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Legislation Review Committee

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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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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*.

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PART ONE – BILLS

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

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

Right to a fair trial – pre-recorded evidence hearings

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

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trials are conducted in an appropriate way in the face of the COVID-19 pandemic; and are time limited – they are to be repealed within 12 months of commencement.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

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

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

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

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

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

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

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

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

Right to a fair trial – jury trials

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

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

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

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

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

Retrospectivity

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

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

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

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

Right to humane treatment in detention

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

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

Victims' rights

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

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

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

Disability rights

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

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

Judicial review rights

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

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

Voting rights

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

Right to participate in public life

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

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

Rights of people detained in mental health facilities

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

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

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

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

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

Right to liberty – arrest without warrant

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

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

Right to privacy and privilege against self-incrimination

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

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

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

Property rights and retrospectivity

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

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

In providing that the Ministers can make regulations to retrospectively stipulate that landlords cannot enforce legal rights under residential and commercial tenancy agreements, the Bill may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, particularly where they retrospectively remove rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee notes that the provisions are an extraordinary measure that seeks to respond to the economic crisis created by the COVID-19 pandemic. Further, any regulations made under them could not last for more than 6 months, and could only be made if the relevant Minister considered them reasonable to protect the welfare of residents, tenants and lessees. In the circumstances, the Committee makes no further comment.

Industrial rights

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

However, for the exemption to apply, the supermarkets must only be staffed by those employees who have freely elected to work on the days in question. Further, in the context of the COVID-19 pandemic, the provisions may assist to keep supermarkets well stocked and prevent panic buying, hoarding, and over-crowding of supermarkets with the attendant risk of spreading infection. Given the circumstances, and the safeguard, the Committee makes no further comment.

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

Ill-defined power – working with children checks

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

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

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

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

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

Wide and ill-defined power – development approvals

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

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

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

Ill-defined power – exemption for state vaccine centres

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

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

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

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

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

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

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

Rights to review of administrative decisions

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

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

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

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

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

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

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

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

Henry VIII clauses

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

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

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

Significant matters in subordinate legislation – parole

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

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

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

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

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

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

Part One – Bills

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

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

PURPOSE AND DESCRIPTION

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

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

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

(c) *Civil and Administrative Tribunal Act 2013*

(d) *Constitution Act 1902*

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

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

(g) *Criminal Procedure Act 1986*

(h) *Electronic Transactions Act 2000*

(i) *Environmental Planning and Assessment Act 1979*

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

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

(l) *Jury Act 1977*

(m) *Local Government Act 1993*

(n) *Mental Health Act 2007*

(o) *Motor Accident Injuries Act 2017*

(p) *Private Health Facilities Act 2007*

(q) *Public Health Act 2010*

(r) *Residential Tenancies Act 2010*

(s) *Retail Leases Act 1994*

(t) *Retail Trading Act 2008*

(u) *Subordinate Legislation Act 1989*

(v) *Workers Compensation Act 1987*.

BACKGROUND

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

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

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

4. A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or become an Act (see Legislation Review Act 1987, s8A(2)). The Committee generally comments on any issues raised by Bills as introduced. However, given that this Bill passed both Houses urgently and with amendments, and given its extraordinary nature – incorporating emergency measures to respond to the COVID-19 pandemic – the Committee has elected to report on any issues raised by this Bill as passed.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to a fair trial – pre-recorded evidence hearings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Right to a fair trial – jury trials

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

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

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

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

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

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

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

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

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

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

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

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

Retrospectivity

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

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

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

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

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

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

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

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

Right to humane treatment in detention

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

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

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

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

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

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

Victims' rights

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

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

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

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

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

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

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

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

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

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

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

Disability rights

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

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

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

41. According to the NCAT's website:

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

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

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

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

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

Judicial review rights

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

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

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

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

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

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

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

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

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

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

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

Voting rights

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

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

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

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

Right to participate in public life

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

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

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

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

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

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

Rights of people detained in mental health facilities

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

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

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

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

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

Right to liberty – arrest without warrant

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

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

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

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

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

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

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

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

Right to privacy and privilege against self-incrimination

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

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

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

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

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

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

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

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

Property rights and retrospectivity

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

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

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

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

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

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

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

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

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

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

In providing that the Ministers can make regulations to retrospectively stipulate that landlords cannot enforce legal rights under residential and commercial tenancy agreements, the Bill may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, particularly where they retrospectively remove rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee notes that the provisions are an extraordinary measure that seeks to respond to the economic crisis created by the COVID-19 pandemic. Further, any regulations made under them could not last for more than 6 months, and could only be made if the relevant Minister considered them reasonable to protect the welfare of residents, tenants and lessees. In the circumstances, the Committee makes no further comment.

Industrial rights

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

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

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

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

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

However, for the exemption to apply, the supermarkets must only be staffed by those employees who have freely elected to work on the days in question. Further, in the context of the COVID-19 pandemic, the provisions may assist to keep supermarkets well stocked and prevent panic buying, hoarding, and over-crowding of supermarkets with the attendant risk of spreading infection. Given the circumstances, and the safeguard, the Committee makes no further comment.

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

Ill-defined power – working with children checks

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

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

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

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

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

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

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

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

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

76. In addition, the media release stated:

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

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

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

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

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

Wide and ill-defined power – development approvals

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

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

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

78. Various safeguards apply:

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

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

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

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

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

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

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

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

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

Ill-defined power – exemption for state vaccine centres

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

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

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

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

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

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

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

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

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

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

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

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

Rights to review of administrative decisions

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

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

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

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

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

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

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

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

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

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

90. Further, the regulations made under these provisions:

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

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

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

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

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

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

Henry VIII clauses

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

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

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

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

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

Significant matters in subordinate legislation – parole

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

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

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

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

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

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

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

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

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

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

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

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

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

PURPOSE AND DESCRIPTION

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

BACKGROUND

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

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

3. The Treasurer further stated that:

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

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

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

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

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

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

ISSUES CONSIDERED BY THE COMMITTEE

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

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.