



## Legislation Review Committee

### LEGISLATION REVIEW DIGEST

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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. PREVENTION OF CRUELTY TO ANIMALS AMENDMENT (RESTRICTIONS ON STOCK ANIMAL PROCEDURES) BILL 2019\*

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

#### *New Offence*

The Bill introduces a new offence that applies to persons who perform the Mules operation on sheep, for which the maximum penalty would be a \$5,500 fine or 6 months imprisonment, or both. The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful.

The Committee acknowledges that the new offence is designed to deter people from performing a procedure that may cause animal suffering and that has been banned or limited in comparable jurisdictions. However, the Committee also notes that the procedure is designed to prevent flystrike infections in sheep. The Committee refers to Parliament the question of whether the new offence is reasonable in the circumstances.

#### *Provisions that limit defences*

The Bill would provide that in the course of undertaking certain procedures on stock animals, such as castration and tail docking, a person would have to administer pain relief to the animal to have a defence to certain animal cruelty offences under the *Prevention of Cruelty to Animals Act 1979*. The Bill would thereby limit the availability of these defences. In doing so, the Bill may impact on personal rights and liberties because conduct not previously unlawful may be caught as such when this provision came into force.

The Committee acknowledges that the provision is designed to deter people from causing unnecessary pain to stock animals when performing the relevant procedures, an objective already recognised as important by the Act. Further, the Committee notes evidence that many in the wool growing industry already use pain relief for certain procedures on sheep. The Committee refers the matter to Parliament to consider whether the limitation on the defences is reasonable in the circumstances.

2. ROAD TRANSPORT AMENDMENT (MOBILE PHONE DETECTION) BILL 2019

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

#### *Reversal of onus of proof – presumption of innocence*

The Bill amends the *Road Transport Act 2013* so that an object held by the driver of a motor vehicle, which is captured in a photograph by a traffic enforcement device approved for mobile phone use offences, is presumed to be a mobile phone. This presumption may be rebutted if the defendant can establish on the balance of probabilities that it was not a mobile phone. This has the effect of reversing the onus of proof which intrudes on the common law principle that a person has the right to be presumed innocent until proven guilty. It is ordinarily for the prosecution to establish all elements of an offence.

The Committee acknowledges that the reversed burden of proof in this instance may relate to a matter that is peculiarly within the knowledge of the accused. Further, it notes the community safety objectives of the Bill and the fact that the offence does not attract a custodial sentence. Nonetheless, an accused may experience difficulty producing the information to the standard necessary to avoid conviction, and may thereby attract a significant maximum monetary penalty and potential loss of licence. The Committee refers the matter to Parliament to consider whether the reversed onus of proof is reasonable in the circumstances.

## PART TWO – REGULATIONS

### 1. CASINO CONTROL REGULATION

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

##### *Strict liability – issue one*

The Regulation contains a number of strict liability offences 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. It may thereby impact on the presumption of innocence. Some of the strict liability offences carry maximum penalties that include imprisonment.

However, the Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions and that many of the strict liability offences in the Regulation appear to encourage compliance with the regulatory framework for managing licensed premises and the responsible service of alcohol. Further, 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.

##### *Strict liability – issue two*

The Regulation provides that a person must not accept the transfer of a cheque that the person knows, or could reasonably be expected to know, is a prize winning cheque. By providing that a person can be held liable for the offence where he or she ought reasonably to know the cheque is a prize winning cheque, the Regulation derogates from the common law principle that mens rea must be proved to hold a person liable for an offence. The Committee notes that a person could be liable to a significant maximum monetary penalty of an \$11,000 fine if found guilty of the offence. However, 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.

##### *Reversed onus of proof – issue 1*

The Regulation provides that a person who accepts the transfer of a prize winning cheque in, or within 500 metres of, a casino is taken to know that the cheque is a prize winning cheque unless the contrary is proven, and is therefore guilty of an offence for which the maximum penalty is an \$11,000 fine. The Regulation thereby reverses 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 are safeguards in this provision – only those actually in or near a casino, and thus likely to realise the cheque is a prize winning cheque, can be caught by it. Similarly, the offence cannot attract a custodial penalty and the reversed onus may assist to prove a matter peculiarly within the knowledge of the accused. In the circumstances, the Committee makes no further comment.

##### *Reversed onus of proof – issue 2*

The Regulation provides that a person must not sell liquor unless the person is authorised to do so by a licence. Further, the Regulation provides that the person apparently in control of the premises from which the liquor was sold is taken to have sold it unless it is proved the person had no knowledge of the sale and had used all due diligence to prevent the sale of liquor on or from the premises. The Regulation thereby reverses the onus of proof that ordinarily requires the prosecution to prove all elements of an offence before a defendant can be found guilty.

The Committee acknowledges that these provisions may assist in the proof of matters that are peculiarly within the knowledge of the accused. Similarly, such provisions are not unusual in regulatory contexts to encourage compliance. In the circumstances, the Committee makes no further comment.

#### *Deemed liability*

The Regulation deems licensees and managers to be liable for the offence of their employees, agents or others acting on their behalf, in supplying liquor to minors on licensed premises. This could result in a person being held liable for an offence about which s/he had no actual knowledge. The Committee notes that deemed liability is not uncommon in regulatory contexts and under licensing schemes to encourage compliance, and that the provisions are designed to promote cultural change around underage drinking. In the circumstances, the Committee makes no further comment.

#### *Freedom of movement – issue one*

The Regulation permits the Authority to issue orders against persons preventing them from entering or being in the vicinity of licensed premises for a period of up to 6 months. An order of this kind could impact on a person's freedom of movement by restricting his or her ability to be in certain places. The Committee notes that these orders can only be made in circumstances where the Authority is satisfied that an individual has repeatedly displayed behaviours that could pose a safety risk to others or create a disturbance. In the circumstances, the Committee makes no further comment.

#### *Freedom of movement – issue two*

The Regulation declares premises surrounding and forming part of The Star to be a casino precinct. This means the Commissioner of Police can direct the casino operator to exclude persons from the precinct and the direction cannot be legally challenged, appealed or reviewed. The Committee acknowledges that such provisions may assist in preventing criminal activity and help problem gamblers. In the circumstances, the Committee makes no further comment.

#### *Right to liberty*

The Regulation prescribes offences in the *Casino Control Act 1992* for which a person may be detained by a casino employee until a police officer arrives. This may impact on a person's right to liberty. The Committee acknowledges that detention may be needed in some cases to promote the safety of employees and patrons and to minimise any threats to the casino's business operations. The Committee also notes the safeguards provided for in the Act to ensure that only reasonable force is used and detention is only permitted until the police arrive. In the circumstances, the Committee makes no further comments.

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

##### *Impact on casino and other businesses within casino complex or precinct*



The Regulation contains provisions that may have an adverse impact on casino businesses and a flow-on effect to smaller businesses within a casino complex or precinct. These include powers for the Authority to impose or vary licence conditions or to issue short or long term closure orders in certain circumstances. The Committee notes that some provisions that directly affect casino operators contain safeguards for example, providing a licensee with the opportunity to make submissions before a decision is made that may have impacts for their business. Further, the provisions are designed to promote public health and safety and to reduce criminal activity and environmental threats. However, given that there does not appear to be a mechanism to review or appeal orders made under these provisions the Committee refers this issue to Parliament to consider whether any of the provisions would have an undue adverse impact on the business community.

***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 takes provisions from the *Liquor Act 2007*, modifies them in some cases, and applies them to casinos. The Committee acknowledges that this action is authorised by section 89 of the *Casino Control Act 1992*. However, it means that provisions that would be more appropriately included in primary legislation are instead contained in the Regulation e.g. offences which carry a maximum penalty of imprisonment. The Committee would have preferred any changes to apply provisions of the *Liquor Act 2007* to a casino (with or without modification) to have been effected by an amending Bill. This would have fostered greater opportunity for parliamentary oversight over the changes and any future changes. The Committee refers this issue to Parliament for further consideration.

2. CRIMINAL RECORDS REGULATION 2019

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

*Limitations to spent convictions scheme*

The Regulation places limits on the spent convictions scheme so that a person may be required to disclose spent convictions when making certain job applications. Similarly, it lists certain sexual offences, convictions for which cannot be spent. The Regulation may thereby limit certain benefits that may accrue to a person if s/he were able to avail him/herself of the spent convictions scheme. For example, the requirement to continue to disclose a conviction may mean that a now law-abiding person misses out on an employment or volunteering opportunity many years after a conviction.

However, the limits that the Regulation places on the spent convictions scheme are quite circumscribed. That is, the job applications for which a person must continue to disclose a spent conviction relate to areas such as practising as a lawyer, or being an officer of the Director of Public Prosecutions for which the character requirements could be expected to be stringent. Similarly, the sexual offences that disqualify a person from the spent convictions scheme are significant offences over which there is considerable community concern, including sexual offences against children. A continued requirement to disclose convictions relating to these offences is a reasonable risk management tool. In the circumstances, the Committee makes no further comment.

