PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

LEGISLATION REVIEW DIGEST

NO. 13/57 – 5 May 2020

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

New South Wales. Parliament. Legislative Assembly.

Legislation Review Committee Legislation Review Digest, Legislation Review Committee, Parliament NSW [Sydney, NSW]: The Committee, 2020, 33pp 30cm

Chair: Felicity Wilson MP

5 May 2020

ISSN 1448-6954

1. Legislation Review Committee – New South Wales
2. Legislation Review Digest No. 13 of 57
I Title.
II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 13 of 57

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

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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 – REGULATIONS

1. BUILDING AND DEVELOPMENT CERTIFIERS REGULATION 2020

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Increased costs to the building industry

The Regulation represents a tightening of the requirements for building certifiers, including in relation to additional training options, higher fees, some new offences and increased penalties. This is likely to add to the costs of doing business in the industry, as confirmed by the Regulatory Impact Statement. However, the Committee notes the likely benefits of increasing consumer protection and upholding building standards. In the circumstances, the Committee makes no further comment.

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

Matters that should be included in primary legislation

Failing to comply with the requirements for registered certifiers to keep records is an offence under Part 7 of the Regulation. The maximum penalty is a fine of $4,400 for an individual and $11,000 for a body corporate (or a lesser amount where a penalty notice is issued). Previously, the principal Act specified a record-keeping offence (with a maximum fine of $5,500), while the 2007 Regulation carried a penalty notice offence and further details for keeping records.

The Committee prefers offences which set significant penalties to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. The Committee also considers that the importance of building certifiers keeping reliable records would be given greater prominence by including the guiding principle and offence in the Act, with administrative detail in the Regulation. The Committee refers these matters to Parliament for consideration.

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

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

Victims' rights

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

As the Committee noted in its Digest No. 12/57, provisions allowing the early release of some inmates in response to COVID-19 may impact on victims' rights. It also noted, however, that

section 276 of the Act contains safeguards, for example, the Commissioner cannot release an inmate under the provisions if the inmate is serving a sentence for murder, a serious sex offence, or a terrorism offence, and in making an order the Commissioner must consider the impact of the release on any victim whose name is recorded in the Victims Register in relation to the inmate.

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

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

Significant matters in subordinate legislation

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

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

3. FAIR TRADING AMENDMENT (CODE OF CONDUCT FOR SHORT-TERM RENTAL ACCOMMODATION INDUSTRY) REGULATION 2020

The Committee discontinued its consideration of the Regulation, which was to commence on 10 April 2020 (clause 2), as it was repealed by the *Fair Trading (Code of Conduct for Short-term Rental Accommodation Industry) Repeal Regulation 2020* which commenced on 9 April 2020 (clause 2).

4. HEALTH PRACTITIONER REGULATION (NEW SOUTH WALES) AMENDMENT (PHARMACY FEES) REGULATION 2020

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

Significant increase in fees

The regulation increases the fees payable by the owner of a pharmacy business when applying for approval of premises as suitable for carrying on a pharmacy business; and when applying to register the holder of a financial interest in a pharmacy business. These fee increases range

from $65 to $115 and represent a 12 to 30 per cent rise – well above any increase necessary to account for changes in the consumer price index. The reasons for this significant increase are unclear and may have some adverse impact on the affected sector of the business community, increasing regulatory expenses. The Committee refers the matter to Parliament for consideration.

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

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

Penalty notice offences – right to a fair trail

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

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

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

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

Matters that should be included in primary legislation

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

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for

an amending Bill, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

6. PUBLIC HEALTH AMENDMENT (PENALTY NOTICES) REGULATION 2020

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

Freedom of movement

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

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

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

Freedom of assembly and association

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

The Committee notes that the Regulation is therefore part of a regime that also places restrictions on people's right to freedom of assembly and association, rights contained in Articles 21 and 22 of the ICCPR. The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest; while the right to freedom of association protects their freedom to form and join associations to pursue a common goal, and to exchange ideas and information.

