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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*.

Conclusions

PART ONE – BILLS

1. ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOMS AND EQUALITY) BILL 2020*

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

Right to freedom from discrimination – broad exceptions

Schedule 1[2] of the Bill seeks to amend the *Anti-Discrimination Act 1977* (the Act) by introducing a new ground of unlawful discrimination – discrimination on the grounds of religious beliefs or religious activities. Schedule 1[2] defines religious beliefs and religious activity, and identifies the circumstances under which unlawful discrimination on the grounds of religious beliefs or religious activities occurs. Religious beliefs are defined to include having a religious conviction, belief, opinion or affiliation; or not having any such conviction, belief, opinion or affiliation.

The acts that the Bill would outlaw on the grounds of religious discrimination are broadly consistent with the kinds of behaviour that are outlawed under the Act in relation to existing grounds of discrimination e.g. racial or sex discrimination. This includes certain behaviour in the areas of work, education, accommodation, and the provision of goods and services.

However, schedule 1[2] also seeks to insert section 22M into the Act to create an exception for "religious ethos organisations". Such organisations would not be taken to discriminate on the grounds of religious beliefs or religious activities if they genuinely believed their conduct: was consistent with the doctrine or beliefs of the religion of their organisation; was required because of the religious susceptibilities of the adherents of their religion; or that it furthered or aided the relevant organisations in acting in accordance with the doctrines of their religion. For instance, if a "religious ethos organisation" satisfied one of these criteria it would not discriminate by giving preference to a person of its religion in areas covered by schedule 1[2] to the Bill e.g. employment, education or accommodation.

The Bill defines "religious ethos organisation" broadly to include private educational authorities, charities and any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. The Bill does not require a "religious ethos organisation" to be established to propagate religion for it to be covered by the proposed exception.

In contrast, section 56 of the Act currently provides a general exception to the Act for certain acts or practices of bodies established to propagate religion e.g. in the ordination of priests; or in the appointment of any other person in any capacity.

In short, if passed, the Bill may protect behaviour from certain educational authorities, charities etc, that is currently deemed to be discriminatory and unlawful under the Act. The Committee acknowledges that the Bill seeks to balance freedom of religion with other human rights. However, the Committee refers the amendments to Parliament to consider whether they are reasonable and proportionate in the circumstances.

Freedom of contract

As above, the Bill seeks to amend the Act by introducing a new ground of unlawful discrimination on the basis of religious belief or activities. The acts that the Bill would outlaw on the grounds of religious discrimination are broadly consistent with the kinds of behaviour that are outlawed under the Act in relation to existing grounds of discrimination. However, the Bill also sets down additional unlawful acts.

Specifically, schedule 1[2], proposed subsection 22N(3) would make it unlawful for an employer to restrict, limit, prohibit or otherwise prevent an employee from engaging in a "protected activity". A "protected activity" is defined as a religious activity that occurs at a time other than when the employee is performing work, and at a place other than the employer's place of work. Further, "protected activity" must not include any direct criticism of, or attack on the employer, and must not cause any direct and material financial detriment to the employer. However, direct and material financial detriment does not include the loss of sponsorship, or a boycott of the employer, in response to the "protected activity".

These amendments may limit the provisions that can be enforced under an employment contract. They may also limit what can be included in an employment contract as regards codes of conduct. The amendments may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms to which they are subject.

The Committee acknowledges that statutory limitations on freedom of contract are not uncommon e.g. where this is deemed necessary to address the unequal bargaining power of parties. However, it also notes the amendments may have some potential for adverse financial impact on some employers e.g. through loss of sponsorships. The Committee refers these amendments to Parliament to consider whether the limits they may place on freedom of contract are reasonable and proportionate in the circumstances.

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

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

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

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

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

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

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

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

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

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

Right to a fair trial – written pleas

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

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

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

Right to a fair trial – appearance by audio visual link

The *COVID-19 Legislation (Emergency Measures) Bill 2020* which passed Parliament on 24 March 2020, contained special provisions to facilitate increased use of audio visual links in court proceedings during the COVID-19 pandemic. Schedule 1.4 to the current Bill expands on

this and includes a new power so that an accused person who is not in custody can appear by audio visual link if the court so directs or the parties to the proceedings consent.

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

However, various safeguards apply including that the court can only make a direction to proceed by audio visual link if it is in the interests of justice having regard to a number of factors including the public health risk posed by the COVID-19 pandemic, and if satisfied that the accused person is able to have private communication with his or her legal representative and has had reasonable opportunity to do so. Further, the provisions are time limited and will last for less than 12 months from their commencement. Given the safeguards, time limit, and the extraordinary public health risk created by COVID-19 to which the provisions seek to respond, the Committee makes no further comment.

Freedom of movement

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

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

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

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

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

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

pandemic response and it grants a sheriff's officer the power to issue directions to people when providing that assistance.

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

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

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

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

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

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

Significant matters in subordinate legislation and Henry VIII clause

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

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

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

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

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

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

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

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

Retrospectivity and victims' rights

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

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

In the current case, as the retrospective provisions concern parole, they may impact on victims' rights. However, the Committee notes that parole amendments that came into force in February 2018 may have unintentionally removed the Authority's power to grant parole to certain offenders, and the provisions seek to restore this power and validate any actions taken on the assumption that the powers continued to exist. Further, safeguards apply to the powers

and an offender is not to be released on parole where the Authority determines it is not in the interests of community safety. In addition, the Committee acknowledges that given the public health risks created by COVID-19, it is important that the Authority have the requisite powers to grant parole to offenders in appropriate cases to prevent prison over-crowding. In the circumstances, the Committee makes no further comment.

Right to personal physical integrity and privacy – human tissue

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

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

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

Rights of people detained in mental health facilities

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

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

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

Right to personal physical integrity – compulsory testing

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

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

Retrospectivity and freedom of contract

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

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

By providing that NCAT may terminate fixed term tenancy agreements, the Bill may impact on freedom of contract – the freedom of parties to choose the contractual terms to which they are subject. The provisions also have retrospective effect, limiting the ability of landlords to rely on their rights under existing agreements. As above, the Committee generally comments on retrospective provisions, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee notes that the provisions are an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic. Accordingly, the time during which tenants can apply for termination is limited, relating to the "moratorium period" that ends on 15 October 2020. Further, only "impacted tenants" – those who have lost at least 25 per cent of their household income as a result of COVID-19 – can apply for termination. In addition, on making the termination order, NCAT can order the tenant to pay the landlord up to two weeks' rent in compensation.

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

Retrospectivity – workers compensation liability

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

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

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

The Committee would prefer such safeguards to be wholly included in primary legislation, not the regulations, to foster an appropriate level of parliamentary oversight. However, the Committee acknowledges the amendments in schedule 1.34 are important to ensure that frontline workers who contract COVID-19 are protected by workers compensation benefits. Subject to the observation that the provisions to protect individual employers from rising premiums, and to spread the cost of claims, would ideally be located in primary legislation, the Committee makes no further comment.

