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Legislation Review Committee

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

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CONTACT DETAILS	Legislation Review Committee Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	02 9230 2226 / 02 9230 3382
FACSIMILE	02 9230 3309
E-MAIL	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/lrc

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. BUILDING AMENDMENT (MECHANICAL SERVICES AND MEDICAL GAS WORK) BILL 2020*

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

New offences with strict liabiity

The Bill seeks to amend the *Home Building Act 1989* to provide that individuals, partnerships and corporations who contract to do "mechanical services work" must be licensed to do so. Further, it amends the Act to provide that it is an offence for an individual to do any such work except where appropriately licensed or qualified to do so. It also creates offences for where a supervisor fails to appropriately supervise a tradesperson or apprentice in carrying out such work.

In each case these are strict liability offences backed up by significant maximum monetary penalties of a $110,000 fine for a corporation and a $22,000 fine in any other case. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mens rea or mental element is a necessary part of liability for an offence.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. For example, the *Home Building Act 1989* currently includes strict liability offences with identical penalties to those in the Bill for individuals who undertake "specialist work" like plumbing and drainage, gas fitting, and electrical wiring work without being licensed to do so. Further "mechanical services work" is highly technical and if it is carried out by unqualified persons, the potential safety consequences are serious. In addition, while the maximum penalties contained in the Bill are significant, they are monetary, not custodial. In the circumstances, the Committee makes no further comment.

2. CONSTITUTION AMENDMENT (WATER ACCOUNTABILITY AND TRANSPARENCY) 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*.

3. CRIMES AMENDMENT (SPECIAL CARE OFFENCES) BILL 2020

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

Expanded offences and burden of proof – familial relationships

Under the *Crimes Act 1900* it is a criminal offence for an adult to have sexual intercourse with, or to sexually touch, a 16 or 17 year old who is under the adult's "special care". The Bill amends the Act to expand the relationship types that constitute "special care relationships" so that more familial relationships will be caught. This includes relationships between a young person and his or her parent and/or grandparent, whether by way of biology or adoption. It also includes relationships between the young person and the spouse or de facto partner of his or her parent or grandparent whether by way of biology or adoption. This change responds to concerns raised with the Legislative Council Committee on Law and Justice during its inquiry

into the adequacy and scope of special care offences, that sexual intercourse between young people and their adoptive parents is not currently explicitly criminalised.

The Committee often comments on the expansion of offences, or the creation of new offences, as this criminalises conduct that was previously lawful, with attendant penalties. The Committee also notes that the prosecution will not have to specifically prove that the family member was in a position of authority over the young person, nor that he or she abused that authority. The prosecution will only have to establish the familial relationship, and the sexual intercourse or sexual touching to establish liability.

In the current case, the Committee considers the expanded offences are appropriate, as is the prosecution's burden of proof in establishing them. Special care offences have been established to acknowledge that in certain limited circumstances the power dynamic between an adult and a 16 or 17 year old displaces the young person's capacity to give free and voluntary consent to engage in sexual acts. The Committee accepts that in the family relationships covered by the expanded offences e.g. adoptive parent and son/daughter, the adult is in an inherent position of authority over the young person and that engaging in sexual acts with the young person in these circumstances is inherently exploitative. Given these considerations, the Committee makes no further comment.

Expanded offences and burden of proof – refuge and crisis accommodation and residential care

As above, under the *Crimes Act 1900* it is a criminal offence for an adult to have sexual intercourse with, or to sexually touch, a 16 or 17 year old who is under the adult's "special care". The Bill also amends the Act to expand the relationship types that constitute "special care relationships" so that more organisational relationships will be caught. These are relationships between young people and adults who perform work for organisations that provide residential care, or refuge or crisis accommodation to young persons.

As also noted above, the Committee often comments when offences are expanded as this criminalises conduct that was previously lawful. Regarding burden of proof, the Committee notes that to establish liability in these cases, the prosecution would need to prove that the adult had an established personal relationship with the young person in connection with the provision of residential care or accommodation and that in that relationship, the young person was under the authority of the offender. However, the prosecution would not need to prove that that authority was abused.

The Committee again considers the expanded offences are appropriate, as is the prosecution's burden of proof in establishing them. Not only would the prosecution have to prove that the adult in question was in a position of authority but the Committee accepts that it is inherently exploitative for an adult to engage in a sexual act with a 16 or 17 year old in residential care or a refuge or crisis accommodation over whom they have such authority. The Committee notes in particular that such young persons are part of a vulnerable population group. In short, there need be no separate requirement for the prosecution to specifically prove that the adult abused their authority. The Committee makes no further comment.

4. LAW ENFORCEMENT CONDUCT COMMISSION AMENDMENT BILL 2020

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

Retrospectivity

Clause 7 (1) (k) of schedule 1 to the *Law Enforcement Conduct Commission Act 2016* (the LECC Act) currently provides that the office of a member of the commission, assistant commissioner or alternate commissioner becomes vacant if the holder is removed from office under clause 7 of schedule 1 to the LECC Act. This does not recognise that a person may also be removed from office under part 6 of the *Government Sector Employment Act 2013.*

The Bill accordingly amends clause 7 of schedule 1 to the LECC Act so that if a person has been removed from office under part 6 of the *Government Sector Employment Act 2013*, the office becomes vacant. The amendment would operate retrospectively, that is, it would apply to cases where a person has been removed from office prior to the Bill commencing. The Committee generally comments on provisions that are drafted to have retrospective effect as they run counter to the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, in the current case the retrospective provision does not remove individual rights nor does it impose obligations on individuals. In particular, it does not expand the circumstances under which a member of the Law Enforcement Conduct Commission can be removed from office. Instead, it is designed to correct a drafting error so that if a person is removed from office pursuant to the *Government Sector Employment Act 2013*, the office also becomes vacant. In the circumstances, the Committee makes no further comment.

It could be argued that the Bill as drafted reduces the independence of the Commission by allowing dismissal of the Commissioner under the *Government Sector Employment Act 2013* to also amount to removal from the statutory position under the LECC Act. The Committee refers this matter to Parliament for consideration.

5. MENTAL HEALTH AND COGNITIVE IMPAIRMENT FORENSIC PROVISIONS BILL 2020

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

Presumption of innocence – removal of not guilty verdict

Part 3, Clause 28 of the Bill establishes the new defence of mental health impairment or cognitive impairment, which replaces the current defence of mental illness. In sum, it provides that a person is not criminally responsible for an act if at the time it was carried out he or she had a mental health and/or cognitive impairment and as a result the person did not know the nature and quality of the act, or did not know the act was wrong.

Clause 30 requires a jury to return a "special verdict" of "act proven but not criminally responsible" in respect of an offence if the jury is satisfied that the defence of mental health impairment or cognitive impairment has been established. Currently, if a successful defence of mental illness is raised, this results in a special verdict of "not guilty by reason of mental illness".

The Committee appreciates that the amended special verdict is intended to deal with concerns that the phrase "not guilty" in the current special verdict caused pain and trauma to victims, by suggesting that the defendant had not done the relevant act. In creating the special verdict, the law is able to acknowledge that the act causing the offence was proven and to reflect the seriousness of the harm caused, whilst maintaining that the person who committed the act was not criminally responsible. Further, the Committee acknowledges that the change to the special verdict comes after consideration by the NSW Law Reform Commission and extensive community consultation.

However, the new special verdict may impact on the right of defendants with mental health and cognitive impairments to be presumed innocent. The presumption of innocence requires the prosecution to prove a charge, and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, mens rea, or the mental element is an integral factor in establishing liability for a crime.

In short, the emphasis of the special verdict appears to have changed. By drawing more focus to the act, and removing the words "not guilty", the new special verdict may risk attaching some of the stigma of a criminal act to a person where the mental element of the crime has not been proved. The Committee refers this matter to Parliament for consideration.

Right to fair trial - special hearings

Under Division 3 of Part 4 of the Bill persons who have found to be found unfit to be tried at a criminal trial may be subject to a "special hearing". A special hearing is a hearing for the purpose of ensuring, despite the unfitness of a defendant to be tried in accordance with normal procedures, that the defendant is acquitted unless it can be proved to the required standard of proof that, on the limited evidence available, the defendant committed the offence or another alternative offence.

At a special hearing, the verdicts of not guilty and act proven but not criminally responsible are to be dealt with in the same manner as an ordinary hearing. A special hearing may also reach a verdict of offence committed on the limited evidence available, which may result in penalties such as a "limiting term". A "limiting term" is the best estimate of the sentence that the court would have imposed on the defendant at an ordinary hearing.

The Bill thereby permits the court to effectively try persons who have been found to be unfit to be tried. This may impact on a person's right to fair trial. However, the Committee notes various safeguards. First, the prosecution must prove to the required criminal standard that the defendant committed the offence before any penalty can be imposed. Further, if a limiting term is imposed the person becomes a forensic patient and is referred to the Mental Health Review Tribunal for supervision and treatment. If the Tribunal later determines that the person has become fit, they must then be tried at law. In the circumstances, the Committee makes no further comment.

Right to fair trial – defence not available in Local Court proceedings

As above, Part 3 of the Bill outlines provisions for the defence of mental health impairment or cognitive impairment, available to defendants subject to criminal proceedings in the Supreme and District Courts. The defence is not available for criminal proceedings at the Local Court level. This may impact on a person's right to fair trial where this defence is not available and the person has a mental health impairment or a cognitive impairment.

However, the Committee notes that Part 2 of the Bill, which relates to proceedings before a Magistrate, instead focusses on diverting people with mental health or cognitive impairments, and those who may be mentally ill or mentally disordered, out of the criminal justice system and into care, treatment, support and supervision. This may be a more appropriate focus in the context of the lower level offending dealt with by the Local Court – a focus on addressing the causes of the offending, rather than a focus on establishing whether the person is guilty. In the circumstances, the Committee makes no further comment.

Extension of status as a forensic patient – indeterminate detention

Part 6 of the Bill allows the Supreme Court to make an order to extend a person's status as a forensic patient in certain circumstances. The provisions may thereby be part of a regime that allows persons to be subject to indeterminate detention thereby impacting on their right to liberty.

However, the Committee acknowledges that in determining to extend a person's status as a forensic patient, the Court must be satisfied to a high degree of probability that a forensic patient poses an unacceptable risk of causing serious harm to others if the patient ceases to be a forensic patient; and that this risk cannot be managed by less restrictive means. Further, an order can be revoked on the application of the Minister administering the proposed Act or on the recommendation of the Mental Health Review Tribunal. In the circumstances, and given the safeguards contained in the Bill, the Committee makes no further comment.

Right to privacy – Victims Register

Part 8 of the Bill establishes a Victims Register for victims who seek to be notified of reviews of relevant forensic patients. Further, the Commissioner of Victims Rights is required to notify a victim of a forensic patient of certain things relating to the patient e.g. when the Mental Health Review Tribunal makes an order for release of the patient or grants him or her a leave of absence; or where the patient appeals against a decision of the Tribunal.

In doing so, this may impact on the patient's right to privacy as regards personal information about their status as a forensic patient. However, the Committee recognises that these provisions are intended to offer peace of mind to victims of forensic patients, notifying them of any changes in status. The Committee also notes that the provisions are already included in the existing *Mental Health (Forensic Provisions) Act 1990* that the Bill seeks to repeal and replace. In the circumstances, the Committee makes no further comment.

Right to privacy – information sharing agreements

Part 9 of the Bill permits information sharing arrangements between the Secretary of the Ministry of Health, the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice relating to information concerning forensic patients and correctional patients. It also enables the Commissioner of Victims Rights and the President of the Mental Health Review Tribunal to exchange information for the purposes of the Victims Register and other matters related to victims.

These arrangements may impact on affected persons' right to privacy over personal information about their status as a forensic or correctional patient. However, the Committee acknowledges that these provisions allow administrative flexibility for these agencies to carry out their functions under the proposed Act in relation to forensic and correctional patients, and the protection of victims and the community. These provisions are also in the existing *Mental Health (Forensic Provisions) Act 1990*. In the circumstances, the Committee makes no further comment.

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

Wide power of delegation

Clause 164 of the Bill allows a Minister administering the proposed Act to delegate the exercise of any function of the Minister under the proposed Act to any person employed in a Department responsible to the Minister, or to any person, or any class of persons, authorised

by the regulations. It also provides a similarly wide power to the Secretary of the Department of Communities and Justice in respect of his or her functions under the proposed Act.

The Committee notes that there are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. The Committee also notes that the proposed Act deals with sensitive matters relating to forensic mental health and that the functions of the Minister and the Secretary therein are significant.

The Committee would prefer the provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. In addition, they should be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. The Committee refers the matter to Parliament for consideration.

6. PERSONAL INJURY COMMISSION BILL 2020

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

Right to a fair hearing and right to an appeal or review

Under clause 52 of the Bill, the Personal Injury Commission (the Commission) may decide to resolve a matter without holding a conference or hearing, if it is satisfied that it has been provided with sufficient information. This may impact on the right of parties to a proceeding to be heard as to the matters in dispute. This is particularly the case given that decisions of the Commission under the Workers Compensation Acts are generally final and binding, and not subject to appeal or review.

The Committee acknowledges that the Bill has broader aims of facilitating the just, quick and cost effective resolution of proceedings, and the Commission must be satisfied that it has sufficient information before it makes a decision. However, given the provisions in question are coupled with limited appeal rights, the Committee refers this matter to Parliament.

Right to legal representation

Under clause 48(3) of the Bill, the Commission may refuse to permit an insurer to be legally represented if the claimant in a workers compensation matter does not have legal representation. While this may impact on the right to legal representation, it is noted that this will only affect insurers and not individuals. Such a provision may also be designed to support access to justice for individual claimants and enhance the Bill's overall goal of facilitating the just, quick and cost effective resolution of Commission matters with as little formality as possible. The Committee also notes that under clause 48(5) the Commission must take into account any written submission prepared by a legal practitioner, even if the party is not legally represented at a conference or hearing. In the circumstances, the Committee makes no further comment.

Access to workers entitlements

Schedule 1, Part 2, Division 2, clause 4 to the Bill provides that when the Commission is established, certain positions in the WCC automatically become vacant. The schedule provides further that the relevant individuals are not entitled to remuneration or compensation because of the loss of that office.

The Committee notes that Divisions 3 and 4 in Part 2 of the Schedule provide for many of these people to be automatically transferred to the Commission. Further, if a person ceases to hold

office and Divisions 3 and 4 do not operate to automatically transfer them, they are eligible, if otherwise qualified, to be appointed to hold an office in the Commission. Notwithstanding these safeguards it is unclear whether cases may eventuate where individuals are not eligible for transfer, or are not transferred, and are not entitled to compensation for loss of their office. The Committee refers these matters to Parliament for consideration.

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

Commencement by proclamation

Clause 6 of the Bill establishes the Commission on the establishment day of 1 December 2020, or any later day proclaimed by the Governor. The Governor can also revoke an earlier proclamation regarding the date of establishment. Further, clause 2 of the Bill provides that while the proposed Act generally commences on assent, schedule 5 commences on a day or days to be appointed by proclamation.

The Committee generally prefers such significant legislative change to commence on a fixed date or on assent to provide certainty for affected parties. However, the Committee acknowledges that the establishment of the new Commission is likely to involve a degree of administrative complexity, requiring some flexibility. Further, it acknowledges that schedule 5 to the Bill makes consequential amendments to certain legislation that will not be necessary until the Commission has been established. Given the circumstances, the Committee makes no further comment.

Significant matters in regulations and Henry VIII clauses

The Bill allows certain significant matters to be set by the regulations. For example, clause 28(1)(e) of the Bill provides that the regulations can make provisions relating to substituted proceedings, that is, proceedings permitted to be heard in the District Court rather than in the Commission. The Committee prefers significant matters such as these to be dealt with in primary legislation to foster an appropriate level of parliamentary scrutiny.

Further, the Committee notes that clause 28(1)(e) also allows such regulations to modify the provisions of the proposed Act, enabling legislation or other legislation. This is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Again, this may be an inappropriate delegation of legislative power particularly as the clause allows the modification of a broad range of legislation – not just the proposed Act itself. The Committee notes that clause 29 of the Bill contains a similarly broad Henry VIII clause. The Committee refers these matters to Parliament to consider whether any inappropriate delegation of legislative power has occurred.

Broad power to create Commission rules

Clause 20 of the Bill provides that the Rules Committee of the Commission may make rules which regulate the procedural aspects of Commission proceedings. In some cases these rules may have the potential to affect the substantive rights of those who have dealings with the Commission. However, the Committee notes that the rules must not be inconsistent with the proposed Act or the workers compensation legislation and motor accidents legislation as defined. Further, such rules can be disallowed by either House of Parliament. Owing to these safeguards, the Committee does not consider the provisions to involve an inappropriate delegation of legislative power and makes no further comment.

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

Procedural directions not disallowable

Clause 21 of the Bill provides that the President may issue procedural directions which must be complied with, provided that those directions are publicly available on the Commission's website and consistent with the Act and the workers compensation legislation and motor accidents legislation as defined. However, unlike the Commission rules which also regulate practice and procedure, the procedural directions do not appear to be disallowable by Parliament. The substantive difference between the procedural directions and the Commission rules is unclear. Given that only the Commission rules are disallowable, the Committee refers this matter to Parliament.

7. RESIDENTIAL APARTMENT BUILDINGS (COMPLIANCE AND ENFORCEMENT POWERS) BILL 2020

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

New offences and retrospectivity

Several new offences in the Bill attract a range of significant monetary penalties. The most significant offences relate to failing to comply with a stop work order or a building work rectification order. The Committee notes that the creation of new offences may impact on personal rights and liberties, making previous lawful conduct unlawful.

The Committee also notes that the Bill has some retrospective effect, applying to existing buildings completed within 10 years of the issue of an occupation certificate. Therefore, those who built buildings under the regime that applied at the time, are now subject to a new regime in respect of those buildings and non-compliance with this new regime could result in significant penalties.

The Committee generally comments on provisions drafted with retrospective effect as they run counter to the rule of law principle that a person is entitled to know the law to which they are subject at any given time. This is particularly so in cases such as this where the retrospective provisions may affect individual rights or obligations.

However, these new offences have been created to promote safety and quality in the building industry in the context of a broader suite of reforms. The public interest in protecting consumers, including in relation to existing defects, is likely to outweigh concerns regarding the new nature of the offences and the retrospective application of the Bill. Further, there are several safeguards in the Bill which allow those affected to receive notice of and make written representations in relation to proposed orders, and enable appeals to the Land and Environment Court. In the circumstances, the Committee makes no further comment.