However, Articles 21 and 22 also recognise that derogation from these rights may be warranted in certain circumstances, including to protect public health. Again, as the Regulation is part of a regime to protect public health in the face of COVID-19, the Committee considers

that it fits within this public health exemption and that the limits it places on freedom of assembly and association are reasonable in the circumstances, particularly as the provisions are time limited. The Committee makes no further comment.

Penalty notice offences - right to a fair trial

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

Penalty notices allow parties to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a party's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that the amounts of $1000 and $5000 are significant amounts to be imposed on a party by way of penalty notice.

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

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

Reduced demand for certain goods and services

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

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

However, each of the ministerial directions sets down the Minister's public health grounds for making the orders including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious. Further, the Government has taken steps to support businesses during the pandemic, for example, through passage of the *Treasury Legislation Amendment (COVID-19) Bill 2020*, discussed in the Committee's Digest No. 12/57 that provides payroll tax concessions to eligible employers.

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

As above, the provisions are also time limited. In the circumstances, the Committee makes no further comment.

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

Matters that should be included in primary legislation

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

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

Part One – Regulations

1. Building and Development Certifiers Regulation 2020

Date tabled	24 March 2020
Disallowance date	12 November 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to make provision for the following—

(a) the registration of certifiers,

(b) the insurance required to indemnify registered certifiers,

(c) conflicts of interest relating to registered certifiers,

(d) the contracts required for certification work,

(e) accreditation authorities,

(f) record keeping,

(g) the carrying out of certification work by or on behalf of a council,

(h) permitting certain registered certifiers and other persons to carry out certain regulated work,

(i) matters to be included on the register of registrations and approvals,

(j) providing that supervision is certification work,

(k) the classes of registration for certifiers and the qualifications, experience, skills and knowledge required for registration in a class,

(l) the code of conduct for registered certifiers,

(m) continuing professional development requirements for registered certifiers,

(n) the fees payable,

(o) the offences under the Act and this Regulation for which penalty notices may be issued.

2. This Regulation is made under the *Building and Development Certifiers Act 2018* which commences on 1 July 2020 (as does the Regulation).[1] The new legislative framework of the Act and Regulation is intended to 'allow the Government to more effectively register and regulate the conduct of certifiers, promoting public confidence in the certification system and the building and construction industry more generally.'[2]

3. Stakeholder organisations and the community were invited to give feedback on the proposed Regulation. The closing date for submissions was 28 October 2019.

4. The Act and Regulation responded in part to some of the recommendations made by the *Independent Review of the Building Professionals Act 2005*, known as the Lambert report.[3]

ISSUES CONSIDERED BY THE COMMITTEE

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

Increased costs to the building industry

5. The Regulatory Impact Statement assessed the overall cost to the industry of proceeding with the Regulation as high. Costs were associated with stronger compliance obligations, increased fees and new penalty notice offences.[4] The Regulatory Impact Statement found that some of the industry's increased costs would flow on to consumers although these might be off-set by greater consumer protection.[5] The overall benefit to consumers was assessed as high. Significantly, the overall benefit to industry was also assessed as high. Potential industry benefits included modernisation and simplification of requirements and reduction of some 'red tape'.[6]

6. Expanded training obligations can apply to prospective building certifiers under Part 2 of the Regulation. Clause 4 provides that the Secretary[7] may require an applicant for registration as a certifier to have successfully completed recognised training, in addition to the applicant having the qualifications, skills, knowledge and experience required. The

[1] Section 2 of the Regulation. The proclamation of the Act (2020-77) was published on the NSW Legislation website on 4 March 2020.

[2] NSW Department of Customer Service, Regulatory Impact Statement, *Building and Development Certifiers Regulation*, September 2019, p 4: https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0005/559256/Regulatory-Impact-Statement.pdf.