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

Wide and ill-defined administrative power – statutory time limits

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

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

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

The Committee also notes the safeguards contained in the Bill. As above, the powers can only be used for the purposes of responding to the public health emergency created by COVID-19.

Accordingly, the provisions are subject to a sunset clause and will be automatically repealed no later than 31 December 2020. Further, regulations cannot be made under the provisions to shorten statutory time periods or extend them beyond 31 December 2020; and cannot be made unless the Parliament is not sitting and is not likely to sit within two weeks due to the COVID-19 pandemic. In the extraordinary circumstances, and given the safeguards, the Committee makes no further comment.

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

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

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

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

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

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

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

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

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

Henry VIII clauses – Energy Security Safeguard

Schedule 1.10 of the Bill amends the *Electricity Supply Act 1995* to constitute the Energy Security Safeguard (the Safeguard). Schedule 1.10 provides that the Safeguard is constituted

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

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

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

Henry VIII clauses

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

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

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

Significant matter in subordinate legislation – privacy rights

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

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

Commencement by proclamation

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

The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. As schedules 2.13, 4.1 and 4.2[2] relate to trade licensing, they may affect individual obligations.

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

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

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

Wide and ill-defined administrative powers

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

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

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

However, the Committee acknowledges that the delayed presentation of the 2020-2021 Budget will allow the Government to allocate resources when it has a greater idea of the

economic impact of COVID-19. It is also consistent with delays that are occurring in other jurisdictions. In these circumstances, until the Budget is presented, it is necessary to grant the Treasurer extraordinary powers to spend consolidated revenue to ensure that agencies are funded and that urgent demands created by the pandemic are met.

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

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

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

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

By providing that the regulations can prescribe the day on which the Budget must be presented, the Bill allows a very significant matter to be dealt with in subordinate legislation. The Committee prefers significant matters such as these to be dealt with in primary legislation to foster an appropriate level of parliamentary oversight.

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

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

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

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

However, the Committee acknowledges that changes to the Public Finance and Audit Regulation 2015 to effect the exemptions have been included in schedule 1.5 to the Bill, thereby ensuring parliamentary oversight in this instance. Further, any regulations that can be made under the powers contained in schedule 1.4 cannot last past 1 November 2021. Noting this limitation, and the fact that it may be appropriate under the extraordinary conditions created by COVID-19 to allow increased flexibility so that any further necessary exemptions

can be granted without the need for an amending Bill, the Committee makes no further comment.

5. WATER(COMMONWEALTH POWERS) AMENDMENT (TERMINATION OF REFERENCES) BILL 2020*

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

PART TWO – REGULATIONS

1. ENVIRONMENTAL PLANNING AND ASSESSMENT (PUBLIC EXHIBITION) REGULATION 2020

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

Access to government information

The Regulation removes requirements for certain notices and documents under the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2000* to be published in a local newspaper. It instead requires these documents and notices to be published online on the relevant council's website; or if the consent authority is the Minister for Planning and Public Spaces, the Independent Planning Commission or a public authority, published online on the NSW planning portal.

The impacted notices and documents impart significant planning and development information, such as the publication of draft and approved development control plans, contributions plans and development applications or modifications for State significant development. This change also applies to environmental impact statements, and related environmental assessment requirements.

These provisions may impact on the right to access government information, particularly for people who do not have access to the internet. There is no requirement for councils and consent authorities to make the information available in an alternative way to people who do not have access to electronic resources. The Committee considers that a review should take place to determine what alternative exhibition practices may be appropriate. The Committee refers the provisions to Parliament for consideration.

2. PROTECTION OF THE ENVIRONMENT OPERATIONS (GENERAL) AMENDMENT (RAILWAY SYSTEMS ACTIVITIES) REGULATION 2020

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

Requirement to hold an environment protection licence

The Regulation amends the *Protection of the Environment Operations (General) Regulation 2009* to extend by three months the period during which a requirement to hold an environment protection licence for the operation of rolling stock on a track is imposed on the occupier of the land on which the track is situated.

By extending the period during which the occupier is required to hold an environmental protection licence, the Regulation may increase regulatory burden on affected members of the business community, on whose land rolling stock is operated. However, the conditions attached to such licences seek to protect the environment by promoting best practice. Further, the NSW Environment Protection Authority (EPA) undertakes risk-based assessments of all

licensed premises and adjusts the level of regulatory burden according to the level of risk posed.

Given the environmental protection objectives of the licensing system, and the risk-based approach adopted by the EPA, the Committee makes no further comment.

Part One – Bills

1. Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*

Date introduced	13 May 2020
House introduced	Legislative Council
Member responsible	The Hon. Mark Latham MLC
	* Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Anti-Discrimination Act 1977* (the Act) as follows—

(a) to establish principles of the Act for the purpose of reconciling conflicting human rights and anti-discrimination provisions, using international conventions and other instruments,

(b) to define religious beliefs and activities in a comprehensive and contemporary way, making religious freedoms and the fair treatment of believers and non-believers possible,

(c) to prohibit discrimination on the ground of a person's religious beliefs or religious activities in work and other areas, so that religion has protections equal to other forms of discrimination in NSW,

(d) to prohibit discrimination against people who do not have any religious conviction, belief, opinion or affiliation,

(e) to provide that a religious ethos organisation is taken not to discriminate on the ground of religious beliefs or religious activities by engaging in certain conduct because of the doctrines, tenets, beliefs or teachings of the religion of the organisation, so as to recognise that religion is integral to the existence and purpose of these organisations; and that religious and associational freedoms are fundamental to a free and democratic society,

(f) to make it unlawful for an employer, qualifying body or educational authority to restrict, limit, prohibit or otherwise prevent people from engaging in a protected activity, or to punish or sanction them for doing so, or for their associates doing so,

(g) to ensure the provisions of the Bill extend to discrimination concerning applicants and employees, commission agents, contract workers, partnerships, industrial organisations, qualifying bodies, employment agencies, education, goods and services, accommodation, registered clubs and State laws and programs, and

(h) to limit exceptions to this part of the Act to those specified, such as for religious ethos organisations and genuine occupational qualifications, rather than encouraging tribunal activism.

BACKGROUND

2. In the second reading speech regarding the Bill, the Hon. Mark Latham MLC told Parliament that:

> The purpose of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill* can be stated in a single sentence: To extend protections against discrimination beyond existing categories of citizenship and identity in New South Wales to people of religious faith and non-faith.

3. Mr Latham stated that the Bill acts on recommendations made in the 2018 report of the Expert Panel into Religious Freedom, chaired by the Hon. Philip Ruddock, entitled 'Religious Freedom Review'. Specifically, Mr Latham referred to the following recommendation:

> New South Wales and South Australia should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's "religious belief or activity", including on the basis that a person does not hold any religious belief.

