Act or the regulations. Penalty notices allow an individual to pay a specified monetary amount instead of appearing before a court to have their matter heard. This may impact on a person’s right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee acknowledges that the Bill seeks to extend provisions intended to facilitate the efficient enforcement of public health measures responding to the extraordinary circumstances created by the COVID-19 pandemic. It also recognises that individuals retain the right to have their matters heard and decided by a court and acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of on-the-spot fines, including deterring contravention of public health measures intended to protect the community from the risks of COVID-19 transmission. Given that the provisions are time-limited to repeal on 30 September 2022, the Committee makes no further comment.

Procedural fairness – mental health examination by AVL

The Bill amends section 203 of the *Mental Health Act 2007* to extend the operation of that provision to 30 June 2022. This would extend the ability of qualified medical practitioners or accredited persons to conduct mental health examinations of involuntarily admitted persons by AVL, where they are satisfied that it is necessary to do so because of the COVID-19 pandemic.

Under the Act, the determination of these mental health examinations may subject the patient to ongoing detention in a mental health facility.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 15/57, and when they were initially extended, in its Digest No. 28/57. Consistent with the Committee's previous comments, the conduct of mental health examinations by AVL may impact the extent to which individuals can fully participate in examinations which concern their involuntary detention. It also may impact the accuracy of the examination process if the use of AVL reduces the ability of examiners to assess a person's demeanour.

However, it acknowledges that the provisions are an extraordinary measure to ensure that mental health examinations can be safely conducted, in light of the risks posed by COVID-19 to patients and staff within mental health facilities and the public. It further notes that the conduct of these examinations by AVL are subject to safeguards, including limiting such examinations only where necessary due to the COVID-19 pandemic and requiring the examiner ascertain the examination can be sufficiently conducted by AVL. Given these safeguards and that the provisions are time limited to 30 June 2022, the Committee makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Henry VIII clauses

The Bill amends section 4 of the *Health Practitioner Regulation (Adoption of National Law) Act 2009* to provide that amendments made to the Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld) do not apply as law in New South Wales until a regulation is made to apply that amendment, with or without modification. Proposed subsection (3) provides that a regulation providing for the modified application of a Queensland amendment may amend the Schedule to the Act for that purpose. The Committee notes that this provision allows the Executive to amend the Act by way of regulation without reference to the Parliament.

Proposed subsection (2) further provides that a regulation's provisions may commence from the date that the relevant Queensland amendment was passed, even if that date is prior to the date of publication on the NSW legislation website, contrary to section 39 of the *Interpretation Act 1987*. The Committee notes that these provisions allow for regulations to alter the operation of provisions contained in their parent Act by overriding contrary statutory provisions.

The Committee notes that this provision also amounts to a Henry VIII clause, allowing the Executive to legislate and amend the operation of an Act by way of regulation. In ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers. However, these amendments are intended to strengthen parliamentary oversight of the NRAS, by no longer permitting amendments passed in another jurisdiction to automatically apply as law in New South Wales. In the circumstances, the Committee makes no further comment in respect to subsections (2) and (3).

Proposed subsections (5)-(6) provide that such a regulation is repealed on the day after all provisions have commenced, however the substantive operation of those provisions continue to apply despite their repeal. These provisions thereby extend the application of the regulations beyond their repeal.

The Committee notes that these provisions also amount to Henry VIII clauses, allowing regulations to alter the operation of provisions contained in the parent Act after its repeal. This may make it difficult for affected persons to ascertain what laws apply to them at any given time. Additionally, by legislating for the automatic repeal of these regulations which are to have continued application, these provisions may not be subject to a disallowance motion by a

member of Parliament and thereby subvert a level of parliamentary scrutiny. For these reasons, the Committee refers these provisions to Parliament for its consideration.

3. HOME BUILDING AMENDMENT (MEDICAL GAS LICENSING) BILL 2022

The Committee makes no comment on the Bill in respect of the issues set out in section 8A of the *Legislation Review Act 1987*.

4. STATE REVENUE AND FINES LEGISLATION AMENDMENT (MISCELLANEOUS) BILL 2022

Trespasses unduly on personal rights and liberties (s 8A(1)(b)(i))

Retrospective approval for actions of a local council

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to him or her at any given time. In this case, the actions of a local council may retrospectively be deemed to be validly done, where otherwise those actions may not have been valid under the *Liquor Act 2007* when they were actually done.

The Committee does however note that the proposed retrospective changes are intended to provide local councils with the power to continue to provide approvals for outdoor public spaces to be used for events in a safe way to provide support for businesses recovering from the COVID-19 pandemic, and that the changes allowed to be made under the Act are temporary. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

Privacy

The Bill makes amendments to the *Fines Act 1996* and the *State Debt Recovery Act 2018* to permit the Commissioner of Fines Administration and the Chief Commissioner of State Revenue to have access to certain information for the purpose of exercising their functions under their respective Acts, rather than only to exercise specified functions. These records may include personal contact information, such as an email address and phone number, and the contact details of their current or last known employer. This may infringe on the privacy of those individuals subject to these provisions.

However, the Committee acknowledges that the provisions are intended to assist the Commissioners in exercising their functions under the Act for the purpose of deciding whether to make garnishee orders against the fine defaulter (under the Fines Act) or for the purposes of taking debt recovery action against the debtor (under the State Debt Recovery Act). The Committee also notes that the personal information that would be provided includes details already held by police or other government agencies, which are subject to certain privacy safeguards regarding the storage, use and disclosure of such information. In these circumstances, the Committee makes no further comment.

Right to fair trial – penalty notice offences

The Bill permits the creation of penalty notice offences under the *Fines Act 1996* and the corresponding *Fines Regulation 2020*. Penalty notices allow an individual to pay a specified monetary amount instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that an individual (including a relevant person) retains the right to elect to have their matter heard and decided by a court. It also acknowledges that there

are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. In these circumstances, the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA

Discretionary powers of the Chief Commissioner

The Chief Commissioner has broad powers under the *Duties Act 1997* to seek payment for and make discretionary determinations relevant to a number of duties. The Bill seeks to amend the Duties Act to provide the Chief Commissioner with two additional discretionary powers:

1. allow the Chief Commissioner to decide on the basis of their opinion, if an excluded transition that results in a change of beneficial ownership of dutiable property, was made with the collateral purpose of reducing the duty otherwise chargeable under the Duties Act (section 8(2A); and

2. allow the Chief Commissioner to give an approval or exemption to the residence requirement for the First Home Buyers Assistance Scheme (section 76(2A).

These discretions may have an impact on individuals, who will or will not be subject to pay duties depending on the decision of the Chief Commissioner. The new discretions also do not provide detail as to the factors the Chief Commissioner must consider in exercising their discretion, and therefore the Bill may grant an ill-defined administrative power.

The Committee however acknowledges that the Chief Commissioner has the authority under the Duties Act to make a number of discretionary decisions, and that discretion may be necessary to impose the duties outlined in the Duties Act. The Committee also notes that most decisions of the Chief Commissioner can be reviewed by the NSW Civil and Administrative Tribunal and therefore the discretion of the Chief Commissioner is not entirely unfettered. Given the circumstances, the Committee makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Matters deferred to the regulations – creation of offences and penalties

The Bill seeks to insert a new section 119A into the *Fines Act 1996*, allowing for the regulations to prescribe both penalty notice offences, and determine the prescribed amount payable for penalties.

The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulation. However, the Committee notes that the Bill permits the regulations to create offences that carry a maximum penalty of the amount prescribed in the regulations, and this amount is set by Section 128(2) of the Fines Act which states that the regulations may create offences punishable by a penalty not exceeding 50 units ($5 500).

The Committee prefers that offences be legislated by Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee however does note that the maximum amount of a fine does not exceed $5 500, and that the imposition of fines under the Fines Act is subject to internal and judicial review. In the circumstances the Committee makes no further comment.

5. SECURITY INDUSTRY AMENDMENT BILL 2022

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Strict liability offences – increased penalties

The Bill amends the Security Industry Act and Security Industry Regulation to vary the penalties for offences, including some strict liability offences. These variations include the introduction of custodial sentences for some offences and the increase in some maximum monetary penalties.

For example, the Bill increases the maximum monetary penalty for the strict liability offence of obstructing a law enforcement officer, from 100 penalty units to 500 penalty units, and attaches a two-year custodial sentence. Previously the maximum penalty for this offence was 100 penalty units.

The Bill also introduces a new tiered penalty system for contraventions of licence conditions. Under the tiered system, an individual who contravenes a Tier 3 condition faces a maximum monetary penalty of 250 penalty units, imprisonment for 12 months, or both. The previous maximum penalty for an individual's contravention of a licence condition was 100 penalty units, imprisonment for six months, or both. Section 30 of the Security Industry Act, does not require the establishment of a mental element to prove that the contravention of a condition has occurred, accordingly, depending on the specific condition, the provision may amount to a strict liability offence.

The Committee acknowledges that in speaking to the Bill, Minister Toole indicated that the increase to penalties under the Act or regulation are necessary because the existing provisions for some offences are no longer sufficient to deter criminal activity. However, given the increased penalties apply to strict liability offences and may include imprisonment, the Committee refers this issue to the Parliament for its consideration.

Privacy – Publication of information

Part 3D of the Bill enables the Commissioner to publish information about the revocation of a licence, or an offence committed by a licensee under the Act or the regulations.

Under this Part, the Commissioner may publish the name of a person who committed an offence, information about an offence, including the date, and any other information prescribed by the regulation. The Commissioner may also publish the name of a person whose licence has been revoked, the reason for the revocation, the date on which the licence was revoked, and any other information prescribed by the regulations.

The Committee notes that the publication of the names of persons who have committed an offence or have had their licence revoked may interfere with a person's privacy or confidential information. The Committee also notes that the Bill defers certain items to the regulations, such as the power to prescribe additional information that may be published.

The Committee acknowledges that the bill provides a safeguard through the requirement not to make information publicly available unless the proceedings for the offence or the steps to revoke the licence are finalised. However, the Committee also notes that the regulations may prescribe additional circumstances for the publication of information, which would not be subject to the same level of Parliamentary scrutiny as a Bill. In the circumstances, the Committee refers the matter to parliament for consideration.

Commencement by proclamation

The Bill is intended to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual right or obligations. However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments. This may be particularly the case where amendments are being made to the licensing schemes across

industries and multiple pieces of legislation. In the circumstances, the Committee makes no further comment.

Matters deferred to the regulations

The Bill amends the Security Industry Act to enable the regulations to prescribe activities that do not constitute "security activities", and places that do not constitute "relevant places", for the purposes of the Act. This enables the regulations to determine specific situations that will not be subject to key provisions of the Act.

The Bill also enables the regulations to prescribe grounds or other requirements for the granting of an exemption by the Commissioner, and the prescription of a fee to be paid to the Commissioner on application for an exemption. As discussed earlier, the Bill also defers, to the regulations, the power to prescribe additional information that may be published by the Commissioner in relation to an offence or a revocation of licence.

The Committee acknowledges that, in his second reading speech to the Bill, the Hon. Paul Toole MP, stated that the exemption provisions were included to ensure that there is an available pathway for the Commissioner to exempt persons from the need to obtain a security license where it is in the public interest and in unforeseen situations, such as the COVID-19 pandemic.

However, the Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected such as the procedure for applications for an exemption, or the prescribed information that may be published by the Commissioner. In the circumstances, the Committee refers this matter to parliament for consideration.

6. ELECTORAL LEGISLATION AMENDMENT BILL (NO 2) 2022

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Electoral offence – automated telephone calls

The Bill amends the *Electoral Act 2017* to create a new criminal offence for causing, permitting or authorising an automated telephone call to be made which contains electoral matter, unless it includes the name and address of an individual who instructed the call be made in clear spoken English. This offence carries a maximum penalty for an individual of 20 penalty units ($2 200) or 6 months' imprisonment, or both.

It is unclear whether this offence requires a mental element to be proven and may therefore amount to a strict liability offence. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. Additionally, it may restrict an individual's freedom of political communication and, by requiring disclosure of identifying information, privacy of an individual's personal information.

However, the Committee acknowledges that the provisions intend to clarify how existing authorisation requirements for physical electoral materials apply to automated telephone calls. It also notes that the offence does not prohibit the making of automated telephone calls containing electoral matter and is intended to strengthen compliance with authorisation requirements. In the circumstances, the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

Wide discretionary powers of the NSW Electoral Commissioner

The Bill amends the *Electoral Act 2017* to give the Electoral Commissioner discretionary powers under Schedule 7, Part 4 to make determinations in respect to the 2023 State general election and/or by-elections held before the general election. These determinations are required to be published on the Electoral Commission's website.

Specifically, clause 14 sets out a regulation-making power to authorise the Commissioner to permit certain COVID-19 affected electors to access telephone voting for a particular election. Telephone voting is otherwise limited to blind and vision-impaired voters. It also allows the Commissioner to determine at any time that telephone voting is not permitted for blind, vision impaired or COVID-19 affected electors for a certain election or time period. Clause 15 also allows the Commissioner to determine that postal voting in a relevant election must be conducted under the modifications set out in proposed Schedule 8. Finally, clause 16 allows the Commissioner to appoint a voting centre outside of Australia for declaration voting in the 2023 general election, and to abolish a centre so appointed.

In doing so, the Bill may therefore grant the Electoral Commissioner a wide discretionary power to regulate how electors may vote in the 2023 general election or by-elections held before the general election. This may make an individuals' right to vote and participate in public elections dependent upon the non-reviewable determinations of the Commissioner.

The Bill also defers to regulations the authorisation of the Commissioner to determine when and which COVID-19 affected electors are entitled to vote by telephone voting. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences. The Committee generally prefers substantive matters to be dealt with in the principal legislation to facilitate an appropriate level of parliamentary oversight, particularly where those matters may impact an individual's right to participate and vote in public elections.

The Committee acknowledges that these amendments are intended to facilitate the upcoming general election to be conducted in 2023, and that the provisions are based on the advice of the Commission. It also notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the matters that may be determined by the Commissioner and deferred to the regulations relate to the participation and voting in public elections. The Committee also notes that the determinations are only required to be published on the Commission's website, which is not required to be tabled in Parliament and therefore not subject to disallowance. These provisions may thereby make it difficult for a person to understand how they may meaningfully vote and participate in elections, in this case electors relying on telephone or postal voting and absent voters outside of Australia. For these reasons, the Committee refers this matter to Parliament for its consideration.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by proclamation

The Bill commences by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, which may allow time for the necessary administrative arrangements to be implemented in order to give effect to the amendments. However, given that some of these provisions are intended to facilitate the upcoming State general election in March 2023 and establish new offences, the Committee notes that commencement by proclamation may make

it difficult for individuals to ascertain their electoral rights and obligations for the election. For these reasons, the Committee refers the matter to Parliament for its consideration.

PART TWO – REGULATIONS

1. DISTRICT COURT CRIMINAL PRACTICE NOTE 24

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Access to justice

The Practice Note requires that persons wishing to attend the District Court of NSW in person for appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* satisfy the List Judge or trial Judge that they are vaccinated. This requirement appears to apply to court participants including (among others) counsel, witnesses appearing in person, interpreters, victims or the victims' family members and their support persons.

All other matters will be heard by use of the virtual courtroom. The Committee understands that hybrid in person and remote District Court proceedings are facilitated by provisions of other practice notes and applicable legislation, including the *Evidence (Audio and Audio-Visual Links) Act 1998.*

The use of the virtual courtroom may affect procedural fairness because the Court cannot closely monitor the conduct of a person appearing including what material they have access to, if other persons are in the room or if they are recording the trial on their own device. It may also affect consistency in the quality of evidence between witnesses who appear in person or remotely, particularly if the virtual courtroom experiences technical failures. Additionally, appearing remotely may impact a defendant's access to justice, as the Court does not have the benefit of observing any nuanced behavioural cues of the defendant.

The Committee acknowledges that the use of the virtual courtroom has practical benefits in the circumstances, specifically to protect against the risk of COVID-19 and protect the safety of other court participants. In the circumstances, the Committee makes no further comment.

Open justice

The Practice Note requires that persons wishing to attend the District Court of NSW in person for appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* satisfy the List Judge or trial Judge that they are vaccinated. This requirement appears to apply to court participants including (among others) counsel, witnesses appearing in person, interpreters, court reporters, victims or the victims' family members and their support persons. All other matters will be heard by use of the virtual courtroom.

The Practice Note also requires members of media who wish to attend a trial or hearing provide evidence they are vaccinated to the List Judge or trial Judge. It does not permit members of the public to attend the Court. Both groups have access to the virtual courtroom, on request and subject to any orders made by the trial Judge concerning the conduct of the trial.

The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny. However, the Committee acknowledges that the limitations on access are in response to the current COVID-19 pandemic with the intention of safeguarding broader public health. It considers that the alternative arrangements of a virtual courtroom assist in upholding open justice in the circumstances, particularly considering the other limitations on movement in the Court given the continued requirement to maintain social distancing. The Committee makes no further comment.

Retrospective application

The Practice Note commenced on 29 October 2021, before it was notified in the NSW Government Gazette on 5 November 2021. It also applies to trials and hearings listed on or after 25 October 2021, which is prior to both the date of the Practice Note's commencement and publication. It therefore appears the Practice Note's provisions are intended to apply retrospectively, both because the Note commences 6 days before the publication date and the provisions apply to trials and hearings listed 4 days before the Note commences.

The Committee generally comments on provisions drafted to have retrospective effect, especially where rights may be retrospectively limited, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. The Committee would therefore prefer that the Practice Note commence, and its provisions apply to trials and hearings listed after, the publication date to provide to provide sufficient clarity for persons implementing the Practice Note and those whose rights may be affected. It notes that this approach was taken in District Court Criminal Practice Note 25. That Practice Note was published in the NSW Government Gazette No 586 of 12 November 2021, commenced on 15 November 2021 and applied to sentence proceedings listed for hearing on or after 15 November 2021. While this practice note has been temporarily suspended at the time of writing, the Committee refers this issue to the Parliament for its consideration.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Period of application and review date

The Practice Note does not include a specific end date, although it will be reviewed in mid-November 2021 or as otherwise may be necessary. The Committee would prefer that the Practice Note include a fixed date for review, to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on access to justice and open justice, and that it responds to COVID-19, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

2. DISTRICT COURT PRACTICE NOTE 25 – APPLICATIONS FOR LEAVE FOR IN PERSON APPEARANCES IN SENTENCE PROCEEDINGS

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Open justice

The Practice Note requires any person who seeks to attend Court in person for sentence proceedings to apply for leave at least three business days prior to the listing. Leave will not be granted to any person to attend the Court in person unless the relevant Judge is satisfied that he or she is vaccinated. The Practice Note also requires solicitors for the parties to enquire with participants to confirm their vaccination status.

The Committee notes that this may create a barrier to the principles of open justice for legal representatives, defendants, victims and witnesses involved in sentence proceedings. Open justice requires that the administration of justice take place in open court subjected to public and professional scrutiny. This may particularly affect defendants in custody who face access barriers to the courts. Additionally, it may disenfranchise unvaccinated persons from gaining full access to the open court system.

However, while the Practice Note limits in person appearances, the Committee acknowledges that such requirements are in response to the current COVID-19 pandemic with the intention of

broader public health. The Committee also considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Period of application and review date

The Practice Note does not include a specific end date nor a timeframe in which the Practice Note will be reviewed. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on a person's rights, including their right to participate in the administration of justice as an accused person, the Practice Note may also benefit from the inclusion of an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

3. DUST DISEASES TRIBUNAL OF NSW PRACTICE NOTE, NO. 1 OF 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Access to justice/procedural fairness

The Practice Note prohibits in-person attendance in hearings before a List Judge, allocated Judge or Registrar in the Dust Diseases Tribunal of NSW of any person who has not been fully vaccinated for COVID-19 at least 14 days prior. It also provides that individuals wishing to attend a hearing in-person, or to conduct the hearing bedside at private homes, must seek leave of the relevant Judge or Registrar, and imposes the responsibility for ensuring the vaccination status of all proposed attendees on the relevant solicitor. In respect to bedside hearings, the tribunal may limit the number of lawyers for a party who may attend the hearing.

By limiting who may attend a tribunal hearing in person, the Practice Note may affect a person's right to access justice. This is of particular concern as the tribunal hears claims from dust disease sufferers or their dependants. Given the degenerative nature of these diseases, plaintiffs may be unduly burdened by virtual attendance, or those who require bedside hearings may be disadvantaged by limitations placed on the attendance of their legal representatives.

However, the Committee acknowledges that the Practice Note is providing for the return of in-person attendance following its suspension due to the COVID-19 pandemic. It also notes that this is a response to the extraordinary and evolving circumstances of the pandemic, and is balancing the rights of individuals to in-person attendance with the need to protect public safety particularly dust disease sufferers who are more vulnerable to serious effects of COVID-19. In the circumstances, the Committee makes no further comment.

Open justice

The Practice Note imposes limitations on the attendance of members of the public and media at tribunal hearings. By prohibiting members of the public attending in-person and limiting in-person attendance of members of the media to those individuals who have sought leave and can show they are fully vaccinated for COVID-19, the Practice Note may impact a person's rights to a fair and public hearing contained in Article 14 of the ICCPR. The right to a fair and public hearing enshrines principles of open justice which require the administration of justice must take place in courts which the public and the media may access.

However, Article 14 also recognises that the press and public may be excluded for reasons of morals, public order or national security, to protect the interest of the parties' private lives or where publicity would prejudice the interests of justice. In this case, the Practice Note imposes limitations in response to the extraordinary circumstances of the COVID-19 pandemic. The

Committee further notes that the Practice Note does not preclude the virtual attendance of members of the public and the media. In the circumstances, the Committee makes no further comment.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Period of application and review date

The Practice Note does not include a specific end date. The Committee would prefer that the Practice Note include a fixed date for review, to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on access to justice and open justice, and that it responds to COVID-19, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

4. LOCAL GOVERNMENT (GENERAL) AMENDMENT (ELECTIONS) REGULATION 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Political franchise and right to democratic participation – voting without discrimination

The Regulation amends the *Local Government (General) Regulation 2021* to include a risk to public health related to COVID-19 as a reason for an election manager to temporarily suspend voting at a polling place on election day. It also extends the allowable period of time for adjourning a suspended election beyond the existing 13 day cap to a later day, provided that it is necessary to comply with a public health order or reduce the risk of infection from COVID-19.

