PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

Volume I: 2020 COVID-related reports

Contents

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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

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 s 8A(1)(b) of the *Legislation Review Act 1987*.

COMMENT ON REGULATIONS

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

Conclusions

PART ONE – BILLS

1. COVID-19 LEGISLATION (EMERGENCY MEASURES) BILL 2020

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

Right to a fair trial – pre-recorded evidence hearings

The Bill amends the *Criminal Procedure Act 1986* to allow a "relevant witness" in a trial to given evidence before the trial in a pre-recorded evidence hearing. A "relevant witness" is defined quite broadly and includes a complainant or witness whom the court considers is at significantly greater risk from the COVID-19 pandemic than the risk to members of the community generally, including because of their age or health.

These provisions may impact on the right to a fair trial including the ability of defence counsel to cross-examine witnesses after the prosecution has opened its case, thereby thoroughly testing that case. However, the Committee notes that the Bill includes a number of safeguards. For example, before making such an order regarding pre-recorded evidence, the court must be satisfied that it is in the interests of justice to do so. Similarly, the provisions have been introduced as an extraordinary measure to ensure that criminal trials are conducted in an appropriate way in the face of the COVID-19 pandemic; and are time limited – they are to be repealed within 12 months of commencement. In the circumstances, the Committee makes no further comment.

Right to a fair trial – use of recorded evidence in new trials

The Bill amends the *Criminal Procedure Act* 1986 to allow the original evidence of a witness recorded in a criminal trial to be used in a new trial, for example, where the original trial has been discontinued. These provisions may impact on the right to a fair trial including the ability of defence counsel to cross-examine witnesses after the prosecution has opened its case, thereby thoroughly testing that case.

However, the Committee notes that the Bill includes safeguards. The court can decline to admit a record of the original evidence if it is of the opinion that in doing so, the accused would be unfairly disadvantaged. Similarly, the provisions have been introduced as an extraordinary measure to ensure that criminal trials are conducted in an appropriate way in the face of the COVID-19 pandemic; and are time limited – they will be automatically repealed within 12 months of commencement. In the circumstances, the Committee makes no further comment.

Right to a fair trial – access to pre-recorded evidence

As above, the Bill allows a "relevant witness" in a trial to give evidence before the trial in a pre-recorded evidence hearing. It also allows the original evidence of a witness recorded in a criminal trial to be used in a new trial, for example, where the original trial has been discontinued.

The Bill also makes provision for access to this pre-recorded evidence. It provides that the accused person and his or her legal practitioner are to be given reasonable access, from time to time, to the recording. However, it also provides that the accused and the legal practitioner are not entitled to be given possession of a recording of evidence if the evidence was given by

certain categories of witness including certain complainants, those with a cognitive impairment, and children.

The Bill may thereby impact on the right to a fair trial by limiting the ability of the accused to access evidence and so respond to the case against him or her. The Committee acknowledges that the provisions are designed to protect vulnerable witnesses. Further, a safeguard is included: if reasonable access to the original recording of evidence cannot be given, the prosecuting authority must, as soon as practicable, give the legal practitioner reasonable access to the recording in the way the authority considers appropriate. The Committee refers the provisions to Parliament to consider whether they are reasonable and proportionate in the circumstances.

Right to a fair trial – jury trials

The Bill amends the *Criminal Procedure Act 1986* so that a court may, on its own motion, order that an accused person be tried by Judge alone. This may impact on the right to a fair trial, specifically, the right of the accused to be judged by his or her own peers, according to prevailing community norms. However, the Committee notes that various safeguards apply, including that the accused retains a right of veto – he or she must consent to be tried by a Judge alone. Similarly, the provisions have been introduced as an extraordinary measure to ensure that criminal trials are conducted in an appropriate way in the face of the COVID-19 pandemic; and are time limited – they will be automatically repealed within 12 months of commencement. In the circumstances, the Committee makes no further comment.

Right to a fair trial and fair bail hearing – appearance by audio visual link

Schedule 2.9 of the Bill provides that an accused person is to appear at bail proceedings by audio visual link unless the court directs otherwise. It further provides that, if the court directs, an accused person is to appear by audio visual link at "physical appearance proceedings" including trials, hearings of charges and any inquiry into a person's fitness to be tried for an offence.

By removing rights to appear in person and thereby interact fully with one's legal representatives, the Bill may impact on the right to a fair trial and fair bail hearing. However, various safeguards apply including that the court must be satisfied that parties have reasonable opportunity for private communication with their legal representatives.

Further, the provisions are an extraordinary measure to respond to the public health risk created by COVID-19. The court can only make a direction under the provisions if it is in the interests of justice and it is not inconsistent with the advice given by the Chief Health Officer relating to the COVID-19 pandemic. In this vein, the provisions are also time limited, only applying for a maximum of 12 months after their commencement. In the circumstances, the Committee makes no further comment.

Retrospectivity

The amendments in Schedule 1 of the Bill to enable a witness in a trial to give evidence before the trial in a pre-recorded evidence hearing; and those to enable the original evidence of a witness recorded in a criminal trial to be used in a new trial, have some retrospective effect. As noted previously, these provisions may also have some effect on the right to a fair trial.

The Committee generally comments where provisions are drafted with retrospective effect as this runs counter to the rule of law principle that persons are entitled to know the law to which

they are subject at any given time. This is particularly the case in instances such as this where provisions may have a retrospective impact on rights – the right to a fair trial.

However, the Committee acknowledges that the provisions have been introduced as an extraordinary measure to ensure that criminal trials are conducted in an appropriate way in the face of the COVID-19 pandemic. It may assist if evidence recorded prior to the commencement of the provisions can be used in trials during the pandemic to promote social distancing. In the circumstances, the Committee makes no further comment.

Right to humane treatment in detention

Schedules 2.2 and 2.5 to the Bill enable the Secretary of the Department of Communities and Justice, and the Commissioner of Corrective Services to restrict persons from visiting youth detention centres and adult correctional centres if satisfied that it is reasonably necessary to protect the health of a detainee or inmate, any other person, or the public, from the public health risk posed by the COVID-19 pandemic.

By restricting visits to youth detainees and adult inmates, the Bill may impact on the right to humane treatment in detention. However, the Committee acknowledges that the provisions are an extraordinary measure to protect public, staff and detainee/inmate health in the face of the COVID-19 pandemic. Further, the provisions can only apply for a maximum of 12 months and safeguards apply: they do not stop the Ombudsman or Inspector of Custodial Services visiting; nor do they affect other communications between detainees/inmates and others by post, email, telephone etc. In the circumstances, the Committee makes no further comment.

Victims' rights

Schedule 2.5 to the Bill also enables the Commissioner of Corrective Services to grant parole to certain inmates belonging to a class prescribed by the regulations if satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic.

The Bill may thereby impact on victims' rights. However, the Committee notes the safeguards contained in the Bill. For example, the Commissioner cannot make such an order in respect of inmates serving a sentence for certain offences including murder, a serious sex offence, or a terrorism offence. Further, the Commissioner must consider certain matters in making the order including the risk to community safety and the victim impact of the release. In addition, the parole framework would be used for inmates released under the provisions and there is no limit to the conditions the Commissioner could impose including home detention and electronic monitoring.

The Committee also acknowledges that the provisions are an extraordinary measure to protect public, staff and inmate health in the face of the COVID-19 pandemic. Given the circumstances and safeguards, the Committee makes no further comment.

Disability rights

Schedule 2.3 of the Bill amends the *Civil and Administrative Tribunal Ac 2013* to make changes to the way in with the NSW Civil and Administrative Tribunal (NCAT) operates during the public health emergency created by the COVID-19 pandemic. In particular, it provides that the NCAT may, when exercising a function allocated to its Guardianship Division, be constituted by 2 members assigned to the Guardianship Division instead of 3 members.

This may accord less weight to decisions about guardianship applications thereby affecting the rights of people with disability who are the subject of those applications. However, while the Committee acknowledges the importance of disability rights, it notes that the provisions are an extraordinary measure to protect public health in the face of the COVID-19 epidemic; and are consequently time limited to apply for no more than 12 months. In the circumstances, the Committee considers they are reasonable and proportionate and makes no further comment.

Judicial review rights

Schedule 2.6 of the Bill amends the Crimes (Domestic and Personal Violence) Act 2007 to extend the period of time in which the listing of an application constituted by a provisional apprehended violence order made by a police officer must occur from not more than 28 days to not more than 6 months after the making of the provisional order.

The Committee notes that the provisions affect rights to judicial review – a provisional order made by police that restricts the defendant (e.g. by stopping him or her from going within 100 metres of certain places or people) may stay in place for up to six months without the opportunity for review by a court. However, the Committee acknowledges that the provisions are an extraordinary measure to respond to any impacts that the COVID-19 pandemic may have on the operation of courts in NSW; and they are accordingly time-limited to apply for no more than 12 months after their commencement. Further, the requirement to list the provisional order on the next available court date does not change. In the circumstances, the Committee makes no further comment.

Voting rights

Schedule 2.12 of the Bill amends the Local Government Act 1993 to enable the Minister for Local Government to postpone holding council elections and by-elections if the Minister believes, having regard to the COVID-19 pandemic, that it is reasonable to do so. The Bill may thereby impact on citizens' voting rights. However, as these provisions are an extraordinary measure to respond to the public health risk created by COVID-19; and as they are time limited to apply for a maximum of 12 months, the Committee considers they are reasonable in the circumstances and makes no further comment.

Right to participate in public life

Schedule 2.12 of the Bill removes the need for council members or other persons to attend council meetings, providing that meetings can instead be held by audio visual link or in any other manner approved by the Minister for Local Government if audio visual links are not reasonably available. Further, requirements for council meetings to be open to the public will be satisfied if they are webcast or, if this cannot happen, where members of the public are informed of what occurred at the meeting in any other manner approved by the Minister.

The Bill may thereby impact on the right of citizens to participate in public life, specifically, their right to attend council meetings, address the meeting, and ask questions. However, the Committee notes that the provisions are an extraordinary measure to ensure that council meetings are conducted appropriately in the context of the public health risk posed by COVID-19. Further, they are time limited to apply for no more than 12 months. In the circumstances, the Committee considers the provisions are reasonable and makes no further comment.

Rights of people detained in mental health facilities

Schedule 2.13 of the Bill amends the *Mental Health Act 2007* to provide that the Mental Health Review Tribunal may conduct a mental health inquiry by telephone, or adjourn a mental health

inquiry for up to 28 days, if the Tribunal considers that it is necessary to do so because of the COVID-19 pandemic.

In doing so, the Bill may impact on the rights of people detained in mental health facilities, in particular, their right not to be detained arbitrarily. Mental health inquiries are held to determine whether or not a person detained in a mental health facility is a mentally ill person, and to decide whether the person should continue to be detained, or be discharged.

Were it not for the amendments, mental health inquiries would have to be held in person, or by audio visual link. By allowing them to be held by telephone in certain circumstances, the Bill may impact on the Tribunal's decision-making ability given a reduced opportunity to assess the person's demeanour. Further, allowing adjournments for up to 28 days has potential to delay the discharge of persons from mental health facilities.

However, the provisions are an extraordinary measure to ensure that mental health inquiries are conducted appropriately given the risks COVID-19 poses to persons detained in mental health facilities, Tribunal members, staff, and the public. The provisions only apply where the Tribunal considers them necessary because of COVID-19, and they are consequently time limited to apply for no more than 12 months. Whilst acknowledging the importance of humane treatment of persons detained in mental health facilities, the Committee considers the provisions are reasonable and proportionate in the circumstances and makes no further comment.

Right to liberty – arrest without warrant

Schedule 2.16[3] of the Bill amends the Public Health Act 2010 to enable a police officer to arrest a person without warrant if the police officer suspects on reasonable grounds that the person is contravening a public health order relating to the COVID-19 pandemic. On arrest the person can be returned to his or her place of residence or detention, or if he or she is homeless, to a place specified in the public health order where the person has been ordered to reside.

Were it not for these provisions, a warrant would be required for the arrest. The Bill may thereby impact on the right to liberty and against arbitrary detention. However, the Committee acknowledges that the provisions are an extraordinary measure so that authorities can respond swiftly to any public health risks in the context of the COVID-19 pandemic. They are accordingly time limited to lapse 12 months after their commencement. In the circumstances, the Committee makes no further comment.

Right to privacy and privilege against self-incrimination

Schedule 2.16[4] of the Bill provides that a police officer is an authorised officer under the *Public Health Act 2010* for the purposes of requiring a person suspected of contravening a provision of the Act to provide the person's name and address. Failure to comply without reasonable excuse, or providing false or misleading information, is an offence attracting significant maximum monetary penalties.

By expanding the categories of officer who can demand such information, the Bill may impact on the right to privacy and the privilege against self-incrimination. However, the practicalities of enforcement may require the person's details e.g. for the purposes of issuing a penalty notice. Efficient enforcement of public health requirements is also important given the extraordinary circumstances created by the COVID-19 pandemic; and the expansion is accordingly time-limited to lapse 12 months after commencement.

Further, certain safeguards apply, for example a person is not guilty of an offence for failing to provide the information unless he or she was warned that failure to comply is an offence; and there are limits to the admissibility of the information in evidence against the person in criminal proceedings. Given these safeguards and the circumstances, the Committee makes no further comment.

Property rights and retrospectivity

Schedule 2.17 of the Bill amends the *Residential Tenancies Act 2010* to provide that the Minister for Better Regulation and Innovation can make regulations under any relevant Act to respond to the public health emergency caused by the COVID-19 pandemic. If made, such regulations could prevent landlords from enforcing certain rights under any Act relating to the leasing of premises or land for residential purposes e.g. the right to evict a tenant, or to terminate a lease in particular circumstances.

Schedule 2.18 of the Bill amends the *Retails Leases Act 1994* to provide a similar regulation-making power to the Minister for Finance and Small Business in respect of commercial leases.

In providing that the Ministers can make regulations to retrospectively stipulate that landlords cannot enforce legal rights under residential and commercial tenancy agreements, the Bill may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, particularly where they retrospectively remove 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 notes that the provisions are an extraordinary measure that seeks to respond to the economic crisis created by the COVID-19 pandemic. Further, any regulations made under them could not last for more than 6 months, and could only be made if the relevant Minister considered them reasonable to protect the welfare of residents, tenants and lessees. In the circumstances, the Committee makes no further comment.

Industrial rights

Schedule 2.19 of the Bill amends the *Retail Trading Act 2008* to provide that supermarkets are exempt from the requirement to be closed at all times on Good Friday 2020, at all times on Easter Sunday 2020, and at all times before 1pm on Anzac Day 2020. This may impact on the industrial rights of affected employees who would otherwise be able to observe the public holidays.

However, for the exemption to apply, the supermarkets must only be staffed by those employees who have freely elected to work on the days in question. Further, in the context of the COVID-19 pandemic, the provisions may assist to keep supermarkets well stocked and prevent panic buying, hoarding, and over-crowding of supermarkets with the attendant risk of spreading infection. Given the circumstances, and the safeguard, 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

Ill-defined power – working with children checks

Schedule 2.1 of the Bill enables the Children's Guardian to extend the period during which a working with children check clearance is in force, at his or her discretion. The provision is time

limited so that it will be repealed no more than 12 months after its commencement. However, an extension granted under the provision is not affected by its repeal.

The Committee notes that the provisions are drafted so that there is no limit as to the length of extension the Guardian can grant, and to contain no limit as to the reasons for which the Guardian can grant an extension (though the heading to the relevant provisions reads "duration of clearances – response to COVID-19 pandemic"). The Bill may thereby grant an ill-defined administrative power.

The Committee acknowledges that the provisions are intended to allow flexibility for the Guardian to respond quickly and appropriately to the COVID-19 pandemic. Further, the NSW working with children check system involves continuous monitoring so that employers are advised should a person become barred to work with children regardless of the length of the clearance that they have been granted. In this way, children continue to be protected.

However, the Committee prefers provisions that grant administrative powers to be drafted with sufficient precision, so that their scope and content is clear. In particular, the provision might have been drafted to clearly limit the Guardian's power to grant an extension to cases where this is necessary to respond to COVID-19. The Committee refers the provisions to Parliament to consider whether they contain an insufficiently defined administrative power.

Wide and ill-defined power – development approvals

Schedule 2.8 of the Bill amends the *Environmental Planning and Assessment Act 1979* to provide that the Minister for Planning and Public Spaces may, by order published in the Gazette, authorise development to be carried out on land without the need for any approval under the Act, or consent from any person. Further, the order would have effect despite any environmental planning instrument or development consent.

In doing so, the Bill may grant the Minister a wide and ill-defined administrative power. However, the Committee acknowledges that the provisions are an extraordinary measure, removing planning impediments to allow a swift and appropriate response to the COVID-19 pandemic e.g. converting buildings into temporary hospitals.

In this vein, the Minister can only make such an order if the Minister has consulted with the Minister for Health and Medical Research, and is reasonably satisfied that the making of the order is necessary to protect the health, safety and welfare of members of the public during the COVID-19 pandemic. Further, the provisions are time limited, only applying for a maximum of 12 months after their commencement. In the circumstances, and given the safeguards, the Committee considers the provisions are reasonable and makes no further comment.

Ill-defined power – exemption for state vaccine centres

Schedule 2.10 of the Bill amends the Health Practitioner (Adoption of National Law) Act 2009 to provide that the Secretary of the Ministry of Health can, by notice published in the Gazette, exempt a State Vaccine Centre from some or all of the provisions of Schedule 5F of Schedule 1[25] of the Act "if satisfied that it is in the public interest to do so".

A State Vaccine Centre is defined to mean "premises designated by the Secretary of the Ministry for Health for the storage and distribution of vaccines or medicines or both". Schedule 5F sets down various provisions to regulate pharmacies in NSW including that the premises on which a pharmacy business is carried on in NSW must be approved by the Pharmacy Council of NSW.

The Committee appreciates that the schedule 2.10 seeks to provide more flexibility for storage and distribution of vaccines and medicines in response to the public health emergency created by COVID-19. However, by providing that the Secretary can grant the exemption "if satisfied that it is in the public interest to do so" the Bill may grant the Secretary an ill-defined power. No criteria are set down for the Secretary to follow in making such a public interest determination and the power to grant exemptions is not limited to cases in which they are necessary to respond to the COVID-19 pandemic. The Committee refers the provisions to Parliament to consider whether they contain an insufficiently defined administrative power.

Wide and ill-defined power – selection of jurors by sheriff

Schedule 2.11 of the Bill amends the Jury Act 1977 to provide that the sheriff may exempt a person from being summoned for jury duty if in the sheriff's opinion there is good cause for the exemption. The Bill may thereby grant the sheriff a wide and ill-defined power. The provisions place no limits on the sheriff's discretion although one factor he or she can take into account in granting an exemption is whether there are safety or welfare considerations relating to the community at large.

The Committee acknowledges the provisions are an extraordinary measure, giving the sheriff flexibility to ensure that jury trials and coronial inquests are conducted in an appropriate way in the face of the COVID-19 pandemic. Further, the provisions are time limited to apply for no longer than 12 months. In the circumstances, the Committee makes no further comment.

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

Rights to review of administrative decisions

Schedule 2.16[1] and [2] of the Bill amends the *Public Health Act 2010* to provide that a public health order made by an authorised medical practitioner in respect of a person relating to the COVID-19 pandemic remains in force for the period specified in the order, rather than expiring after 3 business days and then requiring the NCAT to confirm the order. Such an order may require the person subject to it to do a number of things including undergoing specified treatment; and the order may also authorise the detention of that person for its duration.

By removing the requirement for NCAT to confirm these public health orders, the Bill may impact on the rights of affected persons to have those administrative decisions independently reviewed. The Committee appreciates that authorities may need to move swiftly to issue a significant number of orders to contain the COVID-19 pandemic. Notwithstanding this, the orders can remove fundamental rights e.g. by authorising the detention of a person. In these circumstances it is important that affected persons can access independent review of such decisions. The Committee refers the matter to Parliament for consideration.

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

Henry VIII clause and significant matters in subordinate legislation – legal proceedings and administration of sentences

Schedule 1 of the Bill amends the *Criminal Procedure Act 1986* to provide that regulations may be made under various specified Acts in relation to altered arrangements for criminal trials, pre-trial procedures, apprehended violence order proceedings, bail and sentencing, and matters relating to the administration of sentences, for the purposes of responding to the COVID-19 pandemic. The Bill thereby allows for significant matters to be dealt with in subordinate

legislation. The Committee generally prefers for such matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight.

Further, the Bill provides that the regulations that can be made are not limited by the regulation-making powers in the specified Acts, and can override the provisions of any Act or other law. This is a Henry VIII clause, allowing the Executive to legislate without reference to the Parliament.

Under ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by the COVID-19 pandemic, the provisions are a reasonable measure to facilitate a timely and appropriate response to any emerging issues in the justice portfolio, and thereby to ensure the continued administration of justice in NSW. The Committee also notes the safeguards in the Bill. For example, the regulations can only be made if Parliament is not sitting (or is not likely to sit within 2 weeks) and if the arrangements they provide for are in accordance with advice of the Minister for Health or the Chief Health Officer. In addition, the regulations are automatically repealed after 6 months, unless earlier repealed by Parliament. In the extraordinary circumstances, and given the safeguards, the Committee makes no further comment.

Henry VIII clauses

The Bill contains other clauses that allow Ministers to recommend that regulations be made that can override the provisions of primary legislation, and thereby to legislate without reference to Parliament.

For example, schedule 2.12[3] amends the Local Government Act 1993 to allow the Minister for Local Government to recommend that regulations be made that modify the application of the Act for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. Similarly, schedule 2.7 amends the Electronic Transactions Act 2000 to enable the Attorney General to recommend that regulations be made under certain Acts to make alternative arrangements for the signing and witnessing of documents for the purposes of responding to the COVID-19 pandemic. These regulations can override the provisions of any Act or other law.

Again, these are Henry VIII clauses and would ordinarily be an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the provisions are a reasonable measure to allow a flexible and timely response to the pandemic, in a way that minimises disruption in public and everyday administrative matters. Further, safeguards apply including limits on the amount of time for which regulations made under these provisions can apply. In the circumstances, the Committee makes no further comment.

Significant matters in subordinate legislation – parole

As noted previously, schedule 2.5 to the Bill amends the Crimes (Administration of Sentences) Act 1999 to enable the Commissioner to grant parole to certain inmates belonging to a class prescribed by the regulations if satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from COVID-19. The Commissioner can only do so during the "prescribed period" which runs for no more than 12 months after the commencement of the provisions.

Schedule 2.5 also provides that any inmates released on such parole will be subject to the arrangements set down in Part 6 of the Act for inmates released under the ordinary parole system, subject to any modifications set down in the regulations. Further, schedule 2.5 provides

that the regulations can make provision for further significant matters including the application of the Act to an inmate released on parole under a Commissioner's order who remains on parole at the end of the "prescribed period".

The Committee notes that Schedule 2.5 of the Bill thereby allows subordinate legislation to make provision for very significant matters. Matters such as the classes of inmate who can be released on parole should be set by primary legislation to allow an appropriate level of parliamentary oversight. However, the Committee considers that in the emergency conditions created by COVID-19, the provisions may be reasonable to allow authorities the flexibility to respond quickly and appropriately to any emerging health issues in correctional centres whilst keeping the wider community safe. Given these extraordinary circumstances, the Committee makes no further comment.

2. TREASURY LEGISLATION AMENDMENT (COVID-19) BILL 2020

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

3. COVID-19 LEGISLATION AMENDMENT (EMERGENCY MEASURES – ATTORNEY GENERAL) BILL 2020

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

Rights to privacy, personal physical integrity, liberty and a fair trial; and freedom of movement – court security

Schedule 1.1 to the Bill amends the *Court Security Act 2005* to empower security officers to require persons entering court premises to submit to temperature checks and to answer questions relating to "signs of illness" such as fever, cough, sore throat, or shortness of breath. If a person fails to comply the security officer can refuse entry to the court premises or require the person to leave. A person who fails to submit to the temperature check and fails to leave is guilty of an offence attracting a maximum $550 fine.

Further, schedule 1.1 amends the *Court Security Act 2005* to empower security officers to refuse entry to, or require the departure from court premises of persons reporting "signs of illness" or who display them, for example, a person returning a temperature of 38 degrees Celsius or more following a temperature check. Again, a person who fails to comply with such a direction to leave is guilty of an offence attracting a maximum $550 fine.

The Committee also notes that security officers can, without warrant, arrest any person on court premises who is committing an offence under section 16 of the *Court Security Act 2005.*

By requiring people to submit to temperature checks and answer questions about their health, the Bill may impact on the right to personal physical integrity and privacy, particularly for those people who are compelled to attend court on the day in question.

In addition, by allowing security officers to refuse entry to court premises or require people to leave on pain of penalty or arrest without warrant, the Bill may impact on freedom of movement, the right to liberty, and again, on personal physical integrity. It may also have some impact on the public administration of justice and the Committee notes that public oversight of the justice system has implications for the right to a fair trial.

However, the Committee acknowledges that these considerations must be balanced against the public health emergency created by COVID-19, to which the provisions seek to respond. Accordingly, the provisions are time-limited to be repealed no later than 26 March 2021.

Further, the Bill contains some safeguards. For example, where a person who must attend court on the day in question is refused entry or asked to leave for not complying with a temperature check or for exhibiting or reporting "signs of illness" the security officer must give him or her a notice certifying that he or she was required to leave the court premises or refused entry. This can be used as evidence that the person has tried to attend but could not access or remain on the premises in any court action taken in the person's absence. Similarly, a person who fails to comply with a security officer's direction under the provisions must be warned that failure to comply may be an offence exposing the person to the risk of arrest before further action can be taken against him or her. In the extraordinary circumstances, the Committee considers the provisions are reasonable and proportionate, and makes no further comment.

Right to a fair trial – written pleas

Schedule 1.2 of the Bill amends section 182 of the *Criminal Procedure Act 1986* to temporarily remove an exclusion so that an accused person who has been served with a court attendance notice and who has been granted or refused bail, or in relation to whom bail has been dispensed with, is not prevented from lodging a written plea of guilty or not guilty. In the case of a guilty plea, this may be accompanied by additional written material in mitigation of the offence.

The amendment may have some impact on the right to a fair trial by allowing written pleas to be entered in such cases. Arguments presented in writing, in this case material in mitigation of an offence to which an accused person is pleading guilty, may have less persuasive force than those presented in person. This is particularly the case in respect of unrepresented persons should they have limited literacy.

However, these considerations must be balanced against the public health emergency created by COVID-19, to which the amendment seeks to respond by reducing the number of people who appear physically in court. Accordingly, the amendments are time limited and cannot last past 26 March 2021. Further, the amendments do not compel affected accused persons to enter written pleas. In the circumstances, the Committee makes no further comment.

Right to a fair trial – appearance by audio visual link

The *COVID-19 Legislation (Emergency Measures) Bill 2020* which passed Parliament on 24 March 2020, contained special provisions to facilitate increased use of audio visual links in court proceedings during the COVID-19 pandemic. Schedule 1.4 to the current Bill expands on this and includes a new power so that an accused person who is not in custody can appear by audio visual link if the court so directs or the parties to the proceedings consent.

The Committee noted in Digest No. 12/57, when commenting on the original provisions, that by removing rights to appear in person and thereby fully interact with one's legal representatives, the provisions may impact on the right to a fair trial. These comments apply equally to the amendments made in schedule 1.4 to the current Bill.

However, various safeguards apply including that the court can only make a direction to proceed by audio visual link if it is in the interests of justice having regard to a number of factors including the public health risk posed by the COVID-19 pandemic, and if satisfied that the accused person is able to have private communication with his or her legal representative and has had reasonable opportunity to do so. Further, the provisions are time limited and will last for less

than 12 months from their commencement. Given the safeguards, time limit, and the extraordinary public health risk created by COVID-19 to which the provisions seek to respond, the Committee makes no further comment.

Freedom of movement

Schedule 1.5 to the Bill allows the Sheriff, with the approval of the Secretary of the Department of Communities and Justice, to enter into an agreement with the head of another Public Service agency to enable a sheriff's officer to assist that other agency in its COVID-19 pandemic response.

In particular a sheriff's officer when so assisting a Public Service agency may issue certain directions to a person entering, attempting to enter or on restricted access premises e.g. to leave or remain on the premises or part of the premises. "Restricted access premises" are defined as a residence or other place at which a person is required to reside pursuant to an order under section 7 of the Public Health Act 2010 relating to COVID-19; or a premises prescribed by the regulations. Failure to comply with a direction is an offence attracting a maximum penalty of a $110 fine.

Schedule 1.5 may thereby impact on freedom of movement. However, various safeguards apply. For example, the sheriff's officer an only issue such a direction if the officer reasonably believes the direction is necessary to prevent a person from unlawfully entering or exiting restricted access premises or remaining on restricted access premises; or to prevent a person from assaulting another person or from damaging property at restricted access premises. Further, the sheriff's officer must issue a second direction and a warning that failure to comply is an offence, and the person must persist with non-compliance after that before he or she can be fined.

The Committee acknowledges that the provisions are intended to assist with quarantine enforcement during the COVID-19 pandemic and are time limited to cease no later than 26 March 2021. In the circumstances, and given the safeguards that apply, the Committee considers the provisions are a reasonable and proportionate response to the public health emergency and makes no further comment.

Right to privacy and personal physical integrity and freedom from arbitrary interference

As above, schedule 1.5 to the Bill allows the Sheriff, with the approval of the Secretary of the Department of Communities and Justice, to enter into an agreement with the head of another Public Service agency to enable a sheriff's officer to assist that other agency in its COVID-19 pandemic response and it grants a sheriff's officer the power to issue directions to people when providing that assistance.

Under schedule 1.5, a sheriff's officer may also, without warrant, enter restricted access premises and arrest or detain a person, when so assisting a Public Service agency. The officer can use reasonable force in doing so. "Restricted access premises" are defined so as they may include private residences. As above they are "a residence or other place at which a person is required to reside pursuant to an order under section 7 of the Public Health Act 2010 relating to COVID-19"; or premises prescribed by the regulations.

Powers to enter premises, particularly private residences, and to arrest and detain people have the capacity to impact on privacy rights and the right to personal physical integrity. As the powers can be exercised without a warrant they also have the capacity to impact on the right to be free from arbitrary interference.

The Committee acknowledges that various safeguards apply. For example, a sheriff's officer can only exercise the powers if a person has failed to comply with the officer's second direction, or if the officer believes on reasonable grounds that the power must be exercised urgently or a direction will be insufficient, for example, to prevent or stop a person from unlawfully entering or exiting restricted access premises. Further, as soon as practicable after arresting or detaining the person, the officer is to hand the person into the custody of a police officer to be dealt with according to law.

The Committee also acknowledges that the provisions are an extraordinary measure to respond to the public health emergency created by COVID-19 and are intended to assist with quarantine enforcement, particularly in hotels. They are accordingly time limited to cease no later than 26 March 2021.

However, the provisions allow a new category of officer, sheriff's officers, significant powers to enter premises without a warrant to arrest or detain a person, and these premises may include private residences. They may thereby unduly impact on personal rights and liberties, in particular the right to be free from arbitrary interference, and privacy rights. The Committee refers the provisions to Parliament to consider whether they are reasonable and proportionate in the circumstances.

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

Significant matters in subordinate legislation and Henry VIII clause

The *COVID-19 Legislation (Emergency Measures) Bill 2020* inserted section 17 into the *Electronic Transactions Act 2000* (the Act). This section enabled the Attorney General to recommend that regulations be made to facilitate alternative arrangements for the signing and witnessing of documents for the purposes of responding to the COVID-19 pandemic (e.g. witnessing by audio visual link).

Schedule 1.3 to the current Bill expands on this power, allowing regulations to be made under section 17 of the Act or another "relevant Act" to provide for new arrangements that may be necessary for the creation, execution, certification, witnessing, filing, lodgement, production, service or retention of documents under any Act.

In so doing, the Bill may allow for significant matters to be dealt with in subordinate legislation. The Committee generally prefers for such matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight.

Schedule 1.3, item 7 to the Bill also provides that if such regulations are made under section 17 they may override the provisions of any Act, regulation or other law; and if they are made under a "relevant Act" they may override the provisions of that Act or a regulation made under that Act. The Bill therefore includes Henry VIII clauses, allowing the Executive to legislate without reference to Parliament.

The Committee notes that safeguards exist. Regulations can only be made under section 17 or a "relevant Act" if Parliament is not currently sitting and is not likely to sit within 2 weeks after the day the regulations are made. In this regard, the Committee acknowledges that the Attorney General has told Parliament he intends to introduce an amending Bill to effect the changes, and not to make a regulation, if Parliament has resumed its formal sitting routine at the relevant time.

Further, regulations made under section 17 are time limited to expire 6 months after they commence, or on an earlier day decided by Parliament. However, it does not appear that regulations made under a "relevant Act" must be so time limited, and the Committee would prefer this safeguard to so extend. Subject to this observation, the Committee accepts that while they may ordinarily be an inappropriate delegation of legislative power, the provisions contained in schedule 1.3 are an extraordinary measure to allow a flexible and timely response to the public health emergency created by COVID-19. The Committee makes no further comment.

4. COVID-19 LEGISLATION AMENDMENT (EMERGENCY MEASURES – MISCELLANEOUS) BILL 2020

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

Retrospectivity and victims' rights

Schedule 1.8 of the Bill amends the *Crimes (Administration of Sentences) Act 1999* to insert section 159. The section applies to an offender who is subject to a sentence of 3 years or less, being a sentence for which a non-parole period was set; and is no longer subject to a statutory parole order under the section because the order has been revoked. Under the section, the State Parole Authority (the Authority) will be able to make an order releasing the offender on parole in the same way as it can for an offender sentenced to more than 3 years of imprisonment.

Schedule 1.8 also validates anything done by the Authority between 26 February 2018 and the commencement of these amendments if it would have been valid had the amendments been in force. That is, the amendments have retrospective effect. The Committee generally comments on provisions with retrospective effect, particularly if they affect individual rights or obligations, as they run contrary to the rule of law principle allowing persons knowledge of the law to which they are subject at any given time.

In the current case, as the retrospective provisions concern parole, they may impact on victims' rights. However, the Committee notes that parole amendments that came into force in February 2018 may have unintentionally removed the Authority's power to grant parole to certain offenders, and the provisions seek to restore this power and validate any actions taken on the assumption that the powers continued to exist. Further, safeguards apply to the powers and an offender is not to be released on parole where the Authority determines it is not in the interests of community safety. In addition, the Committee acknowledges that given the public health risks created by COVID-19, it is important that the Authority have the requisite powers to grant parole to offenders in appropriate cases to prevent prison over-crowding. In the circumstances, the Committee makes no further comment.

Right to personal physical integrity and privacy – human tissue

Schedule 1.15 of the Bill amends the *Human Tissue Act 1983* to permit any test, analysis, investigation or research required in response to the risks to public health arising from COVID-19 to be carried out, with the approval of the Secretary of the Ministry of Health, on tissue that has been lawfully removed from a person without requiring the person's consent to the use of that tissue for that purpose.

In doing so, the Bill may impact on rights to personal physical integrity and privacy. However, the Bill includes safeguards. As above, the tissue must have been lawfully removed. Similarly, use of tissue other than blood or blood products for the above purpose ceases to be authorised on the earliest possible day that a vaccine for COVID-19 is generally available. In addition, information relating to a test, analysis, investigation or research must not be published in a

generally available publication if it could reasonably be expected to identify any person the subject of the test, analysis, investigation or research.

The Committee also notes that the provisions are an extraordinary measure to respond to the public health emergency created by COVID-19, allowing NSW Health to use the material for this purpose where it would not be practicable to obtain the donor's consent. Given the extraordinary circumstances, and the safeguards contained in the Bill, the Committee makes no further comment.

Rights of people detained in mental health facilities

Section 27 of the *Mental Health Act 2007* sets down certain steps that must be taken regarding medical examination and observation of a person to determine whether they are a "mentally ill person" or a "mentally disordered person" within the meaning of the Act, and whether they should therefore be subject to ongoing detention in a mental health facility.

Schedule 1.21 of the Bill amends the *Mental Health Act 2007* to enable such examinations and observations to take place via audio visual link. In doing so, the Bill may have some impact on the rights of people detained in mental health facilities. Proceeding via audio visual link, and not in person, may make it more difficult for medical practitioners and accredited persons to make assessments. It may thereby increase risks around arbitrary detention and the provision of appropriate treatment consistent with the objects of the Act.

However, medical practitioners and accredited persons can only proceed by audio visual link if this is necessary because of the COVID-19 pandemic; and only if the examination or observation can be carried out with sufficient skill or care to enable the required opinion to be formed about the person. Further, these provisions are time limited – they only authorise the examinations and observations to be carried out by audio visual link until 26 March 2021 at the latest. Noting the safeguards, the time limit, and the public health emergency created by COVID-19, the Committee considers the provisions are reasonable and proportionate in the circumstances and makes no further comment.

Right to personal physical integrity – compulsory testing

Schedule 1.26 of the Bill amends the *Public Health Act 2010* to allow an authorised medical practitioner to make a public health order in respect of a person reasonably suspected to have a Category 4 or 5 condition, or a contact order condition, which may require that person to undergo a specified kind of medical examination or test. This provision applies to a wide range of persons outside of those who may have a COVID-19 infection, including those who may have Human Immunodeficiency Virus (HIV) infection. The Bill does not include a date or condition upon which the provisions expire.

By requiring a person to submit to a medical examination or test, the provisions may unduly trespass on the right to personal physical integrity. The Committee notes that the suitability of the provisions will be considered as part of a statutory review to be conducted by the Minister for Health and Medical Research. The Committee also recognises that the provisions are intended to protect public health through increased COVID-19 testing and tracking. However, as the provisions cover conditions other than COVID-19 and are not subject to a sunset clause, they may extend beyond the power necessary to contain the spread of COVID-19. The Committee refers the provisions to Parliament to consider whether they trespass unduly on personal rights and liberties.

Retrospectivity and freedom of contract

Schedule 1.28 of the Bill amends the Residential Tenancies Act 2010 to allow a tenant who is in financial hardship because of COVID-19 (an "impacted tenant") to apply to the NSW Civil and Administrative Tribunal (NCAT) to end a fixed term tenancy agreement.

On receiving the application, NCAT can make such a termination order if satisfied that during the "moratorium period" the landlord has failed to engage in a rent negotiation process with the impacted tenant; or where the landlord and impacted tenant have been unable to reach an agreement that would avoid financial hardship for the tenant. The "moratorium period" is defined to mean the period ending at the end of 15 October 2020.

By providing that NCAT may terminate fixed term tenancy agreements, the Bill may impact on freedom of contract – the freedom of parties to choose the contractual terms to which they are subject. The provisions also have retrospective effect, limiting the ability of landlords to rely on their rights under existing agreements. As above, the Committee generally comments on retrospective provisions, 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 notes that the provisions are an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic. Accordingly, the time during which tenants can apply for termination is limited, relating to the "moratorium period" that ends on 15 October 2020. Further, only "impacted tenants" – those who have lost at least 25 per cent of their household income as a result of COVID-19 – can apply for termination. In addition, on making the termination order, NCAT can order the tenant to pay the landlord up to two weeks' rent in compensation.

In the circumstances, the Committee considers that the provisions are a reasonable and proportionate measure to respond to COVID-19, and makes no further comment.

Retrospectivity – workers compensation liability

Schedule 1.34 of the Bill creates presumptive rights to compensation under the Workers Compensation Act 1987 for those in “prescribed employment” which includes employment in a number of areas involving a higher risk of exposure to COVID-19.

In addition, schedule 1.34 provides that the amendments contained therein extend to a worker who had confirmed COVID-19 before the amendments commenced. That is, the amendments have retrospective effect. As above, the Committee generally comments on provisions that have retrospective effect, especially if they affect individual rights or obligations. In this case, the provisions retrospectively affect liability to pay workers compensation.

However, the Committee notes that schedule 1.34 contains safeguards so that its provisions do not unduly impact on the liability of individual employers. Under schedule 1.34, regulations can be made to ensure that no employer has a surge in their premiums as a result of a claim being made under the provisions contained therein. In addition, schedule 1.34 includes regulation-making power so that the cost of any claims can be spread evenly across the scheme established by the Act.

The Committee would prefer such safeguards to be wholly included in primary legislation, not the regulations, to foster an appropriate level of parliamentary oversight. However, the Committee acknowledges the amendments in schedule 1.34 are important to ensure that frontline workers who contract COVID-19 are protected by workers compensation benefits.

Subject to the observation that the provisions to protect individual employers from rising premiums, and to spread the cost of claims, would ideally be located in primary legislation, 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

Wide and ill-defined administrative power – statutory time limits

Schedule 1.17 of the Bill amends the *Interpretation Act 1987* to insert a new Part 12. It provides powers for an authorised person to modify statutory time periods if the person is satisfied that the modification, waiver or agreement is reasonable for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. Similarly, the new Part 12 inserts a regulation-making power into the *Interpretation Act* to allow modification of statutory time periods. Again, the power can only be used to respond to the public health emergency caused by COVID-19.

As the *Interpretation Act* applies to all Acts and instruments in NSW, these provisions create wide administrative powers to modify statutory time periods. Further, as the statutory time periods relate to such things as time limits for civil and criminal procedures, the provisions may have some impact on individual rights and obligations.

In short, in ordinary circumstances, the Committee would consider the administrative powers that the provisions create to be too broad and ill-defined. However, the Committee accepts that in the current extraordinary circumstances created by COVID-19, the wide-ranging powers may be appropriate to allow a flexible and timely response to the pandemic in a way that minimises disruption in matters of public administration.

