



Legislation Review Committee

LEGISLATION REVIEW DIGEST

NO. 4/57 – 17 September 2019



New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly.

Legislation Review Committee Legislation Review Digest, Legislation Review Committee, Parliament NSW [Sydney, NSW]: The Committee, 2019, 82pp 30cm

Chair: Felicity Wilson MP

17 September 2019

ISSN 1448-6954

1. Legislation Review Committee – New South Wales

2. Legislation Review Digest No. 4 of 57

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 4 of 57

The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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Membership

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Guide to the Digest

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. CHILDREN'S GUARDIAN BILL 2019

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

Part 4 – Reportable conduct scheme – Right to privacy

The Children's Guardian has the power under the Bill to make preliminary inquiries to decide whether to carry out an investigation or determination. This is to aid in determining whether it is in the public interest to investigate a reportable allegation or make a determination about a reportable conviction or investigate the way a relevant entity is dealing with such a matter. It potentially allows the Children's Guardian to have access to personal and sensitive information that would normally be protected under privacy laws. It may therefore impact on the privacy rights of a person who is not yet the subject of an investigation or determination.

However, the Committee notes that the purpose of accessing such information is to enable the Children's Guardian to assess whether it is in the public interest to investigate or make a determination about a reportable allegation or conviction that potentially involves serious offences against a child. In the circumstances, the Committee makes no further comment.

Part 4 – Reportable conduct scheme – Right to privacy

The Bill expands the reportable conduct scheme to include conduct outside work of certain employees. It may therefore impact on their right to privacy. However, the Committee notes that consideration of conduct outside work only applies to employees of certain entities listed in schedule 1 of the Bill who are likely, or more likely than most, to have contact with children (such as Department of Education employees), or to employees of public authorities who require a working with children check for the purpose of their employment. The Committee also notes that reportable conduct under the scheme includes serious offences against a child. In the circumstances, the Committee makes no further comment.

Part 4 – Reportable conduct scheme – Procedural fairness

The Bill exempts the Children's Guardian, in certain circumstances, from the requirement to notify an employee that an investigation or determination is being carried out in relation to him or her. Further, should an employee be dismissed, removed or punished following a finding of reportable conduct or a determination of a reportable conviction, he or she does not need to be informed of the reasons if certain circumstances apply.

The Committee notes that these provisions impact on the right of affected persons to be treated with procedural fairness. Procedural fairness requires that a person affected by a decision be heard and have a right to respond to any adverse material that has been put regarding him or her. However, the Committee acknowledges that the exemptions only apply where notification may compromise an investigation or put a person's health or safety at serious risk – they are designed to protect persons against the risk of harassment or intimidation, and to safeguard other inquiries or investigations. In the circumstances, the Committee makes no further comment.

Part 4 – Reportable conduct scheme – Presumption of innocence and reversed onus of proof

The Bill provides that an employer who dismisses an employee or prejudices him/her in his/her employment because s/he has assisted the Children's Guardian in a reportable conduct matter is guilty of an offence. The burden is on the employer to prove that the employee was dismissed for reasons other than having assisted the Children's Guardian. This is a reversal of the onus of proof that ordinarily requires the prosecution to prove all elements of an offence before a defendant can be found guilty, consistent with the presumption of innocence.

The Committee acknowledges that there is a public interest in employees feeling able to assist the Children's Guardian in reportable conduct matters without fear of reprisal. Further, a reversed onus may help to prove offences containing elements that are peculiarly within the knowledge of the accused. In the circumstances, the Committee makes no further comment.

Part 4 – Reportable conduct scheme - Exclusion from civil or criminal liability

The Bill provides that persons who make a report, complaint or notify the Children's Guardian under the reportable conduct scheme are immune from civil and criminal liability. This may limit the right of a person negatively affected by such action to redress and compensation. However, the Committee notes that the person making the complaint must have acted in good faith for the immunity to apply.

The Committee further notes that the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that legislation should provide comprehensive protection for individuals who make reports in good faith about child sexual abuse in institutional contexts, including protection from civil and criminal liability (recommendation 7.5). Further, providing greater protection to people who make a report may result in the increased reporting of child abuse and neglect, facilitating its prevention and stopping abuse that is occurring. Given the rationale for this provision and the 'good faith' safeguard around its operation, the Committee makes no further comment.

Part 5 – Out of home care matters – Strict liability

The Bill provides that a person must not provide voluntary out of home care for a child unless they are a designated or registered agency or an individual so authorised; and that the principal officer of a designated agency must not reside on the same property as a child in statutory or supported out of home care supervised by that agency. These are strict liability offences and so derogate from the common law principle that mens rea (the mental element of a crime) must be proved to hold a person liable for an offence.

The Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, the provisions seek to facilitate the safety of children in out of home care. The Committee also notes that the common law defence of an honest and reasonable mistake of fact applies to strict liability offences. In the circumstances, the Committee makes no further comment.

Part 6 – Child employment – strict liability

The Bill provides that it is an offence to employ a child to participate in: an entertainment or exhibition; door to door sales; or an activity prescribed by the regulations; and that it is an offence for a person to cause or allow a child to take part in employment, during which the child's physical or emotional wellbeing is put at risk. These are strict liability offences and so derogate from the common law principle that mens rea (the mental element of a crime) must be proved to hold a person liable for an offence.

The Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, the objects of Part 6 of the Bill are to prevent the exploitation and abuse of children in employment and to ensure that employment does not compromise a child's personal or social development, and the ability to benefit from education. The Committee also notes that the common law defence of an honest and reasonable mistake of fact applies to strict liability offences. In the circumstances, the Committee makes no further comment.

Parts 8, 9 and 12 – Children's Guardian and Official Community Visitors – exclusion from liability

A number of provisions in the Bill provide the Children's Guardian and certain persons or bodies with immunity from civil or criminal liability. For example, an officer of the Children's Guardian is generally immune from personal liability for acts or omissions carried out for the purposes of executing the requirements of the proposed Act. This may limit potential avenues of redress for a person who has been negatively impacted as a result of their action or inaction.

However, the Committee notes that the Bill includes the safeguard of requiring actions or omissions to have been done in good faith. The Committee further notes that the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that legislation should provide comprehensive protection for individuals who make reports in good faith about child sexual abuse in institutional contexts, including protection from civil and criminal liability (recommendation 7.5). In addition, providing greater protection to people who make a report may result in the increased reporting of child abuse and neglect, facilitating its prevention and stopping abuse that is occurring. Given the rationale for these provisions and the 'good faith' safeguard around their operation, the Committee makes no further comment.

Part 11 – Offences – Strict liability

The Bill provides that it is an offence to access information stored by the Children's Guardian unless the person is authorised, approved or delegated to perform a function of the Children's Guardian. This is a strict liability offence and so derogates from the common law principle that *mens rea* (the mental element of a crime) must be proved to hold a person liable for an offence.

The Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, much of the information stored by the Children's Guardian is likely to be extremely sensitive in nature, and the Children's Guardian is able to access information that would normally be protected under privacy laws. Given these considerations and the fact that the maximum penalty for the offence is limited to \$1,100, the Committee makes no further comment.

Part 12 – Right to privacy and significant matter in subordinate legislation

The Bill would allow certain information concerning the safety, welfare and wellbeing of a child to be shared between the Children's Guardian and other 'relevant bodies' including the NSW Police Force and public authorities. It may thereby impact on the right to privacy. The Committee notes that certain safeguards and limitations are included in the Bill – the information must relate to the safety, welfare and wellbeing of a child and must only be shared in good faith and with reasonable care. Given these safeguards the Committee makes no further comment with respect to the impact of these provisions on privacy rights.

Further, the regulations can add to the list of 'relevant bodies' to be part of the information sharing scheme. This potentially decreases the level of parliamentary oversight over the entities that may share information under the provision. To foster an appropriate level of parliamentary oversight over a matter that may affect privacy rights, the Committee considers that any 'relevant bodies' to be part of the information-sharing scheme should be listed in the primary legislation. However, the Committee notes that either House can pass a resolution disallowing a regulation. Given this safeguard, the Committee makes no further comment.

Schedule 2 – Powers of authorised persons – powers of search and entry – right to privacy and freedom from arbitrary interference

The Bill grants broad powers of search and entry to the Children's Guardian or an officer appointed by him/her. The power of entry available to the Children's Guardian or an appointed officer is not limited to public places nor to circumstances where the occupier has consented to the entry. In particular, it allows for entry without warrant in a number of situations: for a reportable conduct investigation under Part 4 of the Bill; in relation to child employment matters under Part 6 of the Bill; or if it concerns premises subject to control or regulation under the Bill.

The powers of search and entry are broad and may impact upon the privacy rights of affected persons and their right to be free from arbitrary interference. The Committee notes that the authorised person must take all reasonable steps to ensure as little inconvenience and damage as possible whilst exercising such powers. Further, the purpose of entry is to facilitate investigations and accreditation, and monitor compliance. The Committee makes no further comment.

Schedule 2 – Powers of authorised persons – Privilege against self-incrimination

Some of the powers of search and entry under the Bill extend to requiring a person to answer questions and provide information or face a penalty. Exemptions are not provided where doing so would incriminate the person, and so the Bill impacts on the privilege against self-incrimination.

The Committee acknowledges that the privilege may hinder investigations where information is within the knowledge of certain persons who are not likely to voluntarily share that information. The Committee further notes that this information is compelled in the context of the Children's Guardian having reasonable grounds for believing there is a risk to the safety, welfare and wellbeing of a child. There is accordingly a public interest in investigators having access to all relevant information. Further, Schedule 2[32] of the Bill provides that any evidence derived from the information or document is not generally admissible against the individual in any proceeding to the extent that it tends to incriminate him/her or expose him/her to a penalty. Having regard to this safeguard the Committee makes no further comment.

Schedule 5 – Right to privacy – breach of confidentiality/freedom of conscience or religion

The Bill expands the list of mandatory reporters so that persons in religious ministries or activities and registered psychologists must report to the Secretary of the Department of Communities and Justice if, during the course of their work or role, they suspect that a child is at risk of significant harm. The Committee notes that in doing so, the Bill may involve these persons divulging the content of discussions otherwise generally considered confidential. In the context of religious confessions, this may also impact on freedom of conscience and religion.

However, the Committee notes that the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that registered psychologists and people in religious ministries be classified as mandatory reporters (Recommendation 7.3). It also notes that expanding the categories of mandatory reporters may result in the increased reporting of child abuse and neglect, facilitating its prevention and stopping abuse that is occurring. In the circumstances, the Committee makes no further comment.

Schedule 5 – Restriction of access to government information

The Bill excludes reportable conduct matters from the requirements of the *Government Information (Public Access) Act 2009*, thereby impacting on the right of persons to access government information. However, given the highly sensitive nature of such material, and the potential impact on persons named in the material, including children, the Committee notes the public interest against disclosure and makes no further comment.

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

Part 4 – Reportable conduct schemes - Ill-defined and wide powers

The Committee notes that under the Bill, the head of a relevant entity may delegate any of his or her functions regarding the reportable conduct scheme to an employee. There are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. Given the potentially serious and sensitive matters with which the reportable conduct scheme is concerned, the Committee refers to Parliament the question of whether the power of delegation is too broad.

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

Commencement by proclamation

The Bill allows for certain of its sections to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons. This is particularly the case where the legislation in question affects individual rights or obligations.

The Committee notes that some sections that are to commence by proclamation relocate the provisions of one Act into another and make no substantive changes to the law. However, other sections expand the coverage of the proposed Act's reportable conduct scheme e.g. to providers of overnight camps and family group homes. While a flexible start date may assist with the implementation of any necessary administrative changes, affected parties may also benefit from having certainty about when their new obligations commence, for which some penalties apply for non-compliance. The Committee refers this matter to Parliament to consider whether a flexible start date is reasonable in the circumstances.

Significant matters in subordinate legislation – issue one

The Bill empowers the Children's Guardian to keep registers relating to persons and organisations providing out of home care services. It further allows certain matters concerning the registers to be dealt with in the regulations. This includes information to be kept on the registers, who may access them, and the way in which they are to be used and kept. Given the potentially sensitive nature of the information that may be recorded on the registers, including information that may prevent the employment of certain individuals, the Committee considers that these details may be more appropriately located in primary legislation to ensure a greater

level of parliamentary oversight over requirements. The Committee refers this matter to Parliament for consideration.

Significant matters in subordinate legislation – issue two

The Bill empowers the regulations to create certain offences. The Committee notes that the offences that can be created are limited to ones that attract a maximum penalty of a \$5,500 fine. However, the Committee prefers substantive matters, such as the creation of offences, to be dealt with in principal legislation to foster increased opportunity for parliamentary scrutiny and debate over whether the conduct in question should be punishable. The Committee refers this matter to Parliament for consideration.

2. JUSTICE LEGISLATION AMENDMENT BILL 2019

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

Reversal of the onus of proof

The Bill would amend the *Anti-Discrimination Act 1977* to provide that certain notices given under that Act, by post, are in the absence of contrary evidence sufficient to raise doubt, presumed to have been given 7 working days after they are sent, rather than the current 4 working days.

The Committee notes that individuals who fail to comply with some of these notices could attract a maximum penalty of a \$1,100 fine. In short, a person who had not in fact received such a notice by post would be presumed to have received it 7 working days after it had been sent, and would have to produce evidence to the contrary to avoid a fine. This is a reversal of the onus proof – consistent with the presumption of innocence, the prosecution is ordinarily required to prove all the elements of an offence before a person can be found guilty of it and face a penalty.

Nonetheless, the provisions are designed to facilitate the efficient service of notices in anti-discrimination matters and the maximum applicable penalties are non-custodial and relatively small. In the circumstances, the Committee makes no further comment.

Potential for arbitrary detention

The Bill provides that where a serious young offender is due for consideration about whether s/he should be released on parole, a victim may make a submission to the Children's Court about the matter and the Court must consider such a submission. The Committee notes that submissions from victims have the potential to be highly emotionally charged and a requirement for the Court to take them into account for the purpose of making parole decisions about a juvenile offender has the potential to be prejudicial to that offender.

However, the Committee recognises that it is very important for a victim to participate in the justice process and be heard. Similarly, the provisions would only apply in respect of serious young offenders and not to juvenile offenders more broadly. The Committee also acknowledges the expertise of the Children's Court to make decisions in the area covered by the provisions. In the circumstances, the Committee makes no further comment.

Right to Privacy

The Bill would amend the *Children (Detention Centres) Act 1987* to provide that the Secretary may, if requested to do so by a victim of a juvenile offender whose name is recorded in the

Victims Register, or at the Secretary's discretion, tell the victim the general area of the juvenile offender's residence following the juvenile offender's discharge from detention. This may impact on a juvenile offender's right to privacy in circumstances where he or she has served his or her sentence of detention for the offence or offences in question.

The Committee acknowledges that these provisions are designed to protect victims' fundamental right to carry on their lives in safety and security, having been subject to the trauma of the juvenile's offending behaviour. The Committee also notes that the provisions would not allow the release of a juvenile offender's precise address, only his or her general location. In the circumstances, the Committee makes no further comment.

Right to liberty

The Bill would introduce an amendment to clarify the legal status of offenders whose release from custody is delayed with their consent by defining them as inmates for the purposes of the *Crimes (Administration of Sentences) Act 1999*. The Committee notes that this may impact on affected persons' right to liberty. The Committee understands that while some of the affected offenders may have requested their release be delayed, there are others who fall outside this category – while they consent to their continued detention they have not requested it. However, as the provisions would not allow or facilitate the delayed release of persons without their consent the Committee makes no further comment.

Burden of proof and procedural fairness

Schedule 1.6 to the Bill would allow a person to be held liable for offences without requiring the prosecution to particularise certain matters e.g. the exact date on which the offence is alleged to have occurred. This is a departure from the ordinary requirement for the prosecution to prove all elements of an offence before a defendant can be held liable, and to particularise its case against the defendant so that he or she can fully respond consistent with the principles of procedural fairness.

However, schedule 1.6 contains various safeguards. For example, the prosecution must particularise a period during which the conduct is alleged to have occurred. Further, the prosecution must establish that there was no time during that period that the alleged conduct, if proved, was not a sexual offence. Similarly, if more than one applicable offence was in force during the relevant period, it will not be possible to prosecute the accused person for an offence that has a higher maximum penalty than any of the other applicable offences. In short, a person cannot be charged for conduct that may not have been an offence at the time it is alleged to have occurred; and cannot receive a greater penalty for the conduct, if proved, if a lesser penalty may have applied at the time the conduct occurred.

The Committee also notes that the provisions are designed to facilitate prosecutions for historical child sex offences so that offenders can be held accountable. Given this, and the safeguards, the Committee makes no further comment.

Standard non-parole period

The Bill increases the standard non-parole period for the bushfire arson offence under section 203E of the *Crimes Act 1900* from 5 to 9 years. Non-parole periods are legislative guideposts for sentencing and there may be some concern that they affect the discretion of judicial officers to impose a sentence that is just taking into account the circumstances of each case.

However, the Committee acknowledges the changes implement a recommendation of the NSW Sentencing Council and are designed to reflect the seriousness with which the community views bushfire offences, the harm caused, and the need for special deterrence. Similarly, while standard non-parole periods must be taken into account in determining an appropriate sentence, this does not limit the matters that are otherwise required or permitted to be taken into account. In addition, a judicial officer is not prevented from setting a non-parole period that is longer or shorter than the standard non-parole period though he or she must record the reasons for doing so, and the factors that were taken into account. Given the reasons for the amendment and the fact that judicial officers will retain a significant level of discretion in setting an appropriate sentence for affected offenders, the Committee makes no further comment.

Right to a fair trial

Schedule 1.9 [1] and 1.10 of the Bill clarifies that there is no requirement for NSW law enforcement officers who are investigating alleged offences to disclose to the Commonwealth DPP all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused, even where the Commonwealth DPP is prosecuting a State offence alongside Commonwealth offences. By clarifying that there is no requirement to forward exculpatory evidence to the Commonwealth DPP in such cases, the Bill may impact on the right of accused persons to a fair trial. The Committee refers the matter to Parliament for consideration.

Right to a fair trial II

Schedule 1.9 and schedule 1.19 of the Bill would amend legislation so that certain indictable offences can be tried summarily in the Local Court. Indictable offences are more serious offences than summary offences and are generally heard in the District or Supreme Courts before a judge and jury. By providing that certain indictable offences can be tried summarily in the Local Court, the Bill may thereby affect any automatic right of an accused person to a jury trial in respect of the subject offences.

However, the Committee notes that the accused person could still elect to have their matter heard on indictment. Similarly, the maximum penalty that the Local Court can generally hand down for an indictable offence heard summarily is two years imprisonment, even if the maximum penalty for the applicable offence is higher. Hence, where an accused person is found guilty, there may be certain advantages to having a matter heard summarily. In the circumstances, the Committee makes no further comment.