*Spent convictions and declared criminal organisations*

Clause 7 of the Regulation provides that spent convictions may be used by the Police Commissioner in making an application for a declaration that an organisation is a 'criminal organisation' under the *Crimes (Criminal Organisations Control) Act 2012*. It also provides that a spent conviction can be used by the Court when deciding whether to grant such an application.

The Regulation would thus enable a person's spent conviction to be used to support an application for a 'criminal organisation' declaration that could lead to his/her activities and associations being restricted as a member of that organisation. It may thereby impact on the objects of the spent convictions scheme of limiting the ongoing effect of a person's convictions for relatively minor offences where they have completed a period of crime-free behaviour.

However, the Committee acknowledges that the scheme under the *Crimes (Criminal Organisations Control) Act 2012* is intended to disrupt and prevent serious organised crime. Further, the Commissioner must satisfy the Supreme Court of the grounds for making a declaration under the Act. In the circumstances, and given this safeguard, 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 set by Parliament*

As above, the Regulation places certain limits on the spent convictions scheme so that a person may be required to disclose spent convictions when making certain job applications, and so that certain listed sexual offences cannot be spent. It also provides that spent convictions can be used by the Police Commissioner in making an application for a 'criminal organisation' declaration. The Committee considers that matters such as these that may have significant impacts on individuals, particularly around their employment prospects, be included in primary not subordinate legislation. This would provide greater opportunity for parliamentary scrutiny and debate. The Committee refers the matter to Parliament for consideration.

### 3. FISHERIES MANAGEMENT (GENERAL) REGULATION 2019

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

*Strict liability offences*

The Regulation includes numerous strict liability offences. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mens rea or the mental element is a necessary part of liability for an offence. However, the committee notes that strict liability offences are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. There is also a public interest in discouraging illegal fishing and maintaining resource sustainability that may be served through the use of strict liability offences. Further, while some of the offences may attract significant monetary penalties, none of them would attract a custodial sentence. In the circumstances, the Committee makes no further comment.

*Penalty notice offences – right to a fair trial*

Schedule 8 of the Regulation sets out the various offences for which a penalty notice may be issued by a fisheries officer. The amounts payable under a notice range from \$75 to more significant penalties, as large as \$5,500 for causing damage to critical habitat.

Penalty notices allow a person to pay the amount specified for an offence within a certain time if he or she does not wish to have the matter determined by a court. By removing the automatic right to have a matter determined by a court they may thereby have some impact on a person's right to a fair trial – that is, the automatic right to have the matter heard by an impartial decision maker in public and to put forward his or her side of the case. While a person may still elect for a matter to go to court, many may waive this right and instead pay the on-the-spot fine.

However, the Regulation does not remove the right of persons to elect to have the matter heard by a court, and given the practical benefits of penalty notices, such as their cost effectiveness and ease of administration, the Committee makes no further comment.

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

*Restricted fisheries – impact on commercial fishers*

The Regulation declares certain 'restricted fisheries' and a person holding a commercial fishing licence cannot take fish for sale in a restricted fishery unless authorised to do so by the Minister. This may impact on some commercial fishing businesses. However, the Committee notes that any new impact is likely to be limited. These areas were already restricted fisheries under the previous Regulation, and allowance is made for those who were eligible for an endorsement in a restricted fishery just prior to the commencement of the Regulation. The Committee accordingly makes no further comment.

4. HEALTH RECORDS AND INFORMATION PRIVACY AMENDMENT (HEALTH RECORDS) REGULATION 2019

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

*Right to Privacy*

The Regulation would exempt certain health records linkage systems administered by the Health Administration Corporation from the health privacy principles contained in Schedule 1, clause 15 of the *Health Records and Information Privacy Act 2002*. In particular, information about a person could be included in one of these systems without the need for that person's consent. The Regulation may thereby impact on the privacy rights of persons whose information is recorded in these systems. The Committee acknowledges that the purpose of these systems is to allow NSW Health healthcare providers to share with each other health information about patients to optimise their care. However, given the potential sensitivity of such information, the Committee refers the matter to Parliament to consider whether the privacy exemption is reasonable in the circumstances.

***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 for certain exemptions to the health privacy principles. It may thereby impact on the privacy rights of certain individuals. The Committee generally prefers matters which affect individual rights to be contained in principal legislation to provide greater opportunity for parliamentary scrutiny and debate. 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.

5. PROTECTION OF THE ENVIRONMENT OPERATIONS (UNDERGROUND PETROLEUM STORAGE SYSTEMS) REGULATION 2019

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

*Strict Liability*

The Regulation includes a number of strict liability offences in relation to the management, loss monitoring and leak detection systems of underground petroleum storage systems. The Committee will generally comment concerning strict liability offences as they derogate from the common law principle that mens rea must be proved to hold a person liable for an offence.

However, the Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, there is significant public interest in minimising the risk and environmental impact of fuel leaks from underground storage systems; and while the most of the Regulation's strict liability offences attract significant maximum monetary penalties of \$22,000 for an individual, no custodial penalties apply. 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.

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

*Regulations incorporating standards of external entities*

Under the Regulation, the Environmental Protection Authority can issue certain guidelines, and failure to comply with such guidelines would be a strict liability offence for which there may be significant maximum monetary penalties. Unlike regulations, there is no requirement for guidelines to be tabled in Parliament and subject to disallowance under the *Interpretation Act 1987*. To ensure an appropriate level of parliamentary oversight over requirements for which there may be significant penalties for non-compliance, it may be preferable for them to be included in the Regulation, not guidelines. The Committee refers the matter to Parliament for consideration.

6. PUBLIC WORKS AND PROCUREMENT REGULATION 2019

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

*Procedural fairness – rules of evidence*

Under the Regulation, the Minister can refer to the NSW Procurement Board for investigation certain complaints about public trading agencies with respect to competitive neutrality in tendering. The Board must then publicly report on its findings and recommendations. In conducting its investigations the Board can inform itself on any matter in any way it thinks fit and is not bound by the rules of evidence.

The rules of evidence are an important part of the common law designed to achieve a just result and to prevent the admission of evidence at trial that may unfairly prejudice an accused person. The Committee acknowledges that the Regulation does not concern criminal trials. However, like a Court, the Board has a determinative function and its investigations could result in a public report that may have reputational consequences for any persons named in it. It is therefore important that the Board's findings are reached in a procedurally fair manner.

However, it is also important that the Board has flexibility to inform itself about relevant matters so that it can make recommendations to promote compliance with the competitive neutrality principles. Given this focus and the fact that the regulation does not concern criminal or disciplinary proceedings, 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***

*Uncertainty regarding the persons to whom power may be delegated*

Under the regulation, a government agency head may, in any case of emergency, authorise the procurement of goods and services to a value sufficient to meet that particular emergency. Further, he or she can delegate this power to a government agency 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 power relates to the expenditure of public funds, and that the monetary amounts could be significant in any given case, the Committee considers the regulation should provide more clarity about the persons to whom the power may be delegated. The Committee refers to Parliament the question of whether the power of delegation is too broad.

*Ill-defined and wide powers*

The Regulation provides the NSW Procurement Board with some broad powers relating to a government agency's procurement of goods and services from an approved disability employment organisation; and to Board agreements with public bodies that are not government agencies. The Committee prefers administrative powers to be drafted with sufficient precision so that their scope and content is clear.

However, the Committee acknowledges that these provisions are intended to facilitate government procurement agreements with disability employment organisations and to ensure adequate flexibility for the effective administration of a particular subset of procurement agreements. In the circumstances, the Committee makes no further comment.

*Matters that should be included in primary legislation*

The Committee notes that the Regulation sets out certain offences that attract significant maximum penalties including imprisonment. Offence provisions, particularly those attracting custodial penalties should be included in primary, not subordinate legislation, to ensure opportunity for an appropriate level of parliamentary scrutiny and debate. The Committee refers this matter to Parliament for consideration.

7. WESTERN SYDNEY PARKLANDS REGULATION 2019

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

*Freedom of movement*

Under clause 8 of the Regulation, a relevant authority can direct a person to leave Trust land if he or she trespasses, causes inconvenience to any person, or otherwise contravenes the Regulation. A direction may also specify a period during which a person must not return. Failing to comply with a direction is punishable by a fine of up to \$1,100. The term 'inconvenience' is broad and there is no guidance as to its meaning. The provision may trespass on the freedom of movement.

However, the Committee notes that these provisions are in line with similar regulations governing recreational spaces used by the public, where the site is managed by a trust or authority. Further, in specifying a period during which a person must not return to Trust land, the relevant authority must take into consideration the seriousness and persistence of the conduct concerned. The Committee also acknowledges the benefit of the provisions for the majority of parkland users, facilitating the peaceful enjoyment of the environment and amenities, and discouraging anti-social behaviour. In the circumstances, the Committee makes no further comment.

*Freedom of assembly*

Clause 17 of the Regulation lists various activities which are prohibited on Trust land including holding a public meeting, demonstration or gathering. Contravening this provision attracts a fine of up to \$1,100. This may impact on the right to freedom of assembly. However, this provision is in line with similar regulations governing recreational spaces used by the public and managed by a trust and has benefits for the peaceful enjoyment of the parklands by other users. Further, meetings, demonstrations and gatherings may still take place with the written permission of the Trust. In the circumstances, the Committee makes no further comment.