[3] Lambert, Michael, *Independent Review of the Building Professionals Act 2005: Final Report*, October 2015. See in particular the Executive Summary (p 11), Chapter 14 (p 211) and Chapter 17 (p 288): https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0017/604520/Independent-review-of-the-Building-Professionals-Act-2005.pdf

[4] Regulatory Impact Statement, p 15.

[5] Regulatory Impact Statement, p 15.

[6] Regulatory Impact Statement, p 16.

[7] 'Secretary' is defined by section 4 of the *Building and Development Certifiers Act 2018* as the Commissioner for Fair Trading or Secretary of the Department of Customer Service.

Regulatory Impact Statement expected that training courses would be conducted by private providers, and confirmed that costs would be associated with the training.[8]

7. The conflict of interest provisions under Part 4 of the Regulation may also have financial implications. A registered certifier who works on behalf of a council is exempt from having a conflict of interest and is able to issue a certificate to the council for a development with a capital investment value of less than $2 million: clause 25(2). This represents a substantial decrease of the previous limit of $5 million under the *Building Professionals Regulation 2007*. The intention behind the reduction is to restrict the conflict of interest exemption to residential building work, and to avoid it applying to the majority of commercial developments.[9]

8. The fees for certifiers under the *Building Professionals Regulation 2007* had not changed since it commenced that year. In Schedule 6 of the 2020 Regulation, application fees for the registration of certifiers have increased slightly to account for changes in the Consumer Price Index.[10] Some other fees have increased to take into account inflation over the last 12 years, including the application fee for obtaining an exemption from a provision of the Act, which has increased from $100 to $200.[11]

9. Indirect costs to the industry are connected with the introduction of new offences. For example, breaching the Code of Conduct is made an offence under Schedule 5 of the Regulation. The maximum penalty is $11,000 (100 penalty units) for an individual or $22,000 (200 penalty units) for a body corporate. Prescribing the Code of Conduct under the Regulation, rather than by a Ministerial order, is intended to emphasise its importance.[12] Section 32 of the principal Act also acknowledges the Code of Conduct and authorises the Regulation to create offences for breaching the Code.

10. Penalty notice offences enforce compliance by allowing parties to pay a specified monetary amount instead of appearing before a Court to have the matter heard. The penalties for some of these offences have been increased under Schedule 7 of the Regulation. For example, the offence of failing to comply with the record-keeping requirements under clause 49(6) of the Regulation, when enforced by a penalty notice, attracts a fine of $1,500 for an individual and $3,000 for a corporation. This doubles the penalty notice amounts of $750 and $1500 which applied under Schedule 3 of the 2007 Regulation.

The Regulation represents a tightening of the requirements for building certifiers, including in relation to additional training options, higher fees, some new offences and increased penalties. This is likely to add to the costs of doing business in the industry, as confirmed by the Regulatory Impact Statement. However, the Committee notes the likely benefits of increasing consumer protection and upholding building standards. In the circumstances, the Committee makes no further comment.

[8] Regulatory Impact Statement, pp 19, 35.

[9] Regulatory Impact Statement, p 23.

[10] Regulatory Impact Statement, p 35.

[11] This fee appears in the 2020 Regulation at Schedule 6, Part 1, item 11 (where one fee unit = $100) and in the 2007 Regulation at Schedule 2, item 6.

[12] Regulatory Impact Statement, p 31. The previous code of conduct for accredited certifiers is available as Attachment A to the Building Professionals Board, *Code of Conduct: A Guide*, 2006 (republished 2007): https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0006/458385/codeofconductguide.pdf

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

Matters that should be included in primary legislation

11. The previous *Building Professionals Act 2005* recognised record-keeping in a separate division of Part 6, which outlined the requirements for accredited certifiers. Offences applied where certifiers contravened the requirement under section 60(1) to keep documents and records as prescribed in the Regulations, or contravened the requirement under section 60(2) to provide a copy of a document or record if requested by the Building Professionals Board. The maximum penalty for each offence was a fine of $5,500 (50 penalty units). Further details of the records required to be kept were outlined by the 2007 Regulation under Part 3, while Schedule 3 provided lesser fine amounts when the relevant offences were dealt with by a penalty notice.