Right to a fair trial III

Schedule 1.9[10] to the Bill would amend the *Criminal Procedure Act 1986* to clarify that a complainant or witness who is aged 16 or 17 years at the time the accused person was committed for trial or sentence is able to give evidence by means of a pre-recorded hearing in accordance with a court order, even if the child reaches the age of 18 years at any time before the conclusion of the proceedings. The Committee notes that allowing prosecution witnesses to give pre-recorded evidence in criminal trials may have some adverse impact on accused persons e.g. it may be unfair to require the defence to cross examine the main prosecution witness before the formal trial has begun.

However, the Committee also notes the intent of these provisions is to reduce the stress, trauma and duration of the court process for young, vulnerable witnesses consistent with recommendations made by the NSW Parliament's 2015 Joint Select Committee on the

Sentencing of Child Sexual Assault Offenders and the Royal Commission into Institutional Responses to Child Sexual Abuse. Given these countervailing considerations, the Committee makes no further comment.

Rights of minors in the criminal process

Clause 13A of the *Young Offenders Regulation 2016* currently excludes certain sexual offences under the *Crimes Act 1900* from coverage by the *Young Offenders Act 1997*. Schedules 1.21 and 1.22 of the Bill would relocate these exclusions to the *Young Offenders Act 1997*. The Committee notes that the Bill will thereby continue certain arrangements that exclude young offenders from being diverted from the criminal justice system in certain cases. In doing so, the Bill may impact on the rights of minors in the criminal process.

However, the Committee notes that certain offences are excluded from coverage by the *Young Offenders Act* because of a concern that a diversionary outcome would not be sufficient to hold a young person accountable for these types of offences. Relatedly, the prescribed offences are offences over which there are considerable community concerns, for example, sexual touching of and sexual acts with or towards people under the age of 10 years. Given these countervailing considerations, the Committee makes no further comment.

Right to reputation

Schedule 1.11[1] to the Bill would amend the *Defamation Act 2005* so that if the Legal Services Commissioner, the Bar Council or the Law Society Council provide copies of compliance audit reports of law practices to each other, they have an absolute privilege to do so, and will be protected from defamation claims. It would thereby affect the reputational rights of any person named in a compliance audit. However, the Committee notes the reasons for limiting these rights, that is, to ensure the relevant statutory bodies can exercise their functions of ensuring that the legal profession complies with applicable professional standards. In the circumstances, the Committee makes no further comment.

Right to reputation II and retrospectivity

Schedule 1.11[2] to the Bill would provide a defence of absolute privilege to the publication of defamatory matter, for matter published by the Independent Planning Commission or its predecessor in a report or other document under certain legislation. The Committee notes that the amendments would affect the reputational rights of any person adversely mentioned during recorded proceedings.

The Committee also notes the rationale for limiting these reputational rights – to allow these bodies to carry out their functions of independently assessing State planning proposals with maximum transparency. However, the amendments would have retrospective effect. Retrospectivity is contrary to the rule of law which allows people knowledge of what the law is at any given time. The Committee prefers legislation affecting rights to be drafted with prospective effect. Nonetheless, the retrospectivity in the current case does not fall within the most serious kind – it does not allow people to be punished for things that were not criminal offences at the time they were committed. Taking this, and the rationale for the amendments, into account, 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 power

By providing that the Secretary may, at his or her discretion, tell a victim the general area of a juvenile offender's residence following the juvenile offender's discharge from detention, the Bill provides the Secretary with a wide and ill-defined administrative power that affects privacy rights. For example, no guidance is provided as to how serious the juvenile's offence must have been before the information can be released. Administrative powers that limit rights and liberties should be drafted with sufficient precision so that their scope and content is clear thereby fostering an appropriate level of parliamentary oversight. However, given that the provisions would not allow the release of a juvenile offender's precise address, only his or her general location, the Committee makes no further comment.

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

Commencement by proclamation

Clause 2 of the Bill provides that some parts of it are to commence by proclamation. The Committee generally prefers that laws commence on a fixed date or on assent to provide certainty to those affected. However, the Committee notes that the parts of the Bill that would commence by proclamation relate to changes to coronial processes; and to changes to processes around applications to the Local Court of NSW for notices to produce. In these circumstances the Committee acknowledges that a flexible start date may be suitable to allow for the implementation of these administrative changes. The Committee makes no further comment.

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

Matters that should be set by Parliament and wide discretionary power

The Bill provides that there is to be a Victims Register and that it is to record the names of victims of juvenile offenders who have asked to be notified of the possible release of the relevant juvenile offender. The Register is to be kept by a government agency prescribed by the regulations or designated by the Minister. Further, the Bill provides that the regulations may make provision for the way in which a notice to victims may or must be given under the *Children (Detention Centres) Act 1987*, and the circumstances in which a notice need not be given; and the identification of a person who is a victim for the purposes of the Act.

Victims' rights and juvenile justice are matters about which there is considerable public interest. Provisions about the government agency that is to keep the Victims Register; any exemptions from the requirement to notify victims about the possible release of a juvenile offender; and the identification of a person who is a victim are more suitably included in primary, rather than subordinate legislation. This is to foster increased opportunity for parliamentary scrutiny and debate.

The Committee notes further that the Minister is granted a broad discretionary power to designate the government agency that is to keep the Victims Register. The Committee would prefer, as a minimum requirement that such a matter be included in the regulations to foster some level of parliamentary oversight. The Committee refers these matters to Parliament for consideration.

Matters that should be set by Parliament II

Schedule 1.20 to the Bill would amend the *Sheriff Act 2005* to clarify that the NSW Sheriff's functions include functions conferred or imposed on the NSW Sheriff under an Act or law another State, or a Territory. In doing so, the Bill would allow functions to be conferred on the

NSW Sheriff without oversight by the NSW Parliament of what those functions are. To foster a greater level of parliamentary oversight, the Committee would prefer any functions that are to be conferred on the NSW Sheriff by the laws of other jurisdictions to be clearly listed in the *Sheriff Act 2005*. The Committee refers the matter to Parliament for consideration.

3. LAKE MACQUARIE SMELTER SITE (PERPETUAL CARE OF LAND) BILL 2019

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

Compensation rights and procedural fairness

The Bill transfers the former smelter site at Boolaroo from Pasminco to HCCDC, a government agency, by compulsory acquisition. However, the Bill modifies the compensation that would otherwise be payable to any person or body as a result of the compulsory acquisition. In short, in determining any compensation payable, the decision maker is to take into account the net present value of the future costs of managing, in perpetuity, the contamination of the former smelter site. Any positive value that any land on the site may be assessed as having is to be offset by these costs, and by any restrictions on the use of the former smelter site.

The Committee acknowledges the reasons for limiting the compensation payable by Government in this instance – in particular, the significant cost to Government of the long-term environmental management of the former smelter site. However, the Committee notes that the Bill requires the decision maker, in determining the amount of compensation payable, to have regard to estimates of the net present value of the future costs of managing the contamination of the former smelter site *that have been provided by a government agency or obtained by it*. The Committee identifies that it may be preferable, to ensure procedural fairness for those seeking compensation, for a body or person wholly independent of Government to provide these costings. The Committee makes no further comment.

Property rights

The Bill allows HCCDC to enter into an agreement with a person who already has a contract to purchase land on the former smelter site (or people who have expressed interest in buying land) without having to make it available for public sale. However, there is no requirement for HCCDC to do so, and there is no requirement to honour the terms of the original contract. The Bill thereby limits the property rights of affected persons particularly as compensation rights are also limited under the Bill. However, the Committee acknowledges that the provisions are designed to offer some concession to affected persons and makes no further comment.

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

Commencement by proclamation

Clause 2 of the Bill provides that the Act is to commence by proclamation. The Committee prefers legislation to commence on assent or a specified day to provide certainty for affected persons. However, the Committee notes that the Bill transfers ownership of a former smelter site to HCCDC, providing for the site's long-term management and the implementation of an environmental plan. In these circumstances, the Committee acknowledges that a flexible start date may be preferable to facilitate the necessary practical arrangements. The Committee makes no further comment.

Matter that should be set by Parliament

The Bill provides that an owner of the former smelter site may delegate the exercise of any of its functions under the Act, other than the power of delegation, to any person, or any class of persons, authorised by the regulations. Given the importance of the owner's functions under the Act, including implementing a long-term environmental management plan for parts of the site, the Committee considers the persons to whom the owner's functions can be delegated should be set down in primary rather than subordinate legislation. This would foster a greater level of parliamentary oversight. The Committee refers the matter to Parliament for consideration.

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

Transfer of land by order of the Governor

Schedule 1 of the Bill makes provision for land at the former smelter site to be transferred in future from one government agency to another, by order of the Governor. In so doing it creates the prospect of a lack of scrutiny by Parliament of future transfers of land. The Committee acknowledges that the transfers that can be made under these provisions are limited, that is, to transfers between government agencies. Further, allowing the transfers to take place by order of the Governor is likely to create administrative efficiencies. However, the Committee considers that as a minimum requirement, the transfers should be effected by regulation so that they are subject to disallowance by both Houses of Parliament. This is to foster a greater level of parliamentary oversight over transfers of land at the former smelter site over which there is considerable public interest given the environmental history. The Committee refers the matter to Parliament for consideration.

4. PETROLEUM (ONSHORE) AMENDMENT (COAL SEAM GAS MORATORIUM) BILL 2019*

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

Suspension of property rights with no right to compensation

The Bill suspends certain property rights relating to petroleum titles during the moratorium period. A person may be prosecuted for an offence if they exercise their property rights during this period. The Committee notes in particular that the State is not required to provide compensation in relation to the suspension of these rights, although it has the discretion to do so. The Committee further notes that petroleum titles are valuable property interests. The Committee refers this issue to Parliament for consideration.

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

Henry VIII clause

The Bill contains a Henry VIII clause which allows subordinate legislation to amend primary legislation. It thereby delegates the Parliament's legislation-making power to the Executive. If amendments are to be made to an Act, this should be done through an amending Bill and not through subordinate legislation. This is to foster an appropriate level of parliamentary oversight of the changes. The Committee refers the matter to Parliament for consideration.

PART TWO – REGULATIONS

1. ADMINISTRATIVE DECISIONS REVIEW REGULATION 2019

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

Exclusion of right to request reasons for an administrative decision

The Regulation excludes an interested person's right under the *Administrative Decisions Review Act 1997* to request reasons in relation to a disciplinary finding decision by the Building Professionals Board. However, the Committee notes that section 32 of the *Building Professionals Act 2005* separately requires the Board to provide a written statement of its decision to the complainant and the accreditation holder. The Committee is satisfied that affected individuals will still have access to a written decision in relation to their matter and therefore makes no further comments.

Exclusion of right to request an internal review for some administrative decisions

The Regulation excludes the option of requesting an internal review for certain administrative decisions. The Committee notes that appropriate options to review or appeal an administrative decision are important for fairness, transparency and accuracy. However, the Committee acknowledges that the decisions referred to in the Regulation can still be the subject of other forms of review or appeal, such as to the Civil and Administrative Tribunal. For this reason, the Committee makes no further comments.

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 set by Parliament*

The Regulation deals with matters which impact on the rights of persons affected by administrative decisions. The Committee prefers matters of this kind to be included in primary legislation rather than subordinate legislation. This fosters a greater level of parliamentary oversight. However, the Committee notes that Regulations are subject to some parliamentary scrutiny because under section 41 of the *Interpretation Act 1987*, either House of Parliament can pass a resolution disallowing a Regulation. Given this safeguard, the Committee makes no further comment.

2. ANTI-DISCRIMINATION REGULATION 2019

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

Clause 4 of the Regulation contains an exception to the unlawful age discrimination provisions in the *Anti-Discrimination Act 1977*. However, the Committee notes that the exception is intended to allow registered clubs to provide benefits and concessions, such as lower membership fees, to members on the basis of their age. This may, for example, allow a registered club to provide a concession to persons who have retired from the workforce and may therefore have a reduced income. In these circumstances, the Committee considers the provision fits within the special needs exception under section 49ZJR of the *Anti-Discrimination Act 1977* and therefore 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 set by Parliament*

The *Anti-Discrimination Act 1977* makes it unlawful to discriminate against individuals on various grounds and in various circumstances, and the President of the Anti-Discrimination Board may grant an exemption from these requirements in certain circumstances. The

Regulation provides a list of matters the President is to consider in making an exemption. The Committee prefers matters of this kind to be included in primary legislation to foster a greater level of parliamentary oversight over matters affecting personal rights. The Committee refers this issue to Parliament for consideration.

3. BIOSECURITY AMENDMENT (BIOSECURITY MANAGEMENT PLANS) REGULATION 2019

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 amends the *Biosecurity Regulation 2017* to recognise biosecurity management plans and to make compliance with those plans a 'mandatory measure'. The *Biosecurity Act 2015* provides significant maximum penalties for failing to comply with a mandatory measure – a \$220,000 fine for an individual.

The Committee considers that provisions such as these, which expand the circumstances under which individuals and corporations may be subject to significant penalties, should be included in primary rather than subordinate legislation to foster an appropriate level of parliamentary oversight. The Committee refers the matter to Parliament for consideration.

Regulations incorporating standards of external entities that will not be subject to disallowance

The Regulation amends the *Biosecurity Regulation 2017* to recognise biosecurity management plans and to make compliance with those plans a 'mandatory measure'. Failure to comply with a mandatory measure attracts significant maximum penalties.

Biosecurity management plans may apply to places at which a commercial or educational activity is carried on for the purpose of intensive or extensive agriculture or horticulture or for the purpose of processing agricultural or horticultural products. The Committee further notes that the Regulation provides the plans may be prepared by, or on behalf of, or adopted by the person conducting the commercial or educational activity at the place – that is, the Regulation incorporates standards of external entities.

Unlike regulations, there is no requirement for such standards to be tabled in Parliament and subject to disallowance under the *Interpretation Act 1987*. However, the Committee acknowledges that the Regulation provides some safeguards, for example measures in the plan must be reasonable and a person is not required to comply with a plan unless there is a notice conspicuously posted at each entrance to the area over which it applies. The Committee makes no further comment.

4. FISHERIES MANAGEMENT (TROUT AND SALMON) (POSSESSION) ORDER 2019

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

Possession limits for certain species of fish

By creating possession limits in relation to certain species of fish in particular circumstances, the Order may have an adverse impact on commercial fishing operators. However, the Committee notes the conservation objects of the *Fisheries Management Act 1994*, under which the Order is made, and makes no further comments.

5. PRIVACY AND PERSONAL INFORMATION PROTECTION REGULATION 2019

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA*Right to privacy – information found in a library, art gallery, museum or archives*

The Regulation provides that personal information found in archives, a library, art gallery or museum is not to be considered as personal information for the purposes of the *Privacy and Personal Information Protection Act 1998*. The Committee notes that the right to privacy is not absolute and acknowledges the public interest in such information being available for reference, study or exhibition purposes. It makes no further comment.

Right to privacy – public register exemptions

The Regulation exempts certain public registers from the requirement that personal information not be disclosed unless it is to be used for a purpose relevant to that of the Register itself. This may impact on the privacy rights of individuals. The exemption potentially allows personal information to be widely known in circumstances where individuals may have little choice about whether to provide it. However, the Committee acknowledges that there may be public interest in this information being publicly available, such as for reasons of openness, accountability and efficiency. In the circumstances, the Committee makes no further comment.

Right to privacy – exemption of the Council of the Bar Association and the Council of the Law Society

Whilst the Committee notes the breadth of a blanket exemption applying to the Councils of the Bar Association and the Law Society as a result of the Regulation, it acknowledges that both of these organisations deal with information privacy in accordance with the *Privacy Act 1988* (Cth) and the Australian Privacy Principles. The Committee makes no further comment.

Right to privacy – local council and CCTV cameras

The Regulation excludes the use of CCTV cameras by local councils from section 11 of the *Privacy and Personal Information Protection Act 1998* (NSW). It accordingly impacts on the privacy rights of individuals as certain limits on the collection of personal information will not apply as a result e.g. the requirement that the information so collected does not unreasonably intrude on the personal affairs of individuals. However, the Committee notes that the Regulation restricts the use of CCTV cameras to the filming of public areas. 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 provides a number of exemptions from the protections of the *Privacy and Information Protection Act 1998*. The Committee generally prefers matters that affect personal rights, such as privacy, to be contained in primary legislation to foster a greater level of parliamentary oversight. The Committee refers the matter to Parliament to consider whether the exemptions would be more appropriately located in the principal Act to allow for a greater level of parliamentary scrutiny.

6. SPORTING VENUES AUTHORITIES REGULATION 2019

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

Clause 5 of the Regulation provides that a ranger or police officer may give a direction to a person to leave land, or a facility on land, vested in or managed by a sporting venues authority. Similarly, clause 6 of the Regulation provides that a sporting venues authority may, by notice in writing, ban a person from entering land, or a facility on land, vested in or managed by the authority, for a period of up to 12 months. It does not appear that the directions or bans can be legally challenged or appealed. The Committee notes that the Regulation would impact on the freedom of movement of affected persons. However, the Committee acknowledges that the directions and bans are clearly designed to stop people from engaging in anti-social behaviour on land or facilities managed by a sporting venues authority. 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

Regulation incorporating standards of external entities that will not be subject to disallowance

Clause 4 of the Regulation provides that a sporting venues authority may, by notice in writing, impose conditions on persons entering or using land, or a facility on land, vested in or managed by the sporting venues authority. While Clause 4 contains a list of things these conditions may cover, this list is not exhaustive.

Unlike regulations, there is no requirement for such conditions to be tabled in Parliament and subject to disallowance pursuant to section 41 of the *Interpretation Act 1987*. In the circumstances, to foster a level of parliamentary oversight, the Committee would prefer the regulation to clearly set down all matters with which the conditions can deal. This is particularly the case given that failure to comply with a condition can result in a person being directed to leave affected land, thereby affecting his or her freedom of movement, and to a possible monetary penalty if he or she does not.

The Committee acknowledges that a notice listing the conditions must be given to persons entering or using the relevant land or facility, or displayed in, or at the boundary or entrance to the land or facility. Further, there may be some need for flexibility as to the matters covered by the conditions to cater for the differing localities to which each set of conditions relates. Given the requirement for the conditions to be displayed and this flexibility consideration, the Committee makes no further comment.

Part One – Bills

1. Children's Guardian Bill 2019

Date introduced	20 August 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Gareth Ward MP
Portfolio	Minister for Families, Communities and Disabilities Services

PURPOSE AND DESCRIPTION

1. The objects of the Bill are to protect and promote the safety, welfare and wellbeing of children and to protect children from child abuse and exploitation.
2. The Bill continues the office of the Children's Guardian and provides for the appointment and functions of the Children's Guardian. It provides for the Children's Guardian to:
 - (a) administer a reportable conduct scheme to prevent, identify and respond to child abuse,
 - (b) regulate the provision of out-of-home care,
 - (c) accredit providers of adoption services.
3. The Bill provides that the Official Visitor scheme, to the extent that it relates to accommodation provided to children in care, is to be administered by the Children's Guardian instead of the Ombudsman, as is currently the case.
4. The Bill makes consequential amendments to other Acts and regulations.