This may mean certain voters are unable to cast their ballots in elections for councillors and mayors for an unknown period of time, and thereby may impact an individual's right to political franchise and democratic participation contained in Article 25 of the ICCPR. The right to political franchise and democratic participation protects the right of individuals to vote by universal and equal suffrage.

However, Article 25 also recognises that the right to vote may be subject to restrictions based on objective and reasonable criteria. The Committee notes that these provisions are extraordinary measures in response to the COVID-19 pandemic and are intended to protect public health. It also acknowledges that the Regulation does not prevent or remove an impacted individual's right to cast a relevant ballot. In the circumstances, the Committee makes no further comment.

Right to take part in public affairs and elections – freedom of political communication and to run for public office

The Regulation amends the *Local Government (General) Regulation 2021* to empower election managers to restrict the personal delivery of nomination papers for proposed candidates in councillors and mayor elections for public health and/or COVID-19 related reasons. It also repeals the time limiting provisions which previously repealed the power of election managers to make COVID-19 related directions on 31 December 2021. As a result, election managers will have an ongoing power to make directions that restrict the presence of scrutineers and the display or distribution of physical electoral materials.

In its Digest No 37/57, the Committee commented on the *Local Government (General) Amendment Regulation 2021* which inserted clauses 337A, 356TA and 356TB into the *Local Government (General) Regulation 2005*, which was the predecessor to and remade by the *Local Government (General) Regulation 2021*. Consistent with those comments, the Committee notes that the Regulation may impact an individual's right to political franchise and democratic

participation contained in Article 25 of the ICCPR. The right to political franchise and democratic participation guarantees the right of citizens to stand for public office, to vote in elections and to have access to positions in public service.

The Regulation may also limit free political communication about candidates available in electoral materials. Free communication of information and ideas about candidates and electoral matters is an important component of the right to take part in public life and elections. It may also hinder the ability to scrutinise the conduct of polling and the counting of ballots to ensure elections are determined fairly and democratically.

However, Article 25 also recognises that the right to vote may be subject to restrictions based on objective and reasonable criteria. The Committee notes that the provisions seek to manage risks to public health in the conduct of elections, especially those risks arising from the COVID-19 pandemic regarding physical distancing. It also acknowledges that the provisions provide for the alternative presence of scrutineers and the dissemination of electoral materials by electronic means. In the circumstances, the Committee makes no further comment.

5. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION (NO 6) 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offence – right to a fair trial

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 6) 2021* provides that penalty notices can be issued for an offence of displaying or producing information or evidence purporting to show a person is a fully vaccinated person. The Regulation inserts subclause (c2) to Schedule 4 to prescribe the penalty for a contravention of the provision under the amendment is $5 000 for an individual. Under the amendment the offence will only be made out where the display or production of that information is untrue and inaccurate.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. This may impact a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that penalty notices of $5 000 for an individual are significant monetary amounts to be imposed by way of penalty notice.

However, the Committee acknowledges individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. As the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices particularly in the extraordinary context of COVID-19, the Committee makes no further comment.

6. DISTRICT COURT CRIMINAL PRACTICE NOTE 23 - RESUMPTION OF JURY TRIALS AND IN PERSON APPEARANCES IN JUDGE ALONE TRIALS

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Barrier to jury participation

The Practice Note requires that an individual must be vaccinated against COVID-19 and consent to undergoing rapid antigen screening (RAS) in order to participate as a juror in criminal trials

heard in the District Court of New South Wales. While a potential juror has the right to decline providing their vaccination status, it appears that doing so prevents that person from becoming a member of a jury panel either in-person or by AVL as an alternative because the Practice Note does not make any exceptions to the vaccination requirement for all jurors.

The Committee reported on these provisions in the previous iteration of the Practice Note, in its Digest No. 37/57. Consistent with the Committee's previous comments, the operation of these provisions may be discriminatory against non-vaccinated people, including individuals who are unable to be vaccinated for medical reasons or those who have received a vaccine other than those approved under NSW Public Health Orders. By limiting the eligibility of individuals to participate as jurors based on their vaccination status, these provisions may also impact the rights of accused persons to have their criminal charges determined fairly and independently by a jury of their peers.

The Committee acknowledges these provisions are intended to manage the risks of COVID-19 to and protect the health and safety of court participants. However, it notes that jury duty is a central feature of the criminal justice system and allows members of the community to participate in the administration of justice. For these reasons, the Committee refers this issue to the Parliament for its consideration.

Open justice

The Practice Note prohibits the attendance of members of the media or the public from attending trials in person. If person who is not a court participant wishes to view a trial, they may make an email request to the trial Judge's Associate to access the virtual courtroom.

The Committee reported on the prohibition of in-person attendance of members of the public in the previous iteration of the Practice Note, in its Digest No. 37/57. Consistent with the Committee's previous comments, the prohibitions may create a barrier to the principles of open justice. That is, that the administration of justice takes place in open court subjected to public and professional scrutiny.

However, the Committee acknowledges that these measures are implemented in response to the risks arising from the COVID-19 pandemic and intended to protect the health and safety of court participants. It further notes that members of the public and the media can request to attend by alternative virtual means, which provides a degree of scrutiny by the community on criminal trials in the District Court. In the circumstances, the Committee makes no further comment.

Procedural fairness

The Practice Note provides that any court participant who declines to provide their vaccination status or does not consent to rapid antigen screening (RAS) will not be allowed to attend in-person. Where that person is participating as a witness or defence expert, it provides for that evidence to be given by audio visual link (AVL). Where that person is a solicitor, counsel or the accused, the Court may vacate and relist the trial or make a direction to enable the accused person to appear by AVL.

The Committee reported on these provisions in the previous iteration of the Practice Note, in its Digest No. 37/57. Consistent with the Committee's previous comments, the appearance of the accused person or giving of evidence from witnesses by AVL may limit the ability of the Court to closely monitor the conduct of witnesses while they are giving evidence, including ensuring the witness is not referring to materials, recording their evidence or otherwise being assisted by another person in the room. It may also affect the consistency in the quality of evidence given

by any particular witness appearing by AVL. This may impact the accused person's rights to a fair trial, particularly their right to procedural fairness.

However, the Committee notes that the use of AVL in criminal trials has practical benefits and may enhance the ability of witnesses to participate in criminal trials. It also acknowledges that these measures are in response to the risks arising from COVID-19 and intended to protect the health and safety of court participants and staff. In the circumstances, the Committee makes no further comment.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Period of application and review date

The Practice Note does not include a specific end date or a fixed date for review. It provides that it will continue to be reviewed as may be necessary.

The Committee reported on similar provisions in the previous iteration of the Practice Note, in its Digest No. 37/57. Consistent with the Committee's previous comments, the Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential impact of the Practice Note on an accused person's right to procedural fairness, jury participation and open justice, the Practice Note may also benefit from the inclusion of an end date. The Committee also notes that repeal or expiry dates have been included in legislation responding to COVID-19. For these reasons, the Committee refers this issue to the Parliament for its consideration.

7. ELECTORAL AMENDMENT (COVID-19) REGULATION 2021

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII clause

The Regulation inserts a Henry VIII clause into the *Electoral Regulations 2018*, allowing subordinate legislation to amend the principal Act. Specifically, by extending the timeframes for preliminary scrutiny of postal ballot papers for by-elections held from 17 December 2021 to 17 June 2022. This clause intends to respond to the COVID-19 pandemic.

The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation, to foster an appropriate level of parliamentary oversight. However, in this case the delegation of Parliament's legislative powers is envisaged in the principal Act. The general regulation-making power in the *Electoral Act 2017* allows the regulations to extend applicable time limits if the time allowed to do an act is insufficient and the extension of time is necessary. Additionally, the Committee notes that the clause applies for a limited duration of six months, intends to respond to the extraordinary circumstances of the pandemic, which may increase the volume of postal votes and necessitate a longer scrutiny period, and that the statutory timeframes do not appear to be excessively extended. In the circumstances, the Committee makes no further comment.

8. ELECTORAL AMENDMENT (COVID-19) REGULATION 2022

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII clauses and significant matters not subject to Parliamentary scrutiny

The Regulation inserts Schedule 2 into the *Electoral Regulation 2018* which enables the Electoral Commissioner to declare electors of a certain electoral district as COVID-19 affected electors for

a by-election conducted before 30 June 2022, where the Commissioner believes it necessary to comply with a public health order or to reduce the risk of COVID-19. That declaration entitles all COVID-19 affected electors to vote by post in the by-election.

This amendment is made by way of a Henry VIII clause set out in section 274 of the parent Act. The Committee reported on the amendments to the *Electoral Act 2017*, which introduced section 274, in its Digest No. 38/57. Consistent with the Committee's previous comments, this amendment allows the Executive to legislate and amend the operation of an Act by way of regulation without reference to the Parliament.

The Committee generally prefers amendments to the operation of an Act to be made by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes as, unlike primary legislation, subordinate legislation is not required to be passed by Parliament.

However, the Committee acknowledges that in the extraordinary circumstances created by the COVID-19 pandemic, the declaration-making power of the Commissioner may facilitate the safe and flexible conduct of parliamentary by-elections in a timely and responsive manner during the public health emergency. It further notes that regulations must be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment in respect to the exercise of the regulation-making power under section 274 of the Act.

Clauses 2(1) and (2) requires that such a declaration made by the Commissioner must be published on the Electoral Commission's website and may be published in any other ways the Commissioner considers necessary to bring it to the attention of relevantly declared COVID-19 affected electors. As the declarations dealt with by the website have bearing on the entitlements of electors legally required to cast votes in parliamentary by-elections, the Committee would prefer that they were dealt with by subordinate legislation. This would foster an appropriate level of parliamentary oversight as, under the *Interpretation Act 1987*, statutory rules must be tabled in Parliament and are subject to disallowance. There appears to be no such requirement for the website in question.

The Committee acknowledges that the provisions enable the flexible exercise of the Commissioner's declaration-making powers and provides for publications in discretionary manners intended to bring the declaration to relevantly affected persons. However, it notes that these declarations impact the entitlements of certain electors in the exercise of their democratic voting rights, and further notes that failure to effectively exercise that right may subject individuals to monetary penalties per section 245 of the *Commonwealth Electoral Act 1918* (Cth). For these reasons, the Committee refers this matter to Parliament for its consideration.

9. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES—AIR TRANSPORTATION QUARANTINE) REGULATION 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offences – right to a fair trial

The *Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021* allows a penalty notice of $5 000 for an individual, or $10 000 for a corporation to be issued to an individual or corporation that contravenes a direction given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*. The Order provides directions in relation to the arrival, transportation, quarantining and testing of inbound arrivals to NSW, including flight crew. The Order also grants the Minister, the Chief Health Officer and the Commissioner of Police powers to make further directions in regards to inbound arrivals.

The Committee has previously commented on other regulations related to managing the COVID-19 pandemic that allow for the issue of penalty notices. Consistent with its previous comments, the Committee notes that penalty notices allow an individual or corporation to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person or corporation's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that in regards to the penalty for an individual, that $5 000 is a significant monetary amount to be imposed by way of penalty notice.

However, the Committee notes that individuals retain the right to elect to have their matter heard and decided by a Court. There are also a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters that should be included in primary legislation

As noted above, the *Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021* allows a penalty notice of $5 000 for an individual, or $10 000 for a corporation to be issued to an individual or corporation that contravenes a direction given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*. The Order provides directions in relation to the arrival, transportation, quarantining and testing of inbound arrivals to NSW, including flight crew. The Order also grants the Minister, the Chief Health Officer and the Commissioner of Police powers to make further directions in regards to inbound arrivals.

Consistent with previous comments in regards to penalty notice offences being included in regulations, the Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

Given the severe circumstances surrounding the COVID-19 pandemic, the Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill. Given the circumstances, the Committee makes no further comment.

10. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION (NO 7) 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offence – right to a fair trial

The Regulation enables penalty notices to be issued for a contravention of a direction of the Minister under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*. Specifically, the Regulation replaces reference of the predecessor public health order in the *Public Health Regulation 2012* with a reference to the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*.

Directions under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021* include, but are not limited to, the requirement to self-isolate after being diagnosed with COVID-19, for close contacts of a person diagnosed with COVID-19 to self-isolate where directed and provide information to specified persons including workplaces, employers and police.

Penalty notices allow an individual to pay a specified monetary amount, and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $5 000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may therefore impact on a person's right to a fair trial, specifically any automatic right to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, the Committee acknowledges that the Regulation does not remove an individual's right to have their matter heard and decided by a Court. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice.

In the circumstances and considering the extraordinary context of COVID-19, including the need to maintain public health by restricting the movement of persons diagnosed with COVID-19 or in contact with those persons, the Committee makes no further comment.

Penalty notice offence – freedom of movement

The Regulation enables penalty notices to be issued for a contravention of a direction of the Minister under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*, which includes directions for persons diagnosed with COVID-19 or close contacts to self-isolate.

The requirement to self-isolate or otherwise be issued with a penalty notice may effectively limit the freedom of movement of persons diagnosed with COVID-19 and close contacts for the duration they are required to isolate. Article 12 of the International Covenant on Civil and Political Rights provides that freedom of movement may be restricted where, provided by law, it is necessary to protect public health and consistent with other rights recognised by the Covenant.

The Committee notes that the right is only limited for persons diagnosed with COVID-19 and close contacts only until the person is medically cleared or otherwise for a specified duration (of 7 days if fully vaccinated or 14 days if not), respectively. The Order also specifies circumstances in which they can leave or allow people to enter their residence or place where they are isolating, including for medical or emergency purposes. In the circumstances and considering the extraordinary context of COVID-19, the Committee makes no further comment.

11. PUBLIC HEALTH AMENDMENT (RAPID ANTIGEN TESTS) REGULATION 2022

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offence – right to a fair trial

The Regulation provides that penalty notices of up to $1 000 can be issued for an offence of failing to comply with a direction of the Minister for Health requiring them to report a positive COVID-19 result detected by a rapid antigen test (failure to give notification offence). The Regulation creates an exception to schedule 4(d) of the Public Health Regulation 2012 to distinguish between penalties under the Public Health (COVID-19 Self-Isolation) Order (No 4) 2021 and that of failing to give notification offences.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $1 000 for an individual are significant monetary amounts to be imposed by way of penalty notice, particularly in the extraordinary circumstances of the COVID-19 pandemic.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may thereby impact on a person's right to a fair trial – that is, to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, as the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices particularly in the extraordinary context of COVID-19 court backlogs, the Committee makes no further comment.

12. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) AMENDMENT (IMPACTED LESSEES) REGULATION 2021

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Property rights and freedom of contract

The *Retail and other Commercial Leases (COVID-19) Amendment (Impacted Lessees) Regulation 2021* imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

The Regulation requires lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the Regulation extends the rights of lessees that were previously deemed impacted lessees to make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. As the Committee noted in digest 27/57, the requirement for lessors to engage in renegotiation of rent in this Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee recognises that the Regulation, like the previous version, only applies to cases involving lessees that were previously deemed to be 'impacted lessees' (i.e. lessees that qualified for certain grants or payments and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking other prescribed actions. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

13. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) REGULATION 2022

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Retrospectivity, property rights and freedom of contract

Like its predecessors, the *Retail and Other Commercial Leases (COVID-10) Regulation 2021* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take into account the economic impacts of COVID-19.

The Regulation continues to require lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. The Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. These changes

also have retrospective effect, in that the 'prescribed period' to which it applies extends back to the 13 July 2021.

The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. However, the Committee recognises that the amending Regulation, like the first Regulation, only applies to cases involving 'impacted lessees', and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes that the prescribed period has again been extended from ending on 13 January 2021 until 13 March 2021. The Committee understands that this is in response to the current COVID-19 pandemic and notes the relatively small extension of time. Given the ongoing economic consequences of the COVID-19 pandemic, and the limited period the Regulation will apply for, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Government regulation of private business contracts – businesses required to incur a loss

As above, the Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against commercial lessees where lessees are unable to meet their obligation due to economic hardship resulting from the COVID-19 pandemic. In doing so, the Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 13 March 2022.

However, the Committee recognises that the amending Regulation is in response to the ongoing public health emergency and resulting economic downturn. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that they may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

14. PUBLIC HEALTH AMENDMENT (COVID-19) REGULATION 2022

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offences – right to a fair trial

The Regulation expands the length of time that a penalty notice may be issued for offences related to compliance with public health orders. The Regulation serves to make the penalty notices permanent from 26 March 2020, where previously penalty notices could only be issued in relation to the relevant offences from 26 March 2020 to 26 March 2022.

Penalty notices allow a person to pay the amount specified for an offence within a certain time should they not wish to have the matter determined by a court. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person from electing to have the matter proceed to court. However, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court, with its associated inconvenience, stress, and/or the risk of having a larger penalty imposed.

Given this, as well as the size of the penalties that may be issued by penalty notice (up to $1 000 for an individual and $5 000 for a corporation) and that the regulation indefinitely extends the period in which these penalty notice offences can be issued, the Committee refers the matter to Parliament for its consideration.

15. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION 2022

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Penalty notice offences prescribed in regulations

The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to prescribe an offence for non-compliance with a direction under an order made under section 7 of the *Public Health Act 2010* which wholly or partly remakes, replaces or consolidates the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*.

The Committee generally prefers that penalties are set down in primary legislation, rather than subordinate legislation, to foster an appropriate level of parliamentary scrutiny. It further notes that penalty notices allow a person to pay the amount specified for an offence within a certain time should he or she not wish to have the matter determined by a court. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee also notes that the amendments would enable authorised officers to issue penalty notices for offences in relation to future public health orders which are not explicitly defined or set out in relevant primary or subordinate legislation. This may run counter to the rule of law principle that a person is entitled to know the law that applies to them at any given time.

The Committee further notes that, unlike regulations, there is no requirement for public health orders to be tabled in Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. This may allow authorised officers to issue penalty notices for infringements of future public health orders, without that power to issue such notices for those future orders being subject to parliamentary scrutiny.

The Committee notes that these penalty notice offences are intended to deter non-compliance with self-isolation orders, in order to protect public health and safety from the risks arising from the COVID-19 pandemic. It further acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. These amendments also do not impact an individual's right to elect to have their matter heard and decided.

However, the amendments permit authorised officers to issue penalty notices for public health orders which are not set out in primary or subordinate legislation, and which are not subject to parliamentary oversight. Given the potential penalty notices of $5 000 for individuals, the Committee refers this matter to Parliament for its consideration.

16. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) AMENDMENT REGULATION 2022

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Reduced assistance to commercial tenants

The Regulation amends the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* and the *Conveyancing (General) Regulation 2018* to reduce the scope of the assistance provided to the tenants of retail and commercial properties under the Existing Regulation. The reductions include lowering the turnover ceiling for businesses to access the scheme from $50 million to $5 million (clause 4(b), and removing the obligation on landlords to not increase the rent of impacted lessees (clause 8).

The Regulation may therefore result in businesses being subject to significant increases in overhead expenses, including rent, as well as removing other protections for lessees such as mandatory mediation in the event of a breach of lease. The Committee notes that due to the changing nature of the COVID-19 pandemic, businesses may have expected that they could rely on the protections previously provided under the Regulations being ongoing.

However, the Committee notes that the protections provided under the Regulations were in response to the COVID-19 pandemic, and that regulation and legislation to this effect has been winding back as the economy recovers. The Committee also notes that commercial tenants will continue to be governed by the *Retail Leases Act 1994* and that this legislation prior to the COVID-19 pandemic had been considered by the Parliament as sufficient to govern commercial leasing arrangements. Given the circumstances, the Committee makes no further comment.

17. PUBLIC HEALTH AMENDMENT (COVID-19 AIR AND MARITIME ARRIVALS) REGULATION 2022

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offences – right to a fair trial

The *Public Health Amendment (COVID-19 Air and Maritime Arrivals) Regulation 2022* (Regulation) amends the *Public Health Regulation 2012* (Public Health Regulation) to enable penalty notices to be issued for a breach of a direction made under the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 2) 2022* or an order that replaces that order. Penalty notices that can be issued in relation to these offences are $5 000 for an individual, or $10 000 for a corporation.

The Regulation previously provided for penalty notices being issued under the *Public Health (COVID-19) Air and Maritime Arrivals) Order (No 1) 2022.* This Regulation therefore extends the operation of the penalty notice provisions that were previously in place, and additionally provides that any orders replacing the current order will automatically be able to result in the issue of penalty notices under the Public Health Regulation.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and, in some circumstances, may elect to have the matter heard by a court. This may impact a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

Further, the Committee notes that this amendment provides that further orders made will be able to authorise the issuing of penalty notices without requiring amendment to the Public Health Regulation, which means that they would not be subject to disallowance.

The Committee also acknowledges individuals and corporations retain the right to elect to have their matter heard and decided by a Court, and the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee further acknowledges that compliance is aimed at reducing the impact of the COVID-19 pandemic.

However, the Committee notes that the value of the penalty notice that can be issued is significant. Further, because the Regulation allows for new orders to replace the current order and be automatically authorised to issue penalty notices, these penalty notices may be issued indefinitely without requiring amending Regulations to be tabled before the Parliament and therefore subject to disallowance. In the circumstances, the Committee refers the mater to Parliament for its consideration.

Part One – Bills

1. COVID-19 and Other Legislation Amendment (Regulatory Reforms) Bill 2022

Date introduced	15 February 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Member introducing	Ms Felicity Wilson MP
Portfolio	Treasurer Energy

Purpose and description

1.1 The objects of this Bill are to—

(a) implement on a permanent basis particular regulatory measures that were implemented on a temporary basis in response to the COVID-19 pandemic, including measures—

(i) enabling strata owners corporations, strata committees, community land associations, association committees and incorporated associations to meet and vote electronically under the *Associations Incorporation Act 2009*, the *Community Land Management Act 2021* and the *Strata Schemes Management Act 2015*, and

(ii) enabling community land associations and owners corporations to validly execute documents under the *Community Land Management Act 2021* and the *Strata Schemes Management Act 2015* by affixing the corporation's or association's common seal electronically or by using a prescribed alternative to affixing the seal, and

(iii) reducing the waiting period to access long service leave for contract cleaners from 20 weeks to 10 weeks under the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010*, and

(iv) providing greater flexibility for employees and businesses to access long service leave under the *Long Service Leave Act 1955*, and

(v) allowing interviews and questioning to be conducted remotely by audio link or audio visual link under the *Biodiversity Conservation Act 2016*,

Crown Land Management Act 2016, the *Fisheries Management Act 1994*, the *Mining Act 1992*, the *Protection of the Environment Operations Act 1997* and the *Water Management Act 2000*, and

(vi) allowing mental health examinations or observations of a person detained in a mental health facility under the *Mental Health Act 2007* to be conducted by audio visual link, and

(vii) allowing planning panels and the Independent Planning Commission to hold public hearings and meetings online or in person under the *Environmental Planning and Assessment Act 1979*, and

(viii) enabling retirement village operators to obtain consent of residents in different ways, including electronically, under the *Retirement Villages Act 1999*, and

(b) preserve the rights of eligible tenants accrued during the prescribed period under the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* and allow savings and transitional regulations to be made in relation to any future commercial leasing protections implemented in response to the COVID-19 pandemic, and

(c) extend, until 26 March 2023, the *Constitution Act 1902*, Schedule 8, which was enacted in response to the COVID-19 pandemic and enables the regulations to prescribe the ways and forms in which Bills may presented to, and assented to by, the Governor and Executive Council meetings are to be held and to allow for the further extension of that Schedule by regulation for a period of not more than 6 months, and

(d) amend the *Interpretation Act 1987* to clarify that a reference in an Act or statutory rule to the tabling of a document in a House of Parliament includes a reference to taking any action allowed or required under the Standing Rules or Orders of the House for the tabling documents in the House when the House is not sitting.