4. Mr Latham also stated that the Bill is co-sponsored by Revd. the Hon. Fred Nile MLC, the Hon. Rod Roberts MLC, and Dr Joe McGirr MP.

5. The *Anti-Discrimination Act 1977* (the Act), which the Bill seeks to amend, is an Act to render unlawful, certain types of discrimination in certain circumstances and to promote equality of opportunity between all persons.

6. The Act currently outlaws racial discrimination; sex discrimination; discrimination on transgender grounds; discrimination on the ground of marital or domestic status; discrimination on the ground of disability; discrimination on the ground of a person's responsibility as a carer; discrimination on the ground of homosexuality; compulsory retirement from employment on the ground of age; HIV/AIDS vilification; and age discrimination.

7. The Act defines the various types of unlawful discrimination. For example, Part 3 deals with sex discrimination and section 24 of that Part provides that a person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of sex if the perpetrator:

- on the ground of the aggrieved person's sex or the sex of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of the opposite sex or who does not have such a relative or associate of that sex, or

- requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex, or who do not have a relative or associate of that sex, comply or are

able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

8. In relation to remedies, Part 9 of the Act provides an avenue for complaints to be made to the NSW Anti-Discrimination Board when it is alleged that a person has contravened a provision of the Act.

9. Complaints are made by being lodged with the President of the Anti-Discrimination Board, who makes an initial determination of whether or not the complaint is to be accepted or declined, in whole or in part (section 89B(1)).

10. The President is obliged to investigate each complaint that has been accepted (section 90 (1)). The President is able to decline the complaint at any stage during the investigation (section 92).

11. If the President declines a complaint during the investigation, the complainant may write to the President and require the President to refer the complaint to the NSW Civil and Administrative Tribunal (the Tribunal) (section 93A).

12. At any stage after the complaint has been accepted, the President can seek to resolve the complaint by conciliation (section 91A).

13. The President is also able to refer complaints to the Tribunal if he or she is of the view the complaint cannot be resolved by conciliation, if conciliation has been unsuccessful, if he or she is of the view it should be referred to the Tribunal or if all parties wish for it to be referred (section 93C).

14. The Tribunal may dismiss the complaint, or find it substantiated in whole or in part. If it is found to be substantiated, it may order the respondent to pay damages, undertake other redress action, or decline to take further action (section 108).

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to freedom from discrimination – broad exceptions

15. Schedule 1[2] of the Bill seeks to amend the Act by inserting Part 2B, which would create a new ground of unlawful discrimination – discrimination on the grounds of religious beliefs or religious activities.

16. Proposed subsection 22K(1) of Part 2B defines "religious activities" as including:

> …engaging in religious activity, including an activity motivated by a religious belief, but does not include any activity that would constitute an offence punishable by imprisonment under the law of New South Wales or the Commonwealth.

17. Further, proposed subsection 22K(1) defines "religious beliefs" as:

- having a religious conviction, belief, opinion or affiliation, or
- not having any religious conviction, belief, opinion or affiliation.

18. Proposed section 22KA provides that this belief must be genuine, which is defined as being sincere, and not fictitious, capricious or an artifice. In addition, proposed section 22KB provides that religious belief or activity includes past, future or presumed religious belief or activity.

19. Proposed section 22L defines what constitutes discrimination on the ground of religious belief or religious activities. These definitions align with other definitions of discrimination on other grounds throughout the Act e.g. the definition of sex discrimination above. Proposed subsection 22L(1) provides that a person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of religious beliefs if the perpetrator:

- on the ground of the aggrieved person's religious beliefs or the religious beliefs of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the perpetrator treats or would treat a person:
  - with different religious beliefs, or
  - who has such a relative or associate with different religious beliefs, or
- requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who:
  - do not have the same religious beliefs, or
  - have such a relative or associate who does not have the same religious beliefs,

  comply or are able to comply, being a requirement or condition that is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

20. Proposed subsection 22L(2) provides a similar definition for what constitutes discrimination on the ground of religious activities.

21. Schedule 1[2] of the Bill also seeks to amend the Act by inserting Part 2B, Divisions 2 and 3, which set down instances of unlawful discrimination on the grounds of religious belief or religious activity. Proposed Division 2 sets down what acts constitute unlawful discrimination in work, and proposed Division 3 sets down what acts constitute unlawful discrimination in other areas, including education, provision of goods and services, accommodation, registered clubs and State laws and programs.

22. These instances are broadly consistent with what the Act has identified as discriminatory acts or behaviour, with respect to discrimination on other grounds (e.g. racial discrimination, sex discrimination etc).

23. However, schedule 1[2] of the Bill also seeks to insert section 22M into the Act to create an exception so that "religious ethos organisations" will be taken not to discriminate against another person on the grounds of the person's religious beliefs or religious activities if:

- the relevant organisation engages in conduct (which may otherwise be discriminatory on the grounds of religious beliefs or activity), and the organisation genuinely believes that the conduct is:
  - consistent with the doctrines, tenets, beliefs of teachings of the religion of the organisation, or
  - is required because of the religious susceptibilities of the adherents of the religion of the organisation, or
  - furthers or aids the organisation in acting in accordance with doctrines, tenets, beliefs or teachings of the religion of the organisation.

24. Further, proposed section 22M provides that protected conduct under that section includes giving preference to persons of the same religion as the religion of the "religious ethos organisation".

25. Proposed section 22K of the Bill defines a "religious ethos organisation" as any of the following:

- a private educational authority that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or
- a charity registered with the Australian Charities and Not-for-profits Commission under the *Australian Charities and Not-for-profits Commission Act 2012* of the Commonwealth that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or
- any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.

26. In discussing this amendment, Mr Lathan told Parliament that:

> Importantly…section 22M…offers an exception for religious ethos organisations, including private educational authorities, registered charities and other bodies conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion—that is, organisations where religion is integral to their existence should not be expected to abandon their beliefs to accommodate the rights of other religions or non-believers.

27. Further, Mr Latham stated:

> Currently, under anti-discrimination law religious bodies are granted exemptions in their employment and other administrative practices as if they had done something wrong to minority groups in society…My bill corrects this imbalance. It treats religion as an equality right no less deserving, no less legitimate, no less equal than any other human right. The bill has exceptions to discrimination law, not exemptions. The provision at section 22M says that when a religious institution acts in accordance with its beliefs, this is not discrimination, as technically described at law.

28. Currently, the Act provides limited exceptions to its provisions. Part 6 of the Act is entitled "General exceptions to this Act" and section 56 that Part provides that nothing in the Act affects the following:

- the ordination or appointment of priests, ministers of religion or members of any religious order
- the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order
- the appointment of any other person in any capacity by a body established to propagate religion, or
- any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

Schedule 1[2] of the Bill seeks to amend the *Anti-Discrimination Act 1977* (the Act) by introducing a new ground of unlawful discrimination – discrimination on the grounds of religious beliefs or religious activities. Schedule 1[2] defines religious beliefs and religious activity, and identifies the circumstances under which unlawful discrimination on the grounds of religious beliefs or religious activities occurs. Religious beliefs are defined to include having a religious conviction, belief, opinion or affiliation; or not having any such conviction, belief, opinion or affiliation.