*Privacy and self-incrimination*

Clause 37 of the Regulation enables an authorised officer who suspects on reasonable grounds that a person has committed an offence against the Regulation to require the person to state their name and address or face a fine up to \$1,100. This power could impact on the right to privacy and the privilege against self-incrimination. However, the Committee notes that the practicalities of enforcement may require the person's details be supplied to allow a fine to be issued. Further, the power is consistent with police powers in other contexts. Further, for a person to be guilty of an offence, the officer must first warn the person that failure to comply is an offence. In the circumstances, the Committee makes no further comment.

## Part One – Bills

# 1. Prevention of Cruelty to Animals Amendment (Restrictions on Stock Animal Procedures) Bill 2019\*

Date introduced	26 September 2019
House introduced	Legislative Council
Minister responsible	The Hon. Mark Pearson MLC
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are—
  - (a) to prohibit the performance of the Mules operation on sheep, and
  - (b) to require the administration of pain relief in certain procedures involving stock animals.

### BACKGROUND

2. In his Second Reading Speech to Parliament, Mr Mark Pearson MLC stated that the Bill would more closely align legislative requirements in respect of stock animals with those for certain other animals:

The bill seeks to strike at the fact that...certain procedures have been permitted upon stock animals—in this case in particular, sheep—which, if performed on domestic animals or a foal, would result in a person facing very serious prosecution under the legislation. There is an exemption in section 24 of the [Prevention of Cruelty to Animals] Act...where a person can mutilate farm animals—certain stock animals—for the purposes of the mules operation, castration, tail docking, dehorning...yet not face any prosecution under the Prevention of Cruelty to Animals Act if the procedure was done in a manner that inflicted no unnecessary pain.

3. Mr Pearson questioned this exemption:

This has been based upon two myths: That farm animals do not feel as much pain as other animals and that young animals—six months or younger, or in some cases 12 months or younger—do not feel pain as much as other animals. Veterinary science and veterinary technical knowledge over time has shown very clearly that those animals feel exactly the same pain, or very similar pain, to a dog, a cat, a horse, a foal or other species that are specifically protected.

4. Mr Pearson stated that one of the main purposes of the Bill was to 'bring that new veterinary technical knowledge into the legislation that has been in place since 1979' and noted that he had 'campaigning for animal industries to develop alternatives to painful procedures or, where that is not available, the provision of pain relief'.

## ISSUES CONSIDERED BY THE COMMITTEE

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

5. Schedule 1[1] to the Bill prohibits the Mules operation being performed on sheep, providing that the maximum penalty for this offence is a \$5,500 fine or 6 months imprisonment, or both. However, a person does not commit an offence under this proposed provision until on or after 1 January 2022.

6. The Mules operation or 'mulesing' is the surgical removal of the breech, tail, skin folds or wrinkles of a sheep. In his Second Reading Speech Mr Pearson stated:

The procedure is usually undertaken on a lamb at less than six months of age. The lamb is constrained in a device known as a cradle. While laid prone on its back, a pair of sharp shears or another sharp implement is used to cut away at the skin around the breech area.

7. Mr Pearson further stated:

Mulesing is a procedure that is actually intended to prevent a very serious state of flystrike. It removes skin which can become fouled by urine, faeces and dirt, creating an environment where flies can lay their eggs and, once hatched, the maggots consume the flesh of the sheep. That is known as flystrike and is a significant welfare problem for the wool industry. What has also become a major ethical issue for the wool industry are the advances in science which make it clear that farmed animals are indeed sentient beings and feel pain and distress. There is no doubt that mulesing is a painful and stressful procedure for lambs.

8. In addition, Mr Pearson told Parliament that New Zealand introduced a complete ban on mulesing in 2018 and that Victoria is introducing changes to the mulesing definition in its *Prevention of Cruelty to Animals—Draft Regulations 2019*.

**The Bill introduces a new offence that applies to persons who perform the Mules operation on sheep, for which the maximum penalty would be a \$5,500 fine or 6 months imprisonment, or both. The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful.**

**The Committee acknowledges that the new offence is designed to deter people from performing a procedure that may cause animal suffering and that has been banned or limited in comparable jurisdictions. However, the Committee also notes that the procedure is designed to prevent flystrike infections in sheep. The Committee refers to Parliament the question of whether the new offence is reasonable in the circumstances.**

*Provisions that limit defences*

9. Schedule 1[5] to the Bill provides that in the course of undertaking certain procedures involving stock animals, a person must administer an analgesic or other appropriate form of pain relief to the animal to have the benefit of a defence to certain animal cruelty offences under Part 2 of the *Prevention of Cruelty to Animals Act 1979*. These procedures include castration, dehorning and tail docking. The cruelty to animals offence under Part 2 attracts a maximum penalty or a \$5,500 fine or 6 months imprisonment, or both, while



the aggravated cruelty to animals offence attracts a maximum penalty of a \$22,000 fine or 2 years imprisonment or both.

10. In his Second Reading Speech Mr Pearson stated:

Recent innovations in veterinary medicine mean that there are now readily available and affordable analgesics such as Tri-Solfen and other substances for farmed animals. Importantly, this Bill will actually assist and protect, when passed, farmers and woolgrowers from possible prosecution. That is because in section 24 of the Act, which is the exemption, it says that you can do these things to these animals—mulesing, tail docking et cetera—but at the end of each section it says that the director general or secretary has made it very clear it must be in a manner that causes no unnecessary pain. If a pain relief is readily available and affordable and is not used, it could be argued that if these procedures are done without the use of that pain relief, it has been done in a manner which has caused unnecessary pain.

11. Mr Pearson also noted evidence that pain relief is being used by many in the wool growing industry in certain circumstances:

The company Bayer, which bought up most of the rights of distribution to the main pain relief used for lambs in mulesing, Tri-Solfen, say that 80 per cent to 85 per cent of woolgrowers are using it during mulesing, but other sources are saying that only 50 to 55 per cent of woolgrowers are.

12. In addition, Mr Pearson stated that 'Necessary pain for farmed animals has always been an economic test, not a veterinary test' and that 'Given that modern veterinary analgesics are now quite cheap, the time has come to mandate pain relief for those common procedures'.

**The Bill would provide that in the course of undertaking certain procedures on stock animals, such as castration and tail docking, a person would have to administer pain relief to the animal to have a defence to certain animal cruelty offences under the *Prevention of Cruelty to Animals Act 1979*. The Bill would thereby limit the availability of these defences. In doing so, the Bill may impact on personal rights and liberties because conduct not previously unlawful may be caught as such when this provision came into force.**

**The Committee acknowledges that the provision is designed to deter people from causing unnecessary pain to stock animals when performing the relevant procedures, an objective already recognised as important by the Act. Further, the Committee notes evidence that many in the wool growing industry already use pain relief for certain procedures on sheep. The Committee refers the matter to Parliament to consider whether the limitation on the defences is reasonable in the circumstances.**

## 2. Road Transport Amendment (Mobile Phone Detection) Bill 2019

Date introduced	24 September 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Roads

### PURPOSE AND DESCRIPTION

1. The objects of the Bill are:

- (a) to amend the *Road Transport Act 2013* to establish a presumption that an object held by, or resting on, the driver of a vehicle in a photograph taken by an approved traffic enforcement device that is approved for mobile phone use offences is a mobile phone for the purposes of a mobile phone use offence, unless the driver satisfies the court that the object was not a mobile phone;
- (b) to amend the *Road Rules 2014* to provide that, for a mobile phone use offence, the driver of a vehicle is not committing the offence if the driver is complying with a requirement made by a police officer or other authorised officer to hand the phone to the officer.

### BACKGROUND

2. In his Second Reading speech for the Bill, the Minister referred to the risks of using a mobile phone while driving:

Mobile phone use while driving is associated with at least a four-fold increase in the risk of having a casualty crash. From 2012 to 2018, there were at least 158 casualty crashes involving a driver or rider using a handheld mobile phone on New South Wales roads, resulting in 12 deaths and 212 injuries.

3. The Minister went on to explain the technology used by the cameras designed to detect illegal mobile phone use by drivers:

The high-resolution images captured by the camera clearly depict drivers holding objects that have the form of a mobile phone and are being held in a manner consistent with using the functions of a mobile phone, such as talking, texting or touching a screen. The technology uses artificial intelligence to automatically analyse images and identify those that are likely to show a driver using a mobile phone. These images are referred for further review and verification by appropriately trained personnel. Images that the system deems unlikely to contain an offence can be quickly, automatically and irretrievably deleted. The system does not in any way interfere with, or monitor, a mobile phone signal from the vehicle or the driver's hand.