Procedural fairness

The Bill contains several procedural fairness provisions, including a requirement to give notice, reasons and consider representations in relation to a proposed building work rectification order. However, it is unclear whether these provisions apply to the Secretary's broad power to modify such orders. Similarly, the threshold for dispensing with some notice requirements for certain types of building rectification work orders may be too low. For example, there is no requirement for the Secretary to give notice of a building work rectification order if the Secretary believes that there is a serious risk to public safety, regardless of whether the risk is immediate or not. It also appears that there are no procedural fairness requirements for the issue of compliance cost notices, despite similar appeal rights to those that apply for building work rectification orders.

Given that a failure to comply with building work rectification orders can attract a significant penalty, the Committee refers these matters to Parliament.

Privacy, property and freedom from arbitrary interference

The Bill introduces a suite of compliance and enforcement powers which are likely to impact on a wide range of rights and liberties including rights to privacy, property and freedom from arbitrary interference. The information gathering powers that are likely to impact on a person's privacy rights include a power to require information and records, to direct a person to answer questions at a specified time and place, and to record evidence. Authorised officers would also have the power to enter premises without a warrant, except for residential premises. The Bill also outlines various search and seizure powers, which aside from more standard search and seizure powers include the power to damage property such as the ability to use reasonable force to break open or otherwise access a thing or to destructively test something.

The Committee notes that many of the proposed powers are quite broad and may, in some circumstances, impact on the right to be free from arbitrary interference. However, the powers must generally be exercised in connection with an authorised purpose and must be reasonable in the circumstances. Entry to residential premises also requires a warrant or the permission of the occupier. Moreover, the Committee acknowledges that the proposed compliance and enforcement powers enable authorised officers to respond quickly and effectively to possible contraventions of the Act, and are part of the broader aim of improving safety and quality in the building industry. For these reasons, and given the safeguards, the Committee makes no further comment.

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

Broad powers of delegation

The Secretary can delegate any of his or her functions in the Bill to a wide range of people, including members of various government departments and any person or class of persons authorised by the regulations. There are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. Given that the Secretary has considerable new powers under this Bill, the Committee refers this matter to Parliament.

Matters that should be set by Parliament – penalty notice offences

The Bill provides that the regulations can create penalty notice offences. The Committee prefers that offences be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The maximum penalties that could attach to the offences created under the regulations are quite significant – a $22,000 fine for bodies corporate and an $11,000 fine in any other case. The Committee refers the matter to Parliament for consideration.

8. RURAL FIRES AMENDMENT (NSW RFS AND BRIGADES DONATIONS FUND) BILL 2020*

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

Protection from breach of trust and civil liability, and retrospectivity

The Bill would amend the *Rural Fires Act 1997* to retrospectively allow certain money in the NSW Rural Fire Service and Brigades Donations Fund to be applied for purposes relating to

bush fire emergency relief. Without the amendment it can only be applied for narrower purposes directly related to the NSW Rural Fire Service brigades. This is because of limitations in the terms of the NSW Rural Fire Service Donations Trust. The Bill also provides protection from breach of trust and civil liability for a trustee who so applies the money.

The Committee acknowledges that the amendment is intended to allow money that was donated during the recent fire season in Australia, in response to a call from a Ms Celeste Barber, to be applied in a way that may more closely align with donors' expectations. Accordingly, the amendments do not have ongoing effect – they only apply to money received from 1 November 2019 to 1 February 2020.

However, the Committee generally comments on provisions that are drafted to have retrospective effect as they run counter to the rule of law principle that a person is entitled to know the law to which they are subject at any given time. In this case, a person who did donate at the relevant time knowing the terms of the trust, which were publicly displayed, would have no recourse if their money were now applied for purposes not covered by those terms. Further, as regards precedent, there are potential consequences for other trusts should Parliament legislate retrospectively to change the terms of the NSW Rural Fire Service Donations Trust. The Committee refers these matters to Parliament for consideration.

9. TRANSPORT ADMINISTRATION AMENDMENT (INTERNATIONAL STUDENTS TRAVEL CONCESSIONS) 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*.

10. WATER MANAGEMENT AMENDMENT (TRANSPARENCY OF WATER RIGHTS) BILL 2020*

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

Privacy Rights

Under the *Water Management Act 2000* a person may apply to the Minister for a water access licence which entitles the holder to specified shares in available water within a specified water management area. The Act also requires the Minister to keep a Water Licence Register (Access Register) and certain matters relating to a water access licence must be recorded on the Access Register including any general dealing in the licence.

The Bill seeks to amend the Act to provide for information recorded in the Access Register to be made publicly available through an electronic search facility, and so that searches could be performed by entering the name of an individual.

By allowing information recorded in the Access Register to be made publicly available, including information that is attached to the name of an individual, the Bill may impact on the privacy rights of affected individuals. However, the Committee notes that similar searches can already be performed in NSW in respect of real property. Further, by increasing the amount of publicly available information about water entitlements the proposed changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers these matters to Parliament to consider whether the possible privacy impacts are reasonable in the circumstances.

Retrospectivity

The Bill would increase the amount of information that people and companies need to provide when making an application for a water access licence under section 61(1) of the *Water Management Act 2000*. This information includes the applicant's name, address and contact details, and details of any existing interests in access licences held by the applicant. These requirements would operate retrospectively. That is, those who already held water access licences on the day on which the proposed Act commenced would have to provide the additional information to the Minister or risk having their water access licence cancelled.

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to him or her at any given time. In this case, a person could have his or her existing water access licence cancelled if he or she did not wish to comply with retrospectively imposed requirements relating to that licence. The Committee notes that the proposed retrospective changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

11. WATER MANAGEMENT AMENDMENT (WATER ALLOCATIONS – DROUGHT INFORMATION) 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. INDUSTRIAL RELATIONS (PUBLIC SECTOR CONDITIONS OF EMPLOYMENT) AMENDMENT (TEMPORARY WAGES POLICY) REGULATION 2020

The Committee discontinued its consideration of the Regulation as it was disallowed by the Legislative Council on 2 June 2020. The Regulation thereby ceased to have effect (see section 41 of the *Interpretation Act 1987*).

Part One – Bills

1. Building Amendment (Mechanical Services and Medical Gas Work) Bill 2020*

Date introduced	3 June 2020
House introduced	Legislative Council
Member responsible	The Hon Mark Buttigieg MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to provide for the licensing of contractors, and the certifying of supervisors and tradespersons, who carry out mechanical services work including medical gas systems work.

2. This Act commences on the day that is 6 months after the date of assent to this Act. However, Schedule 1[2] commences on the day that is 2 years after the date of assent to this Act.

BACKGROUND

3. In the second reading speech, the Hon Mark Buttigieg MLC told Parliament:

> The object of the bill is to provide for the licensing of contractors and the certifying of supervisors and tradespersons who carry out mechanical services work, including medical gas systems work. The legislation is designed to prevent a repeat of the tragic events that took place at the Bankstown-Lidcombe Hospital in 2016 when two newborn babies were catastrophically administered poisonous gas instead of oxygen. A cross-connection of medical gas delivery outlets was the cause of these events. The legislation has been developed to ensure that mechanical services and medical gas works are licensed. This is a highly specialised form of plumbing work which has a great deal of complexity and requires extensive technical training to be performed safely.

ISSUES CONSIDERED BY THE COMMITTEE

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

New offences with strict liabiity

4. Part 2 of the *Home Building Act 1989* (the Act) provides that individuals, partnerships and corporations who contract to do specialist work must be licensed under that Act. Schedule 1 of the Act defines specialist work as the following:

- Plumbing and draining work
- Gasfitting work
- Electrical wiring work

- Any work declared by the regulations to be refrigeration or air conditioning work.

5. Section 3D of the Act provides that work can be classified as specialist work whether or not it is done in connection with a dwelling or residential work. This means specialist work can include commercial or industrial work.

6. Part 2, Division 2 of the Act sets down penalties for individuals who undertake work that they are not appropriately licensed to do, including specialist work. The maximum penalties for offences of this kind are a $110,000 fine in the case of a corporation, and a $22,000 fine in any other case.

7. Schedule 1[4] of the Bill seeks to amend the definition of specialist work to provide that "mechanical services work" is specialist work for the purposes of the Act. This would mean that individuals, partnerships or corporations who contract to do "mechanical services work" would have to be appropriately licensed or qualified to undertake that kind of work.

8. Schedule 1[3] of the Bill defines "mechanical services work" to include work that is the construction, installation, replacement, repair, alteration, maintenance, testing or commissioning of any fixed component used in a reticulation system for the supply or removal of medical gases from the gas source to the wall outlet. The term "medical gases" is also defined to include any gas or mixture of gases or other substance or process for medical use that is supplied to, removed from or conducted at a hospital (or any other place where medical procedures are carried out), by way of a pipeline reticulation system.

9. Schedule 1[2] of the Bill, which is to commence on the day that is 2 years after the date of assent to the proposed Act, also establishes additional requirements for obtaining contractor licenses and supervisor and tradesperson certificates relating to mechanical services work. These provisions set down what will be required for a relevant licence or certificate to be issued by the Secretary to do this kind of work.[1]

10. Further, the Bill establishes offences related to unlicensed and unqualified mechanical services work.

11. Schedule 1[1] provides that an individual must not do any mechanical services work except:

- As a qualified supervisor (meaning the holder of an endorsed contractor licence, or a supervisor certificate, authorising its holder to do mechanical services work), or

- As the holder of a tradesperson certificate authorising its holder to do that work under supervision, but only if the work is done under the supervision and in accordance with the directions, if any, of a qualified supervisor.

[1] The Secretary is defined as the Commissioner for Fair Trading, Department of Finance, Services and Innovation or if there is no such person employed, the Secretary of the Department of Finance, Services and Innovation: Schedule 1, *Home Building Act 1989*.

12. The maximum penalty for breaching these provisions is a $110,000 fine in the case of a corporation, and a $22,000 fine in any other case.

13. Schedule 1[1] also sets down what is required of a qualified supervisor in supervising a holder of a tradesperson certificate authorising its holder to do mechanical services work, but only under supervision. Such supervisors are required to:

- Give directions that are adequate to enable the work to be done correctly by the individual performing it, and
- Personally ensure that the work is correctly done.

14. Failing to supervise in this way carries a maximum penalty of a $110,00 fine in the case of a corporation, and a $22,000 fine in any other case.

15. Schedule 1[1] also provides an exception to the general prohibition on unqualified people undertaking mechanical services work. It provides that an unsuitably qualified apprentice or a trainee may do mechanical services work, but only if a qualified supervisor is present at all times, and is available to be consulted by, and give directions to the apprentice or trainee. It also establishes what is required of a qualified supervisor who is supervising an apprentice or trainee undertaking mechanical services work. Such supervisors are required to:

- Give directions that are adequate to enable the work to be done correctly by the apprentice or trainee performing it (which, unless the qualified supervisor considers it unnecessary, must include directions requiring the apprentice or trainee to advise in detail on progress with the work), and
- Be present when the work is being done and be available to be consulted by, and to give directions relating to how the work is to be done to, the apprentice or trainee, and
- Personally ensure that the work is correctly done.

16. Failing to supervise an apprentice or trainee in this way carries a maximum penalty of a $110,000 fine in the case of a corporation, and a $22,000 fine in any other case.

The Bill seeks to amend the *Home Building Act 1989* to provide that individuals, partnerships and corporations who contract to do "mechanical services work" must be licensed to do so. Further, it amends the Act to provide that it is an offence for an individual to do any such work except where appropriately licensed or qualified to do so. It also creates offences for where a supervisor fails to appropriately supervise a tradesperson or apprentice in carrying out such work.

In each case these are strict liability offences backed up by significant maximum monetary penalties of a $110,000 fine for a corporation and a $22,000 fine in any other case. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mens rea or mental element is a necessary part of liability for an offence.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. For example, the *Home Building Act 1989* currently includes strict

liability offences with identical penalties to those in the Bill for individuals who undertake "specialist work" like plumbing and drainage, gas fitting, and electrical wiring work without being licensed to do so. Further "mechanical services work" is highly technical and if it is carried out by unqualified persons, the potential safety consequences are serious. In addition, while the maximum penalties contained in the Bill are significant, they are monetary, not custodial. In the circumstances, the Committee makes no further comment.

2. Constitution Amendment (Water Accountability and Transparency) Bill 2020

Date introduced	3 June 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Melinda Pavey MP
Portfolio	Water, Property and Housing

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Constitution (Disclosures by Members) Regulation 1983* (the Regulation) as follows—

   (a) to require Members of Parliament to publicly disclose their interests in water access licences, share components of water access licences and contractual rights to receive water from irrigation corporations,

   (b) to require Members of Parliament to publicly lodge returns disclosing water trading activity within 14 days of becoming a party to the activity,

   (c) to provide for the compilation and maintenance of registers of water trading returns by the Clerks of the Legislative Council and the Legislative Assembly,

   (d) to make consequential amendments.

BACKGROUND

2. The *Constitution (Disclosures by Members) Regulation 1983* requires the pecuniary interests of Members of the NSW Parliament to be disclosed including interests in real property, sources of income and gifts (Part 3).

3. In the second reading speech, the Hon. Melinda Pavey MP, Minister for Water, Property and Housing stated:

> Water assets, including water access licenses, their share component, water allocations and other contractual delivery rights, are extremely valuable assets that can be traded on the water market. Members of Parliament that may hold these assets are currently not required to disclose these assets or dealings on these assets as with their other disclosure requirements under the Constitution (Disclosures by Members) Regulation 1983. This bill will amend the Constitution (Disclosures by Members) Regulation 1983 to clarify that parliamentarians are required to disclose their interest in water assets.

4. The Minister provided the following specific information:

> Specifically, this bill will require the disclosure of the licence number and share component of any water access licence, or a contractual right to receive water from an irrigation corporation, and the water entitlements associated with that right in which they had an interest at any time during the primary and/or ordinary return period, and the nature of the interest in the water

> licence. The bill will require also that any relevant Australian Business Number [ABN] is to be attached to each water access licence or right, and that members notify the Parliament via their pecuniary interest register within 14 days of trading water for any purpose, including any moneys made and the change to the net impact of their water holdings.

5. The Minister also told Parliament that any breach of the new disclosure requirements would be subject to the rules that already apply under existing disclosure requirements for parliamentarians. In addition, the Minister noted the rationale for the Bill, increasing transparency and accountability around water interests:

> This bill will strengthen the transparency and accountability of parliamentary disclosure requirements by including water assets as a form of pecuniary interest requiring disclosure. Water is one of our most valuable assets and the New South Wales Government has a responsibility to the people of New South Wales to ensure that it is managed in an equitable and transparent manner. Parliamentarians also have a responsibility to the people of New South Wales that they are reporting all pecuniary interests in line with the Constitution (Disclosures by Members) Regulation 1983.

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*.

3. Crimes Amendment (Special Care Offences) Bill 2020

Date introduced	3 June 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Crimes Act 1900* as follows—

(a) to implement certain recommendations contained in the report by the Legislative Council Standing Committee on Law and Justice entitled "Adequacy and scope of special care offences" published in November 2018, in relation to offences in which a person (the offender) has sexual intercourse with a young person between 16 and 18 years (the victim) who is under the offender's special care (special care sexual intercourse offences)—

(i) to expressly require the offender to be in a position of authority relative to the victim for certain special care relationships involving religious, sporting, musical or other instruction to be established, and

(ii) to revise a special care relationship that is established if the offender is employed at the victim's school and has authority over students at the school, to clarify that it applies to paid, unpaid and voluntary workers at the school and to require the victim to be under the offender's authority, and

(iii) to provide that a special care relationship is established if the offender works for an organisation that provides residential care to young persons in out-of-home care and has an established personal relationship with the victim in connection with the provision of that residential care, in which the victim is under the authority of the offender, and

(iv) to provide that a special care relationship is established if the offender works for an organisation that provides refuge or crisis accommodation and has an established personal relationship with the victim in connection with the provision of that accommodation, in which the victim is under the authority of the offender, and

(v) to provide that a special care relationship is established if the offender is the adoptive parent or the de facto partner of an adoptive parent of the victim,

(b) to provide that a special care relationship is established if the offender is the spouse of a biological or adoptive parent of the victim (rather than a step-parent of the victim),

(c) to extend the special care relationships to include those where the offender is the biological or adoptive parent of a biological or adoptive parent of the victim, or that person's spouse or de facto partner, or the spouse of a guardian or an authorised carer of the victim, excluding any person who is a close family member of the victim for the purposes of the offence of incest,

(d) to extend the amendments referred to in paragraphs (a) and (b) and (without the exclusion)in paragraph (c) to offences involving sexual touching of young persons between 16 and 18 years under special care (***special care sexual touching offences***),

(e) to grant immunity from prosecution to young persons between 16 and 18 years for an offence of incest if the other person to whom the charge relates is the young person's parent or grandparent,

(f) to make consequential and ancillary amendments.

BACKGROUND

2. In the second reading speech, the Hon. Mark Speakman SC MP, Attorney General, told Parliament that the Bill implements recommendations made by the Legislative Council Standing Committee on Law and Justice following its Inquiry into the Adequacy and Scope of Special Care Offences. This inquiry was established on 15 February 2018 to inquire into and report on the adequacy and scope of special care offences under section 73 of the *Crimes Act 1900*.

3. The Attorney General explained that while generally the age of consent to sexual intercourse in NSW is 16 years, an exception is created under section 73 of the *Crimes Act 1900* for "special care" offences. This means that it is a criminal offence for an adult to have sexual intercourse with a 16 or 17 year old (hereinafter a "young person") who is under the adult's "special care":

> While the general age of consent to sexual intercourse in New South Wales is 16 years of age, the special care (sexual intercourse) offence recognises that in certain limited circumstances the power dynamic between an adult and a young person displaces the young person's capacity to give free and voluntary consent to engage in sexual intercourse.

4. Further, the Attorney General stated that section 73(3) currently provides that a young person is under an adult's "special care" if and only if the adult:

- is the step parent, guardian or authorised carer of the young person;
- is the de facto partner of a parent, guardian or authorised carer of the young person;
- is a member of the teaching staff of the school at which the young person is a student;

- has an established personal relationship with the young person in connection with the provision of religious, sporting, musical or other instruction to the young person;
- is a custodial officer of an institution in which the young person is an inmate; or
- is a health professional and the young person is a patient of the health professional.

5. The Attorney General went onto state that the Standing Committee was asked to inquire into the following matters:

- the adequacy of the section 73 offence's scope in relation to relationships between school students and persons who perform work at their schools;
- whether workers in youth residential care settings, including but not limited to homelessness services, should be recognised under section 73 as being in special care relationships with 16 and 17 year olds to whom they provide services;
- whether the section 73 offence should be expanded to recognise relationships between young people and their adoptive parents as special care relationships; and
- whether the incest offence under section 78A of the Crimes Act should be expanded to include adoptive relationships.