Background

1.2 The Bill amends a number of Acts and regulations to permanently implement or otherwise extend the operation of legislative provisions enacted in response to the pandemic.

1.3 Ms Felicity Wilson MP, as the Parliamentary Secretary to the Treasurer and for COVID Recovery, introduced the Bill on behalf of the Treasurer, the Hon. Matt Kean MP. In her second reading speech to the Bill, Ms Wilson remarked on the evolving context of the COVID-19 pandemic since emergency measures were introduced two years ago. In particular, Ms Wilson noted that the measures were "necessary and appropriate" to support businesses, jobs and access to critical goods and services:

> We heard from businesses and communities that many of the temporary measures introduced were practical, sensible and helpful, even outside of pandemic circumstances. … Maintaining this increased flexibility will allow businesses to build upon new business models, adapt to changing customer preferences and recover

> faster. The New South Wales Government is committed to building on the insights and lessons learned during the pandemic as we move towards a new normal.

1.4 Towards that end, the Bill amends the *Associations Incorporation Act 2009*, the *Community Land Management Act 2021*, the *Environmental Planning and Assessment Act 1979*, the *Mental Health Act 2007*, the *Retirement Villages Act 1999* and the *Strata Schemes Management Act 2015* to permanently incorporate existing time-limited legislative measures implemented in response to the COVID-19 pandemic into these laws. These measures enable the conduct of meetings and public hearings, voting and ballot-taking, transmission of documents, the storage and affixing of corporate seals, mental health examination and conferencing to occur by electronic means or other alternative means which would not require physical contact. It also repeals provisions in some of these statutes which enable the making of COVID-19 regulations.

1.5 The Bill also omits specific automatic repeal provisions set out in the *Biodiversity Conservation Act 2016*, the *Crown Land Management Act 2016*, the *Fisheries Management Act 1994*, the *Mining Act 1992*, the *Protection of the Environment Operations Act 1997* and the *Water Management Act 2000*. The repeal of these provisions would effectively allow the continued exercise through electronic interviews of environmental investigative powers to require answers.

1.6 Speaking to the rationale for permanently implementing these measures initially enacted to respond to the COVID-19 pandemic, Ms Wilson highlighted that "COVID-19 continues to pose public health risks" even as New South Wales transitions towards living with COVID-19 as an endemic virus, and further clarified that:

> The recent Omicron outbreak has made retaining these measures all the more important as we continue to deal with the challenges of living with the virus. However, without legislative amendments the measures will sunset, commencing in March 2022. This bill will permanently extend a number of temporary measures that have proven to be both popular and effective and, after consultation and evaluation, have demonstrated real and ongoing benefits for businesses and communities.

1.7 Ms Wilson further highlighted the economic benefits of these reforms, stating that they are in line with the recommendation in the NSW Productivity Commission's white paper on retaining certain COVID-19 legislative changes and that it is expected to deliver:

> … net economic benefits of $2.4 billion over the next decade through greater flexibility and time savings, that $500 million of these net benefits will come from removing barriers to digital processes in areas such as electronic meetings for strata schemes and regulatory interviews.

1.8 The Bill also amends the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* and the *Long Service Leave Act 1955* to permanently implement provisions introduced as a temporary response to the pandemic, which reduced waiting and notice periods for, and amended the manner in which employees and contract cleaners can utilise their accrued long service leave. During her second reading speech, Ms Wilson noted that these changes to the state's long service leave scheme are expected to deliver $1.9 billion of net benefits "for both employees and employers".

1.9 In addition to permanent implementation, the Bill extends the operation of COVID-19 responsive provisions under Schedule 8 of the *Constitution Act 1902* by one year. It amends the *Interpretation Act 1987* to clarify that tabling documents in Parliament includes tabling that occurs while Parliament is not sitting.

1.10 Finally, the Bill amends the *Retail Leases Act 1994* to preserve the operation of certain retail leases obtained under temporary provisions enacted in response to the COVID-19 pandemic.

1.11 The Committee notes that the Bill seeks to permanently implement many provisions of the *COVID-19 Recovery Bill 2021* which received assent on 25 March 2021 and was reported on by this Committee in Digest No. 28/57 (28 March 2021). This report draws upon the analysis of the *COVID-19 Recovery Bill 2021* bill report.[1]

Issues considered by the Committee

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Procedural fairness – mental health examination by AVL

1.12 Chapter 3 of the *Mental Health Act 2007* sets out the legislative regime for the involuntary admission and treatment of persons in and outside of mental health facilities. Under this regime, a person involuntarily detained in a mental health facility may be subject to ongoing detention if medical examinations, conducted in accordance with section 27, determine that person to be a "mentally ill" or "mentally disordered person".

1.13 Where it is not reasonably practicable for the authorised medical officer of that facility or other medical practitioner to personally examine the person, section 27A permits that examination to be conducted by:

(a) a medical practitioner using audio visual link ('**AVL**'); or

(b) an accredited person authorised by the facility's medical superintendent.

1.14 However, certain safeguards are provided under section 274A. Specifically, section 274(3) provides that a medical practitioner must not carrying out an AVL examination unless they are satisfied it can be carried out by AVL with sufficient skill and care so as to form the required opinion about the detainee. Section 27A(4) also requires that a medical practitioner who is not a psychiatrist or an accredited person undertaking this examination must seek the advice of a psychiatrist before making a determination if it is reasonably practicable to do so.

1.15 As noted by Ms Wilson during her second reading speech, accredited persons under the pre-existing regime must undertake the medical examination in person and not via AVL.[2] Section 136 sets out that accredited persons are those persons appointed by the Secretary for the purposes of the Act. There are no legislative eligibility

[1] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 28/57*, 28 March 2021.

[2] New South Wales Institute of Psychiatry, Mental Health Act 2007 - Accredited Person, 7 April 2017, accessed 16 February 2022.

requirements for accredited persons, including no requirement for formal psychiatric or psychological medical training.

1.16 The Bill proposes to extend section 27A of the *Mental Health Act 2007* by explicitly providing that, in circumstances where the medical examination is to be conducted by an accredited person, the examination may be done either in person or via AVL. It also extends the safeguard under subsection (3) to accredited persons carrying out an examination by AVL. This amendment would effectively incorporate the time-limited provisions set out in section 203 of the *Mental Health Act 2007*, which the Bill repeals.

1.17 In speaking to this expanded alternative, Ms Wilson explained that, since enabling accredited persons to conduct such examinations during the COVID-19 pandemic:

> …it has become evident that there are benefits for the person, and the system, in facilitating additional alternatives to assess a person, where such an examination can be carried out with sufficient skill and care so as to form the required opinion about the person.
>
> The benefits of the measure are twofold: Most importantly, it reduces the wait time for an assessment. If the person is at a facility where they risk waiting a long time for their assessment due to staffing, they could be seen more quickly if assessed via audiovisual link. This will mean they are either discharged or admitted for inpatient care more quickly. Second, in rural and regional areas, where practitioners with the relevant experience and qualifications are not necessarily available at all times, transportation to another facility that could be hours away could be avoided. Estimated economic net benefits of this measure range between $2 million and $4 million over 10 years.

The Bill amends the *Mental Health Act 2007* to enable accredited persons under the Act to conduct mental health examination of involuntarily admitted persons by audio visual link, the determination of which may subject the person to ongoing detention. This would, in effect, permanently implement existing temporary provisions enacted in response to the COVID-19 pandemic, which were due to automatically repeal on 31 March 2022.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57, and when they were further extended, in its Digest No. 28/57.[3] It notes that the Committee's previous reporting considered the broader context of the COVID-19 pandemic at the time, and that the current context has changed as New South Wales transitions to post-pandemic life.

Consistent with the Committee's previous comments, the conduct of mental health examinations by AVL may impact the extent to which individuals can fully participate in which concern their involuntary detention. It also may impact the accuracy of the examination process if the use of AVL reduces the ability of examiners to assess a person's demeanour, particularly where the examination

[3] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 12/57, 22 April 2020; Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 28/57*, 28 March 2021.

is conducted by an accredited person who may not have any formal medical or psychological health training.

However, the Committee notes that the conduct of mental health examinations by AVL and/or by individuals who are not psychiatrists are subject to certain safeguards, including requirements to seek psychiatric advice where reasonably practicable and to ascertain that the examination can be sufficiently conducted by AVL to ascertain the required opinion. It further acknowledges that the operation of these provisions is intended to reduce waiting times to obtain such an assessment, particularly in rural and regional areas where relevantly qualified medical practitioners are scarcer, and thereby to minimise the period of time during which individuals are involuntarily detained. In these circumstances, the Committee makes no further comment.

Procedural fairness – compulsory interview by AVL

1.18 Section 12.19 of the *Biodiversity Conservation Act 2016*, section 10.23 of the *Crown Land Management Act 2016*, section 256 of the *Fisheries Management Act 1994*, section 248L of the *Mining Act 1992*, section 203 of the *Protection of the Environment Operations Act 1997* and section 338B of the *Water Management Act 2000* each empower authorised officers under those statutes to require a person to answer questions about certain matters relating to possible contraventions of those Acts, if the officer suspects on reasonable grounds that the person has knowledge of those matters. Under these provisions, the officer may authorise the person to answer the questions using an audio or audio visual link of a kind approved by the officer.

1.19 The Bill seeks to repeal provisions under those laws which would automatically repeal the power of officers to authorise those answers be given by AVL on 31 March 2022. Ms Wilson stated that permanent implementation of these measures:

> …are estimated to deliver net economic benefits of $6.5 million over the next 10 years. Both regulators and interviewees stand to gain from the changes, due to travel time and transport costs saved when interviews are conducted online. Depending on the location of the interview, they may also save on other travel expenses like accommodation and meals. These benefits are particularly significant where the interviewee is based in a regional area.

The Bill repeals certain time limiting provisions in various environmental protection legislation. This would permanently enable authorised officers to require mandatory questioning of individuals occur by video link rather than in person in the course of investigating possible contraventions under those Acts. The Committee previously reported on these provisions when they were first introduced, in its Digest No. 28/57.[4]

Consistent with the Committee's previous comments, the permanent implementation of these provisions may impact the extent to which individuals are able to meaningfully participate in the investigation process of contraventions under the relevant Act. This impact a person's right to procedural

[4] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 12/57*, 22 April 2020; Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 28/57*, 28 March 2021.

fairness, particularly where environmental protection legislation provides that individuals are not excused from answering questions that may tend to incriminate them, contravening the common law privilege against self-incrimination.[5]

The Committee acknowledges that the permanent implementation of these measures is intended to continue delivering economic benefits by reducing administrative costs associated with the investigation of environmental offences. However, it notes that the provisions were introduced as an extraordinary measure in response to the COVID-19 public health emergency at the time, and that context has since changed in New South Wales as the State transitions to post-pandemic life. For these reasons, the Committee refers this matter to Parliament for its consideration.

Civic engagement – meaningful participation in planning hearings

1.20 Clause 3 of Schedule 2 to the *Environmental Planning and Assessment Act 1979* provides that the Independent Planning Commission must conduct a public hearing into environmental and planning matters if requested or required by the Minister. That clause also sets out the process for the conduct and advertisement of such a hearing. Under clause 4, the chairperson of the Commission may also require individuals to give evidence either by attending the public hearing or producing relevant documents at a time and place specified in writing. Failure to comply with this requirement to give evidence without reasonable excuse is an offence that carries a maximum penalty of $11 000.

1.21 The Bill amends clause 3 to empower the Commission to hold a public hearing wholly or partially by audio link, AVL or other electronic means. Where a hearing is to be conducted wholly/partially by electronic means, it further clarifies that the Commission satisfies its requirements to conduct a public hearing if a member of the public can hear or view the hearing at the time.

1.22 During her second reading speech, Ms Wilson stated that this new flexibility for planning bodies would also ensure that these bodies:

> … can continue to carry out their functions safely as we move forward into the next phase of the pandemic. Retaining this measure is estimated to lead to benefits of $2 million over the next 10 years, largely due to attendees saving travel time and transport costs when they attend planning body meetings online. Where meetings are held completely online, there will also be venue hire savings for the government agency.

The Bill amends the *Environmental Planning and Assessment Act 1979* to enable the Independent Planning Commission to electronically conduct public hearings it is required to hold under the Act on environmental and planning matters. This may impact the ability of individuals to meaningfully participate and be heard on matters of public concern which might affect their local environment by reason of the person's technological proficiency. Therefore, these provisions may limit a

[5] *Biodiversity Conservation Act 2016* s 12.23(2); *Crown Land Management Act 2016* s 10.35(2); *Fisheries Management Act 1994* s 258B(2); *Mining Act 1992* s 248T(2); *Protection of the Environment Operations Act 1997* s 212(2); *Water Management Act 2000* s 340B(2).

person's civic engagement in local public decision-making. This is of particular concern in circumstances where a person may be liable for an offence of failing to attend an electronic hearing.

The Committee acknowledges that the provisions are intended to provide flexibility to planning bodies and provide administrative costs-saving in the conduct of such public hearings. It further notes that the provisions allow for individuals to make written submissions on matters relevant to the public hearing. However, the provisions do not require a public hearing conducted electronically be widely accessible, so long as a member of the public can view or hear it at the time, which may disadvantage individuals without internet access or technological proficiency. Given the potential penalties for failing to attend if required and possible technological disadvantages, the Committee refers this matter to Parliament for its consideration.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 8A(1)(b)(v) of the LRA

Henry VIII clauses

1.23 The Bill proposes to insert sub-section (1A) into section 88 of the *Retail Leases Act 1994*. Sub-section (1A) provides that the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* continues to apply to matters relating to an "impacted lease" within the meaning of that regulation, even after the repeal of the regulation.

1.24 Additionally, the Bill also proposes to insert section 89 into the *Retail Leases Act 1994*. Proposed section 89 sets out a power to make savings or transitional provisions in regulations which are consequent on the enactment or repeal of provisions in the Act that are in response to the COVID-19 pandemic. Specifically, section 89(3) explicitly provides that such COVID-19 savings or transitional provisions in the regulations have effect despite anything contrary in the statute.

1.25 Ms Wilson clarified that the provisions are intended to preserve:

> … the protections for eligible tenants acquired during the prescribed period of the Retail and Other Commercial Leases (COVID-19) Regulation 2022 beyond its repeal. The commercial leases regulation is a temporary measure that has provided protections to eligible tenants who have been financially impacted during COVID-19. This amendment will ensure that landlords cannot take action against eligible tenants for circumstances arising during the prescribed period unless they comply with their obligations under the commercial leases regulation, including their obligation to renegotiate rent and attend mediation.

The Bill inserts section 89 into the *Retail Leases Act 1994* to provide that savings or transitional provisions in the regulations consequent on the making or repeal of COVID-19 legislative provisions will have effect despite anything contrary in the Act. The Committee notes that these provisions allow for regulations to alter the operation of provisions contained in their parent Act by overriding contrary statutory provisions.

The Bill also inserts sub-section 88(1A) to extend the operation of the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* beyond its repeal. In its Digest No. 28/57, the Committee commented on the *COVID-19 Recovery Bill 2021*

which introduced provisions similarly extending the application of the *Retail and Other Commercial Leases (COVID-19 Regulation (No 3) 2020* beyond its repeal.[6] Consistent with those comments, the Committee notes that these provisions also allows for regulations to alter the effect of provisions contained in the parent Act.

The Committee notes that these provisions amount to Henry VIII clauses, allowing the Executive to legislate and amend any Act by way of regulation without reference to the Parliament. In ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers.

However, the Committee acknowledges that the provisions are intended to preserve the protections enacted in the extraordinary circumstances created by the COVID-19 pandemic. It notes that the provisions provide consistency to retail tenants in respect to lease matters arising during the COVID-19 pandemic. In the circumstances, the Committee makes no further comment.

Commencement by proclamation

1.26 Clause 2(3) of the Bill provides that certain provisions amending the *Community Land Management Act 2021*, the *Long Service Leave Act 1955*, the *Mental Health Act 2007* and the *Strata Schemes Management Act 2015* commence on a day or days to be appointed by proclamation.

Parts of the Bill commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments to the State's legislative regimes in respect to the management of community land and strata schemes, accessing long service leave and mental health examinations for possible detainees. In the circumstances, the Committee makes no further comment.

[6] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 28/57*, 28 March 2021.

2. Health Legislation (Miscellaneous) Amendment Bill 2022

Date introduced	23 February 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

2.1 The objects of this Bill are as follows—

(a) to amend the *Health Practitioner Regulation (Adoption of National Law) Act 2009*, which adopts, with modifications, the Health Practitioner Regulation National Law as set out in the Schedule (the *Queensland Schedule*) to the *Health Practitioner Regulation National Law Act 2009* of Queensland as a law of New South Wales, to ensure better parliamentary oversight by providing that future amendments to the Queensland Schedule do not take effect as law in New South Wales unless a regulation is made in New South Wales adopting, with or without modification, the amendments,

(b) to amend the *Health Services Act 1997* to update the definitions of Council of Australian Governments ***(COAG)*** and ***Standing Council on Health*** to reflect the current composition of those entities,

(c) to amend the *Mental Health Act 2007* to—

(i) extend, until 30 June 2022, a COVID-19 related provision that enables certain examinations and observations to be conducted using an audio visual link, and

(ii) update the written statements of rights given to persons detained in, and voluntary patients of, mental health facilities to list LawAccess NSW as a service through which a person may seek help or advice instead of Legal Aid's Mental Health Advocacy Service,

(d) to amend the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* to update the certificate that a medical practitioner is required to complete when issuing an order to transfer a person imprisoned in, or a forensic patient detained in, a correctional centre or detention centre to a mental health facility, to include the place where the examination took place, and the name of the correctional centre or detention centre where the person is detained if that place is not the same as where the examination took place,

(e) to amend the *Private Health Facilities Act 2007* to extend the following COVID-19 related provisions until 30 June 2022—

(i) section 12A, which allows the Secretary of the Ministry of Health to impose conditions on a private health facility licence to protect the health and safety of the public, manage resources or ensure the provision of balanced and coordinated health services throughout the State,

(ii) section 70, which allows the Secretary of the Ministry of Health to exempt a licensee or a class of licensees from a condition of a licence or a requirement relating to the medical advisory committee for a facility operated by the licensee,

(f) to amend the *Public Health Act 2010* to—

(i) clarify that an authorised medical practitioner may only require a person who is the subject of a public health order to undergo a medical examination or test that relates to the condition for which the order was made, and

(ii) require that an authorised medical practitioner making a public health order give a person subject to the order information about the duration of the order, the person's rights of review and any other information prescribed by the regulations. It also provides that failure to give the information does not invalidate the order, and

(iii) clarify that a person takes reasonable precautions against spreading a sexually transmissible notifiable disease or scheduled medical condition if the person acts in accordance with any information, if provided, relating to the means of minimising the risk of infecting other people prescribed in the regulations that must be given by a medical practitioner to the person in relation to the disease or condition, and

(iv) extend the following COVID-19 emergency measures provisions until 30 September 2022—

(A) section 112(2), which enables a police officer to direct a person suspected of contravening a provision of the *Public Health Act 2010* or the regulations made under it to provide the person's name and residential address,

(B) section 118(6) and (7), which enable police officers to issue penalty notices under the *Public Health Act 2010* in addition to other authorised officers, and enable the Minister to impose conditions of the exercise of those powers by authorised officers, including police officers, under that Act,

(v) to amend the *Subordinate Legislation Act 1989* to postpone the repeal of the *Poisons and Therapeutic Goods Regulation 2008* to 1 September 2024.

Background

2.2 The Hon. Brad Hazzard MP, Minister for Health, stated in his second reading speech to the Bill that it "makes a range of amendments across the Health portfolio to ensure that legislation remains current and fit for purpose". These amendments seek to update New South Wales' approach to the National Registration and Accreditation Scheme ('**NRAS**'), manage existing COVID-19 legislative provisions and update other miscellaneous provisions in health legislation.

2.3 Relevantly, the Bill amends the following Acts:

(a) *Health Practitioner Regulation (Adoption of National Law) Act 2009*;

(b) *Health Services Act 1997*;

(c) *Mental Health Act 2007*;

(d) *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*;

(e) *Private Health Facilities Act 2007*;

(f) *Public Health Act 2010*; and

(g) *Subordinate Legislation Act 1989*.

2.4 In respect to the *Health Practitioner Regulation (Adoption of National Law) Act 2009* (the '**Adoption of National Law Act**'), the Act sets out the legislative framework for the operation of the NRAS in New South Wales. The Act also provides for the adoption of the Health Practitioner Regulation National Law, set out in the Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld) (the '**Queensland Law**'), in New South Wales.

2.5 The Minister further highlighted the importance of the NRAS as the national scheme for the registration and accreditation of health practitioners working across jurisdictions. The Bill amends the Adoption of National Law Act to explicitly require amendments to the Queensland Law be adopted by regulations, with or without modification, in order to take effect in New South Wales.

2.6 Additionally, the Bill seeks to extend the operation of time-limited provisions in the *Private Health Facilities Act 2007*, the *Public Health Act 2010* and the *Mental Health Act 2007* which were introduced in response to the COVID-19 pandemic. The Minister emphasised in his speech that, while New South Wales has achieved high rates of vaccinations against COVID-19 and appears to have passed the worst of the recent wave from the Omicron variant:

> … there is still a risk of further waves of COVID-19 infection in New South Wales as a result of a combination of the possibility of a new variant of concern, waning immunity, increased social participation and seasonal impacts. This means that some of the COVID-19 provisions will need to remain on the statute book beyond March 2022.