BACKGROUND

5. The Bill consolidates the key powers, functions and responsibilities of the Children's Guardian into one Act. It establishes the safety, welfare and wellbeing of children, including protecting them from child abuse, as the paramount consideration in decision-making under the Act.
6. A number of principles are to guide administration of the Act. These include that the course of action to be followed should be the least intrusive intervention in the life of the child and his or her family. In addition, the Children's Guardian is to observe the principles of natural justice and ensure procedural fairness in decision-making and in the investigation and monitoring of persons.
7. The Minister for Families, Communities and Disability Services noted in his Second Reading speech that:

This bill will create a new Act for the Children's Guardian. It will create key powers, functions and responsibilities to ensure that we continue as a State Government to implement responses to the Royal Commission into Institutional Responses to Child Sexual Abuse, to implement the Government's decision to transfer New South Wales' reportable conduct framework and the Official Community Visitor scheme from the Ombudsman's office, to the Office of the Children's Guardian, and to deliver improvements to the scheme providing independent oversight of responses to child abuse and neglect.

8. As noted in the Second Reading speech, the Bill seeks to implement some of the findings and recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse which made its final report in December 2017. The Bill accordingly:
 - (i) Transfers functions for the reportable conduct scheme from the Ombudsman's office to the Office of the Children's Guardian as the Royal Commission suggested that the agency responsible for implementing the Child Safety Standards regulatory scheme also have responsibility for the reportable conduct scheme. The Royal Commission identified a number of advantages of vesting responsibility for the reportable conduct scheme in the same agency that administers the Working with Children Check.
 - (ii) Makes changes to the reportable conduct scheme, drawing on elements of the frameworks in comparable jurisdictions such as Victoria and the Australian Capital Territory, addressing gaps recognised by the Royal Commission and loopholes highlighted in media reports. This enables the scheme to apply to contractors and subcontractors delivering services to children, as well as the outside work conduct of employees of public authorities and volunteers in public authorities who deliver services to children. The scheme will also cover the inside and outside work of contractors and subcontractors of all entities if they hold or should hold a Working with Children Check. The scheme is to be extended to consistently cover religious bodies from 30 January 2020.
 - (iii) Implements the recommendations of the Royal Commission regarding mandatory reporting and protections for reporters, which includes protection against all civil and criminal liability.

ISSUES CONSIDERED BY THE COMMITTEE

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

Part 4 – Reportable conduct scheme – Right to privacy

9. The reportable conduct scheme under Part 4 of the Bill involves the Children's Guardian and relevant entities investigating reportable allegations and making determinations about reportable convictions. Reportable conduct involves such things as: sexual offences; sexual misconduct; ill-treatment of a child; neglect of a child; an assault against a child; failing to reduce or remove the risk of a child becoming a victim of child abuse; concealing a child abuse offence; or behaviour that causes significant emotional or psychological harm to a child: proposed section 20.
10. Proposed section 44 allows the Children's Guardian to make preliminary inquiries to aid them in their decision about whether to carry out an investigation or determination. It allows for the disclosure of health information and excludes the operation of sections 16

to 19(1) of the *Privacy and Personal Information Protection Act 1998*. These sections relate to: the requirement that an agency check the accuracy of personal information before using it; the limits on a public sector agency when it comes to using personal information for a purpose other than that for which it was collected; and limitations on the disclosure of personal information.

11. The privacy rights of a person who is not yet subject to investigation may thus be impacted as personal and potentially sensitive information may be shared with the Children's Guardian.
12. However, the Committee notes that these provisions are to assist the Children's Guardian in assessing whether it is in the public interest to carry out an investigation or determination into a reportable allegation or conviction.

The Children's Guardian has the power under the Bill to make preliminary inquiries to decide whether to carry out an investigation or determination. This is to aid in determining whether it is in the public interest to investigate a reportable allegation or make a determination about a reportable conviction or investigate the way a relevant entity is dealing with such a matter. It potentially allows the Children's Guardian to have access to personal and sensitive information that would normally be protected under privacy laws. It may therefore impact on the privacy rights of a person who is not yet the subject of an investigation or determination.

However, the Committee notes that the purpose of accessing such information is to enable the Children's Guardian to assess whether it is in the public interest to investigate or make a determination about a reportable allegation or conviction that potentially involves serious offences against a child. In the circumstances, the Committee makes no further comment.

Part 4 – Reportable conduct scheme – Right to privacy

13. The reportable conduct scheme is extended under the Bill to include the conduct outside work of employees (including volunteers and contractors) of Schedule 1 entities. This includes such entities as the Department of Education, Ministry of Health, local health districts, designated agencies, and agencies providing substitute residential care for children, amongst others: proposed section 18.
14. In addition, the conduct outside work of employees (including contractors and volunteers) of public authorities may be considered if they hold, or are required to hold, a Working with Children check clearance for the purpose of employment.
15. By extending the conduct to be considered to include conduct within an employee's personal life, the Bill may impact on the right to privacy, which encompasses freedom from intrusion into the private sphere, where it is considered unwarranted and unreasonable.
16. However, reportable conduct under the scheme is defined to include such serious offences as: sexual offences; sexual misconduct; the ill treatment or neglect of child; an assault against a child; failing to reduce or remove the risk of a child becoming a victim of child abuse; concealing a child abuse offence; or behaviour that causes significant emotional or psychological harm to a child: proposed section 20.

The Bill expands the reportable conduct scheme to include conduct outside work of certain employees. It may therefore impact on their right to privacy. However, the Committee notes that consideration of conduct outside work only applies to employees of certain entities listed in schedule 1 of the Bill who are likely, or more likely than most, to have contact with children (such as Department of Education employees), or to employees of public authorities who require a working with children check for the purpose of their employment. The Committee also notes that reportable conduct under the scheme includes serious offences against a child. In the circumstances, the Committee makes no further comment.

Part 4 – Reportable conduct scheme – Procedural fairness

17. Proposed section 47 of the Bill requires the Children's Guardian to advise an employee and relevant entity that an investigation or determination is being carried out in relation to that employee. It must describe the reportable allegation or the conviction considered to be a reportable conviction.
18. However, proposed section 47(3) allows an exemption from this requirement if giving notice would compromise the investigation or put a person's health or safety at serious risk. The Committee notes that this impacts on the right of a person to be heard and comment on any adverse allegations made about him or her, consistent with the principles of procedural fairness.
19. Further, should the Children's Guardian in a report recommend that an employee be dismissed, removed or punished following a finding of reportable conduct or a determination of a reportable conviction, the Children's Guardian must advise that employee of the recommendation and the reasons for it: proposed section 51. However, such an employee does not need to be notified if the Children's Guardian has a reasonable belief that it would: put a person's health or safety at serious risk; put a person at risk of harassment or intimidation; or prejudice any other investigation or inquiry. This impacts on the right of a person to procedural fairness – the person may find it difficult to challenge a decision to dismiss, remove or punish him or her if s/he has not been provided with reasons for the decision.

The Bill exempts the Children's Guardian, in certain circumstances, from the requirement to notify an employee that an investigation or determination is being carried out in relation to him or her. Further, should an employee be dismissed, removed or punished following a finding of reportable conduct or a determination of a reportable conviction, he or she does not need to be informed of the reasons if certain circumstances apply.

The Committee notes that these provisions impact on the right of affected persons to be treated with procedural fairness. Procedural fairness requires that a person affected by a decision be heard and have a right to respond to any adverse material that has been put regarding him or her. However, the Committee acknowledges that the exemptions only apply where notification may compromise an investigation or put a person's health or safety at serious risk – they are designed to protect persons against the risk of harassment or intimidation, and to safeguard other inquiries or investigations. In the circumstances, the Committee makes no further comment.

Part 4 – Reportable conduct scheme – Presumption of innocence and reversed onus of proof

20. An employer who dismisses an employee or prejudices him/her in his/her employment because s/he has provided assistance to the Children's Guardian in relation to the reportable conduct scheme is guilty of an indictable offence under the Bill: proposed section 63. This offence attracts a maximum penalty of \$22,000 or imprisonment for five years.
21. The burden is on the employer to prove that the employee was dismissed for reasons other than having assisted the Children's Guardian. This is a reversal of the onus of proof that ordinarily requires the prosecution to prove all elements of an offence before a defendant can be found guilty, consistent with the presumption of innocence.

The Bill provides that an employer who dismisses an employee or prejudices him/her in his/her employment because s/he has assisted the Children's Guardian in a reportable conduct matter is guilty of an offence. The burden is on the employer to prove that the employee was dismissed for reasons other than having assisted the Children's Guardian. This is a reversal of the onus of proof that ordinarily requires the prosecution to prove all elements of an offence before a defendant can be found guilty, consistent with the presumption of innocence.

The Committee acknowledges that there is a public interest in employees feeling able to assist the Children's Guardian in reportable conduct matters without fear of reprisal. Further, a reversed onus may help to prove offences containing elements that are peculiarly within the knowledge of the accused. In the circumstances, the Committee makes no further comment.

Part 4 – Reportable conduct scheme - Exclusion from civil or criminal liability

22. Proposed section 68 of the Bill excludes anyone who gives a report, makes a complaint or notifies the Children's Guardian, from civil or criminal liability as a result of administrative process, including disciplinary action.
23. The Committee notes that such provisions impact on the rights of persons adversely impacted to seek redress. For example, a person may have had a complaint or report made against him or her which was not substantiated but has nonetheless caused distress or had other negative consequences. This provision would limit his or her recourse to compensation from the person who made the complaint.
24. The Bill does, however, provide that the person making the report or complaint must have acted in good faith. Further, the Minister noted in the Second Reading Speech regarding the Bill that 'providing greater protections for people making a report will result in increased reporting of child abuse and neglect, allowing the Department of Communities and Justice to prevent children from being abused, or put a stop to abuse that is already occurring'.

The Bill provides that persons who make a report, complaint or notify the Children's Guardian under the reportable conduct scheme are immune from civil and criminal liability. This may limit the right of a person negatively affected by such action to redress and compensation. However, the Committee

notes that the person making the complaint must have acted in good faith for the immunity to apply.

The Committee further notes that the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that legislation should provide comprehensive protection for individuals who make reports in good faith about child sexual abuse in institutional contexts, including protection from civil and criminal liability (recommendation 7.5). Further, providing greater protection to people who make a report may result in the increased reporting of child abuse and neglect, facilitating its prevention and stopping abuse that is occurring. Given the rationale for this provision and the 'good faith' safeguard around its operation, the Committee makes no further comment.

Part 5 – Out of home care matters – Strict liability

25. Proposed section 79 states that a person must not provide voluntary out of home care for a child unless they are a designated or registered agency or an individual so authorised. Further, a person, other than a relevant agency or the Children's Guardian, must not arrange with a parent for a child to be placed in voluntary out of home care or present themselves as being willing to arrange it. Both offences attract a maximum penalty of \$22,000.
26. Proposed section 81 prohibits the principal officer of a designated agency residing on the same property as a child in statutory or supported out of home care supervised by that agency. It attracts a maximum penalty of \$22,000.
27. Both of these offences are strict liability offences and so derogate from the common law principle that mens rea (the mental element of a crime) must be proved to hold a person liable for an offence.

The Bill provides that a person must not provide voluntary out of home care for a child unless they are a designated or registered agency or an individual so authorised; and that the principal officer of a designated agency must not reside on the same property as a child in statutory or supported out of home care supervised by that agency. These are strict liability offences and so derogate from the common law principle that mens rea (the mental element of a crime) must be proved to hold a person liable for an offence.

The Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, the provisions seek to facilitate the safety of children in out of home care. The Committee also notes that the common law defence of an honest and reasonable mistake of fact applies to strict liability offences. In the circumstances, the Committee makes no further comment.

Part 6 – Child employment – strict liability

28. Under proposed section 89(1), it is an offence to employ a child to participate in: an entertainment or exhibition; door to door sales; or an activity prescribed by the regulations. The employer may be liable for a penalty of up to \$11,000 unless they hold an employer's authority for that purpose.

29. Some exemptions are provided (proposed section 90), namely: if the child is employed for the purpose of a fundraising appeal; for the purpose of an occasional entertainment or exhibition of which the net proceeds wholly go to charity; or the employer is exempt under regulation or by the Children's Guardian.
30. In addition, proposed section 103 establishes that it is an offence for a person to cause or allow a child to take part in employment, during which the child's physical or emotional wellbeing is put at risk. A maximum penalty of \$22,000 applies.
31. Both of these offences are strict liability offences and so derogate from the common law principle that mens rea (the mental element of a crime) must be proved to hold a person liable for an offence.

The Bill provides that it is an offence to employ a child to participate in: an entertainment or exhibition; door to door sales; or an activity prescribed by the regulations; and that it is an offence for a person to cause or allow a child to take part in employment, during which the child's physical or emotional wellbeing is put at risk. These are strict liability offences and so derogate from the common law principle that mens rea (the mental element of a crime) must be proved to hold a person liable for an offence.

The Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, the objects of Part 6 of the Bill are to prevent the exploitation and abuse of children in employment and to ensure that employment does not compromise a child's personal or social development, and the ability to benefit from education. The Committee also notes that the common law defence of an honest and reasonable mistake of fact applies to strict liability offences. In the circumstances, the Committee makes no further comment.

Parts 8, 9 and 12 – Children's Guardian and Official Community Visitors – exclusion from liability

32. A number of sections of the Bill provide various immunities from liability. Proposed section 132 protects the Children's Guardian or a person acting under the direction of the Children's Guardian; an advisory committee or its members; and Official Community Visitors from liability in relation to an act or omission so long as the act or omission was done in good faith.
33. An Official Community Visitor may report to the Children's Guardian about a child in care they reasonably suspect to be at risk as regards their safety, welfare or wellbeing. The Official Community Visitor is not liable to civil or criminal action or disciplinary action for making the report, if they have acted in good faith: proposed section 143(5).
34. An act or omission by an officer of the Children's Guardian for the purposes of executing the requirements of the proposed Act precludes them from personal liability, provided they have acted in good faith: proposed section 177.
35. The exclusion of liability in these circumstances may limit the avenues of redress open to a person who has suffered damage as a result of actions or omissions under the proposed Act. However, as noted earlier, in the Second Reading Speech regarding the Bill, the Minister noted that 'providing greater protections for people making a report

will result in increased reporting of child abuse and neglect, allowing the Department of Communities and Justice to prevent children from being abused, or put a stop to abuse that is already occurring'.

A number of provisions in the Bill provide the Children's Guardian and certain persons or bodies with immunity from civil or criminal liability. For example, an officer of the Children's Guardian is generally immune from personal liability for acts or omissions carried out for the purposes of executing the requirements of the proposed Act. This may limit potential avenues of redress for a person who has been negatively impacted as a result of their action or inaction.

However, the Committee notes that the Bill includes the safeguard of requiring actions or omissions to have been done in good faith. The Committee further notes that the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that legislation should provide comprehensive protection for individuals who make reports in good faith about child sexual abuse in institutional contexts, including protection from civil and criminal liability (recommendation 7.5). In addition, providing greater protection to people who make a report may result in the increased reporting of child abuse and neglect, facilitating its prevention and stopping abuse that is occurring. Given the rationale for these provisions and the 'good faith' safeguard around their operation, the Committee makes no further comment.

Part 11 – Offences – Strict liability

36. The Bill provides that it is an offence to access information stored by the Children's Guardian unless the person is authorised, approved or delegated to perform a function of the Children's Guardian: proposed section 158. A maximum penalty of \$1,100 applies. This is a strict liability offence and so derogates from the common law principle that mens rea (the mental element of a crime) must be proved to hold a person liable for an offence.

The Bill provides that it is an offence to access information stored by the Children's Guardian unless the person is authorised, approved or delegated to perform a function of the Children's Guardian. This is a strict liability offence and so derogates from the common law principle that mens rea (the mental element of a crime) must be proved to hold a person liable for an offence.

The Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, much of the information stored by the Children's Guardian is likely to be extremely sensitive in nature, and the Children's Guardian is able to access information that would normally be protected under privacy laws. Given these considerations and the fact that the maximum penalty for the offence is limited to \$1,100, the Committee makes no further comment.

Part 12 – Right to privacy and significant matter in subordinate legislation

37. The Bill makes provision for the sharing of information between agencies. It empowers the Children's Guardian to provide information relating to the safety, welfare and wellbeing of a child to a 'relevant body' as well as to direct a 'relevant body' to provide such information to them: proposed section 176. Nothing affects the obligation or

power to provide information under this section, even other Acts or laws that would otherwise prohibit its disclosure. Further, such disclosure of information is not to be viewed as constituting a breach of professional etiquette or ethics and does not incur liability for defamation. The Bill may accordingly impact on the right to privacy.

38. 'Relevant bodies' are those prescribed under section 248 of the *Children and Young Persons (Care and Protection) Act 1998* and include the NSW Police Force, public service agencies, public authorities, schools, TAFEs, public health organisations, and private health facilities.
39. The Bill also allows the regulations to add to the list of 'relevant bodies'. This potentially decreases the level of parliamentary oversight over the entities that may share information under the provision. Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. Consequently, while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*), the statutory rule may have already been in operation for some time before disallowance occurs.¹
40. The Committee notes that the Bill includes some safeguards. Any information provided that would otherwise be a breach of professional ethics or a departure from accepted standards of professional conduct must have been given in good faith and with reasonable care. The Committee also notes that the information concerned relates to the safety, welfare and wellbeing of a child. The Bill is clear in proposed section 7 that the safety, welfare and wellbeing of children, including protecting them from child abuse, is to be the paramount consideration in decision-making under the proposed Act.

The Bill would allow certain information concerning the safety, welfare and wellbeing of a child to be shared between the Children's Guardian and other 'relevant bodies' including the NSW Police Force and public authorities. It may thereby impact on the right to privacy. The Committee notes that certain safeguards and limitations are included in the Bill – the information must relate to the safety, welfare and wellbeing of a child and must only be shared in good faith and with reasonable care. Given these safeguards the Committee makes no further comment with respect to the impact of these provisions on privacy rights.

Further, the regulations can add to the list of 'relevant bodies' to be part of the information sharing scheme. This potentially decreases the level of parliamentary oversight over the entities that may share information under the provision. To foster an appropriate level of parliamentary oversight over a matter that may affect privacy rights, the Committee considers that any 'relevant bodies' to be part of the information-sharing scheme should be listed in the primary legislation. However, the Committee notes that either House can pass a resolution disallowing a regulation. Given this safeguard, the Committee makes no further comment.