12. The new *Building and Development Certifiers Act 2018* (commencing on 1 July 2020) does not contain distinct record-keeping provisions.[13] Rather, the 2020 Regulation sets out at Part 7, Division 1 the obligations on registered certifiers for keeping records. Breaching the requirements is punishable by a maximum penalty of $4,400 (40 penalty units) for an individual and $11,000 (100 penalty units) for a body corporate: clause 49(6). Lesser amounts apply when offences are dealt with by penalty notices: Schedule 7.

> **Failing to comply with the requirements for registered certifiers to keep records is an offence under Part 7 of the Regulation. The maximum penalty is a fine of $4,400 for an individual and $11,000 for a body corporate (or a lesser amount where a penalty notice is issued). Previously, the principal Act specified a record-keeping offence (with a maximum fine of $5,500), while the 2007 Regulation carried a penalty notice offence and further details for keeping records.**
>
> **The Committee prefers offences which set significant penalties to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. The Committee also considers that the importance of building certifiers keeping reliable records would be given greater prominence by including the guiding principle and offence in the Act, with administrative detail in the Regulation. The Committee refers these matters to Parliament for consideration.**

[13] The keeping of records by registered certifiers is simply listed under section 120(2) as one of the matters that may be dealt with by the Regulations.

2. Crimes (Administration of Sentences) Amendment (COVID-19) Regulation 2020

Date tabled	3 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Counter Terrorism and Corrections

PURPOSE AND DESCRIPTION

1. Under section 276 of the *Crimes (Administration of Sentences) Act 1999* (the Act) the Commissioner of Corrective Services (the Commissioner) may release an inmate on parole if the inmate belongs to a class specified in this Regulation and if the Commissioner is satisfied that it is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic.

2. The object of this Regulation is to prescribe the following classes of inmates as eligible for release on parole by the Commissioner during the COVID-19 pandemic –

   (a) An inmate whose health is at higher risk during the COVID-19 pandemic because of an existing medical condition or vulnerability.

   (b) An inmate whose earliest possible release date is within 12 months.

3. Inmates who are national security interest inmates, male inmates classified as Category AA, A1, A2 or E1 and female inmates classified as Category 5 or 4 or E1 are excluded and cannot be released on parole by the Commissioner.

4. Section 276(3) of the Act provides that certain inmates may not be released on parole by the Commissioner and section 276(4) of the Act requires the Commissioner to consider various factors before releasing an inmate on parole.

5. The Commissioner's functions in respect of releasing inmates on parole under section 276 of the Act are limited to a period of 6 months from 25 March 2020 (or a total period of up to 12 months from that date if a longer period is prescribed by the regulations).

6. This regulation is made under the *Crimes (Administration of Sentences) Act 1999*, including sections 271 (the general regulation-making power) and 276(1)(a) and 10(a).

ISSUES CONSIDERED BY THE COMMITTEE

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

Victims' rights

7. As above under section 276 of the Act the Commissioner may release an inmate on parole if the inmate belongs to a class specified in the regulations and if the Commissioner is satisfied that it is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic. This section was inserted into the Act by *the COVID-19 Legislation Amendment (Emergency Measures) Bill 2020*, about which the Committee commented in its Digest No. 12/57.

8. Accordingly, the Regulation prescribes the following classes of inmate as eligible for release on parole by the Commissioner during the COVID-19 pandemic –

   (a) An inmate whose health is at higher risk during the COVID-19 pandemic because of an existing medical condition or vulnerability other than an excluded inmate.

   (b) An inmate whose earliest possible release date is within 12 months other than an excluded inmate (clause 330(1)).

9. The inmates who are excluded and who cannot be released on parole by the Commissioner are 'national security interest inmates', male inmates classified as Category AA, A1, A2 or E1 or female inmates classified as Category 5 or 4 or E1 (clause 330(1) and (3)).