The acts that the Bill would outlaw on the grounds of religious discrimination are broadly consistent with the kinds of behaviour that are outlawed under the Act in relation to existing grounds of discrimination e.g. racial or sex discrimination. This includes certain behaviour in the areas of work, education, accommodation, and the provision of goods and services.

However, schedule 1[2] also seeks to insert section 22M into the Act to create an exception for “religious ethos organisations”. Such organisations would not be taken to discriminate on the grounds of religious beliefs or religious activities if they genuinely believed their conduct: was consistent with the doctrine or beliefs of the religion of their organisation; was required because of the religious susceptibilities of the adherents of their religion; or that it furthered or aided the relevant organisations in acting in accordance with the doctrines of their religion. For instance, if a “religious ethos organisation” satisfied one of these criteria it would not discriminate by giving preference to a person of its religion in areas covered by schedule 1[2] to the Bill e.g. employment, education or accommodation.

The Bill defines “religious ethos organisation” broadly to include private educational authorities, charities and any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. The Bill does not require a “religious ethos organisation” to be established to propagate religion for it to be covered by the proposed exception.

In contrast, section 56 of the Act currently provides a general exception to the Act for certain acts or practices of bodies established to propagate religion e.g.

in the ordination of priests; or in the appointment of any other person in any capacity.

In short, if passed, the Bill may protect behaviour from certain educational authorities, charities etc, that is currently deemed to be discriminatory and unlawful under the Act. The Committee acknowledges that the Bill seeks to balance freedom of religion with other human rights. However, the Committee refers the amendments to Parliament to consider whether they are reasonable and proportionate in the circumstances.

Freedom of contract

29. As above, the Bill defines what acts constitute unlawful discrimination on the grounds of religious belief or religious activity. These provisions broadly reflect the existing provisions in the Act with regard to what is considered unlawful discrimination on other grounds.

30. However, schedule 1[2] of the Bill also seeks to insert section 22N into the Act which would prescribe additional acts as unlawful discrimination in work. In particular, proposed subsection 22N(3) provides that it is unlawful for an employer to restrict, limit, prohibit or otherwise prevent an employee from engaging in a “protected activity”. Additionally, the Bill makes it unlawful for an employer to punish or sanction an employee for engaging in a “protected activity”, or because an associate of the employee engaged in a “protected activity”.

31. Proposed subsection 22N(4) defines “protected activity” as a religious activity performed by the employee that:

- occurs at a time other than when the employee is performing work and at a place other than the employer’s place of work, and

- does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the employer.

32. It also provides that “protected activity” includes a religious activity performed by an associate of the employee that similarly does not include direct criticism, or attack on, or does not cause direct and material financial determined to the employer.

33. Additionally, proposed subsection 22N(5) provides that a boycott or secondary boycott of the employer because of the “protected activity” does not constitute “direct and material financial detriment”. Similarly, it provides that the withdrawal of sponsorship or other financial or corporate support of the employer because of the “protected activity” does not constitute “direct and material financial detriment”.

34. In discussing these proposed amendments, Mr Latham told Parliament that:

> Extra provision is made in section 22N to act against employers restricting the private exercise of religious practice by their staff or punishing staff for the actions of associates of those staff members. A recent concern is the growth of employment contracts linked to vague notions of employee obligation, such as their impact on corporate image and diversity.

35. Mr Latham went on to say that:

… the bill defines a breach: for an employer to restrict, punish or sanction an employee engaging in religious activity outside of work hours, away from the physical workplace, that does not directly criticise, attack and cause direct and material financial detriment to the employer. Such detriment does not include withdrawal of third-party sponsorship, contracts, and other forms of financial, corporate support.

Employers might say they felt compelled to punish a religious advocate away from the workplace due to financial pressure from third-party sponsors. If so, they should seek relief using Commonwealth provisions governing secondary boycotts and/or write into their sponsorship contracts an employer's right to fully control and manage their own staffing arrangements…Workers have rights and one of them is to live a life free from corporate interference when they are not at work. The bill unashamedly puts the interests of worker freedom and worker rights ahead of corporate activism.

As above, the Bill seeks to amend the Act by introducing a new ground of unlawful discrimination on the basis of religious belief or activities. The acts that the Bill would outlaw on the grounds of religious discrimination are broadly consistent with the kinds of behaviour that are outlawed under the Act in relation to existing grounds of discrimination. However, the Bill also sets down additional unlawful acts.

Specifically, schedule 1[2], proposed subsection 22N(3) would make it unlawful for an employer to restrict, limit, prohibit or otherwise prevent an employee from engaging in a "protected activity". A "protected activity" is defined as a religious activity that occurs at a time other than when the employee is performing work, and at a place other than the employer's place of work. Further, "protected activity" must not include any direct criticism of, or attack on the employer, and must not cause any direct and material financial detriment to the employer. However, direct and material financial detriment does not include the loss of sponsorship, or a boycott of the employer, in response to the "protected activity".

These amendments may limit the provisions that can be enforced under an employment contract. They may also limit what can be included in an employment contract as regards codes of conduct. The amendments may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms to which they are subject.

The Committee acknowledges that statutory limitations on freedom of contract are not uncommon e.g. where this is deemed necessary to address the unequal bargaining power of parties. However, it also notes the amendments may have some potential for adverse financial impact on some employers e.g. through loss of sponsorships. The Committee refers these amendments to Parliament to consider whether the limits they may place on freedom of contract are reasonable and proportionate in the circumstances.

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

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

PURPOSE AND DESCRIPTION

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

    (a) *Court Security Act 2005*

    (b) *Criminal Procedure Act 1986*

    (c) *Electronic Transactions Act 2000*

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

    (e) *Sheriff Act 2005*

    (f) *Subordinate Legislation Act 1989*.

BACKGROUND

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

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

3. The Attorney General further stated:

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

4. The Bill was introduced on 12 May 2020 and passed Parliament the following day without amendments.[1] A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or become an Act (see *Legislation Review Act 1987*, s8A(2)).

ISSUES CONSIDERED BY THE COMMITTEE

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

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

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

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

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

   - warn the person that a failure or refusal to comply or to leave the court premises for the rest of the day may be an offence;
   - provide the person with evidence that the security officer is a security officer, and with his/her badge number and the reason for the exercise of the power;
   - warn the person that the security officer may arrest the person for committing an offence (see schedule 1.1, section 12D(6) of the Bill and section 20(2)(a)-(c) of the *Court Security Act 2005*).

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

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

10. Further, if a person who is entering or who is in court premises has exhibited or reported a "sign of illness" the Bill empowers a security officer to refuse entry to the court premises for the rest of the day or to require the person to leave the court

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

premises for the rest of the day (schedule 1.1, section 12E). "Sign of illness" is defined as:

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

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

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

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

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

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

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

> Many people are compelled to attend court but might fear attending due to the risk of exposure to COVID-19. Introducing temperature checks and other screening questions will improve public confidence in the safety of attending court.