¹ See discussion of the limits to parliamentary oversight of subordinate legislation in ACT Standing Committee on Justice and Community Safety, 'Henry VIII FactSheet' November 2011 pp2-3 at https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

Schedule 2 – Powers of authorised persons – powers of search and entry – right to privacy and freedom from arbitrary interference

41. Schedule 2 of the Bill sets out the various powers of authorised persons, who include the Children's Guardian or an officer so appointed by them. It grants a general power of entry to an authorised person that is not limited to circumstances where the occupier has consented to the entry and may occur for various investigative purposes under the Bill Schedule 2[7]. An authorised person may subsequently search and inspect any part of, or anything at, the place: Schedule 2[13].
42. Relevant premises are not limited to public places and include buildings, caravans and vehicles. Entry without warrant is permitted in certain circumstances, including where an authorised person enters a place to accredit designated agencies and monitor their responsibilities under the Bill. Authorised persons may also enter, without warrant, premises occupied or used by a Schedule 1 entity or public authority that is being investigated under the reportable conduct scheme. Any document or thing in the premises may subsequently be inspected. However, limitations apply should a person have a ground of privilege: proposed section 62(2).
43. An authorised person may also enter and inspect places of employment without warrant for the purpose of ensuring that the conditions imposed on an employer's authority, or any conditions of exemption from an authority, are being complied with: Schedule 2[24]-[25]. They may also enter premises suspected of employing children in contravention with the terms of Part 6 of the Bill.
44. However, a warrant authorising entry must be obtained for matters connected with the Official Community Visitor Scheme. The Committee notes that a requirement to obtain a warrant is designed to protect individuals from arbitrary interference and to protect their privacy rights, that is, authorities must satisfy an independent decision maker that reasonable grounds exist for issuing the search warrant. This is a matter of particular note if the premises to be entered and searched is an individual's private residence.

The Bill grants broad powers of search and entry to the Children's Guardian or an officer appointed by him/her. The power of entry available to the Children's Guardian or an appointed officer is not limited to public places nor to circumstances where the occupier has consented to the entry. In particular, it allows for entry without warrant in a number of situations: for a reportable conduct investigation under Part 4 of the Bill; in relation to child employment matters under Part 6 of the Bill; or if it concerns premises subject to control or regulation under the Bill.

The powers of search and entry are broad and may impact upon the privacy rights of affected persons and their right to be free from arbitrary interference. The Committee notes that the authorised person must take all reasonable steps to ensure as little inconvenience and damage as possible whilst exercising such powers. Further, the purpose of entry is to facilitate investigations and accreditation, and monitor compliance. The Committee makes no further comment.

Schedule 2 – Powers of authorised persons – Privilege against self-incrimination

45. An authorised person may enter places of employment and premises subject to control and regulation under the Bill without warrant: schedule 2[26] and 2[29]. As well as having powers of entry and inspection, the authorised person may require any person in the premises to answer questions or furnish information. Failure to comply with this requirement is an offence attracting a maximum penalty of \$1,100, or \$2,200 if the offence is in relation to the exercise of a power in a place of employment. No exemption is provided where furnishing such information would incriminate the person.
46. Schedule 2[31] sets out powers of entry and inspection under a search warrant. The powers extend to requiring any person in the premises to answer questions and provide information. Again, no exemption is provided where the provision of such information would incriminate the person. However, the Committee notes that an application for a search warrant under this Part may only be made if the Children's Guardian has reasonable grounds for believing there is a risk to the safety, welfare and wellbeing of a child on the premise.
47. The Committee notes that these provisions impact on the privilege against self-incrimination. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her. For example, in criminal proceedings there is a general right to silence at common law and under section 89 of the *Evidence Act 1995*.² Similarly, Article 14 of the International Covenant on Civil and Political Rights provides that, in criminal proceedings, a person has a right 'not to be compelled to testify against himself or confess guilt'.
48. The privilege against self-incrimination seeks to maintain a proper balance between the power of the State and the rights and interests of individuals, and is designed to preserve the presumption of innocence.³

Some of the powers of search and entry under the Bill extend to requiring a person to answer questions and provide information or face a penalty. Exemptions are not provided where doing so would incriminate the person, and so the Bill impacts on the privilege against self-incrimination.

The Committee acknowledges that the privilege may hinder investigations where information is within the knowledge of certain persons who are not likely to voluntarily share that information. The Committee further notes that this information is compelled in the context of the Children's Guardian having reasonable grounds for believing there is a risk to the safety, welfare and wellbeing of a child. There is accordingly a public interest in investigators having access to all relevant information. Further, Schedule 2[32] of the Bill provides that any evidence derived from the information or document is not generally admissible against the individual in any proceeding to the extent that it tends to incriminate him/her or expose him/her to a penalty. Having regard to this safeguard the Committee makes no further comment.

² The common law is set out in *Sanchez v R* [2009] NSWCCA 171; (2009) 196 A Crim R 472 at [48]-[52]. Section 89 of the *Evidence Act 1995* provides that, generally, an unfavourable inference must not be drawn if a person fails or refuses to answer a question in criminal proceedings.

³ Australian Law Reform Commission, [*Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*](#), Report 129, 2016, p 310.

Schedule 5 – Right to privacy – breach of confidentiality/freedom of conscience or religion

49. The Bill provides that persons in religious ministries/activities and registered psychologists will be classified as mandatory reporters under section 27 of the *Children and Young Persons (Care and Protection) Act 1998*: Schedule 5[5.8][4]. They consequently have a duty to report to the Secretary of the Department of Communities and Justice if, during the course of their work or role, they suspect that a child is at risk of significant harm.
50. Suspicions may have been raised during discussions that would usually be considered confidential, such as during an appointment with a psychologist. Further, the Bill may require a member of the clergy to divulge information that was made during a religious confession. This duty to report suspicions may conflict with their religious beliefs about the seal of the confessional and so impact on their freedom of conscience or religion.

The Bill expands the list of mandatory reporters so that persons in religious ministries or activities and registered psychologists must report to the Secretary of the Department of Communities and Justice if, during the course of their work or role, they suspect that a child is at risk of significant harm. The Committee notes that in doing so, the Bill may involve these persons divulging the content of discussions otherwise generally considered confidential. In the context of religious confessions, this may also impact on freedom of conscience and religion.

However, the Committee notes that the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that registered psychologists and people in religious ministries be classified as mandatory reporters (Recommendation 7.3). It also notes that expanding the categories of mandatory reporters may result in the increased reporting of child abuse and neglect, facilitating its prevention and stopping abuse that is occurring. In the circumstances, the Committee makes no further comment.

Schedule 5 – Restriction of access to government information

51. The Bill adds the Office of the Children's Guardian to the list of agencies with certain information that is excluded from the *Government Information (Public Access) Act 2009*. Reportable conduct matters under Part 4 of the Bill are to be considered excluded information: Schedule 5.21. This may impact on the ability of individuals and organisations to access information held by the government, and thus hold the government to account.
52. Under the *Government Information (Public Access) Act 2009*, there is a presumption that there is an overriding public interest against the disclosure of excluded information of an agency, unless it consents to disclosure.

The Bill excludes reportable conduct matters from the requirements of the *Government Information (Public Access) Act 2009*, thereby impacting on the right of persons to access government information. However, given the highly sensitive nature of such material, and the potential impact on persons named in the material, including children, the Committee notes the public interest against disclosure and makes no further comment.

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

Part 4 – Reportable conduct schemes - Ill-defined and wide powers

53. Proposed section 65 enables the head of a relevant entity to delegate any of its functions as it relates to the reportable conduct scheme to an employee of the entity. Functions of the head of the entity include providing the Children's Guardian with written notice if he or she receives a report or becomes aware of a reportable allegation or conviction relating to an employee: Part 4, Division 3. The head is also required to investigate reportable allegations or determine whether something is a reportable conviction: Part 4, Division 5.

The Committee notes that under the Bill, the head of a relevant entity may delegate any of his or her functions regarding the reportable conduct scheme to an employee. There are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. Given the potentially serious and sensitive matters with which the reportable conduct scheme is concerned, the Committee refers to Parliament the question of whether the power of delegation is too broad.

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

Commencement by proclamation

54. Proposed section 2(3) of the Bill allows for sections 128, 129 and items 5 to 7 of Schedule 5.10 to commence by proclamation. Sections 128 and 129 are currently blank sections. They allow for the relocation of sections 182 and 184 of the *Children and Young Persons (Care and Protection) Act 1998* into the proposed Act. That is, they relocate the provisions of one Act into another and do not make any substantive changes to the law. These sections relate to removal of the responsibility for the daily care and control of a child from an authorised carer by the Children's Guardian; and allow the Children's Guardian to apply for review of an order of the Children's Court.
55. Items 5 to 7 of Schedule 5.10 of the Bill add providers of overnight camps, accommodation and respite services for children with overnight beds; and providers of family group homes to the list of schedule 1 entities. Schedule 1 entities are subject to the various requirements of the reportable conduct scheme in Part 4 of the Bill for which there are some penalties for non-compliance. For example, under proposed section 29 of the Bill, a head of such an entity that does not give the Children's Guardian notice about a reportable allegation or conviction within the prescribed time, he or she may be liable to a maximum penalty of a \$1,100 fine.

The Bill allows for certain of its sections to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons. This is particularly the case where the legislation in question affects individual rights or obligations.

The Committee notes that some sections that are to commence by proclamation relocate the provisions of one Act into another and make no substantive changes to the law. However, other sections expand the coverage of the proposed Act's reportable conduct scheme e.g. to providers of overnight camps and family group homes. While a flexible start date may assist with the

implementation of any necessary administrative changes, affected parties may also benefit from having certainty about when their new obligations commence, for which some penalties apply for non-compliance. The Committee refers this matter to Parliament to consider whether a flexible start date is reasonable in the circumstances.

Significant matters in subordinate legislation – issue one

56. Part 5 of the Bill is concerned with out of home care matters. It enables the Children's Guardian to keep: a register for authorised carers; a register for residential care workers; and a register for organisations that provide or arrange voluntary out of home care. Proposed section 85(2) delegates to the regulations a number of matters relating to the registers. This includes the information to be kept on them, who may access the registers, and the way in which they are to be used and kept.
57. The Committee notes that these details may be more appropriately included in primary legislation, given the potentially sensitive matters that may be recorded in the registers, including information that may prevent the employment of certain individuals. Including the details in primary legislation would facilitate a greater level of parliamentary oversight. As noted earlier, unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. Consequently, while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*), the statutory rule may have already been in operation for some time before disallowance occurs.

The Bill empowers the Children's Guardian to keep registers relating to persons and organisations providing out of home care services. It further allows certain matters concerning the registers to be dealt with in the regulations. This includes information to be kept on the registers, who may access them, and the way in which they are to be used and kept. Given the potentially sensitive nature of the information that may be recorded on the registers, including information that may prevent the employment of certain individuals, the Committee considers that these details may be more appropriately located in primary legislation to ensure a greater level of parliamentary oversight over requirements. The Committee refers this matter to Parliament for consideration.

Significant matters in subordinate legislation – issue two

58. The Bill empowers the regulations to create offences punishable by a penalty up to 50 penalty units (currently \$5,500): proposed section 180.

The Bill empowers the regulations to create certain offences. The Committee notes that the offences that can be created are limited to ones that attract a maximum penalty of a \$5,500 fine. However, the Committee prefers substantive matters, such as the creation of offences, to be dealt with in principal legislation to foster increased opportunity for parliamentary scrutiny and debate over whether the conduct in question should be punishable. The Committee refers this matter to Parliament for consideration.

2. Justice Legislation Amendment Bill 2019

Date introduced	21 August 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General and Minister for the Prevention of Domestic Violence

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend various Acts and regulations relating to courts, crimes and other Stronger Communities portfolio matters as follows—
 - (a) to provide that notices relating to complaints made by post under the *Anti-Discrimination Act 1977* are presumed to have been made 7 working days after posting,
 - (b) to clarify that committal proceedings for serious children’s indictable offences are dealt with under the *Criminal Procedure Act 1986*,
 - (c) to correct references to the Justice Health and Forensic Mental Health Network,
 - (d) to extend the period for which a person may be appointed as an Official Visitor to correctional centres and detention centres from 2 to 4 years,
 - (e) to establish a Victims Register for victims of young offenders, enabling those victims to be provided with certain information about the movements of offenders,
 - (f) to remove the requirement to report deaths occurring in circumstances where the deceased person had not been attended by a medical practitioner 6 months before their death,
 - (g) to enable pathologists to conduct certain non-invasive preliminary examinations of a deceased person’s remains in coronial matters,
 - (h) to provide that the Domestic Violence Death Review Team is to include representatives of the Legal Aid Commission of New South Wales,
 - (i) to include portable document scanners as a type of recording device that is prohibited from use in court premises,
 - (j) to clarify that the prosecution of a child sexual offence where there is uncertainty as to exactly when the alleged conduct occurred may be brought where the potentially applicable sexual offences have the same maximum penalty,
 - (k) to clarify that a person whose release from custody has been delayed with the person’s consent continues to be held in custody as an ‘inmate’ until the day of release,

- (l) to clarify that provisions limiting or authorising the disclosure of information obtained in connection with the administration or execution of the *Crimes (Administration of Sentences) Act 1999* include information to which certain persons have or had access,
- (m) to increase the standard non-parole period for bushfire arson offences under the *Crimes Act 1900* from 5 to 9 years,
- (n) to provide a savings and transitional provision enabling the court to call up breaches of good behaviour bonds entered into in connection with suspended sentence orders that had expired before those orders were repealed by an amending Act,
- (o) to clarify that a prosecutor's requirement to certify in a charge certificate that a disclosure certificate under section 15A of the *Director of Public Prosecutions Act 1986* was received and considered does not extend to offences prosecuted by the Commonwealth Director of Public Prosecutions,
- (p) to clarify that an accused's legal representative's obligation to explain the sentencing law, penalty or effect of a plea for the purposes of case conferences is limited to offences that are covered by the Early Appropriate Guilty Pleas scheme under Division 1A of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*,
- (q) to provide an exception to the requirement to file a case conference certificate where a matter is to be dealt with summarily or is not to proceed to committal,
- (r) to provide that certain indictable offences relating to a person's misuse of health practitioner titles and practice restrictions under the *Health Practitioner Regulation National Law (NSW)* may be tried summarily unless the matter is elected to be dealt with on indictment,
- (s) to clarify that children who are eligible to give evidence by means of a pre-recorded hearing in child sexual assault proceedings remain eligible even if the child has become an adult before relevant orders are made,
- (t) to extend the defence of absolute privilege afforded to certain publications under the *Legal Profession Uniform Law (NSW)* to matter that is published in a report of a compliance audit of a law practice under that law by or to certain local regulatory authorities (for example, the Bar Council, Law Society Council or Legal Services Commissioner) or by a person appointed under that Law to conduct the compliance audit,
- (u) to confer a defence of absolute privilege to the publication of defamatory matter published by the Independent Planning Commission (or its predecessor) in a report or other document under certain planning legislation,
- (v) to remove references from the *Drug Misuse and Trafficking Act 1985* to the Poisons List, which is covered by the *Poisons and Therapeutic Goods Act 1966*,
- (w) to enable the Secretary of the Department of Communities and Justice to delegate the Secretary's functions under the *Justices of the Peace Act 2002* or its regulations to senior Departmental staff members,

- (x) to enable certain eligible former justices of the peace to apply for the use of a retirement title after their names,
- (y) to clarify that appeals under Acts against building product rectification orders are to be heard in Class 2 of the Land and Environment Court's jurisdiction (i.e. similar to local government appeals),
- (z) to enable applications for notices to produce documents under *the Law Enforcement (Powers and Responsibilities) Act 2002* to be made by email and any other method authorised by the regulations,
- (za) to provide that the minutes of the Legal Aid Commission's Board meeting be submitted to the Minister with reasonable promptness after the meeting is held,
- (zb) to enable justices of the peace to witness the execution of documents for use in any other State or Territory or the Commonwealth if permitted by the jurisdiction,
- (zc) to provide that the indictable offence of engaging in unsafe conduct as a provider or driver of passenger services may be dealt with summarily or on indictment,
- (zd) to clarify that the Sheriff's functions include those conferred or imposed on the Sheriff under the laws of the Commonwealth, another State or a Territory (including functions conferred by delegation),
- (ze) to relocate the exclusion of certain sexual offences from the offences covered by the *Young Offenders Act 1997* from the regulations to the Act,
- (zf) to make other necessary consequential and related amendments, including savings and transitional amendments.

BACKGROUND

2. In the Second Reading Speech to Parliament regarding the Bill, the Attorney General, the Hon Mark Speakman SC MP stated that the Bill introduced a number of miscellaneous amendments:

The Bill introduces a number of miscellaneous amendments to address developments in case law, support procedural improvement and close gaps in the law that have become apparent. In particular, the amendments will strengthen our community through improving criminal investigation and enforcement, improving coronial processes to reduce delay and improving the NSW justices of the peace system.

ISSUES CONSIDERED BY THE COMMITTEE

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

Reversal of the onus of proof

3. Schedule 1.1 to the Bill would amend the *Anti-Discrimination Act 1977* to provide that notices given under Part 9, Division 2 of that Act, by post, are in the absence of contrary evidence sufficient to raise doubt, presumed to have been given 7 working days after they are sent, rather than the current 4 working days.

4. The Committee notes that an individual who does not comply with certain notices given under the Division (e.g. a notice to supply information under section 90B), can be issued with a maximum penalty of a \$1,100 fine. Therefore, a person who had not in fact received such a notice by post would be presumed to have received it 7 working days after it had been sent, and would have to produce evidence that he or she had not received it to avoid the fine. This is a reversal of the onus of proof – consistent with the presumption of innocence, the prosecution is ordinarily required to prove all elements of an offence before a person can be found guilty of it and face a penalty.

The Bill would amend the *Anti-Discrimination Act 1977* to provide that certain notices given under that Act, by post, are in the absence of contrary evidence sufficient to raise doubt, presumed to have been given 7 working days after they are sent, rather than the current 4 working days.

The Committee notes that individuals who fail to comply with some of these notices could attract a maximum penalty of a \$1,100 fine. In short, a person who had not in fact received such a notice by post would be presumed to have received it 7 working days after it had been sent, and would have to produce evidence to the contrary to avoid a fine. This is a reversal of the onus proof – consistent with the presumption of innocence, the prosecution is ordinarily required to prove all the elements of an offence before a person can be found guilty of it and face a penalty.

Nonetheless, the provisions are designed to facilitate the efficient service of notices in anti-discrimination matters and the maximum applicable penalties are non-custodial and relatively small. In the circumstances, the Committee makes no further comment.