2.7 Finally, the Bill amends various other legislation within the Health portfolio to make miscellaneous updates to legislative references to interstate health regulatory

bodies and legal referral services, mental health medical examination certifies for inmates and extending the operation of the *Poisons and Therapeutic Goods Regulation 2008*. The Bill also proposes a number of miscellaneous amendments to the *Public Health Act 2010* that were previously included in the *Statute Law (Miscellaneous Provisions) Bill 2021*, which was reported on by this Committee in Digest No. 30/57 (11 May 2021).[7]

2.8 The Committee notes that that the Bill seeks to extend provisions introduced by the *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020* which received assent on 25 March 2020 and was reported on by this Committee in its Digest No. 12/57 (22 April 2020).[8] This report draws upon the analysis of those provisions in the *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020* bill report.

Issues considered by the Committee

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Enforcement powers and COVID-19 penalty notice offences

2.9 The Bill amends section 135 of the *Public Health Act 2010*, which provides for the repeal of legislative measures introduced in the Act in response to the COVID-19 pandemic. These amendments clarify the repeal date for the following COVID-19 emergency measures provisions, being:

(a) sections 63(2A) and (2B), 64(7) and 71A, which remain to be repealed on a date no later than 26 March 2022, as prescribed by the regulations; and

(b) sections 112(2) and 118(6) and (7), which are to be repealed on 30 September 2022.

2.10 Section 112 empowers an officer authorised under the Act to direct a person to provide their full name and residential address where they are suspected of contravening or having involvement with the contravention of the Act or the regulations. Relevantly, under section 113, failure to comply with a direction without reasonable excuse is an offence carrying a maximum penalty of a $5 500 fine, as is providing false or misleading information which carries a maximum penalty of 6 months imprisonment and/or a $11 000 fine.

2.11 Section 118 also enables an authorised officer to issue a penalty notice to a person who appears to have committed a penalty notice offence under the Act or the regulations. The offences under the Act or the regulations set out in Schedule 4 of the *Public Health Regulation 2012* are prescribed as penalty notice offences.

2.12 In his second reading speech to the Bill, the Minister noted that the Government "has been progressively scaling back its suite of public health orders and will be continuing to do so as circumstances permit". However, in speaking to the rationale for extending the authorisation of police officers to exercise these powers, he stated that:

[7] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 30/57*, 11 May 2021.

[8] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 12/57*, 22 April 2020.

> There are existing public health orders, and there may be a continuing need for such orders, assuming that the criteria is met under the Act. … While there are public health orders in place, it makes sense to ensure that police officers can assist with the compliance and enforcement of them.

The Bill amends section 135 of the *Public Health Act 2010* to extend the operation of provisions authorising police officers to exercise the powers under sections 112 and 118. These official powers include requiring a person suspected of contravening the Act or regulations to give their full name and address, and the power to issue penalty notices.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57,[9] and when they were initially extended, in its Digest No. 27/57.[10] Consistent with those comments, the extended expansion of 'officers' who can demand identification information to include police officers may impact on a person's right to privacy and privilege against self-incrimination.

In conjunction with the extended authorisation of police officers to issue penalty notices, the extended operation of these enforcement powers enables police officers to issue on-the-spot fines for suspected contraventions of the Act or the regulations. Penalty notices allow an individual to pay a specified monetary amount instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee acknowledges that the Bill seeks to extend provisions intended to facilitate the efficient enforcement of public health measures responding to the extraordinary circumstances created by the COVID-19 pandemic. It also recognises that individuals retain the right to have their matters heard and decided by a court and acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of on-the-spot fines, including deterring contravention of public health measures intended to protect the community from the risks of COVID-19 transmission. Given that the provisions are time-limited to repeal on 30 September 2022, the Committee makes no further comment.

Procedural fairness – mental health examination by AVL

2.13 The Bill amends the *Mental Health Act 2007*, which legislates for the care and treatment of mental health illnesses and disorders in New South Wales. Chapter 3 of the statute sets out the legislative framework for the involuntary admission and treatment of individuals inside and outside of mental health facilities in New South Wales. A person involuntarily admitted in a mental health facility under this regime may be subject to ongoing detention if medical examinations, conducted in accordance with section 27, determine that person to be a "mentally ill" or "mentally disordered person".

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[9] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 12/57*, 22 April 2020.

[10] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 27/57*, 16 March 2021.

2.14 Section 203 of the Act enables that mental health examination to occur by audio visual link ('**AVL**') during the prescribed period, where the relevant qualified examiner is satisfied that conduct of the examination by AVL both:

(a) is necessary because of the COVID-19 pandemic; and

(b) can be carried out with sufficient skill or care using AVL so as to form the required opinion about the patient.

2.15 Relevantly, the Bill amends section 203(5) which defines the prescribed period for the purposes of conducting AVL mental health examinations in accordance with that section. Specifically, it extends the prescribed period so that it ends three months later, on 30 June 2022.

2.16 In speaking to the extension of this repeal date of section 203, the Minister noted that enabling the conduct of mental health examinations by AVL:

> … can assist in reducing the risk of transmitting COVID-19 to others by reducing the requirement to conduct face-to-face examinations where appropriate. It also supports mental health examinations to be carried out while a person is in isolation or quarantine.

2.17 The Minister also addressed, in his second reading speech, that the *COVID-19 and Other Legislation Amendment (Regulatory Reforms) Bill 2022* (the '**Regulatory Reforms Bill**'), a separate bill recently introduced by the Treasurer, seeks to repeal section 203. Clarifying the conflict which may be perceived between both bills, the Minister highlighted that the relevant amendments to the *Mental Health Act 2007* proposed by the Regulatory Reforms Bill "are not tied to audiovisual links being necessary because of the COVID-19 pandemic" and rather intended to enable more flexible use of AVL mental health examinations. He further stated that the amendments proposed by the Regulatory Reforms Bill:

> … will only commence on proclamation, once accompanying guidelines are developed. … Therefore, to ensure there is no gap in the availability of audiovisual link assessments, the Health Legislation (Miscellaneous) Amendment Bill 2022 proposes to extend the repeal date of section 203 of the Act to 30 June 2022.

2.18 The Committee notes that the Regulatory Reforms Bill was reported on by this Committee in Digest No. 39/57 (22 February 2022).[11]

The Bill amends section 203 of the *Mental Health Act 2007* to extend the operation of that provision to 30 June 2022. This would extend the ability of qualified medical practitioners or accredited persons to conduct mental health examinations of involuntarily admitted persons by AVL, where they are satisfied that it is necessary to do so because of the COVID-19 pandemic. Under the Act, the determination of these mental health examinations may subject the patient to ongoing detention in a mental health facility.

[11] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 39/57*, 22 February 2022.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 15/57,[12] and when they were initially extended, in its Digest No. 28/57.[13] Consistent with the Committee's previous comments, the conduct of mental health examinations by AVL may impact the extent to which individuals can fully participate in examinations which concern their involuntary detention. It also may impact the accuracy of the examination process if the use of AVL reduces the ability of examiners to assess a person's demeanour.

However, it acknowledges that the provisions are an extraordinary measure to ensure that mental health examinations can be safely conducted, in light of the risks posed by COVID-19 to patients and staff within mental health facilities and the public. It further notes that the conduct of these examinations by AVL are subject to safeguards, including limiting such examinations only where necessary due to the COVID-19 pandemic and requiring the examiner ascertain the examination can be sufficiently conducted by AVL. Given these safeguards and that the provisions are time limited to 30 June 2022, the Committee makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Henry VIII clauses

2.19 The Bill amends section 4 of the Adoption of National Law Act, which provides that the Queensland Law applies as law in New South Wales, as relevantly modified by Schedule 1 in the Act. Proposed subsection (2) would clarify that amendments to the Queensland Law, which are made in that jurisdiction (a '**Queensland amendment**'), do not apply unless or until a regulation is made under the Adoption of National Law Act which applies the amendment with or without modification.

2.20 The Bill also proposes to insert subsections (3) to (6), which deal with a regulation that so applies a Queensland amendment. Specifically, subsection (3) provides that the regulation made under the Adoption of National Law Act applying a Queensland amendment with modification may amend Schedule 1 to the Adoption of National Law Act for that purpose. Furthermore, subsection (5) provides that the regulation is "repealed on the day after all of its provisions have commenced", however, subsection (6) clarifies that this repeal "does not affect the application of the Queensland amendment, with or without modification, provided for by the regulation".

2.21 Section 39 of the *Interpretation Act 1987* sets out the legislative requirements for the making of statutory rules. Relevantly, subsection (1) requires a statutory rule to be published on the NSW legislation website and explicitly provides that the rule commences on the day on which it is so published, or a later date so specified. Subsection (2A) clarifies that a statutory rule is not invalidated because the whole or part of its provisions are expressed to commence on a date earlier than publication. Rather, it provides that those provisions commence on the publication date instead of the earlier date.

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[12] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 15/57*, 2 June 2020.

[13] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 28/57*, 28 March 2021.

2.22 The Bill proposes to insert section 4(4) into the Adoption of National Law Act, which provides that a regulation applying a Queensland amendment may commence on the day that the amendment commences. This subsection clarifies that this commencement date may be earlier than the publication of the regulation, despite section 39 of the *Interpretation Act 1987*.

2.23 The Minister stated in his second reading speech that this "will change the current approach of automatically adopting any changes to the Queensland law". In speaking to the rationale for these amendments, he further highlighted that this current approach:

> … lacks parliamentary oversight and can impact on the distinct nature of the complaints process in this State. … If changes to the Queensland law impact on how New South Wales handles complaints or amends provisions that New South Wales has already modified, New South Wales currently has to expressly pass legislation to modify the application of Queensland law to this State. … This process can delay the implementation of changes to the national law.

The Bill amends section 4 of the *Health Practitioner Regulation (Adoption of National Law) Act 2009* to provide that amendments made to the Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld) do not apply as law in New South Wales until a regulation is made to apply that amendment, with or without modification. Proposed subsection (3) provides that a regulation providing for the modified application of a Queensland amendment may amend the Schedule to the Act for that purpose. The Committee notes that this provision allows the Executive to amend the Act by way of regulation without reference to the Parliament.

Proposed subsection (2) further provides that a regulation's provisions may commence from the date that the relevant Queensland amendment was passed, even if that date is prior to the date of publication on the NSW legislation website, contrary to section 39 of the *Interpretation Act 1987*. The Committee notes that these provisions allow for regulations to alter the operation of provisions contained in their parent Act by overriding contrary statutory provisions.

The Committee notes that this provision also amounts to a Henry VIII clause, allowing the Executive to legislate and amend the operation of an Act by way of regulation. In ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers. However, these amendments are intended to strengthen parliamentary oversight of the NRAS, by no longer permitting amendments passed in another jurisdiction to automatically apply as law in New South Wales. In the circumstances, the Committee makes no further comment in respect to subsections (2) and (3).

Proposed subsections (5)-(6) provide that such a regulation is repealed on the day after all provisions have commenced, however the substantive operation of those provisions continue to apply despite their repeal. These provisions thereby extend the application of the regulations beyond their repeal.

The Committee notes that these provisions also amount to Henry VIII clauses, allowing regulations to alter the operation of provisions contained in the parent

Act after its repeal. This may make it difficult for affected persons to ascertain what laws apply to them at any given time. Additionally, by legislating for the automatic repeal of these regulations which are to have continued application, these provisions may not be subject to a disallowance motion by a member of Parliament and thereby subvert a level of parliamentary scrutiny. For these reasons, the Committee refers these provisions to Parliament for its consideration.

3. Home Building Amendment (Medical Gas Licensing) Bill 2022

Date introduced	23 March 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Eleni Petinos MP
Portfolio	Fair Trading

Purpose and description

3.1 The object of this Bill is to extend the transitional period in which medical gas related work is exempt from certain licence requirements from 30 April 2022 to 30 September 2022. Carrying out medical gas related work without certain licences would otherwise be an offence outside of this period.

Background

3.2 The Bill amends the *Home Building Act 1989* to extend the transitional arrangements of the medical gas licensing from 1 May 2022 until 30 September 2022.

3.3 In particular, the exemption provides that sections 4, 5, 12, 15A-15C and 16 do not have effect during the transitional period in relation to specialist work that is medical gas-fitting work, mechanical services and medical gas work or medical technician work. The transitional period began on 1 November 2020 and is currently set to end on 30 April 2022.

3.4 In the second reading speech to the Bill, the Minister for Fair Trading stated that the amendment was intended to prevent critical shortages of eligible personnel being able to undertake certain medical gas work:

> Despite the significant number of medical facilities, as of 18 March 2022, there are only 143 people licensed to do medical gas work across the State. The bill does not stray from the robust and effective regulatory system introduced by the Gas Legislation Amendment (Medical Gas Systems) Act 2020 but is intended to give industry and government practitioners more time to secure a licence to do certain work.

3.5 The Minister also highlighted that the reason for this shortage was due to the updated licensing qualifications requiring key face to face components that have been unable to be delivered due to COVID-19 restrictions in the last year:

> Training in this space has been impacted by COVID-19, with units of competency delivered face to face, and the lockdowns that have impacted many parts of the community over the past year have also impacted the medical gas licensing scheme. Licensed practitioners will complete the mandatory additional units of competency prescribed in the Home Building Act. The New South Wales Government is and

> remains committed to continual action to ensure safe and compliant medical gases are supplied. While the bill proposes to extend the transitional arrangements for licensing, the amendments do not change the requirement that all medical gas work must comply with the relevant Australian standards and provide a safe and reliable product to the people of New South Wales. This requirement will continue to be subject to oversight by NSW Health and NSW Fair Trading.

3.6 The Minister noted that the amendments were to ensure the introduction of the new licensing requirement does not impact service delivery in the NSW Health system, such as the closure of operating theatres and particularly in rural areas.

3.7 The Committee previously commented on a similar regulation regarding the *Gas and Electricity (Consumer Safety) Amendment (Medical Gas) Regulation 2021*, in Digest 36/57 on 9 November 2021.[14] In that report, the Committee noted that the regulation permitted unqualified persons to perform medical gas and technician work, which may impact public safety.

3.8 Though this Bill proposes to make a similar amendment, it is understood that this amendment is intended to allow the service delivery of medical gas technicians while also allowing time for these professionals to update their qualifications that have been delayed by COVID-19 restrictions. It is also noted that these transitional arrangements are extended for a period of 4 months and have been done in consultation with the Ministry of Health and NSW Fair Trading. For these reasons, the Committee makes no further comment on this Bill.

Issues considered by the Committee

The Committee makes no comment on the Bill in respect of the issues set out in section 8A of the *Legislation Review Act 1987*.

[14] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 36/57*, 9 November 2021.

4. State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022

Date introduced	22 March 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

Purpose and description

4.1 The objects of this Bill are—

(a) to make miscellaneous amendments to legislation relating to State revenue and fines, and

(b) to amend the *Liquor Act 2007* to extend the provision that allows local councils to encourage the use of outdoor space for dining and performance.

Background

4.2 The *State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022* (Bill) seeks to amend the following legislation and statutory instruments:

(a) Crimes (Administration of Sentences) Act 1999,

(b) Crimes (Administration of Sentences) Regulation 2014,

(c) Crimes (Sentencing Procedure) Act 1999,

(d) *Duties Act 1997,*

(e) *Fines Act 1996,*

(f) *Fines Regulation 2020,*

(g) *First Home Owner Grant (New Homes) Act 2000,*

(h) *Land Tax Act 1956,*

(i) *Liquor Act 2007,*

(j) *State Debt Recovery Act 2018,* and

(k) *Taxation Administration Act 1996*.

4.3 The reforms contained in the Bill fall into three categories:

(a) amendments to taxation and grant legislation with the aim of improving the integrity of the revenue system in NSW, address anomalies, respond to decisions of the court and close loopholes that allow for tax avoidance, and ensure that exemptions and concessions are equitable;

(b) amendments to state debt legislation to give Revenue NSW additional powers to deliver end-to-end payment collection and debt recovery for state agencies; and

(c) amendments to fines legislation to strengthen enforcement provisions and remove the capacity for imprisonment to be imposed for unpaid fines.

4.4 The Bill also contains amendments to the *Liquor Act 2007* that provide local councils with powers to extend the power of local councils to rapidly approve the use of roads and certain other public spaces for outdoor dining, foyer and performance spaces.

Issues considered by the Committee

Trespasses unduly on personal rights and liberties (s 8A(1)(b)(i))

Retrospective approval for actions of a local council

4.5 The Bill proposes inserting a new part to Schedule 1 of the *Liquor Act 2007* that provides that anything done by a local council during the relevant period that would had been validly done had the Bill commenced before it was done, is taken to have been validly done under the Liquor Act. The Bill grants local councils powers to temporarily allow the use of public infrastructure, including roads and footpaths, for outdoor dining, recreation and performances to stimulate outdoor events in accordance with public health advice.

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to him or her at any given time. In this case, the actions of a local council may retrospectively be deemed to be validly done, where otherwise those actions may not have been valid under the *Liquor Act 2007* when they were actually done.

The Committee does however note that the proposed retrospective changes are intended to provide local councils with the power to continue to provide approvals for outdoor public spaces to be used for events in a safe way to provide support for businesses recovering from the COVID-19 pandemic, and that the changes allowed to be made under the Act are temporary. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

Privacy

4.6 The Bill amends sections 117, 117AA and 117AB of the *Fines Act 1996* to provide that the Commissioner of Fines Administration may access certain information for the purpose of enabling the Commissioner to exercise any of the Commissioner's functions under the *Fines Act 1996*, rather than only to exercise specified functions.

4.7 Amended section 117 also requires police and other government agencies to provide the Commissioner of Fines Administration, on request, available information about a fine defaulter's email address and phone number. Schedule 2[22] authorises a credit reporting body to disclose to the Commissioner of Fines Administration the contact details of the current or last known employer of a fine defaulter.

4.8 The Bill also inserts section 117AC, which enables the Commissioner of Fines Administration to obtain from an authorised deposit-taking institution the balance of a fine defaulter's bank account for the purpose of deciding whether to make a garnishee order against the fine defaulter.

4.9 The Bill makes similar amendments section 105-107 of the *State Debt Recovery Act 2018,* which provide that the Chief Commissioner of State Revenue may access certain information for the purpose of enabling the Chief Commissioner to exercise any of the Chief Commissioner's functions under the State Debt Recovery Act 2018, rather than only to exercise specified functions. The Also amends subsection 107(2) to clarify that 'relevant information' that a credit reporting body is authorised to disclose to the Chief Commissioner of State Revenue includes the contact details of the current or last known employer of a debtor.

The Bill makes amendments to the *Fines Act 1996* and the *State Debt Recovery Act 2018* to permit the Commissioner of Fines Administration and the Chief Commissioner of State Revenue to have access to certain information for the purpose of exercising their functions under their respective Acts, rather than only to exercise specified functions. These records may include personal contact information, such as an email address and phone number, and the contact details of their current or last known employer. This may infringe on the privacy of those individuals subject to these provisions.

However, the Committee acknowledges that the provisions are intended to assist the Commissioners in exercising their functions under the Act for the purpose of deciding whether to make garnishee orders against the fine defaulter (under the Fines Act) or for the purposes of taking debt recovery action against the debtor (under the State Debt Recovery Act). The Committee also notes that the personal information that would be provided includes details already held by police or other government agencies, which are subject to certain privacy safeguards regarding the storage, use and disclosure of such information. In these circumstances, the Committee makes no further comment.

Right to fair trial – penalty notice offences

4.10 The Bill inserts section 119A to the *Fines Act 1996* , which enables employees of, and other persons engaged or authorised by, Revenue NSW to issue penalty notices for alleged offences under the *Fines Act 1996*.

4.11 Schedule 3 of the Bill amends the corresponding *Fines Regulation 2020* and inserts clause 7A, which enables a penalty notice to be issued to a person who does not, within the period specified in a verification notice, supply a statutory declaration verifying the person responsible for a vehicle or vessel offence. The amount payable under the penalty notice is equivalent to the amount prescribed in relation to an equivalent offence under the *Road Transport Act 2013*, section 189(4).

The Bill permits the creation of penalty notice offences under the *Fines Act 1996* and the corresponding *Fines Regulation 2020*. Penalty notices allow an individual to pay a specified monetary amount instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that an individual (including a relevant person) retains the right to elect to have their matter heard and decided by a court. It also acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. In these circumstances, the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA

Discretionary powers of the Chief Commissioner

4.12 The Chief Commissioner has broad powers under the *Duties Act 1997* to seek payment for and make determinations relevant to a number of duties. The Bill proposes to extend the Chief Commissioner's powers to give approvals or exemptions in certain circumstances. These amendments seek to:

(a) insert section 8(2A) to allow the Chief Commissioner to decide on the basis of their opinion, if an excluded transition that results in a change of beneficial ownership of dutiable property, was made with the collateral purpose of reducing the duty otherwise chargeable under the Act, and

(b) insert section 76(2A) to allow the Chief Commissioner to give an approval or exemption to the residence requirement for the First Home Buyers Assistance Scheme.

4.13 These discretions of the Chief Commissioner may impact the liability of individuals who will or will not be subject of a duty depending on the outcome of that decision.

The Chief Commissioner has broad powers under the *Duties Act 1997* to seek payment for and make discretionary determinations relevant to a number of duties. The Bill seeks to amend the Duties Act to provide the Chief Commissioner with two additional discretionary powers:

1. **allow the Chief Commissioner to decide on the basis of their opinion, if an excluded transition that results in a change of beneficial ownership of dutiable property, was made with the collateral purpose of reducing the duty otherwise chargeable under the Duties Act (section 8(2A); and**

2. **allow the Chief Commissioner to give an approval or exemption to the residence requirement for the First Home Buyers Assistance Scheme (section 76(2A).**

These discretions may have an impact on individuals, who will or will not be subject to pay duties depending on the decision of the Chief Commissioner. The new discretions also do not provide detail as to the factors the Chief

Commissioner must consider in exercising their discretion, and therefore the Bill may grant an ill-defined administrative power.

The Committee however acknowledges that the Chief Commissioner has the authority under the Duties Act to make a number of discretionary decisions, and that discretion may be necessary to impose the duties outlined in the Duties Act. The Committee also notes that most decisions of the Chief Commissioner can be reviewed by the NSW Civil and Administrative Tribunal and therefore the discretion of the Chief Commissioner is not entirely unfettered. Given the circumstances, the Committee makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Matters deferred to the regulations – creation of offences and penalties

4.14 The Bill proposes inserting a new section 119A into the *Fines Act 1996*, which would allow penalty notice offences to be prescribed by the regulations, and also allow for regulations to determine the prescribed amount for penalties.