## ISSUES CONSIDERED BY THE COMMITTEE

**Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA***Reversal of onus of proof – presumption of innocence*

4. Rule 300 of the *Road Rules 2014* generally requires a driver of a vehicle to not use a mobile phone if the vehicle is moving or is stationary but not parked. A maximum penalty of \$2200 applies to a breach of this rule. Drivers may also be penalised five demerit points from their licence.
5. The Bill amends the *Road Transport Act 2013* to insert proposed section 139B into the Act. This section provides that a photograph, taken by a traffic enforcement device approved for mobile phone use offences, that shows an object held by the driver of a motor vehicle is presumed to be a mobile phone.
6. Proposed section 139B(3) allows the defendant in proceedings for a mobile phone use offence to rebut the presumption by establishing on the balance of probabilities that it was not a mobile phone. This has the effect of reversing the onus of proof.
7. It is a principle of the common law that a person charged with a criminal offence has the right to be presumed innocent until proven guilty. It is ordinarily the duty of the prosecution to prove all of the elements of an offence. Reversing the onus of proof consequently impacts upon the presumption of innocence. However, reversing the burden of proof may sometimes be justified in circumstances where it relates to an issue that is peculiarly within the knowledge of the accused.

**The Bill amends the *Road Transport Act 2013* so that an object held by the driver of a motor vehicle, which is captured in a photograph by a traffic enforcement device approved for mobile phone use offences, is presumed to be a mobile phone. This presumption may be rebutted if the defendant can establish on the balance of probabilities that it was not a mobile phone. This has the effect of reversing the onus of proof which intrudes on the common law principle that a person has the right to be presumed innocent until proven guilty. It is ordinarily for the prosecution to establish all elements of an offence.**

**The Committee acknowledges that the reversed burden of proof in this instance may relate to a matter that is peculiarly within the knowledge of the accused. Further, it notes the community safety objectives of the Bill and the fact that the offence does not attract a custodial sentence. Nonetheless, an accused may experience difficulty producing the information to the standard necessary to avoid conviction, and may thereby attract a significant maximum monetary penalty and potential loss of licence. The Committee refers the matter to Parliament to consider whether the reversed onus of proof is reasonable in the circumstances.**

## Part Two – Regulations

### 1. Casino Control Regulation

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

#### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to remake, with minor amendments, the *Casino Control Regulation 2009*, which will be repealed on 1 September 2019 by section 10(2) of the *Subordinate Legislation Act 1989*.
2. This Regulation –
  - (a) defines certain terms used in the *Casino Control Act 1992* and this Regulation, and
  - (b) exempts certain employees who would otherwise be "special employees" from that category, and
  - (c) prescribes changes in the affairs of a licensee that are required to be notified to the Independent Liquor and Gaming Authority, and
  - (d) imposes requirements for controlled contracts and exempting certain contracts that would otherwise be "controlled contracts" from that category, and
  - (e) imposes requirements in relation to junkets and other gambling inducements by the operator of a casino, and
  - (f) imposes requirements relating to the publication of information about gaming machines, gambling and other matters relating to responsible gambling practices, and
  - (g) prohibits certain advertising and gambling-related signs, and
  - (h) imposes requirements relating to the responsible service of alcohol at a casino, and
  - (i) applies and modifies certain provisions of the *Liquor Act 2007* to a casino, and
  - (j) provides for other miscellaneous matters and matters of an ancillary nature.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Strict liability – issue one*

3. The Regulation contains a number of strict liability offences which deal with various issues. Examples include contravention of provisions relating to:
  - (a) displaying certain notices (see for example clause 16)
  - (b) requirements relating to prize winning cheques (see for example clause 25)
  - (c) obligations of licensees and managers as to responsible service of alcohol (see for example clause 33).
4. The maximum penalties for the type of offences referred to above are monetary penalties.
5. However, Schedule 6 of the Regulation also contains other strict liability offences which carry maximum penalties that include imprisonment, in some cases for up to 12 months. The provisions in Schedule 6 of the Regulation are a collection of provisions taken from the *Liquor Act 2007* that are modified in some cases and applied to casinos (see clause 40 of the Regulation). Examples of strict liability offences in this schedule include contraventions of provisions about:
  - (a) keeping or using unlicensed premises (Schedule 6, clause 8)
  - (b) sale or supply of liquor contrary to licence (Schedule 6, clause 9)
  - (c) offences relating to sale or supply of liquor by minors (Schedule 6, clause 117).

**The Regulation contains a number of strict liability offences 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. It may thereby impact on the presumption of innocence. Some of the strict liability offences carry maximum penalties that include imprisonment.**

**However, the Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions and that many of the strict liability offences in the Regulation appear to encourage compliance with the regulatory framework for managing licensed premises and the responsible service of alcohol. Further, 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.**

#### *Strict liability – issue two*

6. The Regulation makes certain provisions regarding the prize money payable by a casino. In particular, it provides that a person must not accept the transfer of a cheque that the person knows, or could reasonably be expected to know, is a prize winning cheque. The maximum penalty for doing so is an \$11,000 fine (see clause 24 of the Regulation).

7. By providing that a person can be held liable for the offence where he or she ought reasonably to know the cheque is a prize winning cheque, without requiring actual knowledge, the Regulation derogates from the common law principle that mens rea must be proved to hold a person liable for an offence.

**The Regulation provides that a person must not accept the transfer of a cheque that the person knows, or could reasonably be expected to know, is a prize winning cheque. By providing that a person can be held liable for the offence where he or she ought reasonably to know the cheque is a prize winning cheque, the Regulation derogates from the common law principle that mens rea must be proved to hold a person liable for an offence. The Committee notes that a person could be liable to a significant maximum monetary penalty of an \$11,000 fine if found guilty of the offence. However, 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.**

*Reversed onus of proof – issue 1*

8. As above, the Regulation provides that a person must not accept the transfer of a cheque that the person knows, or could reasonably be expected to know, is a prize winning cheque. Further, it provides that a person who accepts the transfer of a prize winning cheque in, or within 500 metres of, a casino is taken to know that the cheque is a prize winning cheque unless the contrary is proven. As above, the maximum penalty for doing so is an \$11,000 fine (see clause 24 of the Regulation).
9. By providing that a person who accepts the transfer of a prize winning cheque in, or within 500 metres of, a casino is taken to know that the cheque is a prize winning cheque unless the contrary is proven, the Regulation reverses 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 Regulation provides that a person who accepts the transfer of a prize winning cheque in, or within 500 metres of, a casino is taken to know that the cheque is a prize winning cheque unless the contrary is proven, and is therefore guilty of an offence for which the maximum penalty is an \$11,000 fine. The Regulation thereby reverses 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 are safeguards in this provision – only those actually in or near a casino, and thus likely to realise the cheque is a prize winning cheque, can be caught by it. Similarly, the offence cannot attract a custodial penalty and the reversed onus may assist to prove a matter peculiarly within the knowledge of the accused. In the circumstances, the Committee makes no further comment.**

*Reversed onus of proof – issue 2*

10. The Regulation provides that a person must not sell liquor unless the person is authorised to do so by a licence. The maximum penalty for this offence is an \$11,000 fine or imprisonment for 12 months or both. Further, the Regulation provides that a person who is the occupier, manager or person apparently in control of any premises on or from which the liquor is sold is taken to have sold the liquor unless it is proved that the person:

- (a) Had no knowledge of the sale, and
  - (b) Had used all due diligence to prevent the sale of liquor on or from premises (see Schedule 6, clause 7 of the Regulation).
11. By providing that the person in control must prove he or she had no knowledge of the sale of the liquor and used all due diligence to prevent it, the Regulation reverses 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 Regulation provides that a person must not sell liquor unless the person is authorised to do so by a licence. Further, the Regulation provides that the person apparently in control of the premises from which the liquor was sold is taken to have sold it unless it is proved the person had no knowledge of the sale and had used all due diligence to prevent the sale of liquor on or from the premises. The Regulation thereby reverses the onus of proof that ordinarily requires the prosecution to prove all elements of an offence before a defendant can be found guilty.**

**The Committee acknowledges that these provisions may assist in the proof of matters that are peculiarly within the knowledge of the accused. Similarly, such provisions are not unusual in regulatory contexts to encourage compliance. In the circumstances, the Committee makes no further comment.**

*Deemed liability*

12. The Regulation provides that a person must not supply liquor to minors on licensed premises and sets down a maximum penalty of an \$11,000 fine or 12 months imprisonment or both for doing so (see Schedule 6, clause 117 of the Regulation).
13. Further, the Regulation deems that a licensee or manager will be guilty of an offence, and liable to the above maximum penalties, where the following categories of persons sell or supply liquor on licensed premises in contravention of the legislation:
- (a) an employee or agent of a licensee, or
  - (b) an employee or agent of the manager of licensed premises, or
  - (c) a person acting, or purporting to act, on behalf of a licensee or the manager of licensed premises (see Schedule 6, clause 149 of the Regulation).

**The Regulation deems licensees and managers to be liable for the offence of their employees, agents or others acting on their behalf, in supplying liquor to minors on licensed premises. This could result in a person being held liable for an offence about which s/he had no actual knowledge. The Committee notes that deemed liability is not uncommon in regulatory contexts and under licensing schemes to encourage compliance, and that the provisions are designed to promote cultural change around underage drinking. In the circumstances, the Committee makes no further comment.**

*Freedom of movement – issue one*

14. The Regulation authorises the Independent Liquor and Gaming Authority (the Authority) to, by order in writing to a person, prohibit a person from entering or remaining on the licensed premises specified in the order for a period of up to 6 months. An application for an order of this kind may be made by various persons including the Secretary, the Commissioner of Police or licensees who are party to a local liquor accord.
15. The Authority is only entitled to make an order of this kind if it is satisfied that the person has been repeatedly violent, intoxicated, quarrelsome or disorderly on or in the immediate vicinity of the licensed premises (see Schedule 6, clause 78). There does not appear to be an appeal or review right for a person affected by such an order.