Potential for arbitrary detention

5. Schedule 1.3 to the Bill inserts proposed section 100B into the *Children (Detention Centres) Act 1987* which provides that where a serious young offender is due for consideration about whether s/he should be released on parole, a victim may make a submission to the Children's Court about the matter, and the Court must consider any such submission.
6. The Committee notes that submissions from victims have the potential to be highly emotionally charged and a requirement for the Court to take them into account for the purpose of making parole decisions about a juvenile offender has the potential to be prejudicial to that offender.
7. However, the Committee further recognises that it is very important for a victim to participate in the justice process and to be heard. The criminal law is protective of public safety and the inclusion of victim submissions in parole proceedings acknowledges the victims' suffering and right to human dignity.
8. Similarly, the provisions would only apply in respect of 'serious young offenders'. A 'serious young offender' is a detainee who has been convicted of a 'serious children's indictable offence' within the meaning of the *Children (Criminal Proceedings) Act 1987*. These offences include homicide; aggravated sexual assault; an offence punishable by imprisonment for life or 25 years; and manufacture or sale of firearms punishable by

imprisonment for 20 years.⁴ The Committee also acknowledges the expertise of the Children's Court to make decisions in the area covered by the provisions.

The Bill provides that where a serious young offender is due for consideration about whether s/he should be released on parole, a victim may make a submission to the Children's Court about the matter and the Court must consider such a submission. The Committee notes that submissions from victims have the potential to be highly emotionally charged and a requirement for the Court to take them into account for the purpose of making parole decisions about a juvenile offender has the potential to be prejudicial to that offender.

However, the Committee recognises that it is very important for a victim to participate in the justice process and be heard. Similarly, the provisions would only apply in respect of serious young offenders and not to juvenile offenders more broadly. The Committee also acknowledges the expertise of the Children's Court to make decisions in the area covered by the provisions. In the circumstances, the Committee makes no further comment.

Right to Privacy

9. Schedule 1.3 to the Bill inserts proposed section 100D into the *Children (Detention Centres) Act 1987* which provides that the Secretary of the Department of Justice may, if requested to do so by a victim of a juvenile offender whose name is recorded in the Victims Register, or at the Secretary's discretion, tell the victim the general area of the juvenile offender's residence following the juvenile offender's discharge from detention.

The Bill would amend the *Children (Detention Centres) Act 1987* to provide that the Secretary may, if requested to do so by a victim of a juvenile offender whose name is recorded in the Victims Register, or at the Secretary's discretion, tell the victim the general area of the juvenile offender's residence following the juvenile offender's discharge from detention. This may impact on a juvenile offender's right to privacy in circumstances where he or she has served his or her sentence of detention for the offence or offences in question.

The Committee acknowledges that these provisions are designed to protect victims' fundamental right to carry on their lives in safety and security, having been subject to the trauma of the juvenile's offending behaviour. The Committee also notes that the provisions would not allow the release of a juvenile offender's precise address, only his or her general location. In the circumstances, the Committee makes no further comment.

Right to liberty

10. Schedule 1.7 to the Bill would introduce an amendment to clarify the legal status of offenders whose release from custody is delayed with the consent of the offender by defining them as inmates for the purposes of the *Crimes (Administration of Sentences) Act 1999*.

⁴ See *Children (Detention Centres) Act 1987*, s37; and *Children (Criminal Proceedings) Act 1987*, s3.

11. The Committee notes that this provision may impact on affected persons' right to liberty, that is, the right not to be detained arbitrarily. The Committee understands from the Attorney General's Second Reading Speech that some of the affected offenders may have had their release delayed on their own request. However, it appears there are others who fall outside this category, that is, while they consent to the delay of their release, they have not requested it.

The Bill would introduce an amendment to clarify the legal status of offenders whose release from custody is delayed with their consent by defining them as inmates for the purposes of the *Crimes (Administration of Sentences) Act 1999*. The Committee notes that this may impact on affected persons' right to liberty. The Committee understands that while some of the affected offenders may have requested their release be delayed, there are others who fall outside this category – while they consent to their continued detention they have not requested it. However, as the provisions would not allow or facilitate the delayed release of persons without their consent the Committee makes no further comment.

Burden of proof and procedural fairness

12. Schedule 1.6 to the Bill amends the *Crimes Act 1900* to deal with cases where there is uncertainty about the time at which a sexual offence against a child occurred.
13. In his Second Reading Speech to Parliament, the Attorney General explained:

In circumstances where there is uncertainty about when a sexual offence is alleged to have been committed against a child and that uncertainty means that the alleged conduct, if proven, would constitute more than one sexual offence, section 80AF of the *Crimes Act 1900* currently provides that the person may be prosecuted under whichever of those sexual offences has the lesser maximum penalty, regardless of when the conduct actually occurred. Schedule 1.6 to the bill will amend section 80AF of the Crimes Act to clarify that, in circumstances where two potentially applicable offences have the same maximum penalty, the accused person may be prosecuted in respect of the conduct under either of those offences. It will continue not to be possible to prosecute the accused person for an offence that has a higher maximum penalty than any of the other applicable offences.

14. The Committee notes that the provisions apply where:
- It is uncertain as to when during a period conduct is alleged to have occurred, and
 - The victim of the alleged conduct was for the whole of the period a child, and
 - There was no time during that period that the alleged conduct, if proven would not have constituted a sexual offence, and
 - Because of a change in the law or a change in the age of the child during that period, the alleged conduct, if proven would have constituted more than one sexual offence during that period.⁵

15. Further, proposed section 80AF(2A), as inserted by the Bill would provide:

⁵ *Crimes Act 1900*, s80AF(1).

- Any requirement to establish that the offence charged was in force is satisfied if the prosecution can establish that the offence was in force at some time during that period, and
 - Any requirement to establish that the victim was of a particular age is satisfied if the prosecution can establish that the victim was of that age at some time during that period.
16. Consistent with the presumption of innocence, the prosecution is ordinarily required to prove all elements of an offence before a person can be found guilty of it and face a penalty. Similarly, the prosecution is generally required to particularise the case against a defendant so that he or she may fully respond to it, consistent with the principles of procedural fairness.
17. However, the Bill provides that a person can be held liable for an offence where the prosecution cannot particularise the date or dates on which the conduct is alleged to have occurred; the fact that the offence charged was in force on that date or those dates; or the precise age of the victim at the time of the alleged offence. In doing so, it departs from these traditional requirements surrounding burden of proof and procedural fairness.
18. Notwithstanding this, the Bill contains various safeguards. First, the prosecution still bears a significant burden of proof – it must particularise a period during which the conduct is alleged to have occurred; that the victim of the alleged conduct was for the whole of that period a child; and that there was no time during that period that the alleged conduct, if proved, was not a sexual offence.
19. Similarly, there is no element of retrospectivity to the Bill. If more than one applicable offence was in force during the relevant period, it will not be possible to prosecute the accused person for an offence that has a higher maximum penalty than any of the other applicable offences. In short, a person cannot be charged for conduct that may not have been an offence at the time it is alleged to have occurred; and cannot receive a greater penalty for the conduct, if proved, if a lesser penalty may have applied at the time the conduct occurred.
20. In addition, the provisions are designed to facilitate prosecutions for historical child sex offences so that offenders can be held accountable.⁶ The Committee notes that in such cases complainants may not recall exact dates of offending because of time elapsed and/or their youth at the time of offending.

Schedule 1.6 to the Bill would allow a person to be held liable for offences without requiring the prosecution to particularise certain matters e.g. the exact date on which the offence is alleged to have occurred. This is a departure from the ordinary requirement for the prosecution to prove all elements of an offence before a defendant can be held liable, and to particularise its case against the defendant so that he or she can fully respond consistent with the principles of procedural fairness.

⁶ See the Hon Mark Speakman SC MP, Attorney General, *Legislative Assembly Debates*, 6 June 2018, pp3-9.

However, schedule 1.6 contains various safeguards. For example, the prosecution must particularise a period during which the conduct is alleged to have occurred. Further, the prosecution must establish that there was no time during that period that the alleged conduct, if proved, was not a sexual offence. Similarly, if more than one applicable offence was in force during the relevant period, it will not be possible to prosecute the accused person for an offence that has a higher maximum penalty than any of the other applicable offences. In short, a person cannot be charged for conduct that may not have been an offence at the time it is alleged to have occurred; and cannot receive a greater penalty for the conduct, if proved, if a lesser penalty may have applied at the time the conduct occurred.

The Committee also notes that the provisions are designed to facilitate prosecutions for historical child sex offences so that offenders can be held accountable. Given this, and the safeguards, the Committee makes no further comment.

Standard non-parole period

21. Schedule 1.8 to the Bill would amend the *Crimes (Sentencing Procedure) Act 1999* to increase the standard non-parole period for the bushfire arson offence under section 203E of the *Crimes Act 1900* from 5 to 9 years. In his Second Reading Speech to the Bill, the Attorney General stated that the amendment implements a recommendation made by the NSW Sentencing Council:

Last year the State Government increased the maximum penalty for NSW's targeted bushfire offence from 14 years to 21 years. When introducing that reform to Parliament, I also asked the NSW Sentencing Council to consider if the standard non-parole period for the bushfire offence should be increased. In its June 2019 fire offences report, the Sentencing Council recommended that the standard non-parole period for the bushfire offence be set somewhere in the range of eight to 10 years.

22. The Attorney also stated that a 9 year standard non-parole period would reflect community views about the seriousness of bushfire arson"

A nine-year standard non-parole period, representing 43 per cent of the maximum penalty, reflects the seriousness with which the community views the offence of bushfire arson. It takes into account the need for special deterrence, given the prevalence of deliberately lit fires and the difficulties in detection and prosecution; the potential for exceptional personal, economic and environmental harm caused by deliberately lit fires; and the potential vulnerability of victims, particularly those who live in rural and regional areas.

23. The Attorney further stated that standard non-parole periods have been described as 'legislative guideposts for sentencing'. The Committee notes that there may therefore be some concern that standard non-parole periods affect the discretion of judicial officers to impose a sentence that is just taking into account the circumstances of each individual case. That is, they could lead to excessive penalties.
24. However, the Committee notes that under section 54B of the *Crimes (Sentencing Procedure) Act 1999*, while the standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, this does not limit the matters that are otherwise required or permitted to be taken into account. Similarly, a judicial officer is not prevented from setting a non-

parole period that is longer or shorter than the standard non-parole period, although he or she must record his or her reasons for doing so and the factors he or she took into account.

The Bill increases the standard non-parole period for the bushfire arson offence under section 203E of the *Crimes Act 1900* from 5 to 9 years. Non-parole periods are legislative guideposts for sentencing and there may be some concern that they affect the discretion of judicial officers to impose a sentence that is just taking into account the circumstances of each case.

However, the Committee acknowledges the changes implement a recommendation of the NSW Sentencing Council and are designed to reflect the seriousness with which the community views bushfire offences, the harm caused, and the need for special deterrence. Similarly, while standard non-parole periods must be taken into account in determining an appropriate sentence, this does not limit the matters that are otherwise required or permitted to be taken into account. In addition, a judicial officer is not prevented from setting a non-parole period that is longer or shorter than the standard non-parole period though he or she must record the reasons for doing so, and the factors that were taken into account. Given the reasons for the amendment and the fact that judicial officers will retain a significant level of discretion in setting an appropriate sentence for affected offenders, the Committee makes no further comment.

Right to a fair trial

25. Schedule 1.9[1] and 1.10 to the Bill clarifies that section 15A of the *Director of Public Prosecutions Act 1986* does not apply where the Commonwealth Director of Public Prosecutions (DPP) is prosecuting an offence, even where he or she is prosecuting a State offence alongside Commonwealth offences.
26. Section 15A of the *Director of Public Prosecutions Act 1986* requires law enforcement officers investigating alleged offences to disclose to the NSW DPP all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused.
27. The Committee notes that, by clarifying that there is no requirement to forward exculpatory evidence (i.e. evidence favourable to the accused) to the Commonwealth DPP in such cases, the Bill may impact on the right of accused persons to a fair trial. In accordance with this right, the case against an accused should not be determined in the absence of available evidence that is favourable to his or her case.

Schedule 1.9 [1] and 1.10 of the Bill clarifies that there is no requirement for NSW law enforcement officers who are investigating alleged offences to disclose to the Commonwealth DPP all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused, even where the Commonwealth DPP is prosecuting a State offence alongside Commonwealth offences. By clarifying that there is no requirement to forward exculpatory evidence to the Commonwealth DPP in such cases, the Bill may

impact on the right of accused persons to a fair trial. The Committee refers the matter to Parliament for consideration.

Right to a fair trial II

28. Schedule 1.9[6] and [8] and schedule 1.19 of the Bill would amend legislation so that certain indictable offences under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* and the *Health Practitioner Regulation National Law (NSW)* can be tried summarily in the Local Court unless the prosecutor or accused person elects otherwise.
29. Indictable offences are more serious offences than summary offences and are generally heard in the District or Supreme Courts before a judge and jury. By providing that certain indictable offences can be tried summarily in the Local Court, the Bill may thereby affect any automatic right of an accused person to a jury trial in respect of the subject offences.
30. However, the Committee notes that the accused person could still elect to have their matter heard on indictment. Similarly, where an accused is found guilty, there may be certain advantages in having their matter heard summarily in the Local Court. The maximum penalty that the Local Court can generally hand down for an indictable offence heard summarily is two years imprisonment, even if the maximum penalty for the applicable offence is higher.⁷ The Committee notes in this regard that the Health Practitioner Regulation offences covered by the Bill attract a maximum penalty of three years imprisonment.

Schedule 1.9 and schedule 1.19 of the Bill would amend legislation so that certain indictable offences can be tried summarily in the Local Court. Indictable offences are more serious offences than summary offences and are generally heard in the District or Supreme Courts before a judge and jury. By providing that certain indictable offences can be tried summarily in the Local Court, the Bill may thereby affect any automatic right of an accused person to a jury trial in respect of the subject offences.

However, the Committee notes that the accused person could still elect to have their matter heard on indictment. Similarly, the maximum penalty that the Local Court can generally hand down for an indictable offence heard summarily is two years imprisonment, even if the maximum penalty for the applicable offence is higher. Hence, where an accused person is found guilty, there may be certain advantages to having a matter heard summarily. In the circumstances, the Committee makes no further comment.

Right to a fair trial III

31. Under Part 29 of Schedule 2 to the *Criminal Procedure Act 1986*, a child complainant or prosecution witness in child sexual assault proceedings in the Sydney and Newcastle District Courts can give evidence by means of a pre-recorded hearing. The pre-recordings are played back to the jury at trial without the need for the child to attend court.

⁷ See *Criminal Procedure Act 1986*, ss267 and 268.

32. Schedule 1.9[10] to the Bill would amend the *Criminal Procedure Act 1986* to clarify that a complainant or witness who is aged 16 or 17 years at the time the accused person was committed for trial or sentence is able to give evidence by means of a pre-recorded hearing in accordance with a court order, even if the child reaches the age of 18 years at any time before the conclusion of the proceedings. In doing so, it potentially expands the number of cases where prosecution witnesses can give pre-recorded evidence in criminal trials.
33. The Committee notes that allowing prosecution witnesses to give pre-recorded evidence in criminal trials may have some adverse impact on accused persons. For example, in its 2010 report *Family Violence – A National Legal Response*, the Australian Law Reform Commission listed the possible drawbacks of pre-recorded testimony including that it may be unfair to require the defence to cross examine the main prosecution witness before the formal trial has begun, and the evidence may be insufficiently tested by cross-examination.⁸
34. However, the Committee also notes that the intent of these provisions is to reduce the stress, trauma and duration of the court process for young, vulnerable witnesses consistent with the recommendations of the NSW Parliament's 2015 Joint Select Committee on the Sentencing of Child Sexual Assault Offenders.⁹ In addition, the Committee notes that the Royal Commission into Institutional Responses to Child Sexual Abuse recommended full pre-recording of complainant's evidence, including cross-examination so that it can be completed as early as possible.¹⁰

Schedule 1.9[10] to the Bill would amend the *Criminal Procedure Act 1986* to clarify that a complainant or witness who is aged 16 or 17 years at the time the accused person was committed for trial or sentence is able to give evidence by means of a pre-recorded hearing in accordance with a court order, even if the child reaches the age of 18 years at any time before the conclusion of the proceedings. The Committee notes that allowing prosecution witnesses to give pre-recorded evidence in criminal trials may have some adverse impact on accused persons e.g. it may be unfair to require the defence to cross examine the main prosecution witness before the formal trial has begun.

However, the Committee also notes the intent of these provisions is to reduce the stress, trauma and duration of the court process for young, vulnerable witnesses consistent with recommendations made by the NSW Parliament's 2015 Joint Select Committee on the Sentencing of Child Sexual Assault Offenders and the Royal Commission into Institutional Responses to Child Sexual Abuse. Given these countervailing considerations, the Committee makes no further comment.

Rights of minors in the criminal process

35. Clause 13A of the *Young Offenders Regulation 2016* currently excludes certain sexual offences under the *Crimes Act 1900* from coverage by the *Young Offenders Act 1997*.

⁸ Australian Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114) 2010 at [26.169-170].

⁹ See Ms Gabrielle Upton MP, Attorney General, *Legislative Assembly Debates*, 22 October 2015, pp68-69.

¹⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, recommendations 52-55.

Schedules 1.21 and 1.22 of the Bill would relocate these exclusions to the *Young Offenders Act 1997*.

36. The *Young Offenders Act 1997* is the primary diversionary legislation for young offenders in NSW. It provides for a hierarchy of responses to offending by young people – warnings, cautions and youth justice conferences, with court as a last resort. Two of the underlying principles of the Act are that:
- The least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, having regard to the matters that must be considered under the Act; and
 - Criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.¹¹
37. However, certain offences are excluded from the *Young Offenders Act 1997* because of a concern that a diversionary outcome would not be sufficient to hold a young person accountable for these types of offences.¹²
38. The Committee notes that by relocating provisions, from the Regulation to the Act, that exclude certain offences from the coverage of the *Young Offenders Act 1997*, the Bill will continue certain arrangements that exclude young offenders from being diverted from the criminal justice system in certain cases. In doing so, the Bill may impact on the rights of minors in the criminal process. However, the Committee notes that the prescribed offences are offences over which there are significant community concerns that offenders be held fully accountable, for example sexual touching of and sexual acts with or towards people under the age of 10 years.

Clause 13A of the *Young Offenders Regulation 2016* currently excludes certain sexual offences under the *Crimes Act 1900* from coverage by the *Young Offenders Act 1997*. Schedules 1.21 and 1.22 of the Bill would relocate these exclusions to the *Young Offenders Act 1997*. The Committee notes that the Bill will thereby continue certain arrangements that exclude young offenders from being diverted from the criminal justice system in certain cases. In doing so, the Bill may impact on the rights of minors in the criminal process.

However, the Committee notes that certain offences are excluded from coverage by the *Young Offenders Act* because of a concern that a diversionary outcome would not be sufficient to hold a young person accountable for these types of offences. Relatedly, the prescribed offences are offences over which there are considerable community concerns, for example, sexual touching of and sexual acts with or towards people under the age of 10 years. Given these countervailing considerations, the Committee makes no further comment.