The Bill seeks to insert a new section 119A into the *Fines Act 1996*, allowing for the regulations to prescribe both penalty notice offences, and determine the prescribed amount payable for penalties.

The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulation. However, the Committee notes that the Bill permits the regulations to create offences that carry a maximum penalty of the amount prescribed in the regulations, and this amount is set by Section 128(2) of the Fines Act which states that the regulations may create offences punishable by a penalty not exceeding 50 units ($5 500).

The Committee prefers that offences be legislated by Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee however does note that the maximum amount of a fine does not exceed $5 500, and that the imposition of fines under the Fines Act is subject to internal and judicial review. In the circumstances the Committee makes no further comment.

5. Security Industry Amendment Bill 2022

Date introduced	21 September 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Toole MP
Portfolio	Police

Purpose and description

5.1 The objects of this Bill are to:

(a) Make miscellaneous amendments to:

(i) The *Security Industry Act 1997;* and

(ii) The *Security Industry Regulation 2016,* and

(b) To insert new offences into the *Tattoo Parlours Act 2012*

Background

5.2 The *Security Industry Amendment Bill 2022* amends the *Security Industry Act 1997* (the **Security Industry Act**) and the *Security Industry Regulations 2016* (the **Security Industry Regulation**). These legislative instruments set out the regulatory framework for the licensing and regulation of persons in the security industry.

5.3 The Bill also amends the *Tattoo Parlours Act 2012* (the **Tattoo Parlours Act**)*,* which sets out the legislative framework for the licensing and regulation of body art tattooing businesses and body art tattooists.

5.4 The Bill is intended to strengthen the licensing regime for the security industry, modernise the Acts to bring them in line with current security activities, and make clarifications to remove ambiguity.

5.5 Schedule 1 amends the Security Industry Act. In his second reading speech to the Bill, the Hon. Paul Toole MP, Minister for Police, stated that the Bill would make seven significant amendments to the security industry licensing scheme in New South Wales. These amendments have been summarised below:

(a) Clarificatory amendments to streamline processes and make the Security Industry Act future proof and fit for purpose.

(b) Amendments to introduce a tiered penalty system for contraventions of licence conditions.

(c) Amendments to update the definition of "crowd controller" to expand the places at which crowd controller functions are exercised and clarify that

controlling or monitoring the behaviour of persons is only a function of a crowd controller if it is done to maintain order.

(d) Amendments to combine the current class 1A, unarmed guard, and class 1C, crowd control, licences into a new security officer class 1A licence. These amendments will also introduce a new class of licence for the security activity of patrol, protect or guard cash-in-transit.

(e) Amendments to empower the Commissioner to prohibit a person from reapplying for a security licence for two years if the commissioner refuses their initial application on specific grounds.

(f) Amendments that move the offences of obstruction or failing to comply with requirements of enforcement officers into a new Part 3C of the Act, and increase the penalty for the offences.

(g) Amendments that enable the Commissioner to make information publicly available about offences committed under the Act.

5.6 Schedule 2 amends the Security Industry Regulation to specify that the conduct of health screening is not a security activity, to update penalties for various offences, and to exempt a person employed as a medical practitioner at a hospital from the operation of the Security Industry Act.

5.7 Schedule 2 also enables the Commissioner to exempt a person who is not an Australian citizen or a permanent Australian resident from the requirement to hold a class 2A security licence if the Commissioner is satisfied the person has specialised skills or experience not readily available in Australia.

5.8 Schedule 3 amends the Tattoo Parlours Act to introduce the new offences of altering, damaging or destroying records, providing false or misleading information, conspiracy and inducing the commission of certain offences

Issues considered by the Committee

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Strict liability offences – increased penalties

5.9 The Bill increases the maximum monetary penalties for numerous offences, including some strict liability offences, set out in the Security Industry Act and Security Industry Regulations. The Bill also introduces a custodial sentence for some existing offences which did not previously attract a custodial sentence.

5.10 For example, under section 39S of the Security Industry Act, the strict liability offence of obstructing an enforcement officer now attracts a maximum penalty of 500 penalty units, imprisonment for 2 years, or both. Previously it attracted a maximum penalty of 100 penalty units.

5.11 The Bill also introduces a new tiered penalty system for the contravention of licence conditions. The contravention of a Tier 3 penalty by an individual now attracts a maximum penalty of 250 penalty units, imprisonment for 12 months, or both.

Previously, the maximum penalty for an individual's contravention of a licence condition was 100 penalty units, imprisonment for six months, or both.

The Bill amends the Security Industry Act and Security Industry Regulation to vary the penalties for offences, including some strict liability offences. These variations include the introduction of custodial sentences for some offences and the increase in some maximum monetary penalties.

For example, the Bill increases the maximum monetary penalty for the strict liability offence of obstructing a law enforcement officer, from 100 penalty units to 500 penalty units, and attaches a two-year custodial sentence. Previously the maximum penalty for this offence was 100 penalty units.

The Bill also introduces a new tiered penalty system for contraventions of licence conditions. Under the tiered system, an individual who contravenes a Tier 3 condition faces a maximum monetary penalty of 250 penalty units, imprisonment for 12 months, or both. The previous maximum penalty for an individual's contravention of a licence condition was 100 penalty units, imprisonment for six months, or both. Section 30 of the Security Industry Act, does not require the establishment of a mental element to prove that the contravention of a condition has occurred, accordingly, depending on the specific condition, the provision may amount to a strict liability offence.

The Committee acknowledges that in speaking to the Bill, Minister Toole indicated that the increase to penalties under the Act or regulation are necessary because the existing provisions for some offences are no longer sufficient to deter criminal activity. However, given the increased penalties apply to strict liability offences and may include imprisonment, the Committee refers this issue to the Parliament for its consideration.

Privacy – Publication of information

5.12 The Bill inserts new Part 3D to the Security Industry Act, which enables the Commissioner to publish information about certain offences. Under this Part, section 39Y permits the Commissioner to publish information about the revocation of a licence, or an offence committed under the Act or the regulations by a licensee.

5.13 Section 39Z enables the Commissioner to publish the name of a person who committed an offence, information about the offence such as the date and any other information prescribed by the regulation. It would also permit the Commissioner to publish the name of a person whose licence has been revoked, the reason for the revocation, the date when the licence was revoked, and any other information prescribed by the regulations.

5.14 Where an offence is dealt with by way of a penalty notice, information about the penalty notice may not be published unless the amount of the notice exceeded $5 000.

5.15 Section 39ZA provides that the Commissioner must not make the information publicly available unless the proceedings for the offence or the steps to revoke the licence are finalised.

5.16 Where an appeal is made against a decision to revoke a licence after the 28-day period, the Commissioner must remove information made publicly available about the revocation as soon as practicable. The Commissioner may subsequently make the information available if the decision to revoke is upheld or the appeal dismissed.

Part 3D of the Bill enables the Commissioner to publish information about the revocation of a licence, or an offence committed by a licensee under the Act or the regulations.

Under this Part, the Commissioner may publish the name of a person who committed an offence, information about an offence, including the date, and any other information prescribed by the regulation. The Commissioner may also publish the name of a person whose licence has been revoked, the reason for the revocation, the date on which the licence was revoked, and any other information prescribed by the regulations.

The Committee notes that the publication of the names of persons who have committed an offence or have had their licence revoked may interfere with a person's privacy or confidential information. The Committee also notes that the Bill defers certain items to the regulations, such as the power to prescribe additional information that may be published.

The Committee acknowledges that the bill provides a safeguard through the requirement not to make information publicly available unless the proceedings for the offence or the steps to revoke the licence are finalised. However, the Committee also notes that the regulations may prescribe additional circumstances for the publication of information, which would not be subject to the same level of Parliamentary scrutiny as a Bill. In the circumstances, the Committee refers the matter to parliament for consideration.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 8A(1)(b)(v) of the LRA

Commencement by proclamation

5.17 Section 2 of the Bill provides that it is to commence by proclamation.

The Bill is intended to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual right or obligations. However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments. This may be particularly the case where amendments are being made to the licensing schemes across industries and multiple pieces of legislation. In the circumstances, the Committee makes no further comment.

Matters deferred to the regulations

5.18 Schedule 1 of the Bill amends the Security Industry Act to enable the regulations to prescribe what activities do not constitute "security activities", and what places do not constitute "relevant places, for the purposes of the Act.

5.19 The Bill also enables the regulations to prescribe grounds or other requirements for the granting of an exemption by the Commissioner, and the prescription of a fee to be paid to the Commissioner on application for an exemption.

5.20 As discussed earlier, the Bill also enables the regulations to prescribe information about an offence or revocation of licence that may be published by the Commissioner.

The Bill amends the Security Industry Act to enable the regulations to prescribe activities that do not constitute "security activities", and places that do not constitute "relevant places", for the purposes of the Act. This enables the regulations to determine specific situations that will not be subject to key provisions of the Act.

The Bill also enables the regulations to prescribe grounds or other requirements for the granting of an exemption by the Commissioner, and the prescription of a fee to be paid to the Commissioner on application for an exemption. As discussed earlier, the Bill also defers, to the regulations, the power to prescribe additional information that may be published by the Commissioner in relation to an offence or a revocation of licence.

The Committee acknowledges that, in his second reading speech to the Bill, the Hon. Paul Toole MP, stated that the exemption provisions were included to ensure that there is an available pathway for the Commissioner to exempt persons from the need to obtain a security license where it is in the public interest and in unforeseen situations, such as the COVID-19 pandemic.

However, the Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected such as the procedure for applications for an exemption, or the prescribed information that may be published by the Commissioner. In the circumstances, the Committee refers this matter to parliament for consideration.

6. Electoral Legislation Amendment Bill (No 2) 2022

Date introduced	12 October 2022
House introduced	Legislative Assembly
Member with carriage[15]	The Hon. Alister Henskens SC MP
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Premier

Purpose and description

6.1 The object of the Bill is to make further miscellaneous amendments to the *Electoral Act 2017*.

6.2 The Bill also amends the *Government Sector Finance Act 2018* in relation to the New South Wales Electoral Commission.

Background

6.3 The Bill seeks to make further amendments to the *Electoral Act 2017* (the **Act**), in addition to the amendments set out in the *Electoral Legislation Amendment Bill 2022* (the **earlier Bill**). The Committee notes that the earlier Bill was introduced in the Legislative Assembly on 22 June 2022 and passed with amendments on 10 August 2022, and is currently under consideration in the Legislative Council at the time of writing. The earlier Bill was reported on by this Committee in its Digest No. 46/57 (9 August 2022).[16]

6.4 In introducing the Bill, the Hon. Alister Henskens SC MP, Leader of the House, stated that these amendments are intended to 'facilitate the upcoming 2023 State general election and improvements to the administration of the NSW Electoral Commission'. He further stated that:

> Amendments included in the bill have been recommended by the NSW Electoral Commission largely to support the delivery and integrity of the State general election in March of next year.

6.5 The Bill proposes a range of reforms to the Act, including establishing a new electoral offence in respect to automated telephone calls containing 'electoral matter'. It also inserts additional provisions under Schedule 2 to enable the Electoral Commissioner (the **Commissioner**) appoint a staff member of the NSW Electoral

[15] The Bill was introduced by the Hon. Alister Henskens SC MP, Minister and Leader of the House, having carriage of the Bill. However, the primary Act that it amends, the *Electoral Act 2017*, is under the joint administration of the Premier and Attorney General in accordance with the *Allocation of the Administration of Acts*.

[16] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 46/57*, 9 August 2022.

Commission (the **Commission**) to act as the Commissioner, while their office is vacant during an election period, or while they are ill or absent.

6.6 It also replaces Part 4 of Schedule 7 to the Act and inserts Schedule 8, which set out special provisions applicable for the upcoming 2023 State general election and by-elections held before that general election.

6.7 Finally, the Bill also amends section 2.7 of the *Government Sector Finance Act 2018* to clarify that the Commissioner is that accountable authority for the Commission under that Act.

Issues considered by the Committee

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Electoral offence – automated telephone calls

6.8 The Bill inserts section 187A into the Act which establishes a new electoral offence, during the period from the issue of the writ for election until 6 pm on election day.

6.9 Specifically, a person must not 'cause, permit or authorise' an automated telephone call to be made which contains electoral matter, unless it includes the name and address of an individual who instructed the call to be made in clear spoken English. This offence carries a maximum penalty of 20 penalty units ($2 200) and/or 6 months' imprisonment for an individual.

6.10 Speaking to these amendments, the Leader of the House explained in his second reading speech that they are intended to clarify existing authorisation requirements for automated telephone calls, otherwise known as 'robocalls'. He noted that under existing section 186, a person is already required to 'legibly show' the name and address of an individual instructing the creation or printing of electoral material on the material. He further stated that:

> … it is not clear how authorisation details can be "legibly shown" on robocalls. The bill therefore makes amendments to clarify that for automated telephone calls containing electoral matter, the call must contain, in a clear voice, spoken in English, the name and address of an individual on whose instructions the call was made.

The Bill amends the *Electoral Act 2017* to create a new criminal offence for causing, permitting or authorising an automated telephone call to be made which contains electoral matter, unless it includes the name and address of an individual who instructed the call be made in clear spoken English. This offence carries a maximum penalty for an individual of 20 penalty units ($2 200) or 6 months' imprisonment, or both.

It is unclear whether this offence requires a mental element to be proven and may therefore amount to a strict liability offence. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. Additionally, it may restrict an individual's freedom of political communication and, by requiring disclosure of identifying information, privacy of an individual's personal information.

However, the Committee acknowledges that the provisions intend to clarify how existing authorisation requirements for physical electoral materials apply to automated telephone calls. It also notes that the offence does not prohibit the making of automated telephone calls containing electoral matter and is intended to strengthen compliance with authorisation requirements. In the circumstances, the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

Wide discretionary powers of the NSW Electoral Commissioner

6.11 As the Committee previously reported in its Digest No. 46/57,[17] the earlier Bill inserts Part 4 into Schedule 7 of the Act. It sets out special provisions to limit technology-assisted voting available in the 2023 general election and by-elections held before then, to telephone voting for vision impaired or blind voters.

6.12 The Bill replaces Schedule 7, Part 4 of the Act, to set out further special provisions for the 2023 general election and any by-elections held before that election.

6.13 Clause 14 sets out additional circumstances where telephone voting is permitted in these elections. Specifically, subclause (3) allows regulations to authorise the Electoral Commissioner to determine that telephone voting is permitted for COVID-19 affected electors. Subclause (4) allows the Commissioner to determine at any time that telephone voting is not permitted for a specified election or period during an election. A determination by the Commissioner under clause 14 is required to be published on the Electoral Commission's website.

6.14 In his second reading speech, the Leader of the House explained that these provisions provide 'flexibility should it be required closer to the 2023 election'. He also acknowledged that the earlier Bill:

> … which is currently before the Parliament, contains a prohibition on technology assisted voting—except for telephone voting for vision impaired or blind electors—for the 2023 general election and any by-elections held before that date. Other than including some flexibility for telephone voting to be made available for electors isolating due to COVID-19, the bill otherwise retains this prohibition.

6.15 Under Part 4, clause 15 allows the Commissioner to determine that 'modified postal voting' must be conducted for the 2023 general election and/or a by-election held before the general election. Subclause (2) sets out the deadline for the making of this determination, and requires the determination be published on the Electoral Commission's website.

6.16 Relevantly, the Bill also inserts Schedule 8 into the Act which sets out amendments to the postal voting provisions under Part 7, Division 10. These amendments only operate for an election over which a determination by the Commissioner under clause 15 applies and is in force, in accordance with clause 15(3).

[17] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 46/57*, 9 August 2022.

6.17 The Leader of the House explained the rationale for this modified method of postal voting in his second reading speech, noting that high numbers of postal votes are expected for the 2023 general election and stating that:

> The NSW Electoral Commission has advised that no supplier in New South Wales is able to print and dispatch sufficient quantities of postal vote material in the form currently required by the Electoral Act to meet the anticipated demand and the time frames required in response to these issues. The NSW Electoral Commission has proposed an alternate form of postal vote materials consistent with the postal vote pack used in the Federal election.

6.18 Finally, Part 4 substituted by the Bill includes clause 16, which sets out provisions which apply to the 2023 general election only.

6.19 Specifically, clause 16(2) allows the Commissioner to appoint a voting centre outside of Australia for all electoral districts, and designate and determine the operation of that centre as an early voting centre. The Commissioner may do this only if they are satisfied it would 'enhance the convenience of a large number of electors'. Subclause (3) also allows the Commissioner to abolish a voting centre so appointed.

6.20 However, clause 16(5) clarifies that only absent voters and absent silent electors under sections 135 and 136 of the Act may vote at a voting centre outside of Australia that has been appointed by the Commissioner. Subclause (4) also requires the Commissioner to publish a notice on the Electoral Commission's website of a determination regarding a voting centre outside of Australia under clause 16. This notice should be published at the time of making the determination.

6.21 In his second reading speech, the Leader of the House explained that clause 16 is intended to 'better facilitate declaration voting at overseas early voting centres for the 2023 general election' and stated that the Commission 'has advised that postal votes sent from overseas are not always able to be returned in time to be included in the vote count'.

The Bill amends the *Electoral Act 2017* to give the Electoral Commissioner discretionary powers under Schedule 7, Part 4 to make determinations in respect to the 2023 State general election and/or by-elections held before the general election. These determinations are required to be published on the Electoral Commission's website.

Specifically, clause 14 sets out a regulation-making power to authorise the Commissioner to permit certain COVID-19 affected electors to access telephone voting for a particular election. Telephone voting is otherwise limited to blind and vision-impaired voters. It also allows the Commissioner to determine at any time that telephone voting is not permitted for blind, vision impaired or COVID-19 affected electors for a certain election or time period. Clause 15 also allows the Commissioner to determine that postal voting in a relevant election must be conducted under the modifications set out in proposed Schedule 8. Finally, clause 16 allows the Commissioner to appoint a voting centre outside of Australia for declaration voting in the 2023 general election, and to abolish a centre so appointed.

In doing so, the Bill may therefore grant the Electoral Commissioner a wide discretionary power to regulate how electors may vote in the 2023 general election or by-elections held before the general election. This may make an individuals' right to vote and participate in public elections dependent upon the non-reviewable determinations of the Commissioner.

The Bill also defers to regulations the authorisation of the Commissioner to determine when and which COVID-19 affected electors are entitled to vote by telephone voting. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences. The Committee generally prefers substantive matters to be dealt with in the principal legislation to facilitate an appropriate level of parliamentary oversight, particularly where those matters may impact an individual's right to participate and vote in public elections.

The Committee acknowledges that these amendments are intended to facilitate the upcoming general election to be conducted in 2023, and that the provisions are based on the advice of the Commission. It also notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the matters that may be determined by the Commissioner and deferred to the regulations relate to the participation and voting in public elections. The Committee also notes that the determinations are only required to be published on the Commission's website, which is not required to be tabled in Parliament and therefore not subject to disallowance. These provisions may thereby make it difficult for a person to understand how they may meaningfully vote and participate in elections, in this case electors relying on telephone or postal voting and absent voters outside of Australia. For these reasons, the Committee refers this matter to Parliament for its consideration.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by proclamation

6.22 Clause 2 of the Bill provides that the Bill commences (as an Act) on a day or days to be appointed by proclamation.

The Bill commences by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, which may allow time for the necessary administrative arrangements to be implemented in order to give effect to the amendments. However, given that some of these provisions are intended to facilitate the upcoming State general election in March 2023 and establish new offences, the Committee notes that commencement by proclamation may make it difficult for individuals to ascertain their electoral rights and obligations for the election. For these reasons, the Committee refers the matter to Parliament for its consideration.

Part Two – Regulations

1. District Court Criminal Practice Note 24

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1.1 The District Court Criminal Practice Note 24 titled 'Applications for leave for in person appearances in Trials and Sentence Hearings of WHS Prosecutions' (the **Practice Note**) was published in NSW Government Gazette No 574 on 5 November 2021.

1.2 The Practice Note provides:

> In person appearances have been temporarily suspended due to COVID-19. With the easing of restrictions and increased vaccination rates, applications may be made for leave to be granted for in person appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* (NSW) (referred to collectively as trials in this Practice Note), which are listed for hearing on or after 25 October 2021.

1.3 This Practice Note is made under the *District Court Act 1973*.

Issues considered by committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Access to justice

1.4 The Practice Note provides that leave will not be granted for any person to attend the Court to appear in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* in person unless the List Judge or trial Judge is satisfied they are vaccinated. An application for leave is made to the List Judge or (where allocated) the trial Judge.

1.5 All other matters will continue to be heard by virtual courtroom.

1.6 Solicitors for the parties must enquire as to the vaccination status of their proposed court participants and provide that information to the List Judge or trial Judge.

1.7 'Court participants' includes judges, associates, tipstaves, counsel representing a party to proceedings, solicitors, parties to proceedings, Sheriff's officers, court officers, witnesses who appear in person (not by audio-visual link), interpreters, RSB court reporters, sound reporters and third party contractors, victims or victims' family members and their support persons.

1.8 'Vaccinated' means the person:

(a) has either completed a two-dose schedule of Pfizer Australia Pty Ltd, AstraZeneca Pty Ltd or Moderna Australia Pty Ltd, or received a single dose of Janssen-Cilag Pty Ltd, and

(b) at least 14 days has elapsed since completing their vaccination schedule.

The Practice Note requires that persons wishing to attend the District Court of NSW in person for appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* satisfy the List Judge or trial Judge that they are vaccinated. This requirement appears to apply to court participants including (among others) counsel, witnesses appearing in person, interpreters, victims or the victims' family members and their support persons.

All other matters will be heard by use of the virtual courtroom. The Committee understands that hybrid in person and remote District Court proceedings are facilitated by provisions of other practice notes and applicable legislation, including the *Evidence (Audio and Audio-Visual Links) Act 1998.*

The use of the virtual courtroom may affect procedural fairness because the Court cannot closely monitor the conduct of a person appearing including what material they have access to, if other persons are in the room or if they are recording the trial on their own device. It may also affect consistency in the quality of evidence between witnesses who appear in person or remotely, particularly if the virtual courtroom experiences technical failures. Additionally, appearing remotely may impact a defendant's access to justice, as the Court does not have the benefit of observing any nuanced behavioural cues of the defendant.