**The Regulation permits the Authority to issue orders against persons preventing them from entering or being in the vicinity of licensed premises for a period of up to 6 months. An order of this kind could impact on a person's freedom of movement by restricting his or her ability to be in certain places. The Committee notes that these orders can only be made in circumstances where the Authority is satisfied that an individual has repeatedly displayed behaviours that could pose a safety risk to others or create a disturbance. In the circumstances, the Committee makes no further comment.**

*Freedom of movement – issue two*

16. The Regulation provides that land including and surrounding The Star is a 'casino precinct' for the purposes of section 81 of the *Casino Control Act 1992*.
17. Section 81 of that Act authorises the Commissioner of Police to direct that a casino operator exclude a person from a casino precinct. A direction of this kind cannot be challenged, reviewed, appealed or questioned on any grounds before any court or tribunal in any legal proceedings (see also clause 45 of the Regulation).

**The Regulation declares premises surrounding and forming part of The Star to be a casino precinct. This means the Commissioner of Police can direct the casino operator to exclude persons from the precinct and the direction cannot be legally challenged, appealed or reviewed. The Committee acknowledges that such provisions may assist in preventing criminal activity and help problem gamblers. In the circumstances, the Committee makes no further comment.**

*Right to liberty*

18. Section 88(2) of the *Casino Control Act 1992* provides for casino employees to detain persons who they suspect, on reasonable grounds, have contravened prescribed provisions of the Act. Detention is permitted until the arrival of a police officer. The Regulation prescribes the following offences as ones for which a person may be detained:
  - (a) excluded person not to enter casino
  - (b) minors not to enter casino
  - (c) forgery (see clause 46 of the Regulation).
19. Section 88(3) of the Act provides that a person may not be detained unless:



- (a) no more force is used than is proper in the circumstances
- (b) the person is informed of the reasons for their detention
- (c) the employee immediately notifies a police officer of the reasons for the detention, and
- (d) the person is only detained for as long as is reasonable to enable a police officer to attend.

**The Regulation prescribes offences in the *Casino Control Act 1992* for which a person may be detained by a casino employee until a police officer arrives. This may impact on a person's right to liberty. The Committee acknowledges that detention may be needed in some cases to promote the safety of employees and patrons and to minimise any threats to the casino's business operations. The Committee also notes the safeguards provided for in the Act to ensure that only reasonable force is used and detention is only permitted until the police arrive. In the circumstances, the Committee makes no further comments.**

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

#### *Impact on casino and other businesses within casino complex or precinct*

20. Schedule 6 of the Regulation contains provisions from the *Liquor Act 2007*, as modified, which apply to casinos. Some of these provisions may have an adverse impact on casino businesses and a flow-on effect to smaller businesses within a casino complex or precinct, particularly provisions providing for:
- (a) the Authority or the Secretary to impose, vary or revoke licence conditions (e.g. restricting the trading hours of, and public access to, the licensed premises).
  - (b) short-term closure orders of up to 72 hours which require the licensee to close premises for a time specified in the order (where the Authority is satisfied that a serious breach of the Act has occurred or is likely to occur on the premises and that the closure is necessary to prevent or reduce a significant threat or risk to the public interest).
  - (c) long-term closure orders which require the licensee to close premises for a time specified in the order (where the licensee or manager of licensed premises is the subject of certain investigations, complaints or disciplinary action and the Authority is satisfied that a serious breach of the Act has occurred or is likely to occur on the premises; and that the closure is necessary to prevent or reduce a significant threat or risk to the public interest).
  - (d) late hour entry declarations, which prevent patrons entering licensed premises during late trading hours even though the premises are authorised to trade (see Schedule 6, clauses 53 to 54 and 82 to 90).

**The Regulation contains provisions that may have an adverse impact on casino businesses and a flow-on effect to smaller businesses within a casino complex or precinct. These include powers for the Authority to impose or vary licence conditions or to issue short or long term closure orders in certain circumstances.**

The Committee notes that some provisions that directly affect casino operators contain safeguards for example, providing a licensee with the opportunity to make submissions before a decision is made that may have impacts for their business. Further, the provisions are designed to promote public health and safety and to reduce criminal activity and environmental threats. However, given that there does not appear to be a mechanism to review or appeal orders made under these provisions the Committee refers this issue to Parliament to consider whether any of the provisions would have an undue adverse impact on the business community.

**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*

21. Clause 40 of the Regulation applies provisions of the *Liquor Act 2007* to a casino. These provisions are modified to read as set out in Schedule 6 of the Regulation. This action is authorised by section 89 of the *Casino Control Act 1992* which provides that the *Liquor Act 2007* does not apply to, or in respect of, a casino, except as provided by the regulations. It specifies that the regulation may apply provisions of the *Liquor Act 2007* to a casino, with or without modification.
22. The effect of this is that the Regulation now contains some offences that carry maximum penalties of imprisonment for up to 12 months (see for example Schedule 6, clause 117 of the Regulation).
23. The Committee would have preferred any changes to apply provisions of the *Liquor Act 2007* to a casino (with or without modification) to have been effected by an amending Bill. This would have fostered opportunity for an appropriate level of parliamentary oversight over the changes and any further changes that may occur in future, which is important given that some of the content of changes related to matters that affect fundamental individual rights e.g. offences that carry potential prison terms.

**The Regulation takes provisions from the *Liquor Act 2007*, modifies them in some cases, and applies them to casinos. The Committee acknowledges that this action is authorised by section 89 of the *Casino Control Act 1992*. However, it means that provisions that would be more appropriately included in primary legislation are instead contained in the Regulation e.g. offences which carry a maximum penalty of imprisonment. The Committee would have preferred any changes to apply provisions of the *Liquor Act 2007* to a casino (with or without modification) to have been effected by an amending Bill. This would have fostered greater opportunity for parliamentary oversight over the changes and any future changes. The Committee refers this issue to Parliament for further consideration.**

## 2. Criminal Records Regulation 2019

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney-General

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to remake, with minor amendments, the *Criminal Records Regulation 2014*, which is repealed on 1 September 2019 by section 10(2) of the *Subordinate Legislation Act 1989*.
2. This Regulation:
  - (a) prescribes certain offences under the *Crimes Act 1900* and the *Summary Offences Act 1988* to be sexual offences for the purposes of the definition of *sexual offences* in section 7 (4) of the *Criminal Records Act 1991*, and
  - (b) prescribes the former offence of a self-excluded person entering or remaining in a casino to which an exclusion order in respect of the person relates as an offence to which section 8 (5) of the *Criminal Records Act 1991* applies, and
  - (c) provides that a person may be required to disclose spent convictions when making certain job applications or during job interviews with certain agencies, and
  - (d) provides that spent convictions may be used by the Commissioner of Police when making an application for a declaration that an organisation is a criminal organisation under the *Crimes (Criminal Organisations Control) Act 2012* and by the Supreme Court when deciding whether to grant the declaration, and
  - (e) provides that it is not an offence for the officer in charge of the Criminal Records Section of the NSW Police Force to disclose information concerning spent convictions in particular circumstances, and
  - (f) prescribes certain persons and bodies as law enforcement agencies for the purposes of the definition of *law enforcement agency* in section 13 (5) of the *Criminal Records Act 1991*, and
  - (g) prescribes various former obscene or indecent exposure offences as eligible homosexual offences to enable certain persons convicted of those offences to apply to have the conviction extinguished.

This Regulation is made under the *Criminal Records Act 1991*, including the following provisions:

- (a) paragraph (h) of the definition of *sexual offences* in section 7 (4), paragraph (o) of the definition of *law enforcement agency* in section 13 (5) and paragraph (d) of the definition of *eligible homosexual offence* in section 19A,
- (b) sections 8 (5), 13 (2) and 25 (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**

#### *Limitations to spent convictions scheme*

3. The primary objective of the *Criminal Records Act 1991* ('the Act') is to implement a scheme to limit the effect of a person's conviction for relatively minor offences if the person completes a period of crime-free behaviour. On the completion of the period, the conviction is taken to be spent and subject to some exceptions, is not to form part of the person's criminal history and does not have to be disclosed by the person e.g. when applying for employment or volunteering opportunities.
4. However, certain convictions cannot be spent under the scheme. These include convictions for which a prison sentence of more than 6 months was imposed, convictions for listed sexual offences and convictions imposed against bodies corporate (see s7(1) of the Act).
5. The Regulation places further limits on the spent convictions scheme. Clause 6 provides that a person may be required to disclose spent convictions when making certain job applications. However, the Committee notes that these job applications relate to quite limited areas e.g. practising as a lawyer, a Crown prosecutor or an officer of the Director of Public Prosecutions, and that respect for the law and a commitment to upholding it would be particularly important in these areas.
6. Similarly, clause 4 lists certain sexual offences, convictions for which cannot be spent. The Committee notes that the listed offences are offences over which there are serious community concerns including aggravated sexual assault and sexual offences against children including sexual touching of a child under 10 years; and possession, production and dissemination of child abuse material.