Right to reputation

39. Schedule 1.11[1] to the Bill would amend the *Defamation Act 2005* so that if the Legal Services Commissioner, the Bar Council or the Law Society Council provide copies of

¹¹ *Young Offenders Act 1997*, s7.

¹² See Legislative Assembly Committee on Law and Safety, *The Adequacy of Youth Diversionary Programs in New South Wales*, Report 2/56, September 2018, para 2.32.

compliance audit reports of law practices to each other, they have an absolute privilege to do so, and will be protected from defamation claims. In his Second Reading Speech regarding the Bill, the Attorney General stated that the amendments would:

...ensure that particular statutory bodies are not inhibited from exercising their lawful functions because of a potential threat of defamation proceedings against them. NSW has a co-regulatory legal profession scheme where the Legal Services Commission, the NSW Bar Association and the Law Society of NSW all have regulatory duties. Under the Legal Profession Uniform Law (NSW), those bodies are authorised to conduct compliance audits of law practices and are permitted to provide a report of a compliance audit to each other. However, providing copies of the reports has not recently happened in practice for fear of defamation proceedings being brought against them.

40. The Committee notes that the amendments would affect the reputational rights of any person adversely named in a compliance audit – he or she could not commence legal action against these bodies for publishing information that would otherwise be defamatory. However, the Committee further notes the reasons for limiting these rights, that is, to ensure the relevant statutory bodies can exercise their functions of ensuring that the legal profession complies with applicable professional standards.

Schedule 1.11[1] to the Bill would amend the *Defamation Act 2005* so that if the Legal Services Commissioner, the Bar Council or the Law Society Council provide copies of compliance audit reports of law practices to each other, they have an absolute privilege to do so, and will be protected from defamation claims. It would thereby affect the reputational rights of any person named in a compliance audit. However, the Committee notes the reasons for limiting these rights, that is, to ensure the relevant statutory bodies can exercise their functions of ensuring that the legal profession complies with applicable professional standards. In the circumstances, the Committee makes no further comment.

Right to reputation II and retrospectivity

41. Schedule 1.11[2] to the Bill would provide a defence of absolute privilege to the publication of defamatory matter, for matter published by the Independent Planning Commission or its predecessor, the Planning Assessment Commission, in a report or other document (including an audio/video record, an audio record, or a transcription record) under the *Environmental Planning and Assessment Act 1979* or certain provisions of the *Greater Sydney Commission Act 2015* or the *Heritage Act 1977*. In his Second Reading Speech regarding the Bill, the Attorney General provided the following rationale for this amendment:

The Independent Planning Commission is a statutory corporation established under the *Environmental Planning and Assessment Act 1979*. Its functions include: first, determining State significant development applications where there is significant opposition from the community; secondly, conducting public hearings for development applications and other planning and development matters; and thirdly, providing independent expert advice on any planning and development matter as requested by the Minister or the Secretary.

The Independent Planning Commission is required to publish reports, evidence, and summaries of site visits and transcripts of meetings, public hearings and proceedings. The Independent Planning Commission is not able to control what the public might say at the recorded meetings nor to verify the truth of statements made by members of the public. This means that the

commission cannot mitigate the risk of a defamation claim as the commission is required to publish transcripts of meetings. The proposed amendments at schedule 1.11 [2] will ensure the Independent Planning Commission and its predecessor have absolute privilege when publishing this material. This will ensure the commission has a defence to a claim of defamation and will deter any potential litigation.

42. The Committee notes that the amendments would affect the reputational rights of any person adversely mentioned during recorded proceedings – such persons could not commence legal action against the Independent Planning Commission or its predecessor for publishing information that would otherwise be defamatory. The Committee also notes the rationale for limiting these reputational rights – to allow the Independent Planning Commission and its predecessor to carry out their functions of independently assessing State planning proposals with maximum transparency.
43. However, the amendments would have retrospective effect, evidenced by the fact that they apply to the predecessor of the Independent Planning Commission. Retrospectivity is contrary to the rule of law which allows people knowledge of what the law is at any given time, so that they may comply.

Schedule 1.11[2] to the Bill would provide a defence of absolute privilege to the publication of defamatory matter, for matter published by the Independent Planning Commission or its predecessor in a report or other document under certain legislation. The Committee notes that the amendments would affect the reputational rights of any person adversely mentioned during recorded proceedings.

The Committee also notes the rationale for limiting these reputational rights – to allow these bodies to carry out their functions of independently assessing State planning proposals with maximum transparency. However, the amendments would have retrospective effect. Retrospectivity is contrary to the rule of law which allows people knowledge of what the law is at any given time. The Committee prefers legislation affecting rights to be drafted with prospective effect. Nonetheless, the retrospectivity in the current case does not fall within the most serious kind – it does not allow people to be punished for things that were not criminal offences at the time they were committed. Taking this, and the rationale for the amendments, into account, 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 power

44. As above, schedule 1.3 to the Bill inserts proposed section 100D into the *Children (Detention Centres) Act 1987* which provides that the Secretary of the Department of Justice may, if requested to do so by a victim of a juvenile offender whose name is recorded in the Victims Register, or at the Secretary's discretion, tell the victim the general area of the juvenile offender's residence following the juvenile offender's discharge from detention.

By providing that the Secretary may, at his or her discretion, tell a victim the general area of a juvenile offender's residence following the juvenile offender's

discharge from detention, the Bill provides the Secretary with a wide and ill-defined administrative power that affects privacy rights. For example, no guidance is provided as to how serious the juvenile's offence must have been before the information can be released. Administrative powers that limit rights and liberties should be drafted with sufficient precision so that their scope and content is clear thereby fostering an appropriate level of parliamentary oversight. However, given that the provisions would not allow the release of a juvenile offender's precise address, only his or her general location, the Committee makes no further comment.

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

Commencement by proclamation

45. Clause 2 of the Bill provides that some parts of it, namely schedules 1.4[1] and [2], 1.15 and 1.16, are to commence by proclamation. The Committee generally comments on Bills that commence by proclamation as this delegates to the Executive the Parliament's power to commence legislation.
46. The Committee generally prefers that laws commence on a fixed date or on assent to provide certainty to those affected. However, the Committee notes that the parts of the Bill that would commence by proclamation relate to changes to coronial processes; and to changes to processes around applications to the Local Court of NSW for notices to produce.

Clause 2 of the Bill provides that some parts of it are to commence by proclamation. The Committee generally prefers that laws commence on a fixed date or on assent to provide certainty to those affected. However, the Committee notes that the parts of the Bill that would commence by proclamation relate to changes to coronial processes; and to changes to processes around applications to the Local Court of NSW for notices to produce. In these circumstances the Committee acknowledges that a flexible start date may be suitable to allow for the implementation of these administrative changes. The Committee makes no further comment.

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

Matters that should be set by Parliament and wide discretionary power

47. Schedule 1, item 1.3 of the Bill inserts proposed section 100A into the *Children (Detention Centres) Act 1987*. It provides that there is to be a Victims Register and that it is to record the names of victims of juvenile offenders who have requested that they be notified of the possible release of the relevant juvenile offender. The Register is to be kept by a government agency prescribed by the regulations or designated by the Minister.
48. Further, proposed section 100A provides that the regulations may make provision for:
 - the way in which a notice to victims may or must be given under the Act, and the circumstances in which a notice need not be given; and

- the identification of a person who is a victim for the purposes of the Act, including the determination of the persons who are family representatives of the victim.
49. Victims' rights and juvenile justice are matters about which there is considerable public interest. Provisions about the government agency that is to keep the Victims Register; any exemptions from the requirement to notify victims about the possible release of a juvenile offender; and the identification of a person who is a victim are more suitably included in primary, not subordinate legislation, to foster increased opportunity for parliamentary scrutiny and debate.
50. The Committee notes in particular the provision that the Minister is able to designate the government agency that is to keep the Victims Register. This is a wide discretionary power. As a minimum requirement such a matter should be included in the regulations to foster a level of parliamentary oversight – under the *Interpretation Act 1987* statutory rules must be tabled in each House of Parliament and either House of Parliament can pass a resolution disallowing a statutory rule.

The Bill provides that there is to be a Victims Register and that it is to record the names of victims of juvenile offenders who have asked to be notified of the possible release of the relevant juvenile offender. The Register is to be kept by a government agency prescribed by the regulations or designated by the Minister. Further, the Bill provides that the regulations may make provision for the way in which a notice to victims may or must be given under the *Children (Detention Centres) Act 1987*, and the circumstances in which a notice need not be given; and the identification of a person who is a victim for the purposes of the Act.

Victims' rights and juvenile justice are matters about which there is considerable public interest. Provisions about the government agency that is to keep the Victims Register; any exemptions from the requirement to notify victims about the possible release of a juvenile offender; and the identification of a person who is a victim are more suitably included in primary, rather than subordinate legislation. This is to foster increased opportunity for parliamentary scrutiny and debate.

The Committee notes further that the Minister is granted a broad discretionary power to designate the government agency that is to keep the Victims Register. The Committee would prefer, as a minimum requirement that such a matter be included in the regulations to foster some level of parliamentary oversight. The Committee refers these matters to Parliament for consideration.

Matters that should be set by Parliament II

51. Schedule 1.20 to the Bill would amend the *Sheriff Act 2005* to clarify that the NSW Sheriff's functions include functions conferred or imposed on the NSW Sheriff under an Act or law of the Commonwealth, another State, or a Territory, including functions conferred by way of delegation. In his Second Reading Speech regarding the Bill, the Attorney General explained:

All Commonwealth laws which establish the Commonwealth courts provide a mechanism for the Federal Sheriff to delegate to other individuals the ability to exercise powers on his or her

behalf, or to assist in his or her duties. The Federal marshal regularly exercises this delegation to request that the NSW sheriff carry out a range of functions in NSW on behalf of the Commonwealth and the Commonwealth funds the NSW sheriff to undertake this work on the Commonwealth's behalf. The amendment at schedule 1.20 will make it clear that the NSW sheriff and her officers may validly accept and perform those delegated functions, and that such work is included within the functions referred to in section 4 of the *Sheriff Act 2005*.

52. The Committee notes that by providing that the NSW Sheriff's functions include functions conferred on him or her by the laws of other State and Territory jurisdictions, these amendments would allow functions to be conferred on the NSW Sheriff without oversight by the NSW Parliament of what those functions are. To foster a greater level of parliamentary oversight, the Committee would prefer any functions that are to be conferred on the NSW Sheriff by the laws of other jurisdictions to be clearly listed in the *Sheriff Act 2005*.

Schedule 1.20 to the Bill would amend the *Sheriff Act 2005* to clarify that the NSW Sheriff's functions include functions conferred or imposed on the NSW Sheriff under an Act or law another State, or a Territory. In doing so, the Bill would allow functions to be conferred on the NSW Sheriff without oversight by the NSW Parliament of what those functions are. To foster a greater level of parliamentary oversight, the Committee would prefer any functions that are to be conferred on the NSW Sheriff by the laws of other jurisdictions to be clearly listed in the *Sheriff Act 2005*. The Committee refers the matter to Parliament for consideration.

3. Lake Macquarie Smelter Site (Perpetual Care of Land) Bill 2019

Date introduced	20 August 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Melinda Pavey MP
Portfolio	Water, Property and Housing

PURPOSE AND DESCRIPTION

1. The object of the Bill is to provide for the long-term management of contaminated land that was part of the site of the former Pasminco Cockle Creek Smelter at Lake Macquarie.

BACKGROUND

2. From the late 1890s until 2003, a lead and zinc smelter operated to the north of Lake Macquarie at Boolaroo. The site is owned by Pasminco Cockle Creek Smelter Pty Ltd (Pasminco), which entered voluntary administration in 2001.
3. In 2003, the NSW Environment Protection Authority (EPA) issued Pasminco with a remediation order for the site under the *Contaminated Land Management Act 1997*. In 2007, the Minister for Planning granted a project approval under Part 3A of the *Environmental Planning and Assessment Act 1979* for remediation work. This work included the construction of a containment cell to hold the contaminated material excavated from the site, and associated infrastructure including a water treatment plant that treats water collected from the site of the cell.
4. The 2007 project approval required Pasminco to put in place a framework for long-term environmental management of the containment cell and other areas of the former smelter site, including Munibung Hill, that are now re-zoned for environmental conservation because they cannot be fully remediated.
5. Following successive stages of remediation works and site audits, areas of the former smelter site were excised from the remediation order and were able to be re-zoned for light industrial, business or residential purposes, and sold. For example, a Bunnings store and residential development now sits to the south-west of the containment cell.
6. However, Pasminco did not fulfil some of the conditions of the project approval, despite protracted negotiations with the external administrators. In short, no framework was put in place for the long-term environmental management of the containment cell and the land re-zoned for environmental conservation.
7. In 2018, the NSW Government amended State Environmental Planning Policy No 55 – Remediation of Land, to ensure that no further subdivision of the former smelter site could occur until adequate arrangements for the perpetual care of the containment cell,

associated infrastructure, and the land zoned for environmental conservation were in place, reflecting the conditions of the 2007 project approval.

8. In her Second Reading Speech regarding the Bill, the Hon. Melinda Pavey MP, Minister for Water, Property and Housing, stated that the imminent liquidation of Pasminco in future means 'it is inevitable that responsibility for the long-term management of the containment cell and other land will devolve to the Government'.
9. The Bill proposes transferring the ownership of the former smelter site from Pasminco to the Hunter and Central Coast Development Corporation (HCCDC). HCCDC is a NSW government agency established under the *Growth Centres (Development Corporations) Act 1974*. HCCDC will take on the liabilities of Pasminco in relation to the long-term management of the containment cell and other land, including implementing an environmental plan. Certain existing interests on the land title such as easements will be preserved.
10. The Bill will also establish the Containment Cell Perpetual Care Fund. As above, significant portions of the former smelter site have been re-zoned and sold. However, the establishment of the Containment Cell Perpetual Care Fund will mean that the proceeds received by HCCDC for the remaining land that has been zoned for residential, business or industrial purposes, will be quarantined for the purpose of managing the contaminated land in perpetuity.
11. In her Second Reading Speech, the Minister stated:

Boolaroo will be revitalised by the new housing that will be built on this site and the construction jobs and long-term employment opportunities that light industries and businesses on the site will generate. At the same time, the environment and the health of the community will be protected.

ISSUES CONSIDERED BY THE COMMITTEE

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

Compensation rights and procedural fairness

12. Clause 5(1) of the Bill transfers the former smelter site from Pasminco to HCCDC on the vesting day, which is the day on which clause 5 commences. Clause 6(1) provides that the vesting of the site is taken to be a compulsory acquisition under the *Land Acquisition (Just Terms Compensation) Act 1991*.
13. Clauses 5(2) and (4) provide that while the interest of Pasminco as registered proprietor is transferred to HCCDC, certain other interests are preserved. These include easements; rights of access; and leasehold interests held by utilities e.g. telecommunications corporations that have infrastructure and equipment on the site. However, in her Second Reading Speech the Minister stated that there are other interests that will not be preserved:

...any interest that is merely protected by a caveat and not recorded on the title of land will be extinguished. For example, any interest in the land asserted by Fiddletown Investments Limited – a company incorporated in the British Virgin Islands – on the basis of a recent loan facility provided to Pasminco will be extinguished.

14. Clauses 5 and 6 also operate to modify the compensation that would be payable to any person or body as a result of the compulsory acquisition of the former smelter site under the *Land Acquisition (Just Terms Compensation) Act 1991*. The Bill thereby affects compensation rights. Specifically, in determining any compensation payable, the decision maker is to take into account the net present value of the future costs of managing, in perpetuity, the containment cell and its associated infrastructure, and of maintaining the site of the cell and land zoned for environmental conservation. The Minister told Parliament:

...the only remaining potential asset of Pasminco appears to be the land surrounding the containment cell zoned for residential, business or industrial purposes...Any positive value that some of the land or lots may have – if considered separately to land on which the containment cell is located...and just having regard to its zoning for residential, industrial or business purposes – must be offset by the liability attached to the containment cell and its associated infrastructure...and other land that requires long-term environmental management.

15. Further, clause 6(10) requires a person, such as the Valuer General, or a court or tribunal, in determining the amount of compensation payable, to have regard to estimates of the future costs of managing the contamination of the former smelter site, that are provided by a government agency or obtained by it. The Minister told Parliament that the Waste Assets Management Corporation, a government agency, has estimated the net present value of the cost of managing the contaminated land in perpetuity as being approximately \$67 million. The Minister further stated 'That is likely to exceed the value of the land zoned for residential, industrial or business purposes surrounding the containment cell, once subdivided from the containment cell site'.
16. In addition, clause 6(8) provides that in determining the value of the land, restrictions on the use of the former smelter site must be taken into account including restrictions on carrying out complying development on the site under State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.

The Bill transfers the former smelter site at Boolaroo from Pasminco to HCCDC, a government agency, by compulsory acquisition. However, the Bill modifies the compensation that would otherwise be payable to any person or body as a result of the compulsory acquisition. In short, in determining any compensation payable, the decision maker is to take into account the net present value of the future costs of managing, in perpetuity, the contamination of the former smelter site. Any positive value that any land on the site may be assessed as having is to be offset by these costs, and by any restrictions on the use of the former smelter site.

The Committee acknowledges the reasons for limiting the compensation payable by Government in this instance – in particular, the significant cost to Government of the long-term environmental management of the former smelter site. However, the Committee notes that the Bill requires the decision maker, in determining the amount of compensation payable, to have regard to estimates of the net present value of the future costs of managing the contamination of the former smelter site *that have been provided by a government agency or obtained by it*. The Committee identifies that it may be preferable, to ensure procedural fairness for those seeking compensation, for a

body or person wholly independent of Government to provide these costings. The Committee makes no further comment.

Property rights

17. Clause 9 of the Bill deals with the part of the former smelter site that can be developed, that is, the land surrounding the containment cell that is zoned for residential, industrial or business uses. Clause 9(3) provides that HCCDC can enter into an agreement with a person to sell the land to that person without first making the land available for public sale if the person:

- had, immediately before the Bill was introduced into Parliament, a contract to purchase land forming part of the former smelter site, or
- had, before the Bill was introduced into Parliament, engaged in negotiations to purchase land forming part of the former smelter site with the owner of the land.

18. In the Second Reading Speech, the Minister explained:

...part of the site is subject to a contract of purchase and sale with Greencapital Australia Pty Ltd, which already owns a lot next to Munibung Hill that was once part of the site of the smelter operations and is currently carrying out subdivision works for the purpose of housing. While that contract will not be preserved, clause 9(3) will allow [HCCDC] to negotiate a new contract with Greencapital without first having to put the land on the market in recognition of the significant presence that Greencapital has already established in the area and the investments that it has made. I am advised that it is the intention of [HCCDC] to do so. Further, HCCDC can deal directly with other third parties who have expressed an interest in purchasing land, such as IKEA, which still has a caveat on the title of part of the land.