The Committee also notes the safeguards contained in the Bill. As above, the powers can only be used for the purposes of responding to the public health emergency created by COVID-19. Accordingly, the provisions are subject to a sunset clause and will be automatically repealed no later than 31 December 2020. Further, regulations cannot be made under the provisions to shorten statutory time periods or extend them beyond 31 December 2020; and cannot be made unless the Parliament is not sitting and is not likely to sit within two weeks due to the COVID-19 pandemic. In the extraordinary circumstances, and given the safeguards, the Committee makes no further comment.

Wide and ill-defined administrative power – private health facility licences

Schedule 1.24 of the Bill amends the *Private Health Facilities Act 2007* to permit the Secretary of the Ministry of Health to impose any conditions on a licence for a private health facility that the Secretary considers necessary having regard to the COVID-19 pandemic to protect the health and safety of the public, manage resources, or ensure the provision of balanced and coordinated health services throughout the State. These conditions may include limiting the types of elective surgery that can be undertaken. The Bill may thereby include a wide and ill-defined administrative power that may affect rights to access medical treatment.

However, the Committee notes that these provisions are an emergency measure, allowing authorities the necessary flexibility to manage health resources in response to the COVID-19 pandemic. Accordingly, the provisions are time limited to expire no later than 26 March 2022, and any condition imposed by the Secretary is also revoked on the day of expiry. In the circumstances, the Committee makes no further comment.

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

Significant matters in subordinate legislation and Henry VIII clauses – voting rights

The Bill amends the *Industrial Relations Act 1996* and the *Registered Clubs Act 1976* to provide that regulations can be made to modify any time periods in those Acts relating to elections for industrial organisations or governing bodies of clubs. These are Henry VIII clauses – allowing primary legislation to be amended by regulation.

As the provisions also affect voting rights in the industrial organisations and clubs, they may also allow for significant matters to be dealt with in subordinate legislation. The Committee prefers significant matters to be dealt with in primary legislation to allow for an appropriate level of parliamentary oversight.

However, the regulation-making powers conferred by the provisions are limited. Any regulations made under the provisions could only allow the time periods for elections to be held to be extended by 12 months from the date of the commencement of the provisions. Similarly, a Minister can only recommend such regulations be made if he or she considers it necessary for the purposes of responding to the public health emergency created by COVID-19, and if the Electoral Commissioner agrees to the making of the regulations.

In ordinary circumstances the provisions would represent an inappropriate delegation of legislative power. However, in the current extraordinary circumstances created by COVID-19, the provisions may be reasonable to allow a flexible and timely response to conditions created by the pandemic. Given this, and the limitations to the regulation-making powers, the Committee makes no further comment.

Henry VIII clauses – Energy Security Safeguard

Schedule 1.10 of the Bill amends the *Electricity Supply Act 1995* to constitute the Energy Security Safeguard (the Safeguard). Schedule 1.10 provides that the Safeguard is constituted by the schemes provided for in schedule 4A of the *Electricity Supply Act 1995*; and the object of the Safeguard is "to improve the affordability, reliability and sustainability of energy through the creation of financial incentives that encourage the consumption, contracting or supply of energy in particular ways". That consumption, contracting or supply of energy is an "energy activity".

Schedule 1.10 further provides that the object of the Safeguard may be given effect to by regulation that amends Schedule 4A of the *Electricity Supply Act 1995* to establish a scheme to encourage a specified "energy activity". Further, in establishing a scheme, the regulations may amend schedule 4A to the Act to make provision for any matter that is necessary or convenient for carrying out or giving effect to the object of the Safeguard.

By providing that the regulations can amend schedule 4A of the Act, the Bill contains Henry VIII clauses, thereby delegating legislative power to the Executive. However, the Committee notes that any regulations made are to be consistent with the object of the Safeguard, which is set down in the primary legislation. Further, the provisions are designed to allow sufficient flexibility to create schemes that promote economic recovery in the energy industry in the context of COVID-19. The power to make such regulations is accordingly time limited to expire on 31 December 2021. Given these considerations, the Committee makes no further comment.

Henry VIII clauses

The Bill contains other clauses that allow the provisions of primary legislation to be overridden by regulation or Executive action, and thereby to legislate without reference to Parliament.

For example, schedule 1.6 to the Bill amends the *Community Land Management Act 1989* to allow regulations to be made that override some provisions of the Act in response to COVID-19. These regulations would facilitate such things as altered arrangements for the way in which community land schemes convene meetings, or conduct votes at such meetings e.g. using technology to promote social distancing. Schedule 1.31 also amends the *Strata Schemes Management Act 2015* to create a similar regulation-making power in respect of strata schemes. Similarly, schedule 1.30 of the Bill enables the Minister for Better Regulation and Innovation to grant, by order published in the Gazette, exemptions from provisions under the *Retirement Villages Act 1999* during the COVID-19 pandemic.

Again, these are Henry VIII clauses and would ordinarily be an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the provisions are a reasonable measure to allow a flexible and timely response to the public health risk posed by the pandemic in a way that minimises disruption in public and everyday administrative and operational matters. Further, safeguards apply including limits on the time during which such regulations and orders can be made, and limits on how long the regulations and orders themselves can remain in force. In the circumstances, the Committee makes no further comment.

Significant matter in subordinate legislation – privacy rights

Schedule 1.26, items 3 and 4 of the Bill amend the *Public Health Act 2010* to provide that the Secretary of the Ministry of Health can approve certain classes of persons to provide personal information to a health records linkage organisation for the purpose of a public health or disease register established under the Act. These classes of persons include any person prescribed by the regulations.

The Committee would prefer the classes of persons to whom this power may be granted to be set out in primary, not subordinate, legislation. This is to provide for an appropriate level of parliamentary oversight over arrangements that may have privacy implications for affected individuals. The Committee refers the matter to Parliament for consideration.

Commencement by proclamation

Schedule 1.13 of the Bill amends the *Fair Trading Legislation Amendment (Reform) Act 2018* to provide that schedules 2.13, 4.1 and 4.2[2] of that Act are to commence on a day or days to be appointed by proclamation. It thereby provides the Executive with unilateral authority to commence these provisions.

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. As schedules 2.13, 4.1 and 4.2[2] relate to trade licensing, they may affect individual obligations.

However, the Committee acknowledges that were it not for the amendments contained in schedule 1.13 to the Bill, the provisions in question would commence on 1 July 2020. This may not allow enough time for operational arrangements to be made to successfully implement the provisions especially given the day to day complications caused to Government and business by the COVID-19 pandemic. A more flexible start date may assist in this regard. In the circumstances, the Committee makes no further comment.

5. COVID-19 LEGISLATION AMENDMENT (EMERGENCY MEASURES – TREASURER) BILL 2020

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

Wide and ill-defined administrative powers

Schedule 1.1, item 6 of the Bill amends the Government Sector Finance Act 2018 to allow the Treasurer to present the 2020-2021 Budget to Parliament on the "extended Budget presentation day" that is, no later than 31 December 2020, or any different day prescribed by the regulations that is not later than 30 June 2021. Under usual circumstances, the Treasurer would have been required to present the Budget to Parliament by 30 June 2020.

It also allows the Treasurer to authorise payments from the Consolidated Fund on the lapse of the appropriations made by the 2019-2020 Budget because of the delay in the 2020-2021 Budget (up to an amount of 75 per cent of the appropriations under the 2019-2020 Budget) until the "extended Budget presentation day" or the enactment of the 2020-2021 Budget, whichever occurs first. In addition, it allows the Treasurer, with the Governor's approval, to authorise payments out of the Consolidated Fund for exigencies of Government resulting from the COVID-19 pandemic until the 2020-2021 Budget is enacted.

In short, on the lapse of the 2019-2020 appropriations, the Bill allows the Treasurer to authorise much larger payments from the Consolidated Fund for a longer period than would otherwise be the case, before the 2020-2021 Budget is presented. In doing so, the Bill includes a wide and ill-defined administrative power affecting the right of citizens to know how public money is being spent.

However, the Committee acknowledges that the delayed presentation of the 2020-2021 Budget will allow the Government to allocate resources when it has a greater idea of the economic impact of COVID-19. It is also consistent with delays that are occurring in other jurisdictions. In these circumstances, until the Budget is presented, it is necessary to grant the Treasurer extraordinary powers to spend consolidated revenue to ensure that agencies are funded and that urgent demands created by the pandemic are met.

The Committee also notes the provisions in the Bill to safeguard citizens' rights to know how public money is being spent. In particular, for 2020-2021, the Treasurer must continue to publicly release monthly statements of the type referred to in section 8 of the Public Finance and Audit Act 1983, unless it is not reasonably practicable to do so. Similarly, by 28 February 2021, the Treasurer must publicly release the half-yearly review referred to in section 8 of that Act, detailing the condition of the State's finances for 2019-2020. Given these safeguards and the extraordinary conditions created by COVID-19, the Committee makes no further comment.

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

Significant matters in subordinate legislation – presentation of 2020-2021 Budget

As above, the Bill allows the Treasurer to present the 2020-21 Budget to Parliament on the "extended Budget presentation day" that is, no later than 31 December 2020, or any different day prescribed by the regulations that is not later than 30 June 2021. Under usual circumstances, the Treasurer would have been required to present the 2020-21 Budget to Parliament by 30 June 2020.

By providing that the regulations can prescribe the day on which the Budget must be presented, the Bill allows a very significant matter to be dealt with in subordinate legislation. The

Committee prefers significant matters such as these to be dealt with in primary legislation to foster an appropriate level of parliamentary oversight.

However, the Committee notes that the regulation-making power in this case is limited – the day that can be set must be no later than 30 June 2021. Further, allowing limited scope to set the day by regulation facilitates a degree of flexibility that may be appropriate in the context of responding to the unpredictable conditions created by COVID-19. In the circumstances, the Committee makes no further comment.

Significant matters in subordinate legislation and Henry VIII clauses – financial reporting requirements

Schedule 1.4 of the Bill amends the Public Finance and Audit Act 1983 to enable regulations under that Act to exempt certain Departments and statutory bodies from financial reporting requirements. The Bill thereby allows significant matters to be dealt with in subordinate legislation. It also allows the regulations to include provisions inconsistent with the primary legislation – an example of Henry VIII clauses.

Financial reporting under the Public Finance and Audit Act 1983 is important to ensure accountability to citizens for the expenditure of public funds. The Committee would generally prefer for any exemptions to such requirements to be dealt with in primary legislation to foster an appropriate level of parliamentary oversight.

However, the Committee acknowledges that changes to the Public Finance and Audit Regulation 2015 to effect the exemptions have been included in schedule 1.5 to the Bill, thereby ensuring parliamentary oversight in this instance. Further, any regulations that can be made under the powers contained in schedule 1.4 cannot last past 1 November 2021. Noting this limitation, and the fact that it may be appropriate under the extraordinary conditions created by COVID-19 to allow increased flexibility so that any further necessary exemptions can be granted without the need for an amending Bill, the Committee makes no further comment.

6. STATE REVENUE LEGISLATION AMENDMENT (COVID-19 HOUSING RESPONSE) BILL 2020

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

Significant matters not subject to parliamentary scrutiny

Schedule 3 of the Bill seeks to amend the *Land Tax Management Act 1956* to introduce new land tax concessions for certain new build-to-rent developments. Build-to-rent housing refers to housing built specifically for rental purposes.

The Bill proposes a new section 9E which reduces the value of a parcel of land for the purposes of assessing land tax by 50 per cent in the following circumstances:

- if a building is situated on the land, and
- construction of the building commenced on or after 1 July 2020, and
- the Chief Commissioner is satisfied that the building is being used and occupied for a build-to-rent property in accordance with guidelines approved by the Treasurer for the purposes of this section, and
- an application for the reduction is made in accordance with this section.

Subsection 3 of the proposed section 9E establishes what may be contained in the guidelines used to assess if a building is being used for a build-to-rent property. This includes the planning or development standards that must be complied with; the minimum lease conditions that must be offered to tenants; the minimum scale of a building; and the nature of the ownership and management of the building and the land on which the building is situated. The guidelines may also set out the circumstances in which the applicant is required to give an undertaking not to subdivide the land or otherwise divide the ownership of the land. Further, the guidelines may make provision for other matters relating to build-to-rent properties and the land on which build-to-rent properties are situated as the Treasurer determines appropriate.

As the matters dealt with in the guidelines have bearing on the grant of significant tax concessions, the Committee would prefer that they were dealt with by regulation. This would foster an appropriate level of parliamentary oversight. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. There appears to be no such requirement for the guidelines in question. The Committee refers the matter to Parliament for consideration.

PART TWO – REGULATIONS

1. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (COVID-19) REGULATION 2020

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

Victims' rights

Under section 276 of the *Crimes (Administration of Sentences) Act 1999* the Commissioner of Corrective Services may release an inmate on parole if the inmate belongs to a class specified in the regulations and if the Commissioner is satisfied that it is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic. The Regulation accordingly prescribes certain classes of inmate as eligible for release under these provisions, being an inmate whose health is at higher risk during the pandemic because of an existing condition or whose earliest possible release date is within 12 months, other than an excluded inmate.

As the Committee noted in its Digest No. 12/57, provisions allowing the early release of some inmates in response to COVID-19 may impact on victims' rights. It also noted, however, that section 276 of the Act contains safeguards, for example, the Commissioner cannot release an inmate under the provisions if the inmate is serving a sentence for murder, a serious sex offence, or a terrorism offence, and in making an order the Commissioner must consider the impact of the release on any victim whose name is recorded in the Victims Register in relation to the inmate.

Consistent with this, the Regulation provides that the Commissioner cannot release national security interest inmates, nor maximum security inmates. Further, it provides that the Commissioner can only make an order under section 276 if satisfied that it does not pose an unacceptable risk to community safety. The Committee also acknowledges that the provisions in the Act and Regulation are an extraordinary measure to protect public, staff and inmate health in the face of the COVID-19 pandemic and the Commissioner's power to release inmates under them is accordingly time limited to last for no more than 12 months. Given the circumstances, and the safeguards in the Act and Regulation, 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

Significant matters in subordinate legislation

As above, under section 276 of the Act, the Commissioner may release an inmate on parole during the COVID-19 pandemic if the inmate belongs to a class specified in the regulations, and accordingly the Regulation prescribes certain classes of inmate as eligible for release under these provisions, and excludes others.

The Committee prefers significant matters, such as the class of inmate who can be released under parole provisions, to be included in primary not subordinate legislation. This is to foster an appropriate level of parliamentary oversight. However, the Act does contain some guidance about the class of inmate who can be granted parole under the provisions, for example, excluding those who are serving a sentence for murder, a serious sex offence, or a terrorism offence. Further, in the emergency conditions created by COVID-19, placing these matters in the regulations may be reasonable to allow authorities the flexibility to respond quickly and appropriately to any emerging health issues in correctional centres whilst keeping the wider community safe. In the circumstances, the Committee makes no further comment.

2. PUBLIC HEALTH AMENDMENT (COVID-19 SPITTING AND COUGHING) REGULATION 2020

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

Penalty notice offences – right to a fair trail

The Regulation provides that a penalty notice of $5000 can be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order 2020* by intentionally spitting or coughing on a public official, or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

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. The Committee also notes that $5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, 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. 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 above, the Regulation provides that a penalty notice of $5000 can be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order 2020* by intentionally spitting or coughing on a public official, or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and 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.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately 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, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

3. PUBLIC HEALTH AMENDMENT (PENALTY NOTICES) REGULATION 2020

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

Freedom of movement

The Regulation allows penalty notices to be issued to anyone who has committed certain offences under the *Public Health Act 2010* (the Act), including not complying with an order made by the Secretary of the Ministry of Health under section 11 to close public premises on public health grounds; not complying with a public health order made under section 62 relating to COVID-19; and not following a ministerial direction made under section 7.

There are such ministerial directions currently in place, made in response to COVID-19, that restrict movement and that require people to self-isolate, spend time in quarantine, and to stay away from certain locations. The Regulation is therefore part of a regime that places restrictions on people's freedom of movement, a right contained in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. This Article protects the right to move freely in a country for those who are lawfully within that country; the right to leave any country; and the right to enter a country of which you are a citizen.

However, Article 12 also recognises that derogation from this right may be warranted in certain circumstances, for example, to protect national security, public order and public health. The Committee considers that as the Regulation is part of a regime to respond to COVID-19 and stop its spread, it fits within the public health exemption, and that the limits placed on freedom of movement are reasonable in the circumstances. Consistent with this, the provisions are time-limited – the Regulation only allows the penalty notices to be issued for offences occurring between 26 March 2020 and 25 March 2021 – and any ministerial directions only last 90 days. In the circumstances, the Committee makes no further comment.

Freedom of assembly and association

As noted, the Regulation allows penalty notices to be issued to anyone who has committed certain offences under the Act including by failing to comply with a ministerial direction issued under section 7 or an order issued under section 11 to close public premises on public health grounds. As has also been noted, there are ministerial directions currently in place pursuant to section 7, and made in response to COVID-19, that restrict movement – and also gathering – and that require people to self-isolate, spend time in quarantine, and to stay away from certain locations.

The Committee notes that the Regulation is therefore part of a regime that also places restrictions on people's right to freedom of assembly and association, rights contained in Articles

21 and 22 of the ICCPR. The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest; while the right to freedom of association protects their freedom to form and join associations to pursue a common goal, and to exchange ideas and information.

However, Articles 21 and 22 also recognise that derogation from these rights may be warranted in certain circumstances, including to protect public health. Again, as the Regulation is part of a regime to protect public health in the face of COVID-19, the Committee considers that it fits within this public health exemption and that the limits it places on freedom of assembly and association are reasonable in the circumstances, particularly as the provisions are time limited. The Committee makes no further comment.

Penalty notice offences - right to a fair trial

The Regulation allows penalty notices ranging from $1000 and $5000 to be issued to those who have breached certain ministerial directions and public health orders made under the Act.

Penalty notices allow parties to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a party'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 the amounts of $1000 and $5000 are significant amounts to be imposed on a party by way of penalty notice.

However, parties 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. Given these factors, 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

Reduced demand for certain goods and services

As noted, the Regulation allows penalty notices to be issued for breaching a ministerial direction under section 7 of the Act, an order to close public premises on public health grounds, or a public health order relating to COVID-19. Further, a number of ministerial directions have now been issued under section 7 in response to the COVID-19 pandemic that restrict gathering and movement and that require people to self-isolate, spend time in quarantine, and to stay away from certain locations.

The Regulation is therefore part of a regime that may have some adverse impact on the business community. Ministerial directions enforcing quarantine on those arriving in NSW from aircraft and maritime travel; requiring people diagnosed with COVID-19 to self-isolate; and restricting gathering and movement so that people cannot leave home except for essential reasons will decrease demand for non-essential goods and services, and services that involve large indoor or outdoor gatherings, such as the hospitality and event industry.

However, each of the ministerial directions sets down the Minister's public health grounds for making the orders including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious. Further, the Government has taken steps to support businesses during the pandemic, for example, through passage of the *Treasury Legislation Amendment (COVID-19) Bill 2020*,

discussed in the Committee's Digest No. 12/57 that provides payroll tax concessions to eligible employers.

Given the emergency public health considerations and the measures taken to support business, the Committee considers that the regime of which the Regulation is part is reasonable and proportionate in the circumstances, despite some adverse impact on business. As above, the provisions are also time limited. In the circumstances, 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

The Regulation allows penalty notices of between $1000 and $5000 to be issued to those who have breached certain ministerial directions and public health orders made under the Act.

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and 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.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately 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, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

4. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (COVID-19 PLANNING BODIES) REGULATION 2020

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

Right to participate in public life and access to public information

The Regulation provides for public hearings and public meetings of planning bodies, including the Independent Planning Commission, Sydney district and regional planning panels, and local planning panels, to be held by means of an audio link or audio visual link for 6 months during the COVID-19 pandemic.

These panels are largely independent of government and have the power to make determinations on planning matters. Public meetings enable people to put their views to these panels before a determination is made, while the meetings and public hearings also increase the amount of publicly available information about planning decisions.

By providing that public meetings and hearings can be held by audio link or audio visual link, the Regulation may limit this ability of people to put their views to the determining bodies, or to access information about planning decisions, if they do not have the relevant technology. It may thereby impact on the right to participate in public life, and to access public information.

However, the Committee notes that the provisions are an extraordinary measure to ensure that public meetings and hearings are conducted appropriately in the context of the public health

risk posed by COVID-19, and are accordingly time-limited to last 6 months. In the circumstances, the Committee considers that the provisions are reasonable and makes no further comment.

5. LOCAL GOVERNMENT (GENERAL) AMENDMENT (COVID-19) REGULATION (NO 2) 2020

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

Certainty of remuneration

The Regulation modifies the application of the *Local Government Act 1993* (the Act) to extend by two months the time within which the Remuneration Tribunal is required to determine the fees to be paid the following year to councillors and mayors. In doing so, the Regulation delays certainty of remuneration for affected persons.

However, the Committee notes that under section 246 of the Act, a determination of the Remuneration Tribunal may not be challenged, reviewed, or called into question. Therefore, although the Regulation delays certainty of remuneration it does not affect any existing opportunity to challenge a determination.

Similarly, the Regulation is made in response to the COVID-19 pandemic and may assist with such things as allowing the Remuneration Tribunal more time to coordinate their determinations via remote means, and accommodating changing economic circumstances. In the circumstances, 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

Henry VIII clause

As above, the Regulation modifies the application of the Act to extend the time within which the Remuneration Tribunal must make certain fees determinations. It does so, drawing on a power contained in section 747B of the Act, which allows regulations to be made to modify the application of the Act for the purposes of responding to COVID-19.

As noted in the Committee's Digest No.12/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and the regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, this delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic in a way that minimises disruption in matters of public administration. Further, there is a limited amount of time for which regulations made under this power can apply. In the circumstances, the Committee makes no further comment.

6. LOCAL GOVERNMENT (GENERAL) AMENDMENT (COVID-19) REGULATION 2020

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

Access to government information – inspection of documents at council offices

Schedule 1[15] of the Regulation removes the need for councils to make certain documents available for inspection by members of the public in the offices of the councils. These requirements are instead satisfied if such documents are made available on the council website and are provided to a person on request in an electronic form, or in any other form sought by the person and approved by the council.

These provisions may impact on the right to access government information. In particular, people in the community who do not have access to electronic resources can request to inspect documents in a non-electronic form, but this is at the discretion of the council. Access to government information is part of the right to participate in public life as recognised in Article 25 of the International Covenant on Civil and Political Rights to which Australia is a party.

The Committee appreciates that the provisions are an extraordinary measure to respond to the public health emergency created by COVID-19, and that they are accordingly time-limited to apply for no more than 6 months. Even so, the Committee would prefer there to be a requirement for councils to provide the documents in non-electronic form e.g. by mail, if asked to do so. The Committee refers the matter to Parliament for consideration.

Access to government information – newspapers

The Regulation removes requirements in the *Local Government (General) Regulation 2005* for councils to publish certain notices and advertisements in newspapers and instead requires publication on council websites and in other ways that a particular council considers necessary to bring the notice or advertisement to the attention of appropriate persons. Such notices impart significant information and include notices relating to constitutional referenda or council polls; and notices to do with consultation concerning categorisation of land as an area of cultural significance.

These provisions are not time limited, nor drafted to relate to COVID-19. They may impact on the right to access government information. In particular, there is no requirement for councils to make the information accessible to people who do not have access to electronic resources – this is left to the council's discretion. The Committee refers the provisions to Parliament for consideration.

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

As above, the Regulation removes the requirement under the *Local Government Act 1993* (the Act) for councils to make documents available for inspection by members of the public in the offices of the council, and makes provision for alternative arrangements. It does so, drawing on a power contained in section 747B of the Act, which allows regulations to be made to modify the application of the Act for the purposes of responding to COVID-19.

As noted in the Committee's Digest No.12/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and the regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic in a way that minimises disruption in matters of public administration. Further, there is a limited amount of time for which regulations made under this power can apply. In the circumstances, the Committee makes no further comment.

7. RESIDENTIAL TENANCIES AMENDMENT (COVID-19) REGULATION 2020

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

Retrospectivity, property rights and freedom of contract

The Regulation is made under the *Residential Tenancies Act 2010* (the Act) which provides the Minister for Better Regulation and Innovation with the power to make regulations to respond to the public health emergency caused by the COVID-19 pandemic that would stop residential landlords and proprietors of boarding houses enforcing certain rights under residential tenancy and occupancy agreements, and relevant legislation.

The Regulation accordingly limits landlords' rights in response to the pandemic. For example, during the "moratorium period" of 6 months from the commencement of the Regulation, a landlord generally cannot give a tenant who is financially impacted by COVID-19 (an "impacted tenant") a termination notice under the Act for non-payment of rent. An exception exists where the landlord has participated in good faith in a formal rent negotiation process with an "impacted tenant" and it is fair and reasonable in the circumstances.

The Regulation also covers boarding houses. For example, it provides that during the "moratorium period" a boarding house proprietor must give a boarding house resident financially impacted by the COVID-19 pandemic (an "impacted resident") 6 months' notice of an eviction based solely on non-payment of fees under an occupancy agreement, unless the occupant did not participate in good faith negotiations about the fees.

The Regulation also provides that landlords and proprietors must generally give at least 90 days' notice before terminating a tenancy or evicting a resident and this applies regardless of whether an "impacted tenant" or "impacted resident" is involved.

In retrospectively limiting landlords' and proprietors' rights under tenancy and occupancy agreements and relevant legislation, the Regulation may impact on property rights. 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.

Similarly, by limiting the ability of the landlord or proprietor to exercise his/her rights under an existing agreement, the 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 notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants and residents. It is accordingly time limited to last for no more than 6 months. The Committee notes that the Regulation furthers the public health objectives of ensuring citizens remain in their homes, and preventing avoidable movement of persons. In the circumstances, 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 boarding house occupancy agreements

As above, the Regulation introduces significant changes to the circumstances under which boarding house proprietors can enforce certain rights under occupancy agreements, in response to the COVID-19 pandemic. Proprietors are required to give significant amounts of notice before evicting "impacted residents" for non-payment of occupancy fees, or to participate in negotiations about the fees with them. Proprietors must also generally give 90 days' written notice before evicting any resident, regardless of whether they are an "impacted resident".

The Regulation may thereby have some adverse impact on this sector of the business community, requiring them to negotiate about occupancy fees, and limiting their ability to evict current residents in order to seek new residents who can pay their fees.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic. It is accordingly time limited to last for no more than 6 months. In the circumstances, 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 above, the Regulation introduces significant changes to the circumstances under which residential landlords and boarding house proprietors can enforce certain rights under residential tenancy and occupancy agreements, and relevant legislation. As also mentioned, these changes are made pursuant to a power in the Act which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.

The Committee generally prefers significant matters such as these to be included in primary legislation to foster an appropriate level of parliamentary oversight. The changes are wide-reaching and will have considerable impact on landlords and proprietors.

However, in the current case and given the emergency created by COVID-19, the Committee considers that it may be reasonable to include such provisions in subordinate legislation. This facilitates a swift response to any emerging public health or economic issues, without the need for an amending Bill. Further, the power to make such regulations is limited to cases where Parliament is not currently sitting and is not likely to sit in the near future. The Regulations are also time limited to last no more than 6 months. Given these factors, the Committee makes no further comment.

8. RETAIL AND OTHER COMMERCIAL LEASES (COVID -19) REGULATION 2020

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

Retrospectivity, property rights and freedom of contract

The Regulation is made under the *Retail Leases Act 1994* (the Act) which provides the Minister for Finance and Small Business (the Minister) with the power to make regulations to respond to the public health emergency caused by the COVID-19 pandemic that would stop commercial lessors from enforcing certain rights under commercial tenancy agreements, and relevant legislation. The Regulation also gives effect to *National Cabinet Mandatory Code of Conduct-SME Commercial Leasing Principles During COVID-19*, adopted by the National Cabinet on 7 April 2020.

The Regulation significantly limits lessors from taking any prescribed action, such as eviction, against the 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. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

By retrospectively limiting lessors' rights under commercial tenancy agreements the Regulation may impact on property rights. 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.

Similarly, by prohibiting the lessor from exercising his or her legal rights as agreed upon in the lease, the 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 only applies to cases involving "impacted lessees" – those who have experienced economic hardship due to COVID-19, who are eligible for JobKeeper payments, and who had less than $50 million in turnover in the 2018-19 financial year. It does not prohibit lessors from exercising prescribed action in cases not related to the economic impacts of COVID-19. Similarly, the Regulation is time limited to apply only for a period of 6 months from its commencement. The Committee considers the Regulation is a reasonable and proportionate response to the far-reaching economic consequences of COVID-19, and given these extraordinary circumstances, 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 significantly limits the ability of lessors to take any prescribed action against lessees on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours where the lessor has been unable to meet his or her obligations due to economic hardship resulting from the COVID-19 crisis.

In doing so, the Regulation may adversely affect the business of the lessor by prohibiting him or her from recovering lost rent, or from evicting current tenants in order to seek new tenants who can finance the lease. This may force the lessor to incur a loss for a period of 6 months.

However, the Committee recognises that the Regulation is in response to a public health emergency and implements a National Cabinet decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While the lessor is significantly limited from taking prescribed action for failure to pay rent or outgoings, the Committee understands that financial mortgage assistance may be available for eligible lessors to defer business loan repayments for a period of 6 months. In the circumstances, 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 above, the Regulation introduces significant changes to the circumstances under which lessors can take prescribed action, such as eviction, against the 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. As also mentioned, these changes are made pursuant to a power in the Act which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.

The Committee generally prefers significant matters such as these to be included in primary legislation to foster an appropriate level of parliamentary oversight. The changes are wide-reaching and will have considerable impact on commercial lessors and lessees.

However, in the current case and given the emergency created by COVID-19, the Committee considers that it may be reasonable to include such provisions in subordinate legislation. This facilitates a swift response to any emerging public health or economic issues, without the need for an amending Bill. Further, the power to make such regulations is limited to cases where Parliament is not currently sitting and is not likely to sit in the near future, and such regulations must expire within 6 months of their commencement. Given these factors, the Committee makes no further comment.

9. COMMUNITY LAND MANAGEMENT AMENDMENT (COVID-19) REGULATION 2020

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 *Community Land Management Act 1989* (the Act) establishes the roles and responsibilities of community associations, and executive committees of associations. These associations are responsible for the management of various community precinct and neighbourhood schemes established by the subdivision of land under the *Community Land Development Act 1989.*

The Act and the *Community Land Management Regulation 2018* made under it detail how the schemes should be run, providing for such matters as how associations and their executive committees meet and vote.

The Regulation amends the *Community Land Management Regulation 2018* to provide for altered arrangements: for convening, and voting at, meetings of an association (i.e. through electronic means); allowing instruments to be signed rather than affixed with the seal of an association; and to extend certain time periods within which certain things must be done under the Act. The Regulation specifically provides that the altered voting arrangements apply despite any requirements in the Act for a vote to be exercised in person.

The Regulation makes these changes drawing on a power contained in section 122A of the Act which authorises regulations to be made to respond to the public health emergency caused by COVID-19. Section 122A also provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to schemes. Further, there is a limited time during which regulations made under the power can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

10. LIQUOR AMENDMENT (COVID-19 LICENCE ENDORSEMENTS AND TEMPORARY FREEZES) REGULATION 2020

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 – expired endorsements

The Regulation provides that a Responsible Service of Alcohol (RSA) or a Responsible Conduct of Gambling (RCG) endorsement that expires during the "prescribed period" from 1 March 2020 until 29 June 2021, is taken not to expire and is instead to continue in force until 30 June 2021.

This extended expiry date for these endorsements is a special provision in response to the COVID-19 pandemic. Liquor and Gaming NSW has issued a Statement of Regulatory Intent indicating that it intends to take a flexible regulatory approach with regard to the requirements of the *Liquor Act 2007* and the *Liquor Regulation 2018* in response to the exceptional circumstances created by COVID-19, and their impact on business.

The extension applies despite any other provision of the *Liquor Act 2007*. This has the effect of a Henry VIII clause, which allows subordinate legislation to override provisions in an Act. The Committee notes that regulations of this kind typically involve an inappropriate delegation of legislative power. However, the Regulation responds to the extraordinary circumstances created by COVID-19. It may be reasonable to endorse a more flexible approach in this instance, thereby allowing authorities to respond swiftly and appropriately to the impact of COVID-19 on liquor and gaming businesses.

Further, the Committee notes the relevant provision is time-limited with extensions ending on 30 June 2021. Regulations must also be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. In the circumstances, and given the safeguards, the Committee makes no further comment.

Henry VIII Clause – special licence conditions

The Regulation amends Schedule 4 to the *Liquor Act 2007* to remove all four venues from the list of "declared premises" that are subject to the special licensing conditions set out in that Schedule. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster an appropriate level of parliamentary oversight over the changes.

However, it appears that these changes around special licensing are a response to COVID-19. Liquor and Gaming NSW has indicated that it will take a more flexible approach to enforcing standards that were designed to manage safety when businesses could operate at full capacity (i.e. before social distancing). Again, it may be reasonable to proceed via regulation in this instance, thereby allowing authorities to respond swiftly and appropriately to the impact of COVID-19 on liquor and gaming businesses.

Further, regulations must be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. In the circumstances, and given this safeguard, the Committee makes no further comment.

11. PUBLIC HEALTH AMENDMENT (AUTHORISED OFFICERS) REGULATION 2020

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

Broadly drafted provisions in subordinate legislation that may confer significant administrative powers

The *Public Health Act 2010* (the Act) provides that the Secretary of the Ministry of Health can appoint any member, or any member of staff, of a body prescribed by the regulations, to be an "authorised officer", either generally or in relation to a particular function exercisable by authorised officers under the Act or any other Act relating to public health.

The Regulation accordingly allows the Secretary to appoint members, and members of staff, of the Department of Customer Service and the NSW Food Authority as authorised officers, either generally or in relation to particular functions exercisable by authorised officers relating to public health.

The precise functions that a person appointed under these provisions could exercise appears to be left to the terms of his or her appointment. However, it is possible that a person appointed under the provisions could have significant coercive powers. For example, under Part 8 of the Act, authorised officers are granted significant powers to assist them to enforce the Act including to enter and inspect premises, require a person to answer questions, and require that documents and information be provided to the authorised officer.

The Committee would prefer provisions that may confer significant powers to be drafted with a greater level of precision. In short, the provisions should clearly set out the functions being conferred, and the category of persons to whom they are being conferred. This would foster a greater level of parliamentary oversight. In the current case, the exact functions are unclear and the categories of person to whom they are being conferred is broad – any officer of the named agencies. There is no requirement for any particular level of seniority or expertise in an officer before the functions could be conferred on him or her.

The Committee would also generally prefer provisions that may confer significant powers to be included in primary, not subordinate legislation, again to foster an appropriate level of parliamentary oversight.

However, the Committee acknowledges that in the current emergency situation created by COVID-19, it may be reasonable for public health regulations to include such broad provisions so that authorities can respond swiftly and flexibly to the pandemic. Further, the provisions are time limited to repeal in March 2021. The Committee also notes safeguards in the Act, for example, authorised officers cannot enter residential premises unless they have the occupier's permission, or they have obtained a search warrant. In the circumstances, the Committee makes no further comment.

12. PUBLIC HEALTH AMENDMENT (COVID-19 BORDER CONTROL) REGULATION 2020

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

Penalty notice offences – right to a fair trail

On 8 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* (the Order) came into force under which the Minister for Health and Medical Research directed that an "affected person" must not enter NSW unless the person is authorised to do so. The Order defines an "affected person" to be a person who has been in Victoria within the previous 14 days.

Under clause 6 of the Order the Minister also directed that a person must, if required to do so by an enforcement officer, provide information to allow a decision to be made about whether the person is an "affected person" and, if so, whether the person is authorised to enter NSW.

Further, the Minister directed under clause 6 that a person who provides the required information must ensure that the information is true and accurate.

The Regulation provides that a penalty notice of $4000 can be issued to an individual who contravenes clause 6 of the Order (i.e. by failing to provide the required information, or providing false or misleading information).

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. The Committee also notes that $4000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, 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. Given these factors, the Committee makes no further comment.

Right to privacy and freedom of movement

As above, the Regulation provides that a penalty notice of $4000 can be issued to an individual who contravenes clause 6 of the Order by failing to provide information, including photo identification, to allow a decision about whether the person is an "affected person" and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

By providing that a person can receive an on-the-spot penalty for failing to provide such information, or for failing to provide true and accurate information, the Regulation may impact on privacy rights. Further, as the information may be used to deny people entry to NSW, the Regulation is part of a regime that restricts freedom of movement. This right is contained in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. This Article protects the right to move freely in a country for those who are lawfully within that country; the right to leave any country; and the right to enter a country of which you are a citizen.

However, Article 12 also recognises that derogation from this right may be warranted in certain circumstances, including to protect public health. The Committee considers that as the Regulation is part of a regime to respond to COVID-19 and stop its spread following an increase in community transmission in Victoria, it fits within the public health exemption, and that the limits placed on freedom of movement are reasonable in the circumstances. This is particularly so as the associated Order is time limited and will automatically expire 90 days after it commences if it is not repealed sooner.

The fact that the Regulation responds to the public health emergency also makes its possible privacy impacts reasonable in the circumstances. The Committee also notes a safeguard in this regard: an enforcement officer can only require the information under clause 6 of the Order where the enforcement officer believes on reasonable grounds that the person may be an "affected person" – that is, a person who has been in Victoria within the previous 14 days. In the extraordinary circumstances, and given the safeguards, 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 above, the Regulation provides that a penalty notice of $4000 can be issued to an individual who contravenes clause 6 of the Order by failing to provide information to allow a decision about whether the person is an "affected person" and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and 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.

However, given the severe circumstances surrounding the COVID-19 pandemic – in this case the recent increased community transmission in Victoria – it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately 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, which may have serious consequences. In the extraordinary circumstances, the Committee makes no further comment.

13. PUBLIC HEALTH AMENDMENT (COVID-19 SPITTING AND COUGHING) REGULATION(NO 2) 2020

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

Penalty notice offences – right to a fair trail

The Regulation allows a penalty notice of $5000 to be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its Digest No 13/57, the Committee commented on the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* which provided that a penalty notice of $5000 could be issued to a person who contravened an earlier version of the Order, the *Public Health (COVID-19 Spitting and Coughing) Order 2020*, which has now expired.

Consistent with those comments, the Committee notes that 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. The Committee also notes that $5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, 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. 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 above, the Regulation allows a penalty notice of $5000 to be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* by intentionally spitting or coughing on a public official or on other worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

As also noted, in its Digest No 13/57, the Committee commented on the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* which provided that a penalty notice of $5000 could be issued to a person who contravened an earlier version of the Order which has now expired.

Consistent with those comments, the Committee identifies that it generally prefers significant matters to be dealt with in primary rather than subordinate legislation and 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.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately 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, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

14. STRATA SCHEMES MANAGEMENT AMENDMENT (COVID-19) REGULATION 2020

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 *Strata Schemes Management Act 2015* (the Act) is an Act with respect to the management of strata schemes and disputes related to strata schemes. The Act and the *Strata Schemes Management Regulation 2016* made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees; and matters such as how they meet and vote, and the time periods within which certain steps should be taken for the management of strata schemes.

The Regulation amends the *Strata Schemes Management Regulation 2016* to provide for altered arrangements for: convening, and voting at, meetings of an owners corporation or a strata committee (i.e. through electronic means); allowing instruments to be signed rather than affixed with the seal of an owners corporation; and to extend certain time periods within which certain things must be done under the Act. The Regulation specifically provides that the altered voting arrangements apply despite any requirements in the Act for a vote to be exercised in person.

The Regulation makes these changes drawing on a power contained in section 271A of the Act which authorises regulations to be made to respond to the public health emergency caused by COVID-19. Section 271A also provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under the power can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

15. WORKERS COMPENSATION AMENDMENT (CONSEQUENTIAL COVID-19 MATTERS) REGULATION 2020

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

Restricting right to compensation – types of prescribed employment

Clause 5D of the Regulation prescribes certain additional forms of employment for the purpose of establishing a presumption under the Act that a worker contracted COVID-19 in the course of their employment.

Although both section 19B(9) of the Act and clause 5D of the Regulation prescribe many different types of employment to which the presumption applies, some workplaces which have been considered high-risk settings for contracting COVID-19 in Victoria appear to be omitted. For example, it is not clear that the following forms of employment are captured: meat processing, medical and pharmaceutical supply, supermarket distribution and warehousing and distribution. It is also not clear that security and other staff involved in hotel quarantine are captured.

While it is possible that some of the identified industries may be classified as "retail", which is a prescribed form of employment, the Committee notes that the potential omissions or lack of clarity may restrict access to compensation for some workers. Accordingly, the Committee refers this matter to the Parliament.

Restricting right to compensation – types of tests

Clause 5B of the Regulation prescribes certain tests which may be used to classify a worker as having COVID-19 for the purposes of workers compensation. Other than the nominated tests, there appear to be no clinical criteria – such as the presence of symptoms – which may enable a diagnosis of COVID-19. There also appear to be other tests which are not included in the Regulation. For instance, the Regulation appears to omit tests that may detect past rather than active infections, such as serological testing.

According to the Therapeutic Goods Administration (TGA), there is limited evidence to assess the accuracy and utility of COVID-19 tests generally. They have also noted that several SARS-Cov-2 tests have been assessed on an expedited basis.

In light of the emerging evidence around tests, the potential for false negatives, and the possibility of ongoing complications from COVID-19 after an active infection, the testing and clinical criteria for determining that a worker has COVID-19 may appear to be quite narrow. Although the TGA notes that PCR testing, which appears to be included in the Regulation, is the "gold standard" for COVID-19 diagnosis, it is possible that the current classification criteria may result in some active infections or past infections being missed. In limited circumstances, this

may operate to restrict the access of some workers to compensation. In the circumstances, the Committee refers this matter to Parliament for its consideration.