**The Regulation places limits on the spent convictions scheme so that a person may be required to disclose spent convictions when making certain job applications. Similarly, it lists certain sexual offences, convictions for which cannot be spent. The Regulation may thereby limit certain benefits that may accrue to a person if s/he were able to avail him/herself of the spent convictions scheme. For example, the requirement to continue to disclose a conviction may mean that a now law-abiding person misses out on an employment or volunteering opportunity many years after a conviction.**

**However, the limits that the Regulation places on the spent convictions scheme are quite circumscribed. That is, the job applications for which a person must continue to disclose a spent conviction relate to areas such as practising as a lawyer, or being an officer of the Director of Public Prosecutions for which the**

character requirements could be expected to be stringent. Similarly, the sexual offences that disqualify a person from the spent convictions scheme are significant offences over which there is considerable community concern, including sexual offences against children. A continued requirement to disclose convictions relating to these offences is a reasonable risk management tool. In the circumstances, the Committee makes no further comment.

*Spent convictions and declared criminal organisations*

7. Under the *Crimes (Criminal Organisations Control) Act 2012*, the Police Commissioner can apply to the Supreme Court for a declaration that a particular organisation is a 'criminal organisation'. The application must set out the grounds on which the declaration is sought and the information supporting the grounds on which the declaration is sought.
8. Further, the Court can make a 'control order' in respect of a member of such a declared organisation, which restricts the persons with whom he or she can associate and places limits on his/her activities. For example, s/he may no longer be able to carry on certain businesses including a casino or a pawnbroker, or s/he may no longer be able to possess a firearm.
9. Clause 7 of the Regulation provides that spent convictions may be used by the Commissioner when making an application for a declaration that an organisation is a criminal organisation. It also provides that a spent conviction can be used by the Court when deciding whether to grant such an application. It thus appears that a person's spent conviction could be used to support an application for a declaration that could then lead to restrictions being placed on that person's associations and activities.

**Clause 7 of the Regulation provides that spent convictions may be used by the Police Commissioner in making an application for a declaration that an organisation is a 'criminal organisation' under the *Crimes (Criminal Organisations Control) Act 2012*. It also provides that a spent conviction can be used by the Court when deciding whether to grant such an application.**

The Regulation would thus enable a person's spent conviction to be used to support an application for a 'criminal organisation' declaration that could lead to his/her activities and associations being restricted as a member of that organisation. It may thereby impact on the objects of the spent convictions scheme of limiting the ongoing effect of a person's convictions for relatively minor offences where they have completed a period of crime-free behaviour.

However, the Committee acknowledges that the scheme under the *Crimes (Criminal Organisations Control) Act 2012* is intended to disrupt and prevent serious organised crime. Further, the Commissioner must satisfy the Supreme Court of the grounds for making a declaration under the Act. In the circumstances, and given this safeguard, 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 set by Parliament*

10. As above, the Regulation places certain limits on the spent convictions scheme so that a person may be required to disclose spent convictions when making certain job applications, and so that certain listed sexual offences cannot be spent. It also provides that spent convictions can be used by the Police Commissioner in making an application for a 'criminal organisation' declaration.

**As above, the Regulation places certain limits on the spent convictions scheme so that a person may be required to disclose spent convictions when making certain job applications, and so that certain listed sexual offences cannot be spent. It also provides that spent convictions can be used by the Police Commissioner in making an application for a 'criminal organisation' declaration. The Committee considers that matters such as these that may have significant impacts on individuals, particularly around their employment prospects, be included in primary not subordinate legislation. This would provide greater opportunity for parliamentary scrutiny and debate. The Committee refers the matter to Parliament for consideration.**

### 3. Fisheries Management (General) Regulation 2019

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Adam Marshall MP
Portfolio	Agriculture

#### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to remake, with amendments, the provisions of the *Fisheries Management (General) Regulation 2010*, which is repealed on 1 September 2019 by section 10 (2) of the *Subordinate Legislation Act 1989*. This Regulation makes provision with respect to the following:
  - (a) prohibited size fish, bag limits and protected fish and waters,
  - (b) the lawful use of fishing gear, including commercial and recreational nets and traps,
  - (c) rights of priority between commercial and recreational fishers in the use of fishing gear,
  - (d) recreational fishing fees,
  - (e) general matters relating to fisheries management, including offences and restrictions on certain fishing gear and species of fish,
  - (f) share management fisheries,
  - (g) licensing for commercial fishers and fishing boats,
  - (h) the sea urchin and turban shell restricted fishery, the southern fish trawl restricted fishery and the inland restricted fishery,
  - (i) fishing business transfer rules,
  - (j) fish receivers, fish records and fishing business cards,
  - (k) charter fishing management,
  - (l) the protection of aquatic habitats,
  - (m) threatened species conservation,
  - (n) the composition and functions of ministerial advisory councils,

- (o) enforcement, including the offences under the Act and the regulations for which penalty notices may be issued and the amounts of the penalties payable,
- (p) other minor and savings provisions.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Strict liability offences*

2. More than 30 clauses throughout the Regulation include strict liability offences, that is, actions considered to be offences regardless of the person's intention. Maximum penalties range from \$2,750 to \$11,000. These offences concern matters including the lawful use of fishing gear; priorities in the use of fishing gear; restrictions relating to certain fish species and activities; and the tagging and labelling of fish for sale. Strict liability offences derogate from the common law principle that the mental element of an offence is a necessary part of liability.

**The Regulation includes numerous strict liability offences. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mens rea or the mental element is a necessary part of liability for an offence. However, the committee notes that strict liability offences are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. There is also a public interest in discouraging illegal fishing and maintaining resource sustainability that may be served through the use of strict liability offences. Further, while some of the offences may attract significant monetary penalties, none of them would attract a custodial sentence. In the circumstances, the Committee makes no further comment.**

#### *Penalty notice offences – right to a fair trial*

3. Schedule 8 of the Regulation lists the various offences under the Regulation and the *Fisheries Management Act 1994* for which a penalty notice may be issued by a fisheries officer.

**Schedule 8 of the Regulation sets out the various offences for which a penalty notice may be issued by a fisheries officer. The amounts payable under a notice range from \$75 to more significant penalties, as large as \$5,500 for causing damage to critical habitat.**

**Penalty notices allow a person to pay the amount specified for an offence within a certain time if he or she does not wish to have the matter determined by a court. By removing the automatic right to have a matter determined by a court they may thereby have some impact on a person's right to a fair trial – that is, the automatic right to have the matter heard by an impartial decision maker in public and to put forward his or her side of the case. While a person may still elect for a matter to go to court, many may waive this right and instead pay the on-the-spot fine.**

**However, the Regulation does not remove the right of persons to elect to have the matter heard by a court, and given the practical benefits of penalty notices,**



such as their cost effectiveness and ease of administration, the Committee makes no further comment.

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

*Restricted fisheries – impact on commercial fishers*

4. Part 9 of the Regulation declares the following to be restricted fisheries: sea urchin and turban shell (clause 127); southern fish trawl (clause 145); and inland (clause 155). Section 112 of the *Fisheries Management Act 1994* establishes that a commercial fishing licence does not authorise a person to take fish for sale in a restricted fishery unless authorised by the Minister. The number of licences that can be so endorsed may be limited (section 113). Part 9 of the Regulation may thus have an adverse impact on commercial fishing businesses that wish to fish in restricted fisheries.
5. However, clauses 129, 146 and 157 of the Regulation make allowance for those who were eligible for an endorsement in the relevant restricted fishery immediately prior to the commencement of the Regulation on 1 September 2019, so that they continue to be eligible for an endorsement. Further, the fisheries declared to be restricted fisheries are the same as those declared under the previous Regulation, the *Fisheries Management (General) Regulation 2010*, prior to its repeal.

**The Regulation declares certain ‘restricted fisheries’ and a person holding a commercial fishing licence cannot take fish for sale in a restricted fishery unless authorised to do so by the Minister. This may impact on some commercial fishing businesses. However, the Committee notes that any new impact is likely to be limited. These areas were already restricted fisheries under the previous Regulation, and allowance is made for those who were eligible for an endorsement in a restricted fishery just prior to the commencement of the Regulation. The Committee accordingly makes no further comment.**

## 4. Health Records and Information Privacy Amendment (Health Records) Regulation 2019

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to prescribe certain health records linkage systems administered by the Health Administration Corporation as not being health records linkage systems for the purposes of clause 15 of Schedule 1 (Health Privacy Principles) to the *Health Records and Information Privacy Act 2002*.
2. This Regulation is made under the *Health Records and Information Privacy Act 2002*, including section 75 (the general regulation-making power) and clause 15 of Schedule 1.