6. The Attorney General also told Parliament that in June 2018, while the Standing Committee was deliberating, the NSW Parliament introduced section 73A into the *Crimes Act 1900*. This offence was not considered as part of the Standing Committee's deliberations nor included in its recommendations:

> The special care (sexual intercourse) offence under section 73 was supplemented by an additional special care offence involving sexual touching in June 2018, now under section 73A of the Crimes Act..[This]offence applies to the same relationship types as are set out in section 73(3), as well as to relationships between young people and their parents and grandparents, and between young people and the de facto partners of their grandparents.

7. The Standing Committee tabled its report on 22 November 2018, and it contained five recommendations. The Government accepted all five recommendations, culminating in the Bill. The Attorney General stated:

> The report concluded that there would be value in amending the special care (sexual intercourse) offence under section 73 to provide greater clarity and certainty about which relationship types are captured to ensure that young people in relationships with adults that involve a power imbalance due to the adult's position of authority relative to the young person are suitably protected; and that innocent, consensual relationships between young people who are over the age of consent and adults who may be only a few years older than the young person, which do not involve power disparity due to the adult's position of authority relative to the young person, are not criminalised.

8. In particular, the Government accepted the Standing Committee's view that some of the relationship types set out in the section 73 special care offence do not make it clear that

sexual intercourse in those relationships is an offence because of a power disparity in favour of the adult. For this reason, the amendments contained in schedule 1[4], [6] and [7] of the Bill make it explicit that to commit a special care offence against a young person, the adult offender must be in a position of authority relative to the young person. These changes cover the section 73 special care offence (sexual intercourse) and the section 73A offence (sexual touching), (although as above, the Standing Committee's recommendations only related to the section 73 offence).

9. Specifically, schedule 1[4] amends section 72B of the *Crimes Act 1900* to effectively provide that a young person is under the other person's authority if the young person is in the care, or under the supervision or authority, of the other person.

10. Further, schedule 1[6] amends section 73 (sexual intercourse) and 73A (sexual touching) to create two new subsections, (3) (b), and 3 (b1) relating to special care offences in school settings. The Attorney General explained:

> Under 3 (b), it will remain the case that in a school setting all relationships between teachers, principals and deputy principals on the one hand, and young people at their schools on the other hand, are relationships of special care. This reflects the inherent authority that teachers, principals and deputy principals have over their student cohorts.

11. However, the Attorney General stated that the laws would be different for special care relationships in schools where the adult in question performs work at the school but is not a teacher, principal or deputy principal. In that case, the young person would have to be under the offender's authority to be caught by the provisions:

> Under 3 (b1), special care relationships will also exist where an adult performs work at a school as an employee, whether paid or unpaid, a contractor, a volunteer or otherwise and has sexual relationships within any young person at the school where that adult has authority over that young person and any other students, if any.

12. In addition, schedule 1[7] of the Bill makes similar amendments to cover other organisational settings. The Attorney General explained:

> Schedule 1[7] will amend section 73(3) (c) and section 73A (3) (c) to require expressly that for relationships between young people and adults who provide them religious, sporting, musical or other instruction to constitute "special care" relationships, the young person must be under the adult's authority in that relationship.

13. The Attorney General also noted that (as with teachers, deputy principals and principals in school settings) most of the relationship types included in the special care offences involve an adult who is inherently in a position of authority over the young person e.g. doctor/patient relationships and correctional officer/inmate relationships.

14. Further, the Bill makes amendments recommended by the Standing Committee that relate to the overall policy objectives of the special care offences and the Attorney General stated:

> Schedule 1[4], [6] and [7] to the bill make some clarifying amendments and cross-references…to achieve in a better way the overall policy objective of the special care offences. The policy objective of special care offences is to protect 16 and 17 year olds who are over the age of consent from exploitation by adults who are in positions of authority over them, whether or not that authority is abused.

15. And further:

> The special care offence seeks to strike a balance between respecting young people's autonomy and capacity to engage in consensual sexual relationships with whom they choose and the reality that in certain relationships where an adult is in a position of authority relative to a young person that power dynamic might influence the young person's capacity to consent to sexual activity freely and voluntarily.

16. In addition to these over-arching amendments, the Bill makes further amendments some of which expand the special care offences in line with the Standing Committee's recommendations, and these are discussed further below.

ISSUES CONSIDERED BY THE COMMITTEE

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

Expanded offences and burden of proof – familial relationships

17. As above, under section 73 of the *Crimes Act 1900* it is a criminal offence for an adult to have sexual intercourse with a young person (16 or 17 years old) who is under the adult's "special care". Similarly, under section 73A of the *Crimes Act 1900* it is a criminal offence for an adult to engage in sexual touching of a young person (16 or 17 years old) who is under the adult's "special care".

18. Schedule 1[1], [5] and [9] of the Bill amend sections 73(3)(a) and 73A(3) of the *Crimes Act 1900* to expand the relationship types that constitute "special care relationships". As a result "special care relationships" will now exist between:

- a young person and his or her parent and/or grandparent whether by way of biology or adoption;
- a young person and the spouse and/or de facto partner of his or her parent or grandparent whether by way of biology or adoption.

19. The Attorney General told Parliament that these changes drew on concerns that some stakeholders raised with the Standing Committee that sexual intercourse between young people and their adoptive parents is not explicitly criminalised. The Standing Committee agreed that greater clarity would be beneficial.

20. Further, the Committee notes that it will not be necessary for the prosecution to prove that these family members were in a position of authority over the young person to establish liability. Such family members are considered to be in an inherent position of authority over the young person. This consistent with most of the relationship types already included in the special care offences (e.g. teacher/student; doctor/patient; correctional officer/inmate).

21. Nor will the prosecution need to establish that the family member abused his or her authority to establish liability. In short, the prosecution will only have to establish the familial relationship, and the sexual intercourse or sexual touching to establish liability.

22. However, as above, the Committee notes the Attorney General's statement about the rationale for special care offences being to recognise "that in certain limited circumstances the power dynamic between an adult and a young person displaces the

young person's capacity to give free and voluntary consent to engage in sexual intercourse". Further, the Committee notes the Attorney General's above statement that "The policy objective of the special care offences is to protect 16 and 17 year olds who are over the age of consent from exploitation by adults who are in positions of authority over them, whether or not that authority is abused".

> **Under the *Crimes Act 1900* it is a criminal offence for an adult to have sexual intercourse with, or to sexually touch, a 16 or 17 year old who is under the adult's "special care". The Bill amends the Act to expand the relationship types that constitute "special care relationships" so that more familial relationships will be caught. This includes relationships between a young person and his or her parent and/or grandparent, whether by way of biology or adoption. It also includes relationships between the young person and the spouse or de facto partner of his or her parent or grandparent whether by way of biology or adoption. This change responds to concerns raised with the Legislative Council Committee on Law and Justice during its inquiry into the adequacy and scope of special care offences, that sexual intercourse between young people and their adoptive parents is not currently explicitly criminalised.**
>
> **The Committee often comments on the expansion of offences, or the creation of new offences, as this criminalises conduct that was previously lawful, with attendant penalties. The Committee also notes that the prosecution will not have to specifically prove that the family member was in a position of authority over the young person, nor that he or she abused that authority. The prosecution will only have to establish the familial relationship, and the sexual intercourse or sexual touching to establish liability.**
>
> **In the current case, the Committee considers the expanded offences are appropriate, as is the prosecution's burden of proof in establishing them. Special care offences have been established to acknowledge that in certain limited circumstances the power dynamic between an adult and a 16 or 17 year old displaces the young person's capacity to give free and voluntary consent to engage in sexual acts. The Committee accepts that in the family relationships covered by the expanded offences e.g. adoptive parent and son/daughter, the adult is in an inherent position of authority over the young person and that engaging in sexual acts with the young person in these circumstances is inherently exploitative. Given these considerations, the Committee makes no further comment.**

Expanded offences and burden of proof – refuge and crisis accommodation and residential care

23. Schedule 1[8] to the Bill amends section 73(3) and section 73A(3) of the *Crimes Act 1900* to recognise two further types of relationship as "special care relationships". These are:

- relationships between young people and adults who perform work for organisations that provide residential care to young persons; and
- relationships between young people and adults who perform work for organisations that provide refuge or crisis accommodation to young persons who may be experiencing homelessness or similar instability;

where the adult has established a personal relationship with the young person in connection with the provision of that care or accommodation, in which relationship the victim is under the authority of the adult.

24. Thus, in establishing an offence pursuant to these provisions, the prosecution would need to prove that the young person was under the authority of the adult. However, again, the prosecution would not need to establish that the authority was abused.

25. Schedule 1[3] to the Bill defines work for an organisation as including paid or unpaid work by employees, volunteers or otherwise.

26. These changes are consistent with recommendation 4 of the Standing Committee and the Attorney General told Parliament:

> The Government recognises that staff who work with young people in residential care settings, refuges and similar homelessness accommodation services are in unique positions of trust and influence. Many have implied or explicit authority over the young people they engage with, who may be extremely vulnerable, be experiencing acute instability, lack other support systems and have complex histories of trauma. The Government agrees that extending both the special care sexual intercourse offence and the special care sexual touching offence to relationships formed between adults who work in these environments on the one hand, and the young people they provide services to and have authority over, on the other hand, is appropriate and will help extend the protections available to some of the most vulnerable members of our community.

As above, under the *Crimes Act 1900* it is a criminal offence for an adult to have sexual intercourse with, or to sexually touch, a 16 or 17 year old who is under the adult's "special care". The Bill also amends the Act to expand the relationship types that constitute "special care relationships" so that more organisational relationships will be caught. These are relationships between young people and adults who perform work for organisations that provide residential care, or refuge or crisis accommodation to young persons.

As also noted above, the Committee often comments when offences are expanded as this criminalises conduct that was previously lawful. Regarding burden of proof, the Committee notes that to establish liability in these cases, the prosecution would need to prove that the adult had an established personal relationship with the young person in connection with the provision of residential care or accommodation and that in that relationship, the young person was under the authority of the offender. However, the prosecution would not need to prove that that authority was abused.

The Committee again considers the expanded offences are appropriate, as is the prosecution's burden of proof in establishing them. Not only would the prosecution have to prove that the adult in question was in a position of authority but the Committee accepts that it is inherently exploitative for an adult to engage in a sexual act with a 16 or 17 year old in residential care or a refuge or crisis accommodation over whom they have such authority. The Committee notes in particular that such young persons are part of a vulnerable population group. In short, there need be no separate requirement for the prosecution to specifically prove that the adult abused their authority. The Committee makes no further comment.

4. Law Enforcement Conduct Commission Amendment Bill 2020

Date introduced	4 June 2020
House introduced	Legislative Council
Member introducing	The Hon. Natalie Ward MLC on behalf of the Hon Damien Tudehope MLC
Minister responsible	The Hon. Gladys Berejiklian MP
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the eligibility requirements for appointment of the Chief Commissioner and alternate Chief Commissioner of the Law Enforcement Conduct Commission and to clarify when an office becomes vacant.

BACKGROUND

2. The Bill responds to a report dated 3 December 2019 that the Assistant Inspector of the Law Enforcement Conduct Commission (the LECC), Mr Bruce McClintock SC provided to the Presiding Officers of the Parliament. In the report the Assistant Inspector recommended consideration be given to widening eligibility criteria for appointment as Chief Commissioner of the LECC.

3. The Bill accordingly amends the *Law Enforcement Conduct Commission Act 2016* (the LECC Act) to implement that recommendation. In the second reading speech the Hon. Natalie Ward MLC on behalf of the Hon. Damien Tudehope MLC, Minister for Finance and Small Business and Leader of the Government in the Legislative Council, stated that currently, under section 18(3) of the Act, to be eligible for appointment as Chief Commissioner, or to act in that office, a person must be a current or former judge or other judicial officer of a superior court of record of NSW or another State or Territory of Australia. Ms Ward further stated:

> In his report, the assistant inspector expressed the view that "there are very few people who fall within this category and that many would, for various reasons, be unsuitable or unwilling to accept" an appointment as Chief Commissioner of the LECC, and that this provision undesirably narrows the pool of persons available for appointment.

4. The Bill widens the definition of persons eligible for appointment as Chief Commissioner and provides that a person will not be eligible to be appointed as Chief Commissioner of the LECC, or to act in that office, unless the person has "special legal qualifications".

5. Ms Ward told Parliament:

> A person who has "special legal qualifications" is a person who is, or is qualified to be appointed as, a judge or other judicial officer of a superior court of record of New South Wales or of any other State or Territory Australia; or is a former judge or judicial officer of such a court. This means that a person would currently need at least five years' standing as an Australian lawyer to meet the "special legal qualifications" threshold. This is currently the minimum qualification required to be eligible to be appointed as a justice of the High Court of Australia.

6. Ms Ward also stated that the amendment would bring the eligibility criteria for LECC Chief Commissioners into line with eligibility criteria for commissioners of the Independent Commission Against Corruption (the ICAC) and that the ICAC exercises similar royal commission style powers to those exercised by the LECC.

7. The Bill also makes an amendment to clarify when an office becomes vacant and on this change Ms Ward stated:

> Clause 7 of schedule 1 to the LECC Act sets out when the office of a member of the commission, assistant commissioner or alternate commissioner becomes vacant, including circumstances like the death or resignation of a person. Clause 7 (2) also provides that the Governor may remove a person from office for incapacity, incompetence or misbehaviour.
>
> Clause 7 (1) (k) of schedule 1 to the LECC Act currently provides that the office of a member of the commission, assistant commissioner or alternate commissioner becomes vacant if the holder is removed from office under clause 7 of schedule 1 to the LECC Act. This does not recognise that a person may also be removed from office under part 6 of the Government Sector Employment Act 2013, which relates to the removal of statutory officers by the Governor… It is proposed to amend clause 7 of schedule 1 to the LECC Act to ensure that, if a person has been removed from office under part 6 of the Government Sector Employment Act, then the office becomes vacant.

8. Ms Ward also provided the following background to the amendment:

> On 15 January 2020 the Governor, on the advice of the Executive Council, removed Mr Patrick Saidi from the office of Commissioner for Oversight of the LECC, pursuant to section 77 of the Government Sector Employment Act. Mr Saidi's removal from office followed the assistant inspector's special report to Parliament, which considered if Mr Saidi was guilty of officer maladministration or misconduct, with the assistant inspector ultimately deciding against such a finding. I am advised that Mr Saidi was given the opportunity to make submissions, but that he did not raise any objection to the proposal that he be removed from office.

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity

9. As noted above, clause 7 (1) (k) of schedule 1 to the LECC Act currently provides that the office of a member of the commission, assistant commissioner or alternate commissioner becomes vacant if the holder is removed from office under clause 7 of schedule 1 to the LECC Act. This does not recognise that a person may also be removed from office under part 6 of the *Government Sector Employment Act 2013*.

10. Therefore, the Bill amends clause 7 of schedule 1 to the LECC Act so that if a person has been removed from office under part 6 of the *Government Sector Employment Act 2013*, the office becomes vacant.

11. This amendment would operate retrospectively, that is, it would apply to cases where a person has been removed from office prior to the Bill commencing. Ms Ward told Parliament:

> The bill also includes an associated savings and transitional provision to apply the amendment to the removal from office of a person before the commencement of the section. This will clarify that the office of the Commissioner for Oversight is vacant for the purposes of clause 7 of schedule 1 following Mr Saidi's removal from office. The bill does not expand the circumstances in which a member of the LECC can be removed from office; it merely corrects a drafting oversight to clarify that if a person is removed from office by the Governor under part 6 of the Government Sector Employment Act, the office also becomes vacant.

Clause 7 (1) (k) of schedule 1 to the *Law Enforcement Conduct Commission Act 2016* (the LECC Act) currently provides that the office of a member of the commission, assistant commissioner or alternate commissioner becomes vacant if the holder is removed from office under clause 7 of schedule 1 to the LECC Act. This does not recognise that a person may also be removed from office under part 6 of the *Government Sector Employment Act 2013.*

The Bill accordingly amends clause 7 of schedule 1 to the LECC Act so that if a person has been removed from office under part 6 of the *Government Sector Employment Act 2013*, the office becomes vacant. The amendment would operate retrospectively, that is, it would apply to cases where a person has been removed from office prior to the Bill commencing. The Committee generally comments on provisions that are drafted to have retrospective effect as they run counter to the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, in the current case the retrospective provision does not remove individual rights nor does it impose obligations on individuals. In particular, it does not expand the circumstances under which a member of the Law Enforcement Conduct Commission can be removed from office. Instead, it is designed to correct a drafting error so that if a person is removed from office pursuant to the *Government Sector Employment Act 2013*, the office also becomes vacant. In the circumstances, the Committee makes no further comment.

It could be argued that the Bill as drafted reduces the independence of the Commission by allowing dismissal of the Commissioner under the *Government Sector Employment Act 2013* to also amount to removal from the statutory position under the LECC Act. The Committee refers this matter to Parliament for consideration.

5. Mental Health and Cognitive Impairment Forensic Provisions Bill 2020

Date introduced	3 June 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows—

(a) to provide for criminal procedures relating to offences where defendants or accused persons have mental health impairments or cognitive impairments,

(b) to clarify procedures and Local Court powers when diversion of defendants with mental health impairments or cognitive impairments is raised in summary proceedings,

(c) to replace the special verdict of not guilty by reason of mental illness with a special verdict of act proven but not criminally responsible,

(d) to provide a statutory test for whether a defendant is fit to be tried,

(e) to provide for the treatment, care and detention of forensic patients and prisoners who have a mental illness or other condition that may be treated in a mental health facility and the powers of the Mental Health Review Tribunal (the Tribunal) to review and make orders about those persons,

(f) to re-enact provisions establishing a Victims Register for victims of forensic patients,

(g) to provide for other miscellaneous related matters,

(h) to update the *Crimes Act 1900* in relation to the offence and partial defence of infanticide and the partial defence of substantial impairment by abnormality of mind, including by updating terminology to refer to mental health impairments or cognitive impairments,

(i) to make consequential amendments to other Acts and provide for savings and transitional matters as a consequence of the enactment of the proposed Act.

BACKGROUND

2. The Bill repeals and replaces the *Mental Health (Forensic Provisions) Act 1990* (the 1990 Act) and sets out a new legal framework to deal with persons who come into contact with the criminal justice system, and who have a mental health or cognitive impairment.

3. In the Second Reading Speech, the Hon Mark Speakman SC MP, Attorney General noted that forensic mental health is a complex area:

> It aims to recognise that people who come into contact with the criminal justice system who have mental health impairment or cognitive impairment may require a legal response different from the response to those who commit crimes wilfully. It must also take into account the safety and experiences of victims, as well as prioritise the safety of the community.