The Committee acknowledges that the use of the virtual courtroom has practical benefits in the circumstances, specifically to protect against the risk of COVID-19 and protect the safety of other court participants. In the circumstances, the Committee makes no further comment.

Open justice

1.9 The Practice Note provides that leave will not be granted for any person to attend the Court to appear in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* in person unless the List Judge or trial Judge is satisfied they are vaccinated. An application for leave is made to the List Judge or (where allocated) the trial Judge.

1.10 All other matters will continue to be heard by virtual courtroom.

1.11 Solicitors for the parties must enquire as to the vaccination status of their proposed court participants and provide that information to the List Judge or trial Judge. As noted above, 'court participants' include (among others) counsel representing a party to proceedings, solicitors, parties to proceedings, witnesses who appear in person (not by audio-visual link), interpreters, RSB court reporters, victims or victims' family members and their support persons.

1.12 A member of the media who wishes to attend a trial or hearing in person must also provide evidence to the List Judge or (where allocated) the trial Judge that he or she is vaccinated. If a member of the media declines to provide their vaccination status, attendance will be permitted by the use of the virtual courtroom, on request and subject to orders made by the trial Judge concerning the conduct of the trial. Any attendance in person must not infringe the $4m^2$ rule.

1.13 Members of the public may not attend the court in person, but may also access the virtual courtroom on request and subject to orders made by the trial Judge concerning the conduct of the trial.

1.14 As noted above, 'vaccinated' means that a person has either received the full dosage of a vaccine recognised by the Therapeutic Goods Administration and at least 14 days has elapsed since completing their vaccination schedule.

The Practice Note requires that persons wishing to attend the District Court of NSW in person for appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* satisfy the List Judge or trial Judge that they are vaccinated. This requirement appears to apply to court participants including (among others) counsel, witnesses appearing in person, interpreters, court reporters, victims or the victims' family members and their support persons. All other matters will be heard by use of the virtual courtroom.

The Practice Note also requires members of media who wish to attend a trial or hearing provide evidence they are vaccinated to the List Judge or trial Judge. It does not permit members of the public to attend the Court. Both groups have access to the virtual courtroom, on request and subject to any orders made by the trial Judge concerning the conduct of the trial.

The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny. However, the Committee acknowledges that the limitations on access are in response to the current COVID-19 pandemic with the intention of safeguarding broader public health. It considers that the alternative arrangements of a virtual courtroom assist in upholding open justice in the circumstances, particularly considering the other limitations on movement in the Court given the continued requirement to maintain social distancing. The Committee makes no further comment.

Retrospective application

1.15 The Practice Note commences on 29 October 2021 and was published in NSW Government Gazette No 574 of 5 November.

1.16 Paragraph 3 provides that applications may be made for leave to be granted for in person appearances in trials or sentence hearings of prosecutions under the *Work Health and Safety Act 2011* listed for hearing on or after 25 October 2021.

The Practice Note commenced on 29 October 2021, before it was notified in the NSW Government Gazette on 5 November 2021. It also applies to trials and hearings listed on or after 25 October 2021, which is prior to both the date of the Practice Note's commencement and publication. It therefore appears the Practice Note's provisions are intended to apply retrospectively, both because the Note commences 6 days before the publication date and the provisions apply to trials and hearings listed 4 days before the Note commences.

The Committee generally comments on provisions drafted to have retrospective effect, especially where rights may be retrospectively limited, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. The Committee would therefore prefer that the Practice Note commence, and its provisions apply to trials and hearings listed after, the publication date to provide to provide sufficient clarity for persons implementing the Practice Note and those whose rights may be affected. It notes that this approach was taken in District Court Criminal Practice Note 25. That Practice Note was published in the NSW Government Gazette No 586 of 12 November 2021, commenced on 15 November 2021 and applied to sentence proceedings listed for hearing on or after 15 November 2021.[18] While this practice note has been temporarily suspended at the time of writing,[19] the Committee refers this issue to the Parliament for its consideration.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Period of application and review date

1.17 The Practice Note commences on 29 October 2021.

1.18 Paragraph 2 states that the Practice Note will be reviewed in mid-November 2021 or as otherwise may be necessary.

The Practice Note does not include a specific end date, although it will be reviewed in mid-November 2021 or as otherwise may be necessary. The Committee would prefer that the Practice Note include a fixed date for review, to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on access to justice and open justice, and that it responds to COVID-19, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

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[18] New South Wales Government, *District Court Criminal Practice Note 25 – Applications for Leave for In Person Appearances in Sentence Proceedings*, NSW Government Gazette No 586 - Other, 12 November 2021.

[19] District Court New South Wales, Practice Notes Criminal Jurisdiction, Item 24 District Court Criminal Practice Note 24, viewed 16 February 2021.

2. District Court Practice Note 25 – Applications for Leave for In Person Appearances in Sentence Proceedings

Date tabled	LA: 16 November 2021 LC: 16 November 2021
Disallowance date	LA: 23 March 2022 LC: 30 March 2022
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

2.1 The purpose of Practice Note 25, 'Applications for Leave for In Person Appearances in Sentence Proceedings,' (the **Practice Note**) is to revise the former Practice Note 25. Former Practice Note 25, which was signed on 8 November 2021, was to commence on 15 November 2021.[20] As the content of these practice notes are substantially similar, save for minor updates, the Committee has not commented separately on the earlier revision of this Practice Note.

2.2 The current Practice Note makes provisions for the granting of leave for in person appearances in sentence proceedings listed for hearing on or after 15 November 2021.

2.3 The Practice Note was published in NSW Government Gazette No 586 on 12 November 2021 and is made under the *District Court Act 1973.*

2.4 The introduction of the Practice Note provides:

(i) Under District Court Criminal Practice Notes 23 and 24, in person appearances are permitted in jury trials, judge alone trials and WHS Prosecutions trials and sentence hearings.

(ii) With the further easing of restrictions and increased vaccination rates, applications may now be made for leave to be granted for in person appearances in sentence proceedings which are listed for hearing on or after 15 November 2021.

(iii) All other matters will continue to be heard by use of the virtual courtroom.

[20] Government Gazette No 586 of Friday 12 November 2021, District Court Practice Note 25, n2021-2470 and n2021-2477.

2.5 The Practice Note applies to all District Court venues with specific provisions made for Sydney District Court (Downing Centre and John Maddison Tower).

Issues considered by committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Open justice

2.6 The Practice Note provides that where an application for leave for in person appearances at sentence proceedings is sought, the below conditions must be satisfied:

(i) solicitors for the parties must enquire as to the vaccination status of all their proposed court participants and forward that information in the form annexed to the relevant Judge, confirming that each proposed court participant is vaccinated.

(ii) the solicitor must sight his or her COVID-19 certificate provided by the Australian Government before providing that information to the relevant Judge in the form annexed to the Practice Note.

2.7 Paragraph 8 of the Practice Note prescribes the destruction of the completed annexed form once the outcome of the leave application has been finalised.

2.8 Applications for leave must be made at least three business days prior to the hearing date by emailing the Judge's Associate. Where the sentence has not been allocated, the application must be made by emailing the Associate of the Chief Judge at Sydney District Court or in the case of any other court, the Senior Judge. This process applies to both proceedings that have not commenced and proceedings that are part-heard.

2.9 Leave will not be granted to any person to attend the Court in person unless the relevant Judge is satisfied that he or she is vaccinated.

2.10 Under the Practice Note, 'Vaccinated' means that a person:

(i) has either completed a two-dose schedule of Pfizer Australia Pty Ltd, AstraZeneca Pty Ltd or Moderna Australia Pty Ltd, or received a single dose of Janssen-Cilag Pty Ltd; and at least 14 days has elapsed since completing their vaccination schedule; or

(ii) is exempt from vaccination pursuant to NSW Public Health Orders; or

(iii) is taken to be a “fully vaccinated person” pursuant to NSW Public Health Orders.

2.11 The Practice Note applies to sentence proceedings listed on or after 15 November 2021.

The Practice Note requires any person who seeks to attend Court in person for sentence proceedings to apply for leave at least three business days prior to the listing. Leave will not be granted to any person to attend the Court in person

unless the relevant Judge is satisfied that he or she is vaccinated. The Practice Note also requires solicitors for the parties to enquire with participants to confirm their vaccination status.

The Committee notes that this may create a barrier to the principles of open justice for legal representatives, defendants, victims and witnesses involved in sentence proceedings. Open justice requires that the administration of justice take place in open court subjected to public and professional scrutiny. This may particularly affect defendants in custody who face access barriers to the courts. Additionally, it may disenfranchise unvaccinated persons from gaining full access to the open court system.

However, while the Practice Note limits in person appearances, the Committee acknowledges that such requirements are in response to the current COVID-19 pandemic with the intention of broader public health. The Committee also considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Period of application and review date

2.12 The Practice Note applies to sentence proceedings listed on or after 15 November 2021.

The Practice Note does not include a specific end date nor a timeframe in which the Practice Note will be reviewed. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on a person's rights, including their right to participate in the administration of justice as an accused person, the Practice Note may also benefit from the inclusion of an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

3. Dust Diseases Tribunal of NSW Practice Note, No. 1 of 2021

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Minister Responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

3.1 This Practice Note commenced on 14 October 2021, and will be reviewed in mid-November 2021 or as otherwise may be necessary.

3.2 The purpose of this Practice Note is to allow for the making of applications for leave to be granted in person appearances in hearings, which includes bedside hearings at private homes and Issues and Listings Conferences (ILC) before the Registrar, that are listed for hearing on or after 25 October 2021. These applications would allow the return of in person appearances, which were temporarily suspended due to COVID-19, in certain hearings whilst all other matters will continue to be heard by use of the virtual courtroom.

Issues considered by committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Access to justice/procedural fairness

3.3 Paragraphs 6 to 10 of the Practice Note sets out requirements in relation to leave granting in person appearance at relevant hearings of the Dust Diseases Tribunal of NSW. It sets out that individuals wishing to appear in person must make an application for leave to the relevant List Judge, allocated Judge or Registrar at the time the hearing is listed, but otherwise no later than one business day prior.

3.4 The Practice Note states that leave will not be granted to any person unless the relevant List Judge, Judge or Registrar allocated is satisfied that they are vaccinated. This is defined in the Practice Note as a person who has received all necessary doses of an approved COVID-19 vaccine at least 14 days prior. Paragraph 10 of the Practice Note also imposes a responsibility on solicitors to enquire of the vaccination status and sight a valid COVID-19 certificate (where applicable) for all participants they propose to attend tribunal. That information must be provided to the List Judge or Judge for the hearing.

3.5 Paragraph 8 of the Practice Note concerns applications for leave to conduct bedside hearings at private homes. Amongst the considerations set out when determining whether to grant leave for such hearings, the List Judge, allocated Judge or Registrar

will consider the plaintiff's wishes, the premises including whether the hearing can be held outside and the number of parties in the litigation. It also provides that limitations may placed on a party as to the number of lawyers who can attend a bedside hearing at private homes.

The Practice Note prohibits in-person attendance in hearings before a List Judge, allocated Judge or Registrar in the Dust Diseases Tribunal of NSW of any person who has not been fully vaccinated for COVID-19 at least 14 days prior. It also provides that individuals wishing to attend a hearing in-person, or to conduct the hearing bedside at private homes, must seek leave of the relevant Judge or Registrar, and imposes the responsibility for ensuring the vaccination status of all proposed attendees on the relevant solicitor. In respect to bedside hearings, the tribunal may limit the number of lawyers for a party who may attend the hearing.

By limiting who may attend a tribunal hearing in person, the Practice Note may affect a person's right to access justice. This is of particular concern as the tribunal hears claims from dust disease sufferers or their dependants. Given the degenerative nature of these diseases, plaintiffs may be unduly burdened by virtual attendance, or those who require bedside hearings may be disadvantaged by limitations placed on the attendance of their legal representatives.

However, the Committee acknowledges that the Practice Note is providing for the return of in-person attendance following its suspension due to the COVID-19 pandemic. It also notes that this is a response to the extraordinary and evolving circumstances of the pandemic, and is balancing the rights of individuals to in-person attendance with the need to protect public safety particularly dust disease sufferers who are more vulnerable to serious effects of COVID-19. In the circumstances, the Committee makes no further comment.

Open justice

3.6 Paragraphs 13 and 14 of the Practice Note set limitations on the attendance of third parties at tribunal hearings. The policy rationale for these limitations is set out in paragraph 12, which states that:

> The Tribunal remains committed to the principles of open justice. However, the risk of COVID-19 requires the Tribunal to limit the persons who may attend a hearing in person.

3.7 In-person attendance at tribunal hearings by members of the public are prohibited under paragraph 13. However, a member of the public may be permitted to virtually attend a hearing other than a bedside hearing or Issues and Listings Conference. This attendance by a virtual courtroom will be facilitated by email request to the relevant Judge's associate.

3.8 Attendance by members of the media is also limited by paragraph 14 of the Practice Note. Specifically, a member of the media who wishes to attend a hearing in person must provide evidence to the List Judge or Judge that they are vaccinated, and any in-person attendance must abide by the $4m^2$ rule. Members of the media who do not wish to provide evidence of their vaccination status may virtually attend by email request to the relevant Judge's associate.

The Practice Note imposes limitations on the attendance of members of the public and media at tribunal hearings. By prohibiting members of the public attending in-person and limiting in-person attendance of members of the media to those individuals who have sought leave and can show they are fully vaccinated for COVID-19, the Practice Note may impact a person's rights to a fair and public hearing contained in Article 14 of the ICCPR.[21] The right to a fair and public hearing enshrines principles of open justice which require the administration of justice must take place in courts which the public and the media may access.

However, Article 14 also recognises that the press and public may be excluded for reasons of morals, public order or national security, to protect the interest of the parties' private lives or where publicity would prejudice the interests of justice. In this case, the Practice Note imposes limitations in response to the extraordinary circumstances of the COVID-19 pandemic. The Committee further notes that the Practice Note does not preclude the virtual attendance of members of the public and the media. In the circumstances, the Committee makes no further comment.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Period of application and review date

3.9 The Practice Note commenced on 14 October 2021.

The Practice Note does not include a specific end date. The Committee would prefer that the Practice Note include a fixed date for review, to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on access to justice and open justice, and that it responds to COVID-19, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

[21] United Nations, Office of the High Commissioner for Human Rights, International Covenant on Civil and Political Rights, 1966.

4. Local Government (General) Amendment (Elections) Regulation 2021

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Minister responsible	The Hon. Wendy Tuckerman MP
Portfolio	Local Government

Purpose and description

4.1 The object of *the Local Government (General) Amendment (Elections) Regulation 2021* (the **Regulation**) is to amend the *Local Government (General) Regulation 2021* to make further provision regarding the conduct of local government elections during the COVID-19 pandemic.

4.2 The Regulation is made under the *Local Government Act 1993* and commenced on 22 October 2021, being the day on which it was published on the NSW legislation website.

Issues considered by committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Political franchise and right to democratic participation – voting without discrimination

4.3 The Regulation amends several provisions under Part 11 of the *Local Government (General) Regulation 2021* which concerns the conduct of elections of councillors and mayors. These amendments are intended to respond to circumstances arising from the COVID-19 pandemic.

4.4 Under subclause 383(1) of the *Local Government (General) Regulation 2021*, an election manager may temporarily suspend voting at a polling place on election day if they consider it is necessary to do so because of the reasons. Schedule 1[12] of the Regulation includes, as such a reason for suspending voting, "a risk of harm to public health" caused by the attendance of a person infected with or otherwise required to self-isolate due to COVID-19.

4.5 The Regulation also amends subclause 383A(4)(b). Clause 383A of the *Local Government (General) Regulation 2021* requires the election manager, who has exercised that power to suspend voting, to adjourn the taking of a poll to a later day if voting cannot be reopened that election day or if they are of the opinion a person was prevented from voting because they could not reasonably have voted at any other polling place.

4.6 Specifically, subclause 383A(4) permits the election manager to adjourn the election to a day that is as soon as practicable after the day of postponement. However, under subclause 383A(4)(b), that day must be 1-13 days after the election day. The Regulation creates an exception under clause 383(4)(b)(ii), that the election manager can adjourn the election to a day later than that thirteenth subsequent day where they are satisfied "it is necessary to comply with a public health order, or to reduce the risk of infection from COVID-19".

The Regulation amends the *Local Government (General) Regulation 2021* to include a risk to public health related to COVID-19 as a reason for an election manager to temporarily suspend voting at a polling place on election day. It also extends the allowable period of time for adjourning a suspended election beyond the existing 13 day cap to a later day, provided that it is necessary to comply with a public health order or reduce the risk of infection from COVID-19.

This may mean certain voters are unable to cast their ballots in elections for councillors and mayors for an unknown period of time, and thereby may impact an individual's right to political franchise and democratic participation contained in Article 25 of the ICCPR.[22] The right to political franchise and democratic participation protects the right of individuals to vote by universal and equal suffrage.

However, Article 25 also recognises that the right to vote may be subject to restrictions based on objective and reasonable criteria.[23] The Committee notes that these provisions are extraordinary measures in response to the COVID-19 pandemic and are intended to protect public health. It also acknowledges that the Regulation does not prevent or remove an impacted individual's right to cast a relevant ballot. In the circumstances, the Committee makes no further comment.

Right to take part in public affairs and elections – freedom of political communication and to run for public office

4.7 Clause 289 of the *Local Government (General) Regulation 2021* regulates the nomination of a candidate for an election of councillors and mayors which is to be provided in the relevant form. Specifically, subclause 289(5) states that a nomination paper "is to be made by lodging it with the returning officer by 12 noon on the nomination day". In accordance with subclause 289(5AA), that nomination paper may be lodged by personal delivery, post, transmission by facsimile or email, or through an approved website or online electronic nomination system.

4.8 The Regulation amends subclause 289(5AA)(a) to require lodgement by personal delivery be made to an "approved place". It further inserts subclauses 289(5AC)-(5AE) which provide for the publication of an approved place for that purpose. If satisfied that it is necessary to comply with a public health order or to reduce the

[22] United Nations, Office of the High Commissioner for Human Rights, International Covenant on Civil and Political Rights, 1966.

[23] United Nations, Office of the High Commissioner for Human Rights, CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 1996.

risk of infection from COVID-19, proposed subclause 289(5AE) enables the election manager by order published on their website to either:

(a) limit the times and dates that a nomination proposal may be lodged by personal delivery at an approved place, or

(b) prohibit the lodgement of nomination proposals by personal delivery at an approved place.

4.9 Division 8, Part 11 of the *Local Government (General) Regulation 2021* regulates the conduct of ordinary voting at attendance elections. A candidate may appoint a scrutineer in accordance with clause 119 of the *Electoral Act 2017* to represent them at each place at which polling is conducted, ballot-papers are scrutinised or votes are counted.

4.10 However, clause 337A enables the election manager to publish a direction which either prohibits or caps scrutineers from being physically present at a relevant place. The election manager may only make that direction if they are satisfied that it is necessary either to comply with a public health order currently in force or to reduce the risk of infection from COVID-19 at each relevant place, and there are alternative scrutiny arrangements.

4.11 Division 9A of Part 11 sets out provisions relating to activities undertaken during the regulated period of an election. Subdivisions 3 to 5 sets out a number of provisions and offences in respect to the creation, registration, display and distribution of electoral materials during the regulated period. These offences are intended to regulate the electoral materials and other pieces of communication containing electoral materials which are permissible for display or distribution during the regulated period, including on election day.

4.12 However, clauses 356TA and 356TB respectively enables an election manager to make directions by publication to the manager's website that a person not display a poster or hand out tangible electoral inside, on the premises of or within 100 metres of a pre-polling office or polling place. Such a direction may only be given if the election manager is satisfied that it is necessary to comply with a current public health order or to reduce the risk of infection from COVID-19.

4.13 The Regulation amends clauses 337A, 356TA and 356TB by repealing subclauses 337A(6), 356TA(7) and 356TB(8) which time limited these clauses to expire on 31 December 2021. This extends indefinitely the power of election managers to make relevant directions limiting the presence of scrutineers, display of posters and distribution of physical electoral materials for reasons relating to COVID-19 and/or public health.

The Regulation amends the *Local Government (General) Regulation 2021* to empower election managers to restrict the personal delivery of nomination papers for proposed candidates in councillors and mayor elections for public health and/or COVID-19 related reasons. It also repeals the time limiting provisions which previously repealed the power of election managers to make COVID-19 related directions on 31 December 2021. As a result, election managers will have an ongoing power to make directions that restrict the presence of scrutineers and the display or distribution of physical electoral materials.

In its Digest No 37/57, the Committee commented on the *Local Government (General) Amendment Regulation 2021* which inserted clauses 337A, 356TA and 356TB into the *Local Government (General) Regulation 2005*, which was the predecessor to and remade by the *Local Government (General) Regulation 2021*. Consistent with those comments, the Committee notes that the Regulation may impact an individual's right to political franchise and democratic participation contained in Article 25 of the ICCPR. The right to political franchise and democratic participation guarantees the right of citizens to stand for public office, to vote in elections and to have access to positions in public service.[24]

The Regulation may also limit free political communication about candidates available in electoral materials. Free communication of information and ideas about candidates and electoral matters is an important component of the right to take part in public life and elections. It may also hinder the ability to scrutinise the conduct of polling and the counting of ballots to ensure elections are determined fairly and democratically.

However, Article 25 also recognises that the right to vote may be subject to restrictions based on objective and reasonable criteria. The Committee notes that the provisions seek to manage risks to public health in the conduct of elections, especially those risks arising from the COVID-19 pandemic regarding physical distancing. It also acknowledges that the provisions provide for the alternative presence of scrutineers and the dissemination of electoral materials by electronic means. In the circumstances, the Committee makes no further comment.

[24] Australian Government Attorney-General's Department, Right to take part in public affairs and elections [website] (accessed 24 November 2021).

5. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 6) 2021

Date tabled	LA: 9 November 2021 LC: 9 November 2021
Disallowance date	LA: 22 February 2022 LC: 22 March 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

5.1 The object of the *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 6) 2021* (the **Regulation**) is to prescribe a penalty notice offence amount of $5,000 for the offence of failing to comply with the direction prohibiting the provision, display or production of information or evidence purporting to show a person is a fully vaccinated person that is not true and accurate.

5.2 The Regulation is made under the delegation of the *Public Health Act 2010* and takes effect from the date on which the Regulation was published; 27 October 2021.

Issues considered by committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offence – right to a fair trial

5.3 The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to enable a penalty notice to be issued for an offence of displaying or producing information or evidence purporting to show a person is a fully vaccinated person. The penalty for a contravention of the provision under the amendment is $5 000 for an individual. The amendment does not create an offence against a corporation.