16. PUBLIC HEALTH AMENDMENT (COVID-19 BORDER CONTROL – TRANSITING ACT RESIDENTS) REGULATION 2020

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

On 8 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* (the Order) came into force under which the Minister for Health and Medical Research directed that an "affected person" must not enter NSW unless the person is authorised to do so. The Order defined an "affected person" to be a person who has been in Victoria within the previous 14 days.

Further, on 13 August 2020, the *Public Health (COVID-19 Border Control) Amendment (Transiting ACT Residents) Order* (the Amendment Order) commenced, which amended the Order by inserting clauses 8B and 8C into it. Clause 8B provided that subclause 5(1) of the Order directing that an "affected person" must not enter NSW unless the person is authorised to enter NSW did not apply to an "exempt person" transiting through NSW to the ACT, who complied with certain conditions. An "exempt person" meant an ACT resident who was the subject of an Entry Authorisation Certificate, and was in Victoria immediately before the commencement of the clause.

Clause 8C provided that a person who travelled through NSW under clause 8B must not enter NSW until a period of at least 14 days had elapsed since the person entered the ACT under that clause.

The Regulation amends the *Public Health Regulation 2012* to allow a $5000 penalty notice to be issued for offending against section 10 of the *Public Health Act 2010* by contravening clause 8B or 8C of the Order, that is, by contravening the conditions set down in clauses 8B or 8C when transiting through NSW to the ACT in accordance with the exemption set down in clause 8B.

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. The Committee also notes that $5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, 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. Given these factors, the Committee makes no further comment.

Freedom of movement

As above, the Regulation allows for a $5000 penalty notice to be issued for an offence against section 10 of the Public Health Act 2010 involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.

Such conditions were set out in clauses 8B and 8C of the Order and included transiting through NSW to the ACT by the route designated by the Commissioner of Police, directly to the ACT without stopping, except in narrow circumstances (e.g. for a fatigue or hygiene break or in an emergency); only travelling between the hours of 9am and 3pm; and not re-entering NSW until a period of at least 14 days had elapsed since the person entered the ACT.

By providing that a person can receive a significant on-the-spot penalty for travelling from Victoria, through NSW and into the ACT without complying with strict conditions, the Regulation is part of a regime that restricts freedom of movement. This right is contained in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. This Article protects the right to move freely in a country for those who are lawfully within that country; the right to leave any country; and the right to enter a country of which you are a citizen.

However, Article 12 also recognises that derogation from this right may be warranted in certain circumstances, including to protect public health. The Committee considers that as the Regulation is part of a regime to respond to COVID-19 and stop its spread following an increase in community transmission in Victoria, it fits within the public health exemption, and that the limits placed on freedom of movement are reasonable in the circumstances.

This is particularly so as the associated Order was time limited to automatically expire 90 days after it commenced, and it was repealed on 2 October 2020 (the provisions set down in clauses 8B and 8C being repealed before that). While a similar Order, the Public Health (COVID-19 Border Control) Order (No 2) 2020 commenced on the same day (2 October), in making this second Order the Minister again had to outline the public health grounds for making such an Order (set out in clause 4), and it too will automatically expire 90 days after its commencement unless earlier revoked (as per subsection 7(5) of the Act).

In short, in the extraordinary circumstances created by COVID-19, and given the abovementioned time limits and other safeguards, the Committee considers that the Regulation, and the regime of which it is part, place reasonable limits on freedom of movement, and 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 above, the Regulation allows for a $5000 penalty notice to be issued for an offence against section 10 of the Public Health Act 2010 involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and 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.

However, given the severe circumstances surrounding the COVID-19 pandemic – in this case the recent increased community transmission in Victoria – it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately 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, which may have serious consequences. In the extraordinary circumstances, the Committee makes no further comment.

Part One – Bills

1. COVID-19 Legislation (Emergency Measures) Bill 2020

Date introduced	24 March 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the following Acts in response to the COVID-19 pandemic –

   (a) *Child Protection (Working with Children) Act 2012*

   (b) *Children (Detention Centres) Act 1987*

   (c) *Civil and Administrative Tribunal Act 2013*

   (d) *Constitution Act 1902*

   (e) *Crimes (Administration of Sentences) Act 1999*

   (f) *Crimes (Domestic and Personal Violence) Act 2007*

   (g) *Criminal Procedure Act 1986*

   (h) *Electronic Transactions Act 2000*

   (i) *Environmental Planning and Assessment Act 1979*

   (j) *Evidence (Audio and Audio Visual Links) Act 1998*

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

   (l) *Jury Act 1977*

   (m) *Local Government Act 1993*

   (n) *Mental Health Act 2007*

   (o) *Motor Accident Injuries Act 2017*

   (p) *Private Health Facilities Act 2007*

   (q) *Public Health Act 2010*

(r) *Residential Tenancies Act 2010*

(s) *Retail Leases Act 1994*

(t) *Retail Trading Act 2008*

(u) *Subordinate Legislation Act 1989*

(v) *Workers Compensation Act 1987*.

BACKGROUND

2. In the second reading speech, the Hon. Mark Speakman SC, MP, Attorney General stated:

> The bill seeks to prepare New South Wales services and institutions for the impacts of COVID-19 in line with critical health advice. Broadly, the bill seeks to do three things: first, to take immediate steps to address existing barriers in our laws that may get in the way of social distancing; second, to empower our agencies and institutions with the capacity to continue functioning; and third, to build in flexibility so that the Government is able to act further as the public health emergency evolves. Some of the amendments in the bill are extraordinary, which is why they generally have sunset clauses of between six months to 12 months.

3. The Bill was passed by both Houses on the same day that it was introduced, 24 March 2020 and was assented to the following day.[1] The Bill as passed incorporates eight amendments to the original Bill, five put by the Government and three put by The Greens.

4. 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 become an Act (see Legislation Review Act 1987, s8A(2)). The Committee generally comments on any issues raised by Bills as introduced. However, given that this Bill passed both Houses urgently and with amendments, and given its extraordinary nature – incorporating emergency measures to respond to the COVID-19 pandemic – the Committee has elected to report on any issues raised by this Bill as passed.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to a fair trial – pre-recorded evidence hearings

5. Schedule 1 of the Bill amends the Criminal Procedure Act 1986 by inserting Part 5 of Chapter 7 into it, the purpose of which "is to enable criminal trials in the State to be conducted in a way that is appropriate given the public health emergency caused by the COVID-19 pandemic" (section 353).

6. In particular, Division 2 of the new Part 5 allows a "relevant witness" in a trial to give evidence before the trial in a pre-recorded evidence hearing. A "relevant witness" is defined quite broadly to include:

[1] Generally Bills are not passed on the same day that they are introduced: See Legislative Assembly Standing Order 188(9) and (10) which provide that immediately following the mover's second reading speech, the debate shall be adjourned; and the mover shall ask the Speaker to fix the resumption of the debate as an Order of the Day for a future day which shall be at least five clear days ahead, *Legislative Assembly Consolidated Standing and Sessional Orders and Resolutions of the House, 57th Parliament*, March 2020.

- a complainant in prescribed sexual offence proceedings;
- a complainant in proceedings for a domestic violence offence;
- a complainant in proceedings for a serious indictable offence that is an offence of violence; or
- a complainant or witness whom the court considers is at a significantly greater risk from the COVID-19 pandemic than the risk to members of the community generally, including because of their age or health;
- additional persons or classes of persons prescribed by the regulations (section 354).

7. Various safeguards apply. A court can only make an order for the evidence to be given in a pre-recorded evidence hearing if:

- the accused person has sought and received advice from an Australian legal practitioner, and
- both parties have been heard on the order, and
- all pre-trial disclosure and case management requirements under Division 3 of Part 3 of Chapter 3 of the *Criminal Procedure Act 1986* have been complied with, and
- the court is satisfied it is in the interests of justice to do so (section 356(2)).

8. Further, in proceedings in which pre-recorded evidence is so given, the court must warn the jury not to draw any inference adverse to the accused person, or give the evidence any greater or lesser weight, because the evidence was given in that way (section 356(6)). The court may also order that a transcript be supplied to it or the jury if the court considers that this would aid in comprehension of the pre-recorded evidence (section 356(7).

9. In addition, a time limit applies to these provisions, as the new Part 5 of Chapter 7 is to be repealed 6 months after its commencement, or on a later day not more than 12 months after its commencement, as prescribed by the regulations.

10. In a statement released on 24 March 2020, the NSW Bar Association raised concerns about allowing evidence to be pre-recorded for use in future trials:

> The pre-recording of evidence for use in future trials which have not yet occurred and are not presently in a position to run, is inconsistent with the fundamental concept of a criminal trial where evidence is led in support of a prosecution case and is tested on that basis. There are no safeguards to ensure the integrity of the process by which evidence is taken remotely….[E]vidence that is taken in such a vacuum, for use in subsequent trials, can only be done at the substantial risk of unfair outcomes.[2]

[2] Tim Game SC, President NSW Bar Association, "COVID-19 Laws Must Be Reasonable, Appropriate and Proportionate, not Undermine Justice", 24 March 2020: https://nswbar.asn.au/uploads/pdf-documents/submissions/24032020_-_NSWBA_MR_-_COVID-19.pdf.

The Bill amends the *Criminal Procedure Act 1986* to allow a "relevant witness" in a trial to given evidence before the trial in a pre-recorded evidence hearing. A "relevant witness" is defined quite broadly and includes a complainant or witness whom the court considers is at significantly greater risk from the COVID-19 pandemic than the risk to members of the community generally, including because of their age or health.

These provisions may impact on the right to a fair trial including the ability of defence counsel to cross-examine witnesses after the prosecution has opened its case, thereby thoroughly testing that case. However, the Committee notes that the Bill includes a number of safeguards. For example, before making such an order regarding pre-recorded evidence, the court must be satisfied that it is in the interests of justice to do so. Similarly, the provisions have been introduced as an extraordinary measure to ensure that criminal trials are conducted in an appropriate way in the face of the COVID-19 pandemic; and are time limited – they are to be repealed within 12 months of commencement. In the circumstances, the Committee makes no further comment.

Right to a fair trial – use of recorded evidence in new trials

11. Schedule 1 of the Bill also inserts Division 3, Part 5 of Chapter 7 into the *Criminal Procedure Act* 1986, to allow the original evidence of a witness recorded in a criminal trial to be used in a new trial, for example, where the original trial has been discontinued (section 362(1)).

12. Some safeguards apply, for example, the court can decline to admit a record of the original evidence of the witness if it is of the opinion that the accused would be unfairly disadvantaged by the admission of the record having regard to:

    - the completeness of the original evidence, including whether the witness has been cross-examined on the evidence,
    - the effect of editing any inadmissible evidence from the original evidence,
    - the availability of the witness to attend to give further evidence,
    - the interests of justice,
    - any other matter the court thinks relevant (section 362(5)).

13. In addition, a time limit applies to these provisions. As above, the new Part 5 of Chapter 7 is to be repealed 6 months after its commencement, or on a later day not more than 12 months after its commencement, as prescribed by the regulations.

The Bill amends the *Criminal Procedure Act* 1986 to allow the original evidence of a witness recorded in a criminal trial to be used in a new trial, for example, where the original trial has been discontinued. These provisions may impact on the right to a fair trial including the ability of defence counsel to cross-examine witnesses after the prosecution has opened its case, thereby thoroughly testing that case.

However, the Committee notes that the Bill includes safeguards. The court can decline to admit a record of the original evidence if it is of the opinion that in doing so, the accused would be unfairly disadvantaged. Similarly, the provisions have been introduced as an extraordinary measure to ensure that criminal trials are conducted in an appropriate way in the face of the COVID-19 pandemic; and are time limited – they will be automatically repealed within 12 months of commencement. In the circumstances, the Committee makes no further comment.

Right to a fair trial – access to pre-recorded evidence

14. As above, schedule 1 of the Bill amends the *Criminal Procedure Act 1986* by inserting Part 5 of Chapter 7 into it, which allows a "relevant witness" in a trial to give evidence before the trial in a pre-recorded evidence hearing. It also allows the original evidence of a witness recorded in a criminal trial to be used in a new trial, for example, where the original trial has been discontinued.

15. New Part 5 also makes provision for access to this recorded evidence. It provides that the accused person and his or her legal practitioner are to be given reasonable access, from time to time, to the recording of evidence taken at a pre-recorded evidence hearing to enable them to listen to or view the recording (sections 357(2)) and 363(2)). However, it also provides that an accused person and his or her legal practitioner are not entitled to be given possession of a recording of evidence if the evidence was given by certain witnesses, for example, certain complainants, a child, or a cognitively impaired person (see sections 357(1) and 363(1)).

16. Further, the Part provides that if reasonable access to the original recording of evidence cannot be given because of the above provisions, the prosecuting authority must, as soon as practicable, give the legal practitioner reasonable access to the recording in the way the authority considers appropriate (section 357(3) and section 363(3)).

As above, the Bill allows a "relevant witness" in a trial to give evidence before the trial in a pre-recorded evidence hearing. It also allows the original evidence of a witness recorded in a criminal trial to be used in a new trial, for example, where the original trial has been discontinued.

The Bill also makes provision for access to this pre-recorded evidence. It provides that the accused person and his or her legal practitioner are to be given reasonable access, from time to time, to the recording. However, it also provides that the accused and the legal practitioner are not entitled to be given possession of a recording of evidence if the evidence was given by certain categories of witness including certain complainants, those with a cognitive impairment, and children.

The Bill may thereby impact on the right to a fair trial by limiting the ability of the accused to access evidence and so respond to the case against him or her. The Committee acknowledges that the provisions are designed to protect vulnerable witnesses. Further, a safeguard is included: if reasonable access to the original recording of evidence cannot be given, the prosecuting authority must, as soon as practicable, give the legal practitioner reasonable access to the recording in the way the authority considers appropriate. The Committee refers

the provisions to Parliament to consider whether they are reasonable and proportionate in the circumstances.

Right to a fair trial – jury trials

17. In inserting a new Division 4, Part 5 into Chapter 7 of the *Criminal Procedure Act 1986*, schedule 1 of the Bill also provides that a court may, on its own motion order that an accused be tried by a Judge alone. However, a court can only make such an order where:

- the accused person consents to be tried by a Judge alone or, for a joint trial, all the accused persons consent to be tried by a Judge alone, and
- if the prosecutor does not agree to the person being tried by a Judge alone, the court considers that it is in the interests of justice for the accused person to be tried by a Judge alone, and
- the court is satisfied that the accused person has sought and received advice from an Australian legal practitioner in relation to the effect of an order that the person be tried by a Judge alone (section 365).

18. Further, a time limit applies to these provisions. As above, the new Part 5 of Chapter 7 is to be repealed 6 months after its commencement, or on a later day not more than 12 months after its commencement, as prescribed by the regulations.

The Bill amends the *Criminal Procedure Act 1986* so that a court may, on its own motion, order that an accused person be tried by Judge alone. This may impact on the right to a fair trial, specifically, the right of the accused to be judged by his or her own peers, according to prevailing community norms. However, the Committee notes that various safeguards apply, including that the accused retains a right of veto – he or she must consent to be tried by a Judge alone. Similarly, the provisions have been introduced as an extraordinary measure to ensure that criminal trials are conducted in an appropriate way in the face of the COVID-19 pandemic; and are time limited – they will be automatically repealed within 12 months of commencement. In the circumstances, the Committee makes no further comment.

Right to a fair trial and fair bail hearing – appearance by audio visual link

19. Schedule 2.9 of the Bill, section 22C(2), amends the Evidence (Audio and Audio Visual Links) Act 1998 to provide that the appearance of an accused person in any bail proceedings is to take place by audio visual link unless the court directs otherwise.

20. In addition, section 22C(3) of schedule 2.9 provides that the appearance of an accused person in any "physical appearance proceedings" (other than proceedings relating to bail or proceedings prescribed by the regulations) may take place by way of audio visual link if the court directs. "Physical appearance proceedings" are defined in the Act to include any trial or hearing of charges and any inquiry into a person's fitness to be tried for an offence (section 3).

21. Various safeguards apply. The court can only make a direction under these provisions if it is in the interests of justice and it is not inconsistent with the advice given by the Chief Health Officer of the Ministry of Health relating to the COVID-19 pandemic. Similarly, if an audio visual link is used, the court must be satisfied that a party is able to have

private communication with his or her legal representative and has had a reasonable opportunity to do so.

22. Further, while section 22C(3) provides that the court can direct – either on its own motion or following the application of a party – that an accused person appear by way of audio visual link, it can only make such a direction after parties have had the opportunity to be heard on the matter.

23. The provisions are also time limited – they only apply for 6 months after their commencement, or for a longer period of up to 12 months after commencement if prescribed by the regulations.

> **Schedule 2.9 of the Bill provides that an accused person is to appear at bail proceedings by audio visual link unless the court directs otherwise. It further provides that, if the court directs, an accused person is to appear by audio visual link at "physical appearance proceedings" including trials, hearings of charges and any inquiry into a person's fitness to be tried for an offence.**
>
> **By removing rights to appear in person and thereby interact fully with one's legal representatives, the Bill may impact on the right to a fair trial and fair bail hearing. However, various safeguards apply including that the court must be satisfied that parties have reasonable opportunity for private communication with their legal representatives.**
>
> **Further, the provisions are an extraordinary measure to respond to the public health risk created by COVID-19. The court can only make a direction under the provisions if it is in the interests of justice and it is not inconsistent with the advice given by the Chief Health Officer relating to the COVID-19 pandemic. In this vein, the provisions are also time limited, only applying for a maximum of 12 months after their commencement. In the circumstances, the Committee makes no further comment.**

Retrospectivity

24. In amending the *Criminal Procedure Act 1986* to insert Division 2 of Part 5 of Chapter 7, which enables a witness in a trial to give evidence before the trial in a pre-recorded evidence hearing, Schedule 1 of the Bill also contains transitional provisions.

25. Relevantly, section 111(1) provides that if, before the commencement of the clause, relevant evidence was given and recorded at a hearing in the absence of the jury (if any), the evidence is taken to have been given at a pre-recorded evidence hearing under Division 2 of Part 5 of Chapter 7.

26. That is, the amendments in the Bill to enable a witness in a trial to give evidence before the trial in a pre-recorded evidence hearing have some retrospective effect.

27. Similarly, in amending the Criminal Procedure Act 1986 to insert Division 3 of Part 5 of Chapter 7, to allow the original evidence of a witness recorded in a criminal trial to be used in a new trial, Schedule 1 of the Bill also contains transitional provisions.

28. Section 112(1) provides that the original evidence of a witness recorded in a criminal proceeding before the commencement of this clause is, for the purposes of Division 3 of

Part 5 of Chapter 7 to be treated in the same way as the original evidence of a witness recorded after the commencement.

29. That is, the amendments in the Bill to enable the original evidence of a witness recorded in a criminal trial to be used in a new trial have some retrospective effect.

> **The amendments in Schedule 1 of the Bill to enable a witness in a trial to give evidence before the trial in a pre-recorded evidence hearing; and those to enable the original evidence of a witness recorded in a criminal trial to be used in a new trial, have some retrospective effect. As noted previously, these provisions may also have some effect on the right to a fair trial.**
>
> **The Committee generally comments where provisions are drafted with retrospective effect as this runs counter to the rule of law principle that persons are entitled to know the law to which they are subject at any given time. This is particularly the case in instances such as this where provisions may have a retrospective impact on rights – the right to a fair trial.**
>
> **However, the Committee acknowledges that the provisions have been introduced as an extraordinary measure to ensure that criminal trials are conducted in an appropriate way in the face of the COVID-19 pandemic. It may assist if evidence recorded prior to the commencement of the provisions can be used in trials during the pandemic to promote social distancing. In the circumstances, the Committee makes no further comment.**

Right to humane treatment in detention

30. Schedule 2.2 to the Bill amends the Children (Detention Centres) Act 1987 to enable the Secretary of the Department of Communities and Justice to prohibit or restrict any person, other than the Ombudsman and the Inspector of Custodial Services, from entering or visiting a detention centre if satisfied that it is reasonably necessary to protect the health of a detainee, any other person or the public from the public health risk posed by the COVID-19 pandemic.

31. Similarly, schedule 2.5 of the Bill amends the Crimes (Administration of Sentences) Act 1999 to enable the Commissioner of Corrective Services to prohibit or restrict any person other than the Ombudsman and the Inspector of Custodial Services, from entering or visiting a correctional centre or other correctional premises if satisfied that it is reasonably necessary to protect the health of a detainee, any other person or the public from the public health risk posed by the COVID-19 pandemic.

32. In both cases the provisions are time limited – they apply for a minimum period of 12 months, and may apply for a total of 12 months if the regulations prescribe a longer period. Similarly, the provisions do not affect any communication between detainees/inmates and other persons by post, telephone, email, audio visual link, or other means provided for under the respective Acts.

> **Schedules 2.2 and 2.5 to the Bill enable the Secretary of the Department of Communities and Justice, and the Commissioner of Corrective Services to restrict persons from visiting youth detention centres and adult correctional centres if satisfied that it is reasonably necessary to protect the health of a detainee or**

inmate, any other person, or the public, from the public health risk posed by the COVID-19 pandemic.

By restricting visits to youth detainees and adult inmates, the Bill may impact on the right to humane treatment in detention. However, the Committee acknowledges that the provisions are an extraordinary measure to protect public, staff and detainee/inmate health in the face of the COVID-19 pandemic. Further, the provisions can only apply for a maximum of 12 months and safeguards apply: they do not stop the Ombudsman or Inspector of Custodial Services visiting; nor do they affect other communications between detainees/inmates and others by post, email, telephone etc. In the circumstances, the Committee makes no further comment.

Victims' rights

33. Schedule 2.5 to the Bill also enables the Commissioner of Corrective Services to grant parole to certain inmates belonging to a class prescribed by the regulations if satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic.

34. A number of safeguards apply. For example, the Commissioner cannot make an order in respect of certain inmates including an inmate serving a sentence of imprisonment for murder, a serious sex offence within the meaning of the Crimes (High Risk Offenders) Act 2006 or a terrorism offence within the meaning of Division 3A of Part 6 of the Crimes (Administration of Sentences) Act 1999, or an inmate serving a life sentence. Similarly, in making an order the Commissioner must consider certain matters including:

- the risk to community safety of releasing the inmate,
- the impact of the release of the inmate on any victim whose name is recorded on the Victims Register in relation to the inmate, and
- in the case of an inmate who has previously been convicted of a domestic violence offence, the protection of the victim of the domestic violence offence and any person with whom the inmate is likely to reside if released.

35. The Commissioner can also revoke the parole for any reason. Further, the provisions are time limited – they apply for 6 months following their commencement, or may apply for a longer period of up to 12 months after commencement, if prescribed by the regulations.

36. In the second reading speech, the Attorney General spoke about these provisions and stated:

> The Bill seeks to provide us with powers we hope we will never have to use but the evolution of the pandemic may require it….This flexibility is necessary to give the commissioner the capacity to protect the health of inmates and correctional services staff…through the emergency. The Government contemplates that if the power were used it would be in relation to lower risk or vulnerable inmates to be prioritised for potential release, such as older inmates nearing completion of their sentence.

37. The Attorney General also stated that the parole framework would be used for inmates released under the provisions:

> The conditional release of an inmate will be subject to the standard conditions of parole, which are that the parolee must be of good behaviour, must not commit any offence and must adapt to normal community life, and any other conditions the Commissioner thinks is appropriate. There is no limit to the conditions the Commissioner can impose which could include home detention and electronic monitoring.

> **Schedule 2.5 to the Bill also enables the Commissioner of Corrective Services to grant parole to certain inmates belonging to a class prescribed by the regulations if satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic.**

> **The Bill may thereby impact on victims' rights. However, the Committee notes the safeguards contained in the Bill. For example, the Commissioner cannot make such an order in respect of inmates serving a sentence for certain offences including murder, a serious sex offence, or a terrorism offence. Further, the Commissioner must consider certain matters in making the order including the risk to community safety and the victim impact of the release. In addition, the parole framework would be used for inmates released under the provisions and there is no limit to the conditions the Commissioner could impose including home detention and electronic monitoring.**

> **The Committee also acknowledges that the provisions are an extraordinary measure to protect public, staff and inmate health in the face of the COVID-19 pandemic. Given the circumstances and safeguards, the Committee makes no further comment.**

Disability rights

38. Schedule 2.3 of the Bill amends the *Civil and Administrative Tribunal Act 2013* to make changes to the way in which the NSW Civil and Administrative Tribunal (NCAT) operates. In the second reading speech, the Attorney General stated: "The bill amends the Civil and Administrative Tribunal Act 2013 to provide greater discretion to manage the work of the tribunal during the public health emergency".

39. In particular, section 23 provides that the NCAT may, when exercising a function allocated to its Guardianship Division, be constituted by 2 members assigned to the Guardianship Division instead of 3 members.

40. The provision applies for a minimum period of 6 months from the date of commencement and may apply for a total of 12 months if the regulations prescribe a longer period.

41. According to the NCAT's website:

> NCAT's Guardianship Division exercises a protective jurisdiction under the Guardianship Act 1987. Its purpose is to protect and promote the rights and welfare of adults with impaired decision-making capacity.

Adults with disabilities are usually assisted by family members, friends and service providers. If these arrangements are not working, or if there is a legal problem, NCAT can make orders and put formal arrangements in place if needed.

NCAT determines applications for the appointment of guardians and/or financial managers for people with disabilities.[3]

Schedule 2.3 of the Bill amends the *Civil and Administrative Tribunal Ac 2013* to make changes to the way in with the NSW Civil and Administrative Tribunal (NCAT) operates during the public health emergency created by the COVID-19 pandemic. In particular, it provides that the NCAT may, when exercising a function allocated to its Guardianship Division, be constituted by 2 members assigned to the Guardianship Division instead of 3 members.

This may accord less weight to decisions about guardianship applications thereby affecting the rights of people with disability who are the subject of those applications. However, while the Committee acknowledges the importance of disability rights, it notes that the provisions are an extraordinary measure to protect public health in the face of the COVID-19 epidemic; and are consequently time limited to apply for no more than 12 months. In the circumstances, the Committee considers they are reasonable and proportionate and makes no further comment.

Judicial review rights

42. Schedule 2.6 of the Bill amends the *Crimes (Domestic and Personal Violence) Act 2007* to extend the period of time in which the listing of an application constituted by a provisional apprehended domestic violence order or apprehended personal violence order made by a police officer must occur, from not more than 28 days to not more than 6 months after the making of the provisional order. However, this provision is time limited so that it cannot apply for more than 12 months after its date of commencement.

43. An apprehended violence order is a court order protecting an applicant from a person he or she fears e.g. a person who has hurt, threatened or intimidated them. If an apprehended violence order is made, the defendant is not given a criminal record but if he or she breaches the order, it is a criminal offence.[4]

44. A provisional apprehended violence order is an order made by the police or a court in response to an urgent application, where the police believe a person is in need of immediate protection. It contains orders that tell the defendant what he or she can or cannot do e.g. a provision that he or she cannot go within 100 metres of a certain place or person; or a provision that he or she must surrender all firearms and related licences to police.[5]

45. Prior to the amendments made by schedule 2.6, a provisional apprehended violence order lasted 28 days to expire at midnight on the 28th day or sooner if the application

[3] NCAT Fact Sheet, Guardianship Division: 'Role of Guardianship Division': www.ncat.nsw.gov.au/Documents/gd_factsheet_role_of_the_guardianshi_division.pdf.

[4] See https://lawaccess.nsw.gov.au/Pages/representing/lawassist_avo.sapx

[5] See https://lawaccess.nsw.gov.au/Pages/representing/lawassist_avo.sapx; and https://lawaccess.nsw.gov.au/Documents/sample-provisional_advo_explained.pdf.

was revoked, withdrawn or dismissed. The provisional order also had to be listed before a local court on the next domestic violence list day, and no more than 28 days from the date on which it was made. The court would then replace the provisional order with an interim or final apprehended violence order or dismiss the application (unless it was withdrawn).[6]

46. In the second reading speech, the Attorney General stated: "The existing requirement to list the provisional order on the next date on which the matter can be listed on a domestic violence list at the appropriate court will not be changed".

> **Schedule 2.6 of the Bill amends the Crimes (Domestic and Personal Violence) Act 2007 to extend the period of time in which the listing of an application constituted by a provisional apprehended violence order made by a police officer must occur from not more than 28 days to not more than 6 months after the making of the provisional order.**
>
> **The Committee notes that the provisions affect rights to judicial review – a provisional order made by police that restricts the defendant (e.g. by stopping him or her from going within 100 metres of certain places or people) may stay in place for up to six months without the opportunity for review by a court. However, the Committee acknowledges that the provisions are an extraordinary measure to respond to any impacts that the COVID-19 pandemic may have on the operation of courts in NSW; and they are accordingly time-limited to apply for no more than 12 months after their commencement. Further, the requirement to list the provisional order on the next available court date does not change. In the circumstances, the Committee makes no further comment.**

Voting rights

47. Schedule 2.12 [1] and [2] of the Bill amend the *Local Government Act 1993* to enable the Minister for Local Government to postpone the requirements relating to holding ordinary council elections and by-elections if the Minister believes that it is reasonable to do so. Urgent amendments made to the Bill on the day that it was introduced to Parliament, and passed, clarified that the Minister's discretion to so postpone was limited to cases where *having regard to the COVID-19 pandemic* he or she believes that it is reasonable.

48. The provision applies for a minimum of 6 months from commencement and may apply for up to 12 months if the regulations prescribe a longer period.

> **Schedule 2.12 of the Bill amends the Local Government Act 1993 to enable the Minister for Local Government to postpone holding council elections and by-elections if the Minister believes, having regard to the COVID-19 pandemic, that it is reasonable to do so. The Bill may thereby impact on citizens' voting rights. However, as these provisions are an extraordinary measure to respond to the public health risk created by COVID-19; and as they are time limited to apply for a maximum of 12 months, the Committee considers they are reasonable in the circumstances and makes no further comment.**

[6] See https://lawaccess.nsw.gov.au/Pages/representing/lawassist_avo.sapx; and *Crimes (Domestic and Personal Violence) Act 2007*, section 29(1)-(3).

Right to participate in public life

49. Schedule 2.12 [3] of the Bill amends the *Local Government Act 1993* to remove the need for council members or other persons to attend council meetings. Meetings can be held by audio visual link; or in any other manner approved by the Minister but only if audio visual links are not reasonably available.

50. Further, requirements for council meetings to be open to the public will be satisfied if:

- they are webcast, or
- where members of the public are informed of what occurred at the meeting in any other manner approved by the Minister, but only if audio visual links are not reasonably available.

51. These provisions are time limited to apply for 6 months after their date of commencement or for a longer period of up to 12 months if prescribed by the regulations.

52. In the second reading speech, the Attorney General told Parliament:

> The bill amends the Local Government Act 1993 to allow councils to continue to meet and members of the public to observe their meetings in a way that does not expose participants and attendees to the risk of transmission of the COVID-19 virus.
>
> **Schedule 2.12 of the Bill removes the need for council members or other persons to attend council meetings, providing that meetings can instead be held by audio visual link or in any other manner approved by the Minister for Local Government if audio visual links are not reasonably available. Further, requirements for council meetings to be open to the public will be satisfied if they are webcast or, if this cannot happen, where members of the public are informed of what occurred at the meeting in any other manner approved by the Minister.**
>
> **The Bill may thereby impact on the right of citizens to participate in public life, specifically, their right to attend council meetings, address the meeting, and ask questions. However, the Committee notes that the provisions are an extraordinary measure to ensure that council meetings are conducted appropriately in the context of the public health risk posed by COVID-19. Further, they are time limited to apply for no more than 12 months. In the circumstances, the Committee considers the provisions are reasonable and makes no further comment.**

Rights of people detained in mental health facilities

53. Schedule 2.13 of the Bill amends the Mental Health Act 2007 to provide that the Mental Health Review Tribunal may conduct a mental health inquiry by telephone, or adjourn a mental health inquiry for up to 28 days if the Tribunal considers that it is necessary to do so because of the COVID-19 pandemic.

54. The provisions are time limited so that they apply for 6 months after commencement, or for a longer period of up to 12 months if prescribed by the regulations.

55. Mental health inquiries are held for the purpose of determining whether or not, on the balance of probabilities, a person detained in a declared mental health facility is a mentally ill person. In conducting such an inquiry, the Tribunal decides whether the person should continue to be detained in the facility or discharged, based on the findings of authorised medical officers and other medical practitioners who have examined the person after his or her detention.[7]

56. The amendments modify the pre-existing requirement for all mental health inquiries to be held in person or by audio visual link.[8] They also modify the amount of time for which a mental health inquiry can be adjourned – generally the Tribunal can only adjourn a mental health inquiry, from time to time, for a period not exceeding 14 days.[9]

> **Schedule 2.13 of the Bill amends the *Mental Health Act 2007* to provide that the Mental Health Review Tribunal may conduct a mental health inquiry by telephone, or adjourn a mental health inquiry for up to 28 days, if the Tribunal considers that it is necessary to do so because of the COVID-19 pandemic.**
>
> **In doing so, the Bill may impact on the rights of people detained in mental health facilities, in particular, their right not to be detained arbitrarily. Mental health inquiries are held to determine whether or not a person detained in a mental health facility is a mentally ill person, and to decide whether the person should continue to be detained, or be discharged.**
>
> **Were it not for the amendments, mental health inquiries would have to be held in person, or by audio visual link. By allowing them to be held by telephone in certain circumstances, the Bill may impact on the Tribunal's decision-making ability given a reduced opportunity to assess the person's demeanour. Further, allowing adjournments for up to 28 days has potential to delay the discharge of persons from mental health facilities.**
>
> **However, the provisions are an extraordinary measure to ensure that mental health inquiries are conducted appropriately given the risks COVID-19 poses to persons detained in mental health facilities, Tribunal members, staff, and the public. The provisions only apply where the Tribunal considers them necessary because of COVID-19, and they are consequently time limited to apply for no more than 12 months. Whilst acknowledging the importance of humane treatment of persons detained in mental health facilities, the Committee considers the provisions are reasonable and proportionate in the circumstances and makes no further comment.**

Right to liberty – arrest without warrant

57. Schedule 2.16[3] of the Bill amends the *Public Health Act 2010* to enable a police officer to arrest a person without warrant if the police officer suspects on reasonable grounds that the person is contravening a public health order relating to the COVID-19 pandemic.

58. On being arrested the person may be returned to his or her home or usual place of residence, or if he or she is a public health detainee, to the person's place of detention.

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[7] See *Mental Health Act 2007*, Chapter 3, Part 2, and https://mhrt.nsw.gov.au/mental-health-inquiries.html.

[8] See *Mental Health Act 2007*, section 34(2) and https://mhrt.nsw.gov.au/mental-health-inquiries.html.

[9] *Mental Health Act 2007*, section 36(1).

An amendment made to the provision by the Government before the Bill was passed also covers homeless persons, by stipulating that after arrest a person can be returned to "the place specified in the public health order that the person has been ordered to reside".[10] The provisions are time limited to be repealed 12 months after their commencement.

59. Were it not for these provisions, a warrant would be required for the arrest (see *Public Health Act 2010*, section 71).

> **Schedule 2.16[3] of the Bill amends the Public Health Act 2010 to enable a police officer to arrest a person without warrant if the police officer suspects on reasonable grounds that the person is contravening a public health order relating to the COVID-19 pandemic. On arrest the person can be returned to his or her place of residence or detention, or if he or she is homeless, to a place specified in the public health order where the person has been ordered to reside.**
>
> **Were it not for these provisions, a warrant would be required for the arrest. The Bill may thereby impact on the right to liberty and against arbitrary detention. However, the Committee acknowledges that the provisions are an extraordinary measure so that authorities can respond swiftly to any public health risks in the context of the COVID-19 pandemic. They are accordingly time limited to lapse 12 months after their commencement. In the circumstances, the Committee makes no further comment.**

Right to privacy and privilege against self-incrimination

60. Schedule 2.16[4] of the Bill provides that a police officer is an authorised officer under the *Public Health Act 2010* for the purposes of requiring a person suspected of contravening a provision of the Act to provide the person's name and address. This provision is time limited to be repealed 12 months after its commencement.

61. Failure to comply without reasonable excuse is an offence attracting a maximum penalty of a $5,500 fine; as is providing false or misleading information which attracts a maximum $11,000 fine (section 113). However, a person is not guilty of an offence of failing to provide this information unless the person was warned that failure to comply is an offence. Further, any answer given is not admissible in evidence against the person in criminal proceedings if the person objected at the time of giving the answer on the ground that it may incriminate him or her, or the person was not warned on that occasion that the person may object to giving the answer on the ground that it might incriminate the person (section 114(1) and (4)).

62. However, further information obtained as a result of an answer given is not inadmissible by reason only that the answer had to be given, or that the answer given incriminates the person (section 114(5)).

> **Schedule 2.16[4] of the Bill provides that a police officer is an authorised officer under the *Public Health Act 2010* for the purposes of requiring a person suspected of contravening a provision of the Act to provide the person's name and address. Failure to comply without reasonable excuse, or providing false or**

[10] See the Hon. Mark Speakman SC, MP, *Second Reading Speech, COVID-19 Legislation Amendment (Emergency Measures) Bill 2020*, 24 March 2020; and schedule 2.16 of the Bill as passed, section 71A(2)(b).

misleading information, is an offence attracting significant maximum monetary penalties.

By expanding the categories of officer who can demand such information, the Bill may impact on the right to privacy and the privilege against self-incrimination. However, the practicalities of enforcement may require the person's details e.g. for the purposes of issuing a penalty notice. Efficient enforcement of public health requirements is also important given the extraordinary circumstances created by the COVID-19 pandemic; and the expansion is accordingly time-limited to lapse 12 months after commencement.

Further, certain safeguards apply, for example a person is not guilty of an offence for failing to provide the information unless he or she was warned that failure to comply is an offence; and there are limits to the admissibility of the information in evidence against the person in criminal proceedings. Given these safeguards and the circumstances, the Committee makes no further comment.

Property rights and retrospectivity

63. Schedule 2.17 of the Bill amends the *Residential Tenancies Act 2010* to provide that the Minister for Better Regulation and Innovation can make regulations under any relevant Act to respond to the public health emergency caused by the COVID-19 pandemic:

- Prohibiting the recovery of possession of premises by a landlord, owner or proprietor of premises from a tenant or resident of the premises under the "relevant Act" in particular circumstances,
- Prohibiting the termination of a residential tenancy agreement, occupancy agreement or site agreement by a landlord, proprietor of premises or operator of a community under the "relevant Act" in particular circumstances,
- Regulating or preventing the exercise or enforcement of another right of a landlord, proprietor of premises or operator of a community by the landlord, proprietor or operator under the "relevant Act" or an agreement relating to the premises,
- Exempting a tenant, resident or home owner, or class of tenants residents or home owners, from the operation of a provision of the "relevant Act" or any agreement relating to the premises.

64. Such regulations would be time limited to expire 6 months after they commence or on an earlier day decided by Parliament by resolution of either House of Parliament. Further, they could only be made if, in the Minister's opinion, they are reasonable to protect the health, safety and welfare of tenants or residents under the Act.

65. "Relevant Act" is defined in schedule 2.17 to mean the *Boarding Houses Act 2012*; the *Residential (Land Leases) Communities Act 2013;* the *Residential Tenancies Act 2010*; and "any other Act relating to the leasing of premises or land for residential purposes".

66. Schedule 2.18 of the Bill amends the *Retail Leases Act 1994* to provide a similar regulation-making power to the Minister for Finance and Small Business in respect of commercial leases. If made, such regulations could prevent commercial landlords from enforcing certain rights under the *Agricultural Tenancies Act 1990*, the *Retail Leases Act 1994*, and "any other Act relating to the leasing of premises or land for commercial

purposes" e.g. the right to evict a tenant, or to terminate a lease in particular circumstances. Again, the provisions are time limited to expire 6 months after they commence or earlier if resolved by either House of Parliament; and the regulations can only be made if, in the Minister's opinion, they are reasonable to protect the health, safety and welfare of lessees or tenants under the Act.

67. These provisions are a result of an amendment put by The Greens to the Bill as introduced. In proposing the amendment, Mr David Shoebridge MLC stated:

> This amendment seeks to provide powers to make regulations to address the immediate and urgent need for government action to ensure that people are not evicted into homelessness in this crisis and also to enable powers for the Government to act to provide protection for those facing the reality that they are unable to pay their commercial lease…I accept it pre-empts the decision by the National Cabinet tonight but it does not actually put the protections in place. The protections require further action from the Ministers and further action following this, which would then be consistent with any National Cabinet decision. By passing this amendment, members empower the Government to act without having to wait until we are next back in this House, whenever that may be…

Schedule 2.17 of the Bill amends the *Residential Tenancies Act 2010* to provide that the Minister for Better Regulation and Innovation can make regulations under any relevant Act to respond to the public health emergency caused by the COVID-19 pandemic. If made, such regulations could prevent landlords from enforcing certain rights under any Act relating to the leasing of premises or land for residential purposes e.g. the right to evict a tenant, or to terminate a lease in particular circumstances.

Schedule 2.18 of the Bill amends the *Retails Leases Act 1994* to provide a similar regulation-making power to the Minister for Finance and Small Business in respect of commercial leases.

In providing that the Ministers can make regulations to retrospectively stipulate that landlords cannot enforce legal rights under residential and commercial tenancy agreements, the Bill may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, particularly where they retrospectively remove 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 notes that the provisions are an extraordinary measure that seeks to respond to the economic crisis created by the COVID-19 pandemic. Further, any regulations made under them could not last for more than 6 months, and could only be made if the relevant Minister considered them reasonable to protect the welfare of residents, tenants and lessees. In the circumstances, the Committee makes no further comment.