Schedule 1.1 to the Bill amends the *Court Security Act 2005* to empower security officers to require persons entering court premises to submit to temperature checks and to answer questions relating to "signs of illness" such as fever, cough, sore throat, or shortness of breath. If a person fails to comply the security officer can refuse entry to the court premises or require the person

to leave. A person who fails to submit to the temperature check and fails to leave is guilty of an offence attracting a maximum $550 fine.

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

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

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

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

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

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

Right to a fair trial – written pleas

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

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

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

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

> The…bill will amend the Criminal Procedure Act to allow temporarily the existing written plea provisions to apply to persons about whom a bail decision has been made during the COVID-19 pandemic. Temporary removal of this exclusion will reduce the number of people required to appear physically in the Local Court to enter pleas and will allow for matters to progress without undue interpersonal contact or proximity.

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

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

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

Right to a fair trial – appearance by audio visual link

21. As noted in the Committee's Digest No.12/57, the first COVID-19 emergency Bill, the *COVID-19 Legislation (Emergency Measures) Bill 2020*, which passed Parliament on 24 March 2020 and commenced the following day[2] inserted section 22C into the *Evidence (Audio and Audio Visual Links) Act 1998*. Section 22C contained special provisions to facilitate increased use of audio visual links in court proceedings during the COVID-19 pandemic.

22. Schedule 1.4 to the current Bill amends section 22C to expand on this use of audio visual links in court proceedings during the COVID-19 pandemic. It contains a new power so

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

that an accused person who is not in custody can appear by audio visual link if the court so directs or the parties to the proceedings consent (schedule 1.4, items 2 and 3).

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

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

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

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

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

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

However, various safeguards apply including that the court can only make a direction to proceed by audio visual link if it is in the interests of justice having regard to a number of factors including the public health risk posed by the COVID-19 pandemic, and if satisfied that the accused person is able to have private communication with his or her legal representative and has had reasonable opportunity to do so. Further, the provisions are time limited and will last for less than 12 months from their commencement. Given the safeguards, time limit, and the extraordinary public health risk created by COVID-19 to which the provisions seek to respond, the Committee makes no further comment.

Freedom of movement

26. Schedule 1.5 to the Bill allows the Sheriff, with the approval of the Secretary of the Department of Communities and Justice, to enter into an agreement with the head of

another Public Service agency to enable a sheriff's officer to assist that other agency in its COVID-19 pandemic response.

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

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

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

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

29. "Restricted access premises" are defined as:

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

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

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

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

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

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

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

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

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

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

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

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

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

    - to prevent or stop a person from assaulting another person at restricted access premises, or
    - to prevent or stop a person from damaging property at restricted access premises, or

- to prevent or stop a person from unlawfully entering or exiting restricted access premises (section 7C(10)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Significant matters in subordinate legislation and Henry VIII clause

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

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

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

42. The Attorney General told Parliament:

> The first bill before the House today amends the regulation-making power in section 17 of the Act to also allow for the making of regulations that modify or suspend requirements, permissions or arrangements in relation to certification, execution, production, filing, lodgement, service or witnessing of documents and imposing requirements relating to the form and content of a document or processes for making a document and other matters. The regulation-making power is being expanded because the restrictions on interpersonal contact

during COVID-19 may impact a range of processes beyond the matters covered by the existing power in section 17. This expansion of regulation-making power is necessary to respond effectively to COVID-19 related limitations.

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

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

- Parliament is not currently sitting and is not likely to sit within 2 weeks after the day the regulations are made, and
- In the Attorney General's opinion the arrangements made by the regulations are in accordance with advice issued by the Minister for Health and Medical Research or the Chief Health Officer; and they are a reasonable to protect the health, safety and welfare of persons (see section 17(2) of the *Electronic Transactions Act 2000* as amended by schedule 1.3, item 4 of the current Bill).

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

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

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

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

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

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

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

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

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

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

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

PURPOSE AND DESCRIPTION

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

(a) *Annual Holidays Act 1944*

(b) *Associations Incorporation Act 2009*

(c) *Biodiversity Conservation Act 2016*

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

(e) *Children's Guardian Act 2019*

(f) *Community Land Management Act 1989*

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

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

(i) *Crown Land Management Act 2016*

(j) *Electricity Supply Act 1995*

(k) *Environmental Planning and Assessment Act 1979*

(l) *Fair Trading Act 1987*

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

(n) *Fisheries Management Act 1994*

(o) *Human Tissue Act 1983*

(p) *Industrial Relations Act 1996*

(q) *Interpretation Act 1987*

(r) *Landlord and Tenant Regulation 2015*

(s) *Local Government Act 1993*

(t) *Long Service Leave Act 1955*

(u) *Mental Health Act 2007*

(v) *Mining Act 1992*

(w) *Private Health Facilities Act 2007*

(x) *Property and Stock Agents Act 2002*

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

(z) *Public Health Act 2010*

(aa) *Registered Clubs Act 1976*

(ab) *Residential Tenancies Act 2010*

(ac) *Residential Tenancies Regulation 2019*

(ad) *Retirement Villages Act 1999*

(ae) *Strata Schemes Management Act 2015*

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

(ag) *Water Management Act 2000*

(ah) *Workers Compensation Act 1987*.

BACKGROUND

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

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

4. A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill

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

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

Retrospectivity and victims' rights

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

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

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

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

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

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

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

> The authority will exercise the power in the same way it makes parole decisions for an offender sentenced to over three years imprisonment where a non-parole period has been set. Notably,

that means that the same community safety test, which requires the authority to be satisfied that releasing an offender on parole is in the interests of the safety of the community, will apply for any consideration of parole under the new power…

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

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

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

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

Right to personal physical integrity and privacy – human tissue

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

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

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

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

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

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

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

Rights of people detained in mental health facilities

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

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

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

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

16. Further, these provisions are time limited, and they only authorise the examinations and observations to be carried out by audio visual link for a period starting from the day of their commencement and ending on 26 September 2020, or on a later day not later than 26 March 2021, prescribed by the regulations.

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

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

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

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

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

Right to personal physical integrity – compulsory testing

18. Schedule 1.26 of the Bill amends section 62 of the *Public Health Act 2010*. Section 62 allows an "authorised medical practitioner"[4] to make a public health order in respect of a person if satisfied, on reasonable grounds that:

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

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

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

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

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

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

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

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

- Viral haemorrhagic fevers.