10. The Commissioner may designate an inmate a 'national security interest inmate' if of the opinion that:

    (a) The inmate constitutes an extreme danger to other people or an extreme threat to good order and security, and

    (b) There is a risk that the inmate may engage in, or incite other persons to engage in activities that constitute a serious threat to the peace, order or good government of the State or any other place (clause 15(3A) of the *Crimes (Administration of Sentences) Regulation 2014*).

11. Male inmates classified as Category AA, A1 and A2, and female inmates classified as 5 or 4 are maximum security inmates. Inmates classified as E1 are inmates who have previously escaped from prison and who have been classified as maximum security inmates.[14]

12. The Commissioner's power to release inmates on parole under section 276 of the Act is limited to a period of 6 months after its commencement, or not more than 12 months after commencement if prescribed by the regulations (see sections 274 and 276(1) of the Act). Further, the Regulation provides that the Commissioner can only make an

[14] *Corrective Services NSW FactSheet 9 Classification and Placement*: https://www.correctiveservices.justice.nsw.gov.au/Documents/CSNSW%20Fact%20Sheets/classification-and-placement.pdf

order releasing an inmate under section 276 if satisfied that it does not pose an unacceptable risk to community safety (clause 330(2)).

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

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

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

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

Significant matters in subordinate legislation

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

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

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

3. Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation 2020

Date tabled	24 March 2020
Disallowance date	Not applicable
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The objects of this Regulation were as follows:

   (a) to declare a code of conduct for the short-term rental accommodation industry,

   (b) to prescribe persons who provide property management services as an additional class of persons to whom the code of conduct applies,

   (c) to exclude certain arrangements (including the provision of refuge or crisis accommodation) from the operation of the code of conduct,

   (d) to provide for appeals against the listing of a person on the exclusion register kept under the code of conduct,

   (e) to authorise the imposition and recovery of fees in connection with the enforcement and administration of the code of conduct,

   (f) to specify the maximum amount that may be imposed as a civil penalty for contravention of the code of conduct,

   (g) To enable the offence of contravention of the code of conduct to be dealt with by way of penalty notice.

2. This Regulation was to be made under the *Fair Trading Act 1987*, including Division 4A of Part 4, section 67 and section 92 (the general regulation-making power).

3. This Regulation was to commence on 10 April 2020 and make changes relating to amendments made by the *Fair Trading Amendment (Short-Term Rental Accommodation) Act 2018*, which commenced on 10 April 2020.[15]

[15] The proclamation of the *Fair Trading Amendment (Short-Term Rental Accommodation) Act 2018* (2020-86) was published on the NSW Legislation website on 13 March 2020.

ISSUES CONSIDERED BY THE COMMITTEE

The Committee discontinued its consideration of the Regulation, which was to commence on 10 April 2020 (clause 2), as it was repealed by the *Fair Trading (Code of Conduct for Short-term Rental Accommodation Industry) Repeal Regulation 2020* which commenced on 9 April 2020 (clause 2).

4. Health Practitioner Regulation (New South Wales) Amendment (Pharmacy Fees) Regulation 2020

Date tabled	27 March 2020
Disallowance date	To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to increase certain fees payable under the *Health Practitioner Regulation National Law (NSW)* relating to—

   (a) applications for the approval of premises as suitable for carrying on a pharmacy business by a pharmacist, and

   (b) applications for the registration of the holder of a financial interest in a pharmacy business.

2. This Regulation is made under the *Health Practitioner Regulation National Law (NSW)*, including section 247A (the NSW regulation-making power) and clause 12(5) of Schedule 5F.

ISSUES CONSIDERED BY THE COMMITTEE

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

Significant increase in fees

3. Under Schedule 5F, Part 3, Clause 12 of the *Health Practitioner Regulation National Law (NSW) No 86A*, an application for:

   - approval of premises as suitable for carrying on a pharmacy business by a pharmacist; and
   - an application to register the holder of a financial interest in a pharmacy business;

   must be made to the Pharmacy Council of NSW by the owner or owners of the pharmacy business.