Industrial rights

68. Schedule 2.19 of the Bill amends the *Retail Trading Act 2008* to provide that supermarkets are exempt from the requirement to be closed at all times on Good Friday 2020, at all times on Easter Sunday 2020, and at all times before 1pm on Anzac Day

2020. However, for the exemption to apply, the supermarkets must only be staffed by those employees who have freely elected to work on the days in question.

69. The second reading speech is silent on the reasons for this provision, but during the second reading debate, Mr Paul Lynch MP noted the "drastic circumstances" created by COVID-19 and stated:

> We must ensure that there are as few obstacles to the restocking of supermarkets as possible to give the community confidence that what they need will still be on the shelves when they go to the shops. It also helps to guard against large crowds attending and the risk of spreading infection that that creates. Arguably, it reduces the risk of hoarding by some customers.

Schedule 2.19 of the Bill amends the *Retail Trading Act 2008* to provide that supermarkets are exempt from the requirement to be closed at all times on Good Friday 2020, at all times on Easter Sunday 2020, and at all times before 1pm on Anzac Day 2020. This may impact on the industrial rights of affected employees who would otherwise be able to observe the public holidays.

However, for the exemption to apply, the supermarkets must only be staffed by those employees who have freely elected to work on the days in question. Further, in the context of the COVID-19 pandemic, the provisions may assist to keep supermarkets well stocked and prevent panic buying, hoarding, and over-crowding of supermarkets with the attendant risk of spreading infection. Given the circumstances, and the safeguard, 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

Ill-defined power – working with children checks

70. Schedule 2.1 of the Bill amends the *Child Protection (Working with Children) Act 2012*, relating to working with children checks.

71. A working with children check is a requirement for anyone who works or volunteers in child-related work in NSW. It involves a national police check (criminal history record check) and a review of reportable workplace misconduct.[11] The result of a working with children check is either a clearance to work with children for 5 years, or a bar against working with children.[12]

72. Section 22(1) of the *Child Protection (Working with Children) Act 2012* provides that a working with children check clearance ceases to have effect 5 years after the date it is granted, unless it is sooner cancelled or surrendered.

73. However, schedule 2.1 of the Bill provides that despite section 22(1), the period during which a working with children check clearance is in force may be extended at the discretion of the Children's Guardian. This provision is time limited so that it is repealed 6 months after its commencement or on a day not more than 12 months after its

[11] See https://www.service.nsw.gov.au/transaction/apply-working-children-check

[12] https://www.kidsguardian.nsw.gov.au/child-safe-organisations/working-with-children-check

commencement, prescribed by the regulations. However, an extension granted under the provision is not affected by its repeal.

74. In the second reading speech, the Attorney General stated the amendment "enable[s] the Children's Guardian to extend clearances, where appropriate, to help prevent any unforeseen disruption to services as a result of COVID-19".

75. In a media release dated 26 March 2020, the NSW Children's Guardian advised that as a result of the amendments, all working with children clearances that were due to expire from 26 March 2020 to 26 September 2020 had been extended for a further 6 months, and that further extensions may be applied should they be needed.

76. In addition, the media release stated:

> One of the strengths of the NSW system is that it is underpinned by ongoing, continuous checking. By extending these clearances, the Children's Guardian will also be able to continuously monitor the people working with children and advise employers should anyone become barred through the continuous monitoring process.[13]

Schedule 2.1 of the Bill enables the Children's Guardian to extend the period during which a working with children check clearance is in force, at his or her discretion. The provision is time limited so that it will be repealed no more than 12 months after its commencement. However, an extension granted under the provision is not affected by its repeal.

The Committee notes that the provisions are drafted so that there is no limit as to the length of extension the Guardian can grant, and to contain no limit as to the reasons for which the Guardian can grant an extension (though the heading to the relevant provisions reads "duration of clearances – response to COVID-19 pandemic"). The Bill may thereby grant an ill-defined administrative power.

The Committee acknowledges that the provisions are intended to allow flexibility for the Guardian to respond quickly and appropriately to the COVID-19 pandemic. Further, the NSW working with children check system involves continuous monitoring so that employers are advised should a person become barred to work with children regardless of the length of the clearance that they have been granted. In this way, children continue to be protected.

However, the Committee prefers provisions that grant administrative powers to be drafted with sufficient precision, so that their scope and content is clear. In particular, the provision might have been drafted to clearly limit the Guardian's power to grant an extension to cases where this is necessary to respond to COVID-19. The Committee refers the provisions to Parliament to consider whether they contain an insufficiently defined administrative power.

Wide and ill-defined power – development approvals

77. Schedule 2.8 of the Bill amends the *Environmental Planning and Assessment Act 1979* to provide the Minister for Planning and Public Spaces with a power to approve any

[13] NSW Children's Guardian, "NSW Children's Guardian extends working with children check clearances in response to COVID-19", 26 March 2020: https//www.kidsguardian.nsw.gov.au/about-us/news/nsw-children-s-guardian-extends-wwcc-clearances-in-response-to-covid-19

development without going through the usual planning process. That is, it provides that the Minister may, by order published in the Gazette, authorise development to be carried out on land without the need for any approval under the Act, or consent from any person. Further, the order would have effect despite any environmental planning instrument or development consent.

78. Various safeguards apply:

- The Minister can only make such an order if the Minister has consulted with the Minister for Health and Medical Research, and is reasonably satisfied that the making of the order is necessary to protect the health, safety and welfare of members of the public during the COVID-19 pandemic.

- The provisions are time limited so that they only apply for a period of 6 months after their commencement, or for a total of 12 months if the regulations prescribe a longer period.

79. In the second reading speech the Attorney General stated:

> The bill amends the Environmental Planning and Assessment Act 1979 to allow the planning system to respond. If we need to construct a COVID-19 clinic, we need, for the period of this crisis, to have the unfettered ability to be able to do that.

80. The Attorney General also expanded on this during the second reading debate:

> …it is a circumscribed ability to make orders. For example, the power as set out in the bill will allow the Minister to approve the conversion of business and buildings and land into vital services, to transform buildings into temporary hospitals, to transform community centres into homeless shelters and to convert restaurants into dark kitchens.

Schedule 2.8 of the Bill amends the *Environmental Planning and Assessment Act 1979* to provide that the Minister for Planning and Public Spaces may, by order published in the Gazette, authorise development to be carried out on land without the need for any approval under the Act, or consent from any person. Further, the order would have effect despite any environmental planning instrument or development consent.

In doing so, the Bill may grant the Minister a wide and ill-defined administrative power. However, the Committee acknowledges that the provisions are an extraordinary measure, removing planning impediments to allow a swift and appropriate response to the COVID-19 pandemic e.g. converting buildings into temporary hospitals.

In this vein, the Minister can only make such an order if the Minister has consulted with the Minister for Health and Medical Research, and is reasonably satisfied that the making of the order is necessary to protect the health, safety and welfare of members of the public during the COVID-19 pandemic. Further, the provisions are time limited, only applying for a maximum of 12 months after their commencement. In the circumstances, and given the safeguards, the Committee considers the provisions are reasonable and makes no further comment.

Ill-defined power – exemption for state vaccine centres

81. Schedule 2.10 of the Bill amends the *Health Practitioner (Adoption of National Law) Act 2009* to provide that the Secretary of the Ministry of Health can, by notice published in the Gazette, exempt a State Vaccine Centre from some or all of the provisions of Schedule 5F of Schedule 1[25] of the Act "if satisfied that it is in the public interest to do so." A State Vaccine Centre is defined to mean "premises designated by the Secretary of the Ministry for Health for the storage and distribution of vaccines or medicines or both".

82. Schedule 5F of Schedule 1[25] of the Act sets down various provisions to regulate pharmacies in NSW including that:

- The premises on which a pharmacy business is carried on in NSW must be approved by the Pharmacy Council of NSW (Clause 3(1)(a))
- All holders of a financial interest in a pharmacy business in NSW must be registered in the Register of Pharmacies (Clause 3(1)(b))
- There are various restrictions on who can have a financial interest in pharmacy businesses in NSW – they must be a pharmacist; a partner in a pharmacists' partnership; or a pharmacists' body corporate, or a member of a pharmacists' body corporate (Clause 5(1)).

Schedule 2.10 of the Bill amends the Health Practitioner (Adoption of National Law) Act 2009 to provide that the Secretary of the Ministry of Health can, by notice published in the Gazette, exempt a State Vaccine Centre from some or all of the provisions of Schedule 5F of Schedule 1[25] of the Act "if satisfied that it is in the public interest to do so".

A State Vaccine Centre is defined to mean "premises designated by the Secretary of the Ministry for Health for the storage and distribution of vaccines or medicines or both". Schedule 5F sets down various provisions to regulate pharmacies in NSW including that the premises on which a pharmacy business is carried on in NSW must be approved by the Pharmacy Council of NSW.

The Committee appreciates that the schedule 2.10 seeks to provide more flexibility for storage and distribution of vaccines and medicines in response to the public health emergency created by COVID-19. However, by providing that the Secretary can grant the exemption "if satisfied that it is in the public interest to do so" the Bill may grant the Secretary an ill-defined power. No criteria are set down for the Secretary to follow in making such a public interest determination and the power to grant exemptions is not limited to cases in which they are necessary to respond to the COVID-19 pandemic. The Committee refers the provisions to Parliament to consider whether they contain an insufficiently defined administrative power.

Wide and ill-defined power – selection of jurors by sheriff

83. Schedule 2.11 of the Bill amends the *Jury Act 1977* to provide that the sheriff may, on his or her own motion, exempt a person from being summoned for jury duty for trials or coronial inquests if, in the sheriff's opinion, there is good cause for the exemption. One

of the factors that the sheriff can take into account in making such a decision is whether there are safety or welfare considerations relating to the person or the community at large.

84. The provisions are time limited to apply for 6 months after commencement or for a longer period of up to 12 months prescribed by the regulations.

> **Schedule 2.11 of the Bill amends the Jury Act 1977 to provide that the sheriff may exempt a person from being summoned for jury duty if in the sheriff's opinion there is good cause for the exemption. The Bill may thereby grant the sheriff a wide and ill-defined power. The provisions place no limits on the sheriff's discretion although one factor he or she can take into account in granting an exemption is whether there are safety or welfare considerations relating to the community at large.**
>
> **The Committee acknowledges the provisions are an extraordinary measure, giving the sheriff flexibility to ensure that jury trials and coronial inquests are conducted in an appropriate way in the face of the COVID-19 pandemic. Further, the provisions are time limited to apply for no longer than 12 months. In the circumstances, the Committee makes no further comment.**

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

Rights to review of administrative decisions

85. Schedule 2.16 [1] and [2] of the Bill amends the *Public Health Act 2010* to provide that a public health order made by an authorised medical practitioner in respect of a person relating to the COVID-19 pandemic remains in force for the period specified in the order, rather than expiring after 3 business days and then requiring the NCAT to confirm the order. These provisions are time limited to be repealed 12 months after their commencement.

86. Such a public health order may require the person subject to it to do a number of things including undergoing specified treatment; notifying the Secretary of the Ministry for Health of other persons with whom the person has been in contact within a specified period; and to notify the Secretary if the person displays any specified signs or symptoms. The order may also authorise the detention of the person the subject of the order for the duration of the order (see *Public Health Act* 2010, sections 62(3) and (4)).

> **Schedule 2.16[1] and [2] of the Bill amends the *Public Health Act 2010* to provide that a public health order made by an authorised medical practitioner in respect of a person relating to the COVID-19 pandemic remains in force for the period specified in the order, rather than expiring after 3 business days and then requiring the NCAT to confirm the order. Such an order may require the person subject to it to do a number of things including undergoing specified treatment; and the order may also authorise the detention of that person for its duration.**
>
> **By removing the requirement for NCAT to confirm these public health orders, the Bill may impact on the rights of affected persons to have those administrative decisions independently reviewed. The Committee appreciates that authorities may need to move swiftly to issue a significant number of orders to contain the**

COVID-19 pandemic. Notwithstanding this, the orders can remove fundamental rights e.g. by authorising the detention of a person. In these circumstances it is important that affected persons can access independent review of such decisions. The Committee refers the matter to Parliament for consideration.

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

Henry VIII clause and significant matters in subordinate legislation – legal proceedings and administration of sentences

87. As noted earlier, schedule 1 of the Bill amends the *Criminal Procedure Act 1986* to insert Part 5 of Chapter 7 into it.

88. New Part 5 provides that the regulations under any "relevant Act" may provide for the following matters for the purpose of responding to the public health emergency caused by the COVID-19 pandemic:

- altered arrangements for criminal proceedings, including pre-trial proceedings, provided for by an Act or another law,
- altered arrangements for apprehended violence order proceedings, including provisional and interim orders, provided for by an Act or another law,
- matters relating to bail and sentencing,
- matters relating to the administration of sentences provided for by an Act or other law (section 366(1).

89. "Relevant Act" is defined to mean a number of listed Acts within the justice portfolio including the *Criminal Procedure Act 1986*, the *Crimes (Administration of Sentences) Act 1999*, the *Bail Act 2013*, the *Crimes (Sentencing Procedure) Act 1999* as well as "another Act administered by the Attorney General" (section 366(6)).

90. Further, the regulations made under these provisions:

- are not limited by the regulation-making power in a relevant Act, and
- may override the provisions of any Act or other law (section 366(3)).

91. Various safeguards apply. First, the Minister can only recommend to the Governor that such regulations be made if:

- Parliament is not currently sitting and is not likely to sit within two weeks after the day the regulations are made, and
- In the Minister's opinion:
    - the arrangements made by the provisions of the regulations are in accordance with advice issued by the Minister for Health and Medical Research, or the Chief Health Officer, and
    - the regulations are reasonable to protect the health, safety and welfare of persons in relation to the administration of justice.

- In cases where the matter relates to altered arrangements for criminal proceedings, altered arrangements for apprehended violence order proceedings, or matters relating to bail or sentencing: if the Chief Justice of NSW and relevant Head of Jurisdiction has consented (section 366(2).

92. Further, such regulations expire 6 months after their commencement, or the earlier day decided by Parliament by resolution of either House of Parliament (section 366(4)).

> **Schedule 1 of the Bill amends the *Criminal Procedure Act 1986* to provide that regulations may be made under various specified Acts in relation to altered arrangements for criminal trials, pre-trial procedures, apprehended violence order proceedings, bail and sentencing, and matters relating to the administration of sentences, for the purposes of responding to the COVID-19 pandemic. The Bill thereby allows for significant matters to be dealt with in subordinate legislation. The Committee generally prefers for such matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight.**
>
> **Further, the Bill provides that the regulations that can be made are not limited by the regulation-making powers in the specified Acts, and can override the provisions of any Act or other law. This is a Henry VIII clause, allowing the Executive to legislate without reference to the Parliament.**
>
> **Under ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by the COVID-19 pandemic, the provisions are a reasonable measure to facilitate a timely and appropriate response to any emerging issues in the justice portfolio, and thereby to ensure the continued administration of justice in NSW. The Committee also notes the safeguards in the Bill. For example, the regulations can only be made if Parliament is not sitting (or is not likely to sit within 2 weeks) and if the arrangements they provide for are in accordance with advice of the Minister for Health or the Chief Health Officer. In addition, the regulations are automatically repealed after 6 months, unless earlier repealed by Parliament. In the extraordinary circumstances, and given the safeguards, the Committee makes no further comment.**

Henry VIII clauses

93. The Bill contains other clauses that allow Ministers to recommend that regulations be made that can override the provisions of primary legislation, and thereby to legislate without reference to Parliament.

94. For example, schedule 2.12[3] of the Bill amends the Local Government Act 1993 to allow the Minister for Local Government to recommend that regulations be made that modify the application of the Act for the purposes of responding to the public health emergency caused by the COVID-19 pandemic.

95. Similarly, schedule 2.7 of the Bill amends the Electronic Transactions Act 2000 to enable the Attorney General to recommend that regulations be made under certain Acts to make alternative arrangements for the signing and witnessing of documents for the purposes of responding to the COVID-19 pandemic. Regulations made under these provisions can override the provisions of any Act or other law.

96. Again, safeguards apply. With regard to the regulation-making powers in schedules 2.12[3] and 2.7, the regulations can only be made if Parliament is not sitting (or is not likely to sit within 2 weeks) and in the Minister's opinion: the arrangements provided by the regulations are in accordance with the advice of the Minister for Health and Medical Research or the Chief Health Officer, and are reasonable to protect the health, safety and welfare of persons. Further, there are again time limits e.g. the regulations made pursuant to schedules 2.12[3] and 2.7 can only last for a maximum of 6 months after they commence.

> **The Bill contains other clauses that allow Ministers to recommend that regulations be made that can override the provisions of primary legislation, and thereby to legislate without reference to Parliament.**
>
> **For example, schedule 2.12[3] amends the Local Government Act 1993 to allow the Minister for Local Government to recommend that regulations be made that modify the application of the Act for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. Similarly, schedule 2.7 amends the Electronic Transactions Act 2000 to enable the Attorney General to recommend that regulations be made under certain Acts to make alternative arrangements for the signing and witnessing of documents for the purposes of responding to the COVID-19 pandemic. These regulations can override the provisions of any Act or other law.**
>
> **Again, these are Henry VIII clauses and would ordinarily be an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the provisions are a reasonable measure to allow a flexible and timely response to the pandemic, in a way that minimises disruption in public and everyday administrative matters. Further, safeguards apply including limits on the amount of time for which regulations made under these provisions can apply. In the circumstances, the Committee makes no further comment.**

Significant matters in subordinate legislation – parole

97. As noted previously, schedule 2.5 (section 276) to the Bill amends the *Crimes (Administration of Sentences) Act 1999* to enable the Commissioner of Corrective Services to grant parole to certain inmates belonging to a class prescribed by the regulations if satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic.

98. The Commissioner can only do so during the "prescribed period" which starts on the commencement of the provisions and ends 6 months after, or on a later day not more than 12 months after commencement, prescribed by the regulations (see section 274).

99. In doing so, schedule 2.5 provides that the regulations can make provision for:

- The functions of the Commissioner under the provisions and the application of the *Crimes (Administration of Sentences) Act 1999* in respect of an inmate released on parole under a Commissioner's order during the prescribed period,

- The application of the provisions and the *Crimes (Administration of Sentences) Act 1999* to an inmate released on parole under a Commissioner's order who remains on parole at the end of the "prescribed period" (section 276(10)).

100. Further, the Bill stipulates that, subject to any modifications provided for in section 276, or the regulations:

- the *Crimes (Administration of Sentences) Act 1999* applies, during the prescribed period, to any inmates released under the provisions in the same way as it applies to inmates who are released under the ordinary parole system set out in Part 6 of that Act,

- the Parole Authority, during the prescribed period, is to deal with an inmate release under the provisions in the same way as it deals with an offender released under the ordinary parole system set out in Part 6 of the Act.

As noted previously, schedule 2.5 to the Bill amends the Crimes (Administration of Sentences) Act 1999 to enable the Commissioner to grant parole to certain inmates belonging to a class prescribed by the regulations if satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from COVID-19. The Commissioner can only do so during the "prescribed period" which runs for no more than 12 months after the commencement of the provisions.

Schedule 2.5 also provides that any inmates released on such parole will be subject to the arrangements set down in Part 6 of the Act for inmates released under the ordinary parole system, subject to any modifications set down in the regulations. Further, schedule 2.5 provides that the regulations can make provision for further significant matters including the application of the Act to an inmate released on parole under a Commissioner's order who remains on parole at the end of the "prescribed period".

The Committee notes that Schedule 2.5 of the Bill thereby allows subordinate legislation to make provision for very significant matters. Matters such as the classes of inmate who can be released on parole should be set by primary legislation to allow an appropriate level of parliamentary oversight. However, the Committee considers that in the emergency conditions created by COVID-19, the provisions may be reasonable to allow authorities the flexibility to respond quickly and appropriately to any emerging health issues in correctional centres whilst keeping the wider community safe. Given these extraordinary circumstances, the Committee makes no further comment.

2. Treasury Legislation Amendment (COVID-19) Bill 2020

Date introduced	24 March 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

1. The object of the Bill is to amend the *Long Service Leave Act 1955* and *Payroll Tax Act 2007* as a result of the COVID-19 pandemic.

BACKGROUND

2. The Treasurer in his second reading speech addressed the impact of the COVID-19 pandemic on the NSW economy, noting that NSW is:

> …staring down an economic challenge of immense and unprecedented scale. It is a challenge unlike any other before it. There is no underlying lack of demand. No bubble has burst. There is simply an extraordinary external event forcing many of us to stop what we are doing and shelter in place.

3. The Treasurer further stated that:

> Our key economic responsibilities now are to provide as much support to keep people in jobs, business in business and take care of those most in need. This is not a conventional downturn, where the aim is simply to stimulate demand. Our objective is to preserve the structure of supply, to ensure that as many businesses as possible can remain viable so they can return to profitability when this storm passes, to ensure that as many workers as possible can be kept in their current employment, and to ensure the most vulnerable are looked after.

4. The Bill alters the *Long Service Leave Act 1955* to provide more flexibility about how much notice an employer must give an employee to take their long service leave and the amount of leave that may be taken. The Bill inserts section 15A into the *Long Service Leave Act 1955* to enable an employer to grant a worker less than one month's long service leave before the worker is entitled to long service leave, if the worker agrees. This changes the current requirement that the minimum period of leave granted in these circumstances be of at least one month's duration. The Bill also allows the employer to give less than one month's notice of when long service leave is to be given and taken, with the worker's agreement.

5. In addition, the Bill inserts section 99A into the *Payroll Tax Act 2007* so that an employer only needs to pay 75 per cent of the payroll tax on wages for the financial year beginning 1 July 2019 if all Australian wages paid or payable are no more than $10,000,000. Special requirements apply to employers who are part of a group, who must provide information about all other employers of that group to the Chief Commissioner of State Revenue to

be eligible for the concession. The Bill also increases the threshold amount for payroll tax liability for the financial year commencing 1 July 2020 to $1,000,000.

6. The Treasurer noted in the second reading speech that:

> The bill proposes two changes to the Payroll Tax Act 2007 to deliver critical financial assistance to small businesses. The bill firstly provides New South Wales businesses with direct tax relief this financial year…. We estimate that this change will deliver savings of $15,000 on average to 30,000 New South Wales businesses and keep around $450 million in the New South Wales economy…. The second proposed change to the Payroll Tax Act 2007 will bring forward an increase in the payroll tax threshold amount to $1 million… This will keep a further $56 million in the economy in 2020-2021, benefitting around 38,000 businesses that currently pay payroll tax.

ISSUES CONSIDERED BY THE COMMITTEE

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

3. COVID-19 Legislation Amendment (Emergency Measures – Attorney General) Bill 2020

Date introduced	12 May 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The Bill amends the following Acts administered by the Attorney General to implement further emergency measures as a result of the COVID-19 pandemic:

   (a) *Court Security Act 2005*

   (b) *Criminal Procedure Act 1986*

   (c) *Electronic Transactions Act 2000*

   (d) *Evidence (Audio and Audio Visual Links) Act 1998*

   (e) *Sheriff Act 2005*

   (f) *Subordinate Legislation Act 1989*.

BACKGROUND

2. The Bill is cognate with the *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Bill 2020*; and the *COVID-19 Legislation Amendment (Emergency Measures – Treasurer) Bill 2020*. In introducing the three Bills, the Attorney General the Hon. Mark Speakman SC MP told Parliament:

> These Bills will amend 40 New South Wales Acts and four New South Wales regulations across multiple portfolios. Although New South Wales has seen significant success in flattening the curve, and we may see some restrictions lifted sooner than anticipated when the House last met, the advice from our officials is that we must maintain social distancing and continue to adapt to reduce the risk of spread.

3. The Attorney General further stated:

> As with provisions in the recent emergency Act, most of these bills' provisions have sunset clauses and will subsequently lapse in September this year on the same date as the majority of the provisions enacted in the previous emergency Act. Time limits are included in recognition that these measures are extraordinary and are proposed in response to an unprecedented and rapidly evolving public health emergency.

4. The Bill was introduced on 12 May 2020 and passed Parliament the following day without amendments.[14] 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 become an Act (see *Legislation Review Act 1987*, s8A(2)).

ISSUES CONSIDERED BY THE COMMITTEE

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

Rights to privacy, personal physical integrity, liberty and a fair trial; and freedom of movement – court security

5. Schedule 1.1 of the Bill amends the *Court Security Act 2005* to give security officers the power to require a person who is entering or in court premises to submit to a thermal imaging scan, or to a temperature check using a contactless approved temperature monitoring device (section 12D(1)).

6. It also gives security officers the power to require such persons to answer questions about the person's health in relation to "signs of illness" or any other thing that may determine whether the person is likely to be at risk of exposure to COVID-19 (section 12D(1)).

7. If a person fails to comply with these requirements the security officer may re-state the requirement and, if the person is not a selected juror must:

    - warn the person that a failure or refusal to comply or to leave the court premises for the rest of the day may be an offence;

    - provide the person with evidence that the security officer is a security officer, and with his/her badge number and the reason for the exercise of the power;

    - warn the person that the security officer may arrest the person for committing an offence (see schedule 1.1, section 12D(6) of the Bill and section 20(2)(a)-(c) of the *Court Security Act 2005*).

8. Under section 16 of the *Court Security Act 2005*, a security officer may, without warrant, arrest a person in court premises if a person has committed or is committing an offence under that Act.

9. After the above warnings, a person must comply with the requirement to submit to the health check or leave the court premises and if he or she does not, is guilty of an offence with a maximum penalty of $550 (section 12D(7)).

10. Further, if a person who is entering or who is in court premises has exhibited or reported a "sign of illness" the Bill empowers a security officer to refuse entry to the court premises for the rest of the day or to require the person to leave the court premises for the rest of the day (schedule 1.1, section 12E). "Sign of illness" is defined as:

[14] Generally Bills are not passed the day after they are introduced: See Legislative Assembly Standing Order 188(9) and (10) which provide that immediately following the mover's second reading speech, the debate shall be adjourned; and the mover shall ask the Speaker to fix the resumption of the debate as an Order of the Day for a future day which shall be at least five clear days ahead, *Legislative Assembly Consolidated Standing and Sessional Orders and Resolutions of the House, 57th Parliament*, March 2020.

- a fever including a fever indicated by a temperate of more than 38 degrees Celsius following the above temperature check or thermal imaging scan;
- a cough or runny nose;
- a sore throat;
- shortness of breath;
- loss of taste or smell (schedule 1.1, section 12A).

11. Again, if the person fails to comply the security officer must issue the above warnings that failure to comply is an offence, that the security officer can arrest the person for committing an offence; and must provide evidence that he or she is a security officer and reasons for exercise of the power (schedule 1.1, section 12E(3)).

12. After that, if the person still fails to leave, he or she is guilty of an offence attracting a maximum penalty of a $550 fine (schedule 1.1, section 12E(4)).

13. However, the Bill makes specific provision for selected jurors. If they fail to comply with a health check or are exhibiting or reporting a "sign of illness" the security officer must refer them to the judicial officer or coroner conducting the trial or inquest concerned (schedule 1.1, section 12F).

14. Further, the Bill provides protections for people other than selected jurors who are required to attend court on the day in question. In denying such persons entry, or requiring them to leave because they would not submit to a health check or they are displaying or reporting a "sign of illness", the security officer must give them a written notice certifying that they were required to leave the court premises or were refused entry, and the security officer must also immediately advise the court. The notice can then be used as evidence that the person has tried to attend court but could not access or remain on the premises in any act, action, order, judgment or application taken in the person's absence (schedule 1.1, section 12G).

15. Schedule 1.1 also provides that these amendments to the *Court Security Act 2005* are automatically repealed on 26 September 2020 or on a later day prescribed by the regulations that is not later than 26 March 2021.

16. In commenting on the amendments, the Attorney General told Parliament:

> Many people are compelled to attend court but might fear attending due to the risk of exposure to COVID-19. Introducing temperature checks and other screening questions will improve public confidence in the safety of attending court.
>
> **Schedule 1.1 to the Bill amends the *Court Security Act 2005* to empower security officers to require persons entering court premises to submit to temperature checks and to answer questions relating to "signs of illness" such as fever, cough, sore throat, or shortness of breath. If a person fails to comply the security officer can refuse entry to the court premises or require the person to leave. A person who fails to submit to the temperature check and fails to leave is guilty of an offence attracting a maximum $550 fine.**

Further, schedule 1.1 amends the *Court Security Act 2005* to empower security officers to refuse entry to, or require the departure from court premises of persons reporting "signs of illness" or who display them, for example, a person returning a temperature of 38 degrees Celsius or more following a temperature check. Again, a person who fails to comply with such a direction to leave is guilty of an offence attracting a maximum $550 fine.

The Committee also notes that security officers can, without warrant, arrest any person on court premises who is committing an offence under section 16 of the *Court Security Act 2005.*

By requiring people to submit to temperature checks and answer questions about their health, the Bill may impact on the right to personal physical integrity and privacy, particularly for those people who are compelled to attend court on the day in question.

In addition, by allowing security officers to refuse entry to court premises or require people to leave on pain of penalty or arrest without warrant, the Bill may impact on freedom of movement, the right to liberty, and again, on personal physical integrity. It may also have some impact on the public administration of justice and the Committee notes that public oversight of the justice system has implications for the right to a fair trial.

However, the Committee acknowledges that these considerations must be balanced against the public health emergency created by COVID-19, to which the provisions seek to respond. Accordingly, the provisions are time-limited to be repealed no later than 26 March 2021.

Further, the Bill contains some safeguards. For example, where a person who must attend court on the day in question is refused entry or asked to leave for not complying with a temperature check or for exhibiting or reporting "signs of illness" the security officer must give him or her a notice certifying that he or she was required to leave the court premises or refused entry. This can be used as evidence that the person has tried to attend but could not access or remain on the premises in any court action taken in the person's absence. Similarly, a person who fails to comply with a security officer's direction under the provisions must be warned that failure to comply may be an offence exposing the person to the risk of arrest before further action can be taken against him or her. In the extraordinary circumstances, the Committee considers the provisions are reasonable and proportionate, and makes no further comment.

Right to a fair trial – written pleas

17. Schedule 1.2 of the Bill amends the *Criminal Procedure Act 1986* to provide that an accused person who has been served with a court attendance notice and who has been granted or refused bail, or in relation to whom bail has been dispensed with, is not prevented from lodging a written plea of guilty or not guilty under section 182 of that Act.

18. This provision is automatically repealed on 26 September 2020, or on a later day prescribed by the regulations that is no later than 26 March 2021.

19. Under section 182 of the *Criminal Procedure Act 1986*, an accused person served with a court attendance notice may enter a written plea of guilty or not guilty and in the case of a guilty plea, this may be accompanied by additional written material containing matters in mitigation of the offence.

20. In commenting on this amendment, the Attorney General told Parliament:

> The…bill will amend the Criminal Procedure Act to allow temporarily the existing written plea provisions to apply to persons about whom a bail decision has been made during the COVID-19 pandemic. Temporary removal of this exclusion will reduce the number of people required to appear physically in the Local Court to enter pleas and will allow for matters to progress without undue interpersonal contact or proximity.
>
> **Schedule 1.2 of the Bill amends section 182 of the *Criminal Procedure Act 1986* to temporarily remove an exclusion so that an accused person who has been served with a court attendance notice and who has been granted or refused bail, or in relation to whom bail has been dispensed with, is not prevented from lodging a written plea of guilty or not guilty. In the case of a guilty plea, this may be accompanied by additional written material in mitigation of the offence.**
>
> **The amendment may have some impact on the right to a fair trial by allowing written pleas to be entered in such cases. Arguments presented in writing, in this case material in mitigation of an offence to which an accused person is pleading guilty, may have less persuasive force than those presented in person. This is particularly the case in respect of unrepresented persons should they have limited literacy.**
>
> **However, these considerations must be balanced against the public health emergency created by COVID-19, to which the amendment seeks to respond by reducing the number of people who appear physically in court. Accordingly, the amendments are time limited and cannot last past 26 March 2021. Further, the amendments do not compel affected accused persons to enter written pleas. In the circumstances, the Committee makes no further comment.**

Right to a fair trial – appearance by audio visual link

21. As noted in the Committee's Digest No.12/57, the first COVID-19 emergency Bill, the *COVID-19 Legislation (Emergency Measures) Bill 2020*, which passed Parliament on 24 March 2020 and commenced the following day[15] inserted section 22C into the *Evidence (Audio and Audio Visual Links) Act 1998*. Section 22C contained special provisions to facilitate increased use of audio visual links in court proceedings during the COVID-19 pandemic.

22. Schedule 1.4 to the current Bill amends section 22C to expand on this use of audio visual links in court proceedings during the COVID-19 pandemic. It contains a new power so that an accused person who is not in custody can appear by audio visual link if the court so directs or the parties to the proceedings consent (schedule 1.4, items 2 and 3).

[15] See clause 2 of the *COVID-19 Legislation (Emergency Measures) Bill 2020* which provides that "This Act commences on the date of assent to this Act" which was 25 March 2020, see NSW Legislation website: https://www.legislation.nsw.gov.au/#/view/notification/20200323

23. The court is only to make such a direction if it is in the interests of justice having regard to:

- The public health risk posed by the COVID-19 pandemic;
- The efficient use of available judicial and administrative resources;
- Any relevant matter raised by a party to the proceedings;
- Any other matter the court considers relevant (schedule 1.4, item 6).

24. Further, if an audio visual link is used, the court must be satisfied that a party is able to have private communication with the legal representative of the party and has had a reasonable opportunity to do so (section 22C(7)).

25. These provisions are time limited as section 22C of the *Evidence (Audio and Audio Visual Links) Act 1998* only applies for 6 months from the time of its commencement or for a period of up to 12 months from commencement if prescribed by the regulations (see section 22C(1) and (9)).

> **The *COVID-19 Legislation (Emergency Measures) Bill 2020* which passed Parliament on 24 March 2020, contained special provisions to facilitate increased use of audio visual links in court proceedings during the COVID-19 pandemic. Schedule 1.4 to the current Bill expands on this and includes a new power so that an accused person who is not in custody can appear by audio visual link if the court so directs or the parties to the proceedings consent.**
>
> **The Committee noted in Digest No. 12/57, when commenting on the original provisions, that by removing rights to appear in person and thereby fully interact with one's legal representatives, the provisions may impact on the right to a fair trial. These comments apply equally to the amendments made in schedule 1.4 to the current Bill.**
>
> **However, various safeguards apply including that the court can only make a direction to proceed by audio visual link if it is in the interests of justice having regard to a number of factors including the public health risk posed by the COVID-19 pandemic, and if satisfied that the accused person is able to have private communication with his or her legal representative and has had reasonable opportunity to do so. Further, the provisions are time limited and will last for less than 12 months from their commencement. Given the safeguards, time limit, and the extraordinary public health risk created by COVID-19 to which the provisions seek to respond, the Committee makes no further comment.**

Freedom of movement

26. Schedule 1.5 to the Bill allows the Sheriff, with the approval of the Secretary of the Department of Communities and Justice, to enter into an agreement with the head of another Public Service agency to enable a sheriff's officer to assist that other agency in its COVID-19 pandemic response.

27. In particular, a sheriff's officer when so assisting a Public Service agency may issue a direction to a person entering, attempting to enter or on restricted access premises to:

- leave the premises or part of the premises
- remain on the premises or go to a specified part of the premises
- refrain from specified conduct (section 7C(4)).

28. However, the sheriff's officer can only issue such a direction if the officer reasonably believes the direction is necessary:

    - to prevent a person from unlawfully entering or exiting restricted access premises or remaining on restricted access premises, or
    - to prevent a person from assaulting another person or from damaging property at restricted access premises (section 7C(5)).

29. "Restricted access premises" are defined as:

    - a residence or other place at which a person is required to reside pursuant to an order under section 7 of the *Public Health Act 2010* relating to COVID-19,
    - premises prescribed by the regulations (section 7C(14)).

30. If a person fails to comply with the direction of the sheriff's officer, the sheriff's officer can give a second direction, and at that time the sheriff's officer is required to:

    - tell the person that the officer is a sheriff's officer, and the reason for the direction, and
    - warn the person that failure to comply with the direction may be an offence (section 7C(6)).

31. If a person fails to comply with a second direction without reasonable excuse, he or she is guilty of an offence for which the maximum penalty is a $110 fine (section 7C(7)). However, a person is not guilty of such an offence unless:

    - The sheriff's officer was in uniform when the direction was given, and
    - The sheriff's officer complied with the requirements of section 7C(6) above, and
    - The person persisted and failed to comply after the second direction was given (section 7C(8)).

32. The provisions contained in schedule 1.5 are time limited to end on 26 September 2020, or on a later day not later than 26 March 2021, prescribed by the regulations (section 7C(14)).

Schedule 1.5 to the Bill allows the Sheriff, with the approval of the Secretary of the Department of Communities and Justice, to enter into an agreement with the head of another Public Service agency to enable a sheriff's officer to assist that other agency in its COVID-19 pandemic response.

In particular a sheriff's officer when so assisting a Public Service agency may issue certain directions to a person entering, attempting to enter or on restricted access premises e.g. to leave or remain on the premises or part of the premises. "Restricted access premises" are defined as a residence or other place at which a person is required to reside pursuant to an order under section 7 of the Public Health Act 2010 relating to COVID-19; or a premises prescribed by the regulations. Failure to comply with a direction is an offence attracting a maximum penalty of a $110 fine.

Schedule 1.5 may thereby impact on freedom of movement. However, various safeguards apply. For example, the sheriff's officer an only issue such a direction if the officer reasonably believes the direction is necessary to prevent a person from unlawfully entering or exiting restricted access premises or remaining on restricted access premises; or to prevent a person from assaulting another person or from damaging property at restricted access premises. Further, the sheriff's officer must issue a second direction and a warning that failure to comply is an offence, and the person must persist with non-compliance after that before he or she can be fined.

The Committee acknowledges that the provisions are intended to assist with quarantine enforcement during the COVID-19 pandemic and are time limited to cease no later than 26 March 2021. In the circumstances, and given the safeguards that apply, the Committee considers the provisions are a reasonable and proportionate response to the public health emergency and makes no further comment.

Right to privacy and personal physical integrity and freedom from arbitrary interference

33. As above, schedule 1.5 to the Bill allows the Sheriff, with the approval of the Secretary of the Department of Communities and Justice, to enter into an agreement with the head of another Public Service agency to enable a sheriff's officer to assist that other agency in its COVID-19 pandemic response; and it grants a sheriff's officer the power to issue directions to people when providing that assistance.

34. Under schedule 1.5, a sheriff's officer may also, without warrant, enter restricted access premises and arrest or detain a person, when so assisting a Public Service agency (section 7C(9)). However, the sheriff's officer can only do so if a person has failed to comply with the officer's second direction, or if the officer believes on reasonable grounds that the power must be exercised urgently or a direction will be insufficient:

- to prevent or stop a person from assaulting another person at restricted access premises, or
- to prevent or stop a person from damaging property at restricted access premises, or
- to prevent or stop a person from unlawfully entering or exiting restricted access premises (section 7C(10)).

35. As above, "restricted access premises" are defined as:

- a residence or other place at which a person is required to reside pursuant to an order under section 7 of the *Public Health Act 2010* relating to COVID-19,

- premises prescribed by the regulations (section 7C(14)).

36. A sheriff's officer may, when exercising these powers, use reasonable force, and as soon as practicable after arresting or detaining the person, the officer is to hand the person into the custody of a police officer to be dealt with according to law (section 7C(11) and (12)).

37. As above, the provisions contained in schedule 1.5 are time limited to end on 26 September 2020, or on a later day not later than 26 March 2021, prescribed by the regulations (section 7C(14)).

38. In discussing the powers under schedule 1.5, the Attorney General told Parliament:

> …Sheriff's officers have been helping the NSW Police Force with quarantining individuals in hotels. To assist Sheriff's officer's to prevent and respond to assaults, damage to property and unlawful exit or entry to restricted premises while performing these duties, the…bill amends the Sheriff Act 2005 to grant officers [power] to temporarily to issue directions, enter rooms or quarantine facilities, arrest or detain persons for the purpose of handing them into police custody and using reasonable force to exercise the new entry, arrest and detention powers. These powers are consistent with the functions Sheriff's officers have in their civil law enforcement and security roles.

As above, schedule 1.5 to the Bill allows the Sheriff, with the approval of the Secretary of the Department of Communities and Justice, to enter into an agreement with the head of another Public Service agency to enable a sheriff's officer to assist that other agency in its COVID-19 pandemic response and it grants a sheriff's officer the power to issue directions to people when providing that assistance.

Under schedule 1.5, a sheriff's officer may also, without warrant, enter restricted access premises and arrest or detain a person, when so assisting a Public Service agency. The officer can use reasonable force in doing so. "Restricted access premises" are defined so as they may include private residences. As above they are "a residence or other place at which a person is required to reside pursuant to an order under section 7 of the Public Health Act 2010 relating to COVID-19"; or premises prescribed by the regulations.

Powers to enter premises, particularly private residences, and to arrest and detain people have the capacity to impact on privacy rights and the right to personal physical integrity. As the powers can be exercised without a warrant they also have the capacity to impact on the right to be free from arbitrary interference.

The Committee acknowledges that various safeguards apply. For example, a sheriff's officer can only exercise the powers if a person has failed to comply with the officer's second direction, or if the officer believes on reasonable grounds that the power must be exercised urgently or a direction will be insufficient, for example, to prevent or stop a person from unlawfully entering or exiting restricted access premises. Further, as soon as practicable after arresting or

detaining the person, the officer is to hand the person into the custody of a police officer to be dealt with according to law.