4. The Attorney General stated that in 2018, the 1990 Act was amended to improve the experience of victims of forensic patients, and that those reforms gave effect to the recommendations of the Hon Anthony Whealy QC in his review of the Mental Health Review Tribunal.[2]

5. The Attorney General further stated that the Bill would now amend the remainder of the 1990 Act to implement principal reforms recommended by the NSW Law Reform Commission in two landmark forensic mental health reports: *Diversion*, published in 2012, and *Criminal Responsibility and Consequences*, published in 2013.[3]

6. The Attorney General also told Parliament that the Bill has three overlapping primary objectives:

> First and foremost, it aims to protect victims and the community. Secondly it aims to ensure people with mental health impairment or cognitive impairment who commit crime receive the treatment, support and supervision they need to get well and to prevent reoffending. Thirdly, it provides clear language, structure and processes, enabling efficient and effective responses to people with mental health and cognitive impairment who come into contact with the criminal justice system.

7. The Attorney General also stated that the Bill had been the subject of much consultation:

> The bill is the result of long-term in-depth stakeholder engagement. For this bill the Government has worked closely with the [Mental Health Review] tribunal, the courts, victim advocates, legal stakeholders, police and forensic health professionals…The Government has engaged with over 75 stakeholders with around 50 per cent of those contributing to the process more than once. The result is a bill that the vast majority of stakeholders support and want to see implemented.

ISSUES CONSIDERED BY THE COMMITTEE

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

Presumption of innocence – removal of not guilty verdict

8. Part 3 of the Bill outlines the legislative framework for a defence of mental health impairment or cognitive impairment and applies to criminal proceedings in the Supreme Court (including summary proceedings) and the District Court.

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[2] Hon Anthony Whealy QC, *Mental Health Review Tribunal: A Review in Respect of Forensic Patients*, December 2017: https://www.health.nsw.gov.au/mentalhealth/reviews/tribunal/Pages/default.aspx

[3] NSW Law Reform Commission, *Report 135: Diversion*, June 2012: https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-135.pdf and NSW Law Reform Commission, *Report 138: Criminal Responsibility and Consequences*, May 2013: https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-138.pdf

9. Clause 28 establishes the new defence of mental health impairment or cognitive impairment, which replaces the current defence of mental illness. It provides that a person is not criminally responsible for an offence if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the person:

- did not know the nature and quality of the act, or
- did not know that the act was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).

10. Under Clause 4 of the Bill, a person has a mental health impairment if:

- the person has a temporary or ongoing disturbance of thought, mood volition or perception of memory, and
- the disturbance would be regarded as significant for a clinical diagnostic purposes, and
- the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

11. Clause 5 provides that a person has a cognitive impairment if:

- the person has an ongoing impairment in adaptive functioning, and
- the person has an ongoing impairment in comprehension, reason, judgement, learning or memory, and
- the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from any of the following conditions: intellectual disability; borderline intellectual functioning; dementia; an acquired brain injury; drug or alcohol related brain damage, including foetal alcohol spectrum disorder; or autism spectrum disorder.

12. Clause 30 requires a jury to return a “special verdict” of “act proven but not criminally responsible” in respect of an offence if the jury is satisfied that the defence of mental health impairment or cognitive impairment has been established. Clause 31 also enables a special verdict to be entered by a court at any time in the proceedings if the defendant and the prosecutor agree that the proposed evidence in the proceedings establishes a defence of mental health impairment or cognitive impairment, the defendant is represented by an Australian legal practitioner, and the court is satisfied that the defence is established.

13. Clause 33 provides that on entering a special verdict, the court can make one or more of the following orders:

- an order that the defendant be remanded in custody until further order
- an order that the defendant be detained in a specified place or manner that the court thinks fit until released by due process of law

- an order for the unconditional release of the defendant from custody conditionally or unconditionally
- other orders that the court thinks appropriate.

14. Clause 33 also provides that before making an order for release, the court may obtain a report from a forensic psychiatrist or other person prescribed by the regulations as to whether the release is likely to seriously endanger the safety of the defendant or any member of the public. The court must not order the defendant's release unless it is satisfied, on the balance of probabilities, that the release is not going to have that effect.

15. Currently, if a successful defence of mental illness is raised, this results in a special verdict of "not guilty by reason of mental illness". In its 2013 report *Criminal Responsibility and Consequences*, the NSW Law Reform Commission recommended amending this verdict to "not criminally responsible" and, as above, clause 30 of the Bill has consequently replaced the current special verdict with a special verdict of "act proven but not criminally responsible". In speaking to this amendment, the Attorney General told Parliament:

> The terms of the current special verdict are the cause of further pain and trauma for victims and their families because the phrase "not guilty" intimated that the defendant had not done the act…The special verdict of "not guilty by reason of mental illness" does not result in the person being released by the court as a normal finding of "not guilty" would. In most cases the person is referred to the [Mental Health Review] tribunal to become a forensic patient…The terms of the special verdict were problematic and the LRC recommended amending the verdict in statute to "not criminally responsible". That is what we have done.

Part 3, Clause 28 of the Bill establishes the new defence of mental health impairment or cognitive impairment, which replaces the current defence of mental illness. In sum, it provides that a person is not criminally responsible for an act if at the time it was carried out he or she had a mental health and/or cognitive impairment and as a result the person did not know the nature and quality of the act, or did not know the act was wrong.

Clause 30 requires a jury to return a "special verdict" of "act proven but not criminally responsible" in respect of an offence if the jury is satisfied that the defence of mental health impairment or cognitive impairment has been established. Currently, if a successful defence of mental illness is raised, this results in a special verdict of "not guilty by reason of mental illness".

The Committee appreciates that the amended special verdict is intended to deal with concerns that the phrase "not guilty" in the current special verdict caused pain and trauma to victims, by suggesting that the defendant had not done the relevant act. In creating the special verdict, the law is able to acknowledge that the act causing the offence was proven and to reflect the seriousness of the harm caused, whilst maintaining that the person who committed the act was not criminally responsible. Further, the Committee acknowledges that the change to the special verdict comes after consideration by the NSW Law Reform Commission and extensive community consultation.

However, the new special verdict may impact on the right of defendants with mental health and cognitive impairments to be presumed innocent. The

presumption of innocence requires the prosecution to prove a charge, and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, mens rea, or the mental element is an integral factor in establishing liability for a crime.

In short, the emphasis of the special verdict appears to have changed. By drawing more focus to the act, and removing the words "not guilty", the new special verdict may risk attaching some of the stigma of a criminal act to a person where the mental element of the crime has not been proved. The Committee refers this matter to Parliament for consideration.

Right to fair trial - special hearings

16. Part 4 of the Bill outlines provisions regarding a person's fitness to stand trial. Under Division 3 of Part 4, persons who have been found to be unfit to be tried may be subject to a "special hearing".

17. Clause 54 defines a special hearing as a hearing for the purpose of ensuring, despite the unfitness of a defendant to be tried in accordance with normal procedures, that the defendant is acquitted unless it can be proved to the required criminal standard of proof that, on the limited evidence available, the defendant committed the offence or another alternative offence.

18. Clause 59 provides that at the special hearing, the available verdicts include:

- not guilty
- a special verdict of act proven but not criminally responsible
- that on the limited evidence available, the defendant committed the offence charged
- that on the limited evidence available, the defendant committed an offence available as an alternative to the offence charged.

19. Clause 60 also provides that if a defendant is found not guilty at a special hearing, it is to be dealt with as if the defendant had been found not guilty at an ordinary criminal trial. Further, clause 61 provides that if a special verdict of "act proven but not criminally responsible" is found at a special hearing, then it is to be treated the same as it would be at an ordinary trial.

20. Clause 62 provides that where there is a verdict of offence committed on the limited evidence available:

- this constitutes a qualified finding of guilt and does not constitute a basis in law for a conviction of the offence
- is subject to appeal in the same manner as a verdict in an ordinary trial of criminal proceedings, and
- is taken to be a conviction for the purpose of enabling a victim to make a claim for compensation.

21. Clause 63 provides that penalties arising from this verdict include a "limiting term" that is the best estimate of the sentence that the court would have imposed on the defendant at an ordinary hearing. The Attorney General told Parliament:

> When a court finds a person guilty on the limited evidence available to it at a special hearing, and in an ordinary criminal trial would have imposed a sentence of imprisonment, the court must impose a limiting term. A limiting term is the best estimate of the sentence that the court would have imposed on the defendant in those circumstances. A defendant who receives a limiting term becomes a forensic patient…The LRC…recommended that the court impose a limiting term, including the period of the term, and refer the person to the [Mental Health Review] tribunal. The tribunal then takes over the treatment and supervision of the person. The process has been adopted in clauses 63 and 65 of the bill. A person who receives a limiting term continues to be reviewed by the tribunal. If they become fit they may then be tried by law.

22. Clause 63 also provides that if the court determines that it would not have imposed a sentence of imprisonment it can also impose any other penalty or make any order it might have imposed or made if the defendant had been found guilty of the offence in an ordinary trial of criminal proceedings.

> **Under Division 3 of Part 4 of the Bill persons who have found to be found unfit to be tried at a criminal trial may be subject to a "special hearing". A special hearing is a hearing for the purpose of ensuring, despite the unfitness of a defendant to be tried in accordance with normal procedures, that the defendant is acquitted unless it can be proved to the required standard of proof that, on the limited evidence available, the defendant committed the offence or another alternative offence.**
>
> **At a special hearing, the verdicts of not guilty and act proven but not criminally responsible are to be dealt with in the same manner as an ordinary hearing. A special hearing may also reach a verdict of offence committed on the limited evidence available, which may result in penalties such as a "limiting term". A "limiting term" is the best estimate of the sentence that the court would have imposed on the defendant at an ordinary hearing.**
>
> **The Bill thereby permits the court to effectively try persons who have been found to be unfit to be tried. This may impact on a person's right to fair trial. However, the Committee notes various safeguards. First, the prosecution must prove to the required criminal standard that the defendant committed the offence before any penalty can be imposed. Further, if a limiting term is imposed the person becomes a forensic patient and is referred to the Mental Health Review Tribunal for supervision and treatment. If the Tribunal later determines that the person has become fit, they must then be tried at law. In the circumstances, the Committee makes no further comment.**

Right to fair trial – defence not available in Local Court proceedings

23. As above, Part 3 of the Bill outlines provisions for the defence of mental health impairment or cognitive impairment. It applies to criminal proceedings in the Supreme Court (including criminal proceedings within the summary jurisdiction of the Supreme Court) and the District Court.

24. However, the defence of mental health impairment or cognitive impairment is not available for criminal proceedings occurring in the Local Court. Instead, Part 2 outlines provisions relating to criminal proceedings before a Magistrate, and clause 8 stipulates that these include summary proceedings, indictable offences triable summarily and related proceedings under the *Bail Act 2013.*

25. Division 2 of Part 2 of the Bill relates to defendants with mental health impairments or cognitive impairments. Clause 12 provides that a Magistrate can make orders under the Division or adjourn proceedings if it appears that a defendant has (or had at the time of the alleged commission of the offence) a mental health impairment or cognitive impairment, or both.

26. Further, clause 13 provides that a Magistrate can adjourn proceedings for certain other reasons including to enable:

- the defendant's mental health impairment or cognitive impairment to be assessed or diagnosed, or
- the development of a treatment or support plan.

27. Under clause 14 a Magistrate can also make an order to dismiss a charge and discharge the defendant:

- into the care of a responsible person, unconditionally or subject to the conditions, or
- on the condition that the defendant attend on a person or place specified by the Magistrate for assessment, treatment or the provision of support for the defendant's mental health impairment or cognitive impairment, or
- unconditionally.

28. In determining whether it is appropriate to make an order under the Division, a Magistrate must consider a number of factors including:

- the nature of the defendant's apparent mental health impairment or cognitive impairment
- the nature, seriousness and circumstances of the alleged offence
- the suitability of the sentencing options available if the defendant is found guilty
- the relevant changes in circumstances of the defendant since the alleged commission of the offence
- the defendant's criminal history
- whether the defendant has previously been the subject of an order under the proposed Act or section 32 of the 1990 Act

- whether a treatment or support plan has been prepared in relation to the defendant and the content of that plan
- whether the defendant is likely to endanger the safety of the defendant, a victim of the defendant, or any other member of the public
- other relevant factors (clause 15).

29. Division 3 of Part 2 relates to mentally ill or mentally disordered persons. Under clause 19, if it appears to a Magistrate that a defendant is, instead, a mentally ill person or mentally disordered person, he or she may make an order:

- that that the defendant be taken to a mental health facility for assessment
- an order that the defendant be taken to and detained in a mental health facility for assessment and that, if the defendant is found upon assessment not to be a mentally ill person or mentally disordered person, the defendant be brought back before a Magistrate or an authorised justice as soon as practicable unless granted bail by a police officer at that facility
- an order for the discharge of the defendant unconditionally or subject to conditions, into the care of a responsible person.

30. In the second reading speech, the Attorney General stated:

> Part 2 of the Bill relates to diversion of people with mental health impairment or cognitive impairment in summary proceedings. The 1990 Act provides that diversion orders are only applicable to offences dealt with summarily by the Local Court and are not available to defendants who are facing more serious charges in the District Court or the Supreme Court. Diversion aims to divert people with mental health impairment or cognitive impairment who are charged with low-level offending out of the criminal justice system and into care, treatment, support and supervision. Diversion can benefit both the offender and the wider community by addressing the causes of the offending.

As above, Part 3 of the Bill outlines provisions for the defence of mental health impairment or cognitive impairment, available to defendants subject to criminal proceedings in the Supreme and District Courts. The defence is not available for criminal proceedings at the Local Court level. This may impact on a person's right to fair trial where this defence is not available and the person has a mental health impairment or a cognitive impairment.

However, the Committee notes that Part 2 of the Bill, which relates to proceedings before a Magistrate, instead focusses on diverting people with mental health or cognitive impairments, and those who may be mentally ill or mentally disordered, out of the criminal justice system and into care, treatment, support and supervision. This may be a more appropriate focus in the context of the lower level offending dealt with by the Local Court – a focus on addressing the causes of the offending, rather than a focus on establishing whether the person is guilty. In the circumstances, the Committee makes no further comment.

Extension of status as a forensic patient – indeterminate detention

31. Part 6 of the Bill confers jurisdiction on the Supreme Court to make an order to extend a person's status as a forensic patient if the Court is satisfied to a high degree of probability that a forensic patient poses an unacceptable risk of causing serious harm to others if the patient ceases to be a forensic patient; and the risk cannot be managed by less restrictive means (see clause 122).

32. A forensic patient is defined under Clause 72 of the Bill as:

- a person who has been found unfit to be tried and who is detained in a mental health facility, correctional centre, detention centre or other place
- a person for whom a limiting term has been nominated after a special hearing and who is detained in a mental health facility, correctional centre, detention centre or other place or who is released from custody subject to an order made by the Mental Health Review Tribunal
- a person who is the subject of a special verdict of act proven but not criminally responsible and who is detained in a mental health facility, correctional centre, detention centre or other place or who is released from custody subject to conditions under an order made by a court or the Mental Health Review Tribunal
- a person who is a member of a class of persons prescribed by the regulations.

33. Under clause 127, in determining an application for an extension order, the Supreme Court must consider factors including:

- the safety of the community
- the assessments obtained by the Court (e.g. psychiatrists' reports)
- the forensic patient's level of compliance with any obligations to which the patient is or has been subject while a forensic patient
- and the views of the court that imposed the limiting term or existing extension order on the patient at the time the limiting order or extension order was imposed.

34. Clause 133 also enables the Supreme Court to revoke an extension order or interim extension order at any time on the application of the Minister administering the Act, the forensic patient, or on the recommendation of the Mental Health Review Tribunal.

Part 6 of the Bill allows the Supreme Court to make an order to extend a person's status as a forensic patient in certain circumstances. The provisions may thereby be part of a regime that allows persons to be subject to indeterminate detention thereby impacting on their right to liberty.

However, the Committee acknowledges that in determining to extend a person's status as a forensic patient, the Court must be satisfied to a high degree of probability that a forensic patient poses an unacceptable risk of

causing serious harm to others if the patient ceases to be a forensic patient; and that this risk cannot be managed by less restrictive means. Further, an order can be revoked on the application of the Minister administering the proposed Act or on the recommendation of the Mental Health Review Tribunal. In the circumstances, and given the safeguards contained in the Bill, the Committee makes no further comment.

Right to privacy – Victims Register

35. Part 8 of the Bill establishes a Victims Register. Clause 156 provides that it is to include the names of victims of forensic patients who have requested that they be given notice of the review by the Mental Health Review Tribunal of those patients. However, the names can only be included if:

- there is a special verdict of "act proven but not criminally responsible" for the offence against the victim entered in respect of the forensic patient, or
- a limiting term has been imposed on the forensic patient following a special hearing in respect of the offence against the victim.

36. The Register is to be kept by the Commissioner of Victims Rights.

37. Clause 157 requires the Commissioner of Victims Rights to give notice to a registered victim of a forensic patient:

- of a mandatory review of the patient by the Tribunal
- of an application by the patient to the Tribunal for release or leave of absence
- of an order for release or a grant of leave of absence for the patient
- when the patient ceases to be a forensic patient
- when the patient is unlawfully absent from a mental health facility or other place of detention
- when the patient appeals against a decision of the Tribunal.

38. In the Second Reading Speech, the Attorney General stated that Part 8 of the Bill "incorporates the important reforms made to the current Act in 2018 in response to the Whealy review related to victims of forensic patients. There have been no amendments to these clauses".

Part 8 of the Bill establishes a Victims Register for victims who seek to be notified of reviews of relevant forensic patients. Further, the Commissioner of Victims Rights is required to notify a victim of a forensic patient of certain things relating to the patient e.g. when the Mental Health Review Tribunal makes an order for release of the patient or grants him or her a leave of absence; or where the patient appeals against a decision of the Tribunal.

In doing so, this may impact on the patient's right to privacy as regards personal information about their status as a forensic patient. However, the Committee recognises that these provisions are intended to offer peace of mind to victims

of forensic patients, notifying them of any changes in status. The Committee also notes that the provisions are already included in the existing *Mental Health (Forensic Provisions) Act 1990* that the Bill seeks to repeal and replace. In the circumstances, the Committee makes no further comment.

Right to privacy – information sharing agreements

39. Part 9 of the Bill outlines miscellaneous provisions, including those pertaining to information sharing agreements. Clause 161 provides for information sharing arrangements between the Secretary of the Ministry of Health, the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice relating to information concerning forensic patients and correctional patients. The clause also enables the Commissioner of Victims Rights and the President of the Mental Health Review Tribunal to exchange information for the purposes of the Victims Register and other matters related to victims.

Part 9 of the Bill permits information sharing arrangements between the Secretary of the Ministry of Health, the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice relating to information concerning forensic patients and correctional patients. It also enables the Commissioner of Victims Rights and the President of the Mental Health Review Tribunal to exchange information for the purposes of the Victims Register and other matters related to victims.