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 6) 2021* provides that penalty notices can be issued for an offence of displaying or producing information or evidence purporting to show a person is a fully vaccinated person. The Regulation inserts subclause (c2) to Schedule 4 to prescribe the penalty for a contravention of the provision under the amendment is $5 000 for an individual. Under the amendment the offence will only be made out where the display or production of that information is untrue and inaccurate.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. This may impact a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial

decision maker. The Committee also notes that penalty notices of $5 000 for an individual are significant monetary amounts to be imposed by way of penalty notice.

However, the Committee acknowledges individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. As the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices particularly in the extraordinary context of COVID-19, the Committee makes no further comment.

6. District Court Criminal Practice Note 23 - Resumption of Jury Trials and in person appearances in Judge Alone Trials

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

6.1 This Practice Note commences on 12 January 2022 and applies to the resumption of jury trials at the following District Court venues: the Downing Centre; John Maddison Tower; Armidale; Campbelltown; Dubbo; Gosford; Goulburn; Grafton; Katoomba; Newcastle; Nowra; Parramatta; Penrith; Tamworth; Wollongong; Queanbeyan; and any other venue directed by the Chief Judge.

6.2 The commencement of new jury trials at these Court venues were temporarily suspended due to COVID-19. With the easing of restrictions under Public Health Orders and increased vaccination rates, the temporary suspension of jury trials at these venues was lifted on 25 October 2021.

6.3 In person appearances continue to only be allowed for new jury trials from 25 October 2021. All other matters in the Court will continue to be conducted by use of the virtual courtroom, subject to any leave granted by application to the trial Judge in judge alone trials. In sentencing matters, the sentencing Judge may advise the parties if in person appearance is required.

6.4 The Committee notes that the Practice Note revises its previous iteration, which commenced on 21 October 2021 and was reported on by this Committee in its Digest No. 37/57 (16 November 2021).[25] The Practice Note substantially remakes most of the provisions contained in its previous reiteration and this report draws upon the analysis of the 2021 regulation report.

[25] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

Issues considered by the Committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Barrier to jury participation

6.5 Paragraph 15 of the Practice Note requires the NSW Sheriff to ensure that all members of jury panels for trials in the District Court are vaccinated, and consent to and have undergone rapid antigen screening (**RAS**) as required. The Practice Note also sets out in paragraph 20 the rationale for the provision of a court participant's vaccination status, stating it will assist the management of risks arising from COVID-19 to all court participants and staff.

6.6 While a court participant (which is defined in paragraph 10 to include jurors) has a right under paragraph 18 to decline to provide their vaccination status, the Practice Note does not provide for alternative measures for the participation of jurors in trials either in-person by undergoing RAS, or using audio visual link ('**AVL**').

6.7 'Vaccinated' is defined in paragraph 10 as a person who has had the required number of doses of a COVID-19 vaccine, as defined under NSW Public Health Orders, or is taken to be "fully vaccinated" pursuant to NSW Public Health Orders.

The Practice Note requires that an individual must be vaccinated against COVID-19 and consent to undergoing rapid antigen screening (RAS) in order to participate as a juror in criminal trials heard in the District Court of New South Wales. While a potential juror has the right to decline providing their vaccination status, it appears that doing so prevents that person from becoming a member of a jury panel either in-person or by AVL as an alternative because the Practice Note does not make any exceptions to the vaccination requirement for all jurors.

The Committee reported on these provisions in the previous iteration of the Practice Note, in its Digest No. 37/57.[26] Consistent with the Committee's previous comments, the operation of these provisions may be discriminatory against non-vaccinated people, including individuals who are unable to be vaccinated for medical reasons or those who have received a vaccine other than those approved under NSW Public Health Orders. By limiting the eligibility of individuals to participate as jurors based on their vaccination status, these provisions may also impact the rights of accused persons to have their criminal charges determined fairly and independently by a jury of their peers.

The Committee acknowledges these provisions are intended to manage the risks of COVID-19 to and protect the health and safety of court participants. However, it notes that jury duty is a central feature of the criminal justice system and allows members of the community to participate in the administration of justice. For these reasons, the Committee refers this issue to the Parliament for its consideration.

[26] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

Open justice

6.8 The Practice Note requires that all other court participants, besides jurors, in jury and judge alone trials consent to RAS as required under paragraphs 36 to 39 and 55. It also requires that these persons be vaccinated as defined by paragraph 10, or to have a valid exemption or medical clearance under the NSW Public Health Orders in accordance with paragraphs 40 and 41.

6.9 Paragraphs 56 to 58 of the Practice Note deal with matters relevant to open justice in the conduct of jury trials. Specifically, paragraphs 57 and 58 explicitly prohibits both members of the public and the media from attending court in person.

6.10 Where a member of the public or the media wishes to view a trial, attendance may be permitted by use of the virtual courtroom. That virtual attendance requires an email request to the trial Judge's associate, and paragraph 57 clarifies that the virtual attendance of a member of the public will be a discretionary matter for the trial Judge.

6.11 Paragraph 56 sets out the rationale for these prohibitions, as follows:

> The Court remains committed to the principles of open justice. However, the risk of COVID-19 requires the Court to limit the persons who may attend a trial in person.

6.12 The Committee notes that the previous iteration of the Practice Note permitted the in-person attendance of members of the media, on the condition that they can provide evidence of their vaccination status and consents to undergo mandatory RAS.

The Practice Note prohibits the attendance of members of the media or the public from attending trials in person. If person who is not a court participant wishes to view a trial, they may make an email request to the trial Judge's Associate to access the virtual courtroom.

The Committee reported on the prohibition of in-person attendance of members of the public in the previous iteration of the Practice Note, in its Digest No. 37/57.[27] Consistent with the Committee's previous comments, the prohibitions may create a barrier to the principles of open justice. That is, that the administration of justice takes place in open court subjected to public and professional scrutiny.

However, the Committee acknowledges that these measures are implemented in response to the risks arising from the COVID-19 pandemic and intended to protect the health and safety of court participants. It further notes that members of the public and the media can request to attend by alternative virtual means, which provides a degree of scrutiny by the community on criminal trials in the District Court. In the circumstances, the Committee makes no further comment.

[27] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

Procedural fairness

6.13 Paragraphs 42 and 43 and 48 to 50 provides for the management of jury trials where a court participant declines to provide their vaccination status or to consent to RAS as required.

6.14 Specifically, paragraphs 48 to 50 enables the giving of evidence or appearance of witnesses for the Crown or defence, a defence expert and/or alibi witness, and the accused person by AVL.

6.15 Where an accused person, counsel and/or solicitors in the trial decline to provide their vaccination status or does not consent to RAS, the Court may vacate the trial and relist it on a later date or direct that the accused person attend by AVL where possible. The considerations which the Court will have regard to is listed in paragraphs 42 and 43.

6.16 Furthermore, paragraph 53 explicitly states that leave will not be granted to any person to attend a judge alone trial in person unless the trial judge is satisfied that they are vaccinated. Paragraph 55 requires that all court participants also undergo mandatory RAS as required.

The Practice Note provides that any court participant who declines to provide their vaccination status or does not consent to rapid antigen screening (RAS) will not be allowed to attend in-person. Where that person is participating as a witness or defence expert, it provides for that evidence to be given by audio visual link (AVL). Where that person is a solicitor, counsel or the accused, the Court may vacate and relist the trial or make a direction to enable the accused person to appear by AVL.

The Committee reported on these provisions in the previous iteration of the Practice Note, in its Digest No. 37/57.[28] Consistent with the Committee's previous comments, the appearance of the accused person or giving of evidence from witnesses by AVL may limit the ability of the Court to closely monitor the conduct of witnesses while they are giving evidence, including ensuring the witness is not referring to materials, recording their evidence or otherwise being assisted by another person in the room. It may also affect the consistency in the quality of evidence given by any particular witness appearing by AVL. This may impact the accused person's rights to a fair trial, particularly their right to procedural fairness.

However, the Committee notes that the use of AVL in criminal trials has practical benefits and may enhance the ability of witnesses to participate in criminal trials. It also acknowledges that these measures are in response to the risks arising from COVID-19 and intended to protect the health and safety of court participants and staff. In the circumstances, the Committee makes no further comment.

[28] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Period of application and review date

6.17 The Practice Note commences on 12 January 2022.

6.18 Paragraph 2 states that the Practice Note will continue to be reviewed "as may be necessary".

The Practice Note does not include a specific end date or a fixed date for review. It provides that it will continue to be reviewed as may be necessary.

The Committee reported on similar provisions in the previous iteration of the Practice Note, in its Digest No. 37/57.[29] Consistent with the Committee's previous comments, the Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential impact of the Practice Note on an accused person's right to procedural fairness, jury participation and open justice, the Practice Note may also benefit from the inclusion of an end date. The Committee also notes that repeal or expiry dates have been included in legislation responding to COVID-19. For these reasons, the Committee refers this issue to the Parliament for its consideration.

[29] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

7. Electoral Amendment (COVID-19) Regulation 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Dominic Perrottet MP The Hon. Mark Speakman SC MP
Portfolio	Premier Attorney General

Purpose and description

7.1 The object of the Electoral Amendment (COVID-19) Regulation 2021 (the Regulation) is to make special provision for by-elections held during the COVID-19 pandemic.

7.2 The Regulation is made under section 267 (the general regulation-making power) of the Electoral Act 2017 (the Act).

Issues considered by committee

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII clause

7.3 The Regulation inserts new clause 9 into the Electoral Regulations 2017. Clause 9 extends the timeframes for preliminary scrutiny of postal ballots under section 149 of the Act, for by-elections held during the period starting on 17 December and ending six months after the clause commences, on 17 June 2022.

7.4 Clause 9 provides that the Electoral Commissioner, at the scrutiny of postal ballots:

(a) may produce unopened envelopes on which a postal vote certificate is printed containing postal votes (postal vote) as have been received by the Commissioner on any day not more than 14 days before election day, rather than 5 days before the election day, and

(b) must produce unopened all remaining postal votes received by the Commissioner up to 6 pm on the thirteenth day immediately following the close of voting, rather than the fourth day immediately following the close of voting.

7.5 Section 267 includes the Act's general regulation-making power. Section 267(2) states that if the time allowed to do any act is insufficient, and that the extension of time (and any alteration of any dates consequent on that extension) is necessary, the regulations or Governor may make that alteration or declaration.

The Regulation inserts a Henry VIII clause into the *Electoral Regulations 2018*, allowing subordinate legislation to amend the principal Act. Specifically, by extending the timeframes for preliminary scrutiny of postal ballot papers for by-elections held from 17 December 2021 to 17 June 2022. This clause intends to respond to the COVID-19 pandemic.

The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation, to foster an appropriate level of parliamentary oversight. However, in this case the delegation of Parliament's legislative powers is envisaged in the principal Act. The general regulation-making power in the *Electoral Act 2017* allows the regulations to extend applicable time limits if the time allowed to do an act is insufficient and the extension of time is necessary. Additionally, the Committee notes that the clause applies for a limited duration of six months, intends to respond to the extraordinary circumstances of the pandemic, which may increase the volume of postal votes and necessitate a longer scrutiny period, and that the statutory timeframes do not appear to be excessively extended. In the circumstances, the Committee makes no further comment.

8. Electoral Amendment (COVID-19) Regulation 2022

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Executive responsible	The Hon. Dominic Perrottet MP The Hon. Mark Speakman SC MP
	Premier Attorney General

Purpose and description

8.1 The object of this Regulation is to amend the *Electoral Regulation 2018* to make further provision regarding the conduct of by-elections during the COVID-19 pandemic.

8.2 This Regulation is made under the *Electoral Act 2017* (the '**Act**'), including Part 10, Division 3 (By-elections during COVID-19 pandemic).

8.3 The Committee notes that the Regulation remakes in proposed Schedule 2, clauses 1 and 4 provisions made by the *Electoral Amendment (COVID-19) Regulation 2021*, which is reported on by this Committee in this Digest (No. 40/57). The Committee reiterates its comments raised in the report on the *Electoral Amendment (COVID-19) Regulation 2021* in respect to Schedule 2, clauses 1 and 4, and this report considered new issues identified in the *Electoral Amendment (COVID-19) Regulation 2022*.

Issues considered by the Committee

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII clauses and significant matters not subject to Parliamentary scrutiny

8.4 The Regulation inserts Schedule 2 into the *Electoral Regulation 2018*, clause 2 of which provides for postal voting in State government by-elections conducted during the period from 19 January to 30 June 2022.

8.5 Clause 2 is made under section 274 of the Act, which relevantly provides that:

(1) The regulations may modify the application of this Act for a by-election held during the prescribed period, for the purposes of responding to the public health emergency caused by the COVID-19 pandemic.

(2) The Minister may recommend to the Governor that regulations be made under this section only if the proposed regulations are—

(a) in accordance with advice issued by the Electoral Commissioner, and

(b) reasonable to protect the health, safety and welfare of persons from risk of harm caused by the COVID-19 pandemic.

8.6 Specifically, subclause (1) enables the Electoral Commissioner to declare by order published on the Electoral Commission's website that the electors of a specified electoral district are 'COVID-19 affected electors' for a relevant by-election. The Commissioner may only exercise this power if satisfied that it is necessary to comply with a public health order or to reduce the risk of infection from COVID-19.

8.7 That declaration by the Commissioner must also include a notice that informs COVID-19 affected electors of their entitlement to vote by post in a relevant by-election, and also specify they may vote in person at a voting centre if they wish, per subclauses (3) and (4).

8.8 Subclause (2) clarifies that the Commissioner may also publish a copy of the declaration under subclause (1) "in other ways the Electoral Commissioner considers necessary to bring the declaration to the attention of the COVID-19 affected electors".

The Regulation inserts Schedule 2 into the *Electoral Regulation 2018* which enables the Electoral Commissioner to declare electors of a certain electoral district as COVID-19 affected electors for a by-election conducted before 30 June 2022, where the Commissioner believes it necessary to comply with a public health order or to reduce the risk of COVID-19. That declaration entitles all COVID-19 affected electors to vote by post in the by-election.

This amendment is made by way of a Henry VIII clause set out in section 274 of the parent Act. The Committee reported on the amendments to the *Electoral Act 2017*, which introduced section 274, in its Digest No. 38/57. Consistent with the Committee's previous comments, this amendment allows the Executive to legislate and amend the operation of an Act by way of regulation without reference to the Parliament.

The Committee generally prefers amendments to the operation of an Act to be made by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes as, unlike primary legislation, subordinate legislation is not required to be passed by Parliament.

However, the Committee acknowledges that in the extraordinary circumstances created by the COVID-19 pandemic, the declaration-making power of the Commissioner may facilitate the safe and flexible conduct of parliamentary by-elections in a timely and responsive manner during the public health emergency. It further notes that regulations must be tabled in Parliament and are subject to

disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment in respect to the exercise of the regulation-making power under section 274 of the Act.

Clauses 2(1) and (2) requires that such a declaration made by the Commissioner must be published on the Electoral Commission's website and may be published in any other ways the Commissioner considers necessary to bring it to the attention of relevantly declared COVID-19 affected electors. As the declarations dealt with by the website have bearing on the entitlements of electors legally required to cast votes in parliamentary by-elections, the Committee would prefer that they were dealt with by subordinate legislation. This would foster an appropriate level of parliamentary oversight as, under the *Interpretation Act 1987*, statutory rules must be tabled in Parliament and are subject to disallowance. There appears to be no such requirement for the website in question.

The Committee acknowledges that the provisions enable the flexible exercise of the Commissioner's declaration-making powers and provides for publications in discretionary manners intended to bring the declaration to relevantly affected persons. However, it notes that these declarations impact the entitlements of certain electors in the exercise of their democratic voting rights, and further notes that failure to effectively exercise that right may subject individuals to monetary penalties per section 245 of the *Commonwealth Electoral Act 1918* (Cth). For these reasons, the Committee refers this matter to Parliament for its consideration.

9. Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

9.1 The Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021 is made under the Public Health Act 2010 and takes effect from the date on which the Regulation was published, 1 December 2021.

9.2 The object of this Regulation is to prescribe a penalty notice offence amount of $5 000 for an individual and $10 000 for a corporation for the offence of failing to comply with a direction under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*.

9.3 There are a significant number of directions that can be lawfully given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*. The Minister, police officers and the Chief Health Officer have powers under the Order to make directions in relation to the questioning, testing and quarantine for those arriving by air transportation into NSW.

Issues considered by committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offences – right to a fair trial

9.4 The Regulation provides that a person or corporation that does not comply with a direction lawfully given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021* may be issued with a penalty notice. The maximum penalty that may be given is $5 000 for an individual or $10 000 for a corporation.

9.5 There are a significant number of directions under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*, including directions to:

(a) isolate at a particular location or residence;

(b) be tested for COVID-19;

(c) provide contact information to a class of persons;

(d) wear a mask in certain circumstances; and

(e) not be present at certain location if unvaccinated.

9.6 The Order also provides that the Minister, Chief Health Officer, and Commissioner of Police can give further directions under the Order.

The *Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021* allows a penalty notice of $5 000 for an individual, or $10 000 for a corporation to be issued to an individual or corporation that contravenes a direction given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*. The Order provides directions in relation to the arrival, transportation, quarantining and testing of inbound arrivals to NSW, including flight crew. The Order also grants the Minister, the Chief Health Officer and the Commissioner of Police powers to make further directions in regards to inbound arrivals.

The Committee has previously commented on other regulations related to managing the COVID-19 pandemic that allow for the issue of penalty notices.[30] Consistent with its previous comments, the Committee notes that penalty notices allow an individual or corporation to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person or corporation's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that in regards to the penalty for an individual, that $5 000 is a significant monetary amount to be imposed by way of penalty notice.

However, the Committee notes that individuals retain the right to elect to have their matter heard and decided by a Court. There are also a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters that should be included in primary legislation

9.7 As noted above, the Regulation allows for a penalty notice of $5 000 for individuals and $10 000 for corporations to be issued for a contravention of the wide range of directions given in the Order.

As noted above, the *Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021* allows a penalty

[30] Digest No. 39/57; Digest No. 33/57

notice of $5 000 for an individual, or $10 000 for a corporation to be issued to an individual or corporation that contravenes a direction given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*. The Order provides directions in relation to the arrival, transportation, quarantining and testing of inbound arrivals to NSW, including flight crew. The Order also grants the Minister, the Chief Health Officer and the Commissioner of Police powers to make further directions in regards to inbound arrivals.

Consistent with previous comments in regards to penalty notice offences being included in regulations, the Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation.[31] This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

Given the severe circumstances surrounding the COVID-19 pandemic, the Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill. Given the circumstances, the Committee makes no further comment.

[31] Digest No. 39/57; Digest No. 33/57

10. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 7) 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

10.1 The object of the *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 7) 2021* (the **Regulation**) is to prescribe a penalty notice offence amount of $5 000 for an individual and $10 000 for a corporation for the offence of failing to comply with a direction under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021* (the **Order**).

10.2 The Regulation is made under delegation of the *Public Health Act 2010*. Specifically, section 7 enables the Minister to take such action and by order give directions if the Minister believes on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health. Section 4 of the Order provides the basis for concluding that such a situation has arisen on the basis of COVID-19.

10.3 The Regulation commenced at 10pm on 4 December 2021, at the same time as the Order.

10.4 The Committee commented on the creation of the penalty notice offence for contravention of a direction under the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* in Digest No. 37/57,[32] in relation to a person's right to a fair trial.

Issues considered by committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offence – right to a fair trial

10.5 The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to make it a penalty notice offence to fail to comply with a direction of the Minister under the Order. It achieves this by replacing the reference to the *Public Health (COVID-19*

[32] New South Wales Parliament, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

Self-Isolation) Order (No 3) 2021, in force until 4 December 2021 at 10pm, with a reference to the updated version of the public health order.

10.6 The Order includes directions of the Minister about, among other things:

(a) self-isolation of persons diagnosed with COVID-19 and close contacts (being a person identified by an authorised contact tracer as likely to have come into contact with a person with COVID-19, and at risk of developing COVID-19), including a requirement:

(i) for a person who diagnosed with COVID-19 to self-isolate until medically cleared,

(ii) for a person diagnosed with COVID-19 to provide information of their residence or place and also on their movements for the previous 28 days and take reasonable steps to notify employers, close contacts and education providers, and

(iii) for close contacts to self-isolate for up to 14 days if directed,

(b) providing information to a police officer and, where the person is conducting a business or undertaking, SafeWork NSW, and

(c) being medically cleared of COVID-19 and medical clearance notices.

10.7 The penalty imposed for a penalty notice offence is $5 000 for an individual and $10 000 for a corporation.

The Regulation enables penalty notices to be issued for a contravention of a direction of the Minister under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*. Specifically, the Regulation replaces reference of the predecessor public health order in the *Public Health Regulation 2012* with a reference to the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*.

Directions under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021* include, but are not limited to, the requirement to self-isolate after being diagnosed with COVID-19, for close contacts of a person diagnosed with COVID-19 to self-isolate where directed and provide information to specified persons including workplaces, employers and police.

Penalty notices allow an individual to pay a specified monetary amount, and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $5 000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may therefore impact on a person's right to a fair trial, specifically any automatic right to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, the Committee acknowledges that the Regulation does not remove an individual's right to have their matter heard and decided by a Court.

Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice.

In the circumstances and considering the extraordinary context of COVID-19, including the need to maintain public health by restricting the movement of persons diagnosed with COVID-19 or in contact with those persons, the Committee makes no further comment.

Penalty notice offence – freedom of movement

10.8 The Regulation makes it a penalty notice offence to fail to comply with a direction of the Minister under the Order, including the Minister's orders for persons diagnosed with COVID-19 and close contacts to self-isolate. Specifically, the Minister directs:

(a) persons diagnosed with to self-isolate at their residence or a specified place until medically cleared, and

(b) close contacts to self-isolate at their residence or a specified place, if directed by an authorised contact tracer, for 7 days if they are fully vaccinated (meaning they have had 2 does of a COVID-19 vaccinate at least 14 days prior) or 14 days if they are not.

10.9 While self-isolating, persons diagnosed with COVID-19 or close contacts may only leave their residence or the specified place to obtain medical care or supplies and in emergencies. They may only allow other people to enter in certain circumstances, including where (without limitation) those other people usually live there and are complying with the Order, or the entry is for medical or emergency care, or to provide essential support services.