4. The regulation increases the fees payable by the owner or owners of the pharmacy business when making these applications. These fee increases range from $65 to $115

and represent a 12 to 30 per cent rise – well above any increase necessary to account for changes in the consumer price index.[16]

The regulation increases the fees payable by the owner of a pharmacy business when applying for approval of premises as suitable for carrying on a pharmacy business; and when applying to register the holder of a financial interest in a pharmacy business. These fee increases range from $65 to $115 and represent a 12 to 30 per cent rise – well above any increase necessary to account for changes in the consumer price index. The reasons for this significant increase are unclear and may have some adverse impact on the affected sector of the business community, increasing regulatory expenses. The Committee refers the matter to Parliament for consideration.

[16] The quarterly percentage change in the consumer price index, non-seasonally adjusted, at December 2019, was 0.7 per cent: https://www.rba.gov.au/inflation/measures-cpi.html.

5. Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020

Date tabled	9 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Brad Hazzard
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction under the *Public Health (COVID-19 Spitting and Coughing) Order 2020* about intentionally spitting or coughing on:

    - a public official or
    - another worker while the worker is at the worker's place of work or travelling to or from the worker's place of work,

    in a way that is likely to cause fear about the spread of COVID-19.

2. This Regulation is made under the *Public Health Act 2010,* including sections 118 and 134 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Penalty notice offences – right to a fair trail

3. Under section 7 of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, the Minister may take such action, and may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences. An order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order.

4. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction.

5. On 9 April the *Public Health (COVID-19 Spitting and Coughing) Order 2020* (the Order) was published in the NSW Government Gazette. The Minister made the Order under section 7 of the Act, directing under clause 5 that a person must not intentionally spit or cough on a public official in a way that would reasonably be likely to cause fear about

the spread of COVID-19. Clause 5 of the Order was subsequently amended to protect all workers – not only public officials – while they are at their place of work or travelling to or from it, and the amended Order was published in the NSW Government Gazette on 19 April 2020.

6. Clause 4 of the Order also set down the Minister's grounds for concluding that a situation has arisen that is, or is likely to be, a risk to public health including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious.

7. The Order was drafted to commence when the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* (the Regulation) commenced, which was 9 April 2020[17] and the amendments to the Order commenced on 20 April 2020.[18]

8. The Regulation allows for a $5000 penalty notice to be issued for a contravention of the Ministerial direction under clause 5 of the Order, that is, when an individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

> **The Regulation provides that a penalty notice of $5000 can be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order 2020* by intentionally spitting or coughing on a public official, or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.**
>
> **Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.**
>
> **However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.**

[17] See clause 2 of the Order which provides that the Order is to commence when the Regulation commences; and clause 2 of the Regulation which provides that it is to commence on the day that it is published on the NSW Legislation website, which was 9 April 2020.

[18] See clause 2 of the *Public Health (COVID-19 Spitting and Coughing) Amendment Order 2020*.

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

Matters that should be included in primary legislation

9. As above, the Regulation allows for a $5000 penalty notice to be issued for a contravention of the Ministerial direction under clause 5 of the Order, that is, when an individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

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

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

6. Public Health Amendment (Penalty Notices) Regulation 2020

Date tabled	25 March 2020
Disallowance date	To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence occurring between 26 March 2020 and 25 March 2021 against a provision of the *Public Health Act 2010* involving a contravention of the following—

   (a) a Ministerial direction to deal with a public health risk,

   (b) an order to close public premises on public health grounds,

   (c) a public health order relating to COVID-19.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Freedom of movement

3. Under section 7 of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, the Minister may take such action, and may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences. An order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order.

4. Under section 10 of the Act, a person who is subject to a ministerial direction under section 7, and who has notice of the direction is guilty of an offence if he or she fails to comply with the direction without reasonable excuse.