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

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

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

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

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

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

Retrospectivity and freedom of contract

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

- any one or more rent-paying members of the household have:

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

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

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

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

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

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

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

By providing that NCAT may terminate fixed term tenancy agreements, the Bill may impact on freedom of contract – the freedom of parties to choose the contractual terms to which they are subject. The provisions also have retrospective effect, limiting the ability of landlords to rely on their rights under existing agreements. As above, the Committee generally comments on retrospective provisions, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee notes that the provisions are an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic. Accordingly, the time during which tenants can apply for termination is limited, relating to the "moratorium period" that ends on 15 October 2020. Further, only "impacted tenants" – those who have lost at least 25 per cent of their household income as a result of COVID-19 – can apply for termination. In addition, on making the termination order, NCAT can order the tenant to pay the landlord up to two weeks' rent in compensation.

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

Retrospectivity – workers compensation liability

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

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

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

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

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

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

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

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

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

33. Mr Shoebridge further stated:

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

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

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

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

The Committee would prefer such safeguards to be wholly included in primary legislation, not the regulations, to foster an appropriate level of parliamentary

oversight. However, the Committee acknowledges the amendments in schedule 1.34 are important to ensure that frontline workers who contract COVID-19 are protected by workers compensation benefits. Subject to the observation that the provisions to protect individual employers from rising premiums, and to spread the cost of claims, would ideally be located in primary legislation, the Committee makes no further comment.

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

Wide and ill-defined administrative power – statutory time limits

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

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

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

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

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

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

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

    - within which a person is authorised to do a thing or omit to do a thing;
    - at the end of which a thing expires.

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

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

- for the purposes of responding to the public health emergency caused by the COVID-19 pandemic; and
- if Parliament is not sitting and, due to COVID-19 is not likely to be sitting within 2 weeks after the day the regulation is made (Part 12, subsections 87(2) and (3)).

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

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

> Most limitation and other time periods continue to apply across all New South Wales legislation. However, if emergency and social distancing measures delay or suspend processes and procedures, the provisions will allow the Government to respond more rapidly and flexibly if it became difficult for an action to be taken within prescribed time limits. The amendments are subject to sunset clauses. Any regulations made under the powers may be made only for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. Furthermore, a regulation to modify time periods may be made only if the Parliament is not sitting and is not likely to sit within two weeks due to the COVID-19 pandemic or the response to it.

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

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

In short, in ordinary circumstances, the Committee would consider the administrative powers that the provisions create to be too broad and ill-defined. However, the Committee accepts that in the current extraordinary

circumstances created by COVID-19, the wide-ranging powers may be appropriate to allow a flexible and timely response to the pandemic in a way that minimises disruption in matters of public administration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Henry VIII clauses – Energy Security Safeguard

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

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

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

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

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

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

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

By providing that the regulations can amend schedule 4A of the Act, the Bill contains Henry VIII clauses, thereby delegating legislative power to the Executive. However, the Committee notes that any regulations made are to be consistent with the object of the Safeguard, which is set down in the primary legislation. Further, the provisions are designed to allow sufficient flexibility to create schemes that promote economic recovery in the energy industry in the context of COVID-19. The power to make such regulations is accordingly time

limited to expire on 31 December 2021. Given these considerations, the Committee makes no further comment.

Henry VIII clauses

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

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

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

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

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

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

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

60. Similarly, schedule 1.30 of the Bill enables the Minister for Better Regulation and Innovation to grant, by order published in the Gazette, exemptions from provisions of the *Retirement Villages Act 1999* during the COVID-19 pandemic. The Attorney General told Parliament:

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

61. Again, there are time limits and valid orders that grant exemptions from the provisions of the *Retirement Villages Act 1999* can only be made from the time the amendments contained in schedule 1.30 commence, to 26 September 2020 or a day not later than 26 March 2021 prescribed by the regulations.

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

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

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

Significant matter in subordinate legislation – privacy rights

62. Schedule 1.26, items 3 and 4 of the Bill amend the *Public Health Act 2010* to provide that the Secretary of the Ministry of Health can approve certain classes of persons to provide personal information to a health records linkage organisation for the purpose of a public health or disease register established under the Act. These classes of persons include health practitioners; health organisations within the meaning of the *Health Care Complaints Act 1993*; public authorities; and "any other person prescribed by the regulations".

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

under the Act. These classes of persons include any person prescribed by the regulations.

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

Commencement by proclamation

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

64. During the committee stage of the Bill in the Legislative Council, the Hon Damien Tudehope MLC, Minister for Finance and Small Business, and Leader of Government Business in the Legislative Council explained that without these amendments, schedules 2.13, 4.1 and 4.2[2] would commence on 1 July 2020.

65. The Minister further stated that schedule 2.13 of the *Fair Trading Legislation Amendment (Reform) Act 2018* applies new blanket one, three and five-year terms for licences in the portfolio of registration system for spatial surveyors. Further, schedule 4.1 and 4.2 create the new special trade category of trade home building licences.

66. In relation to the special surveying registration system, the Minister stated that "there are unresolved financial and technical issues for the spatial surveying registration system" one of which is that "the licensing platform for the registration system does not currently accommodate different licence terms and there are insufficient time and resources to make the necessary changes prior to 1 July 2020".

67. In relation to the new special trade category of trade home building licences, the Minister stated:

> Schedules 4.1 and 4.2 of the reform Act create a new special trade category for 13 of the existing trade licences in the Home Building Act 1989. This means those licensees will not be required to renew their licence on a one-, three- or five-year basis. Instead, they will only need to advise that they wish to continue to hold their licence every five years. Many licensees, however, hold licences in one of those categories—for example, a splashback installation licence—as well as other categories not subject to the changes, like a carpentry licence, which means they have to renew and notify on different years. An entirely new mechanism and new forms are needed to separate/manage licensees that occupy multiple categories.
>
> This will significantly impact on the operation of the current home building licensing platform. Provision will also need to be made on the platform for new licences issued in the special trade category without an expiry date. There is currently no capacity to make those major changes to the licensing platform to commence this reform. If it commences on 1 July 2020 the agency will not be able to manage these licences under this new category.

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

The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. As schedules 2.13, 4.1 and 4.2[2] relate to trade licensing, they may affect individual obligations.

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

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

Date introduced	12 May 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasurer

PURPOSE AND DESCRIPTION

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

   (a) *Government Sector Finance Act 2018*

   (b) *Government Sector Finance Regulation 2018*

   (c) *Payroll Tax Act 2007*

   (d) *Public Finance and Audit Act 1983*

   (e) *Public Finance and Audit Regulation 2015*.

BACKGROUND

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

3. The Bill passed Parliament on 13 May 2020, having been introduced by the Attorney General on the previous day.[5] The Bill as passed incorporates two amendments to the original Bill, both put by the Opposition.

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

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

pandemic – the Committee has elected to report on any issues raised by this Bill as passed.