The Committee also acknowledges that the provisions are an extraordinary measure to respond to the public health emergency created by COVID-19 and are intended to assist with quarantine enforcement, particularly in hotels. They are accordingly time limited to cease no later than 26 March 2021.

However, the provisions allow a new category of officer, sheriff's officers, significant powers to enter premises without a warrant to arrest or detain a person, and these premises may include private residences. They may thereby unduly impact on personal rights and liberties, in particular the right to be free from arbitrary interference, and privacy rights. The Committee refers the provisions to Parliament to consider whether they are reasonable and proportionate in the circumstances.

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

Significant matters in subordinate legislation and Henry VIII clause

39. As noted in the Committee's Digest No.12/57, the first COVID-19 emergency Bill, the *COVID-19 Legislation (Emergency Measures) Bill 2020* which passed Parliament on 24 March 2020 and commenced the following day, inserted section 17 into the *Electronic Transactions Act 2000* and enabled the Attorney General to recommend that regulations be made to make alternative arrangements for the signing and witnessing of documents for the purposes of responding to the COVID-19 pandemic.

40. As a result, the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* was made on 22 April 2020 enabling the witnessing of documents to take place by audio visual link.

41. Schedule 1.3 to the current Bill amends section 17 to expand this power so that the Attorney General can recommend regulations be made under section 17, or another Act ("a relevant Act"), that provide for altered arrangements that may be necessary for the creation, execution, certification, witnessing, filing, lodgement, production, service or retention of documents under any Act. A "relevant Act" is defined to include such Acts as the *Oaths Act 1900* or the *Conveyancing Act 1919* (see section 17(5) of the *Electronic Transactions Act 2000*).

42. The Attorney General told Parliament:

> The first bill before the House today amends the regulation-making power in section 17 of the Act to also allow for the making of regulations that modify or suspend requirements, permissions or arrangements in relation to certification, execution, production, filing, lodgement, service or witnessing of documents and imposing requirements relating to the form and content of a document or processes for making a document and other matters. The regulation-making power is being expanded because the restrictions on interpersonal contact during COVID-19 may impact a range of processes beyond the matters covered by the existing power in section 17. This expansion of regulation-making power is necessary to respond effectively to COVID-19 related limitations.

43. Schedule 1.3, item 7 to the Bill also provides that if such regulations are made under section 17 they may override the provisions of any Act, regulation or other law; and if they

are made under a "relevant Act" they may override the provisions of that Act or a regulation made under that Act.

44. In addition, such regulations can only be made under section 17 or a "relevant Act" if:

- Parliament is not currently sitting and is not likely to sit within 2 weeks after the day the regulations are made, and

- In the Attorney General's opinion the arrangements made by the regulations are in accordance with advice issued by the Minister for Health and Medical Research or the Chief Health Officer; and they are a reasonable to protect the health, safety and welfare of persons (see section 17(2) of the *Electronic Transactions Act 2000* as amended by schedule 1.3, item 4 of the current Bill).

45. Consequently, the Attorney General stated that should Parliament be sitting, he would seek to make the necessary changes by introducing a Bill, not by making a regulation:

> The Department of Communities and Justice consults relevant stakeholders to identify documents that may be appropriately executed and filed in electronic form during the COVID-19 emergency. My intention is that if Parliament has resumed its formal sitting routine once those appropriate types of documents have been identified, I will introduce a Bill to Parliament proposing amendments to the substantive law rather than seek the making of a regulation under section 17.

46. Regulations made under section 17 are time limited to expire 6 months after they commence, or on an earlier day decided by Parliament. However, it would appear that regulations made under a "relevant Act" are not so time limited (see section 17(4) of the *Electronic Transactions Act 2000*).

> **The *COVID-19 Legislation (Emergency Measures) Bill 2020* inserted section 17 into the *Electronic Transactions Act 2000* (the Act). This section enabled the Attorney General to recommend that regulations be made to facilitate alternative arrangements for the signing and witnessing of documents for the purposes of responding to the COVID-19 pandemic (e.g. witnessing by audio visual link).**
>
> **Schedule 1.3 to the current Bill expands on this power, allowing regulations to be made under section 17 of the Act or another "relevant Act" to provide for new arrangements that may be necessary for the creation, execution, certification, witnessing, filing, lodgement, production, service or retention of documents under any Act.**
>
> **In so doing, the Bill may allow for significant matters to be dealt with in subordinate legislation. The Committee generally prefers for such matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight.**
>
> **Schedule 1.3, item 7 to the Bill also provides that if such regulations are made under section 17 they may override the provisions of any Act, regulation or other law; and if they are made under a "relevant Act" they may override the provisions of that Act or a regulation made under that Act. The Bill therefore**

includes Henry VIII clauses, allowing the Executive to legislate without reference to Parliament.

The Committee notes that safeguards exist. Regulations can only be made under section 17 or a "relevant Act" if Parliament is not currently sitting and is not likely to sit within 2 weeks after the day the regulations are made. In this regard, the Committee acknowledges that the Attorney General has told Parliament he intends to introduce an amending Bill to effect the changes, and not to make a regulation, if Parliament has resumed its formal sitting routine at the relevant time.

Further, regulations made under section 17 are time limited to expire 6 months after they commence, or on an earlier day decided by Parliament. However, it does not appear that regulations made under a "relevant Act" must be so time limited, and the Committee would prefer this safeguard to so extend. Subject to this observation, the Committee accepts that while they may ordinarily be an inappropriate delegation of legislative power, the provisions contained in schedule 1.3 are an extraordinary measure to allow a flexible and timely response to the public health emergency created by COVID-19. The Committee makes no further comment.

4. COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Bill 2020

Date introduced	12 May 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The Bill amends the following Acts and Regulations to implement further emergency measures as a result of the COVID-19 pandemic:

(a) *Annual Holidays Act 1944*

(b) *Associations Incorporation Act 2009*

(c) *Biodiversity Conservation Act 2016*

(d) *Children (Community Service Orders) Act 1987*

(e) *Children's Guardian Act 2019*

(f) *Community Land Management Act 1989*

(g) *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010*

(h) *Crimes (Administration of Sentences) Act 1999*

(i) *Crown Land Management Act 2016*

(j) *Electricity Supply Act 1995*

(k) *Environmental Planning and Assessment Act 1979*

(l) *Fair Trading Act 1987*

(m) *Fair Trading Legislation Amendment (Reform) Act 2018*

(n) *Fisheries Management Act 1994*

(o) *Human Tissue Act 1983*

(p) *Industrial Relations Act 1996*

(q) *Interpretation Act 1987*

(r) *Landlord and Tenant Regulation 2015*

(s) *Local Government Act 1993*

(t) *Long Service Leave Act 1955*

(u) *Mental Health Act 2007*

(v) *Mining Act 1992*

(w) *Private Health Facilities Act 2007*

(x) *Property and Stock Agents Act 2002*

(y) *Protection of the Environment Operations Act 1997*

(z) *Public Health Act 2010*

(aa) *Registered Clubs Act 1976*

(ab) *Residential Tenancies Act 2010*

(ac) *Residential Tenancies Regulation 2019*

(ad) *Retirement Villages Act 1999*

(ae) *Strata Schemes Management Act 2015*

(af) *Waste Avoidance and Resource Recovery Act 2001*

(ag) *Water Management Act 2000*

(ah) *Workers Compensation Act 1987*.

BACKGROUND

2. The Bill is cognate with the *COVID-19 Legislation Amendment (Emergency Measures – Attorney General) Bill 2020*; and the *COVID-19 Legislation Amendment (Emergency Measures – Treasurer) Bill* 2020.

3. The Bill passed Parliament on 13 May 2020, having been introduced by the Attorney General on the previous day.[16] The Bill as passed incorporates 16 amendments to the original Bill, one put by the Government; eight put by the Opposition; five put by The Greens; one put by Pauline Hanson's One Nation; and one put by the Shooters, Fishers and Farmers Party.

4. 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

[16] Generally Bills are not passed the day after they are introduced: See Legislative Assembly Standing Order 188(9) and (10) which provide that immediately following the mover's second reading speech, the debate shall be adjourned; and the mover shall ask the Speaker to fix the resumption of the debate as an Order of the Day for a future day which shall be at least five clear days ahead, *Legislative Assembly Consolidated Standing and Sessional Orders and Resolutions of the House, 57th Parliament*, March 2020.

been so passed or become an Act (see *Legislation Review Act 1987*, s8A(2)). The Committee generally comments on any issues raised by Bills as introduced. However, given that this Bill passed both Houses urgently and with amendments, and given its extraordinary nature – incorporating emergency measures to respond to the COVID-19 pandemic – the Committee has elected to report on any issues raised by this Bill as passed.

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity and victims' rights

5. Schedule 1.8, item 2 of the Bill amends the *Crimes (Administration of Sentences) Act 1999* to insert section 159. The section applies to an offender who:

    - is subject to a sentence of 3 years or less, being a sentence for which a non-parole period was set, and
    - is no longer subject to a statutory parole order under the section because the order has been revoked.

6. Under the section, the State Parole Authority (the Authority) will be able to make an order releasing the offender on parole in the same way as it can for an offender sentenced to more than 3 years of imprisonment. The Authority will also be required to consider releasing an offender on parole at least 60 days before the offender's parole eligibility date, except in the case of an offender whose statutory parole order is revoked prior to release.

7. Schedule 1.8, item 3 of the Bill validates anything done by the Authority between 26 February 2018 and the commencement of these amendments if it would have been valid had the amendments been in force.

8. In discussing the amendments contained in schedule 1.8, the Attorney General told Parliament:

> The…bill amends the Crimes (Administration of Sentences) Act 1999 to provide the State Parole Authority with the power to make parole orders for offenders sentenced to three years imprisonment or less with a non-parole period in two scenarios: First, where the offender's statutory parole order has been revoked; and second, where a parole order made by the authority under this power has been revoked…
>
> The amendment will have retrospective effect to validate anything done or omitted to be done by the authority under the previous assumption that the authority's power operated this way. The Parole Legislation Amendment Act 2017, which commenced on 26 February 2018, may have unintentionally removed the authority's ability to make parole orders for those offenders. It is appropriate to ensure that the authority retains the power, particularly in light of the COVID-19 pandemic.

9. The Attorney General also stated that the Authority would be required to continue to uphold community safety in exercising the powers contained in schedule 1.8:

> The authority will exercise the power in the same way it makes parole decisions for an offender sentenced to over three years imprisonment where a non-parole period has been set. Notably, that means that the same community safety test, which requires the authority to be satisfied

that releasing an offender on parole is in the interests of the safety of the community, will apply for any consideration of parole under the new power…

Offenders who are released under the power will be subject to the standard conditions of parole as well as any conditions that the authority considers appropriate. If the authority determines that it is not in the interests of community safety to release an offender on parole, the offender will remain in custody.

Schedule 1.8 of the Bill amends the *Crimes (Administration of Sentences) Act 1999* to insert section 159. The section applies to an offender who is subject to a sentence of 3 years or less, being a sentence for which a non-parole period was set; and is no longer subject to a statutory parole order under the section because the order has been revoked. Under the section, the State Parole Authority (the Authority) will be able to make an order releasing the offender on parole in the same way as it can for an offender sentenced to more than 3 years of imprisonment.

Schedule 1.8 also validates anything done by the Authority between 26 February 2018 and the commencement of these amendments if it would have been valid had the amendments been in force. That is, the amendments have retrospective effect. The Committee generally comments on provisions with retrospective effect, particularly if they affect individual rights or obligations, as they run contrary to the rule of law principle allowing persons knowledge of the law to which they are subject at any given time.

In the current case, as the retrospective provisions concern parole, they may impact on victims' rights. However, the Committee notes that parole amendments that came into force in February 2018 may have unintentionally removed the Authority's power to grant parole to certain offenders, and the provisions seek to restore this power and validate any actions taken on the assumption that the powers continued to exist. Further, safeguards apply to the powers and an offender is not to be released on parole where the Authority determines it is not in the interests of community safety. In addition, the Committee acknowledges that given the public health risks created by COVID-19, it is important that the Authority have the requisite powers to grant parole to offenders in appropriate cases to prevent prison over-crowding. In the circumstances, the Committee makes no further comment.

Right to personal physical integrity and privacy – human tissue

10. Schedule 1.15, item 1 of the Bill amends the *Human Tissue Act 1983* to permit any test, analysis, investigation or research required in response to the risks to public health arising from COVID-19 to be carried out, with the approval of the Secretary of the Ministry of Health, on tissue that has been lawfully removed from a person without requiring the person's consent to the use of that tissue for that purpose.

11. However, schedule 1.15, item 2 of the Bill provides that use of tissue other than blood or blood products for the above purpose ceases to be authorised on the earliest possible day that a vaccine for COVID-19 is generally available. Item 2 also provides that information relating to a test, analysis, investigation or research must not be published in a generally available publication if it could reasonably be expected to identify any person the subject of the test, analysis, investigation or research.

12. In discussing the amendments, the Attorney General told Parliament that they "will allow NSW Health to use retained blood samples for testing, research, analysis or investigation into community members' levels of antibodies to COVID-19, as necessary, where it would not be practicable to obtain donors' consent".

> **Schedule 1.15 of the Bill amends the *Human Tissue Act 1983* to permit any test, analysis, investigation or research required in response to the risks to public health arising from COVID-19 to be carried out, with the approval of the Secretary of the Ministry of Health, on tissue that has been lawfully removed from a person without requiring the person's consent to the use of that tissue for that purpose.**
>
> **In doing so, the Bill may impact on rights to personal physical integrity and privacy. However, the Bill includes safeguards. As above, the tissue must have been lawfully removed. Similarly, use of tissue other than blood or blood products for the above purpose ceases to be authorised on the earliest possible day that a vaccine for COVID-19 is generally available. In addition, information relating to a test, analysis, investigation or research must not be published in a generally available publication if it could reasonably be expected to identify any person the subject of the test, analysis, investigation or research.**
>
> **The Committee also notes that the provisions are an extraordinary measure to respond to the public health emergency created by COVID-19, allowing NSW Health to use the material for this purpose where it would not be practicable to obtain the donor's consent. Given the extraordinary circumstances, and the safeguards contained in the Bill, the Committee makes no further comment.**

Rights of people detained in mental health facilities

13. Schedule 1.21 of the Bill relates to examinations and observations carried out by medical officers and accredited persons under section 27 of the *Mental Health Act 2007*.

14. Section 27 of the Mental Health Act 2007 sets down certain steps that must be taken regarding medical examination and observation of a person to determine whether they are a "mentally ill person" or a "mentally disordered person" within the meaning of the Act, and whether they should therefore be subject to ongoing detention in a mental health facility.

15. Schedule 1.21 of the Bill amends the Mental Health Act 2007 to enable such examinations and observations to take place via audio visual link. However, this can only happen if:

- carrying out the examination or observation via audio visual link is necessary because of the COVID-19 pandemic, and
- the examination or observation can be carried out with sufficient skill or care using an audio visual link so as to form the required opinion about the person.

16. Further, these provisions are time limited, and they only authorise the examinations and observations to be carried out by audio visual link for a period starting from the day of

their commencement and ending on 26 September 2020, or on a later day not later than 26 March 2021, prescribed by the regulations.

17. The Committee also notes that the objects of the *Mental Health Act 2007* are set down in section 3 and include:

- to provide for the care and treatment of, and to promote the recovery of, persons who are mentally ill or mentally disordered, and
- to facilitate the care and treatment of those persons through community care facilities, and
- to facilitate the provision of hospital care for those persons on a voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis, and
- while protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care and, where necessary, to provide for treatment for their own protection or the protection of others, and
- to facilitate the involvement of those persons, and persons for them, in decisions involving appropriate care and treatment.

Section 27 of the *Mental Health Act 2007* sets down certain steps that must be taken regarding medical examination and observation of a person to determine whether they are a "mentally ill person" or a "mentally disordered person" within the meaning of the Act, and whether they should therefore be subject to ongoing detention in a mental health facility.

Schedule 1.21 of the Bill amends the *Mental Health Act 2007* to enable such examinations and observations to take place via audio visual link. In doing so, the Bill may have some impact on the rights of people detained in mental health facilities. Proceeding via audio visual link, and not in person, may make it more difficult for medical practitioners and accredited persons to make assessments. It may thereby increase risks around arbitrary detention and the provision of appropriate treatment consistent with the objects of the Act.

However, medical practitioners and accredited persons can only proceed by audio visual link if this is necessary because of the COVID-19 pandemic; and only if the examination or observation can be carried out with sufficient skill or care to enable the required opinion to be formed about the person. Further, these provisions are time limited – they only authorise the examinations and observations to be carried out by audio visual link until 26 March 2021 at the latest. Noting the safeguards, the time limit, and the public health emergency created by COVID-19, the Committee considers the provisions are reasonable and proportionate in the circumstances and makes no further comment.

Right to personal physical integrity – compulsory testing

18. Schedule 1.26 of the Bill amends section 62 of the *Public Health Act 2010*. Section 62 allows an "authorised medical practitioner"[17] to make a public health order in respect of a person if satisfied, on reasonable grounds that:

    - the person has a "Category 4 " or "Category 5" condition and because of the way the person behaves he or she may be a risk to public health; or
    - the person has been exposed to a "contact order condition" and is at risk of developing a contact order condition, and because of the way the person behaves, may be a risk to public health.

19. The Bill replaces subsection 62(3)(g) to provide that such a public health order may require a person with a Category 4 or Category 5 condition, or a contact order condition, to "undergo a specified kind of medical examination or test".

20. Schedule 1 of the *Public Health Act 2010,* provides a list of Category 4 and Category 5 conditions. Category 4 conditions include:

    - Avian influenza in humans;
    - COVID-19 (also known as Novel Coronavirus 2019);
    - Middle East respiratory syndrome coronavirus;
    - Severe Acute Respiratory Syndrome;
    - Tuberculosis;
    - Typhoid; and
    - Viral haemorrhagic fevers.

21. The only condition to be defined as a Category 5 condition is the Human Immunodeficiency Virus (HIV) infection.

22. Schedule 1A of the *Public Health Act 2010* also provides a list of contact order conditions, which include:

    - Avian influenza in humans;
    - COVID-19 (also known as Novel Coronavirus 2019);
    - Middle East respiratory syndrome coronavirus;
    - Severe Acute Respiratory Syndrome;

[17] An "authorised medical practitioner" is the Chief Health Officer or a registered medical practitioner so authorised by the Secretary of the Ministry of Health, see *Public Health Act 2010*, section 60.

- Typhoid; and
- Viral haemorrhagic fevers.

23. In the second reading speech the Attorney General stated:

> The…bill will make a number of minor amendments to the Public Health Act 2010. Although not exclusively related to the COVID-19 pandemic, they will help enhance the way our health services can deal with pandemic situations. The…bill will amend section 62 to allow public health orders to require a person who has, or who has been exposed to, a category 4 or 5 medical condition, including COVID-19, to undergo testing or an examination. This will ensure that individuals' infection status can be confirmed, risks to public health can be better managed and appropriate treatment plans can be devised.

24. The Attorney General also noted section 136 of the *Public Health Act 2010* which, in part, requires the Minister for Health and Medical Research to conduct a review of the provisions contained in section 62 of the Act to determine whether the policy objectives contained therein remain valid, and whether the terms of those provisions remain appropriate for securing those objectives:

> Section 62 is currently subject to a statutory review as required by section 136. Following concerns raised by the Member for Sydney and stakeholders, I can reassure the House that, should the proposed amendment to section 62 pass the Parliament, it will be considered as part of the review.

> **Schedule 1.26 of the Bill amends the *Public Health Act 2010* to allow an authorised medical practitioner to make a public health order in respect of a person reasonably suspected to have a Category 4 or 5 condition, or a contact order condition, which may require that person to undergo a specified kind of medical examination or test. This provision applies to a wide range of persons outside of those who may have a COVID-19 infection, including those who may have Human Immunodeficiency Virus (HIV) infection. The Bill does not include a date or condition upon which the provisions expire.**
>
> **By requiring a person to submit to a medical examination or test, the provisions may unduly trespass on the right to personal physical integrity. The Committee notes that the suitability of the provisions will be considered as part of a statutory review to be conducted by the Minister for Health and Medical Research. The Committee also recognises that the provisions are intended to protect public health through increased COVID-19 testing and tracking. However, as the provisions cover conditions other than COVID-19 and are not subject to a sunset clause, they may extend beyond the power necessary to contain the spread of COVID-19. The Committee refers the provisions to Parliament to consider whether they trespass unduly on personal rights and liberties.**

Retrospectivity and freedom of contract

25. Schedule 1.28 of the Bill amends the *Residential Tenancies Act 2010* to allow an "impacted tenant" to apply to the NSW Civil and Administrative Tribunal (NCAT) to end a fixed term tenancy agreement. An "impacted tenant" is defined as a tenant who is a member of a household impacted by the COVID-19 pandemic. Further, a household is considered to be so impacted if:

- any one or more rent-paying members of the household have:
    - lost employment or income as a result of the impact of the COVID-19 pandemic, or
    - had a reduction in work hours or income as a result of the impact of the COVID-19 pandemic, or
    - had to stop working, or materially reduce the member's work hours because of the member's illness with COVID-19, or another member of the household's illness with COVID-19, or the member's carer responsibilities for a family member ill with COVID-19,

  and as a result, the weekly household income has been reduced by at least 25 per cent.

26. On receiving the application, NCAT can make such a termination order if satisfied that during the "moratorium period":

- The impacted tenant has asked the landlord to formally negotiate the rent payable under the agreement and the landlord has not responded to the request within 7 days, has refused to negotiate the rent, or has agreed to negotiate but the negotiations have not started within 7 days of the landlord's agreement; or
- The impacted tenant and landlord are not able, after negotiating in good faith, to reach an agreement about the rent that would avoid financial hardship for the impacted tenant.

27. The "moratorium period" is defined to mean the period ending at the end of 15 October 2020. Further, if the NCAT makes the order, it may also order the impacted tenant to pay compensation of an amount of not more than two weeks' rent.

Schedule 1.28 of the Bill amends the Residential Tenancies Act 2010 to allow a tenant who is in financial hardship because of COVID-19 (an "impacted tenant") to apply to the NSW Civil and Administrative Tribunal (NCAT) to end a fixed term tenancy agreement.

On receiving the application, NCAT can make such a termination order if satisfied that during the "moratorium period" the landlord has failed to engage in a rent negotiation process with the impacted tenant; or where the landlord and impacted tenant have been unable to reach an agreement that would avoid financial hardship for the tenant. The "moratorium period" is defined to mean the period ending at the end of 15 October 2020.

By providing that NCAT may terminate fixed term tenancy agreements, the Bill may impact on freedom of contract – the freedom of parties to choose the contractual terms to which they are subject. The provisions also have retrospective effect, limiting the ability of landlords to rely on their rights under existing agreements. As above, the Committee generally comments on retrospective provisions, 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 notes that the provisions are an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic. Accordingly, the time during which tenants can apply for termination is limited, relating to the "moratorium period" that ends on 15 October 2020. Further, only "impacted tenants" – those who have lost at least 25 per cent of their household income as a result of COVID-19 – can apply for termination. In addition, on making the termination order, NCAT can order the tenant to pay the landlord up to two weeks' rent in compensation.

In the circumstances, the Committee considers that the provisions are a reasonable and proportionate measure to respond to COVID-19, and makes no further comment.

Retrospectivity – workers compensation liability

28. Schedule 1.34 of the Bill amends the *Workers Compensation Act 1987* to create a presumption that if a worker, during the time the worker was engaged in "prescribed employment" contracts COVID-19:

- the disease was contracted by the worker in the course of the employment; and
- that the employment was the main contributing factor, or was a substantial contributing factor to contracting the disease.

29. Schedule 1.34 thereby creates presumptive rights to compensation under the *Workers Compensation Act 1987* for those in "prescribed employment" which includes employment in a number of areas involving a higher risk of exposure to COVID-19 including:

- the retail industry (other than businesses providing only online retail)
- the health care sector including ambulance officers and public health employees
- disability and aged care facilities
- educational institutions including pre-schools, schools and tertiary institutions (other than establishments providing only online teaching services)
- police and emergency services (including fire brigades and rural fire services)
- restaurants, clubs and hotels
- the construction industry
- the cleaning industry.

30. In addition, schedule 1.34 provides that the amendments contained therein extend to a worker who had confirmed COVID-19 before the amendments commenced.

31. Schedule 1.34 also provides that the regulations can make provision with respect to certain matters including:

- the use of employers' claims histories relating to COVID-19 related claims in calculating premiums payable under the Act, and
- the sharing of the financial risk arising out of COVID-19 between all insurers under the Act including through the imposition and enforcement of risk equalisation arrangements for that purpose.

32. The provisions contained in schedule 1.34 are the result of an amendment put by The Greens to the Bill as introduced. In proposing the amendment, Mr David Shoebridge MLC stated:

> The purpose of the legislation is to ensure that if any frontline workers contract COVID-19—and, tragically, to date some have—they are protected by workers compensation benefits.
>
> As the law stands, workers who contract COVID-19—let us say a nurse at a hospital working in a busy ward—have to prove that work was a substantial contributing factor to them contracting the disease. They have to prove that they contracted the disease at work or in the course of their employment. The legal challenges in proving that for the worker are quite significant.

33. Mr Shoebridge further stated:

> We know there are risk-based premiums in New South Wales and most workers compensation schemes. Because we see this as a protective measure, and because we are not requiring causation to be proven, the amendment also provides that the regulations can be made to ensure that no employer has a surge in their premiums as a result of a claim being made under the deeming provisions. It also provides a regulation-making power to ensure that the cost of any claims is spread evenly across the scheme. Not one particular sector will have a surge in claims, and therefore a surge in workers compensation premiums. We are all in this together. The amendments will ensure that if a significant number of claims are made under these provisions they will be shared generally across employers in New South Wales.

Schedule 1.34 of the Bill creates presumptive rights to compensation under the Workers Compensation Act 1987 for those in "prescribed employment" which includes employment in a number of areas involving a higher risk of exposure to COVID-19.

In addition, schedule 1.34 provides that the amendments contained therein extend to a worker who had confirmed COVID-19 before the amendments commenced. That is, the amendments have retrospective effect. As above, the Committee generally comments on provisions that have retrospective effect, especially if they affect individual rights or obligations. In this case, the provisions retrospectively affect liability to pay workers compensation.

However, the Committee notes that schedule 1.34 contains safeguards so that its provisions do not unduly impact on the liability of individual employers. Under schedule 1.34, regulations can be made to ensure that no employer has a surge in their premiums as a result of a claim being made under the provisions contained therein. In addition, schedule 1.34 includes regulation-making power so that the cost of any claims can be spread evenly across the scheme established by the Act.

The Committee would prefer such safeguards to be wholly included in primary legislation, not the regulations, to foster an appropriate level of parliamentary oversight. However, the Committee acknowledges the amendments in schedule 1.34 are important to ensure that frontline workers who contract COVID-19 are protected by workers compensation benefits. Subject to the observation that the provisions to protect individual employers from rising premiums, and to spread the cost of claims, would ideally be located in primary legislation, 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

Wide and ill-defined administrative power – statutory time limits

34. Schedule 1.17 of the Bill amends the *Interpretation Act 1987* to insert Part 12 "Special provisions for COVID-19 pandemic". This Part creates new powers for persons and regulations to modify statutory time periods.

35. Section 84 of Part 12 allows an authorised person to modify statutory time periods. Subsection 84(1) provides that section 84 applies if a person is authorised or required under an Act to take any of the following actions:

- modify, on any ground, a period within which the person, or another person, is authorised or required to do a thing or omit to do a thing
- modify, on any ground, a period at the end of which a thing expires
- waive, on any ground, a period within which a thing must be done or omitted to be done
- agree that a thing may be done or omitted to be done despite the expiry of a period.

36. Subsection 84(2) provides that the power of a person to take the action referred to in subsection (1) is taken to include a power to take the action on the ground the person is satisfied the modification, waiver or agreement is reasonable for the purposes of responding to the public health emergency caused by the COVID-19 pandemic.

37. The *Interpretation Act 1987* applies to all Acts and instruments, whether enacted or made before or after commencement of the Act (see section 5).

38. The Bill contains safeguards regarding the use of this power. If a period is extended, suspended or waived under subsection 84(2), the period may only be extended, suspended or waived to a day no later than 31 December 2020 (subsection 84(3)). Further, if it is agreed under subsection 84(2) that a thing may be done or omitted to be done despite the expiry of the period, the day by which it is agreed the thing may be done or omitted to be done may be no later than 31 December 2020 (subsection 84(4)).

39. In addition, section 85 of Part 12 creates a regulation-making power to modify or suspend statutory time periods. Subsection 85(1) provides that the section applies if an Act (a "relevant Act") provides for a period:

- within which a person is authorised to do a thing or omit to do a thing;

- at the end of which a thing expires.

40. Subsection 85(2) provides that a regulation can be made under section 85 or a "relevant Act" to modify or extend the period. An explanatory note for these provisions sets out examples of such periods including time limits for civil and criminal procedures and processes such as limitation periods and times for giving notices, lodging applications and filing documents.

41. However, again there are safeguards. Under subsection 85(6), a regulation made under a "relevant Act" or section 85 cannot be used to shorten the period or extend or suspend the period to a day that is later than 31 December 2020. Similarly, a regulation can only be made under Part 12:

    - for the purposes of responding to the public health emergency caused by the COVID-19 pandemic; and

    - if Parliament is not sitting and, due to COVID-19 is not likely to be sitting within 2 weeks after the day the regulation is made (Part 12, subsections 87(2) and (3)).

42. The Committee also notes a further overarching safeguard in schedule 1.17 to the Bill: under Part 12, section 90, a provision of Part 12 is repealed on 26 September 2020 or a later day, no later than 31 December 2020, prescribed by the regulations.

43. In the second reading speech, the Attorney General discussed the amendments contained in schedule 1.17 and stated:

> Most limitation and other time periods continue to apply across all New South Wales legislation. However, if emergency and social distancing measures delay or suspend processes and procedures, the provisions will allow the Government to respond more rapidly and flexibly if it became difficult for an action to be taken within prescribed time limits. The amendments are subject to sunset clauses. Any regulations made under the powers may be made only for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. Furthermore, a regulation to modify time periods may be made only if the Parliament is not sitting and is not likely to sit within two weeks due to the COVID-19 pandemic or the response to it.
>
> **Schedule 1.17 of the Bill amends the *Interpretation Act 1987* to insert a new Part 12. It provides powers for an authorised person to modify statutory time periods if the person is satisfied that the modification, waiver or agreement is reasonable for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. Similarly, the new Part 12 inserts a regulation-making power into the *Interpretation Act* to allow modification of statutory time periods. Again, the power can only be used to respond to the public health emergency caused by COVID-19.**
>
> **As the *Interpretation Act* applies to all Acts and instruments in NSW, these provisions create wide administrative powers to modify statutory time periods. Further, as the statutory time periods relate to such things as time limits for civil and criminal procedures, the provisions may have some impact on individual rights and obligations.**

In short, in ordinary circumstances, the Committee would consider the administrative powers that the provisions create to be too broad and ill-defined. However, the Committee accepts that in the current extraordinary circumstances created by COVID-19, the wide-ranging powers may be appropriate to allow a flexible and timely response to the pandemic in a way that minimises disruption in matters of public administration.

The Committee also notes the safeguards contained in the Bill. As above, the powers can only be used for the purposes of responding to the public health emergency created by COVID-19. Accordingly, the provisions are subject to a sunset clause and will be automatically repealed no later than 31 December 2020. Further, regulations cannot be made under the provisions to shorten statutory time periods or extend them beyond 31 December 2020; and cannot be made unless the Parliament is not sitting and is not likely to sit within two weeks due to the COVID-19 pandemic. In the extraordinary circumstances, and given the safeguards, the Committee makes no further comment.

Wide and ill-defined administrative power – private health facility licences

44. Schedule 1.24 of the Bill amends the *Private Health Facilities Act 2007* to permit the Secretary of the Ministry of Health to impose any conditions on a licence for a private health facility that the Secretary considers necessary having regard to the COVID-19 pandemic to protect the health and safety of the public, manage resources, or ensure the provision of balanced and coordinated health services throughout the State.

45. This amendment is repealed on 26 March 2021 unless the regulations prescribe a later date for the repeal, being not later than 26 March 2022. Any condition imposed by the Secretary is also revoked on the same day that the amendment is repealed.

46. In discussing the amendment, the Attorney General stated:

> The bill amends the *Private Health Facilities Act 2007* to allow the Health Secretary to include additional conditions on a private health facility's licence if necessary as a result of the pandemic. These conditions may include limiting the types of elective surgeries that can be undertaken. This may be necessary to manage resources or coordinate health services to ensure an appropriate supply of personal protective equipment for more serious cases across the entire New South Wales health system, both public and private, during this crisis.

Schedule 1.24 of the Bill amends the *Private Health Facilities Act 2007* to permit the Secretary of the Ministry of Health to impose any conditions on a licence for a private health facility that the Secretary considers necessary having regard to the COVID-19 pandemic to protect the health and safety of the public, manage resources, or ensure the provision of balanced and coordinated health services throughout the State. These conditions may include limiting the types of elective surgery that can be undertaken. The Bill may thereby include a wide and ill-defined administrative power that may affect rights to access medical treatment.

However, the Committee notes that these provisions are an emergency measure, allowing authorities the necessary flexibility to manage health resources in response to the COVID-19 pandemic. Accordingly, the provisions are time limited to expire no later than 26 March 2022, and any condition imposed by the

Secretary is also revoked on the day of expiry. In the circumstances, the Committee makes no further comment.

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

Significant matters in subordinate legislation and Henry VIII clauses – voting rights

47. Schedule 1.16 of the Bill amends the *Industrial Relations Act 1996* to provide that if the Act or the rules of a State industrial organisation specify a period for the term of office for an officer of that organisation, or a period for when an election for an office of that organisation must be held, the regulations can modify that period.

48. Similarly, schedule 1.27 of the Bill amends the *Registered Clubs Act 1976* to provide that if the Act or rules of a registered club specify a period in relation to the election of the governing body of the club responsible for the management of the business and affairs of the club, the regulations can modify that period.

49. However, both schedules provide that the regulations made can only extend the periods to a day no later than 12 months after the amendments contained in the schedules commence. Further, the relevant Ministers can only recommend such regulations be made if:

- the Minister considers the regulation is necessary for the purposes of responding to the public health emergency caused by COVID-19; and
- the Electoral Commissioner has agreed to the making of the regulation.

50. In addition, the provisions of both schedules are repealed on 30 June 2021.

The Bill amends the *Industrial Relations Act 1996* and the *Registered Clubs Act 1976* to provide that regulations can be made to modify any time periods in those Acts relating to elections for industrial organisations or governing bodies of clubs. These are Henry VIII clauses – allowing primary legislation to be amended by regulation.

As the provisions also affect voting rights in the industrial organisations and clubs, they may also allow for significant matters to be dealt with in subordinate legislation. The Committee prefers significant matters to be dealt with in primary legislation to allow for an appropriate level of parliamentary oversight.

However, the regulation-making powers conferred by the provisions are limited. Any regulations made under the provisions could only allow the time periods for elections to be held to be extended by 12 months from the date of the commencement of the provisions. Similarly, a Minister can only recommend such regulations be made if he or she considers it necessary for the purposes of responding to the public health emergency created by COVID-19, and if the Electoral Commissioner agrees to the making of the regulations.

In ordinary circumstances the provisions would represent an inappropriate delegation of legislative power. However, in the current extraordinary circumstances created by COVID-19, the provisions may be reasonable to allow a flexible and timely response to conditions created by the pandemic. Given this,

and the limitations to the regulation-making powers, the Committee makes no further comment.

Henry VIII clauses – Energy Security Safeguard

51. Schedule 1.10 of the Bill amends the *Electricity Supply Act 1995* to constitute the Energy Security Safeguard (the Safeguard). Schedule 1.10 provides that the Safeguard is constituted by the schemes provided for in schedule 4A of the *Electricity Supply Act 1995*; and the object of the Safeguard is "to improve the affordability, reliability and sustainability of energy through the creation of financial incentives that encourage the consumption, contracting or supply of energy in particular ways". That consumption, contracting or supply of energy is an "energy activity".

52. Schedule 1.10 further provides that the object of the Safeguard may be given effect to by regulation that amends Schedule 4A of the *Electricity Supply Act 1995* to establish a scheme to encourage a specified "energy activity". Further, in establishing a scheme, the regulations may amend schedule 4A to the Act to make provision for any matter that is necessary or convenient for carrying out or giving effect to the object of the Safeguard.

53. The regulation-making power expires on 31 December 2021.

54. In discussing the amendments contained in Schedule 1.10 of the Bill, the Attorney General told Parliament:

> The…bill amends the *Electricity Supply Act 1995* to reconstitute the Energy Savings Scheme as the Energy Security Safeguard by creating a regulation-making power to establish schemes that encourage the consumption, contracting or supply of energy in particular ways…It is of critical importance during these uncertain times to provide confidence to the energy industry and its employees, and to support them to access new business opportunities on the other side of the pandemic…

Schedule 1.10 of the Bill amends the *Electricity Supply Act 1995* to constitute the Energy Security Safeguard (the Safeguard). Schedule 1.10 provides that the Safeguard is constituted by the schemes provided for in schedule 4A of the *Electricity Supply Act 1995*; and the object of the Safeguard is "to improve the affordability, reliability and sustainability of energy through the creation of financial incentives that encourage the consumption, contracting or supply of energy in particular ways". That consumption, contracting or supply of energy is an "energy activity".

Schedule 1.10 further provides that the object of the Safeguard may be given effect to by regulation that amends Schedule 4A of the *Electricity Supply Act 1995* to establish a scheme to encourage a specified "energy activity". Further, in establishing a scheme, the regulations may amend schedule 4A to the Act to make provision for any matter that is necessary or convenient for carrying out or giving effect to the object of the Safeguard.

By providing that the regulations can amend schedule 4A of the Act, the Bill contains Henry VIII clauses, thereby delegating legislative power to the Executive. However, the Committee notes that any regulations made are to be consistent with the object of the Safeguard, which is set down in the primary legislation. Further, the provisions are designed to allow sufficient flexibility to

create schemes that promote economic recovery in the energy industry in the context of COVID-19. The power to make such regulations is accordingly time limited to expire on 31 December 2021. Given these considerations, the Committee makes no further comment.

Henry VIII clauses

55. The Bill contains other clauses that allow the provisions of primary legislation to be overridden by regulation or Executive action, and thereby to legislate without reference to Parliament.

56. For example, schedule 1.6 to the Bill amends the *Community Land Management Act 1989* to allow regulations to be made for the purposes of responding to the public health emergency caused by COVID-19 to provide for:

- altered arrangements for convening meetings of associations, including for the issue or service of notices or other documents in relation to those meetings
- altered arrangements for the way a vote may be conducted at meetings
- an alternative to affixing the seal of the association
- extending the time period in which a thing is required to be done under the Act.

57. Such regulations may override the provisions of the *Community Land Management Act 1989*. However, regulations made under the power expire 6 months after their commencement or on an earlier day resolved by Parliament. Further, the regulation-making power expires on 13 November 2020, unless the regulations prescribe a later date for repeal, being not later than 13 May 2021.

58. In discussing the provisions in schedule 1.6 of the Bill, the Attorney General told Parliament:

> The…bill will insert a temporary regulation-making power into the Community Land Management Act 1989 which will allow for regulations to be made to assist community land schemes to manage and fulfil their functions during the pandemic. The temporary powers will be subject to an automatic six-month sunset clause and enable the regulations to override a limited set of provisions of the Act for that limited period. This will ensure that, as necessary, provision can be made for schemes to carry out essential functions during the pandemic in a way that is compliant with public health orders and social distancing. By way of example, the powers would allow for regulations to be made to allow for meetings and voting to be conducted remotely, rather than in person, or for statutory time limits within which certain actions must be taken to be extended.

59. Schedule 1.31 of the Bill amends the *Strata Schemes Management Act 2015* to create a similar regulation-making power in respect of strata schemes with the same time limits attached.

60. Similarly, schedule 1.30 of the Bill enables the Minister for Better Regulation and Innovation to grant, by order published in the Gazette, exemptions from provisions of the

Retirement Villages Act 1999 during the COVID-19 pandemic. The Attorney General told Parliament:

> The Act provides for the administration and operation of retirement villages. This includes rules about in-person meetings, votes conducted by written ballot at in-person meetings and various other requirements which, if adhered to, would be contrary to public health orders and could risk the health of residents…This amendment will allow orders to be made for limited exemptions…to the requirements of the Act, subject to conditions for the protection of residents and staff, to ensure that villages can continue to operate safely and effectively.

61. Again, there are time limits and valid orders that grant exemptions from the provisions of the *Retirement Villages Act 1999* can only be made from the time the amendments contained in schedule 1.30 commence, to 26 September 2020 or a day not later than 26 March 2021 prescribed by the regulations.

> **The Bill contains other clauses that allow the provisions of primary legislation to be overridden by regulation or Executive action, and thereby to legislate without reference to Parliament.**
>
> **For example, schedule 1.6 to the Bill amends the *Community Land Management Act 1989* to allow regulations to be made that override some provisions of the Act in response to COVID-19. These regulations would facilitate such things as altered arrangements for the way in which community land schemes convene meetings, or conduct votes at such meetings e.g. using technology to promote social distancing. Schedule 1.31 also amends the *Strata Schemes Management Act 2015* to create a similar regulation-making power in respect of strata schemes. Similarly, schedule 1.30 of the Bill enables the Minister for Better Regulation and Innovation to grant, by order published in the Gazette, exemptions from provisions under the *Retirement Villages Act 1999* during the COVID-19 pandemic.**
>
> **Again, these are Henry VIII clauses and would ordinarily be an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the provisions are a reasonable measure to allow a flexible and timely response to the public health risk posed by the pandemic in a way that minimises disruption in public and everyday administrative and operational matters. Further, safeguards apply including limits on the time during which such regulations and orders can be made, and limits on how long the regulations and orders themselves can remain in force. In the circumstances, the Committee makes no further comment.**

Significant matter in subordinate legislation – privacy rights

62. Schedule 1.26, items 3 and 4 of the Bill amend the *Public Health Act 2010* to provide that the Secretary of the Ministry of Health can approve certain classes of persons to provide personal information to a health records linkage organisation for the purpose of a public health or disease register established under the Act. These classes of persons include health practitioners; health organisations within the meaning of the *Health Care Complaints Act 1993*; public authorities; and "any other person prescribed by the regulations".