19. The Committee notes that this provision affects property rights. While HCCDC can enter into an agreement with a person who already has a contract to purchase land on the former smelter site (or people who have expressed interest in buying land) without having to make it available for public sale, there is no requirement for HCCDC to do so, and there is no requirement to honour the terms of the original contract. As already noted, the compensation to which such people may be entitled for the extinguishment of any contracts or other interests may also be limited.

The Bill allows HCCDC to enter into an agreement with a person who already has a contract to purchase land on the former smelter site (or people who have expressed interest in buying land) without having to make it available for public sale. However, there is no requirement for HCCDC to do so, and there is no requirement to honour the terms of the original contract. The Bill thereby limits the property rights of affected persons particularly as compensation rights are also limited under the Bill. However, the Committee acknowledges that the provisions are designed to offer some concession to affected persons and makes no further comment.

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

Commencement by proclamation

20. Clause 2 of the Bill provides that the Act commences on a day to be appointed by proclamation thereby delegating its legislative power to set a commencement date to

the Executive. The Committee generally prefers Acts to commence on assent or a specific date to provide certainty for those affected. However, as above, the Bill transfers ownership of a former smelter site to HCCDC, providing for its long-term management and the implementation of an environmental plan.

Clause 2 of the Bill provides that the Act is to commence by proclamation. The Committee prefers legislation to commence on assent or a specified day to provide certainty for affected persons. However, the Committee notes that the Bill transfers ownership of a former smelter site to HCCDC, providing for the site's long-term management and the implementation of an environmental plan. In these circumstances, the Committee acknowledges that a flexible start date may be preferable to facilitate the necessary practical arrangements. The Committee makes no further comment.

Matter that should be set by Parliament

21. Clause 12(1)(c) of the Bill provides that an owner of the former smelter site may delegate the exercise of any function of the owner under the Act, other than the power of delegation, to any person, or any class of persons, authorised by the regulations.
22. The Committee notes that the owner of the former smelter site is granted very important functions under the Bill. Clause 7 requires the owner to implement a long-term environmental management plan for the containment cell, and clause 8 contains similar requirements for the land on the site that is zoned for environmental conservation. Similarly, clause 9 requires the owner to facilitate the development of the land surrounding the containment cell that is zoned for residential, industrial and business uses.
23. Given this, the Committee would prefer the persons and classes of persons to whom the owner's functions can be delegated to be set down in primary rather than subordinate legislation. This is to foster an appropriate level of parliamentary oversight. Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*), the statutory rule may have already been in operation for some time before disallowance occurs.¹³

The Bill provides that an owner of the former smelter site may delegate the exercise of any of its functions under the Act, other than the power of delegation, to any person, or any class of persons, authorised by the regulations. Given the importance of the owner's functions under the Act, including implementing a long-term environmental management plan for parts of the site, the Committee considers the persons to whom the owner's functions can be delegated should be set down in primary rather than subordinate legislation. This would foster a greater level of parliamentary oversight. The Committee refers the matter to Parliament for consideration.

¹³ See general discussion of the limits to parliamentary oversight of subordinate legislation in ACT Standing Committee on Justice and Community Safety, 'Henry VIII clauses fact sheet' November 2011 pp2-3 at https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

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

Transfer of land by order of the Governor

24. Schedule 1, Part 1, clause 3 of the Bill allows the Governor, by order published on the NSW Legislation website, to amend Part 2 of Schedule 1 of the proposed Act and thereby transfer land forming part of the former smelter site from one government agency to another, including the local council. The Minister stated in the Second Reading Speech:

[G]iven that the contaminants such as lead and cadmium in the containment cell will not decay and will remain on the site indefinitely, it is inevitable that management for the cell will pass eventually to new government bodies. Schedule 1 recognises that by allowing land to be readily transferred by order of the Governor...

25. The Committee notes that by allowing the land transfers to occur by order of the Governor, the Bill may insufficiently subject the exercise of legislative power to parliamentary scrutiny. The transfers could occur without any requirement for them to be passed by Parliament, as would be the case if they were to be effected by an amending Bill. Further, they would not be subject to disallowance by Parliament – if the transfers were to be effected by regulation rather than order, there would be a requirement for the regulation to be tabled in Parliament and it would be subject to disallowance by either House under the *Interpretation Act 1987*.¹⁴

Schedule 1 of the Bill makes provision for land at the former smelter site to be transferred in future from one government agency to another, by order of the Governor. In so doing it creates the prospect of a lack of scrutiny by Parliament of future transfers of land. The Committee acknowledges that the transfers that can be made under these provisions are limited, that is, to transfers between government agencies. Further, allowing the transfers to take place by order of the Governor is likely to create administrative efficiencies. However, the Committee considers that as a minimum requirement, the transfers should be effected by regulation so that they are subject to disallowance by both Houses of Parliament. This is to foster a greater level of parliamentary oversight over transfers of land at the former smelter site over which there is considerable public interest given the environmental history. The Committee refers the matter to Parliament for consideration.

¹⁴ See the definition of 'statutory rule' s21 *Interpretation Act 1987*, and the ability of either House of Parliament to pass a resolution disallowing a statutory rule under s41 of that Act.

4. Petroleum (Onshore) Amendment (Coal Seam Gas Moratorium) Bill 2019*

Date introduced	22 August 2019
House introduced	Legislative Council
Member responsible	Mr Justin Field MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Petroleum (Onshore) Act 1991*:
 - (a) to impose a moratorium on the prospecting for, or the mining of, coal seam gas in New South Wales, and
 - (b) to reintroduce the public interest as a ground for certain decisions relating to petroleum titles.

BACKGROUND

2. In his Second Reading Speech for the Bill, Mr Justin Field MLC described the Bill as follows:

This moratorium bill reflects the risks of coal seam gas development and is based on the lived experiences of communities that have already gone down this troubling path, including those in Queensland and the United States that have seen this industry march across the landscape and pollute land and water. The bill reflects the growing scientific understanding of the carbon footprint of the industry. It is anything other than a useful transition fuel; it is a greenhouse gas emission disaster.

3. Mr Field also spoke about the background to the concept of a moratorium on coal seam gas:

The idea of a moratorium comes from the findings of a 2011 upper House inquiry into coal seam gas that was driven by Mr Jeremy Buckingham and former Shooters, Fishers and Farmers Party MLC the Hon. Robert Brown, who chaired the inquiry.

ISSUES CONSIDERED BY THE COMMITTEE

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

Suspension of property rights with no right to compensation

4. The moratorium period relating to prospecting for, or mining of, coal seam gas will commence when proposed Part 2A of the Bill commences. The moratorium period ends on the day specified in a moratorium lifting order (see proposed section 7A in the Bill).
5. During the moratorium period, prospecting for, or mining of, coal seam gas is prohibited except in accordance with an existing production lease. However, during the

moratorium period, an existing production lease that is a petroleum title relating to coal seam gas is taken not to authorise petroleum mining operations involving drilling or hydraulic fracturing for the purpose of increasing or extending the holder's capacity to produce coal seam gas (see proposed section 7B in the Bill).

6. In addition, during the moratorium period:
 - (a) any petroleum title, other than an existing production lease, relating to coal seam gas that is in force before the moratorium period commences is suspended to the extent to which it authorises prospecting for, or mining, coal seam gas
 - (b) the Minister must not grant or renew any petroleum title relating to coal seam gas
 - (c) a person may be subject to the offence of prospecting or mining without authority if the person prospects or mines coal seam gas except in accordance with the circumstances described above for an existing production lease (see proposed section 7B in the Bill).
7. Petroleum titles relating to coal seam gas are defined as:
 - (a) an exploration licence giving the holder the exclusive right to prospect for coal seam gas on the land described in the licence
 - (b) an assessment lease granting the holder the exclusive right to prospect for coal seam gas and assess any coal seam gas deposit on the land described in the lease
 - (c) a production lease giving the holder the exclusive right to conduct petroleum mining operations for coal seam gas in and on the land in the lease
 - (d) a special prospecting authority giving the holder the exclusive right to conduct speculative geological, geophysical or geochemical surveys or scientific investigations in relation to coal seam gas on and in respect of the land in the authority (see proposed section 7A in the Bill).
8. The Bill provides that compensation is not payable by or on behalf of the State of New South Wales because of the enactment or operation of the provisions of the Bill, including:
 - (a) any direct or indirect consequences, or
 - (b) any conduct relating to any such enactment or operation.
9. However, the State is not prevented from voluntarily providing compensation in such circumstances as it considers appropriate (see proposed section 7G in the Bill).

The Bill suspends certain property rights relating to petroleum titles during the moratorium period. A person may be prosecuted for an offence if they exercise their property rights during this period. The Committee notes in particular that the State is not required to provide compensation in relation to the suspension of these rights, although it has the discretion to do so. The Committee further notes that petroleum titles are valuable property interests. The Committee refers this issue to Parliament for consideration.

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

10. Proposed Schedule 4 in the Bill provides for 'no go zones for coal seam gas extraction'. The Bill authorises the Minister to amend Schedule 4 by order published on the NSW Legislation website to add descriptions of additional areas. The Minister may only take such action if the Standing Expert Advisory Body has recommended that the area be added to Schedule 4.
11. Any such order made by the Minister must be tabled in both Houses of Parliament and is subject to disallowance in accordance with sections 40 and 41 of the *Interpretation Act 1987* (see proposed section 7C of the Bill).
12. A Henry VIII clause is a clause of an Act that enables the Act to be amended by subordinate legislation. That is, the Parliament has delegated its legislation-making power to the Executive. Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule, the statutory rule may have already been in operation for some time before disallowance occurs.¹⁵

The Bill contains a Henry VIII clause which allows subordinate legislation to amend primary legislation. It thereby delegates the Parliament's legislation-making power to the Executive. If amendments are to be made to an Act, this should be done through an amending Bill and not through subordinate legislation. This is to foster an appropriate level of parliamentary oversight of the changes. The Committee refers the matter to Parliament for consideration.

¹⁵ See discussion of Henry VIII clauses in ACT Standing Committee on Justice and Community Safety, 'Henry VIII clauses fact sheet' November 2011 at https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

Part Two – Regulations

1. Administrative Decisions Review Regulation 2019

Date published	20 August 2019
Disallowance date	12 November 2019
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to repeal and remake, with minor amendments, the *Administrative Decisions Review Regulation 2014*, which would otherwise be repealed on 1 September 2019 by section 10(2) of the *Subordinate Legislation Act 1989*.
2. The Regulation makes provision with respect to the following:
 - (a) the exclusion of certain classes of administratively reviewable decisions from the requirement to provide reasons for a decision and from internal review
 - (b) repeal, savings and formal matters.

ISSUES CONSIDERED BY THE COMMITTEE

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

Exclusion of right to request reasons for an administrative decision

3. Section 49 of the *Administrative Decisions Review Act 1997* gives an interested person the right to request reasons for an administratively reviewable decision and outlines the process for dealing with such a request. The Regulation excludes the Building Professionals Board from the application of that provision where the Board makes a disciplinary finding in relation to an accreditation holder under section 33 of the *Building Professionals Act 2005*.
4. However, section 32 of the *Building Professionals Act 2005* separately required the Board to give a written statement of its decision to the complainant and the accreditation holder. The statement of a decision is to: set out findings on material questions of fact; refer to evidence or other material on which findings were based; and give reasons for the decision.
5. An individual can also apply to the Civil and Administrative Tribunal for an administrative review of the Board's finding and any action taken by the Board.

6. This provision was also included in the earlier version of the Regulation, the *Administrative Decisions Review Regulation 2014*, which is now repealed.

The Regulation excludes an interested person's right under the *Administrative Decisions Review Act 1997* to request reasons in relation to a disciplinary finding decision by the Building Professionals Board. However, the Committee notes that section 32 of the *Building Professionals Act 2005* separately requires the Board to provide a written statement of its decision to the complainant and the accreditation holder. The Committee is satisfied that affected individuals will still have access to a written decision in relation to their matter and therefore makes no further comments.

Exclusion of right to request an internal review for some administrative decisions

7. Section 53 of the *Administrative Decisions Review Act 1997* gives an interested person a right to apply for an internal review of an administratively reviewable decision and outlines the process for dealing with an internal review.
8. The Regulation specifies decisions in nine Acts and one Regulation which are excluded from the operation of the internal review provision in section 53 of the *Administrative Decisions Review Act 1997*. Examples include:
- (a) a decision by the Attorney General under section 126A of the *Anti-Discrimination Act 1977* about certifying a program or activity as a special needs program or activity
 - (b) a decision by the Commissioner of Fair Trading under section 79A of the *Fair Trading Act 1987* to suspend a licence granted under any legislation administered by the Minister for Better Regulation and Innovation
 - (c) a decision of the Veterinary Practitioners Board under section 34 of the *Veterinary Practice Act 2003* to refuse to grant an individual full registration as a veterinary practitioner.
9. The decisions referred to in the Regulation can still be the subject of other kinds of review or appeal, mostly to the Civil and Administrative Tribunal.
10. This provision was also included in the previous *Administrative Decisions Review Regulation 2014*, which is now repealed. The new Regulation contains minor amendments to this provision.

The Regulation excludes the option of requesting an internal review for certain administrative decisions. The Committee notes that appropriate options to review or appeal an administrative decision are important for fairness, transparency and accuracy. However, the Committee acknowledges that the decisions referred to in the Regulation can still be the subject of other forms of review or appeal, such as to the Civil and Administrative Tribunal. For this reason, the Committee makes no further comments.

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 set by Parliament

11. The Regulation excludes the Building Professionals Board from the application of section 49 of the *Administrative Decisions Review Act 1997*, where the Board makes a disciplinary finding in relation to an accreditation holder. That provision provides an interested person with the right to request reasons for a decision.
12. The Regulation also specifies decisions in nine Acts and one Regulation which are excluded from the operation of the internal review provisions in section 53 of the *Administrative Decisions Review Act 1997*.
13. Further background about these matters is discussed in the sections above.

The Regulation deals with matters which impact on the rights of persons affected by administrative decisions. The Committee prefers matters of this kind to be included in primary legislation rather than subordinate legislation. This fosters a greater level of parliamentary oversight. However, the Committee notes that Regulations are subject to some parliamentary scrutiny because under section 41 of the *Interpretation Act 1987*, either House of Parliament can pass a resolution disallowing a Regulation. Given this safeguard, the Committee makes no further comment.

2. Anti-Discrimination Regulation 2019

Date published	20 August 2019
Disallowance date	12 November 2019
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to repeal and remake, without changes, the provisions of the *Anti-Discrimination Regulation 2014*, which would otherwise be repealed on 1 September 2019 by section 10(2) of the *Subordinate Legislation Act 1989*.
2. The Regulation:
 - (a) enables a registered club to give benefits to its members on the basis of age, and
 - (b) enables complaints to be lodged with the President of the Anti-Discrimination Board by email, and
 - (c) provides for the matters the President is to consider before granting, renewing, varying or revoking an exemption from the provisions of the *Anti-Discrimination Act 1977*.

ISSUES CONSIDERED BY THE COMMITTEE

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

Exception to age discrimination

3. Clause 4 of the Regulation contains an exception to the unlawful age discrimination provisions of the *Anti-Discrimination Act 1977*. Clause 4 states that the provision, in good faith, of a benefit (including a concession) to a member of a registered club by reason of the member's age is lawful. A benefit or concession is defined to also include a lower membership fee.

Clause 4 of the Regulation contains an exception to the unlawful age discrimination provisions in the *Anti-Discrimination Act 1977*. However, the Committee notes that the exception is intended to allow registered clubs to provide benefits and concessions, such as lower membership fees, to members on the basis of their age. This may, for example, allow a registered club to provide a concession to persons who have retired from the workforce and may therefore have a reduced income. In these circumstances, the Committee considers the provision fits within the special needs exception under section 49ZYR of the *Anti-Discrimination Act 1977* and therefore 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 set by Parliament

4. The *Anti-Discrimination Act 1977* makes it unlawful to discriminate against individuals on various grounds and in various circumstances.
5. Section 126 of the Act authorises the President of the Anti-Discrimination Board to grant an exemption from the legislation in relation to:
 - (a) a person or class of persons, or
 - (b) an activity or class of activity, or
 - (c) any other matter or circumstance.
6. Clause 6 of the Regulation provides a list of matters the President is to consider in relation to making a proposed exemption. Examples include:
 - (a) whether the proposed exemption is appropriate or reasonable,
 - (b) whether there are non-discriminatory ways of achieving the objects or purposes for which the proposed exemption is sought,
 - (c) the public, business, social or other community impact of the granting of the proposed exemption.
7. The President is also entitled to consider other matters in addition to those referred to in clause 6.

The *Anti-Discrimination Act 1977* makes it unlawful to discriminate against individuals on various grounds and in various circumstances, and the President of the Anti-Discrimination Board may grant an exemption from these requirements in certain circumstances. The Regulation provides a list of matters the President is to consider in making an exemption. The Committee prefers matters of this kind to be included in primary legislation to foster a greater level of parliamentary oversight over matters affecting personal rights. The Committee refers this issue to Parliament for consideration.

3. Biosecurity Amendment (Biosecurity Management Plans) Regulation 2019

Date published	26 July 2019
Disallowance date	LA: 15 October 2019 LC: 22 October 2019
Minister responsible	The Hon. Adam Marshall MP
Portfolio	Agriculture and Western New South Wales

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Biosecurity Regulation 2017*:
 - (a) to recognise biosecurity management plans containing measures to prevent, eliminate or minimise the risks of biosecurity impacts that are prepared by persons who carry on commercial or educational activities for the purpose of intensive or extensive agriculture or horticulture or for the purpose of processing agricultural or horticultural products.
 - (b) to make compliance with those biosecurity management plans a mandatory measure that must be complied with by persons who enter or who are at or in places to which the plans apply and who deal with biosecurity matters or carriers.

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

Matters that should be included in primary legislation

2. The Regulation amends the *Biosecurity Regulation 2017* to recognise biosecurity management plans and to make compliance with those plans a 'mandatory measure'. Mandatory measures are permitted under section 24 of the *Biosecurity Act 2015* 'to require persons who deal with biosecurity matter or carriers to take specified actions to prevent, eliminate or minimise a biosecurity risk posed or likely to be posed by the biosecurity matter, carrier or dealing'.
3. Section 25 of the *Biosecurity Act 2015* provides that failure to comply with a 'mandatory measure' attracts a maximum penalty of \$220,000 for an individual (and a further maximum penalty of \$55,000 for each day the offence continues) or \$440,000 in the case of a corporation (and a further penalty of \$110,000 for each day the offence continues).