5. Under section 11 of the Act, if the Secretary of the Ministry of Health considers that access to premises where members of the public congregate should be restricted or prohibited to protect public health, the Secretary may by order direct that access to the premises be restricted or prohibited. An order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order. Any person who controls or is involved with the control of the premises, and has notice of

the direction, must take reasonably practicable action to comply with the direction or be guilty of an offence.

6. Similarly, under section 62 of the Act an authorised medical officer may make a public health order in respect of a person if satisfied on reasonable grounds that the person has, or has been exposed to, certain conditions and may be a risk to public health. Such an order may require the person to do a number of things including undergoing specified treatment and may also authorise the detention of the person for the order's duration. Section 70(1) of the Act provides that a person who fails to comply with a requirement of a public health order is guilty of an offence.

7. The Regulation allows penalty notices to be issued to anyone who has committed an offence under the above provisions of the Act of:

    - not following a ministerial direction (sections 7 and 10 of the Act);
    - not taking reasonably practicable action to comply with an order issued by the Secretary restricting or prohibiting access to premises (section 11 of the Act); or
    - not complying with a public health order (sections 62 and 70(1) of the Act);

    where the offence occurs between 26 March 2020 and 25 March 2021.

8. As of 27 April 2020, seven ministerial directions had been issued under section 7 of the Act in response to the COVID-19 pandemic, including the following:

    - The *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020*, under which the Minister directs that a person must not leave their residence without reasonable excuse such as obtaining food or other goods and services; travelling for the purposes of undertaking work or education if the person cannot do so from home; exercise; or medical or caring reasons. The ministerial direction also provides that a person must not participate in a gathering in a public place or more than two persons except for a gathering of members of the same household, or for essential work or education.
    - The *Public Health (COVID-19 Air Transportation Quarantine) Order 2020*, under which the Minister directs that persons who arrive in NSW by aircraft and have been in another country in the 14 days before their arrival must undertake mandatory quarantine for a period of 14 days, excluding the flight crew of aircraft.
    - The *Public Health (COVID-19 Maritime Quarantine) Order 2020*, which contains certain ministerial directions to persons arriving on or disembarking from a vessel in NSW, and exemptions, to deal with the public health risk of COVID-19 and its possible consequences. For example, it provides that a person who has arrived in NSW on a vessel that has come from a port outside NSW must not disembark from the vessel unless the person is authorised to do so by the Commissioner of Police, or is required to do so because of an emergency. Further, a person who is authorised to disembark must go directly to a quarantine facility as directed by the Commissioner of Police or go to a hospital or other medical facility for treatment.

- The *Public Health (COVID-19 Self-Isolation) Order 2020*, under which the Minister directs that a person diagnosed with COVID-19 must immediately travel to a suitable residence or hospital for assessment. On being discharged from the hospital the person must travel directly to a suitable residence and, except in specified circumstances, stay there by him or herself until medically cleared.

- The *Public Health (COVID-19 Residential Aged Care Facilities) Order 2020*, under which the Minister gives a direction restricting persons from entering or remaining on the premises of residential aged care facilities.

- The *Public Health (COVID-19 Lord Howe Island) Order 2020*, under which the Minister gives a direction restricting access to and from the Island to deal with the public health risk of COVID-19 and its possible consequences.

9. Each of the ministerial directions also set down the Minister's grounds for concluding that a situation has arisen that is, or is likely to be, a risk to public health including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious.

10. Each of the ministerial directions will last for no longer than 90 days because section 7(5) of the Act provides that unless it is earlier revoked, an order made under section 7 expires 90 days after it was made or on such earlier date as may be specified in the order.

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

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

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

Freedom of assembly and association

11. As noted above, the Regulation allows penalty notices to be issued to anyone who has committed certain offences under the Act including by failing to comply with a ministerial direction issued under section 7, or an order issued under section 11 that prohibits access to certain premises on public health grounds.