### 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*

3. Schedule 1, clause 15 of the *Health Records and Information Privacy Act 2002* (the Act) provides that an organisation must not:
  - a. Include health information about an individual in a health records linkage system unless the individual has expressly consented to the information being so included, or
  - b. Disclose an identifier of an individual to any person if the purpose of the disclosure is to include information about the individual in a health records linkage system, unless the individual has expressly consented to the identifier being disclosed for that purpose.
4. Schedule 1, clause 15 further provides that a 'health records linkage system' is a computerised system that is designed to link health records for an individual held by different organisations for the purpose of facilitating access to health records.
5. However, clause 3 of the Regulation provides that certain health records linkage systems administered by the Health Administration Corporation, namely 'HealtheNet' and 'Clinical Health Information Exchange' are not health records linkage systems for the purpose of schedule 1, clause 15 of the Act. The Regulation therefore exempts these systems from

the above health privacy principles. It may thereby impact on the privacy rights of persons whose health information is recorded in these systems.

6. The Committee does however note that the purpose of health records linkage systems is to allow a patient's medical information to be shared between healthcare providers to optimise his or her care. For example, a note on the eHealth NSW website advises that patient health information is often spread across a number of locations and that HealtheNet 'connects these disjointed systems'. It further advises:

[HealtheNet] provides NSW Health clinicians with secure and immediate access to a patient's recent medical history from across all NSW Local Health Districts and a patient's My Health Record.

This means that irrespective of which NSW Health service a patient attends, their treating doctors, nurses and allied health providers will have the information they need to deliver the best care.

**The Regulation would exempt certain health records linkage systems administered by the Health Administration Corporation from the health privacy principles contained in Schedule 1, clause 15 of the *Health Records and Information Privacy Act 2002*. In particular, information about a person could be included in one of these systems without the need for that person's consent. The Regulation may thereby impact on the privacy rights of persons whose information is recorded in these systems. The Committee acknowledges that the purpose of these systems is to allow NSW Health healthcare providers to share with each other health information about patients to optimise their care. However, given the potential sensitivity of such information, the Committee refers the matter to Parliament to consider whether the privacy exemption is reasonable in the circumstances.**

### **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*

7. As discussed above, the Regulation provides for certain exemptions to the health privacy principles. It may thereby impact on the privacy rights of certain individuals. The Committee generally prefers matters which affect individual rights to be contained in principal legislation to provide a greater opportunity for parliamentary scrutiny and debate.
8. 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.<sup>1</sup>

**The Regulation provides for certain exemptions to the health privacy principles. It may thereby impact on the privacy rights of certain individuals. The Committee**

<sup>1</sup> 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](https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf).

**generally prefers matters which affect individual rights to be contained in principal legislation to provide greater opportunity for parliamentary scrutiny and debate. 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.**

## 5. Protection of the Environment Operations (Underground Petroleum Storage Systems) Regulation 2019

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Matthew Kean MP
Portfolio	Energy and Environment

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to remake, with minor changes, the provisions of the *Protection of the Environment Operations (Underground Petroleum Storage Systems) Regulation 2014*, which will be repealed on 1 September 2019 by section 10(2) of the *Subordinate Legislation Act 1989*.
2. This Regulation includes provisions about the following:
  - (a) the commissioning and decommissioning of underground storage systems (Part 2),
  - (b) the installation of leak detection systems (Part 3),
  - (c) the use of underground storage systems (Part 4),
  - (d) reports (Part 5),
  - (e) record-keeping (Part 6),
  - (f) other minor, consequential or ancillary matters (Parts 1 and 7).

### ISSUES CONSIDERED BY THE COMMITTEE

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

##### *Strict Liability*

3. Parts 2, 3, 4, 5 and 6 of the Regulation set out various requirements relating to: the installation, modification and repair of storage systems; leak detection systems; the use of storage systems; records and reports of events; and the keeping of documents. The clauses set out various management, loss monitoring and leak detection systems to guard against and detect leaks from underground petroleum storage systems.
4. Failure to comply with any of the clauses in these Parts of the Regulation is a strict liability offence. The maximum penalty that applies for most of the offences contained in these Parts is \$22,000 for an individual and \$44,000 for a corporation.

5. Strict liability offences 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. However, the Committee notes that the purpose of the Regulation is to minimise the risk of soil and groundwater contamination from leaking underground storage tanks. It requires operators of underground petroleum storage systems to monitor, detect and stop leaks early and implement best practice management systems at their sites. A regulatory focus on prevention is designed to reduce the possibility of environmental and health impacts that may result from leakage.

**The Regulation includes a number of strict liability offences in relation to the management, loss monitoring and leak detection systems of underground petroleum storage systems. The Committee will generally comment concerning strict liability offences as they derogate from the common law principle that mens rea must be proved to hold a person liable for an offence.**

However, the Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, there is significant public interest in minimising the risk and environmental impact of fuel leaks from underground storage systems; and while the most of the Regulation's strict liability offences attract significant maximum monetary penalties of \$22,000 for an individual, no custodial penalties apply. 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.

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

#### *Regulations incorporating standards of external entities*

6. Clause 30 of the Regulation empowers the Environment Protection Authority (EPA) to issue guidelines for the purposes of the Regulation. Notice of any guidelines must be published in the Gazette.
7. Clauses 17, 18, 20, 23 and 24 of the Regulation include requirements that certain systems comply with EPA guidelines some of which may be issued in future by the EPA. Failure to comply would be a strict liability offence and the maximum penalty that may apply in some cases is \$22,000 for an individual and \$44,000 for a corporation.

**Under the Regulation, the Environmental Protection Authority can issue certain guidelines, and failure to comply with such guidelines would be a strict liability offence for which there may be significant maximum monetary penalties. Unlike regulations, there is no requirement for guidelines to be tabled in Parliament and subject to disallowance under the *Interpretation Act 1987*. To ensure an appropriate level of parliamentary oversight over requirements for which there may be significant penalties for non-compliance, it may be preferable for them to be included in the Regulation, not guidelines. The Committee refers the matter to Parliament for consideration.**

## 6. Public Works and Procurement Regulation 2019

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Damien Tudehope MLC
Portfolio	Finance and Small Business

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to repeal and remake the provisions of the *Public Works and Procurement Regulation 2014*, which would otherwise be repealed on 1 September 2019 by section 10 (2) of the *Subordinate Legislation Act 1989*.
2. This Regulation provides for the following matters:
  - (a) the procurement of goods and services by and for government agencies, including procurement in emergencies, and the supply of goods and services by approved disability employment organisations,
  - (b) agreements between the New South Wales Procurement Board (the Board) and public bodies that are not government agencies relating to procurement by or for those bodies,
  - (c) the investigation by the Board of a complaint that a public trading agency has failed to comply with competitive neutrality principles in relation to tender bids made by the agency in response to an invitation for tenders,
  - (d) the role of the Minister responsible for the public trading agency concerned in responding to a report of the Board with respect to the complaint,
  - (e) savings and formal matters.
3. This Regulation is made under the *Public Works and Procurement Act 1912*, including sections 173 and 178 (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**

##### *Procedural fairness – rules of evidence*

4. Section 164 of the *Public Works and Procurement Act 1912* (the Act) establishes the NSW Procurement Board (the Board). Section 165 provides that the Board is to consist of the Secretary of the Department of Finance, Services and Innovation and the heads of at least 6 other Government Departments, being Departments determined by the Minister.

5. Under clause 9 of the Regulation, the Minister can refer to the Board, for investigation and report, a complaint about a public trading agency with respect to:
  - a) A failure of the agency to comply with competitive neutrality principles in relation to any or all of its public trading activities,
  - b) The inappropriate manner in which competitive neutrality principles are applied by or to the agency in relation to any or all of its public trading activities.
6. Under clause 10, the Board must investigate and report on any complaint the Minister refers to it that is not subsequently withdrawn by the Minister.
7. Under clause 11, the report of the Board with respect to a complaint is to contain a statement of its findings and recommendations about the complaint, and the Board is to arrange for the report to be made publicly available. If the complaint is substantiated, the report must also contain a statement about any changes needed to ensure compliance with the competitive neutrality principles in future.
8. Clause 14(1)(b) provides that in conducting its investigations, the Board can inform itself on any matter in any way it thinks fit and is not bound by the rules of evidence.

**Under the Regulation, the Minister can refer to the NSW Procurement Board for investigation certain complaints about public trading agencies with respect to competitive neutrality in tendering. The Board must then publicly report on its findings and recommendations. In conducting its investigations the Board can inform itself on any matter in any way it thinks fit and is not bound by the rules of evidence.**

**The rules of evidence are an important part of the common law designed to achieve a just result and to prevent the admission of evidence at trial that may unfairly prejudice an accused person. The Committee acknowledges that the Regulation does not concern criminal trials. However, like a Court, the Board has a determinative function and its investigations could result in a public report that may have reputational consequences for any persons named in it. It is therefore important that the Board's findings are reached in a procedurally fair manner.**

**However, it is also important that the Board has flexibility to inform itself about relevant matters so that it can make recommendations to promote compliance with the competitive neutrality principles. Given this focus and the fact that the regulation does not concern criminal or disciplinary proceedings, 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**

#### *Uncertainty regarding the persons to whom power may be delegated*

9. Clause 4 of the Regulation provides that a government agency head may, in any case of emergency, authorise the procurement of goods and services to a value sufficient to meet that particular emergency. Further, he or she can delegate this power to a government agency employee.