Schedule 1.26, items 3 and 4 of the Bill amend the *Public Health Act 2010* to provide that the Secretary of the Ministry of Health can approve certain classes of persons to provide personal information to a health records linkage organisation for the purpose of a public health or disease register established under the Act. These classes of persons include any person prescribed by the regulations.

The Committee would prefer the classes of persons to whom this power may be granted to be set out in primary, not subordinate, legislation. This is to provide for an appropriate level of parliamentary oversight over arrangements that may have privacy implications for affected individuals. The Committee refers the matter to Parliament for consideration.

Commencement by proclamation

63. Schedule 1.13 of the Bill amends the *Fair Trading Legislation Amendment (Reform) Act 2018* to provide that schedules 2.13, 4.1 and 4.2[2] of the Act are to commence on a day or days to be appointed by proclamation.

64. During the committee stage of the Bill in the Legislative Council, the Hon Damien Tudehope MLC, Minister for Finance and Small Business, and Leader of Government Business in the Legislative Council explained that without these amendments, schedules 2.13, 4.1 and 4.2[2] would commence on 1 July 2020.

65. The Minister further stated that schedule 2.13 of the *Fair Trading Legislation Amendment (Reform) Act 2018* applies new blanket one, three and five-year terms for licences in the portfolio of registration system for spatial surveyors. Further, schedule 4.1 and 4.2 create the new special trade category of trade home building licences.

66. In relation to the special surveying registration system, the Minister stated that "there are unresolved financial and technical issues for the spatial surveying registration system" one of which is that "the licensing platform for the registration system does not currently accommodate different licence terms and there are insufficient time and resources to make the necessary changes prior to 1 July 2020".

67. In relation to the new special trade category of trade home building licences, the Minister stated:

> Schedules 4.1 and 4.2 of the reform Act create a new special trade category for 13 of the existing trade licences in the Home Building Act 1989. This means those licensees will not be required to renew their licence on a one-, three- or five-year basis. Instead, they will only need to advise that they wish to continue to hold their licence every five years. Many licensees, however, hold licences in one of those categories—for example, a splashback installation licence—as well as other categories not subject to the changes, like a carpentry licence, which means they have to renew and notify on different years. An entirely new mechanism and new forms are needed to separate/manage licensees that occupy multiple categories.
>
> This will significantly impact on the operation of the current home building licensing platform. Provision will also need to be made on the platform for new licences issued in the special trade category without an expiry date. There is currently no capacity to make those major changes to the licensing platform to commence this reform. If it commences on 1 July 2020 the agency will not be able to manage these licences under this new category.

Schedule 1.13 of the Bill amends the *Fair Trading Legislation Amendment (Reform) Act 2018* to provide that schedules 2.13, 4.1 and 4.2[2] of that Act are to commence on a day or days to be appointed by proclamation. It thereby provides the Executive with unilateral authority to commence these provisions.

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. As schedules 2.13, 4.1 and 4.2[2] relate to trade licensing, they may affect individual obligations.

However, the Committee acknowledges that were it not for the amendments contained in schedule 1.13 to the Bill, the provisions in question would commence on 1 July 2020. This may not allow enough time for operational arrangements to be made to successfully implement the provisions especially given the day to day complications caused to Government and business by the COVID-19 pandemic. A more flexible start date may assist in this regard. In the circumstances, the Committee makes no further comment.

5. COVID-19 Legislation Amendment (Emergency Measures – Treasurer) Bill 2020

Date introduced	12 May 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

1. The Bill amends the following Acts and Regulations administered by the Treasurer to implement further emergency measures as a result of the COVID-19 pandemic:

   (a) *Government Sector Finance Act 2018*

   (b) *Government Sector Finance Regulation 2018*

   (c) *Payroll Tax Act 2007*

   (d) *Public Finance and Audit Act 1983*

   (e) *Public Finance and Audit Regulation 2015*.

BACKGROUND

2. The Bill is cognate with the *COVID-19 Legislation Amendment (Emergency Measures – Attorney General) Bill 2020*; and the *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Bill* 2020.

3. The Bill passed Parliament on 13 May 2020, having been introduced by the Attorney General on the previous day.[18] The Bill as passed incorporates two amendments to the original Bill, both put by the Opposition.

4. 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 become an Act (see *Legislation Review Act 1987*, s8A(2)). The Committee generally comments on any issues raised by Bills as introduced. However, given that this Bill passed both Houses urgently and with amendments, and given its extraordinary nature – incorporating emergency measures to respond to the COVID-19 pandemic – the Committee has elected to report on any issues raised by this Bill as passed.

[18] Generally Bills are not passed the day after they are introduced: See Legislative Assembly Standing Order 188(9) and (10) which provide that immediately following the mover's second reading speech, the debate shall be adjourned; and the mover shall ask the Speaker to fix the resumption of the debate as an Order of the Day for a future day which shall be at least five clear days ahead, *Legislative Assembly Consolidated Standing and Sessional Orders and Resolutions of the House, 57th Parliament*, March 2020.

ISSUES CONSIDERED BY THE COMMITTEE

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

Wide and ill-defined administrative powers

5. Schedule 1.1, item 6 of the Bill amends the *Government Sector Finance Act 2018* to allow the Treasurer to present the 2020-2021 Budget to Parliament on the "extended Budget presentation day" that is, no later than 31 December 2020, or any different day prescribed by the regulations that is not later than 30 June 2021. Under usual circumstances, the Treasurer would have been required to present the 2020-21 Budget to Parliament by 30 June 2020.[19]

6. In addition, schedule 1.1, item 6 amends the *Government Sector Finance Act 2018* to allow the Treasurer to authorise payments under section 4.10 of that Act from the Consolidated Fund on the lapse of the appropriations made by the 2019-2020 Budget because of the delay in the 2020-2021 Budget (up to an amount of 75 per cent of the appropriations under the 2019-2020 Budget) until the "extended Budget presentation day" or the enactment of the 2020-2021 Budget, whichever occurs first.

7. Further, schedule 1.1, item 6 amends the *Government Sector Finance Act 2018* to allow the Treasurer, with the Governor's approval, to authorise payments out of the Consolidated Fund for exigencies of Government resulting from the COVID-19 pandemic until the 2020-2021 Budget is enacted.

8. Ordinarily, where a Budget has not been enacted before the annual reporting period for that Budget commences, the Treasurer can authorise payments out of the Consolidated Fund to meet the requirements of the reporting period. However, the payments must not exceed 25 per cent of the appropriations under the previous Budget, and the authorisation ends within 3 months (see section 4.10 of the *Government Sector Finance Act 2018*). In short, on the lapse of the 2019-2020 appropriations, the Bill allows the Treasurer to authorise much larger payments from the Consolidated Fund for a longer period than would otherwise be the case, before the 2020-2021 Budget is presented.

9. Schedule 1.1, item 6 also makes changes to reporting obligations in response to the COVID-19 pandemic. Section 8 of the *Public Finance and Audit Act 1983* provides that the Treasurer is to release a half-yearly review by 31 December each year containing:

    - revised projections for the current financial year and an explanation of any significant variation in those revised projections from the original budget time projections, and
    - revised forward estimates, for major aggregates, over 3 years, and
    - the latest economic projections for the current financial year and an explanation of any significant variation from the budget time projections contained in the Budget Papers.

10. The half-yearly review is to be based on actual results as at the end of the previous October. Schedule 1.1, item 6 of the Bill amends the *Government Sector Finance Act 2018*

[19] See section 4.4 of the *Government Sector Finance Act 2018* and schedule 1.1 item 6 of the Bill.

to provide that the Treasurer is to publicly release this half-yearly review by 28 February 2021, for the financial year commencing on 1 July 2019.

11. Still on reporting obligations, section 8 of the *Public Finance and Audit Act 1983* also provides that the Treasurer is to publicly release a statement for each month (a monthly statement), by the end of the following month, setting out the budget time projections and year-to-date balances for the major general government sector aggregates disclosed in the Budget.

12. Schedule 1.1, item 6 of the Bill also amends the *Government Sector Finance Act 2018* to provide that, unless it is not reasonably practicable to do so, the Treasurer is to publicly release these monthly statements during the period beginning on the commencement of the amendments and ending on 31 October 2021. During the committee stage of the Bill in the Legislative Council, the Hon. Walt Secord MLC stated with regard to this amendment:

> I have agreed to insert the words "Unless it is not reasonably practicable to do so the Treasurer is to"…I do accept that there might be a circumstance where a monthly statement might not be permissible or able to be prepared – for example, a deadly second wave of COVID. I do accept that situation, but the current wording is tight enough for us to hold the Government to account.

13. In discussing the amendments contained in schedule 1.1, item 6 of the Bill more generally, the Attorney General told Parliament:

> On 20 March the New South Wales Government announced that the 2020-2021 budget would be deferred, consistent with the Commonwealth budget and other Australian jurisdictions. The…bill amends the Government Sector Finance Act 2018 to allow for this deferral of the 2020-21 budget from June until no later than 31 December 2020, or a day prescribed by regulation. This allows the Government to allocate resources based on a more complete picture of the impact of COVID-19 on the State's fiscal and economic position.

14. The Attorney General also spoke about the amendments related to payments from the Consolidated fund:

> To ensure agency funding is available until the budget is tabled, the second bill will amend the Act to extend the ability of the Treasurer to authorise payments from the Consolidated Fund on the lapse of appropriations made by the 2019-20 budget, subject to a cap of 75 per cent of the amount previously appropriated, and, with the Governor's approval, to authorise payments out of the Consolidated Fund for exigencies of Government resulting from the COVID-19 pandemic until the 2020-21 budget is enacted.

Schedule 1.1, item 6 of the Bill amends the Government Sector Finance Act 2018 to allow the Treasurer to present the 2020-2021 Budget to Parliament on the "extended Budget presentation day" that is, no later than 31 December 2020, or any different day prescribed by the regulations that is not later than 30 June 2021. Under usual circumstances, the Treasurer would have been required to present the Budget to Parliament by 30 June 2020.

It also allows the Treasurer to authorise payments from the Consolidated Fund on the lapse of the appropriations made by the 2019-2020 Budget because of the delay in the 2020-2021 Budget (up to an amount of 75 per cent of the appropriations under the 2019-2020 Budget) until the "extended Budget presentation day" or the enactment of the 2020-2021 Budget, whichever occurs

first. In addition, it allows the Treasurer, with the Governor's approval, to authorise payments out of the Consolidated Fund for exigencies of Government resulting from the COVID-19 pandemic until the 2020-2021 Budget is enacted.

In short, on the lapse of the 2019-2020 appropriations, the Bill allows the Treasurer to authorise much larger payments from the Consolidated Fund for a longer period than would otherwise be the case, before the 2020-2021 Budget is presented. In doing so, the Bill includes a wide and ill-defined administrative power affecting the right of citizens to know how public money is being spent.

However, the Committee acknowledges that the delayed presentation of the 2020-2021 Budget will allow the Government to allocate resources when it has a greater idea of the economic impact of COVID-19. It is also consistent with delays that are occurring in other jurisdictions. In these circumstances, until the Budget is presented, it is necessary to grant the Treasurer extraordinary powers to spend consolidated revenue to ensure that agencies are funded and that urgent demands created by the pandemic are met.

The Committee also notes the provisions in the Bill to safeguard citizens' rights to know how public money is being spent. In particular, for 2020-2021, the Treasurer must continue to publicly release monthly statements of the type referred to in section 8 of the Public Finance and Audit Act 1983, unless it is not reasonably practicable to do so. Similarly, by 28 February 2021, the Treasurer must publicly release the half-yearly review referred to in section 8 of that Act, detailing the condition of the State's finances for 2019-2020. Given these safeguards and the extraordinary conditions created by COVID-19, the Committee makes no further comment.

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

Significant matters in subordinate legislation – presentation of 2020-2021 Budget

15. As above Schedule 1.1, item 6 of the Bill amends the *Government Sector Finance Act 2018* to allow the Treasurer to present the 2020-21 Budget to Parliament on the "extended Budget presentation day" that is, no later than 31 December 2020, or any different day prescribed by the regulations. Under usual circumstances, the Treasurer would have been required to present the 2020-21 Budget to Parliament by 30 June 2020.

As above, the Bill allows the Treasurer to present the 2020-21 Budget to Parliament on the "extended Budget presentation day" that is, no later than 31 December 2020, or any different day prescribed by the regulations that is not later than 30 June 2021. Under usual circumstances, the Treasurer would have been required to present the 2020-21 Budget to Parliament by 30 June 2020.

By providing that the regulations can prescribe the day on which the Budget must be presented, the Bill allows a very significant matter to be dealt with in subordinate legislation. The Committee prefers significant matters such as these to be dealt with in primary legislation to foster an appropriate level of parliamentary oversight.

However, the Committee notes that the regulation-making power in this case is limited – the day that can be set must be no later than 30 June 2021. Further,

allowing limited scope to set the day by regulation facilitates a degree of flexibility that may be appropriate in the context of responding to the unpredictable conditions created by COVID-19. In the circumstances, the Committee makes no further comment.

Significant matters in subordinate legislation and Henry VIII clauses – financial reporting requirements

16. Schedule 1.4 of the Bill amends the *Public Finance and Audit Act 1983* to enable regulations under that Act to provide for the following provisions of that Act to apply to particular Departments and statutory bodies, or kinds of Departments and statutory bodies, except for specified provisions:

- Division 3 (General audit of statutory bodies) of Part 3, and
- Division 4A (General audit of Departments) of Part 3.

17. Regulations made for this purpose must provide for their repeal no later than on 1 November 2021.

18. Schedule 1.5 of the Bill accordingly uses the regulation-making power conferred by schedule 1.4 and amends the *Public Finance and Audit Regulation 2015* to exempt certain kinds of Departments and statutory bodies from requirements relating to the preparation of financial reports. The provisions will be repealed on 1 November 2021.

19. In discussing these amendments, the Attorney General told Parliament:

> The…bill amends the Public Finance and Audit Act 1983 to enable the Treasurer flexibility in relation to tabling or publication of certain reports during the 2019-20 and 2020-21 reporting period for the NSW Government. These amendments provide planned relief for certain departments and statutory bodies from financial reporting requirements for the 2019-20 reporting period. This includes certain small agencies, Crown land managers, special purpose staff agencies and retained State interests. This relief will produce sector-wide time savings, which is particularly crucial in the current circumstances.

Schedule 1.4 of the Bill amends the Public Finance and Audit Act 1983 to enable regulations under that Act to exempt certain Departments and statutory bodies from financial reporting requirements. The Bill thereby allows significant matters to be dealt with in subordinate legislation. It also allows the regulations to include provisions inconsistent with the primary legislation – an example of Henry VIII clauses.

Financial reporting under the Public Finance and Audit Act 1983 is important to ensure accountability to citizens for the expenditure of public funds. The Committee would generally prefer for any exemptions to such requirements to be dealt with in primary legislation to foster an appropriate level of parliamentary oversight.

However, the Committee acknowledges that changes to the Public Finance and Audit Regulation 2015 to effect the exemptions have been included in schedule 1.5 to the Bill, thereby ensuring parliamentary oversight in this instance. Further, any regulations that can be made under the powers contained in schedule 1.4 cannot last past 1 November 2021. Noting this limitation, and the fact that it may

be appropriate under the extraordinary conditions created by COVID-19 to allow increased flexibility so that any further necessary exemptions can be granted without the need for an amending Bill, the Committee makes no further comment.

6. State Revenue Legislation Amendment (COVID-19 Housing Response) Bill 2020

Date introduced	29 July 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasurer

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend State revenue legislation in connection with the COVID-19 pandemic response as follows—

   a. the *Duties Act 1997* is amended to increase duty concessions available under the First Home Buyers Assistance scheme for certain agreements and transfers that are entered into during the period beginning on 1 August 2020 and ending on 31 July 2021,

   b. the *Duties Act 1997*, the *Land Tax Act 1956* and the *Land Tax Management Act 1956* are amended—

      i. to provide a land tax concession to apply until 2040, being that the value of land on which certain build-to-rent properties are constructed is, for the purposes of assessing land tax, to be reduced by 50 per cent, and

      ii. to provide for exemptions from and refunds of surcharge purchaser duty and surcharge land tax payable in respect of land on which build-to-rent properties are situated,

   c. the *Payroll Tax Act 2007* is amended to provide that certain wages paid or payable to employees that are funded by the Commonwealth program known as the Aged Care Workforce Retention Grant Opportunity are to be exempt from payroll tax.

BACKGROUND

2. In the Second Reading Speech, the Treasurer addressed the economic impact of the COVID-19 pandemic on the Australian economy, stating that:

> The Australian economy fell by 0.3 per cent in the March quarter—its first decline in nine years. Restrictions to reduce the spread of COVID-19 are expected to cause a further drop in activity in the June quarter. This is expected to drive the Australian economy into a technical recession for the first time in 29 years.

3. The Treasurer went on to highlight the impact on the NSW economy, noting that:

> The national economic downturn is being felt here in New South Wales too. At the time of the half-yearly review our economy was on track to grow by 1¾ per cent over 2019-20 and return to trend growth of 2½ per cent by 2021-22. Following a severe bushfire season, and then the

> pandemic, the State economy is now expected to contract by around 10 per cent over the second half of the 2019-20 fiscal year. In practical terms, the economic impact has put thousands of businesses under intense pressure and cost hundreds of thousands of New South Wales citizens their jobs. From March to May this year the number of people employed in New South Wales fell by a staggering 269,300. The easing of restrictions led to an increase of 80,800 jobs in June, but there are still 188,500 fewer people in work since March, just in our State.

4. The Treasurer outlined how the Bill would contribute to the overall economic recovery in NSW, stating that:

> It will support our efforts to keep the most vulnerable members of our community safe by facilitating the Commonwealth Government's aged care retention bonus, and it will stimulate jobs and help drive economic recovery, with targeted support for the residential construction sector. The bill achieves these outcomes by reducing the tax burden on employers in the aged care sector and on the construction of new homes. In this way the bill will ensure that taxes are not a barrier to either quality care for our older citizens or to the recovery of the economy in the months and years ahead.

ISSUES CONSIDERED BY THE COMMITTEE

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

Significant matters not subject to parliamentary scrutiny

5. Schedule 3 of the Bill seeks to amend the current land tax structure as it applies to build-to-rent development. When describing build-to-rent housing, the Treasurer told the Parliament that:

> Build-to-rent housing refers to high-density developments built with the intention of creating high-quality rental housing for those who want it. Because they are built with the specific purpose of providing rental accommodation, build-to-rent developments offer greater security for tenants because they are better able to accommodate long-term leases. They also provide a counter-cyclical source of housing supply and improve housing diversity, offering more choice for New South Wales citizens in finding a place to call home.

6. The Treasurer went on to describe how the Bill would facilitate this kind of development, stating that:

> One of the barriers to build-to-rent development is the current structure of land tax in New South Wales. To mitigate that tax discrepancy the bill—in an Australian first—introduces a 50 per cent discount to land valuations for the purposes of calculating land tax. The discount applies to new build-to-rent developments until 2040. By limiting the benefit to new developments the measure will help support new construction during this difficult time. Providing those benefits until 2040 ensures a period of certainty for investors, with the greatest benefit flowing to those who start building sooner.

7. Further, the Treasurer stated that this change, in addition to other changes contained in the Bill, form part of the broader response to the economic impacts of COVID-19:

> Both the first home buyer and build-to-rent elements of the bill are designed to drive the creation of new housing for the people of New South Wales. They will further contribute to improving housing affordability over the medium term and they will act as an important stimulus measure, supporting job creation in the near future to help get New South Wales working again and on the path to a robust recovery.

8. The amendment contained in Schedule 3 of the Bill, seeks to amend the *Land Tax Management Act 1956* by inserting a new section 9E. This section provides a land lax concession that will apply until 2040 for land on which certain build-to-rent properties are constructed. For properties to which this section applies, their land value (for the purposes of assessing land tax), will be reduced by 50 per cent.

9. Subsection 2 of the new section 9E sets out the circumstances in which this land tax reduction will apply. It states that for the purposes of assessing land tax, the land value of a parcel of land is to be reduced by 50 per cent if –

    a. a building is situated on the land, and

    b. construction of the building commenced on or after 1 July 2020, and

    c. the Chief Commissioner is satisfied that the building is being used and occupied for a build-to-rent property in accordance with guidelines approved by the Treasurer for the purposes of this section, and

    d. an application for the reduction is made in accordance with this section.

10. Subsection 3 of the new the section 9E sets out what can be contained in the guidelines referred to in subsection 2(c), stating that the guidelines may include provisions with respect to the following:

    a. the circumstances in which a building is taken to be a build-to-rent property, including in relation to the following—

        i. the planning or development standards that must be complied with,

        ii. the minimum lease conditions that must be offered to tenants of the build-to-rent property,

        iii. the minimum scale of a building to qualify as a build-to-rent property,

        iv. the nature of the ownership and management of the building and the land on which the building is situated,

    b. the circumstances in which the applicant is required to give an undertaking to not subdivide the land or otherwise divide the ownership of the land,

    c. other matters relating to build-to-rent properties and the land on which build-to-rent properties are situated as the Treasurer determines appropriate.

11. With regard to the guidelines, the Treasurer stated in the Second Reading Speech that:

> …The bill provides for further details of the build-to-rent land tax policy to be set out in guidelines. The guidelines will be administered by the chief commissioner of taxation, including technical details of what constitutes a build-to-rent development.

Schedule 3 of the Bill seeks to amend the *Land Tax Management Act 1956* to introduce new land tax concessions for certain new build-to-rent developments. Build-to-rent housing refers to housing built specifically for rental purposes.

The Bill proposes a new section 9E which reduces the value of a parcel of land for the purposes of assessing land tax by 50 per cent in the following circumstances:

- **if a building is situated on the land, and**
- **construction of the building commenced on or after 1 July 2020, and**
- **the Chief Commissioner is satisfied that the building is being used and occupied for a build-to-rent property in accordance with guidelines approved by the Treasurer for the purposes of this section, and**
- **an application for the reduction is made in accordance with this section.**

Subsection 3 of the proposed section 9E establishes what may be contained in the guidelines used to assess if a building is being used for a build-to-rent property. This includes the planning or development standards that must be complied with; the minimum lease conditions that must be offered to tenants; the minimum scale of a building; and the nature of the ownership and management of the building and the land on which the building is situated. The guidelines may also set out the circumstances in which the applicant is required to give an undertaking not to subdivide the land or otherwise divide the ownership of the land. Further, the guidelines may make provision for other matters relating to build-to-rent properties and the land on which build-to-rent properties are situated as the Treasurer determines appropriate.

As the matters dealt with in the guidelines have bearing on the grant of significant tax concessions, the Committee would prefer that they were dealt with by regulation. This would foster an appropriate level of parliamentary oversight. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. There appears to be no such requirement for the guidelines in question. The Committee refers the matter to Parliament for consideration.

Part Two – Regulations

1. Crimes (Administration of Sentences) Amendment (COVID-19) Regulation 2020

Date tabled	3 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Counter Terrorism and Corrections

PURPOSE AND DESCRIPTION

1. Under section 276 of the *Crimes (Administration of Sentences) Act 1999* (the Act) the Commissioner of Corrective Services (the Commissioner) may release an inmate on parole if the inmate belongs to a class specified in this Regulation and if the Commissioner is satisfied that it is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic.

2. The object of this Regulation is to prescribe the following classes of inmates as eligible for release on parole by the Commissioner during the COVID-19 pandemic –

   (a) An inmate whose health is at higher risk during the COVID-19 pandemic because of an existing medical condition or vulnerability.

   (b) An inmate whose earliest possible release date is within 12 months.

3. Inmates who are national security interest inmates, male inmates classified as Category AA, A1, A2 or E1 and female inmates classified as Category 5 or 4 or E1 are excluded and cannot be released on parole by the Commissioner.

4. Section 276(3) of the Act provides that certain inmates may not be released on parole by the Commissioner and section 276(4) of the Act requires the Commissioner to consider various factors before releasing an inmate on parole.

5. The Commissioner's functions in respect of releasing inmates on parole under section 276 of the Act are limited to a period of 6 months from 25 March 2020 (or a total period of up to 12 months from that date if a longer period is prescribed by the regulations).

6. This regulation is made under the *Crimes (Administration of Sentences) Act 1999*, including sections 271 (the general regulation-making power) and 276(1)(a) and 10(a).

ISSUES CONSIDERED BY THE COMMITTEE

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

Victims' rights

7. As above under section 276 of the Act the Commissioner may release an inmate on parole if the inmate belongs to a class specified in the regulations and if the Commissioner is satisfied that it is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic. This section was inserted into the Act by *the COVID-19 Legislation Amendment (Emergency Measures) Bill 2020*, about which the Committee commented in its Digest No. 12/57.

8. Accordingly, the Regulation prescribes the following classes of inmate as eligible for release on parole by the Commissioner during the COVID-19 pandemic –

   (a) An inmate whose health is at higher risk during the COVID-19 pandemic because of an existing medical condition or vulnerability other than an excluded inmate.

   (b) An inmate whose earliest possible release date is within 12 months other than an excluded inmate (clause 330(1)).

9. The inmates who are excluded and who cannot be released on parole by the Commissioner are 'national security interest inmates', male inmates classified as Category AA, A1, A2 or E1 or female inmates classified as Category 5 or 4 or E1 (clause 330(1) and (3)).

10. The Commissioner may designate an inmate a 'national security interest inmate' if of the opinion that:

    (a) The inmate constitutes an extreme danger to other people or an extreme threat to good order and security, and

    (b) There is a risk that the inmate may engage in, or incite other persons to engage in activities that constitute a serious threat to the peace, order or good government of the State or any other place (clause 15(3A) of the *Crimes (Administration of Sentences) Regulation 2014*).

11. Male inmates classified as Category AA, A1 and A2, and female inmates classified as 5 or 4 are maximum security inmates. Inmates classified as E1 are inmates who have previously escaped from prison and who have been classified as maximum security inmates.[20]

12. The Commissioner's power to release inmates on parole under section 276 of the Act is limited to a period of 6 months after its commencement, or not more than 12 months after commencement if prescribed by the regulations (see sections 274 and 276(1) of the Act). Further, the Regulation provides that the Commissioner can only make an order

[20] *Corrective Services NSW FactSheet 9 Classification and Placement*: https://www.correctiveservices.justice.nsw.gov.au/Documents/CSNSW%20Fact%20Sheets/classification-and-placement.pdf

releasing an inmate under section 276 if satisfied that it does not pose an unacceptable risk to community safety (clause 330(2)).

Under section 276 of the *Crimes (Administration of Sentences) Act 1999* the Commissioner of Corrective Services may release an inmate on parole if the inmate belongs to a class specified in the regulations and if the Commissioner is satisfied that it is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic. The Regulation accordingly prescribes certain classes of inmate as eligible for release under these provisions, being an inmate whose health is at higher risk during the pandemic because of an existing condition or whose earliest possible release date is within 12 months, other than an excluded inmate.

As the Committee noted in its Digest No. 12/57, provisions allowing the early release of some inmates in response to COVID-19 may impact on victims' rights. It also noted, however, that section 276 of the Act contains safeguards, for example, the Commissioner cannot release an inmate under the provisions if the inmate is serving a sentence for murder, a serious sex offence, or a terrorism offence, and in making an order the Commissioner must consider the impact of the release on any victim whose name is recorded in the Victims Register in relation to the inmate.

Consistent with this, the Regulation provides that the Commissioner cannot release national security interest inmates, nor maximum security inmates. Further, it provides that the Commissioner can only make an order under section 276 if satisfied that it does not pose an unacceptable risk to community safety. The Committee also acknowledges that the provisions in the Act and Regulation are an extraordinary measure to protect public, staff and inmate health in the face of the COVID-19 pandemic and the Commissioner's power to release inmates under them is accordingly time limited to last for no more than 12 months. Given the circumstances, and the safeguards in the Act and Regulation, 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

Significant matters in subordinate legislation

13. As above, under section 276 of the Act, the Commissioner may release an inmate on parole during the COVID-19 pandemic if the inmate belongs to a class specified in the regulations, and accordingly the Regulation prescribes certain classes of inmate as eligible for release under these provisions. It also excludes certain inmates from being eligible (see above).

As above, under section 276 of the Act, the Commissioner may release an inmate on parole during the COVID-19 pandemic if the inmate belongs to a class specified in the regulations, and accordingly the Regulation prescribes certain classes of inmate as eligible for release under these provisions, and excludes others.

The Committee prefers significant matters, such as the class of inmate who can be released under parole provisions, to be included in primary not subordinate legislation. This is to foster an appropriate level of parliamentary oversight. However, the Act does contain some guidance about the class of inmate who can be granted parole under the provisions, for example, excluding those who are serving a sentence for murder, a serious sex offence, or a terrorism offence. Further, in the emergency conditions created by COVID-19, placing these matters in the regulations may be reasonable to allow authorities the flexibility to respond quickly and appropriately to any emerging health issues in correctional centres whilst keeping the wider community safe. In the circumstances, the Committee makes no further comment.

2. Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020

Date tabled	9 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction under the *Public Health (COVID-19 Spitting and Coughing) Order 2020* about intentionally spitting or coughing on:

    - a public official or
    - another worker while the worker is at the worker's place of work or travelling to or from the worker's place of work,

    in a way that is likely to cause fear about the spread of COVID-19.

2. This Regulation 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 trail

3. Under section 7 of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, the Minister may take such action, and may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences. An order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order.

4. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction.

5. On 9 April the *Public Health (COVID-19 Spitting and Coughing) Order 2020* (the Order) was published in the NSW Government Gazette. The Minister made the Order under section 7 of the Act, directing under clause 5 that a person must not intentionally spit or cough on a public official in a way that would reasonably be likely to cause fear about the spread

of COVID-19. Clause 5 of the Order was subsequently amended to protect all workers – not only public officials – while they are at their place of work or travelling to or from it, and the amended Order was published in the NSW Government Gazette on 19 April 2020.

6. Clause 4 of the Order also set down the Minister's grounds for concluding that a situation has arisen that is, or is likely to be, a risk to public health including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious.

7. The Order was drafted to commence when the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* (the Regulation) commenced, which was 9 April 2020[21] and the amendments to the Order commenced on 20 April 2020.[22]

8. The Regulation allows for a $5000 penalty notice to be issued for a contravention of the Ministerial direction under clause 5 of the Order, that is, when an individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

> **The Regulation provides that a penalty notice of $5000 can be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order 2020* by intentionally spitting or coughing on a public official, or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.**
>
> **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. The Committee also notes that $5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.**
>
> **However, 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. 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. As above, the Regulation allows for a $5000 penalty notice to be issued for a contravention of the Ministerial direction under clause 5 of the Order, that is, when an

[21] See clause 2 of the Order which provides that the Order is to commence when the Regulation commences; and clause 2 of the Regulation which provides that it is to commence on the day that it is published on the NSW Legislation website, which was 9 April 2020.

[22] See clause 2 of the *Public Health (COVID-19 Spitting and Coughing) Amendment Order 2020*.

individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

As above, the Regulation provides that a penalty notice of $5000 can be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order 2020* by intentionally spitting or coughing on a public official, or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and 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.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately 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, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

3. Public Health Amendment (Penalty Notices) Regulation 2020

Date tabled	25 March 2020
Disallowance date	To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence occurring between 26 March 2020 and 25 March 2021 against a provision of the *Public Health Act 2010* involving a contravention of the following—

   (a) a Ministerial direction to deal with a public health risk,

   (b) an order to close public premises on public health grounds,

   (c) a public health order relating to COVID-19.

2. This Regulation 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

Freedom of movement

3. Under section 7 of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, the Minister may take such action, and may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences. An order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order.

4. Under section 10 of the Act, a person who is subject to a ministerial direction under section 7, and who has notice of the direction is guilty of an offence if he or she fails to comply with the direction without reasonable excuse.

5. Under section 11 of the Act, if the Secretary of the Ministry of Health considers that access to premises where members of the public congregate should be restricted or prohibited to protect public health, the Secretary may by order direct that access to the premises be restricted or prohibited. An order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order. Any person who controls

or is involved with the control of the premises, and has notice of the direction, must take reasonably practicable action to comply with the direction or be guilty of an offence.

6. Similarly, under section 62 of the Act an authorised medical officer may make a public health order in respect of a person if satisfied on reasonable grounds that the person has, or has been exposed to, certain conditions and may be a risk to public health. Such an order may require the person to do a number of things including undergoing specified treatment and may also authorise the detention of the person for the order's duration. Section 70(1) of the Act provides that a person who fails to comply with a requirement of a public health order is guilty of an offence.

7. The Regulation allows penalty notices to be issued to anyone who has committed an offence under the above provisions of the Act of:

    - not following a ministerial direction (sections 7 and 10 of the Act);
    - not taking reasonably practicable action to comply with an order issued by the Secretary restricting or prohibiting access to premises (section 11 of the Act); or
    - not complying with a public health order (sections 62 and 70(1) of the Act);

    where the offence occurs between 26 March 2020 and 25 March 2021.

8. As of 27 April 2020, seven ministerial directions had been issued under section 7 of the Act in response to the COVID-19 pandemic, including the following:

    - The *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020*, under which the Minister directs that a person must not leave their residence without reasonable excuse such as obtaining food or other goods and services; travelling for the purposes of undertaking work or education if the person cannot do so from home; exercise; or medical or caring reasons. The ministerial direction also provides that a person must not participate in a gathering in a public place or more than two persons except for a gathering of members of the same household, or for essential work or education.
    - The *Public Health (COVID-19 Air Transportation Quarantine) Order 2020*, under which the Minister directs that persons who arrive in NSW by aircraft and have been in another country in the 14 days before their arrival must undertake mandatory quarantine for a period of 14 days, excluding the flight crew of aircraft.
    - The *Public Health (COVID-19 Maritime Quarantine) Order 2020*, which contains certain ministerial directions to persons arriving on or disembarking from a vessel in NSW, and exemptions, to deal with the public health risk of COVID-19 and its possible consequences. For example, it provides that a person who has arrived in NSW on a vessel that has come from a port outside NSW must not disembark from the vessel unless the person is authorised to do so by the Commissioner of Police, or is required to do so because of an emergency. Further, a person who is authorised to disembark must go directly to a quarantine facility as directed by the Commissioner of Police or go to a hospital or other medical facility for treatment.

- The *Public Health (COVID-19 Self-Isolation) Order 2020*, under which the Minister directs that a person diagnosed with COVID-19 must immediately travel to a suitable residence or hospital for assessment. On being discharged from the hospital the person must travel directly to a suitable residence and, except in specified circumstances, stay there by him or herself until medically cleared.

- The *Public Health (COVID-19 Residential Aged Care Facilities) Order 2020*, under which the Minister gives a direction restricting persons from entering or remaining on the premises of residential aged care facilities.

- The *Public Health (COVID-19 Lord Howe Island) Order 2020*, under which the Minister gives a direction restricting access to and from the Island to deal with the public health risk of COVID-19 and its possible consequences.

9. Each of the ministerial directions also set down the Minister's grounds for concluding that a situation has arisen that is, or is likely to be, a risk to public health including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious.

10. Each of the ministerial directions will last for no longer than 90 days because section 7(5) of the Act provides that unless it is earlier revoked, an order made under section 7 expires 90 days after it was made or on such earlier date as may be specified in the order.

The Regulation allows penalty notices to be issued to anyone who has committed certain offences under the *Public Health Act 2010* (the Act), including not complying with an order made by the Secretary of the Ministry of Health under section 11 to close public premises on public health grounds; not complying with a public health order made under section 62 relating to COVID-19; and not following a ministerial direction made under section 7.

There are such ministerial directions currently in place, made in response to COVID-19, that restrict movement and that require people to self-isolate, spend time in quarantine, and to stay away from certain locations. The Regulation is therefore part of a regime that places restrictions on people's freedom of movement, a right contained in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. This Article protects the right to move freely in a country for those who are lawfully within that country; the right to leave any country; and the right to enter a country of which you are a citizen.

However, Article 12 also recognises that derogation from this right may be warranted in certain circumstances, for example, to protect national security, public order and public health. The Committee considers that as the Regulation is part of a regime to respond to COVID-19 and stop its spread, it fits within the public health exemption, and that the limits placed on freedom of movement are reasonable in the circumstances. Consistent with this, the provisions are time-limited – the Regulation only allows the penalty notices to be issued for offences occurring between 26 March 2020 and 25 March 2021 – and any ministerial directions only last 90 days. In the circumstances, the Committee makes no further comment.

Freedom of assembly and association

11. As noted above, the Regulation allows penalty notices to be issued to anyone who has committed certain offences under the Act including by failing to comply with a ministerial direction issued under section 7, or an order issued under section 11 that prohibits access to certain premises on public health grounds.

12. As is also noted, a number of ministerial directions have now been issued under section 7 in response to the COVID-19 pandemic and these restrict gathering and movement; enforce quarantine on those arriving in NSW from aircraft and maritime travel; require people diagnosed with COVID-19 to self-isolate; and restrict access to aged care facilities and to and from Lord Howe Island.

> **As noted, the Regulation allows penalty notices to be issued to anyone who has committed certain offences under the Act including by failing to comply with a ministerial direction issued under section 7 or an order issued under section 11 to close public premises on public health grounds. As has also been noted, there are ministerial directions currently in place pursuant to section 7, and made in response to COVID-19, that restrict movement – and also gathering – and that require people to self-isolate, spend time in quarantine, and to stay away from certain locations.**
>
> **The Committee notes that the Regulation is therefore part of a regime that also places restrictions on people's right to freedom of assembly and association, rights contained in Articles 21 and 22 of the ICCPR. The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest; while the right to freedom of association protects their freedom to form and join associations to pursue a common goal, and to exchange ideas and information.**
>
> **However, Articles 21 and 22 also recognise that derogation from these rights may be warranted in certain circumstances, including to protect public health. Again, as the Regulation is part of a regime to protect public health in the face of COVID-19, the Committee considers that it fits within this public health exemption and that the limits it places on freedom of assembly and association are reasonable in the circumstances, particularly as the provisions are time limited. The Committee makes no further comment.**

Penalty notice offences - right to a fair trial

13. The Regulation allows for a $1000 penalty notice to be issued to an individual who has committed an offence under the Act of:

- not following a ministerial direction (sections 7 and 10 of the Act);
- not taking reasonably practicable action to comply with an order issued by the Secretary restricting or prohibiting access to premises (section 11 of the Act); or
- not complying with a public health order (sections 62 and 70(1) of the Act).

14. It also allows for a $5000 penalty notice to be issued to a corporation that has breached such a ministerial direction made under section 7, or order issued by the Secretary under section 11.

The Regulation allows penalty notices ranging from $1000 and $5000 to be issued to those who have breached certain ministerial directions and public health orders made under the Act.

Penalty notices allow parties to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a party'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 the amounts of $1000 and $5000 are significant amounts to be imposed on a party by way of penalty notice.

However, parties 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. Given these factors, 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

Reduced demand for certain goods and services

15. As noted, the Regulation allows penalty notices to be issued for breaching a ministerial direction under section 7 of the Act, an order to close public premises on public health grounds, or a public health order relating to COVID-19, between 26 March 2020 and 25 March 2021. Further, a number of ministerial directions have now been issued under section 7 in response to the COVID-19 pandemic and these restrict gathering and movement; enforce quarantine on those arriving in NSW from aircraft and maritime travel; require people diagnosed with COVID-19 to self-isolate; and restrict access to aged care facilities and to and from Lord Howe Island.

16. Each of the ministerial directions sets down the Minister's grounds for concluding that a situation has arisen that is, or is likely to be, a risk to public health including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious.

As noted, the Regulation allows penalty notices to be issued for breaching a ministerial direction under section 7 of the Act, an order to close public premises on public health grounds, or a public health order relating to COVID-19. Further, a number of ministerial directions have now been issued under section 7 in response to the COVID-19 pandemic that restrict gathering and movement and that require people to self-isolate, spend time in quarantine, and to stay away from certain locations.

The Regulation is therefore part of a regime that may have some adverse impact on the business community. Ministerial directions enforcing quarantine on those arriving in NSW from aircraft and maritime travel; requiring people diagnosed with COVID-19 to self-isolate; and restricting gathering and movement so that people cannot leave home except for essential reasons will decrease demand for

non-essential goods and services, and services that involve large indoor or outdoor gatherings, such as the hospitality and event industry.

However, each of the ministerial directions sets down the Minister's public health grounds for making the orders including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious. Further, the Government has taken steps to support businesses during the pandemic, for example, through passage of the *Treasury Legislation Amendment (COVID-19) Bill 2020*, discussed in the Committee's Digest No. 12/57 that provides payroll tax concessions to eligible employers.

Given the emergency public health considerations and the measures taken to support business, the Committee considers that the regime of which the Regulation is part is reasonable and proportionate in the circumstances, despite some adverse impact on business. As above, the provisions are also time limited. In the circumstances, 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

17. As above, the Regulation allows penalty notices ranging from $1000 and $5000 to be issued to those who have breached certain ministerial directions and public health orders made under the Act.

The Regulation allows penalty notices of between $1000 and $5000 to be issued to those who have breached certain ministerial directions and public health orders made under the Act.