The Regulation amends the *Biosecurity Regulation 2017* to recognise biosecurity management plans and to make compliance with those plans a 'mandatory measure'. The *Biosecurity Act 2015* provides significant maximum

penalties for failing to comply with a mandatory measure – a \$220,000 fine for an individual.

The Committee considers that provisions such as these, which expand the circumstances under which individuals and corporations may be subject to significant penalties, should be included in primary rather than subordinate legislation to foster an appropriate level of parliamentary oversight. The Committee refers the matter to Parliament for consideration.

Regulations incorporating standards of external entities that will not be subject to disallowance

4. As above, the Regulation amends the *Biosecurity Regulation 2017* to recognise biosecurity management plans and to make compliance with those plans a 'mandatory measure'. Failure to comply with a mandatory measure attracts significant maximum penalties.
5. Clause 44A of the Regulation provides that the biosecurity management plans may apply to places at which a commercial or educational activity is carried on for the purpose of intensive or extensive agriculture or horticulture or for the purpose of processing agricultural or horticultural products. Clause 44B of the Regulation further provides that the plans may be prepared by, or on behalf of, or adopted by the person conducting the commercial or educational activity at the place.
6. Clause 44B of the Regulation also sets out the requirements of a biosecurity management plan. The purpose of a plan is to prevent, eliminate or minimise the risk of a 'biosecurity impact' caused by persons entering or carrying out activities at or from the place. Section 13 of the *Biosecurity Act 2015* defines 'biosecurity impact' as an 'adverse effect on the economy, the environment or the community that arises, or has the potential to arise, from biosecurity matter, a carrier or dealing with biosecurity matter or a carrier'. Biosecurity impacts relate to:
 - (a) The introduction, presence, spread or increase of a disease or disease agent into or within NSW;
 - (b) The introduction, presence, spread or increase of a pest into or within NSW;
 - (c) Stock food or fertilisers;
 - (d) Animals, plants or animal products becoming chemically affected;
 - (e) Public nuisance caused by bees;
 - (f) A risk to public safety caused by bees or non-indigenous animals; or
 - (g) Anything declared by the regulations to be a biosecurity impact.
7. Measures in the plan must be reasonable. According to the Department of Primary Industries website, examples of reasonable measures include requiring a person entering the place to write their details in a visitors log; wear personal protective equipment when dealing with biosecurity matter; and to enter the place at certain points only.¹⁶

¹⁶ Department of Primary Industries, [Biosecurity Management Plan](#), viewed 20 August 2019.

8. Under clause 44C of the Regulation, a person who enters a management area and who deals with biosecurity matter or a carrier must comply with the requirements of the biosecurity management plan. However, a person is not required to comply with a plan unless there is a notice conspicuously posted at each entrance to the management area. The notice must set out:
- (a) that persons entering the management area must comply with biosecurity management plan and that failure to do so may be an offence.
 - (b) how a copy of the biosecurity management plan may be obtained; and
 - (c) the contact details of a person who can explain the obligations under the plan.

The Regulation amends the *Biosecurity Regulation 2017* to recognise biosecurity management plans and to make compliance with those plans a 'mandatory measure'. Failure to comply with a mandatory measure attracts significant maximum penalties.

Biosecurity management plans may apply to places at which a commercial or educational activity is carried on for the purpose of intensive or extensive agriculture or horticulture or for the purpose of processing agricultural or horticultural products. The Committee further notes that the Regulation provides the plans may be prepared by, or on behalf of, or adopted by the person conducting the commercial or educational activity at the place – that is, the Regulation incorporates standards of external entities.

Unlike regulations, there is no requirement for such standards to be tabled in Parliament and subject to disallowance under the *Interpretation Act 1987*. However, the Committee acknowledges that the Regulation provides some safeguards, for example measures in the plan must be reasonable and a person is not required to comply with a plan unless there is a notice conspicuously posted at each entrance to the area over which it applies. The Committee makes no further comment.

4. Fisheries Management (Trout and Salmon) (Possession) Order 2019

Date published	22 August 2019
Disallowance date	14 November 2019
Minister responsible	The Hon. Adam Marshall MP
Portfolio	Minister for Agriculture and Western New South Wales

PURPOSE AND DESCRIPTION

1. The Order is made under section 17C of the *Fisheries Management Act 1994* and will remain in force for five years commencing on the date of publication.
2. The Order creates possession limits for certain species of fish if a person takes fish of these species using the methods described from the waters listed.

ISSUES CONSIDERED BY THE COMMITTEE

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

Possession limits for certain species of fish

3. The Order creates possession limits relating to Atlantic Salmon, Brook Trout, Brown Trout and Rainbow Trout. These limits apply if a person takes the fish using the methods described in the Order from the waters which are listed.
4. The objects in section 3(1) of the *Fisheries Management Act 1994* are 'to conserve, develop and share the fishery resources of the State for the benefit of present and future generations'.

By creating possession limits in relation to certain species of fish in particular circumstances, the Order may have an adverse impact on commercial fishing operators. However, the Committee notes the conservation objects of the *Fisheries Management Act 1994*, under which the Order is made, and makes no further comments.

5. Privacy and Personal Information Protection Regulation 2019

Date published	16 August 2019
Disallowance date	12 November 2019
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to repeal and remake, with minor amendments, the *Privacy and Personal Information Protection Regulation 2014*, which would otherwise be repealed on 1 September 2019 by section 10 (2) of the *Subordinate Legislation Act 1989*. The Regulation provides for the following:
 - a. that the Inspector of Custodial Services is an investigative agency for the purposes of the *Privacy and Personal Information Protection Act 1998* (the Act) and is therefore exempt from the information protection principles,
 - b. information about an individual contained in archives or held by a library, art gallery, museum or the State Archives and Records Authority is not personal information for the purposes of the Act,
 - c. the exemption of certain public sector agencies from requirements relating to privacy management plans and public registers,
 - d. the exemption of the Council of the Bar Association and the Council of the Law Society from all provisions of the Act,
 - e. the exemption of local councils from certain provisions of the Act relating to the collection and disclosure of personal information, in respect of the use of CCTV cameras to film a public place.
2. This Regulation is made under the *Privacy and Personal Information Protection Act 1998*, including sections 3 (1) (definition of investigative agency), 4 (3) (k), 4B, 33 and 71 (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

Right to privacy – information found in a library, art gallery, museum or archives

3. The *Privacy and Personal Information Protection Act 1998* (NSW) provides for the protection of personal information and the privacy of individuals generally. It applies to the collection and use of personal information by NSW public sector agencies including

government agencies, local councils, State Owned Corporations and universities. Individuals have a right to privacy and protection against unlawful or arbitrary interference with their privacy, family, home and correspondence. However, the right to privacy is not absolute and may be balanced against other rights and public interests.

4. Clause 5 of the Regulation excludes from the definition of personal information any information in a document that is kept in a library, art gallery or museum for the purposes of reference, study or exhibition. It also excludes archival information available for public inspection, including that controlled by the State Archives and Records Authority.
5. The term 'personal information' is referred to in all twelve Information Protection Principles which apply to NSW public sector agencies under the Privacy and Personal Information Protection Act 1998. These principles regulate the following issues:
 - (a) agencies collecting personal information for lawful purposes and directly from the individual
 - (b) requirements placed on agencies when collecting personal information
 - (c) retention and security of personal information held by agencies
 - (d) individuals finding out about personal information held by agencies
 - (e) individuals accessing and altering personal information held by agencies
 - (f) agencies checking the accuracy of personal information before using it
 - (g) limits on agencies using and disclosing personal information.
6. The effect of clause 5 of the Regulation is that the twelve Information Protection Principles would not apply to the information referred to in the Regulation. This means that NSW public sector agencies that hold this kind of information would not be required to follow the Information Protection Principles in their dealings with it.
7. However, the NSW Law Reform Commission saw no harm in a similar exception being included in the 2005 version of the Regulation (Personal Information and Privacy Information Protection Regulation 2005).¹⁷

The Regulation provides that personal information found in archives, a library, art gallery or museum is not to be considered as personal information for the purposes of the *Privacy and Personal Information Protection Act 1998*. The Committee notes that the right to privacy is not absolute and acknowledges the public interest in such information being available for reference, study or exhibition purposes. It makes no further comment.

Right to privacy – public register exemptions

8. Clause 7 of the Regulation exempts the keeping of certain public registers from Part 6 of the *Privacy and Personal Information Protection Act 1998 (NSW)*. Part 6 prohibits public sector agencies from disclosing any personal information kept in a public register unless

¹⁷ NSW Law Reform Commission, Access to Personal Information, Report 126, February 2010, p 39.

it is to be used for a purpose relevant to the register. The registers exempt from this requirement relate to: conveyancing matters such as deeds, plans and land values; electoral matters concerning Parties, funding and lobbyists; and justices of the peace; amongst others.

9. The NSW Law Reform Commission recognises that certain information on public registers may be made public for reasons of openness, accountability, and efficiency.¹⁸ However, it stresses that the information given to agencies should only be used for the purpose for which it was given. The Office of the Commonwealth Privacy Commissioner has stated in relation to the regulation of public registers that:

the law should, unless there is a very strong public interest reason, restrict the collection from, and use of, personal information on a public register to the public purpose for which the register is set up and for which the information is made public. This is because generally speaking individuals have no choice about whether to provide the information and little choice about its publication.¹⁹

10. The NSW Law Reform Commission has also warned that 'The exemption of certain public registers by regulation or code is an abrogation of legislative standards that should not occur without proper consultation and accountability measures'.²⁰ It highlights that the widespread circulation of public registers may allow the personal information of individuals to be widely known.

The Regulation exempts certain public registers from the requirement that personal information not be disclosed unless it is to be used for a purpose relevant to that of the Register itself. This may impact on the privacy rights of individuals. The exemption potentially allows personal information to be widely known in circumstances where individuals may have little choice about whether to provide it. However, the Committee acknowledges that there may be public interest in this information being publicly available, such as for reasons of openness, accountability and efficiency. In the circumstances, the Committee makes no further comment.

Right to privacy – exemption of the Council of the Bar Association and the Council of the Law Society

11. Clause 8 of the Regulation exempts the Council of the Bar Association and the Council of the Law Society from all provisions of the *Privacy and Personal Information Protection Act 1998* (NSW). However, the Committee notes that the Act is generally concerned with the collection and use of personal information by NSW public sector agencies including government agencies, local councils, State Owned Corporations and universities.

Whilst the Committee notes the breadth of a blanket exemption applying to the Councils of the Bar Association and the Law Society as a result of the Regulation, it acknowledges that both of these organisations deal with information privacy in accordance with the *Privacy Act 1988* (Cth) and the Australian Privacy Principles. The Committee makes no further comment.

¹⁸ NSW Law Reform Commission, *Protecting Privacy in New South Wales*, Report 127, May 2010, p 174.

¹⁹ Quoted in NSW Law Reform Commission, *Protecting Privacy in New South Wales*, Report 127, May 2010, p 174.

²⁰ NSW Law Reform Commission, *Protecting Privacy in New South Wales*, Report 127, May 2010, p 179.

Right to privacy – local council and CCTV cameras

12. Clause 9 of the Regulation exempts local councils from section 11 of the *Privacy and Personal Information Protection Act 1998 (NSW)* in relation to the use of CCTV cameras. Section 11, if it applied, would require local councils to ensure that personal information so collected is not excessive, is accurate, up to date and complete, and does not unreasonably intrude on the personal affairs of individuals. The exemption thus removes limitations on the use and extent of the collection of personal information.

The Regulation excludes the use of CCTV cameras by local councils from section 11 of the *Privacy and Personal Information Protection Act 1998 (NSW)*. It accordingly impacts on the privacy rights of individuals as certain limits on the collection of personal information will not apply as a result e.g. the requirement that the information so collected does not unreasonably intrude on the personal affairs of individuals. However, the Committee notes that the Regulation restricts the use of CCTV cameras to the filming of public areas. 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

13. The Regulation provides a number of exemptions from the protections of the *Privacy and Information Protection Act 1998*, as discussed above. These exemptions include: exempting certain public sector agencies from requirements relating to privacy management and public registers; a blanket exemption of the Council of the Bar Association and the Council of the Law Society from all provisions; and exempting local councils in relation to the use of CCTV cameras in public areas.
14. As noted previously, the exemptions in the Regulation impact on privacy rights. As also noted previously, the NSW Law Reform Commission has warned that exempting certain public registers by regulation "is an abrogation of legislative standards that should not occur without proper consultation and accountability measures".²¹
15. The Committee generally prefers that matters which affect individual rights be contained in principal legislation, thereby providing greater opportunity for parliamentary scrutiny and debate.

The Regulation provides a number of exemptions from the protections of the *Privacy and Information Protection Act 1998*. The Committee generally prefers matters that affect personal rights, such as privacy, to be contained in primary legislation to foster a greater level of parliamentary oversight. The Committee refers the matter to Parliament to consider whether the exemptions would be more appropriately located in the principal Act to allow for a greater level of parliamentary scrutiny.

²¹ NSW Law Reform Commission, *Protecting Privacy in New South Wales*, Report 127, May 2010, p 179.

6. Sporting Venues Authorities Regulation 2019

Date published	20 August 2019
Disallowance date	12 November 2019
Minister responsible	The Hon. John Sidoti MP
Portfolio	Sport, Multiculturalism, Seniors and Veterans

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to repeal and remake, without substantial alteration, the *Sporting Venues Authorities Regulation 2014*, which would otherwise be repealed on 1 September 2019 by section 10 (2) of the *Subordinate Legislation Act 1989*.
2. This Regulation makes provision with respect to the following:
 - (a) conditions of entry to land, or facilities on land, vested in or managed by a sporting venues authority,
 - (b) the removal of persons from the land or facilities,
 - (c) conditions under which sporting venues authorities may ban persons from entering the land or facilities for a period of up to 12 months,
 - (d) the exercise of the functions of a board of management for a regional sporting venues authority in circumstances where the board is not constituted,
 - (e) the maximum term for which a person may be appointed to a board of management or to an advisory committee,
 - (f) the functions of Local Venues Councils and the appointment of chairpersons to those Councils,
 - (g) the methods by which a document may be given to a person under this Regulation,
 - (h) the prescription of an offence under this Regulation as a penalty notice offence (being the offence of re-entering a sporting venue within 48 hours of being directed to leave, or being removed from, the venue).

This Regulation is made under the *Sporting Venues Authorities Act 2008*, including sections 14 (5), 33A (7), 38 and 40 (the general regulation-making power) and Schedule 2.

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 and administrative review rights

3. Clause 5 of the Regulation provides that a ranger or police officer may give a direction to a person to leave land, or a facility on land, vested in or managed by a sporting venues authority if, in the opinion of the ranger or police officer the person is:
 - trespassing, or
 - committing an offence, or
 - contravening a condition of entry or use, or
 - causing a nuisance or inconvenience to another person in the sporting venue.
4. A person who fails to comply with a direction to leave may be removed from the land or facility by a ranger or police officer. In addition, a person who has been given a direction to leave, or who has been removed from the land or facility must not re-enter the land or facility for a period of 48 hours after the direction was given or after the removal, whichever is later. If a person does, he or she is liable to a maximum penalty of a \$1,100 fine.
5. Similarly, clause 6 of the Regulation provides that a sporting venues authority may, by notice in writing, ban a person from entering land, or a facility on land, vested in or managed by the authority, for a period of up to 12 months. A person can only receive such a ban if he or she:
 - Has failed to comply with a direction to leave land, or a facility on land, vested in or managed by a sporting venues authority after which he or she has been removed by a ranger or police officer, or
 - Has been convicted of failing to comply with a direction to leave land, or a facility on land, vested in or managed by a sporting venues authority; or been convicted of re-entering such land while under a ban, or
 - Has committed an offence under another law in relation to land or a facility vested in or managed by the authority, or
 - Is subject to a ban under the *Sporting Venues (Invasions) Act 2003* from a designated sporting venue within the meaning of that Act.
6. A person under such a ban who enters the land or facility is liable to a maximum penalty of a \$1,100 fine.
7. The Committee notes that these provisions impact of the freedom of movement of affected persons and there does not appear to be provision for the bans to be legally challenged or appealed. However, the Committee acknowledges that the bans are clearly designed to stop people from engaging in anti-social behaviour on land or facilities managed by a sporting venues authority, for example, trespassing, committing

offences, contravening a condition of entry, causing a nuisance, or invading a sporting field during play.

Clause 5 of the Regulation provides that a ranger or police officer may give a direction to a person to leave land, or a facility on land, vested in or managed by a sporting venues authority. Similarly, clause 6 of the Regulation provides that a sporting venues authority may, by notice in writing, ban a person from entering land, or a facility on land, vested in or managed by the authority, for a period of up to 12 months. It does not appear that the directions or bans can be legally challenged or appealed. The Committee notes that the Regulation would impact on the freedom of movement of affected persons. However, the Committee acknowledges that the directions and bans are clearly designed to stop people from engaging in anti-social behaviour on land or facilities managed by a sporting venues authority. 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

Regulation incorporating standards of external entities that will not be subject to disallowance

8. Clause 4 of the Regulation provides that a sporting venues authority may, by notice in writing, impose conditions on persons entering or using land, or a facility on land, vested in or managed by the sporting venues authority. Further, it sets out the things that the conditions may deal with, for example, imposing fees and charges on persons entering or using the land or facility, or closing the land or facility to the public. However, this list is not exhaustive.
9. In addition, as discussed, above, under clause 5 of the Regulation, a ranger or police officer can give a direction to a person to leave land or a facility on land vested in or managed by a sporting venues authority if he or she is of the opinion that the person has contravened one of these conditions of entry or use. If the person fails to comply with such a direction he or she is liable to a maximum penalty of \$1,100.
10. The Committee notes that a written notice of the conditions must be displayed in or at the boundary or entrance to the land or facility to which the conditions relate, or given to persons entering or using the land or facility.

Clause 4 of the Regulation provides that a sporting venues authority may, by notice in writing, impose conditions on persons entering or using land, or a facility on land, vested in or managed by the sporting venues authority. While Clause 4 contains a list of things these conditions may cover, this list is not exhaustive.

Unlike regulations, there is no requirement for such conditions to be tabled in Parliament and subject to disallowance pursuant to section 41 of the *Interpretation Act 1987*. In the circumstances, to foster a level of parliamentary oversight, the Committee would prefer the regulation to clearly set down all matters with which the conditions can deal. This is particularly the case given that failure to comply with a condition can result in a person being directed to leave affected land, thereby affecting his or her freedom of movement, and to a possible monetary penalty if he or she does not.

The Committee acknowledges that a notice listing the conditions must be given to persons entering or using the relevant land or facility, or displayed in, or at the boundary or entrance to the land or facility. Further, there may be some need for flexibility as to the matters covered by the conditions to cater for the differing localities to which each set of conditions relates. Given the requirement for the conditions to be displayed and this flexibility consideration, 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.