These arrangements may impact on affected persons' right to privacy over personal information about their status as a forensic or correctional patient. However, the Committee acknowledges that these provisions allow administrative flexibility for these agencies to carry out their functions under the proposed Act in relation to forensic and correctional patients, and the protection of victims and the community. These provisions are also in the existing *Mental Health (Forensic Provisions) Act 1990*. In the circumstances, the Committee makes no further comment.

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

Wide power of delegation

40. Clause 164 of the Bill provides that a Minister administering the proposed Act may, by instrument in writing, delegate the exercise of any function of the Minister under the proposed Act (other than the power of delegation) to:

- any person employed in a Department responsible to the Minister, or
- any person, or any class of persons, authorised by the regulations.

41. The Minister has significant functions under the proposed Act. As one example, the Minister can apply to the Supreme Court under the proposed Act for an extension order that extends a person's status as a forensic patient (see Part 6 and in particular clause 123).

42. Similarly, clause 164 provides that the Secretary of the Department of Communities and Justice can delegate the exercise of any function of the Secretary under the proposed Act (other than the power of delegation) to:

- any person employed in the Department of Communities and Justice, or
- any person, or any class of persons, authorised by the regulations.

43. The Secretary has significant functions under the proposed Act, for example, functions relating to the transfer and security conditions for forensic patients (see clauses 115 and 117).

Clause 164 of the Bill allows a Minister administering the proposed Act to delegate the exercise of any function of the Minister under the proposed Act to any person employed in a Department responsible to the Minister, or to any person, or any class of persons, authorised by the regulations. It also provides a similarly wide power to the Secretary of the Department of Communities and Justice in respect of his or her functions under the proposed Act.

The Committee notes that there are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. The Committee also notes that the proposed Act deals with sensitive matters relating to forensic mental health and that the functions of the Minister and the Secretary therein are significant.

The Committee would prefer the provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. In addition, they should be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. The Committee refers the matter to Parliament for consideration.

6. Personal Injury Commission Bill 2020

Date introduced	3 June 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The objects of the Bill are:

   (a) to establish the Personal Injury Commission and provide for its functions, and

   (b) to repeal, and make other consequential amendments to, certain other legislation.

BACKGROUND

2. The Bill establishes an independent Personal Injury Commission (the Commission) with the jurisdiction of the existing Workers Compensation Commission (WCC) and the State Insurance Regulatory Authority's (SIRA's) motor accident dispute resolution services. The Commission is not a court but will be headed by a president who is a judicial officer.

3. The creation of the Commission aligns with a 2018 recommendation of the Legislative Council's Standing Committee on Law and Justice. That Committee's inquiries into the compulsory third party insurance (CTP) and workers compensation schemes recommended that the Government establish a one-stop shop model so that CTP disputes, which are currently managed by SIRA, will be consolidated into an expanded WCC; that is, the new Commission.[4] The Government supported the respective recommendations in principle.[5] In the second reading speech, the Hon Victor Dominello MP, Minister for Customer Service stated:

> In 2018 the Legislative Council Standing Committee on Law and Justice found that it can be confusing for people navigating disputes in these schemes. The committee recommended consolidating the workers compensation and CTP dispute resolution systems into a single personal injury tribunal by expanding the jurisdiction of the Workers Compensation Commission but retaining two streams of expertise…This bill delivers on this Government's response to that recommendation.

4. The Minister also told Parliament that the Bill is the second phase of a reform package dating back to 2017 for the workers compensation dispute resolution system in NSW. The Minister stated that the first phase of reforms consolidated dispute resolution functions into the WCC:

[4] See Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, *2018 Review of the Compulsory Third Party Scheme – Report No. 68*, February 2019 and *2018 Review of the Workers Compensation Scheme – Report No. 67*, February 2019.

[5] NSW Government, *Government Response to Report of the Legislative Council Standing Committee on Law and Justice – 2018 Review of the Workers Compensation Scheme*, August 2019.

> Mandatory internal reviews were scrapped; the pre-injury average weekly earnings calculation was simplified; the complaints handling functions of the…[SIRA] and the Workers Compensation Independent Review Office [WIRO] were redefined and clarified; and merit reviews were moved from WIRO back into the jurisdiction of the [WCC].

5. While the Bill establishes a consolidated Commission, it does so with separate specialist workers compensation and CTP insurance divisions. The Minister stated that the consolidated Commission would "bring several benefits over the status quo" including a "one-stop-shop" for customers and simplified, harmonised processes:

> Currently, injured people and customers face dealing with multiple dispute resolution entities in the schemes. The WCC deals with workers compensation disputes. The State Insurance Regulatory Authority deals with motor accident disputes through the dispute resolution service in the 2017 CTP scheme and through the Clams Assessment and Resolution Service and the Medical Assessment Service in the 1999 CTP scheme. Now four distinct bodies will be consolidated into one commission. There will be greater visibility of a single commission through a single contact point for commission services. When injured people need to access these services they will not be confused about where they need to go.

6. And further:

> Injured people of New South Wales navigating disputes in the schemes are currently faced with different forms, procedures and customer journeys across these schemes. Users of a new, single commission will benefit from fewer forms, less complexity, a harmonised process and better access to dispute resolution across all schemes.

7. The Minister also confirmed that the reforms contained in the Bill do not change the substantive law relating to the entitlements of injured people under the workers compensation and motor accident legislation.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to a fair hearing and right to an appeal or review

8. Clause 52 of the Bill enables the Commission to decide whether a hearing or conference is required in a proceeding. The Commission may also decide that there is no need for a conference or hearing, provided it is satisfied that sufficient information has been provided to enable a decision.

9. Decisions of the Commission under the Workers Compensation Acts are generally final and binding and are not subject to appeal or review: clause 56(1). Similarly, a decision of the Commission is not to be appealed or questioned by any Court, unless there is a jurisdictional error: clause 56(2) and (3). That said, the Commission may reconsider, rescind, alter or amend decisions of the Workers Compensation Division: clause 57.

10. The Committee also notes that one of the objects of the proposed Act is to enable the Commission to resolve the real issues in proceedings justly, quickly, cost effectively and with as little formality as possible: clause 3(c).

> **Under clause 52 of the Bill, the Personal Injury Commission (the Commission) may decide to resolve a matter without holding a conference or hearing, if it is satisfied that it has been provided with sufficient information. This may impact**

on the right of parties to a proceeding to be heard as to the matters in dispute. This is particularly the case given that decisions of the Commission under the Workers Compensation Acts are generally final and binding, and not subject to appeal or review.

The Committee acknowledges that the Bill has broader aims of facilitating the just, quick and cost effective resolution of proceedings, and the Commission must be satisfied that it has sufficient information before it makes a decision. However, given the provisions in question are coupled with limited appeal rights, the Committee refers this matter to Parliament.

Right to legal representation

11. Although clause 48(1) of the Bill provides that parties to proceedings before the Commission are entitled to legal representation, clause 48(3) provides that the Commission may refuse to permit an insurer to be legally represented if the claimant in a workers compensation matter is not represented.

12. Further, clause 48(5) provides that the Commission must take into account any written submission prepared by a legal practitioner acting for a party to proceedings and submitted by or on behalf of the party, whether or not the party is represented by an Australian legal practitioner at any conference or hearing in the proceedings.

Under clause 48(3) of the Bill, the Commission may refuse to permit an insurer to be legally represented if the claimant in a workers compensation matter does not have legal representation. While this may impact on the right to legal representation, it is noted that this will only affect insurers and not individuals. Such a provision may also be designed to support access to justice for individual claimants and enhance the Bill's overall goal of facilitating the just, quick and cost effective resolution of Commission matters with as little formality as possible. The Committee also notes that under clause 48(5) the Commission must take into account any written submission prepared by a legal practitioner, even if the party is not legally represented at a conference or hearing. In the circumstances, the Committee makes no further comment.

Access to workers entitlements

13. The savings and transitional provisions in Schedule 1, Part 2, Division 2, clause 4 to the Bill provide that certain positions in the WCC immediately become vacant when the Commission is established. Aside from the President and Deputy President, these positions include the roles of claims assessor under the *Motor Accident Injuries Act 2017* or the *Motor Accidents Compensation Act 1999* (or both); and a merit reviewer under the *Motor Accident Injuries Act 2017*.

14. Schedule 1, Part 2, Division 2, Clause 4(3) also provides that these individuals are not entitled to remuneration or compensation because of the loss of that office. However, it further provides that they are eligible (if otherwise qualified) to be appointed to hold an office in the Commission if Part 2 Division 3 or 4 to the Schedule does not already operate to make the appointment. Division 3 and Division 4 provide for certain persons who cease to hold office by operation of the above provisions to be automatically transferred to the Commission.

Schedule 1, Part 2, Division 2, clause 4 to the Bill provides that when the Commission is established, certain positions in the WCC automatically become vacant. The schedule provides further that the relevant individuals are not entitled to remuneration or compensation because of the loss of that office.

The Committee notes that Divisions 3 and 4 in Part 2 of the Schedule provide for many of these people to be automatically transferred to the Commission. Further, if a person ceases to hold office and Divisions 3 and 4 do not operate to automatically transfer them, they are eligible, if otherwise qualified, to be appointed to hold an office in the Commission. Notwithstanding these safeguards it is unclear whether cases may eventuate where individuals are not eligible for transfer, or are not transferred, and are not entitled to compensation for loss of their office. The Committee refers these matters to Parliament for consideration.

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

Commencement by proclamation

15. Clause 6 of the Bill establishes the Commission on the establishment day, being 1 December 2020 or any later day proclaimed by the Governor. The Governor can also revoke an earlier proclamation regarding the date of establishment.

16. Further, clause 2 of the Bill provides that while the proposed Act generally commences on assent, schedule 5 commences on a day or days to be appointed by proclamation. Schedule 5 to the Bill makes consequential amendments to certain legislation including motor accidents legislation and workers compensation legislation, made necessary by the establishment of the new Commission.

Clause 6 of the Bill establishes the Commission on the establishment day of 1 December 2020, or any later day proclaimed by the Governor. The Governor can also revoke an earlier proclamation regarding the date of establishment. Further, clause 2 of the Bill provides that while the proposed Act generally commences on assent, schedule 5 commences on a day or days to be appointed by proclamation.

The Committee generally prefers such significant legislative change to commence on a fixed date or on assent to provide certainty for affected parties. However, the Committee acknowledges that the establishment of the new Commission is likely to involve a degree of administrative complexity, requiring some flexibility. Further, it acknowledges that schedule 5 to the Bill makes consequential amendments to certain legislation that will not be necessary until the Commission has been established. Given the circumstances, the Committee makes no further comment.

Significant matters in regulations and Henry VIII clauses

17. The Bill allows certain significant matters to be set by the regulations. For example, clause 26(1) provides that a person with standing to apply to the President or the Commission for a matter concerning a compensation claim to be determined by the usual decision-maker (a "compensation matter application") can with leave of the District Court make the application to the Court instead of the President or Commission. Further, clause 26(2) provides that the regulations may make provision for:

- who has standing to make an application for leave, and
- excluding or including applications as compensation matter applications.

18. Similarly, clause 28(1)(e) of the Bill provides that the regulations can make provisions relating to substituted proceedings, that is, proceedings permitted to be heard in the District Court rather than in the Commission. This clause also allows such regulations to modify the provisions of the proposed Act, "enabling legislation" or other legislation. This is a Henry VIII clause – a clause allowing the regulations to amend primary legislation. Further, in this case the clause has broad effect, allowing the regulations to amend legislation beyond the Bill.

19. Clause 29 represents another Henry VIII clause. That clause allows the regulations to amend "enabling legislation" to prevent the commencement of proceedings in a court for a compensation claim unless certain preconditions are met, if compliance with those preconditions may involve an exercise of federal jurisdiction or be the subject of substituted proceedings.

20. Clause 5 of the Bill defines "enabling legislation" to mean "workers compensation legislation" and "motor accidents legislation" and both terms are in turn defined to include a number of existing statutes as well as "any other Act prescribed by the regulations".

> **The Bill allows certain significant matters to be set by the regulations. For example, clause 28(1)(e) of the Bill provides that the regulations can make provisions relating to substituted proceedings, that is, proceedings permitted to be heard in the District Court rather than in the Commission. The Committee prefers significant matters such as these to be dealt with in primary legislation to foster an appropriate level of parliamentary scrutiny.**
>
> **Further, the Committee notes that clause 28(1)(e) also allows such regulations to modify the provisions of the proposed Act, enabling legislation or other legislation. This is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Again, this may be an inappropriate delegation of legislative power particularly as the clause allows the modification of a broad range of legislation – not just the proposed Act itself. The Committee notes that clause 29 of the Bill contains a similarly broad Henry VIII clause. The Committee refers these matters to Parliament to consider whether any inappropriate delegation of legislative power has occurred.**

Broad power to create Commission rules

21. Clause 20 of the Bill enables the Rule Committee to make rules of the Commission in relation to a wide variety of matters relating to the practice and procedure of Commission proceedings. The Rule Committee has a wide membership and consists of the President, the Division Heads of the Commission, two persons nominated by the SIRA, a barrister and solicitor nominated by their respective professional associations, and two other persons appointed by the president from time to time: clause 19.

22. Although the Rule Committee is empowered to make rules primarily in relation to the procedural aspects of proceedings, such rules may still have the potential to affect substantive rights. For example, rules can be made regarding the effects of non-

compliance with practices and procedures of the Commission and the making of assessments and determinations.

23. The Commission rules may also authorise registrars to make specified kinds of decisions on behalf of the Commission: clause 23.

24. However, a note accompanying clause 20 clarifies that the Commission rules are rules of court within the meaning of section 21 of the *Interpretation Act 1987*. This means that they are statutory rules that may be disallowed by either House of Parliament. Further, clause 20 provides that any such rules cannot be inconsistent with the proposed Act, or "enabling legislation". As above, "enabling legislation" is defined by clause 5 of the Bill as the workers compensation legislation and the motor accidents legislation which is in turn defined to encompass a number of existing statutes.

> **Clause 20 of the Bill provides that the Rules Committee of the Commission may make rules which regulate the procedural aspects of Commission proceedings. In some cases these rules may have the potential to affect the substantive rights of those who have dealings with the Commission. However, the Committee notes that the rules must not be inconsistent with the proposed Act or the workers compensation legislation and motor accidents legislation as defined. Further, such rules can be disallowed by either House of Parliament. Owing to these safeguards, the Committee does not consider the provisions to involve an inappropriate delegation of legislative power and makes no further comment.**

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

Procedural directions not disallowable

25. Clause 21 of the Bill enables the President to issue procedural directions to be followed in proceedings before the Commission, or by medical assessors or merit reviewers. Those procedural directions must be publicly available on the Commission's website and consistent with the Act and "enabling legislation".

26. Unlike the Commission rules, which also regulate aspects of procedure, the procedural directions do not appear to be statutory rules that are disallowable by either House of Parliament.

> **Clause 21 of the Bill provides that the President may issue procedural directions which must be complied with, provided that those directions are publicly available on the Commission's website and consistent with the Act and the workers compensation legislation and motor accidents legislation as defined. However, unlike the Commission rules which also regulate practice and procedure, the procedural directions do not appear to be disallowable by Parliament. The substantive difference between the procedural directions and the Commission rules is unclear. Given that only the Commission rules are disallowable, the Committee refers this matter to Parliament.**

7. Residential Apartment Buildings (Compliance and Enforcement Powers) Bill 2020

Date introduced	2 June 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of the Bill is to prevent developers from carrying out building work that may result in serious defects or result in significant harm or loss to the public or current or future occupiers. In particular, the Bill makes provision for the following:

(a) to enable the Secretary of the Department of Customer Service (the ***Secretary***) to:

(i) issue a stop work order if building work is being carried out, or is likely to be carried out, in a manner that could result in a significant harm or loss to the public or current or future occupiers of the building, or

(ii) issue a building work rectification order to require developers to rectify defective building works, or

(iii) prohibit the issuing of an occupation certificate in relation to building works in certain circumstances,

(b) to impose an obligation on developers to notify the Secretary at least 6 months, but not more than 12 months, before an application for an occupation certificate is intended to be made in relation to building works,

(c) to provide investigative and enforcement powers for authorised officers to ensure compliance with the requirements of the proposed Act,

(d) to establish penalties for the contravention of the requirements of the proposed Act,

(e) to make provision for the recovery of costs associated with compliance with the requirements of the proposed Act by a developer where there is more than 1 developer for the building work, or by the Secretary where the developer fails to comply,

(f) to enact other minor and consequential provisions and provisions of a savings and transitional nature,

(g) to make consequential amendments to other legislation.

BACKGROUND

2. The Bill was introduced in the context of a recent NSW Legislative Council Public Accountability Committee inquiry into the regulation of the building industry. The Committee recommended that a bill granting the NSW Building Commissioner new powers be introduced to the NSW Parliament in May 2020 as a matter of urgency.[6] A response to an earlier report of the Committee as part of the inquiry confirmed that the Government was progressing such a bill as part of its legislative reform package, and set out further background about wider reforms to the building industry.[7]

3. The Bill passed Parliament on 4 June 2020, having been introduced on 2 June 2020.[8] The Bill as passed incorporates nine amendments to the Bill as introduced, one put by Mr Alex Greenwich MP, Independent, and eight put by The Greens.

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

5. In the second reading speech, the Hon. Kevin Anderson MP, Minister for Better Regulation and Innovation stated that the Bill complements the *Design and Building Practitioners Bill 2019* (which passed Parliament on 3 June 2020) in efforts to increase quality and safety in the residential building industry:

> Together with the Design and Building Practitioners Bill 2019, this bill presents a comprehensive reform package to transform the building sector into a consumer-centred industry that is focused on the quality of construction. People purchasing and occupying units in buildings deserve to know that they are buying a quality design and expert construction that is protected by strong and modernised building laws. They also deserve to have recourse available in the event of a defect while the building is under construction and during the building's life.

6. The Minister characterised the Bill as part of the "six-pillar" work plan overseen by the NSW Building Commissioner to improve confidence in the building industry by 2025. The Minister also stated that Construct NSW, a panel of industry experts established by the Government, will be providing input into the delivery of the work plan.

7. The Minister noted the compliance and enforcement powers available under the Bill to ensure the safety and quality of buildings, which can be delegated by the Secretary of the Department of Customer Service to the NSW Building Commissioner:

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[6] Parliament of New South Wales, Legislative Council, Public Accountability Committee, *Regulation of building standards, building quality and building disputes: Final report – report no. 6*, 30 April 2020, recommendation 1, p12.

[7] NSW Government, *Government response to Regulation of building standards, building quality and building disputes: First report - report no. 4,* 13 May 2020.