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and 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.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately 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, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

4. Environmental Planning and Assessment Amendment (COVID-19 Planning Bodies) Regulation 2020

Date tabled	30 April 2020
Disallowance date	To be confirmed
Minister responsible	The Hon. Robert Stokes MP
Portfolio	Planning and Public Spaces

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide for public hearings and public meetings of planning bodies to be held by means of an audio link or audio visual link for 6 months during the COVID-19 pandemic.

2. The relevant planning bodies are the Independent Planning Commission, Sydney district planning panels, regional planning panels, local planning panels and panels established by the Minister or Planning Secretary under section 2.3 of the *Environmental Planning and Assessment Act 1979*.

3. This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 2.3(7), 2.16(3)(a) and 10.13 (the general regulation-making power) and clause 8(a) of Schedule 2.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to participate in public life and access to public information

4. The Regulation provides for public hearings and public meetings of planning bodies to be held by means of an audio link or audio visual link for 6 months during the COVID-19 pandemic.

5. The relevant planning bodies are the Independent Planning Commission, Sydney district planning panels, regional planning panels, local planning panels and panels established by the Minister or Planning Secretary under section 2.3 of the *Environmental Planning and Assessment Act 1979*.

6. These panels are largely independent of government and have power to make determinations on planning matters.[23] For example, the Independent Planning Commission determines state significant development applications where there is

[23] See Part 2 of the *Environmental Planning and Assessment Act 1979*, and in particular sections 2.3, 2.7, 2.9, 2.12, 2.15, 2.17 and 2.19.

significant opposition from the community.[24] Similarly, Sydney district and regional planning panels determine regionally significant development applications.[25]

7. Public meetings enable the public to put their views to the determining body before a decision is made.[26] The Independent Planning Commission also has the function of holding a public hearing into any matter where the Minister for Planning and Public Spaces so requests and the Commission has powers to require certain people to attend the public hearing and give evidence.[27]

The Regulation provides for public hearings and public meetings of planning bodies, including the Independent Planning Commission, Sydney district and regional planning panels, and local planning panels, to be held by means of an audio link or audio visual link for 6 months during the COVID-19 pandemic.

These panels are largely independent of government and have the power to make determinations on planning matters. Public meetings enable people to put their views to these panels before a determination is made, while the meetings and public hearings also increase the amount of publicly available information about planning decisions.

By providing that public meetings and hearings can be held by audio link or audio visual link, the Regulation may limit this ability of people to put their views to the determining bodies, or to access information about planning decisions, if they do not have the relevant technology. It may thereby impact on the right to participate in public life, and to access public information.

However, the Committee notes that the provisions are an extraordinary measure to ensure that public meetings and hearings are conducted appropriately in the context of the public health risk posed by COVID-19, and are accordingly time-limited to last 6 months. In the circumstances, the Committee considers that the provisions are reasonable and makes no further comment.

[24] See: https://www.ipcn.nsw.gov.au/about-us

[25] See: https://www.planningportal.nsw.gov.au/planning-panels/about-planning-panels

[26] See for example discussion of public meetings by the Independent Planning Commission: https://www.ipcn.nsw.gov.au/ourprocesses; and involving local planning panels: https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Local-Planning-Panels

[27] See *Environmental Planning and Assessment Act 1979*, s2.9(1)(d) and https://www.ipcn.nsw.gov.au/ourprocesses

5. Local Government (General) Amendment (COVID-19) Regulation (No 2) 2020

Date tabled	24 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Shelley Hancock MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to delay by 2 months, in response to the COVID-19 pandemic, the time within which the Remuneration Tribunal is required to determine the fees to be paid during the following year to councillors and mayors.

2. This Regulation is made under the *Local Government Act 1993*, including sections 747B and 748 (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

Certainty of remuneration

3. The Regulation is made under the *Local Government Act 1993* (the Act), which provides a legal framework for the system of local government in NSW, and in particular section 747B which allows regulations to be made to modify the application of the Act for the purposes of responding to the public health emergency caused by the COVID-19 pandemic.

4. The Local Government Remuneration Tribunal is established under Chapter 9, Part 2, Division 4 of the Act and one of its functions is to determine, not later than 1 May each year, the maximum and minimum amount of fees to be paid during the following year to councillors and mayors (section 241).

5. Section 246 of the Act provides that a determination of the Remuneration Tribunal may not be challenged, reviewed, quashed or called into question before any court in any legal proceedings, or restrained, removed or otherwise affected by proceedings in the nature of prohibition, mandamus, certiorari or otherwise.

6. Clause 3 of the Regulation provides that despite section 241 of the Act, fees determinations made under that section are to be made no later than 1 July 2020, rather than 1 May 2020. That is, the Regulation extends by two months the time for the determinations to be made in 2020.

> **The Regulation modifies the application of the *Local Government Act 1993* (the Act) to extend by two months the time within which the Remuneration Tribunal is required to determine the fees to be paid the following year to councillors and mayors. In doing so, the Regulation delays certainty of remuneration for affected persons.**

However, the Committee notes that under section 246 of the Act, a determination of the Remuneration Tribunal may not be challenged, reviewed, or called into question. Therefore, although the Regulation delays certainty of remuneration it does not affect any existing opportunity to challenge a determination.

Similarly, the Regulation is made in response to the COVID-19 pandemic and may assist with such things as allowing the Remuneration Tribunal more time to coordinate their determinations via remote means, and accommodating changing economic circumstances. In the circumstances, 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

Henry VIII clause

7. As above, the Regulation is made under section 747B of the Act which allows regulations to be made to modify the application of the Act for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. The Regulation modifies the application of the Act to extend the time within which the Remuneration Tribunal must make certain fees determinations.

8. Regulations made under section 747B expire within 6 months or such earlier day decided by Parliament by resolution of either House of Parliament (section 747B(4)).

As above, the Regulation modifies the application of the Act to extend the time within which the Remuneration Tribunal must make certain fees determinations. It does so, drawing on a power contained in section 747B of the Act, which allows regulations to be made to modify the application of the Act for the purposes of responding to COVID-19.

As noted in the Committee's Digest No.12/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and the regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, this delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic in a way that minimises disruption in matters of public administration. Further, there is a limited amount of time for which regulations made under this power can apply. In the circumstances, the Committee makes no further comment.

6. Local Government (General) Amendment (COVID-19) Regulation 2020

Date tabled	17 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Shelley Hancock MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are—

(a) to introduce the following temporary modifications to the application of provisions of the *Local Government Act 1993* in response to the public health emergency caused by the COVID-19 pandemic—

(i) pushing back dates on which certain things must be done by councils (including the adoption of annual operational plans, preparation and auditing of financial records and the preparation of annual reports),

(ii) providing additional time for the payment of an instalment of annual rates and charges,

(iii) permitting councils to waive payment of, or reduce, a fee in a category of cases without first giving public notice of that category if the category relates to a response to the COVID-19 pandemic,

(iv) removing the need for councils to make certain documents available for inspection by members of the public in the offices of the councils and to instead make these documents available by other means, and

(b) to remove requirements on councils to publish certain notices and advertisements in newspapers and to instead require publication on council websites and in other ways that a particular council (or in the case of a notice relating to a constitutional referendum or council poll, the relevant election manager) considers necessary to bring the notice or advertisement to the attention of appropriate persons, and

(c) to provide that a water supply restriction may be imposed by a council by notice published on the website of the council rather than in a newspaper.

2. This Regulation is made under the *Local Government Act 1993*, including sections 747B and 748 (the general regulation-making power) and Schedule 6.

ISSUES CONSIDERED BY THE COMMITTEE

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

Access to government information – inspection of documents at council offices

3. Section 747B of the *Local Government Act 1993* (the Act) authorises regulations under the Act to modify the application of the Act for the purposes of responding to the public health emergency created by the COVID-19 pandemic. Regulations made under this section are time limited to expire 6 months after the day on which the regulation commences or on an earlier day decided by Parliament by resolution of either House (see s747B(4)).

4. Schedule 1[15] of the Regulation accordingly inserts Division 15 into Part 13 of the *Local Government (General) Regulation 2005* to make temporary measures for the COVID-19 pandemic.

5. Among those measures, clause 413K provides that a requirement under section 9(2), 43, 113(5), 167, 364(1), 418(4) and 733(6) of the Act that a document be made available at the offices of a council is satisfied if the document is instead made available on the website of the council, and provided to a person on request in an electronic form, or in any other form requested by the person and approved by the council. An example of such a document is the agenda and associated business papers of a council meeting (see section 9 of the Act).

6. Similarly, a requirement in section 47G, 302(2) and 405(4) of the Act that a document be made available at the offices of a council or a location in the area of the council is satisfied if the document is instead provided to a person on request in an electronic form, or in any other form approved by the council. An example of such a document is the roll of electors that the General Manager of a council must make publicly available (see section 302(2) of the Act).

> **Schedule 1[15] of the Regulation removes the need for councils to make certain documents available for inspection by members of the public in the offices of the councils. These requirements are instead satisfied if such documents are made available on the council website and are provided to a person on request in an electronic form, or in any other form sought by the person and approved by the council.**
>
> **These provisions may impact on the right to access government information. In particular, people in the community who do not have access to electronic resources can request to inspect documents in a non-electronic form, but this is at the discretion of the council. Access to government information is part of the right to participate in public life as recognised in Article 25 of the International Covenant on Civil and Political Rights to which Australia is a party.**
>
> **The Committee appreciates that the provisions are an extraordinary measure to respond to the public health emergency created by COVID-19, and that they are accordingly time-limited to apply for no more than 6 months. Even so, the Committee would prefer there to be a requirement for councils to provide the**

documents in non-electronic form e.g. by mail, if asked to do so. The Committee refers the matter to Parliament for consideration.

Access to government information – newspapers

7. Schedule 1[1]-[12] of the Regulation removes requirements in the *Local Government (General) Regulation 2005* for councils to publish certain notices and advertisements in newspapers and instead requires publication on council websites and in other ways that a particular council (or in the case of a notice relating to a constitutional referendum or council poll, the relevant election manager) considers necessary to bring the notice or advertisement to the attention of appropriate persons. These provisions are not time limited nor drafted to relate to the COVID-19 pandemic.

8. Such notices include advertisements inviting tenders for council contracts (schedule 1[10]-[12]); notices to do with consultation concerning categorisation of land as an area of cultural significance (schedule 1[5]); and, as above, notices relating to constitutional referenda or council polls e.g. their date, location, or the question to be asked at them (schedule 1[16]).

The Regulation removes requirements in the *Local Government (General) Regulation 2005* for councils to publish certain notices and advertisements in newspapers and instead requires publication on council websites and in other ways that a particular council considers necessary to bring the notice or advertisement to the attention of appropriate persons. Such notices impart significant information and include notices relating to constitutional referenda or council polls; and notices to do with consultation concerning categorisation of land as an area of cultural significance.

These provisions are not time limited, nor drafted to relate to COVID-19. They may impact on the right to access government information. In particular, there is no requirement for councils to make the information accessible to people who do not have access to electronic resources – this is left to the council's discretion. The Committee refers the provisions to Parliament for consideration.

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

9. As above, Schedule 1[15] of the Regulation is made under section 747B of the Act which allows regulations to be made to modify the application of the Act for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. Schedule 1[15] of the Regulation removes the requirement under the Act for councils to make documents available for inspection by members of the public in the offices of the councils, and makes provision for alternative arrangements.

10. As also noted above, regulations made under section 747B expire within 6 months or such earlier day decided by Parliament by resolution of either House of Parliament (section 747B(4)).

As above, the Regulation removes the requirement under the *Local Government Act 1993* (the Act) for councils to make documents available for inspection by members of the public in the offices of the council, and makes provision for

alternative arrangements. It does so, drawing on a power contained in section 747B of the Act, which allows regulations to be made to modify the application of the Act for the purposes of responding to COVID-19.

As noted in the Committee's Digest No.12/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and the regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic in a way that minimises disruption in matters of public administration. Further, there is a limited amount of time for which regulations made under this power can apply. In the circumstances, the Committee makes no further comment.

7. Residential Tenancies Amendment (COVID-19) Regulation 2020

Date tabled	15 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to—

(a) generally prohibit, in the 6 months after the commencement of the regulation (the "moratorium period"), a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) from—

(i) giving a tenant who is a member of a household financially impacted by the COVID-19 pandemic (an "impacted tenant") a termination notice under the *Residential Tenancies Act 2010* for non-payment of rent or charges, or

(ii) applying to NSW Civil and Administrative Tribunal (NCAT) under the *Residential Tenancies Act 2010* for a termination order relating to a termination notice given to an impacted tenant for non-payment of rent or charges, or

(iii) otherwise applying to NCAT for a termination order in relation to the residential tenancy agreement solely on the ground that an impacted tenant has failed to pay rent or charges, and

(b) provide that, during the moratorium period, a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) may only evict an impacted tenant for non-payment of rent or charges if—

(i) the landlord gives a termination notice, or applies for a termination order, at least 60 days after the commencement of the regulation, and

(ii) the landlord and impacted tenant have participated, in good faith, in a formal rent negotiation process about the rent or charges payable, and

(iii) it is fair and reasonable in the circumstances of the case for the landlord to give the termination notice or apply for the order, and

(c) require a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) to give at least 90 days' notice of the termination of—

(i) a fixed term tenancy at the end of the term, or

(ii) a periodic tenancy, or

(iii) a tenancy because of a breach of the residential tenancy agreement (other than non-payment of rent or charges), or

(iv) a tenancy of 20 years or more, and

(d) prohibit a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) from listing an impacted tenant on a residential tenancy database for the non-payment of rent or charges, and

(e) prescribe, during the moratorium period, the minimum period of written notice the proprietor of a boarding house must give a resident financially impacted by the COVID-19 pandemic (an "impacted resident") of an eviction based solely on the non-payment of fees (including occupancy fees or rent) or fees for services as follows—

(i) if the proprietor and impacted resident have participated in negotiations about the fees but were not able to reach agreement because the impacted resident did not participate in good faith—60 days, or

(ii) otherwise—6 months, and

(f) prescribe, during the moratorium period, that the proprietor of a boarding house must give a resident 90 days written notice of eviction, unless the eviction is based on—

(i) the resident causing or permitting serious damage to the premises or other residents' property, or

(ii) the resident using the premises for illegal purposes, or

(iii) the resident threatening, abusing, intimidating or harassing other residents, or

(iv) the non-payment of fees (including occupancy fees or rent) or fees for services, unless the resident is an impacted resident.

2. This Regulation is made under the *Residential Tenancies Act 2010*, including sections 224 (the general regulation-making power) and 229(1)(a), (b) and (c).

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

3. The Regulation is made under the *Residential Tenancies Act 2010* (the Act) and in particular, section 229(1)(a),(b) and (c) which provide that the Minister for Better Regulation and Innovation (the Minister) can make regulations under any "relevant Act" to respond to the public health emergency caused by the COVID-19 pandemic:

- prohibiting the recovery of possession of premises by a landlord, owner or proprietor of premises from a tenant or resident of the premises under the "relevant Act" in particular circumstances,
- prohibiting the termination of a residential tenancy agreement, occupancy agreement or site agreement by a landlord, proprietor of premises or operator of a community under the "relevant Act" in particular circumstances, and
- regulating or preventing the exercise or enforcement of another right of a landlord, proprietor of premises or operator of a community by the landlord, proprietor or operator under the "relevant Act" or an agreement relating to the premises.

4. Such regulations are time limited to expire 6 months after they commence or on an earlier day decided by Parliament by resolution of either House of Parliament (section 229(4)). Further, they can only be made if, in the Minister's opinion, they are reasonable to protect the health, safety and welfare of tenants or residents under the Act (section 229(5)).

5. "Relevant Act" is defined to mean the *Boarding Houses Act 2012*; the *Residential (Land Leases) Communities Act 2013;* the *Residential Tenancies Act 2010*; and "any other Act relating to the leasing of premises or land for residential purposes" (section 229(5)).

6. The Regulation accordingly generally prohibits in the 6 months after the commencement of the Regulation (the "moratorium period"), a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) from:

- giving an "impacted tenant" a termination notice under the Act for non-payment of rent or charges, or
- applying to NSW Civil and Administrative Tribunal (NCAT) under the Act for a termination order relating to a termination notice given to an impacted tenant for non-payment of rent or charges, or
- otherwise applying to NCAT for a termination order in relation to the residential tenancy agreement solely on the ground that an impacted tenant has failed to pay rent or charges (schedule 1, clause 41C(1)).

7. An "impacted tenant" is defined as a tenant who is a member of a household impacted by the COVID-19 pandemic (schedule 1, clause 41A). Further, a household is considered to be impacted by the COVID-19 pandemic if:

- any one or more rent-paying members of the household have:
    - lost employment or income as a result of the impact of the COVID-19 pandemic, or
    - had a reduction in work hours or income as a result of the impact of the COVID-19 pandemic, or
    - had to stop working, or materially reduce the member's work hours because of the member's illness with COVID-19, or another member of

the household's illness with COVID-19, or the member's carer responsibilities for a family member ill with COVID-19,

and as a result, the weekly household income has been reduced by at least 25 per cent (schedule 1, clause 41B).

8. Further, schedule 1, clause 41C(2) of the Regulation provides that, during the moratorium period, a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) may only evict an impacted tenant for non-payment of rent or charges if—

- the landlord gives a termination notice, or applies for a termination order, at least 60 days after the commencement of the Regulation, and
- the landlord and impacted tenant have participated, in good faith, in a formal rent negotiation process about the rent or charges payable, and
- it is fair and reasonable in the circumstances of the case for the landlord to give the termination notice or apply for the order.

9. In deciding whether the landlord has participated in good faith, and that it is fair and reasonable in the circumstances, NCAT may have regard to a number of factors including:

- the nature of any financial hardship experienced by the landlord or impacted tenant, including the general financial position of each party,
- the availability and affordability of reasonable alternative accommodation for the impacted tenant,
- the public health objectives of ensuring citizens remain in their homes and preventing all avoidable movement of persons (schedule 1, clause 41C(4)).

10. Schedule 1, clause 41D of the Regulation also provides that a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) must give at least 90 days' notice of the termination of:

- a fixed term tenancy at the end of the term, or
- a periodic tenancy, or
- a tenancy because of a breach of the residential tenancy agreement (other than non-payment of rent or charges), or
- a tenancy of 20 years or more,

and this applies regardless of whether the tenant is an "impacted tenant".

11. The Regulation also covers boarding houses. Schedule 2, clause 34 provides that during the "moratorium period" (again the period ending 6 months after the day on which the Regulation commences), the minimum period of written notice the proprietor of a boarding house must give a resident financially impacted by the COVID-19 pandemic (an

"impacted resident") of an eviction based solely on the non-payment of fees (including occupancy fees or rent) or fees for services is as follows:

- if the proprietor and impacted resident have participated in negotiations about the fees but were not able to reach agreement because the impacted resident did not participate in good faith, 60 days, or
- otherwise, 6 months.

12. The definition of an "impacted resident" is set down in schedule 2, clauses 32 and 33 and is similar to that for an "impacted tenant" under the Regulation, that is, the "impacted resident" has had their income reduced by at least 25 per cent because of COVID-19.

13. Schedule 2, clause 35 of the Regulation also provides that, during the moratorium period, the proprietor of a boarding house must generally give a resident 90 days written notice of eviction and this applies regardless of whether the resident is an "impacted resident". Exceptions include where the resident is using the premises for illegal purposes or causing serious damage to the premises.

The Regulation is made under the *Residential Tenancies Act 2010* (the Act) which provides the Minister for Better Regulation and Innovation with the power to make regulations to respond to the public health emergency caused by the COVID-19 pandemic that would stop residential landlords and proprietors of boarding houses enforcing certain rights under residential tenancy and occupancy agreements, and relevant legislation.

The Regulation accordingly limits landlords' rights in response to the pandemic. For example, during the "moratorium period" of 6 months from the commencement of the Regulation, a landlord generally cannot give a tenant who is financially impacted by COVID-19 (an "impacted tenant") a termination notice under the Act for non-payment of rent. An exception exists where the landlord has participated in good faith in a formal rent negotiation process with an "impacted tenant" and it is fair and reasonable in the circumstances.

The Regulation also covers boarding houses. For example, it provides that during the "moratorium period" a boarding house proprietor must give a boarding house resident financially impacted by the COVID-19 pandemic (an "impacted resident") 6 months' notice of an eviction based solely on non-payment of fees under an occupancy agreement, unless the occupant did not participate in good faith negotiations about the fees.

The Regulation also provides that landlords and proprietors must generally give at least 90 days' notice before terminating a tenancy or evicting a resident and this applies regardless of whether an "impacted tenant" or "impacted resident" is involved.

In retrospectively limiting landlords' and proprietors' rights under tenancy and occupancy agreements and relevant legislation, the Regulation may impact on property rights. 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.

Similarly, by limiting the ability of the landlord or proprietor to exercise his/her rights under an existing agreement, the 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 notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants and residents. It is accordingly time limited to last for no more than 6 months. The Committee notes that the Regulation furthers the public health objectives of ensuring citizens remain in their homes, and preventing avoidable movement of persons. In the circumstances, 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 boarding house occupancy agreements

14. As above, the Regulation introduces significant changes to the circumstances under which boarding house proprietors can enforce certain rights under occupancy agreements, in response to the COVID-19 pandemic.

15. In particular, proprietors must give a significant amount of written notice – 6 months – before evicting an "impacted resident" for non-payment of occupancy fees and fees for service under the occupancy agreement. An exception exists where the proprietor has participated in good faith in a negotiation about the fees, but the resident did not participate in good faith. Proprietors must also generally give 90 days' written notice before evicting any resident, including residents who are not "impacted residents".

As above, the Regulation introduces significant changes to the circumstances under which boarding house proprietors can enforce certain rights under occupancy agreements, in response to the COVID-19 pandemic. Proprietors are required to give significant amounts of notice before evicting "impacted residents" for non-payment of occupancy fees, or to participate in negotiations about the fees with them. Proprietors must also generally give 90 days' written notice before evicting any resident, regardless of whether they are an "impacted resident".

The Regulation may thereby have some adverse impact on this sector of the business community, requiring them to negotiate about occupancy fees, and limiting their ability to evict current residents in order to seek new residents who can pay their fees.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic. It is accordingly time limited to last for no more than 6 months. In the circumstances, 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

16. As above, the Regulation introduces significant changes to the circumstances under which residential landlords and boarding house proprietors can enforce certain rights under residential tenancy and occupancy agreements, and relevant legislation.

17. As also mentioned above, the Regulation is made under the Act, in particular section 229(1)(a),(b) and (c) which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.

18. However, there are limits to this power. For example, the Minister can only make such regulations if Parliament is not currently sitting and not likely to sit within 2 weeks after the day the regulations are made; and if it is the Minister's opinion that the regulations are reasonable to protect the health, safety and welfare of tenants or residents under the Act (section 229(2) (a) and (b)). Further, such regulations are time limited to expire 6 months after they commence or on an earlier day decided by Parliament by resolution of either House of Parliament (section 229(4)).

> **As above, the Regulation introduces significant changes to the circumstances under which residential landlords and boarding house proprietors can enforce certain rights under residential tenancy and occupancy agreements, and relevant legislation. As also mentioned, these changes are made pursuant to a power in the Act which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.**
>
> **The Committee generally prefers significant matters such as these to be included in primary legislation to foster an appropriate level of parliamentary oversight. The changes are wide-reaching and will have considerable impact on landlords and proprietors.**
>
> **However, in the current case and given the emergency created by COVID-19, the Committee considers that it may be reasonable to include such provisions in subordinate legislation. This facilitates a swift response to any emerging public health or economic issues, without the need for an amending Bill. Further, the power to make such regulations is limited to cases where Parliament is not currently sitting and is not likely to sit in the near future. The Regulations are also time limited to last no more than 6 months. Given these factors, the Committee makes no further comment.**

8. Retail and Other Commercial Leases (COVID -19) Regulation 2020

Date tabled	24 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Damien Tudehope MLC
Portfolio	Finance and Small Business

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to give effect to the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* adopted by the National Cabinet on 7 April 2020. In particular, the Regulation—

   (a) prohibits and regulates the exercise of certain rights of lessors relating to the enforcement of certain commercial leases during the COVID-19 pandemic period, and

   (b) requires, in response to the COVID-19 pandemic, that lessors and lessees renegotiate the rent and other terms of those commercial leases in good faith having regard to the leasing principles set out in the National Code of Conduct, before any legal enforcement action of the terms of those commercial leases can be commenced.

2. This Regulation is made under the *Retail Leases Act 1994*, including sections 85 (the general regulation-making power) and 87 and under section 202 (the general regulation-making power) of the *Conveyancing Act 1919*.

3. This Regulation comprises or relates to matters set out in Schedule 3 to the *Subordinate Legislation Act 1989*—namely, matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State or Territory.

4. This Regulation is made with the agreement of the Minister for Customer Service, 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

5. The Regulation is made under the *Retail Leases Act 1994* (the Act), in particular section 87 which provides that the Minister for Finance and Small Business (the Minister) can make regulations under any "relevant Act" to respond to the public health emergency caused by the COVID-19 pandemic:

- prohibiting the recovery of possession of premises by a lessor or owner of premises or land from a lessee or tenant of the premises or land under the relevant Act in particular circumstances,

- prohibiting the termination of a lease or tenancy by a lessor or owner of premises or land under the relevant Act in particular circumstances,

- regulating or preventing the exercise or enforcement of another right of a lessor or owner of premises or land under the relevant Act or an agreement relating to the premises or land in particular circumstances,

- exempting a lessee or tenant, or a class of lessees or tenants, from the operation of a provision of the relevant Act or any agreement relating to the leasing or licensing of premises or land.

6. Such regulations are time limited to expire 6 months after they commence or on an earlier day decided by Parliament by resolution of either House of Parliament (section 87(4)). Further, they can only be made if, in the Minister's opinion, they are reasonable to protect the health, safety and welfare of lessees or tenants under the Act (section 87(2)).

7. "Relevant Act" is defined to mean the *Agricultural Tenancies Act 1990*, the *Retail Leases Act 1994* and any other Act relating to the leasing of premises or land for commercial purposes.

8. The Regulation also gives effect to the *National Cabinet Mandatory Code of Conduct-SME Commercial Leasing Principles During COVID-19,* which was adopted by the National Cabinet on 7 April 2020. The purpose of the National Code of Conduct is to impose a set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, where the tenant is an eligible business for the purpose of the Commonwealth Government's JobKeeper program.[28]

9. The National Code of Conduct was created in response to the unfolding COVID-19 pandemic to ensure that businesses affected by the public health restrictions and unable to fulfil their rental obligations would not be forced to terminate their commercial lease agreements.

10. The Regulation applies to "impacted lessees", who are defined under Clause 4 as lessees:

- who are eligible for the JobKeeper scheme under sections 7 and 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* of the Commonwealth; and

- who had a turnover during the 2018-19 financial year that was less than $50 million.

11. Clause 6 provides that a lessor must not take any "prescribed action" against an impacted lessee on the grounds of breach of the commercial lease during the "prescribed period"

[28] National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19, https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf .

for a failure to pay rent or outgoings or failing to operate during the business hours specified in the lease.

12. Clause 3 defines "prescribed action" as taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court or tribunal for any of the following:

    - eviction of a lessee from premises or land the subject of the commercial lease
    - exercising a right of re-entry to premises or land the subject of the commercial lease
    - recovery of the premises or land
    - distraint of goods
    - forfeiture
    - damages
    - requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a lessee
    - recovery of the whole or part of a security bond under the commercial lease
    - performance of obligations by the lessee or any other person pursuant to a guarantee under the commercial lease
    - possession
    - termination of the commercial lease
    - any other remedy otherwise available to a lessor against a lessee at common law or under the law of NSW.

13. Clause 3 also defines "prescribed period" as the period ending on the day that is 6 months after the Regulation commences.

14. Instead, Clause 7 of the Regulation imposes the obligation to renegotiate rent and other terms of commercial leases before taking or continuing any prescribed action. That is, a lessor under a commercial contract must not take or continue any prescribed action against an impacted lessee for failing to pay rent during the prescribed period unless he or she has complied with the renegotiation requirements of clause 7. The parties are to renegotiate the rent payable under, and other terms of, the commercial lease having regard to the economic impacts of the COVID-19 pandemic, and the leasing principles set out in the National Code of Conduct.

15. Consistent with the requirements of the Act, the Regulation expires 6 months after its commencement (clause 12).

The Regulation is made under the *Retail Leases Act 1994* (the Act) which provides the Minister for Finance and Small Business (the Minister) with the power to

make regulations to respond to the public health emergency caused by the COVID-19 pandemic that would stop commercial lessors from enforcing certain rights under commercial tenancy agreements, and relevant legislation. The Regulation also gives effect to *National Cabinet Mandatory Code of Conduct-SME Commercial Leasing Principles During COVID-19*, adopted by the National Cabinet on 7 April 2020.

The Regulation significantly limits lessors from taking any prescribed action, such as eviction, against the 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. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

By retrospectively limiting lessors' rights under commercial tenancy agreements the Regulation may impact on property rights. 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.

Similarly, by prohibiting the lessor from exercising his or her legal rights as agreed upon in the lease, the 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 only applies to cases involving "impacted lessees" – those who have experienced economic hardship due to COVID-19, who are eligible for JobKeeper payments, and who had less than $50 million in turnover in the 2018-19 financial year. It does not prohibit lessors from exercising prescribed action in cases not related to the economic impacts of COVID-19. Similarly, the Regulation is time limited to apply only for a period of 6 months from its commencement. The Committee considers the Regulation is a reasonable and proportionate response to the far-reaching economic consequences of COVID-19, and given these extraordinary circumstances, 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

16. As noted above, the Regulation is made under the *Retail Leases Act 1994* and gives effect to *National Cabinet Mandatory Code of Conduct-SME Commercial Leasing Principles During COVID-19*, adopted by the National Cabinet on 7 April 2020. The Regulation significantly limits lessors from taking any prescribed action, such as eviction, against the 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.

17. The Regulation applies for a period of 6 months to existing commercial leases of impacted lessees – those eligible for JobKeeper payments and who had less than $50 million in turnover in the 2018-19 financial year.

18. In the context of broader economic responses to the COVID-19 pandemic as they relate to business, the Committee understands that financial mortgage assistance may be available for eligible lessors to defer business loan repayments for a period of 6 months.[29]

> **As above, the Regulation significantly limits the ability of lessors to take any prescribed action against lessees on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours where the lessor has been unable to meet his or her obligations due to economic hardship resulting from the COVID-19 crisis.**
>
> **In doing so, the Regulation may adversely affect the business of the lessor by prohibiting him or her from recovering lost rent, or from evicting current tenants in order to seek new tenants who can finance the lease. This may force the lessor to incur a loss for a period of 6 months.**
>
> **However, the Committee recognises that the Regulation is in response to a public health emergency and implements a National Cabinet decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While the lessor is significantly limited from taking prescribed action for failure to pay rent or outgoings, the Committee understands that financial mortgage assistance may be available for eligible lessors to defer business loan repayments for a period of 6 months. In the circumstances, 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

19. As above, the Regulation introduces significant changes to the circumstances under which lessors can take prescribed action, such as eviction, against the 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.

20. As also mentioned above, the Regulation is made under the Act, in particular section 87 which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.

21. However, there are limits to this power. For example, the Minister can only make such regulations if Parliament is not currently sitting and not likely to sit within 2 weeks after the day the regulations are made; and if it is the Minister's opinion that the regulations are reasonable to protect the health, safety and welfare of lessees or tenants under the Act (section 87(2)).

22. Further, any such regulations are time limited – they must expire 6 months after they commence or on an earlier day decided by Parliament by resolution of either House of Parliament (section 87(4)), and clause 12 of the Regulation accordingly provides that the Regulation is to expire 6 months after its commencement.

[29] Australian Banking Association, Commercial Landlord Relief Package, <https://www.ausbanking.org.au/covid-19/the-landlord-relief-package/>.

As above, the Regulation introduces significant changes to the circumstances under which lessors can take prescribed action, such as eviction, against the 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. As also mentioned, these changes are made pursuant to a power in the Act which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.

The Committee generally prefers significant matters such as these to be included in primary legislation to foster an appropriate level of parliamentary oversight. The changes are wide-reaching and will have considerable impact on commercial lessors and lessees.

However, in the current case and given the emergency created by COVID-19, the Committee considers that it may be reasonable to include such provisions in subordinate legislation. This facilitates a swift response to any emerging public health or economic issues, without the need for an amending Bill. Further, the power to make such regulations is limited to cases where Parliament is not currently sitting and is not likely to sit in the near future, and such regulations must expire within 6 months of their commencement. Given these factors, the Committee makes no further comment.

9. Community Land Management Amendment (COVID-19) Regulation 2020

Date tabled	16 June 2020
Disallowance date	LA: 13 October 2020 LC: 20 October 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide for the following matters under the *Community Land Management Act 1989* for the purposes of responding to the public health emergency caused by the COVID-19 pandemic:

    a. altered arrangements for convening, and voting at, meetings of an association or its executive committee,

    b. allowing instruments, instead of being affixed with the seal of an association in the presence of certain persons, to be signed (and the signatures to be witnessed) by those persons,

    c. the extension, to 6 months, of the time periods within which—

        i. the first annual general meeting of an association must be convened and held, and

        ii. an estimate must be made to reimburse an amount paid or transferred from an administrative fund or a sinking fund.

2. This Regulation is made under the *Community Land Management Act 1989*, including sections 122 (the general regulation-making power) and 122A.

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 Clause

3. The *Community Land Management Act 1989* (the Act) establishes the roles and responsibilities of community associations, and executive committees of associations. These associations are responsible for the management of various community precinct and neighbourhood schemes established by the subdivision of land under the *Community Land Development Act 1989.*

4. The Act and the *Community Land Management Regulation 2018* made under it detail how the schemes should be run. They provide for such matters as how associations and their executive committees meet and vote, and the time periods within which certain steps should be taken for the management of schemes.

5. Section 122A of the Act authorises regulations to be made to respond to the public health emergency caused by COVID-19. These regulations can provide for matters including:

    - altered arrangements for convening an association meeting including arrangements for the issue or service of notices and other documents in relation to the meeting,
    - altered arrangements for the way voting may be conducted at an association meeting,
    - an alternative to affixing the seal of the association, including any requirements for witnessing or attesting to the alternative way, and
    - extension of a time period in which a thing is required to be done under the Act.

6. Section 122A further provides that regulations made under the section:

    - can override a provision of the Act, and
    - expire on the day that is 6 months after their commencement, or the earlier day decided by Parliament by resolution of either House.

7. In addition, section 122A provides for its own repeal on:

    - 13 November 2020, or
    - On a later day, not later than 13 May 2021, prescribed by the regulations.

8. The Regulation is made under section 122A (and section 122, which is the general regulation-making power) and it accordingly amends the *Community Land Management Regulation 2018* to:

    - provide for altered arrangements for convening, and voting at, meetings of an association or its executive committee,
    - allow instruments, instead of being affixed with the seal of an association in the presence of certain persons, to be signed (and the signatures to be witnessed) by those persons,
    - extend certain time periods e.g. the time in which the first annual general meeting of an association must be convened under section 9 of the Act.

9. In particular, schedule 1, clause 23 of the Regulation authorises altered arrangements for voting at association meetings, and provides that these arrangements are to apply despite any requirements in the Act for a vote to be exercised in person. Further, clause 26 sets down the altered methods of voting that can be used at an association meeting, or at a

meeting of an association's executive committee. These methods include voting by means of teleconference, video-conferencing, email or other electronic means.

The *Community Land Management Act 1989* (the Act) establishes the roles and responsibilities of community associations, and executive committees of associations. These associations are responsible for the management of various community precinct and neighbourhood schemes established by the subdivision of land under the *Community Land Development Act 1989.*

The Act and the *Community Land Management Regulation 2018* made under it detail how the schemes should be run, providing for such matters as how associations and their executive committees meet and vote.

The Regulation amends the *Community Land Management Regulation 2018* to provide for altered arrangements: for convening, and voting at, meetings of an association (i.e. through electronic means); allowing instruments to be signed rather than affixed with the seal of an association; and to extend certain time periods within which certain things must be done under the Act. The Regulation specifically provides that the altered voting arrangements apply despite any requirements in the Act for a vote to be exercised in person.

The Regulation makes these changes drawing on a power contained in section 122A of the Act which authorises regulations to be made to respond to the public health emergency caused by COVID-19. Section 122A also provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to schemes. Further, there is a limited time during which regulations made under the power can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

10. Liquor Amendment (COVID-19 Licence Endorsements and Temporary Freezes) Regulation 2020

Date tabled	2 June 2020
Disallowance date	LA: 22 September 2020 LC: 13 October 2020
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The objects of the Regulation are as follows—

   a. to provide for RSA and RCG endorsements that have expired in a prescribed period to continue in force until 30 June 2021,

   b. to extend the temporary freeze on licences and other authorisations in prescribed precincts from 1 June 2020 to 1 December 2020,

   c. to except premises holding certain licences from the temporary freeze on extended trading, licence conditions and licence removals,

   d. to remove the imposition of special licence conditions that currently apply to certain licensed premises.

2. The Regulation is made under the *Liquor Act 2007*, including sections 11(1A), 47A, 47J(c) and 159 (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

Henry VIII Clause – expired endorsements

3. Schedule 1, item 1 of the Regulation inserts clause 73A into the *Liquor Regulation 2018,* entitled "COVID-19 pandemic – special provision for expired RSA and RCG endorsements to continue in force".

4. Clause 73A provides that a Responsible Service of Alcohol (RSA) or a Responsible Conduct of Gambling (RCG) endorsement that expires during the "prescribed period" from 1 March 2020 until 29 June 2021, is taken not to expire and to continue in force until 30 June 2021.

5. The extension of expiry dates for RSA and RCG endorsements forms part of the Liquor and Gaming NSW response to COVID-19. Liquor and Gaming NSW has issued a Statement of

Regulatory Intent, setting out the enforcement approach that it will take with regard to certain requirements under the *Liquor Act 2007* and the *Liquor Regulation 2018*, in response to the pandemic. The Statement notes:

> Liquor & Gaming NSW recognises that the COVID-19 pandemic has created an exceptional set of circumstances and will have significant impacts on the businesses we regulate. Liquor & Gaming NSW appreciates that exceptional circumstances require flexibility on the part of the regulator.[30]

6. Liquor and Gaming NSW has also published a document relating to the Statement of Regulatory Intent entitled "COVID-19 (coronavirus) FAQs for the liquor and gaming industries" which notes the extended expiry date of 30 June 2021 for endorsements due for renewal on or after 1 March 2020.[31]

7. Schedule 1, item 1 of the Regulation provides that this clause applies despite any other provision of the *Liquor Act 2007* or the *Liquor Regulation 2018.*

The Regulation provides that a Responsible Service of Alcohol (RSA) or a Responsible Conduct of Gambling (RCG) endorsement that expires during the "prescribed period" from 1 March 2020 until 29 June 2021, is taken not to expire and is instead to continue in force until 30 June 2021.

This extended expiry date for these endorsements is a special provision in response to the COVID-19 pandemic. Liquor and Gaming NSW has issued a Statement of Regulatory Intent indicating that it intends to take a flexible regulatory approach with regard to the requirements of the *Liquor Act 2007* and the *Liquor Regulation 2018* in response to the exceptional circumstances created by COVID-19, and their impact on business.

The extension applies despite any other provision of the *Liquor Act 2007*. This has the effect of a Henry VIII clause, which allows subordinate legislation to override provisions in an Act. The Committee notes that regulations of this kind typically involve an inappropriate delegation of legislative power. However, the Regulation responds to the extraordinary circumstances created by COVID-19. It may be reasonable to endorse a more flexible approach in this instance, thereby allowing authorities to respond swiftly and appropriately to the impact of COVID-19 on liquor and gaming businesses.

Further, the Committee notes the relevant provision is time-limited with extensions ending on 30 June 2021. Regulations must also be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. In the circumstances, and given the safeguards, the Committee makes no further comment.

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[30] Liquor and Gaming NSW, "Statement of Regulatory Intent in regards to COVID-19 coronavirus" updated 1 June 2020: https://www.liquorandgaming.nsw.gov.au/news-and-media/statement-of-regulatory-intent, viewed 26 June 2020.

[31] Liquor and Gaming NSW, "COVID-19 (coronavirus) FAQs for the liquor and gaming industries" 19 June 2020: https://www.liquorandgaming.nsw.gov.au/news-and-media/covid-19-coronavirus-faqs-for-the-liquor-and-gaming-industries, viewed 26 June 2020.

Henry VIII Clause – special licence conditions

8. Under the NSW Violent Venues Scheme, licensed premises with a particular level of alcohol-related violent incidents, as recorded in the latest 12 months of data collected by the NSW Bureau of Crime Statistics and Research, are listed as "declared premises" in Schedule 4 to the *Liquor Act 2007* and subject to certain special licensing conditions set down therein.

9. There is a hierarchy of conditions according to the number of incidents. That is, to be declared a "Level 1" premises, there must generally have been 19 or more incidents, and these premises attract a greater number of special conditions than "level 2" declared premises, for which there must generally have been 12-18 incidents.[32]

10. Schedule 2 of the Regulation amends Schedule 4 of *Liquor Act 2007*. It does so drawing on a Henry VIII clause contained in subsection 11(1A) of the Act, which provides that the regulations can amend Schedule 4 including by adding or removing a licence under Schedule 4.

11. Schedule 2 of the Regulation accordingly removes the following venues from Schedule 4 of the Act so that they are no longer "declared premises":

    - Ivy – Sydney
    - Imperial Hotel – Tamworth
    - Northies – Cronulla Hotel – Cronulla
    - Tattersalls Hotel Penrith – Penrith.