12. As is also noted, a number of ministerial directions have now been issued under section 7 in response to the COVID-19 pandemic and these restrict gathering and movement; enforce quarantine on those arriving in NSW from aircraft and maritime travel; require people diagnosed with COVID-19 to self-isolate; and restrict access to aged care facilities and to and from Lord Howe Island.

> **As noted, the Regulation allows penalty notices to be issued to anyone who has committed certain offences under the Act including by failing to comply with a ministerial direction issued under section 7 or an order issued under section 11 to close public premises on public health grounds. As has also been noted, there are ministerial directions currently in place pursuant to section 7, and made in response to COVID-19, that restrict movement – and also gathering – and that require people to self-isolate, spend time in quarantine, and to stay away from certain locations.**
>
> **The Committee notes that the Regulation is therefore part of a regime that also places restrictions on people's right to freedom of assembly and association, rights contained in Articles 21 and 22 of the ICCPR. The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest; while the right to freedom of association protects their freedom to form and join associations to pursue a common goal, and to exchange ideas and information.**
>
> **However, Articles 21 and 22 also recognise that derogation from these rights may be warranted in certain circumstances, including to protect public health. Again, as the Regulation is part of a regime to protect public health in the face of COVID-19, the Committee considers that it fits within this public health exemption and that the limits it places on freedom of assembly and association are reasonable in the circumstances, particularly as the provisions are time limited. The Committee makes no further comment.**

Penalty notice offences - right to a fair trial

13. The Regulation allows for a $1000 penalty notice to be issued to an individual who has committed an offence under the Act of:

- not following a ministerial direction (sections 7 and 10 of the Act);
- not taking reasonably practicable action to comply with an order issued by the Secretary restricting or prohibiting access to premises (section 11 of the Act); or
- not complying with a public health order (sections 62 and 70(1) of the Act).

14. It also allows for a $5000 penalty notice to be issued to a corporation that has breached such a ministerial direction made under section 7, or order issued by the Secretary under section 11.

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

Penalty notices allow parties to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a party's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that the amounts of $1000 and $5000 are significant amounts to be imposed on a party by way of penalty notice.

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

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

Reduced demand for certain goods and services

15. As noted, the Regulation allows penalty notices to be issued for breaching a ministerial direction under section 7 of the Act, an order to close public premises on public health grounds, or a public health order relating to COVID-19, between 26 March 2020 and 25 March 2021. Further, a number of ministerial directions have now been issued under section 7 in response to the COVID-19 pandemic and these restrict gathering and movement; enforce quarantine on those arriving in NSW from aircraft and maritime travel; require people diagnosed with COVID-19 to self-isolate; and restrict access to aged care facilities and to and from Lord Howe Island.

16. Each of the ministerial directions sets down the Minister's grounds for concluding that a situation has arisen that is, or is likely to be, a risk to public health including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious.

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

The Regulation is therefore part of a regime that may have some adverse impact on the business community. Ministerial directions enforcing quarantine on those arriving in NSW from aircraft and maritime travel; requiring people diagnosed with COVID-19 to self-isolate; and restricting gathering and movement so that people cannot leave home except for essential reasons will

decrease demand for non-essential goods and services, and services that involve large indoor or outdoor gatherings, such as the hospitality and event industry.

However, each of the ministerial directions sets down the Minister's public health grounds for making the orders including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious. Further, the Government has taken steps to support businesses during the pandemic, for example, through passage of the *Treasury Legislation Amendment (COVID-19) Bill 2020*, discussed in the Committee's Digest No. 12/57 that provides payroll tax concessions to eligible employers.

Given the emergency public health considerations and the measures taken to support business, the Committee considers that the regime of which the Regulation is part is reasonable and proportionate in the circumstances, despite some adverse impact on business. As above, the provisions are also time limited. In the circumstances, the Committee makes no further comment.

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

Matters that should be included in primary legislation

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

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

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

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.