[8] 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 5 clear days ahead, *Legislative Assembly Consolidated Standing and Sessional Orders and Resolutions of the House, 57th Parliament*, March 2020.

> Importantly, the bill provides the secretary and, through delegation the building commissioner and his staff with the compliance and enforcement powers necessary to detect, investigate and require the rectification of serious building defects for the benefit of consumers in New South Wales.

8. The Minister noted that these regulatory powers are like those in other recent legislation administered by Fair Trading, including the *Design and Building Practitioners Bill 2019* and the *Building and Development Certifiers Act 2018*.

9. A key feature of the Bill is the requirement that developers give notice to the Secretary that their building is close to completion: clause 7. The Minister stated that this requirement is critical "as it provides the secretary with sufficient lead time in which to examine the construction of the residential building and to detect and act on serious building defects that may be discovered before the occupation certificate is issued".

10. Under the Bill, the Secretary will also have the power to prevent the issue of an occupation certificate or the registration of a strata plan in certain circumstances, including for serious defects: clause 9. The Minister stated: "Prohibiting the issue of an occupation certificate or the registration of a strata plan is the ultimate signal to the developer that they must resolve any noncompliance or face never having the building sold or occupied".

11. Another notable power under the Bill is the ability for the Secretary to issue a stop work order if concerned that the building work is, or is likely to be, carried out in a manner that represents a risk of significant harm or loss to the public or occupiers (including potential occupiers), or significant damage to property: clause 29.

12. The Minister confirmed that the Bill applies to existing residential apartment buildings – including mixed use buildings – completed within six years of the issue of an occupation certificate "providing protections to owners of existing defective buildings".

13. Following amendments put by The Greens, these provisions were adjusted so that the Bill as passed applies to existing residential apartment buildings – including mixed use buildings – completed within *10* years of the issue of an occupation certificate. A further amendment put by the Greens also means that the regulations may provide that a specified provision, or specified provisions, of the Bill extend to other classes of buildings within the meaning of the *Building Code of Australia* (see clauses 3 and 6 of the Bill as passed).

14. The Minister also noted that at this stage the Bill does not require supporting regulations, although regulation-making powers are included in the Bill.

ISSUES CONSIDERED BY THE COMMITTEE

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

New offences and retrospectivity

15. In strengthening the compliance and enforcement framework for the residential building industry, the Bill introduces several new offences. These include:

    (i) failing to comply with a stop work order: clause 29

(ii) failing to comply with a building work rectification order: clause 33

(iii) failing to comply with an undertaking given to the secretary: clause 28

(iv) various offences connected to obstructing the exercise of information gathering, entry, and search and seizure powers in Part 3.

16. Some of these offences attract significant penalties, particularly the offences of failing to comply with a stop work order or a building work rectification order. For a body corporate the maximum penalties for these offences are a $330,000 fine and a $33,000 fine for each day the offence continues. In any other case the maximum penalties are a $110,00 fine and a $11,000 fine for each day the offence continues.

17. Further, the Bill has some retrospective effect with its substantive provisions applying to existing buildings completed within 10 years of the issue of an occupation certificate (clause 6).

18. Certain safeguards exist. Part 5, Division 2 of the Bill contains natural justice provisions which require the Secretary to give notice of proposed rectification orders, and stipulate that those who receive such notice can make written representations to the Secretary concerning the orders. It also allows developers to appeal to the Land and Environment Court against a building work rectification order.

Several new offences in the Bill attract a range of significant monetary penalties. The most significant offences relate to failing to comply with a stop work order or a building work rectification order. The Committee notes that the creation of new offences may impact on personal rights and liberties, making previous lawful conduct unlawful.

The Committee also notes that the Bill has some retrospective effect, applying to existing buildings completed within 10 years of the issue of an occupation certificate. Therefore, those who built buildings under the regime that applied at the time, are now subject to a new regime in respect of those buildings and non-compliance with this new regime could result in significant penalties.

The Committee generally comments on provisions drafted with retrospective effect as they run counter to the rule of law principle that a person is entitled to know the law to which they are subject at any given time. This is particularly so in cases such as this where the retrospective provisions may affect individual rights or obligations.

However, these new offences have been created to promote safety and quality in the building industry in the context of a broader suite of reforms. The public interest in protecting consumers, including in relation to existing defects, is likely to outweigh concerns regarding the new nature of the offences and the retrospective application of the Bill. Further, there are several safeguards in the Bill which allow those affected to receive notice of and make written representations in relation to proposed orders, and enable appeals to the Land and Environment Court. In the circumstances, the Committee makes no further comment.

Procedural fairness

19. The Bill contains several provisions which attempt to afford proposed recipients of building work rectification orders procedural fairness. However, these procedural fairness provisions do not appear to apply in all circumstances.

20. Generally, the Secretary is required to provide notice as to the terms and period of a proposed building work rectification order (clause 44), and to consider any written representations made by the recipient in relation to that order (clause 47). A developer may also appeal to the Land and Environment Court against the order or any of its terms: clause 49.

21. Clause 38 provides the Secretary with a broad power to modify a building work rectification order at any time, including the period for compliance with the order. However, it is not clear whether the Secretary would still be required to provide notice or reasons for such a modification, or whether the recipient is entitled to make written representations. It is also unclear whether a modified order constitutes a new order, which can be appealed to the Court within 30 days.

22. Clause 44(3) also provides that the Secretary is not required to give notice of a proposed building work rectification order if the Secretary believes that there is a serious risk to public safety or it is an emergency. Notably, there is no express requirement that the belief of the Secretary is a reasonable one or that the risk to public safety is sufficiently imminent to justify the lack of notice.

23. Under the Bill, the Secretary can issue a developer who is subject to a building work rectification order with a compliance cost notice: clause 51. This notice requires the developer to pay to the Secretary reasonable costs and expenses incurred by the Secretary in connection with the preceding investigation and the issue and enforcement of the building work rectification order. Although such notices can be appealed to the Court in the same way as building work rectification orders (clause 52), it appears that similar procedural fairness requirements (i.e. requirements to give notice and to consider written representations) do not apply.

> **The Bill contains several procedural fairness provisions, including a requirement to give notice, reasons and consider representations in relation to a proposed building work rectification order. However, it is unclear whether these provisions apply to the Secretary's broad power to modify such orders. Similarly, the threshold for dispensing with some notice requirements for certain types of building rectification work orders may be too low. For example, there is no requirement for the Secretary to give notice of a building work rectification order if the Secretary believes that there is a serious risk to public safety, regardless of whether the risk is immediate or not. It also appears that there are no procedural fairness requirements for the issue of compliance cost notices, despite similar appeal rights to those that apply for building work rectification orders.**
>
> **Given that a failure to comply with building work rectification orders can attract a significant penalty, the Committee refers these matters to Parliament.**

Privacy, property and freedom from arbitrary interference

24. Part 3 of the Bill creates several investigation and enforcement powers to promote compliance with the proposed Act. For example, Division 3 equips authorised officers with several information gathering powers, including broad powers to require certain information and records (clause 17) and to direct a person to answer questions (clause 18). An authorised officer may also direct a person to attend at a specified place and time to answer the relevant questions (clause 18(2)) and such answers may be recorded provided that notice is given to the person being questioned (clause 19). Such a recording may be made despite the provisions of any other law (clause 19(4)).

25. The power of an authorised officer to order the production of information or records that "may" be required for an authorised purpose appears to be slightly broader than the power to require answers, as the latter power requires that the information sought is "reasonably required" for the authorised purpose. Relevantly, the definition of authorised purpose under clause 12 is very broad.

26. Division 4 also sets out several powers of entry to premises. The power to enter premises does not require a search warrant, but a warrant is required to enter residential premises if the occupier has not permitted entry: clauses 20 and 21. Clause 22 sets a fairly low threshold for the issue of a search warrant, enabling an authorised officer to apply for a warrant if he or she believes on reasonable grounds that there is a contravention of the Act, or there is a matter or thing on the premises connected with an offence under the Act or the regulations.

27. These powers of entry are complemented by numerous search and seizure powers that may be exercised on lawfully entered premises: clause 24. Aside from standard powers of search and seizure, these powers include the ability to open up, cut open or demolish building work in certain circumstances, the power to use reasonable force to break open or otherwise access a thing, and the power to destructively test a thing or a sample of a thing if it is reasonable in the circumstances.

28. Division 4 also creates the offences of obstructing, hindering or interfering with an authorised officer, and the offence of failing to comply with a direction without reasonable excuse: clauses 26 and 27.

29. The proposed compliance and enforcement framework should be considered in light of the broad powers of the Secretary to investigate developers and former developers, even in the absence of a complaint: clause 32.

> **The Bill introduces a suite of compliance and enforcement powers which are likely to impact on a wide range of rights and liberties including rights to privacy, property and freedom from arbitrary interference. The information gathering powers that are likely to impact on a person's privacy rights include a power to require information and records, to direct a person to answer questions at a specified time and place, and to record evidence. Authorised officers would also have the power to enter premises without a warrant, except for residential premises. The Bill also outlines various search and seizure powers, which aside from more standard search and seizure powers include the power to damage property such as the ability to use reasonable force to break open or otherwise access a thing or to destructively test something.**

The Committee notes that many of the proposed powers are quite broad and may, in some circumstances, impact on the right to be free from arbitrary interference. However, the powers must generally be exercised in connection with an authorised purpose and must be reasonable in the circumstances. Entry to residential premises also requires a warrant or the permission of the occupier. Moreover, the Committee acknowledges that the proposed compliance and enforcement powers enable authorised officers to respond quickly and effectively to possible contraventions of the Act, and are part of the broader aim of improving safety and quality in the building industry. For these reasons, and given the safeguards, the Committee makes no further comment.

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

Broad powers of delegation

30. Under clause 62, the Secretary has broad powers to delegate any of his or her functions under the Bill to:

(a) any person employed in the Department of Customer Service,

(b) an employee of Fire and Rescue NSW,

(c) an employee of a council who is an authorised person under the *Local Government Act 1993*, or

(d) any person, or any class of persons, authorised for the purposes of this section by the regulations.

The Secretary can delegate any of his or her functions in the Bill to a wide range of people, including members of various government departments and any person or class of persons authorised by the regulations. There are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. Given that the Secretary has considerable new powers under this Bill, the Committee refers this matter to Parliament.

Matters that should be set by Parliament – penalty notice offences

31. Clause 57 of the Bill provides that the regulations may prescribe penalty notice offences. Committing a penalty notice offence can also be considered a continuing offence each day that the contravention continues: clause 59.

32. Clause 67(4) provides some limit so that the regulations may only create an offence punishable by a penalty which does not exceed a $22,000 in the case of a body corporate and an $11,000 fine in any other case.

The Bill provides that the regulations can create penalty notice offences. The Committee prefers that offences be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The maximum penalties that could attach to the offences created under the regulations are quite significant – a $22,000 fine for bodies corporate and an $11,000 fine in any other case. The Committee refers the matter to Parliament for consideration.

8. Rural Fires Amendment (NSW RFS and Brigades Donations Fund) Bill 2020*

Date introduced	3 June 2020
House introduced	Legislative Council
Member responsible	Mr David Shoebridge MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to:

   (a) allow for the application of certain money in the NSW Rural Fire Service and Brigades Donations Fund for purposes relating to bush fire emergency relief, and

   (b) provide protection from breach of trust and civil liability in relation to the application of that money.

BACKGROUND

2. In the second reading speech, Mr David Shoebridge MLC told Parliament that the Bill seeks to allow donations made to the NSW Rural Fire Service and Brigades Donations Fund during the most recent fire season, that were gathered in response to a call from Ms Celeste Barber, "to be sent where those who made the donations wanted the funds to be allocated".

3. Mr Shoebridge told Parliament about the *Instagram* post that Ms Barber had issued calling for donations:

> …her *Instagram* post was "Please help any way you can. This is terrifying." Then it says, "Fundraiser for The Trustee for NSW Rural Fire Service & Donations Fund by Celeste Barber."…Celeste Barber's comment on the post in her name included an image of a house burning…Her comment is, "This is my mother-in-law's house. It's terrifying. They are scared. They need your help…" That was the call that people responded to …

4. As a result, millions of dollars were donated. Mr Shoebridge stated:

> By the end of the fire season in excess of $50 million had been donated…People from around the world saw what was happening. They saw houses had been burnt down and wanted to help. Indeed, that was the primary call from Celeste Barber…They knew people and communities needed urgent aid. They saw wildlife being killed on a scale that is both cruel and unimaginable.

5. However, because of limitations in the terms of the NSW Rural Fire Service Donations Trust, it later became apparent that the donations could only be applied for certain purposes. Mr Shoebridge told Parliament:

> …because of the limitations of the RFS Donations Trust, the wishes of many of those who donated could not be fulfilled. The terms of the RFS Donations Trust allowed the funds to be used only "to or for the brigades in order to enable or assist them to meet the costs of purchasing and maintaining firefighting equipment and facilities, providing training and resources and/or to otherwise meet the administrative expenses of the brigade, which are associated with their volunteer-based service activities."

6. The trustees of the NSW Rural Fire Service and Brigades Donations Fund also made an application to the NSW Supreme Court for advice on how the money could be applied. On 25 May 2020, the Court confirmed that the money could only be applied for the purposes of the trust.[9]

7. Mr Shoebridge stated:

> …the Supreme Court said there was no failure in the gift and no problem with the terms of the deed. The money can only be applied for the purposes of the trust. It cannot be provided to the community. It cannot be provided outside of New South Wales. It cannot help anybody who has lost their home. It cannot help any of the organisations that care for wildlife. It can only go to the brigades.

ISSUES CONSIDERED BY THE COMMITTEE

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

Protection from breach of trust and civil liability, and retrospectivity

8. The Bill would amend the *Rural Fires Act 1997* to retrospectively allow "relevant trust money" in the NSW Rural Fire Service and Brigades Donations Fund to be applied to provide support or assistance to any one or more of the following:

   (a) the families of volunteer rural fire fighters killed while providing rural fire services,

   (b) volunteer rural fire fighters injured while providing rural fire services,

   (c) people and organisations providing care to animals injured or displaced by bush fires,

   (d) people and communities that are significantly affected by bush fires.

9. "Relevant trust money" is defined as "gifts or contributions received by or on behalf of the trust during the period commencing on 1 November 2019 and ending on 1 February 2020". Mr Shoebridge accordingly confirmed in the second reading speech that these amendments would not have ongoing effect:

> What the bill does is very simple: It uses the Rural Fire Service Act as the vehicle to, effectively by statute, amend the purposes of the deed. It does not do so on an ongoing basis; it does so only in respect of moneys received in the relevant period, being the period within which people were donating so generously as a result of the fires.

10. Further, the Bill provides protection so that no such application of money by a trustee can be regarded as a breach of trust or breach of deed. In addition, it provides that a trustee does not incur any civil liability for so applying the money.

[9] *In the Matter of the New South Wales Rural Fire Service & Brigades Donations Fund; Application of Macdonald & Or* [2020] NSWSC 604.

11. Mr Shoebridge also noted that at the time the "relevant trust money" was donated the terms of the NSW Rural Fire Service Donations Trust, which only allowed the funds to be used for certain purposes, were displayed on the internet. However, the donors may not have been aware of this:

> By going to a Federal website and following a series of links, the trust and the terms of the trust can be found on a public website. But nobody does that before making a donation. Nobody I am aware of did this before they made their donation in response to Celeste Barber's call.

The Bill would amend the *Rural Fires Act 1997* to retrospectively allow certain money in the NSW Rural Fire Service and Brigades Donations Fund to be applied for purposes relating to bush fire emergency relief. Without the amendment it can only be applied for narrower purposes directly related to the NSW Rural Fire Service brigades. This is because of limitations in the terms of the NSW Rural Fire Service Donations Trust. The Bill also provides protection from breach of trust and civil liability for a trustee who so applies the money.

The Committee acknowledges that the amendment is intended to allow money that was donated during the recent fire season in Australia, in response to a call from a Ms Celeste Barber, to be applied in a way that may more closely align with donors' expectations. Accordingly, the amendments do not have ongoing effect – they only apply to money received from 1 November 2019 to 1 February 2020.

However, the Committee generally comments on provisions that are drafted to have retrospective effect as they run counter to the rule of law principle that a person is entitled to know the law to which they are subject at any given time. In this case, a person who did donate at the relevant time knowing the terms of the trust, which were publicly displayed, would have no recourse if their money were now applied for purposes not covered by those terms. Further, as regards precedent, there are potential consequences for other trusts should Parliament legislate retrospectively to change the terms of the NSW Rural Fire Service Donations Trust. The Committee refers these matters to Parliament for consideration.

9. Transport Administration Amendment (International Students Travel Concessions) Bill 2020*

Date introduced	4 June 2020
House introduced	Legislative Assembly
Member responsible	Ms Jenny Leong MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to allow full fee paying international tertiary students to be issued with the same concessional travel passes as other tertiary students.

BACKGROUND

2. In the second reading speech, Ms Jenny Leong MP told Parliament that:

> The object of the bill is to allow full fee paying international tertiary students to be issued with the same concessional travel passes as other tertiary students. This will bring New South Wales into line with every other State in Australia. It seeks to amend the Transport Administration Act 1988 to give effect to the object of the bill by granting international tertiary students the same access to travel concessions as other tertiary students.

3. Ms Leong noted that the Bill does this by inserting provisions relating to international students into Schedule 7 of the *Transport Administration Act 1988* (the Act). The provisions state that:

> A full fee paying international student is entitled to be issued with a concessional travel pass (as referred to in section 88) of the same kind as is available to a person who is a domestic student at a tertiary educational institution.

4. Ms Leong also told Parliament that the Bill proposes to amend the Act by omitting section 88(3A), which allows regulations made under the Act to prescribe persons or a class of persons who are not entitled to a concessional travel pass. The subsection provides that regulations of this kind apply despite any determination or direction of the Minister or of an Authority, or the *Anti-Discrimination Act 1977.*

5. When speaking to the proposed removal of this section, Ms Leong stated that:

> …as a matter of principle this is important because it goes to the heart of the problem the bill is addressing. This clause enables regulations made through the Transport Administration Act to exist outside the Anti-Discrimination Act framework when it comes to travel concessions.

6. Ms Leong also stated that:

Racism and discrimination are real problems in our community, in our society and in our world. They are not abstract concepts as we have seen in recent times. The impacts cause real harm. We know that people experience racial discrimination and vilification on public transport regularly. We know that this has increased during this current pandemic. We know that international students are vulnerable to discrimination and racism when they catch a bus, get a job and or rent a house. The fact is that our State sanctions racial discrimination against international students because it is embedded in our Transport Administration Act. We cannot allow this practice to continue.

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*.