12. This also means that the premises are no longer subject to special licensing conditions, for example:

    - Not being able to serve any drink in a glass or breakable plastic container during a "restricted service period" (Schedule 4, Clause 4, *Liquor Act 2007*);
    - Having to cease selling or supplying liquor for a continuous period of 10 minutes during each hour of a restricted service period, or actively distribute water and/or food to patrons (Schedule 4, Clause 6, *Liquor Act 2007*);
    - Having to cease selling or supplying liquor on the premises 30 minutes before the premises are required to cease trading (Schedule 4, Clause 7, *Liquor Act 2007*);
    - Having to maintain an incident register recording the details of violent or anti-social behaviour occurring on the licensed premises (Schedule 4, Clause 7A, *Liquor Act 2007*).

[32] Liquor and Gaming NSW, *Fact sheet FS3006 – Violent venues scheme*: https://www.liquorandgaming.nsw.gov.au/__data/assets/pdf_file/0020/202961/fs3006-violent-venues-scheme.pdf, viewed 26 June 2020.

13. A "restricted service period" means the period between midnight and such later time (if any) at which the premises are required to cease trading, or, in the case of relevant premises that are not required to cease trading at any time after midnight, the period between midnight and 5am (Schedule 4, Clause 1, *Liquor Act 2007*).

14. As these four venues were the only venues listed in Schedule 4 to the Act, there are now no "declared premises" in NSW.

15. It appears that these amendments also relate to COVID-19. Liquor and Gaming NSW has indicated that, in response to COVID-19, it will take a more flexible approach to enforcing standards that were designed to manage safety when businesses could operate at full capacity (i.e. before social distancing). Liquor and Gaming NSW's Statement of Regulatory Intent notes:

> Liquor & Gaming NSW appreciates that premises that are permitted to open to the public are not able to operate at their full capacity while customer limits and seating requirements apply under the Public Health (COVID-19 Places of Social Gathering) Order (No 3) 2020.
>
> In recognition of this, Liquor & Gaming NSW will also take a flexible approach to enforcing certain licence conditions that are aimed at managing public amenity and safety risks at times when venues are operating at their full capacity.[33]

The Regulation amends Schedule 4 to the *Liquor Act 2007* to remove all four venues from the list of "declared premises" that are subject to the special licensing conditions set out in that Schedule. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster an appropriate level of parliamentary oversight over the changes.

However, it appears that these changes around special licensing are a response to COVID-19. Liquor and Gaming NSW has indicated that it will take a more flexible approach to enforcing standards that were designed to manage safety when businesses could operate at full capacity (i.e. before social distancing). Again, it may be reasonable to proceed via regulation in this instance, thereby allowing authorities to respond swiftly and appropriately to the impact of COVID-19 on liquor and gaming businesses.

Further, regulations must be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. In the circumstances, and given this safeguard, the Committee makes no further comment.

[33] Liquor and Gaming NSW, "Statement of Regulatory Intent in regards to COVID-19 coronavirus" updated 1 June 2020: https://www.liquorandgaming.nsw.gov.au/news-and-media/statement-of-regulatory-intent, viewed 26 June 2020.

11. Public Health Amendment (Authorised Officers) Regulation 2020

Date tabled	16 June 2020
Disallowance date	LA: 13 October 2020 LC: 20 October 2020
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the Regulation is to allow the Secretary of the Ministry of Health to appoint members and members of staff of the Department of Customer Service and the NSW Food Authority as authorised officers, either generally or in relation to particular functions exercisable by authorised officers relating to public health.

2. The Regulation is made under the *Public Health Act 2010*, including sections 126(1) 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

Broadly drafted provisions in subordinate legislation that may confer significant administrative powers

3. The objects of the *Public Health Act 2010* (the Act) are set down in section 3 and include:

- to promote, protect and improve public health,
- to control risks to public health,
- to promote control of infectious diseases,
- to prevent the spread of infectious diseases,
- to monitor diseases and conditions affecting public health.

4. The Act therefore sets down various powers so that the NSW Government can deal with public health risks. For example, under section 7, where the Minister for Health considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, he or she can issue public health orders to deal with the risk, which are to be

published in the NSW Government Gazette. The Minister has recently issued a number of such public health orders in response to the COVID-19 pandemic.[34]

5. Under section 126 of the Act, the Secretary of the Ministry of Health can appoint persons as "authorised officers" to enforce compliance with the requirements of the Act. In particular, subsection 126(1)(c) provides that the Secretary can appoint any member, or any member of staff, of a body prescribed by the regulations, to be an authorised officer, either generally or in relation to a particular function exercisable by authorised officers under the Act or any other Act relating to public health.

6. Clause 99A of the Regulation accordingly allows the Secretary to appoint members, and members of staff, of the Department of Customer Service and the NSW Food Authority as authorised officers, either generally or in relation to particular functions exercisable by authorised officers relating to public health. Clause 99A is time limited, to be repealed on 26 March 2021.

7. The precise functions that a person appointed under these provisions would exercise appears to be left to the terms of his or her appointment. Subsection 127(1) of the Act provides that, subject to the terms of his or her appointment, an authorised officer has such functions as are conferred or imposed on an authorised officer by or under the Act, or any other Act.

8. However, it is possible that a person appointed under the provisions could have significant coercive powers. For example, under Part 8 of the Act, authorised officers are granted significant powers to assist them to enforce the Act including to:

    - enter and inspect any premises, inspect documents (and make copies), take photographs and video, and take samples (section 108),
    - require a person to answer questions (section 110),
    - require that documents and information be provided to the authorised officer, including names and addresses (sections 111 and 112).

9. Certain safeguards apply. For example, before entering premises an authorised officer must:

    - give reasonable notice where possible (subsection 108(2)(c)), and
    - if seeking to enter residential premises, obtain the consent of the occupier, or do so under the authority of a search warrant (subsection 108(4)).

The *Public Health Act 2010* (the Act) provides that the Secretary of the Ministry of Health can appoint any member, or any member of staff, of a body prescribed by the regulations, to be an "authorised officer", either generally or in relation to a particular function exercisable by authorised officers under the Act or any other Act relating to public health.

[34] For a list of public health orders to date that respond to COVID-19, see the NSW Legislation website: https://www.legislation.nsw.gov.au/#/, viewed 26 June 2020.

The Regulation accordingly allows the Secretary to appoint members, and members of staff, of the Department of Customer Service and the NSW Food Authority as authorised officers, either generally or in relation to particular functions exercisable by authorised officers relating to public health.

The precise functions that a person appointed under these provisions could exercise appears to be left to the terms of his or her appointment. However, it is possible that a person appointed under the provisions could have significant coercive powers. For example, under Part 8 of the Act, authorised officers are granted significant powers to assist them to enforce the Act including to enter and inspect premises, require a person to answer questions, and require that documents and information be provided to the authorised officer.

The Committee would prefer provisions that may confer significant powers to be drafted with a greater level of precision. In short, the provisions should clearly set out the functions being conferred, and the category of persons to whom they are being conferred. This would foster a greater level of parliamentary oversight. In the current case, the exact functions are unclear and the categories of person to whom they are being conferred is broad – any officer of the named agencies. There is no requirement for any particular level of seniority or expertise in an officer before the functions could be conferred on him or her.

The Committee would also generally prefer provisions that may confer significant powers to be included in primary, not subordinate legislation, again to foster an appropriate level of parliamentary oversight.

However, the Committee acknowledges that in the current emergency situation created by COVID-19, it may be reasonable for public health regulations to include such broad provisions so that authorities can respond swiftly and flexibly to the pandemic. Further, the provisions are time limited to repeal in March 2021. The Committee also notes safeguards in the Act, for example, authorised officers cannot enter residential premises unless they have the occupier's permission, or they have obtained a search warrant. In the circumstances, the Committee makes no further comment.

12. Public Health Amendment (COVID-19 Border Control) Regulation 2020

Date tabled	LA: 28 July 2020 LC: To be determined
Disallowance date	LA: 20 October 2020 LC: To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a ministerial direction under the *Public Health (COVID-19 Border Control) Order 2020*.

2. The Ministerial direction relates to the provision of information to help enforcement officers decide whether persons entering NSW have been in Victoria in the last 14 days and, if they have, whether they are authorised to enter NSW.

3. The Regulation 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 trail

4. Under subsections 7(1) and (2) of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, the Minister may take such action, and may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

5. Under subsection 7(4) of the Act, such an order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order. In addition, subsection 7(5) provides that, unless earlier revoked, such an order expires at the end of 90 days after it was made, or earlier if so specified in the Order. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction.

6. On 7 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* was published in the NSW Government Gazette. The Minister made the Order under section 7 of the Act, directing under clause 5 that an "affected person" must not enter NSW unless the person

is authorised to do so (that is, they must belong to a specified class of persons, hold a current entry permit and comply with specified conditions). Clause 3 of the Order defines an "affected person" to be a person who has been in Victoria within the previous 14 days.

7. Clause 4 of the Order also sets down the Minister's grounds for concluding that a situation has arisen that is, or is likely to be, a risk to public health, which are that:

    - public health authorities both internationally and in Australia have been monitoring and responding to outbreaks of COVID-19, also known as Novel Coronavirus 2019,
    - COVID-19 is a potentially fatal condition and is also highly contagious,
    - a number of cases of individuals with COVID-19 have now been confirmed in NSW, as well as other Australian jurisdictions,
    - recent cases of unexpected community transmission of COVID-19 in Victoria, with restrictions on the movement of people being put in place in certain hotspot areas,
    - the Victorian Government and the NSW Government have agreed that the border should, subject to exceptions determined by the Government of NSW, be closed until community transmission of COVID-19 in Victoria is contained.

8. Further, under clause 6 of the Order, the Minister directed that a person must, if required to do so by an enforcement officer, provide information (including photo identification) to allow a decision to be made about:

    - whether the person is an "affected person" and
    - if the person is an "affected person" – whether the person is authorised to enter NSW.

9. However, an enforcement officer may only require information about whether a person is an "affected person" if the enforcement officer believes on reasonable grounds that the person may be an "affected person". The Minister further directed under clause 6 that a person who provides the required information must ensure that the information is true and accurate.

10. The Regulation amends the *Public Health Regulation 2012* to allow a $4000 penalty notice to be issued for offending against section 10 of the Act by contravening the Ministerial direction under clause 6 of the Order, that is by failing to provide the required information, or providing false or misleading information.

11. The Order and the Regulation both commenced on 8 July 2020.[35]

On 8 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* (the Order) came into force under which the Minister for Health and Medical Research directed that an "affected person" must not enter NSW unless the

[35] See clause 2 of the Order and clause 2 of the Regulation, which provides that the Regulation is to commence on the day that is published on the NSW Legislation website, which was 8 July 2020.

person is authorised to do so. The Order defines an "affected person" to be a person who has been in Victoria within the previous 14 days.

Under clause 6 of the Order the Minister also directed that a person must, if required to do so by an enforcement officer, provide information to allow a decision to be made about whether the person is an "affected person" and, if so, whether the person is authorised to enter NSW. Further, the Minister directed under clause 6 that a person who provides the required information must ensure that the information is true and accurate.

The Regulation provides that a penalty notice of $4000 can be issued to an individual who contravenes clause 6 of the Order (i.e. by failing to provide the required information, or providing false or misleading information).

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. The Committee also notes that $4000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, 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. Given these factors, the Committee makes no further comment.

Right to privacy and freedom of movement

12. As above, the Regulation allows for a $4000 penalty notice to be issued for a contravention of the Ministerial direction under clause 6 of the Order, that is, where a person fails to provide information (including photo identification) to allow a decision about whether the person is an "affected person" and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

As above, the Regulation provides that a penalty notice of $4000 can be issued to an individual who contravenes clause 6 of the Order by failing to provide information, including photo identification, to allow a decision about whether the person is an "affected person" and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

By providing that a person can receive an on-the-spot penalty for failing to provide such information, or for failing to provide true and accurate information, the Regulation may impact on privacy rights. Further, as the information may be used to deny people entry to NSW, the Regulation is part of a regime that restricts freedom of movement. This right is contained in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is

a party. This Article protects the right to move freely in a country for those who are lawfully within that country; the right to leave any country; and the right to enter a country of which you are a citizen.

However, Article 12 also recognises that derogation from this right may be warranted in certain circumstances, including to protect public health. The Committee considers that as the Regulation is part of a regime to respond to COVID-19 and stop its spread following an increase in community transmission in Victoria, it fits within the public health exemption, and that the limits placed on freedom of movement are reasonable in the circumstances. This is particularly so as the associated Order is time limited and will automatically expire 90 days after it commences if it is not repealed sooner.

The fact that the Regulation responds to the public health emergency also makes its possible privacy impacts reasonable in the circumstances. The Committee also notes a safeguard in this regard: an enforcement officer can only require the information under clause 6 of the Order where the enforcement officer believes on reasonable grounds that the person may be an "affected person" – that is, a person who has been in Victoria within the previous 14 days. In the extraordinary circumstances, and given the safeguards, 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

13. As above, the Regulation allows for a $4000 penalty notice to be issued for a contravention of the Ministerial direction under clause 6 of the Order, that is, where a person fails to provide information to allow a decision about whether the person is an "affected person" and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

As above, the Regulation provides that a penalty notice of $4000 can be issued to an individual who contravenes clause 6 of the Order by failing to provide information to allow a decision about whether the person is an "affected person" and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and 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.

However, given the severe circumstances surrounding the COVID-19 pandemic – in this case the recent increased community transmission in Victoria – it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately 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, which may have serious consequences. In the extraordinary circumstances, the Committee makes no further comment.

13. Public Health Amendment (COVID-19 Spitting and Coughing) Regulation(No 2) 2020

Date tabled	LA: 28 July 2020 LC: To be determined
Disallowance date	LA: 20 October 2020 LC: To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction under the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* about intentionally spitting or coughing on:

    - a public official or
    - another worker while the worker is at the worker's place of work or travelling to or from the worker's place of work,

    in a way that is likely to cause fear about the spread of COVID-19.

2. This Regulation 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 trail

3. Under subsections 7(1) and (2) of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, the Minister may take such action, and may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

4. Under subsection 7(4) of the Act, such an order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order. And under subsection 7(5) of the Act, such an order expires 90 days after it is made unless earlier revoked, or unless an earlier day is specified in the order.

5. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction.

6. On 3 July 2020 the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* was published in the NSW Government Gazette. The Minister made the Order under section 7 of the Act, directing under clause 5 that a person must not intentionally spit or cough on:

    - a public official, or
    - a worker while they are at their place of work or travelling to or from it,

    in a way that would reasonably be likely to cause fear about the spread of COVID-19.

7. Clause 4 of the Order also set down the Minister's grounds for concluding that a situation has arisen that is, or is likely to be, a risk to public health including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious.

8. The Regulation amends the *Public Health Regulation 2012* to allow for a $5000 penalty notice to be issued for a contravention of the Ministerial direction under clause 5 of the Order, that is, when an individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

9. The Order and the Regulation both commenced on 7 July 2020.[36]

10. The Order replaces a previous Order, the *Public Health (COVID-19 Spitting and Coughing) Order 2020* ('the first Order'), which commenced on 9 April 2020[37] and expired 90 days later in accordance with subsection 7(5) of the Act. The first Order and the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* ('the first Regulation') had the same combined effect as the current Order and the Regulation.[38] It was necessary to make the Regulation to take account of the current Order, otherwise the *Public Health Regulation 2012* would still refer to the first Order, which has expired, and the $5000 penalty notices could not be issued for contravention of the ministerial direction under the current Order.

11. The Committee commented on the first Regulation in its Digest No 13/57.

> **The Regulation allows a penalty notice of $5000 to be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* by intentionally spitting or coughing on a public official or on another**

[36] See clause 2 of the Order and clause 2 of the Regulation.

[37] See clause 2 of the first Order which provides that the first Order is to commence when the first Regulation commences; and clause 2 of the first Regulation which provides that it is to commence on the day that it is published on the NSW Legislation website, which was 9 April 2020.

[38] That is, once the first Order was amended to protect all workers – not only public officials – and these amendments came into effect on 20 April 2020, see *Public Health (COVID-19 Spitting and Coughing) Amendment Order 2020*, clause 2.

worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its Digest No 13/57, the Committee commented on the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* which provided that a penalty notice of $5000 could be issued to a person who contravened an earlier version of the Order, the *Public Health (COVID-19 Spitting and Coughing) Order 2020*, which has now expired.

Consistent with those comments, the Committee notes that 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. The Committee also notes that $5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, 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. 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

12. As above, the Regulation allows for a $5000 penalty notice to be issued for a contravention of the Ministerial direction under clause 5 of the Order, that is, when an individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

As above, the Regulation allows a penalty notice of $5000 to be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* by intentionally spitting or coughing on a public official or on other worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

As also noted, in its Digest No 13/57, the Committee commented on the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* which provided that a penalty notice of $5000 could be issued to a person who contravened an earlier version of the Order which has now expired.

Consistent with those comments, the Committee identifies that it generally prefers significant matters to be dealt with in primary rather than subordinate legislation and 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.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately 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, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

14. Strata Schemes Management Amendment (COVID-19) Regulation 2020

Date tabled	16 June 2020
Disallowance date	LA: 13 October 2020 LC: 20 October 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide for the following matters under the *Strata Schemes Management Act 2015* for the purposes of responding to the public health emergency caused by the COVID-19 pandemic:

    a. altered arrangements for convening, and voting at, meetings of an owners corporation of a strata committee,

    b. allowing instruments, instead of being affixed with the seal of an association in the presence of certain persons, to be signed (and the signatures to be witnessed) by those persons,

    c. the extension, to 6 months, of the time periods within which—

        i the first annual general meeting of an association must be convened and held, and

        ii a levy must be determined to reimburse an amount paid or transferred from an administrative fund or a capital works fund.

2. This Regulation is made under the *Strata Schemes Management Act* 2015, including sections 271 (the general regulation-making power) and 271A.

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 Clause

3. The *Strata Schemes Management Act 2015* (the Act) is an Act with respect to the management of strata schemes and disputes related to strata schemes. The Act and the *Strata Schemes Management Regulation 2016* made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees; and matters such as how they meet and vote, and the time periods within which certain steps should be taken for the management of strata schemes.

4. Section 271A of the Act authorises regulations to be made to respond to the public health emergency caused by COVID-19. These regulations can provide for matters including:

    - altered arrangements for convening a relevant strata meeting including arrangements for the issue or service of notices and other documents in relation to the meeting,
    - altered arrangements for the means of voting at a relevant strata meeting including:
        - the circumstances in which the altered arrangements for voting may apply, and
        - conditions that apply to the way the vote is exercised,
    - an alternative to affixing the seal of the owners corporation including any requirements for witnessing or attesting to the alternative way,
    - extension of a time period in which a thing is required to be done under the Act.

5. Section 271A further provides that regulations made under the section:

    - can override a provision of the Act, and
    - expire on the day that is 6 months after their commencement, or the earlier day decided by Parliament by resolution of either House.

6. In addition, section 271A provides for its own repeal on:

    - 13 November 2020, or
    - on a later day, not later than 13 May 2021, prescribed by the regulations.

7. The Regulation is made under section 271A (and section 271, which is the general regulation-making power) and it accordingly amends the *Strata Schemes Management Regulation 2016* to:

    - provide for altered arrangements for convening, and voting at, meetings of an owners corporation or a strata committee,
    - allow instruments, instead of being affixed with the seal of an owners corporation in the presence of certain persons to be signed (and the signatures to be witnessed) by those persons,
    - extend certain time periods e.g. the time in which the first annual general meeting of an owners corporation must be convened and held under section 14 of the Act.

8. In particular, schedule 1, clause 71 of the Regulation provides that the means of voting specified in clause 14 of the *Strata Schemes Management Regulation 2016* can be used to determine a matter at a relevant strata meeting even if the owners corporation or strata committee has not, by resolution, adopted those means of voting. These means of voting include voting by means of:

- teleconference,
- videoconferencing,
- email, or
- other electronic means.

9. However, if those means of voting have not been adopted by resolution, the secretary of the owners corporation must take reasonable steps to ensure that each owner of a lot in the strata scheme or each member of the strata committee can participate and vote at the strata meeting.

10. Further, schedule 1, clause 71 provides that these arrangements are to apply despite any requirements in the Act for a vote to be exercised in person.

> **The *Strata Schemes Management Act 2015* (the Act) is an Act with respect to the management of strata schemes and disputes related to strata schemes. The Act and the *Strata Schemes Management Regulation 2016* made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees; and matters such as how they meet and vote, and the time periods within which certain steps should be taken for the management of strata schemes.**
>
> **The Regulation amends the *Strata Schemes Management Regulation 2016* to provide for altered arrangements for: convening, and voting at, meetings of an owners corporation or a strata committee (i.e. through electronic means); allowing instruments to be signed rather than affixed with the seal of an owners corporation; and to extend certain time periods within which certain things must be done under the Act. The Regulation specifically provides that the altered voting arrangements apply despite any requirements in the Act for a vote to be exercised in person.**
>
> **The Regulation makes these changes drawing on a power contained in section 271A of the Act which authorises regulations to be made to respond to the public health emergency caused by COVID-19. Section 271A also provides that regulations so made can override the provisions of the Act.**
>
> **As noted in the Committee's Digest No 15/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under the power can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.**

15. Workers Compensation Amendment (Consequential COVID-19 Matters) Regulation 2020

Date tabled	LA: 28 July 2020 LC: 4 August 2020
Disallowance date	LA: 20 October 2020 LC: 20 October 2020
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The object of the Regulation is to amend the *Workers Compensation Regulation 2016* as the result of the recent enactment of section 19B of the *Workers Compensation Act 1987*.

2. That is, the Act now includes an automatic presumption that certain workers who contract COVID-19 contracted the illness in the course of their employment (unless the contrary is established). This is designed to make it easier for workers who contract COVID-19 to receive workers compensation to support their recovery.[39]

3. For the purposes of the Act, this Regulation:

   (a) prescribes medical tests for COVID-19 and the results of those tests that must be obtained, and the clinical criteria that must be satisfied, for a worker to be taken to have contracted COVID-19, and

   (b) modifies the provision of the Act to make the terminology used in the provision consistent with concepts used in a Part of the Act dealing with entitlements to weekly compensation, for the purposes of applying that Part to workers with COVID-19, and

   (c) provides for certain matters in relation to how the period of incapacity of a worker due to COVID-19 is to be established for the purposes of the Act, and

   (d) clarifies and makes more detailed provision for the way in which workers who have contracted COVID-19 but in relation to whom the presumption of entitlement to weekly compensation under section 19B is rebutted are to be dealt with under the Act, and

[39] NSW State Insurance Regulatory Authority, undated, *Presumption for COVID-19 affected workers*, https://www.sira.nsw.gov.au/resources-library/list-of-sira-publications/coronavirus-covid_19/what-you-need-to-know/accordion/presumption-for-covid-19-affected-workers, viewed 18 August.

(e) prescribes further types of employment as prescribed employment.

4. This Regulation is made under the *Workers Compensation Act 1987*, including sections 19B and 280 (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

Restricting right to compensation – types of prescribed employment

5. Schedule 1, item 3 inserts new clause 5D into the *Workers Compensation Regulation 2016*. Clause 5D prescribes additional types of employment to the definition of "prescribed employment" in section 19B(9) of the *Workers Compensation Act 1987*.

6. Section 19B(1) of the Act provides that if a worker, during a time when the worker is engaged in prescribed employment, contracts COVID-19, there is a rebuttable presumption for the purposes of the Act that:

(1) …

(a) the disease was contracted by the worker in the course of the employment, and

(b) the employment—

(i) in the case of a person to whom clause 25 of Part 19H of Schedule 6 applies—was a substantial contributing factor to contracting the disease,[40] or

(ii) in any other case—was the main contributing factor to contracting the disease.

7. The remainder of section 19B establishes the relevant medical testing criteria for a worker to be deemed to have COVID-19 and other presumptions about the date of injury and duration of the period in which they are incapable of work.

8. Section 19B(9) prescribes various types of employment for the purposes of applying the relevant presumptions. These types of employment include in the retail industry (other than businesses providing only online retail); the health care sector; disability and aged care facilities; educational institutions; police and emergency services; restaurants, clubs and hotels; and the cleaning industry, among others.

9. New clause 5D adds cafes, supermarkets, funeral homes and childcare facilities to the forms of prescribed employment.

10. Other potential high risk settings for COVID-19 do not appear to be prescribed under clause 5D or section 19B(9). For example, under the Stage 4 restrictions in Victoria, industries that were deemed to be high risk but which could continue operating subject to the conditions of a "High Risk COVIDSafe Plan" included: construction, meat processing,

[40] Clause 25 of Part 19H of Schedule 6 of the Act applies certain savings and transitional provisions to police officers, paramedics and firefighters.

medical and pharmaceutical supply, supermarket distribution and warehousing and distribution.[41]

11. Another potential high-risk workplace setting which may not be captured relates to security guards or other personnel involved in hotel quarantine.

> **Clause 5D of the Regulation prescribes certain additional forms of employment for the purpose of establishing a presumption under the Act that a worker contracted COVID-19 in the course of their employment.**
>
> **Although both section 19B(9) of the Act and clause 5D of the Regulation prescribe many different types of employment to which the presumption applies, some workplaces which have been considered high-risk settings for contracting COVID-19 in Victoria appear to be omitted. For example, it is not clear that the following forms of employment are captured: meat processing, medical and pharmaceutical supply, supermarket distribution and warehousing and distribution. It is also not clear that security and other staff involved in hotel quarantine are captured.**
>
> **While it is possible that some of the identified industries may be classified as "retail", which is a prescribed form of employment, the Committee notes that the potential omissions or lack of clarity may restrict access to compensation for some workers. Accordingly, the Committee refers this matter to the Parliament.**

Restricting right to compensation – types of tests

12. Schedule 1, item 3 of the Regulation inserts clause 5B(1) and (2) in the *Workers Compensation Regulation 2016*. The clause provides as follows:

> (1) For the purposes of section 19B(2) of the 1987 Act, a result set out in Column 3 of Part 2 of Schedule 2 in relation to COVID-19, if obtained by means of a medical test the requirements of which are set out opposite that result in Column 2 of that Part in relation to the disease, is a result prescribed in respect of the disease.
>
> (2) For the purposes of section 19B(3) of the 1987 Act, the clinical criteria prescribed for the purpose of making a classification of COVID-19 are the obtaining of a result prescribed under section 19B(2) of the 1987 Act in respect of the disease by means of a medical test that complies with the requirements prescribed under that subsection in relation to the disease.

13. As discussed at paragraphs 6 – 8 above, section 19B establishes a rebuttable presumption that, among other things, certain workers contracted COVID-19 in the course of their employment. It also sets out the medical testing criteria for a worker to be deemed to have COVID-19.

14. Clause 5B(1) appears to relate to the medical tests required to establish that a worker has COVID-19. Clause 5B(3) provides that the clinical criteria for diagnosing COVID-19 are obtaining a result using the same medical tests required by clause 5B(1). The effect of the clause therefore appears to be that a worker may only be deemed to have COVID-19 if

[41] Business Victoria, undated, *High Risk COVIDSafe Plan,* https://www.business.vic.gov.au/disputes-disasters-and-succession-planning/covid-safe-business/high-risk-covid-safe-plan, viewed 19 August.

one of the following two tests prescribed in Part 2 of Schedule 2 of the Regulation have returned a positive result:

Part 2 – Medical tests and results – COVID-19

Column 1	Column 2	Column 3
COVID-19	Nucleic acid testing of any specimen using a specific SARS-CoV-2 nucleic acid test that is listed in the Australian Register of Therapeutic Goods	Detection of SARS-CoV-2
	A laboratory culture of any specimen, with confirmatory testing using a PCR test that is listed in the Australian Register of Therapeutic Goods	The isolation of SARS-CoV-2, confirmed with PCR

15. Other than the above tests, there appear to be no separate clinical criteria – such as symptoms - which may enable a diagnosis of COVID-19 (for the purposes of workers compensation).

16. The two tests prescribed for the purpose of classifying workers as having COVID-19 appear to both be types of nucleic acid testing.[42] PCR tests, which appear to be referred to in the above Schedule, are described by the Therapeutic Goods Administration (TGA) as the current "gold standard" for diagnosing COVID-19.

17. However, there are several different tests which can be used to diagnose COVID-19. For instance, serological testing may be used to find that a person has already had COVID-19, but is generally not able to detect active infections.[43] False negatives are also possible, and may be influenced by the timing of a test.[44] The TGA has also noted that several SARS-Cov-2 tests have undergone an "expedited assessment" and that there is currently "limited evidence available to assess the accuracy and clinical utility" of COVID-19 tests.[45]

Clause 5B of the Regulation prescribes certain tests which may be used to classify a worker as having COVID-19 for the purposes of workers compensation. Other than the nominated tests, there appear to be no clinical criteria – such as the presence of symptoms – which may enable a diagnosis of COVID-19. There also appear to be other tests which are not included in the Regulation. For instance, the Regulation appears to omit tests that may detect past rather than active infections, such as serological testing.

[42] Commonwealth Department of Health, Therapeutic Goods Administration, 15 September 2020, *COVID-19 testing in Australia – information for health professionals*, https://www.tga.gov.au/covid-19-testing-australia-information-health-professionals, viewed 23 September 2020.

[43] Ibid.

[44] Slezak, M., 15 July 2020, *COVID-19 testing not as accurate missing coronaviruses cases grow*, https://www.abc.net.au/news/2020-07-15/covid-19-testing-not-as-accurate-missing-coronavirus-cases-grow/12455076, viewed 23 September 2020.

[45] Commonwealth Department of Health, Therapeutic Goods Administration, 15 September 2020, *COVID-19 testing in Australia – information for health professionals*, https://www.tga.gov.au/covid-19-testing-australia-information-health-professionals, viewed 23 September 2020.

According to the Therapeutic Goods Administration (TGA), there is limited evidence to assess the accuracy and utility of COVID-19 tests generally. They have also noted that several SARS-Cov-2 tests have been assessed on an expedited basis.

In light of the emerging evidence around tests, the potential for false negatives, and the possibility of ongoing complications from COVID-19 after an active infection, the testing and clinical criteria for determining that a worker has COVID-19 may appear to be quite narrow. Although the TGA notes that PCR testing, which appears to be included in the Regulation, is the "gold standard" for COVID-19 diagnosis, it is possible that the current classification criteria may result in some active infections or past infections being missed. In limited circumstances, this may operate to restrict the access of some workers to compensation. In the circumstances, the Committee refers this matter to Parliament for its consideration.

16. Public Health Amendment (COVID-19 Border Control – Transiting ACT Residents) Regulation 2020

Date tabled	LA: 15 September 2020 LC: 25 August 2020
Disallowance date	LA: 17 November 2020 LC: 10 November 2020
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a condition applying to certain ACT residents transiting through NSW to the ACT in accordance with an exemption under the *Public Health (COVID-19 Border Control) Order 2020*.

2. This Regulation 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

3. Under subsections 7(1) and (2) of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, the Minister may take such action, and may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

4. Under subsection 7(4) of the Act, such an order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order. In addition, subsection 7(5) provides that, unless earlier revoked, such an order expires at the end of 90 days after it was made, or earlier if so specified in the order. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction.

5. On 7 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* (the Order) was published in the NSW Government Gazette, and commenced the following day (clause 2). The object of the Order was to restrict entry into NSW of persons who had been in Victoria within the previous 14 days before entry.

6. The Minister made the Order under section 7 of the Act, directing under subclause 5(1) that an “affected person” must not enter NSW unless the person is authorised to enter NSW. Subclause 5(2) provided that a person was authorised to enter NSW if they belonged to a specified class of persons, held a current entry permit and complied with specified conditions. Clause 3 of the Order defined an “affected person” to be a person who has been in Victoria within the previous 14 days.

7. Clause 4 of the Order also set down the Minister’s grounds for concluding that a situation had arisen that was, or was likely to be, a risk to public health (and thus his grounds for making the Order under section 7 of the Act), which were that:

    - public health authorities both internationally and in Australia had been monitoring and responding to outbreaks of COVID-19, also known as Novel Coronavirus 2019,
    - COVID-19 is a potentially fatal condition and is also highly contagious,
    - a number of cases of individuals with COVID-19 had now been confirmed in NSW, as well as other Australian jurisdictions,
    - recent cases of unexpected community transmission of COVID-19 in Victoria, with restrictions on the movement of people being put in place in certain hotspot areas,
    - the Victorian Government and the NSW Government had agreed that the border should, subject to exceptions determined by the Government of NSW, be closed until community transmission of COVID-19 in Victoria was contained.

8. On 13 August 2020, the *Public Health (COVID-19 Border Control) Amendment (Transiting ACT Residents) Order 2020* (the Amendment Order) commenced to create an exemption to the Order for certain ACT residents transiting through NSW to the ACT. The Amendment Order inserted clauses 8B and 8C into the Order. Clause 8B provided that subclause 5(1) of the Order directing that an “affected person” must not enter NSW unless the person is authorised to enter NSW did not apply to an "exempt person" who complied with certain conditions. In particular, the "exempt person" had to:

    - immediately before entering NSW, if the person was the driver of a vehicle, ensure that the vehicle had sufficient petrol to travel to the ACT without refuelling, and
    - after entering NSW, travel, by the route designated by the Commissioner of Police, directly to the ACT without stopping, except—
        - for a fatigue or hygiene break at a safe location designated by the Commissioner of Police, or
        - to obtain urgent medical care, or
        - to deal with an emergency, and
    - while in NSW—

- maintain an appropriate physical distance from any person who is not travelling with the exempt person, and
- travel only between the hours of 9.00 am and 3.00 pm, and

- at all times—
  - carry the person's Entry Authorisation Certificate, and
  - produce the Entry Authorisation Certificate for inspection by an enforcement officer if requested to do so by the enforcement officer.

9. Further, clause 8B provided that the "exempt person" must not enter NSW again from Victoria after transiting through NSW under the clause. Clause 8B also provided that for the purposes of the clause:

- "ACT resident" meant a person whose usual place of residence is the Australian Capital Territory.
- "Entry Authorisation Certificate" meant an Entry Authorisation Certificate issued by the Chief Health Officer of the Australian Capital Territory that grants the person subject to the certificate authority to enter the Australian Capital Territory.
- "Exempt person" meant an ACT resident who: (a) was the subject of an Entry Authorisation Certificate, and (b) was in Victoria immediately before the commencement of the clause.

10. Clause 8B also provided for its own repeal at 3:00pm on 17 August 2020.

11. As noted, the Amendment Oder also inserted Clause 8C into the Order and this clause provided that a person who travelled through NSW under clause 8B must not enter NSW until a period of at least 14 days had elapsed since the person entered the ACT under that clause. Clause 8C provided for its own repeal on 1 September 2020.

12. The Regulation amends the *Public Health Regulation 2012* to allow a $5000 penalty notice to be issued for offending against section 10 of the Act by contravening clause 8B or 8C of the Order, that is, by contravening the conditions set down in clauses 8B or 8C when transiting through NSW to the ACT in accordance with the exemption set down in clause 8B.

On 8 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* (the Order) came into force under which the Minister for Health and Medical Research directed that an "affected person" must not enter NSW unless the person is authorised to do so. The Order defined an "affected person" to be a person who has been in Victoria within the previous 14 days.

Further, on 13 August 2020, the *Public Health (COVID-19 Border Control) Amendment (Transiting ACT Residents) Order* (the Amendment Order) commenced, which amended the Order by inserting clauses 8B and 8C into it. Clause 8B provided that subclause 5(1) of the Order directing that an "affected person" must not enter NSW unless the person is authorised to enter NSW did not apply to an "exempt person" transiting through NSW to the ACT, who

complied with certain conditions. An "exempt person" meant an ACT resident who was the subject of an Entry Authorisation Certificate, and was in Victoria immediately before the commencement of the clause.

Clause 8C provided that a person who travelled through NSW under clause 8B must not enter NSW until a period of at least 14 days had elapsed since the person entered the ACT under that clause.

The Regulation amends the *Public Health Regulation 2012* to allow a $5000 penalty notice to be issued for offending against section 10 of the *Public Health Act 2010* by contravening clause 8B or 8C of the Order, that is, by contravening the conditions set down in clauses 8B or 8C when transiting through NSW to the ACT in accordance with the exemption set down in clause 8B.

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. The Committee also notes that $5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, 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. Given these factors, the Committee makes no further comment.

Freedom of movement

13. As above, the Regulation allows for a $5000 penalty notice to be issued for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.

14. As noted, such conditions were set out in clauses 8B and 8C of the Order and include transiting through NSW to the ACT by the route designated by the Commissioner of Police, directly to the ACT without stopping, except in narrow circumstances (e.g. for a fatigue or hygiene break or in an emergency); only travelling between the hours of 9am and 3pm; and not re-entering NSW until a period of at least 14 days had elapsed since the person entered the ACT.

15. As is also noted above, the Order was made under section 7 of the Act, subsection 7(5) of which provides that, unless earlier revoked, orders so made expire at the end of 90 days after they are made, or earlier if so specified in the Order.

16. In this case, the Order commenced on 8 July 2020 (clause 2) and was repealed on 2 October 2020 under clause 14 of the *Public Health (COVID-19 Border Control) Order (No 2) 2020* (the second Order), which itself commenced on 2 October (clause 2). Although as

described earlier, clauses 8B and 8C of the Order did not commence until 13 August 2020, and were repealed on 17 August 2020 and 1 September 2020 respectively.

17. The second Order covers similar matter to the original Order, restricting entry to NSW for persons who have been in Victoria, subject to certain exceptions. Like the original Order, it sets out the Minister's grounds for concluding that there is a risk to public health (clause 4), and thus his reasons for making the second Order pursuant to section 7 of the Act. Further, like the original Order, the second Order will expire at the end of 90 days after its commencement pursuant to subsection 7(5) of the Act, unless earlier revoked.

> **As above, the Regulation allows for a $5000 penalty notice to be issued for an offence against section 10 of the Public Health Act 2010 involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.**
>
> **Such conditions were set out in clauses 8B and 8C of the Order and included transiting through NSW to the ACT by the route designated by the Commissioner of Police, directly to the ACT without stopping, except in narrow circumstances (e.g. for a fatigue or hygiene break or in an emergency); only travelling between the hours of 9am and 3pm; and not re-entering NSW until a period of at least 14 days had elapsed since the person entered the ACT.**
>
> **By providing that a person can receive a significant on-the-spot penalty for travelling from Victoria, through NSW and into the ACT without complying with strict conditions, the Regulation is part of a regime that restricts freedom of movement. This right is contained in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. This Article protects the right to move freely in a country for those who are lawfully within that country; the right to leave any country; and the right to enter a country of which you are a citizen.**
>
> **However, Article 12 also recognises that derogation from this right may be warranted in certain circumstances, including to protect public health. The Committee considers that as the Regulation is part of a regime to respond to COVID-19 and stop its spread following an increase in community transmission in Victoria, it fits within the public health exemption, and that the limits placed on freedom of movement are reasonable in the circumstances.**
>
> **This is particularly so as the associated Order was time limited to automatically expire 90 days after it commenced, and it was repealed on 2 October 2020 (the provisions set down in clauses 8B and 8C being repealed before that). While a similar Order, the Public Health (COVID-19 Border Control) Order (No 2) 2020 commenced on the same day (2 October), in making this second Order the Minister again had to outline the public health grounds for making such an Order (set out in clause 4), and it too will automatically expire 90 days after its commencement unless earlier revoked (as per subsection 7(5) of the Act).**
>
> **In short, in the extraordinary circumstances created by COVID-19, and given the abovementioned time limits and other safeguards, the Committee considers that the Regulation, and the regime of which it is part, place reasonable limits on freedom of movement, and 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

18. As above, the Regulation allows for a $5000 penalty notice to be issued for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.

> **As above, the Regulation allows for a $5000 penalty notice to be issued for an offence against section 10 of the Public Health Act 2010 involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.**
>
> **The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and 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.**
>
> **However, given the severe circumstances surrounding the COVID-19 pandemic – in this case the recent increased community transmission in Victoria – it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately 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, which may have serious consequences. In the extraordinary circumstances, the Committee makes no further comment.**

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.

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.

The functions of the Committee 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)

	Regulation	Digest No.	Date
1	Crimes (Administration of Sentences) Amendment (COVID-19) Regulation 2020	13	5 May 2020
2	Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020	13	5 May 2020
3	Public Health Amendment (Penalty Notices) Regulation 2020	13	5 May 2020
4	Environmental Planning and Assessment Amendment (COVID-19 Planning Bodies) Regulation 2020	14	14 May 2020
5	Local Government (General) Amendment (COVID-19) Regulation (No 2) 2020	14	14 May 2020
6	Local Government (General) Amendment (COVID-19) Regulation 2020	14	14 May 2020
7	Residential Tenancies Amendment (COVID-19) Regulation 2020	14	14 May 2020
8	Retail and Other Commercial Leases (COVID-19) Regulation 2020	14	14 May 2020
9	Community Land Management Amendment (COVID-19) Regulation 2020	17	4 August 2020
10	Liquor Amendment (COVID-19 Licence Endorsements and Temporary Freezes) Regulation 2020	17	4 August 2020
11	Public Health Amendment (Authorised Officers) Regulation 2020	17	4 August 2020
12	Public Health Amendment (COVID-19 Border Control) Regulation 2020	17	4 August 2020
13	Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 2) 2020	17	4 August 2020
14	Strata Schemes Management Amendment (COVID-19) Regulation 2020	17	4 August 2020
15	Workers Compensation Amendment (Consequential COVID-19 Matters) Regulation 2020	20	13 October 2020
16	Public Health Amendment (COVID-19 Border Control—Transiting ACT Residents) Regulation 2020	21	20 October 2020