ISSUES CONSIDERED BY THE COMMITTEE

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

Wide and ill-defined administrative powers

5. Schedule 1.1, item 6 of the Bill amends the *Government Sector Finance Act 2018* to allow the Treasurer to present the 2020-2021 Budget to Parliament on the "extended Budget presentation day" that is, no later than 31 December 2020, or any different day prescribed by the regulations that is not later than 30 June 2021. Under usual circumstances, the Treasurer would have been required to present the 2020-21 Budget to Parliament by 30 June 2020.[6]

6. In addition, schedule 1.1, item 6 amends the *Government Sector Finance Act 2018* to allow the Treasurer to authorise payments under section 4.10 of that Act from the Consolidated Fund on the lapse of the appropriations made by the 2019-2020 Budget because of the delay in the 2020-2021 Budget (up to an amount of 75 per cent of the appropriations under the 2019-2020 Budget) until the "extended Budget presentation day" or the enactment of the 2020-2021 Budget, whichever occurs first.

7. Further, schedule 1.1, item 6 amends the *Government Sector Finance Act 2018* to allow the Treasurer, with the Governor's approval, to authorise payments out of the Consolidated Fund for exigencies of Government resulting from the COVID-19 pandemic until the 2020-2021 Budget is enacted.

8. Ordinarily, where a Budget has not been enacted before the annual reporting period for that Budget commences, the Treasurer can authorise payments out of the Consolidated Fund to meet the requirements of the reporting period. However, the payments must not exceed 25 per cent of the appropriations under the previous Budget, and the authorisation ends within 3 months (see section 4.10 of the *Government Sector Finance Act 2018*). In short, on the lapse of the 2019-2020 appropriations, the Bill allows the Treasurer to authorise much larger payments from the Consolidated Fund for a longer period than would otherwise be the case, before the 2020-2021 Budget is presented.

9. Schedule 1.1, item 6 also makes changes to reporting obligations in response to the COVID-19 pandemic. Section 8 of the *Public Finance and Audit Act 1983* provides that the Treasurer is to release a half-yearly review by 31 December each year containing:

   - revised projections for the current financial year and an explanation of any significant variation in those revised projections from the original budget time projections, and
   - revised forward estimates, for major aggregates, over 3 years, and
   - the latest economic projections for the current financial year and an explanation of any significant variation from the budget time projections contained in the Budget Papers.

[6] See section 4.4 of the *Government Sector Finance Act 2018* and schedule 1.1 item 6 of the Bill.

10. The half-yearly review is to be based on actual results as at the end of the previous October. Schedule 1.1, item 6 of the Bill amends the *Government Sector Finance Act 2018* to provide that the Treasurer is to publicly release this half-yearly review by 28 February 2021, for the financial year commencing on 1 July 2019.

11. Still on reporting obligations, section 8 of the *Public Finance and Audit Act 1983* also provides that the Treasurer is to publicly release a statement for each month (a monthly statement), by the end of the following month, setting out the budget time projections and year-to-date balances for the major general government sector aggregates disclosed in the Budget.

12. Schedule 1.1, item 6 of the Bill also amends the *Government Sector Finance Act 2018* to provide that, unless it is not reasonably practicable to do so, the Treasurer is to publicly release these monthly statements during the period beginning on the commencement of the amendments and ending on 31 October 2021. During the committee stage of the Bill in the Legislative Council, the Hon. Walt Secord MLC stated with regard to this amendment:

> I have agreed to insert the words "Unless it is not reasonably practicable to do so the Treasurer is to"…I do accept that there might be a circumstance where a monthly statement might not be permissible or able to be prepared – for example, a deadly second wave of COVID. I do accept that situation, but the current wording is tight enough for us to hold the Government to account.

13. In discussing the amendments contained in schedule 1.1, item 6 of the Bill more generally, the Attorney General told Parliament:

> On 20 March the New South Wales Government announced that the 2020-2021 budget would be deferred, consistent with the Commonwealth budget and other Australian jurisdictions. The…bill amends the Government Sector Finance Act 2018 to allow for this deferral of the 2020-21 budget from June until no later than 31 December 2020, or a day prescribed by regulation. This allows the Government to allocate resources based on a more complete picture of the impact of COVID-19 on the State's fiscal and economic position.

14. The Attorney General also spoke about the amendments related to payments from the Consolidated fund:

> To ensure agency funding is available until the budget is tabled, the second bill will amend the Act to extend the ability of the Treasurer to authorise payments from the Consolidated Fund on the lapse of appropriations made by the 2019-20 budget, subject to a cap of 75 per cent of the amount previously appropriated, and, with the Governor's approval, to authorise payments out of the Consolidated Fund for exigencies of Government resulting from the COVID-19 pandemic until the 2020-21 budget is enacted.

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

It also allows the Treasurer to authorise payments from the Consolidated Fund on the lapse of the appropriations made by the 2019-2020 Budget because of

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

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

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

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

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

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

15. As above Schedule 1.1, item 6 of the Bill amends the *Government Sector Finance Act 2018* to allow the Treasurer to present the 2020-21 Budget to Parliament on the "extended Budget presentation day" that is, no later than 31 December 2020, or any different day prescribed by the regulations. Under usual circumstances, the Treasurer would have been required to present the 2020-21 Budget to Parliament by 30 June 2020.

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

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

these to be dealt with in primary legislation to foster an appropriate level of parliamentary oversight.

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

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

16. Schedule 1.4 of the Bill amends the *Public Finance and Audit Act 1983* to enable regulations under that Act to provide for the following provisions of that Act to apply to particular Departments and statutory bodies, or kinds of Departments and statutory bodies, except for specified provisions:

    - Division 3 (General audit of statutory bodies) of Part 3, and
    - Division 4A (General audit of Departments) of Part 3.

17. Regulations made for this purpose must provide for their repeal no later than on 1 November 2021.

18. Schedule 1.5 of the Bill accordingly uses the regulation-making power conferred by schedule 1.4 and amends the *Public Finance and Audit Regulation 2015* to exempt certain kinds of Departments and statutory bodies from requirements relating to the preparation of financial reports. The provisions will be repealed on 1 November 2021.

19. In discussing these amendments, the Attorney General told Parliament:

> The…bill amends the Public Finance and Audit Act 1983 to enable the Treasurer flexibility in relation to tabling or publication of certain reports during the 2019-20 and 2020-21 reporting period for the NSW Government. These amendments provide planned relief for certain departments and statutory bodies from financial reporting requirements for the 2019-20 reporting period. This includes certain small agencies, Crown land managers, special purpose staff agencies and retained State interests. This relief will produce sector-wide time savings, which is particularly crucial in the current circumstances.

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

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

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

5. Water(Commonwealth Powers) Amendment (Termination of References) Bill 2020*

Date introduced	13 May 2020
House introduced	Legislative Council
Member responsible	The Hon. Mark Banasiak MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Water (Commonwealth Powers) Act 2008* to enable each House of Parliament, by resolution, to terminate certain references made under that Act for the purposes of section 51(xxxvii) of the Constitution of the Commonwealth.