10. Water Management Amendment (Transparency of Water Rights) Bill 2020*

Date introduced	3 June 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 Management Act 2000* (the Act), the *Water Management (General) Regulation 2018* (the Water Regulation), the *Constitution Act 1902* and the *Constitution (Disclosures by Members) Regulation 1983* as follows—

   (a) to facilitate public access to information relating to water access licences (within the meaning of the Act) and recorded in the Water Access Licence Register established by the Act (the Access Register),

   (b) to impose requirements relating to maintaining and updating the Access Register,

   (c) to provide for the independent audit of the Access Register,

   (d) to impose requirements relating to the information to be provided in applications for water access licences,

   (e) to require the public disclosure of interests in water access licences held by Members of Parliament and the spouses of Members of Parliament,

   (f) to make other consequential amendments,

   (g) to insert provisions of a transitional nature consequent on the enactment of the proposed Act.

BACKGROUND

2. The Bill is very similar to the *Water Management Amendment (Water Rights Transparency) Bill 2020* which Mrs Helen Dalton MP introduced into the Legislative Assembly on 27 February 2020 ('the first Bill'). The first Bill lapsed in accordance with the Standing Orders on 23 April 2020. The Committee commented on the first Bill in its Digest No. 11/57.

3. In the second reading speech regarding the current Bill, the Hon. Mark Banasiak MLC told Parliament:

> My colleague and member for Murray, Helen Dalton, introduced the bill in the other place, the purpose of which is to end the secrecy around water ownership in the State—and there is a lot of it. Ever since water was separated from land and became an individual property right, there

> have been many issues around registering and providing public transparency on water ownership.

4. As above, the Bill seeks to amend the *Water Management Act 2000* (the Act), which is an Act to provide for the sustainable and integrated management of the water sources of the State (section 3).

5. As part of the water management regime set down under the Act, a person may apply to the Minister for Water, Property and Housing for a water access licence (Chapter 2, Part 2). Such a licence entitles the holder:

   - to specified shares in available water within a specified water management area or from a specified water source; and
   - to take water at specified times, at specified rates or in specified circumstances, and in specified areas or from specified locations (see in particular sections 56(1)) and 61).

6. The Act requires the Minister to keep a Water Licence Register (Access Register) for the purposes of the Act (section 71) and certain matters relating to a water access licence must be recorded on the Register including any general dealing in the licence; and any caveat lodged in relation to the licence (section 71A).

7. The Bill seeks to amend the Act to change the application process for getting a water access licence and Mr Banasiak told Parliament:

> the bill changes the application process for getting a water licence so people cannot hide their identity when they apply for their licence. This includes the requirement for more information, such as major shareholders and directors of companies who apply for a water licence. Existing water licence holders are given 12 months to provide this extra information.

8. In addition, the Bill seeks to amend the Act to make changes around the Access Register, and Mr Banasiak stated:

> …the bill proposes to change the online New South Wales water register to allow people to search for the water holdings of people, companies and government departments. We have a register for land ownership... Why is water different? Why is it so hard? Currently, the online New South Wales water register by WaterNSW only allows you to search the water access licence number. How you access someone's water licence number when you do not know their name could prove tricky.

9. The Bill also seeks to amend the *Constitution Act 1902*, and the *Constitution (Disclosures by Members) Regulation 1983*, which is made under it. The *Constitution (Disclosures by Members) Regulation 1983* requires the pecuniary interests of Members of the NSW Parliament to be disclosed including interests in real property, sources of income and gifts (Part 3). The amendments would mean that Members of Parliament and their spouses would have to publicly disclose interests in water access licences. Mr Banasiak provided the following background to these amendments:

> There should be no difference in the treatment of property rights and water rights when it comes to the pecuniary interests of members of Parliament, yet for some reason there is no necessity for members of Parliament to announce their interests in water. New South Wales has been in drought for a long time. We have towns that have been out of water for such a long

time and there are children out there who have never seen rain. In the current climate, water is a commodity. It is an asset to be traded. In times of drought it is arguably the most important asset, the demand of which can send prices skyrocketing. A lot of money can be made if you have water entitlements. It would make sense that, as a member of Parliament, if you own water entitlements and you are legislating on issues relating to water that it would be in the public's interest that you register that interest. It is very simple.

ISSUES CONSIDERED BY THE COMMITTEE

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

Privacy Rights

10. As above, the Bill seeks to make it easier for the public to obtain information about water access entitlements, consistent with the first Bill.

11. Schedule 1, item 1 of the Bill proposes to amend the Act to provide that the purposes of the Access Register include creating, maintaining and updating records relating to water access licences and licence holders, and facilitating public access to those records.

12. Schedule 1, item 6 of the Bill requires the Minister to make the information recorded in the Access Register publicly available through an electronic search facility on a website, and prohibits restrictions being placed on access to the information. The electronic search facility would enable details of water access licences to be searched by entering a number of search terms including the name of an individual.

13. As noted by the Committee in its report on the first Bill (Digest No.11/57), by allowing information recorded in the Access Register to be made publicly available, including information that is attached to the name of a person, the Bill may impact on the privacy rights of affected persons. However, as the Committee noted in the previous report, similar searches can already be done in NSW in respect of real property.[10]

> **Under the *Water Management Act 2000* a person may apply to the Minister for a water access licence which entitles the holder to specified shares in available water within a specified water management area. The Act also requires the Minister to keep a Water Licence Register (Access Register) and certain matters relating to a water access licence must be recorded on the Access Register including any general dealing in the licence.**
>
> **The Bill seeks to amend the Act to provide for information recorded in the Access Register to be made publicly available through an electronic search facility, and so that searches could be performed by entering the name of an individual.**
>
> **By allowing information recorded in the Access Register to be made publicly available, including information that is attached to the name of an individual, the Bill may impact on the privacy rights of affected individuals. However, the Committee notes that similar searches can already be performed in NSW in respect of real property. Further, by increasing the amount of publicly available**

[10] See the Property Registry website https://propertyregistry.com.au/?state=nsw&search_type=Title+Search for details of the land title searches that can be done for NSW properties for a fee. These searches include current ownership details with full name.

information about water entitlements the proposed changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers these matters to Parliament to consider whether the possible privacy impacts are reasonable in the circumstances.

Retrospectivity

14. As above, the Bill also seeks to increase the amount of information that people and companies must provide when making an application for a water access licence under the Act. Again, this is consistent with the first Bill.

15. Schedule 2.3, item 3 of the Bill seeks to amend the *Water Management (General) Regulation 2018* to specify information that is to be required by the approved form for an application for a water access licence under section 61(1) of the Act. This includes the applicant's name, address and contact details, and details of any existing interests in access licences held by the applicant.

16. Schedule 1, item 9 of the Bill requires the holder or co-holder of a water access licence that is in force on the day on which the proposed Act commences, or for which an application was made but not determined by that day, to provide the Minister with additional information relating to that licence. That additional information corresponds with the information that the Bill requires to be included in the approved form for a water access licence application.

17. In short, and as noted by the Committee in its report on the first Bill, the provisions in the Bill that would require additional information to be provided when making an application for a water access licence would operate retrospectively. Further, schedule 1, item 9 provides that a failure to comply with these requirements may result in the cancellation of the relevant water access licence.

The Bill would increase the amount of information that people and companies need to provide when making an application for a water access licence under section 61(1) of the *Water Management Act 2000*. This information includes the applicant's name, address and contact details, and details of any existing interests in access licences held by the applicant. These requirements would operate retrospectively. That is, those who already held water access licences on the day on which the proposed Act commenced would have to provide the additional information to the Minister or risk having their water access licence cancelled.

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to him or her at any given time. In this case, a person could have his or her existing water access licence cancelled if he or she did not wish to comply with retrospectively imposed requirements relating to that licence. The Committee notes that the proposed retrospective changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

11. Water Management Amendment (Water Allocations – Drought Information) Bill 2020*

Date introduced	3 June 2020
House introduced	Legislative Council
Member responsible	The Hon. Mick Veitch MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to provide that the determination of the lowest inflows into a water source under a management plan under the *Water Management Act 2000* is to be made by reference to all flow information held by the Department of Planning, Industry and Environment, and not merely flow information held by the Department on the making of the management plan (or at any other particular time). Schedule 2 to the *Water Management Amendment Act 2014* made amendments to the provisions of several management plans to limit the information to which reference could be made in such a determination, and this Bill reverses the effect of those amendments.

BACKGROUND

2. In the second reading speech, the Hon Mick Veitch MLC stated:

> Any plan on how we use our water, how we allocate our water, what is available for use on any given day and what needs to be held back for the tomorrows needs to be based on the long-term averages of rain, river flows and climate. These long-term averages need to be based on the facts, the data. For our regulated rivers, the data informs a "drought of record".

3. Mr Veitch also stated the following in respect of water management in NSW:

> How do we manage our water and where does it go? New South Wales has a method of allocating water and essentially controlling allocations and the use of water through an instrument known as a water sharing plan. There are 58 water sharing plans for New South Wales and most valleys have water sharing plans for three different categories of water: groundwater that comes from under the surface; surface water, as in river water that might be in a regulated or unregulated river system; and alluvial water, best summarised as water moving across the surface of our landscape, such as paddocks and fields. The water that we have access to can only be used for three basic purposes: the environment, people and their animals—often referred to as stock and domestic—and, of course, irrigated farming. When we sit down and look at our data and make some judgements about how much water there is to serve these three basic needs, we really do not have much flexibility. That is why having access to all of the facts and figures, not just the convenient facts and figures, is so important.

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. Industrial Relations (Public Sector Conditions of Employment) Amendment (Temporary Wages Policy) Regulation 2020

Date tabled	2 June 2020
Disallowance date	Disallowed by the Legislative Council: 2 June 2020
Minister responsible	The Hon. Gladys Berejiklian MP
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The object of this Regulation was to amend the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2014* to implement a temporary wages policy, being a 12-month pause on wage increases for public sector employees covered by the *Industrial Relations Act 1996.*

2. This Regulation was made under the *Industrial Relations Act 1996*, including sections 146C and 407 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

The Committee discontinued its consideration of the Regulation as it was disallowed by the Legislative Council on 2 June 2020. The Regulation thereby ceased to have effect (see section 41 of the *Interpretation Act 1987*).

Appendix One – Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

1 The functions of the Committee with respect to Bills are:

(a) to consider any Bill introduced into Parliament, and

(b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:

i trespasses unduly on personal rights and liberties, or

ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or

iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or

iv inappropriately delegates legislative powers, or

v insufficiently subjects the exercise of legislative power to parliamentary scrutiny

2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations

1 The functions of the Committee with respect to regulations are:

(a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,

(b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:

i that the regulation trespasses unduly on personal rights and liberties,

ii that the regulation may have an adverse impact on the business community,

iii that the regulation may not have been within the general objects of the legislation under which it was made,

iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

v that the objective of the regulation could have been achieved by alternative and more effective means,

vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,

vii that the form or intention of the regulation calls for elucidation, or

viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and

(c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

2 Further functions of the Committee are:

(a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and

(b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

Appendix Two – Letters received from Ministers and Members responding to the Committee's comments (received 15 November 2019 to 10 June 2020)

Number	Digest Number	Minister/Member and Date of Letter	Bills/Regulations Covered by Letter
1	3/57	Hon Kevin Anderson MP – 18 November 2019	*Racing Legislation Amendment Bill 2019; Greyhound Racing Amendment (Transition Period) Regulation*
2	4/57	Hon Gareth Ward MP – 23 November 2019	*Children's Guardian Bill 2019*
3	6/57	Hon Damien Tudehope MLC – 19 November 2019 (received)	*Public Works and Procurement Regulation 2019*
4	8/57	Hon Mark Speakman SC MP – 19 December 2019	*Justice Legislation Amendment Bill (No 2) 2019*
5	8/57	Hon Anthony Roberts MP – 30 January 2020	*Justice Legislation Amendment Bill (No 2) 2019*
6	8/57	Hon Kevin Anderson MP – 11 March 2020	*Better Regulation Legislation Amendment Bill 2019*; *Design and Building Practitioners Bill 2019*; *Greyhound Racing Regulation 2019*
7	9/57	Hon Kevin Anderson MP – 23 December 2019	*Work Health and Safety Amendment (Review) Bill 2019*
8	10/57	Hon Anthony Roberts MP – 18 March 2020	*Crimes (Administration of Sentences) Amendment (Use of Force) Regulation 2019*
9	10/57	Hon Brad Hazzard MP – 20 March 2020	*Poisons and Therapeutic Goods Amendment (Cannabis Medicines) Regulation 2019*
10	10/57	Hon Kevin Anderson MP – 6 April 2020	*Work Health and Safety Amendment (Miscellaneous) Regulation 2019*
11	11/57	Hon Victor Dominello MP – 30 April 2020	*Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Bill 2020;* *Motor Accident Guidelines Version 5*
12	11/57	Hon David Elliott MP – 30 April 2020	*Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020*
13	14/57	Hon Damien Tudehope MP – 22 May 2020	*Retail and Other Commercial Leases (COVID-19) Regulation 2020*

NSW GOVERNMENT
The Honourable Kevin Anderson MP
Minister for Better Regulation and Innovation

Ref: DF19/014282

Ms Felicity Wilson MP
Chair, Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

RECEIVED 4/12/19

Dear Ms Wilson Felicity

Thank you for your letter of 21 August 2019 on behalf of the Legislation Review Committee (**Committee**) in relation to the *Racing Legislation Amendment Bill* 2019 (**the Bill**) and the *Greyhound Racing Amendment (Transition Period) Regulation* 2019 (**the Amending Regulation**). I acknowledge the matters raised by the Committee and have responded to each below.

Amending Regulation
The Amending Regulation commenced on 28 June 2019 and was repealed by the *Greyhound Racing Regulation* 2019 on 1 September 2019. As the Committee notes, the Amending Regulation amended savings and transitional clauses in the *Greyhound Racing Act 2017* (**the GR Act**). I note that this is consistent with Parliament's acknowledgement of the need for flexibility in transitional arrangements, reflected in Schedule 4 of the GR Act, which provides for the making of Regulations that amend savings and transitional provisions.

Racing Legislation Amendment Bill 2019
The Bill was introduced to the Legislative Assembly on 7 August 2019 to, amongst other things, give effect to key recommendations in the *Report on the Powers of Racing NSW over Unlicensed Persons* (**the Report**) commissioned by the NSW Government and previously tabled in Parliament.

The Bill was passed by the Parliament on 16 October 2019 without amendment.

I note below the following in response to the matters raised by the Committee in relation to the Bill:

Right to silence and right against self-incrimination
While acknowledging that compulsion powers in the Bill support investigation into integrity matters, the Committee noted that these powers impact compelled individuals' right to silence and right against self-incrimination.

I note that the Bill includes a number of safeguards to balance the potential for harm that may arise from requiring a compelled person to provide information and/or produce documents or things to special inquiries conducted by Racing NSW or Harness Racing NSW, including:

Supreme Court oversight
The use by racing controlling bodies of compulsion powers will be subject to authorisation by the Supreme Court. In seeking this authorisation, a racing controlling body must:

- be reasonably satisfied that a person has relevant information and is unwilling to provide that information to a special inquiry
- adequately demonstrate to the Court that there is a threat to the integrity of racing
- comply with legislated requirements in making each application.

In making its determination, the Court must consider factors including the nature of the threat, the value of the information, the likelihood that the person has and would be unwilling to provide this information and the potential harm if a person is required to provide self-incriminating evidence.

Right to legal representation
The Bill provides that a compelled person is entitled to legal representation when attending a special inquiry.

Requirement for legal assistance
The Bill also requires that stewards presiding over a special inquiry hearing are assisted by a lawyer of at least seven years standing. Importantly, that lawyer is required to inform the compelled person of the effect of the compulsion powers.

Use immunity
Any information provided by a compelled person is not admissible in other disciplinary, civil or criminal proceedings against that person.

Freedom of movement, procedural fairness and administrative review rights
The Committee stated that the Bill creates restrictions on freedom of movement by providing the NSW Police Commissioner with authority to exclude persons from racecourses in NSW.

The proposed exclusion order model is a reasonable measure to protect public safety and safeguard the integrity of the racing industry. Similar exclusion orders are already in place with respect to the State's casinos under the Casino Control Act 1992 (**Casino Control Act**).

It is important to note that a racecourse exclusion order only applies for the duration of a race meeting at a licensed racecourse within New South Wales, and would not apply to other non-racing events at such venues. That is, any restriction placed on the freedom of movement of a person as a result of racecourse exclusion orders is limited in duration.

A person subject to a racecourse exclusion order can seek an administrative review in the NSW Civil and Administrative Tribunal. It is noted that exclusion orders issued under the Casino Control Act do not provide any review mechanism.

The introduction of racecourse exclusion orders creates consistency with Victoria, where relevant authorities can issue exclusion orders for both casinos and racecourses. Unlike in Victoria, however, the Bill does not impose an obligation on the NSW Police Commissioner to automatically exclude persons from NSW racecourses where they have been excluded from a NSW casino and vice versa, with each decision to be made independently.

Commencement by proclamation
The Committee states that the Bill inappropriately delegates legislative powers as the majority of provisions commence by proclamation. Commencement by proclamation is both practical and responsible given the administrative work to be undertaken by a number of government agencies and other organisations to effectively implement the initiatives in the Bill.

Thank you to the Committee for bringing these matters to my attention.

Yours sincerely

Kevin Anderson MP
Minister for Better Regulation and Innovation

18.11.2019

GPO Box 5341 Sydney NSW 2001 ▪ P: (02) 8574 5000 ▪ F: (02) 9339 5500 ▪ W: premier.nsw.gov.au

The Hon Gareth Ward MP
Minister for Families and Communities
Minister for Disability Services

Obj Ref: A4441212

B

Ms Felicity Wilson MP
Chair
Legislation Review Committee

By email: Legislation.Review@parliament.nsw.gov.au

Dear Chair, Felicity,

Digest No.4/57 of the Legislation Review Committee

I refer to your correspondence regarding the Legislation Review Committee's *Legislation Review Digest No 4/57* (the Report) in which it considered the *Children's Guardian Bill 2019*. A response to the issues raised by the Committee is set out below.

Committee Report reference to personal rights and liberties

Part 4 — Reportable conduct scheme — Right to privacy
The Report notes that the Children's Guardian's powers to make preliminary inquiries (s.44) may impact on the privacy rights of a person who is not yet the subject of an investigation or determination. The purpose of these preliminary inquiries is to inform the Children's Guardian's decision whether or not an own-motion investigation into an allegation of child abuse or mistreatment is in the public interest. This power also enables the Children's Guardian to make inquiries as to the ability or willingness of a relevant entity to deal with an allegation. This power replicates existing powers used under the current reportable conduct scheme (s.13AA, *Ombudsman Act 1974*). The paramount consideration (s.7) in decision-making under the Bill is the safety, welfare and wellbeing of children, including protecting children from child abuse. The Children's Guardian is a protective jurisdiction and the powers to make preliminary inquiries regarding an allegation of child abuse or mistreatment reflects this; particularly noting that the entities coming within the scheme include designated agencies responsible for the provision of out-of-home care to children.