The Regulation enables penalty notices to be issued for a contravention of a direction of the Minister under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*, which includes directions for persons diagnosed with COVID-19 or close contacts to self-isolate.

The requirement to self-isolate or otherwise be issued with a penalty notice may effectively limit the freedom of movement of persons diagnosed with COVID-19 and close contacts for the duration they are required to isolate. Article 12 of the International Covenant on Civil and Political Rights provides that freedom of movement may be restricted where, provided by law, it is necessary to protect public health and consistent with other rights recognised by the Covenant.

The Committee notes that the right is only limited for persons diagnosed with COVID-19 and close contacts only until the person is medically cleared or otherwise for a specified duration (of 7 days if fully vaccinated or 14 days if not), respectively. The Order also specifies circumstances in which they can leave or allow people to enter their residence or place where they are isolating, including for medical or emergency purposes. In the circumstances and considering the extraordinary context of COVID-19, the Committee makes no further comment.

11. Public Health Amendment (Rapid Antigen Tests) Regulation 2022

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC 7 June 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

11.1 The *Public Health Amendment (Rapid Antigen Tests) Regulation 2022* (the Regulation) was introduced in response to the COVID-19 pandemic and prescribes that a person may be issued with a penalty notice of $1 000 if they fail to comply with a direction of the Minister for Health requiring them to report a positive COVID-19 result detected by a rapid antigen test.

11.2 The Regulation is made under sections 118 and 134 of the Act and the general regulation making power.

Issues considered by the Committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offence – right to a fair trial

11.3 The Regulation amends schedule 4 of the *Public Health Regulation 2012* to create a penalty notice offence against a person who does not give notification (failure to give notification offence) that the person has tested positive to COVID-19 following a rapid antigen test.

11.4 The Regulation amends schedule 4(d) of the *Public Health Regulation 2012* by creating an exception to the penalty for offences prescribed under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*. The Regulation amends schedule 4(d) to state that the penalties for those offences is $5 000 and $10 000 for individuals and corporations respectively, but for the offence of failing to give notification where the penalty notice amount is $1 000. Under the Regulation, failure to give notification offences are dealt with as failures to comply with a Ministerial direction under section 4(e) of the schedule.

11.5 A person may provide notification of a positive COVID-19 rapid antigen test by registering their positive result on their Service NSW account.[33] It is not a requirement that negative test results are registered.

The Regulation provides that penalty notices of up to $1 000 can be issued for an offence of failing to comply with a direction of the Minister for Health requiring them to report a positive COVID-19 result detected by a rapid antigen test (failure to give notification offence). The Regulation creates an exception to schedule 4(d) of the Public Health Regulation 2012 to distinguish between penalties under the Public Health (COVID-19 Self-Isolation) Order (No 4) 2021 and that of failing to give notification offences.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $1 000 for an individual are significant monetary amounts to be imposed by way of penalty notice, particularly in the extraordinary circumstances of the COVID-19 pandemic.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may thereby impact on a person's right to a fair trial – that is, to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, as the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices particularly in the extraordinary context of COVID-19 court backlogs, the Committee makes no further comment.

[33] Service NSW, COVID-19 Services - Register a positive rapid test result, viewed 14 March 2022.

12. Retail and Other Commercial Leases (COVID-19) Amendment (Impacted Lessees) Regulation 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Damien Tudehope MLC
Portfolio	Finance

Purpose and description

12.1 The object of this Regulation is to provide that a lessee may still request to renegotiate for reduced rent for a temporary period even though the lessee is no longer an impacted lessee if the lessee—

(a) would have qualified for certain grants or payments, and

(b) had a turnover of less than $5 million during the 2020–2021 financial year.

12.2 This Regulation is made under—

(a) the Retail Leases Act 1994, including sections 85, the general regulation-making power, and 87, and

(b) the Conveyancing Act 1919, section 202, the general regulation-making power.

12.3 This Regulation is made with the agreement of the Minister for Customer Service, being the Minister administering the *Conveyancing Act 1919*.

12.4 This regulation extends the term in which lessees, who would previously have been characterised as impacted lessees, are able to request to renegotiate for a reduced rent for a temporary period. Accordingly, the amendment continues to give effect to clause 6D of the previous version of the *Retail and Other Commercial Leaves Covid-19) Regulation 2021*, which in turn gave effect to the *National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19* which were adopted by the National Cabinet on 7 April 2020.

12.5 As with previous versions of the Regulation, this amendment requires lessors to commence renegotiation of a lease within 14 days of a request by a lessee, unless another timeframe is agreed, and allowing lessees to make multiple requests for rent renegotiation during the prescribed period.

Issues considered by committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Property rights and freedom of contract

12.6 Under the Regulation, a lessee who is no longer an impacted lessee under the definition at section 4 of the *Retail and Other Leases (COVID-19) Regulation 2021*, but who would have met the criteria for an impacted lessee, can request a rent renegotiation. Those criteria are that the lessee:

(a) would have qualified for certain grants or payments; and

(b) had a turnover of less than $5 million during the 2020-2021 financial year.

12.7 Under the Regulation, if a lessee requests a rent renegotiation, the lessor must commence the renegotiation within 14 days of receiving that request. This renegotiation must acknowledge the economic impacts of the COVID-19 pandemic, and the leasing principles set out in the National Code of Conduct.

The *Retail and other Commercial Leases (COVID-19) Amendment (Impacted Lessees) Regulation 2021* imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

The Regulation requires lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the Regulation extends the rights of lessees that were previously deemed impacted lessees to make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. As the Committee noted in digest 27/57, the requirement for lessors to engage in renegotiation of rent in this Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee recognises that the Regulation, like the previous version, only applies to cases involving lessees that were previously deemed to be 'impacted lessees' (i.e. lessees that qualified for certain grants or payments and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking other prescribed actions. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

13. Retail and Other Commercial Leases (COVID-19) Regulation 2022

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Eleni Petinos MP
Portfolio	Small Business

Purpose and description

13.1 The object of this Regulation is to limit the exercise of certain rights by a lessor under retail and certain other commercial leases for a breach of the lease if—

(a) the lessee is a business that, due to the impact of the COVID-19 pandemic, qualified for certain grants, and

(b) the breach is a prescribed breach that occurs between 13 July 2021 and 13 March 2022.

13.2 Before exercising the right, the lessor must try to resolve the breach using mediation.

13.3 This Regulation is made under—

(a) the *Retail Leases Act 1994*, including sections 85, the general regulation-making power, and 87, and

(b) the *Conveyancing Act 1919*, section 202, the general regulation-making power.

13.4 This Regulation is made with the agreement of the Minister for Customer Service and Digital Government, being the Minister administering the *Conveyancing Act 1919*.

Issues considered by the Committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Retrospectivity, property rights and freedom of contract

13.5 The *Retail and Other Commercial Leases (COVID-19) Regulation 2022* (the Regulation) repeals and remakes with minor amendments the *Retail and Other Commercial Leases (COVID-19) Regulation 2021*. The Regulation provides that during the prescribed period a lessor is prohibited from taking a 'prescribed action' against an impacted lessee because of:

(a) a failure to pay rent,

(b) a failure to pay outgoings, or

(c) the business operating under the lease not being open for business during the hours specified in the lease.

13.6 An impacted lessee is a lessee with a turnover in the 2020-21 financial year of less than $50 million that would qualify but for a COVID-19 Disaster payment made to the lessee by the Commonwealth:

(a) 2021 COVID-19 Micro-business Grant,

(b) 2021 COVID-19 Business Grant, or

(c) 2021 JobSaver Payment.

13.7 'Prescribed actions' include evicting the lessee, terminating the lease, or charging interest or fees for unpaid rent among other actions (clause 3).

13.8 Further, the Regulation continues to place certain obligations on lessors, including an obligation not to increase rent payable for an impacted lessee (clause 8), compulsory mediation (clause 9), and the obligation to renegotiate the rent payable under the impacted lease (clause 10). It also specifies that an act or omission of an impacted lessee required under a law of the Commonwealth or the State in response to the COVID-19 pandemic does not amount to a breach of the impacted lease and does not constitute grounds for termination or the taking of any prescribed action by the lessor against the impacted lessee (clause 11).

13.9 The Regulation also extends the prescribed period from 13 January 2022 to 13 March 2022.

Like its predecessors, the *Retail and Other Commercial Leases (COVID-10) Regulation 2021* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take into account the economic impacts of COVID-19.

The Regulation continues to require lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. The Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. These changes also have retrospective effect, in that the 'prescribed period' to which it applies extends back to the 13 July 2021.

The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they

are subject at any given time. However, the Committee recognises that the amending Regulation, like the first Regulation, only applies to cases involving 'impacted lessees', and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes that the prescribed period has again been extended from ending on 13 January 2021 until 13 March 2021. The Committee understands that this is in response to the current COVID-19 pandemic and notes the relatively small extension of time. Given the ongoing economic consequences of the COVID-19 pandemic, and the limited period the Regulation will apply for, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Government regulation of private business contracts – businesses required to incur a loss

13.10 As noted above, the amending Regulation significantly limits lessors from taking any prescribed action, such as eviction, against an impacted lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours.

13.11 The amending Regulation extends the prescribed period for which these limitations are imposed from 13 January 2022 to 13 March 2022.

13.12 The Committee notes that financial mortgage assistance is available for eligible lessors to defer business loan repayments for a period of 3 months.[34] Following any loan repayment deferral, lessors experiencing ongoing financial difficulty may be able to negotiate with their bank to restructure or vary their loan, or be eligible for a deferral extension.[35]

As above, the Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against commercial lessees where lessees are unable to meet their obligation due to economic hardship resulting from the COVID-19 pandemic. In doing so, the Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 13 March 2022.

However, the Committee recognises that the amending Regulation is in response to the ongoing public health emergency and resulting economic downturn. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that they may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

[34] Australian Banking Association, COVID-19 Assistance, current as at 15 March 2022.

[35] Australian Banking Association, COVID-19 support: phase 2, current as at 15 March 2022.

14. Public Health Amendment (COVID-19) Regulation 2022

Date tabled	LA: 4 March 2022 LC: 4 March 2022
Disallowance date	LA: 21 June 2022 LC: 21 June 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

14.1 This Regulation—

(a) prescribes the Department of Enterprise, Investment and Trade as a body whose members, or members of staff, may be appointed as authorised officers under the *Public Health Act 2010* (the Act), and

(b) extends the operation of certain provisions, relating to authorised officers and the issuing of penalty notices, beyond 26 March 2022, and

(c) replaces a reference to a repealed order under the Act.

14.2 This Regulation is made under the *Public Health Act 2010*, including sections 118, 126 and 134, the general regulation-making power.

Issues considered by the Committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offences – right to a fair trial

14.3 The Regulation proposes to amend schedule 4 of the *Public Health Regulation 2012* in regards to the following offences under the *Public Health Act 2012* (Act):

(a) a failure to comply with any direction of the Minister in an order made under the Act;

(b) a failure to comply with section 11 of the Act, which concerns the power to close public premises on public health grounds; and

(c) a failure to comply with section 70(1) of the Act, which concerns the making of public health orders.

14.4 Penalty notices could previously be imposed regarding offences occurring between 26 March 2020 and 26 March 2022. The Regulation extends this period indefinitely from 26 March 2020.

The Regulation expands the length of time that a penalty notice may be issued for offences related to compliance with public health orders. The Regulation serves to make the penalty notices permanent from 26 March 2020, where previously penalty notices could only be issued in relation to the relevant offences from 26 March 2020 to 26 March 2022.

Penalty notices allow a person to pay the amount specified for an offence within a certain time should they not wish to have the matter determined by a court. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person from electing to have the matter proceed to court. However, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court, with its associated inconvenience, stress, and/or the risk of having a larger penalty imposed.

Given this, as well as the size of the penalties that may be issued by penalty notice (up to $1 000 for an individual and $5 000 for a corporation) and that the regulation indefinitely extends the period in which these penalty notice offences can be issued, the Committee refers the matter to Parliament for its consideration.

15. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation 2022

Date tabled	LA: 22 February 2022 LC: 22 February 2022
Disallowance date	LA: 7 June 2022 LC: 19 May 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

15.1 This Regulation provides that the penalty notice offence for a failure to comply with certain directions under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021* continues to apply under an order that remakes, replaces or consolidates that order.

15.2 This Regulation is made under the *Public Health Act 2010* (the **Act**), including sections 118 and 134, the general regulation-making power.

Issues considered by the Committee

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Penalty notice offences prescribed in regulations

15.3 Schedule 4 of the *Public Health Regulation 2012* prescribes offences for which a penalty notice may be issued, and the amount payable for that penalty notice for individuals and corporations.

15.4 Relevantly, Part 1 of Schedule 4 prescribes the offence of failing to comply with a direction to self-isolate under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021* (the **2021 Self-Isolation Order**) as a penalty notice offence. It also prescribes the penalty payable on that penalty notice is $5 000 for individuals and $10 000 for corporations.

15.5 The Regulation amends Schedule 4 to expand that prescription to include a penalty notice offence of non-compliance with a direction under 'an order under the Act, section 7 that remakes, replaces or consolidates, whether in whole or in part' the 2021 Self-Isolation Order.

The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to prescribe an offence for non-compliance with a direction under an order made

under section 7 of the *Public Health Act 2010* which wholly or partly remakes, replaces or consolidates the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*.

The Committee generally prefers that penalties are set down in primary legislation, rather than subordinate legislation, to foster an appropriate level of parliamentary scrutiny. It further notes that penalty notices allow a person to pay the amount specified for an offence within a certain time should he or she not wish to have the matter determined by a court. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee also notes that the amendments would enable authorised officers to issue penalty notices for offences in relation to future public health orders which are not explicitly defined or set out in relevant primary or subordinate legislation. This may run counter to the rule of law principle that a person is entitled to know the law that applies to them at any given time.

The Committee further notes that, unlike regulations, there is no requirement for public health orders to be tabled in Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. This may allow authorised officers to issue penalty notices for infringements of future public health orders, without that power to issue such notices for those future orders being subject to parliamentary scrutiny.

The Committee notes that these penalty notice offences are intended to deter non-compliance with self-isolation orders, in order to protect public health and safety from the risks arising from the COVID-19 pandemic. It further acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. These amendments also do not impact an individual's right to elect to have their matter heard and decided.

However, the amendments permit authorised officers to issue penalty notices for public health orders which are not set out in primary or subordinate legislation, and which are not subject to parliamentary oversight. Given the potential penalty notices of $5 000 for individuals, the Committee refers this matter to Parliament for its consideration.

16. Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2022

Date tabled	LA: 4 March 2022 LC: 4 March 2022
Disallowance date	LA: 21 June 2022 LC: 21 June 2022
Minister responsible	The Hon. Eleni Petinos MP
Portfolio	Small Business

Purpose and description

16.1 The object of this Regulation is to remove requirements in relation to impacted leases that—

(a) required parties to an impacted lease to renegotiate the rent payable under, and other terms of, the lease, and

(b) prevented rent payable under an impacted lease from being increased.

16.2 Provisions requiring compulsory mediation are to remain in place. This Regulation is made under—

(a) the *Retail Leases Act 1994*, including clause 85, the general regulation-making power, and 87, and

(b) the *Conveyancing Act 1919*, including clause 202, the general regulation-making power.

16.3 This Regulation is made with the agreement of the Minister for Customer Service and Digital Government, being the Minister administering the *Conveyancing Act 1919.*

Issues considered by the Committee

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Reduced assistance to commercial tenants

16.4 The Regulation amends the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* (Existing Regulation) to reduce the scope of the assistance provided under the Existing Regulation to the tenants of retail and commercial properties.

16.5 The amendments include:

(a) limiting eligibility by reducing the turnover limit for businesses to qualify for the scheme from $50 million to $5 million (clause 4(b));

(b) removing the obligation on landlords to not increase the quantum of rent payable (clause 8);

(c) removing the obligation to attend compulsory mediation to resolve breaches if the breach occurs after 13 March 2022; and

(d) removing the requirement of a Tribunal or court to consider the National Code of Conduct leasing principles if the prescribed action is for a breach occurring after 13 March 2022.

16.6 The Regulation also amends the *Conveyancing (General) Regulation 2018* to the same effect.

The Regulation amends the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* and the *Conveyancing (General) Regulation 2018* to reduce the scope of the assistance provided to the tenants of retail and commercial properties under the Existing Regulation. The reductions include lowering the turnover ceiling for businesses to access the scheme from $50 million to $5 million (clause 4(b), and removing the obligation on landlords to not increase the rent of impacted lessees (clause 8).

The Regulation may therefore result in businesses being subject to significant increases in overhead expenses, including rent, as well as removing other protections for lessees such as mandatory mediation in the event of a breach of lease. The Committee notes that due to the changing nature of the COVID-19 pandemic, businesses may have expected that they could rely on the protections previously provided under the Regulations being ongoing.

However, the Committee notes that the protections provided under the Regulations were in response to the COVID-19 pandemic, and that regulation and legislation to this effect has been winding back as the economy recovers. The Committee also notes that commercial tenants will continue to be governed by the *Retail Leases Act 1994* and that this legislation prior to the COVID-19 pandemic had been considered by the Parliament as sufficient to govern commercial leasing arrangements. Given the circumstances, the Committee makes no further comment.

17. Public Health Amendment (COVID-19 Air and Maritime Arrivals) Regulation 2022

Date tabled	LA: 7 June 2022 LC: 7 June 2022
Disallowance date	LA: 11 October 2022 LC: 11 October 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

17.1 The object of this Regulation is to update a penalty notice offence consequential on the remaking of a public health order.

17.2 This Order is made under the Public Health Act 2010, including sections 118 and 134, the general regulation-making power.

Issues considered by the Committee

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offences – right to a fair trial

17.3 The *Public Health Amendment (COVID-19 Air and Maritime Arrivals) Regulation 2022* (Regulation) amends the *Public Health Regulation 2012* (Public Health Regulation) to enable penalty notices to be issued for a breach of a direction made under the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 2) 2022* or an order that replaces that order.

17.4 The Public Health Regulation previously provided that penalty notices could be issued for a breach of a direction made under the *Public Health (COVID-19) Air and maritime Arrivals) Order (No 1) 2022*. This Regulation therefore extends the operation of the penalty notice provisions that were previously in place, and additionally provides that any orders replacing the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 2) 2022* will automatically be able to result in the issue of penalty notices under the Public Health Regulation.

17.5 The maximum penalty that can be issued for a contravention of these provisions is $5 000 for an individual, and $10 000 for a corporation.

The *Public Health Amendment (COVID-19 Air and Maritime Arrivals) Regulation 2022* (Regulation) amends the *Public Health Regulation 2012* (Public Health Regulation) to enable penalty notices to be issued for a breach of a direction made under the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 2) 2022* or an order that replaces that order. Penalty notices that can be issued in

relation to these offences are $5 000 for an individual, or $10 000 for a corporation.

The Regulation previously provided for penalty notices being issued under the *Public Health (COVID-19) Air and Maritime Arrivals) Order (No 1) 2022.* This Regulation therefore extends the operation of the penalty notice provisions that were previously in place, and additionally provides that any orders replacing the current order will automatically be able to result in the issue of penalty notices under the Public Health Regulation.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and, in some circumstances, may elect to have the matter heard by a court. This may impact a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

Further, the Committee notes that this amendment provides that further orders made will be able to authorise the issuing of penalty notices without requiring amendment to the Public Health Regulation, which means that they would not be subject to disallowance.

The Committee also acknowledges individuals and corporations retain the right to elect to have their matter heard and decided by a Court, and the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee further acknowledges that compliance is aimed at reducing the impact of the COVID-19 pandemic.

However, the Committee notes that the value of the penalty notice that can be issued is significant. Further, because the Regulation allows for new orders to replace the current order and be automatically authorised to issue penalty notices, these penalty notices may be issued indefinitely without requiring amending Regulations to be tabled before the Parliament and therefore subject to disallowance. In the circumstances, the Committee refers the mater to Parliament for its consideration.

Appendix One – Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

(1) The functions of the Committee with respect to Bills are:

(a) to consider any Bill introduced into Parliament, and

(b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:

(i) trespasses unduly on personal rights and liberties, or

(ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or

(iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or

(iv) inappropriately delegates legislative powers, or

(v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

(2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to regulations

(1) The functions of the Committee with respect to regulations are:

(a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,

(b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:

(i) that the regulation trespasses unduly on personal rights and liberties,

(ii) that the regulation may have an adverse impact on the business community,

(iii) that the regulation may not have been within the general objects of the legislation under which it was made,

(iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

(v) that the objective of the regulation could have been achieved by alternative and more effective means,

(vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,

(vii) that the form or intention of the regulation calls for elucidation, or

(viii) that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and

(c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

(1A) The Committee is not precluded from exercising its functions under subsection (1) in relation to a regulation after it has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the regulation.

(2) Further functions of the Committee are:

(a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and

(b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

(3) The functions of the Committee with respect to regulations do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

Appendix Two – COVID-19 Related Regulations (Not Reported On)

	Regulations	**Digest No.**	**Date**
1	Community Land Management Amendment (COVID-19) Regulation (No 3) 2021	39	22 February 2022
2	District Court Criminal Practice Note 23	39	22 February 2022
3	Electoral Funding Amendment (Political Donations Disclosure Period) Regulation 2021	39	22 February 2022
4	Local Government (General) Amendment (Elections) Regulation 2021	39	22 February 2022
5	Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Amendment (Displaced Persons) Regulation 2021	39	22 February 2022
6	Referable Debt Order (2021-736)	39	22 February 2022
7	Referable Debt Order (2021-769)	39	22 February 2022
8	Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2021	39	22 February 2022
9	Strata Schemes Management Amendment (COVID-19) Regulation (No 3) 2021	39	22 February 2022
10	Liquor Amendment (Outdoor Dining) Regulation 2022	40	22 March 2022
11	Local Government (General) Amendment (By-Elections during COVID-19 Pandemic) Regulation 2022	40	22 March 2022
12	Public Health Amendment (COVID-19) Regulation (No 2) 2022	40	22 March 2022
13	Liquor Amendment (COVID Support) Regulation 2022	41	29 March 2022
14	Public Health Amendment (COVID-19) Regulation (No 2) 2022	41	29 March 2022
15	Community Land Management Amendment (COVID-19) Regulation 2022	45	21 June 2022
16	District Court Criminal Practice Note 27 – Jury Trials and Judge Alone Trials	45	21 June 2022
17	Poisons and Therapeutic Goods Amendment (Prescription Requirements) Regulation 2022	45	21 June 2022
18	Strata Schemes Management Amendment (COVID-19) Regulation 2022	45	21 June 2022