**Under the regulation, a government agency head may, in any case of emergency, authorise the procurement of goods and services to a value sufficient to meet that particular emergency. Further, he or she can delegate this power to a government agency 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 power relates to the expenditure of public funds, and that the monetary amounts could be significant in any given case, the Committee considers the regulation should provide more clarity about the persons to whom the power may be delegated. The Committee refers to Parliament the question of whether the power of delegation is too broad.**

*Ill-defined and wide powers*

10. The Regulation provides the Board with some broad powers. For example, clause 5(1) provides that a government agency may procure goods and services that are supplied by a person or body approved as a disability employment organisation and, in doing so, is released from the ordinary procurement obligations that apply under section 176 of the Act e.g. the requirement to ensure that it obtains value for money in exercising its procurement functions.
11. However, clause 5(3) of the Regulation provides that any such procurement is subject to any Board direction issued in relation to it. The Regulation thereby provides the Board with a broad power to determine the requirements with which a government agency must comply in procuring goods and services from a disability employment organisation.
12. Similarly, clause 6(1) of the Regulation provides that the Board may enter into agreements with public bodies that are not government agencies relating to the procurement of goods and services by and for those bodies. Further, clause 6(3) provides that the Board may establish criteria for the exercise of its functions in doing so, including the circumstances in which, and the public bodies to which, access to the arrangements for government agencies will not be given. The Regulation provides no guidance about the circumstances under which a public body should be denied access to the arrangements for government agencies – this is left to the discretion of the Board.

**The Regulation provides the NSW Procurement Board with some broad powers relating to a government agency's procurement of goods and services from an approved disability employment organisation; and to Board agreements with public bodies that are not government agencies. The Committee prefers administrative powers to be drafted with sufficient precision so that their scope and content is clear.**

**However, the Committee acknowledges that these provisions are intended to facilitate government procurement agreements with disability employment organisations and to ensure adequate flexibility for the effective administration of a particular subset of procurement agreements. In the circumstances, the Committee makes no further comment.**

*Matters that should be included in primary legislation*

13. Clause 18 of the Regulation sets out various offences, e.g. providing the Board with information that the person knows to be false or misleading. The offences attract a maximum penalty of an \$11,000 fine or imprisonment for 6 months or both.

**The Committee notes that the Regulation sets out certain offences that attract significant maximum penalties including imprisonment. Offence provisions, particularly those attracting custodial penalties should be included in primary, not subordinate legislation, to ensure opportunity for an appropriate level of parliamentary scrutiny and debate. The Committee refers this matter to Parliament for consideration.**

## 7. Western Sydney Parklands Regulation 2019

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Robert Stokes MP
Portfolio	Planning and Public Spaces

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to replace, with amendments, the *Western Sydney Parklands Regulation 2013*, which was repealed on 1 September 2019 by section 10(2) of the *Subordinate Legislation Act 1989*.
2. This Regulation deals with the management, use and regulation of the land vested in the Western Sydney Parklands Trust, including:
  - (a) the entry of persons onto Trust land,
  - (b) the driving and parking of vehicles,
  - (c) commercial activities,
  - (d) recreational activities,
  - (e) offensive and dangerous conduct,
  - (f) the bringing of animals onto Trust land, and
  - (g) the offences under this Regulation for which penalty notices may be issued and the amount of the penalty payable.
3. This Regulation is made under the *Western Sydney Parklands Act 2006*, including sections 47, 48 and 50 (the general regulation-making power).

### ISSUES CONSIDERED BY THE COMMITTEE

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

##### *Freedom of movement*

4. Part 2 of the Regulation contains various powers limiting entry onto Trust land, enforced by a 'relevant authority' which is defined as the Trust, the Director of the Trust, or an 'authorised officer' (being a ranger, police officer or other person appointed – clause 3). Clause 8 provides that a person must leave the land if directed to do so by a relevant authority, if the person trespasses, causes inconvenience to any person or otherwise contravenes the Regulation. A person who fails to comply with such a direction may be removed from the land (clause 8(4)).

5. A direction may also specify a period during which the person must not return (clause 8(2)). However, in specifying such a period, the relevant authority must take into consideration the seriousness and persistence of the conduct concerned (clause 8(3)).
6. The maximum penalty for remaining on, entering, or returning to the land in contravention of a direction is a \$1,100 fine.
7. The powers under clause 8 may impact on a person's freedom of movement. The right to liberty of movement within the territory of a State is recognised by Article 12 of the International Covenant on Civil and Political Rights (ICCPR).
8. However, powers directing a person to leave or restricting activities appear to be commonplace in relation to similar parklands or facilities used by the public and managed by a trust or authority, including Centennial Park, Sydney Olympic Park, and sporting venues generally.<sup>2</sup>

**Under clause 8 of the Regulation, a relevant authority can direct a person to leave Trust land if he or she trespasses, causes inconvenience to any person, or otherwise contravenes the Regulation. A direction may also specify a period during which a person must not return. Failing to comply with a direction is punishable by a fine of up to \$1,100. The term 'inconvenience' is broad and there is no guidance as to its meaning. The provision may trespass on the freedom of movement.**

**However, the Committee notes that these provisions are in line with similar regulations governing recreational spaces used by the public, where the site is managed by a trust or authority. Further, in specifying a period during which a person must not return to Trust land, the relevant authority must take into consideration the seriousness and persistence of the conduct concerned. The Committee also acknowledges the benefit of the provisions for the majority of parkland users, facilitating the peaceful enjoyment of the environment and amenities, and discouraging anti-social behaviour. In the circumstances, the Committee makes no further comment.**

#### *Freedom of assembly*

9. Clause 17 of the Regulation prohibits various activities on Trust land including holding a public meeting, gathering or demonstration. This may impact on the freedom of assembly. To gather in peaceful protest is a right under Article 21 of the ICCPR.
10. However, clause 17 does allow for the prospect of a public meeting, gathering or demonstration, as an exception to the prohibition, 'with the written permission of, and in the manner approved by, the Trust'. In addition, as noted above, powers restricting

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<sup>2</sup> The Centennial Park and Moore Park Trust Regulation 2014 provides that a person who trespasses, causes nuisance or inconvenience to any person, or breaches the Regulation must leave if requested, and failure to comply is an offence (clause 27). The Sydney Olympic Park Authority Regulation 2018 contains powers to: prohibit categories of persons from entering the facility (clause 4); ban persons for up to 6 months (clause 11); and direct persons to leave for causing inconvenience to others (clause 25). The Sporting Venues Authorities Regulation 2019 provides for directing a person to leave a venue for causing a nuisance or inconvenience (clause 5) and banning entry of persons for up to 12 months (clause 6).

activities appear to be commonplace in relation to similar parklands or facilities used by the public and managed by a trust or authority in NSW.<sup>3</sup>

**Clause 17 of the Regulation lists various activities which are prohibited on Trust land including holding a public meeting, demonstration or gathering. Contravening this provision attracts a fine of up to \$1,100. This may impact on the right to freedom of assembly. However, this provision is in line with similar regulations governing recreational spaces used by the public and managed by a trust and has benefits for the peaceful enjoyment of the parklands by other users. Further, meetings, demonstrations and gatherings may still take place with the written permission of the Trust. In the circumstances, the Committee makes no further comment.**

#### *Privacy and self-incrimination*

11. Clause 37 of the Regulation enables an authorised officer who suspects on reasonable grounds that a person has committed an offence against the Regulation to require the person to state their full name and residential address. Failing to do so without reasonable cause, or giving false or misleading information, is punishable by a fine of up to \$1,100. However, a person is not guilty of an offence unless the officer warned the person that failure to comply is an offence (clause 37(3)).
12. This provision could impact on the right to privacy and the privilege against self-incrimination. The right to privacy is recognised by Article 17 of the ICCPR, while the privilege against self-incrimination is under Article 14(3).
13. The power to demand identity details could be regarded as disproportionate to the minor nature of some of the offences under the Regulation, such as climbing a tree, stepping over temporary fencing, or depositing ice on the ground (clause 26). However, the practicalities of enforcement may require the person's details for the process of issuing a fine. Police have similar powers to require a person to disclose his or her identity in other contexts, such as with regard to driving.<sup>4</sup>

**Clause 37 of the Regulation enables an authorised officer who suspects on reasonable grounds that a person has committed an offence against the Regulation to require the person to state their name and address or face a fine up to \$1,100. This power could impact on the right to privacy and the privilege against self-incrimination. However, the Committee notes that the practicalities of enforcement may require the person's details be supplied to allow a fine to be issued. Further, the power is consistent with police powers in other contexts. Further, for a person to be guilty of an offence, the officer must first warn the person that failure to comply is an offence. In the circumstances, the Committee makes no further comment.**

<sup>3</sup> *The Centennial Park and Moore Park Trust Regulation 2014* provides that a person must not, without the approval of the Trust, organise or participate in a public gathering, meeting or demonstration (clause 13).

<sup>4</sup> For example, section 175(1) of the *Road Transport Act 2013* provides that an authorised officer may require the driver of a vehicle to produce a driver licence and state their name and address. A person must not refuse to comply or give false information: section 175(2). The maximum penalty is 20 penalty units (\$2,200).

## 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.