BACKGROUND

2. In his second reading speech to Parliament regarding the Bill, the Hon. Mark Banasiak MLC stated:

> The bill amends the *Water (Commonwealth Powers) Act 2008* to enable each House of Parliament, by resolution, to terminate certain references made under that Act. Put simply, the amending bill will change the most significant piece of legislation relating to the Murray Darling Basin Plan in New South Wales. It will re-involve the New South Wales Parliament in the voluntary giving-up of constitutional powers with regards to water.

3. An identical Bill, the *Water (Commonwealth Powers) Amendment (Termination of References) Bill 2019*, was introduced into the Legislative Assembly on 21 November 2019 by Mr Roy Butler MP and was reported on in the Committee's Digest No. 10/57. It lapsed in accordance with the standing orders on 15 May 2020.

ISSUES CONSIDERED BY THE COMMITTEE

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

Part Two – Regulations

1. Environmental Planning and Assessment (Public Exhibition) Regulation 2020

Date tabled	12 May 2020
Disallowance date	LA: 16 September 2020 LC: 23 September 2020
Minister responsible	The Hon. Robert Stokes MP
Portfolio	Planning and Public Space

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to require various notices and other documents under the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2000* to be published online instead of in a local newspaper. Online publication will be on the relevant council's website and if the consent authority is the Minister for Planning and Public Spaces, the Independent Planning Commission or a public authority, online publication will be on the NSW planning portal.

2. The amendments relate to the following notices and documents—

   (a) draft and approved development control plans and the amendment or repeal of development control plans,

   (b) draft and approved contributions plans and the amendment or repeal of contributions plans,

   (c) development applications and applications for modifications of development consents for designated development, State significant development, nominated integrated development, threatened species development and Class 1 aquaculture development,

   (d) notice of the granting of a development consent or the issue of a complying development certificate,

   (e) environmental impact statements and related environmental assessment requirements,

   (f) draft and adopted development plans and the amendment of development plans (in relation to paper subdivisions)

3. This Regulation also makes other minor amendments of a law revision nature.

4. This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 3.45, 4.39(d), 4.59, 4.64, 5.6, 5.8(1) and 10.13 (the general regulation-making power) and clause 6 of Schedule 7.

ISSUES CONSIDERED BY THE COMMITTEE

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

Access to government information

5. The Regulation removes the requirement for various notices and documents under the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2000* to be published in a local newspaper. This is replaced with a requirement for the relevant notices and documents to be published online.

6. Online publication must be done on the website of the relevant council to which the document applies, and if the consent authority is the Minister for Planning and Public Spaces, the Independent Planning Commission or a public authority, online publication will be on the NSW planning portal (Schedule 1, Clause 2 of the Regulation).

7. These changes impact the following documents and notices:

   - draft and approved development control plans and the amendment or repeal of development control plans,
   - draft and approved contributions plans and the amendment or repeal of contributions plans,
   - development applications and applications for modifications of development consents for designated development, State significant development, nominated integrated development, threatened species development and Class 1 aquaculture development,
   - notice of the granting of a development consent or the issue of a complying development certificate,
   - environmental impact statements and related environmental assessment requirements,
   - draft and adopted development plans and the amendment of development plans (in relation to paper subdivisions).

The Regulation removes requirements for certain notices and documents under the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2000* to be published in a local newspaper. It instead requires these documents and notices to be published online on the relevant council's website; or if the consent authority is the Minister for Planning and Public Spaces, the Independent Planning Commission or a public authority, published online on the NSW planning portal.

The impacted notices and documents impart significant planning and development information, such as the publication of draft and approved

development control plans, contributions plans and development applications or modifications for State significant development. This change also applies to environmental impact statements, and related environmental assessment requirements.

These provisions may impact on the right to access government information, particularly for people who do not have access to the internet. There is no requirement for councils and consent authorities to make the information available in an alternative way to people who do not have access to electronic resources. The Committee considers that a review should take place to determine what alternative exhibition practices may be appropriate. The Committee refers the provisions to Parliament for consideration.

2. Protection of the Environment Operations (General) Amendment (Railway Systems Activities) Regulation 2020

Date tabled	12 May 2020
Disallowance date	LA: 16 September 2020 LC: 23 September 2020
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy and Environment

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Protection of the Environment Operations (General) Regulation 2009* to extend the period during which a requirement to hold an environment protection licence for the operation of rolling stock on a track is imposed on the occupier of the land on which the track is situated.

2. The requirement is imposed by clause 19 of Schedule 8 to that Regulation. Clause 19 ceases to apply to an occupier of land 10 months after the commencement of the *Protection of the Environment Operations Legislation Amendment (Scheduled Activities) Regulation 2019*, being 5 May 2020 (or on the day on which each person who operate rolling stock on the track holds an environment protection licence for that activity, if that date is earlier). The proposed amendment extends the application of clause 19 by 3 months, to 5 August 2020.

3. This Regulation is made under the *Protection of the Environment Operations Act 1997*, including sections 5(3) and 323 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Requirement to hold an environment protection licence

4. The Regulation amends the *Protection of the Environment Operations (General) Regulation 2009* to extend by three months the period during which a requirement to hold an environment protection licence for the operation of rolling stock on a track is imposed on the occupier of the land on which the track is situated.

5. According to the NSW Environment Protection Authority (EPA) website, the EPA issues environment protection licences to the owners or operators of various industrial premises under the *Protection of the Environment Operations Act 1997*, and "licence

conditions relate to pollution prevention and monitoring, and cleaner production through recycling and reuse and the implementation of best practice".[7]

6. The website also explains that the environment protection licensing system is risk-based "to ensure that all environment protection licensees receive an appropriate level of regulation based on the environmental risk of their activity". The EPA conducts assessments of all licensed premises in NSW to examine risks, and to identify issues that a licensee needs to address, and where the EPA needs to focus its attention.

7. The website explains further: "Licensees with a high risk level will receive an increased level of regulatory and compliance oversight, whereas licensees with a lower risk level will benefit from reduced red tape and reduced regulatory burden".[8]

The Regulation amends the *Protection of the Environment Operations (General) Regulation 2009* to extend by three months the period during which a requirement to hold an environment protection licence for the operation of rolling stock on a track is imposed on the occupier of the land on which the track is situated.

By extending the period during which the occupier is required to hold an environmental protection licence, the Regulation may increase regulatory burden on affected members of the business community, on whose land rolling stock is operated. However, the conditions attached to such licences seek to protect the environment by promoting best practice. Further, the NSW Environment Protection Authority (EPA) undertakes risk-based assessments of all licensed premises and adjusts the level of regulatory burden according to the level of risk posed.

Given the environmental protection objectives of the licensing system, and the risk-based approach adopted by the EPA, the Committee makes no further comment.

[7] NSW Environment Protection Authority website: https://www.epa.nsw.gov.au/licensing-and-regulation/licensing/environment-protection-licences

[8] NSW Environment Protection Authority website: https://www.epa.nsw.gov.au/licensing-and-regulation/licensing/environment-protection-licences; and https://www.epa.nsw.gov.au/licensing-and-regulation/licensing/environment-protection-licences/risk-based-licensing.

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.