Part 4 — Reportable conduct scheme — Right to privacy
The scheme already applies to the outside work conduct of a large number of employees under the scheme. Employees of *designated government agencies* (such as teachers under the Department of Education) and *designated non-government agencies* (such as approved education and care services) already have their outside-work conduct covered by the scheme (see *Ombudsman Act 1974*). The *Children's Guardian Bill 2019* makes a small, targeted amendment to ensure consistency in relation to employees of *public authorities*. However, this amendment has been deliberately contained to those employees of *public authorities* who hold, or are required to hold, a Working with Children Check. This fixes a legislative anomaly with the current scheme. It is appropriate that persons who provide services to children are treated consistently under the scheme. If a swimming instructor is employed by a local council to provide swimming services to children, they engage in child-related work. If that instructor has engaged in sexual misconduct against a child outside of the work context, it nevertheless is relevant to the child-related work they undertake with the entity and should come within the scope of the scheme. This is consistent with the treatment of outside-work conduct of a teacher for reportable conduct purposes. To cover inside-work conduct and not outside work conduct of employees of public authorities who have direct contact with children by virtue of their

52 Martin Place, Sydney NSW 2000
GPO Box 5341, Sydney NSW 2001
Phone: (61 2) 8574 6050 Web: www.nsw.gov.au/MinisterWard

holding or being required to hold a WWCC would not provide the level of protection the children of NSW deserve making the reportable conduct scheme inconsistent in its coverage.

Part 4 — Reportable conduct scheme — Procedural fairness
The Report notes that the Children's Guardian is, in certain circumstances, exempted from the requirement to notify an employee that an investigation or determination is being carried out in relation to him or her. Significantly, the *Children's Guardian's Bill 2019* seeks to increase observation of procedural fairness principles. The current *Ombudsman Act 1974* does not refer to procedural fairness. In contrast, the Bill includes:

- an explicit reference to the principles of natural justice and procedural fairness being observed in decision-making under the legislation (s.8); and
- requiring relevant entities to have systems, policies, and processes about how they handle reportable conduct allegations that have regard to principles of procedural fairness [s.54(d)].

Further, the Children's Guardian is *obliged* to advise an employee where she decides to carry out an investigation, unless doing so would compromise the investigation or put a person's health or safety at serious risk [s.47(3)]. In contrast, s.25G of the *Ombudsman Act 1974* is silent in relation to requiring the Ombudsman to advise an employee regarding Ombudsman-led investigations of an employee. The Bill seeks to increase transparency of decision-making under the scheme, and balance this where disclosure would risk harassment or intimidation or would compromise the investigation.

Part 4 — Reportable conduct scheme — Presumption of innocence and reversed onus of proof
The Report notes that the burden of proof is reversed, in that it is on an employer to prove that an employee was dismissed for reasons other than having assisted the Children's Guardian. This provision reflects a continuation of the existing onus of proof that applies under s.37(5) of the *Ombudsman Act 1974*. As noted in the Report, there are strong policy reasons to ensure employees feel safe in assisting in reportable conduct investigations without fear of reprisal from their employer.

Part 4 — Reportable conduct scheme — Exclusion from civil or criminal liability
The Report notes that a person who makes a report, complaint or notification to the Children's Guardian is immune from civil and criminal liability. Significantly, the protections provided by this provision are contingent on the report, complaint, or notification being made in good faith. The *Royal Commission into Institutional Responses to Child Sexual Abuse* recognised the importance of ensuring that legislation provides comprehensive protection for individuals who make reports in good faith about child sexual abuse in institutional contexts.

Part 5 — Out-of-home care matters — Strict liability
Part 6 — Child employment — Strict liability
The Report notes that offences relating to voluntary out-of-home care and children's employment are strict liability offences. This reflects the existing offences under the *Children and Young Persons (Care and Protection) Act 1998*. As noted in the Report, strict liability offences are a common feature of regulatory frameworks. These offences are appropriate to ensure the integrity of the regulatory regime governing the provision of voluntary out-of-home care and children's employment. The offences seek to ensure the effectiveness of the regulatory scheme by using the prospect of penalty as a deterrent to persons who are not registered with the Office of the Children's Guardian to arrange or provide voluntary out-of-home care or who are engaging children in employment without authority.

Parts 8, 9, and 12 — Children's Guardian and Official Community Visitors — exclusion from liability
The immunity from civil or criminal liability at s.132 of the *Children's Guardian Bill 2019* reflects existing s.186B of the *Children and Young Persons (Care and Protection) Act 1998* and s.48 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. The *Royal Commission into Institutional Responses to Child Sexual Abuse* recognised the

importance of ensuring that legislation provides comprehensive protection for individuals who make reports in good faith about child sexual abuse in institutional contexts. Section 132 of the *Children's Guardian Bill 2019* is a continuation of existing immunities under the current legislative framework.

Part 11 — Offences — Strict liability
The Office of the Children's Guardian currently holds a large amount of sensitive information in relation to applicants and holders of Working with Children Checks, adoption service providers, and out-of-home care providers. This amount of sensitive information will increase with the transfer of the reportable conduct scheme and official community visitor scheme from the Ombudsman's Office to the Office of the Children's Guardian. While Part 11 of the Bill creates a strict liability offence for unauthorised access to information stored by the Children's Guardian, this is considered appropriate in the circumstances, particularly noting the comparatively small penalty for non-compliance.

Part 12 — Right to privacy and significant matter in subordinate legislation
Part 12 replicates the information exchange provision that currently applies to the Secretary of the Department of Communities and Justice under s.248 of the *Children and Young Persons (Care and Protection) Act 1998*. This will ensure that the Children's Guardian can share information with *prescribed bodies* under that legislative framework (called '*relevant bodies*' under the Bill to avoid confusion between the two schemes), including the NSW Police Force and a Public Service agency or a public authority.

The Report notes that this provision may impact on the right to privacy. Significantly, the provision is limited to sharing '*information relating to the safety, welfare and wellbeing of a particular child or class of children*'. Further, it must be '*for the purpose of exercising the functions of the Children's Guardian*'. The scope of information that may come within the words 'safety, welfare or well-being' has been closely considered by the NSW Civil and Administrative Tribunal. NCAT has made clear that these words are not a broad 'catch all'. OCG fully anticipates that information exchange under this provision will be consistent with NCAT's interpretation. Noting that the Guardian will have an expanded regulatory role in implementation of the Child Safe Standards, Reportable Conduct Scheme and her existing functions regarding regulation of the Working with Children Check and out-of-home care, this provision will enable information of concern to be provided to relevant bodies and assist in the protection of children.

Schedule 2 — Powers of authorised persons — powers of search and entry — right to privacy and freedom from arbitrary interference
The Children's Guardian has existing powers to enter, inspect, copy and remove any document or thing in places employing children and out-of-home care providers under the Care Act. Similarly, the Ombudsman has similar powers in relation to investigations. It is important that consolidation of the Children's Guardian's existing powers, functions, and responsibilities across the consolidated pieces of legislation and the transfer of the reportable conduct and OCV functions, does not result in a diminution of existing powers. Exercise of powers under the Act will continue to be used appropriately by staff of the Children's Guardian in keeping the wellbeing and safety of children at the heart of all OCG's efforts. It is equally important to emphasise that the purpose of exercising powers at Schedule 2 is to ensure compliance with the Act, the main object of which is to protect children by providing for the role and functions of the Children's Guardian (s.6). Further, the paramount consideration in the operation of the Act is the safety, welfare and wellbeing of children. Significantly, an authorised person must take all reasonable steps to cause as little inconvenience, and do as little damage, while exercising powers under Schedule 2 (Schedule 2[19]).

Schedule 2 — Powers of authorised persons — Privilege against self-incrimination
The Schedule 2 power to require a person to answer questions and provide information can only be exercised in the context of the Children's Guardian having reasonable grounds for believing there is a risk to the safety, welfare and wellbeing of a child. This power can only

be exercised under a search warrant, which is limited to an investigation triggered under Part 9 of the Bill (Official Community Visitors). It is noted that this power mirrors that which applies to the official community visitor scheme under the Ageing and Disability Commissioner (see s.17(2)(h) of the *Ageing and Disability Commissioner Act 2019*).

Schedule 5 — Right to privacy — breach of confidentiality/freedom of conscience or religion
The Report notes that the Bill expands the list of mandatory reporters. The changes in relation to mandatory reporting implements the NSW Government response to the *Royal Commission into Institutional Responses to Child Sexual Abuse*. The Royal Commission noted the benefits in having national consistency in mandatory reporter groups. It is noted that the mandatory reporter scheme in NSW already includes most of the groups recommended by the Royal Commission, with the exception of people in religious ministry and registered psychologists. Registered psychologists who provide services to children are already mandatory reporters, but registered psychologists who do not provide services to children are not. This expanded category of mandatory reporters implements the NSW Government response to the Royal Commission and may result in the increased reporting of child abuse and neglect thereby facilitating its prevention.

Schedule 5 — Restriction of access to government information
Exclusion of reportable conduct matters from the requirements of the *Government Information (Public Access) Act 2009* reflects the existing exclusion of Ombudsman information regarding 'complaint handling, investigative and reporting functions' (Schedule 2; *Government Information (Public Access) Act 2009*). This reflects the highly sensitive material considered during investigation of an employee in relation to an allegation of child abuse or mistreatment.

Committee Report reference to rights, liberties or obligations

Part 4 — Reportable conduct schemes — Ill-defined and wide powers
The ability for the head of a relevant entity to delegate his or her powers under the scheme reflects existing s.25JA of the *Ombudsman Act 1974*, which also enables delegation to any person employed in the agency. Not prescribing the circumstances or level of seniority accords with most legislation that provides for powers of delegation. It is noted that the Children's Guardian will also have the power to monitor an entity's investigation of a reportable conduct allegation if it is in the public interest to do so. This seeks to mitigate any risk that may arise regarding an entity's investigation of a particular allegation of reportable conduct.

Committee Report reference to delegation of legislative powers

Commencement by proclamation
Inclusion of certain entities in the reportable conduct scheme is subject to commencement by proclamation. While it is acknowledged that explicit commencement dates provide certainty for entities, commencement by proclamation reflects that further consultation and capacity building with these entities is required prior to their inclusion in the scheme. Thorough consultation and capacity building prior to inclusion in the scheme will ensure greater compliance with the requirements of the scheme.

Significant matters in subordinate legislation — issue one
The existing Carers Register is a centralised database of persons who are authorised, or who apply for authorisation, to provide statutory or supported out-of-home. The existing regulation-making power for the Carers Register is at s.264(1A)(k) of the *Children and Young Persons (Care and Protection) Act 1998*. This provision enables the register to include '*the information that is to be included on the register, the circumstances in which persons are required to enter information on the register, access to, and disclosure of, information on the register*'. This detail in relation to the Carers Register is reflected in the *Children and Young Persons (Care and Protection) Regulation 2012*. The reference to a register for residential care workers reflects

the NSW Government response to the *Royal Commission into Institutional Responses to Child Sexual Abuse.* The NSW Response recognised that, while the Carers Register has been in place since 2015 and covers foster carers, and relative and kinship carers, there is currently no register of residential care workers. The *Children's Guardian Bill 2019* creates the legislative mechanism for the regulations to establish the detail of the register, in the same way that the detail of the Carers Register is currently contained in the *Children and Young Persons (Care and Protection) Act 1998.*

Significant matters in subordinate legislation — issue two
Section180(3) of the Bill enables the regulations to create an offence punishable by a penalty. This is capped at 50 penalty units (currently a maximum penalty of a $5,500 fine). This Bill consolidates the Children's Guardian's powers, including her powers in relation to adoption. Section 208 of the *Adoption Act 2000* enables a regulation to create an offence punishable by 50 penalty units. This has been replicated in the *Children's Guardian Bill 2019,* to ensure the consolidation of the Children's Guardian's functions does not result in a diminution of powers. It is noted that all legislation administered by the Office of the Children's Guardian enables regulations to create an offence, and that to date this power has been exercised with discretion and only where appropriate.

Thank you to you and the Committee for the Report on the *Children's Guardian Bill 2019*. I trust this response addresses the issues raised.

Yours sincerely,

THE HON GARETH WARD MP
Minister for Families and Communities
Minister for Disability Services

23-11-19

The Hon Damien Tudehope MLC
Minister for Finance and Small Business

Reference: *TA19/1913*
Your reference: *LAC19/113.06*

Ms Felicity Wilson MP
Chair
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Sent by email: legislation.review@parliament.nsw.gov.au

Dear Chair

Thank you for your correspondence of 16 October 2019, regarding the Legislation Review Committee's comments on the *Public Works and Procurement Regulation 2019* (PWP Regulation 2019) in the Legislation Review Digest No.6/57.

I refer to the two matters that the Committee has referred to Parliament for consideration and make the following comments:

1. Uncertainty regarding the level of seniority of government agency employees that may be delegated the power to undertake procurement for emergencies

   The expenditure of public money and any restrictions on the power to delegate expenditure functions are governed under other legislation, such as the *Government Sector Finance Act 2018*.

   The emergency procurement provision in the PWP Regulation 2019 has, in effect, been in place since 2000, when clause 35 (Exemption for emergencies) was included in the *Public Sector Management (Goods and Services) Regulation 2000* (PSM (GS) Regulation 2000). Clause 5 was subsequently included in the successor to the PSM (GS) Regulation 2000 as clause 24 (Exemption for emergencies) of the *Public Sector Employment and Management (Goods and Services) Regulation 2010* (PSEM (GS) Regulation 2010).

   In July 2012, the *Public Sector Employment and Management Amendment (Procurement of Goods and Services) Act 2012* (PSEM Amendment Act) was enacted and inserted clause 21A (Procurement for emergencies) into the *Public Sector Employment and Management Regulation 2009* (PSEM Regulation 2009). Clause 21A of the PSEM Regulation 2009 is similar to clause 35 of the PSM (GS) Regulation 2000 and clause 24 of the PSEM (GS) Regulation 2010.

   Clause 21A of the PSEM Regulation 2009 was substantively remade as clause 4 of the *Public Works and Procurement Regulation 2014* (PWP Regulation 2014), and then again subsequently remade as clause 4 of the PWP Regulation 2019.

   As a consequence of the emergency procurement provision having been included in the PSEM Amendment Act it has, prior to its inclusion in the PWP Regulation 2019, been subject an appropriate level of Parliamentary scrutiny and debate.

GPO Box 5341 Sydney NSW 2001
Phone: (61 2) 8574 6450 www.nsw.gov.au/ministertudehope

2. Matters such as offences that attract significant maximum penalties, including imprisonment, that should be included in primary legislation, not subordinate legislation

   Section 173(3) of the *Public Works and Procurement Act 1912* provides that a person who contravenes a provision of the regulations made under this section is guilty of an offence which carries a maximum penalty of 100 penalty units or imprisonment of 6 months, or both. Clauses 17(6) and 18(6) of the PWP Regulation 2019 provide that contravention of clause 17(4) (divulging of confidential information) and clauses 18(1), 18(3), 18(4) and 18(5) (failure to comply with NSW Procurement Board directions/requests relating to Board investigations), are offence provisions for the purposes of section 173(3) of the PWP Act.

   These offence provisions have, in effect, been in place since 2012 when the PSEM Amendment Act was enacted and inserted clauses 11(5A) and 12(5A) into Schedule 1 of the PSEM Regulation 2009. Clauses 11(5A) and 12(5A) of Schedule 1 were substantively remade as clauses 17(6) and 18(6) of the PWP Regulation 2014, which were subsequently remade as clauses 17(6) and 18(6) of the PWP Regulation 2019. As such, the offence provisions included in the PWP Regulation 2019 have previously been subject to an appropriate level of Parliamentary scrutiny and debate.

Thank you for bringing these matters to my attention.

Yours sincerely

Damien Tudehope MLC
Minister for Finance and Small Business

Mark Speakman
Attorney General

D19/620004/DJ

Ms Felicity Wilson MP
Chair of the Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

legislation.review@parliament.nsw.gov.au

Dear Ms Wilson,

Legislation Review Digest No. 8/57 dated 12 November 2019

Thank you for your letter of 13 November 2019, providing a copy of the Legislation Review Committee (LRC)'s Digest No. 8/57. I have received and considered the issues raised by the LRC in respect of Digest No. 8/57.

Digest No. 8/57 reviews 12 Bills and 5 Regulations. Those Bills are the Better Regulation Legislation Amendment Bill 2019, the Central Coast Drinking Water Catchments Protection Bill 2019, the Child Protection (Nicole's Law) Bill 2019, the Design and Building Practitioners Bill 2019, the Digital Restart Fund Bill 2019, the Environment Planning and Assessment (Territorial Limits) Bill 2019, the Justice Legislation Amendment Bill (No 2) 2019, the Liquor Amendment (Intoxication) Bill 2019, the Liquor Amendment (Harm Reduction Areas) Bill 2019, the Professional Engineers Registration Bill 2019, the Real Estate Services Council Bill 2019, and the State Revenue Legislation Further Amendment Bill 2019. The Regulations are the Film and Television Industry Regulation 2019, the Gaming Machines Regulation 2019, the Greyhound Racing Regulation 2019, the Parramatta Park Trust Regulation 2019, and the National Parks and Wildlife Regulation 2019.

I note that the Justice Legislation Amendment Bill (No 2) 2019 falls under my portfolio responsibility. I would like to express my appreciation for the LRC's close consideration and thoughtful comments. As you may be aware, those matters raised by the LRC were addressed in Parliamentary debate of the Bill, and have helped to ensure that the Bill's scope, purpose and application are well understood by Members of Parliament and the wider community.

I look forward to receiving and reflecting on any future comments the LRC has on Bills and Regulations under my portfolio responsibility.

Thank you for taking the time to write.

Yours sincerely

Mark Speakman
19 DEC 2019

GPO Box 5341, Sydney NSW 2001
Phone: (61 2) 8574 6390 Fax: (61 2) 9339 5562 Email: www.nsw.gov.au/your-government/the-cabinet/attorney-general

NSW GOVERNMENT
The Honourable Anthony Roberts MP
Minister for Counter Terrorism and Corrections

CESC19/02176
IM19/29259
Your ref: LAC19/113.08

Ms Felicity Wilson MP
Chair
Legislation Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

Dear Ms Wilson

Thank you for your letter of 13 November 2019 outlining the comments of the Legislation Review Committee in relation to the *Justice Legislation Amendment Bill (No 2) 2019* and providing the opportunity to respond to the Committee's comments. I note you have also written to the Attorney General and Minister for Police and Emergency Services regarding those aspects of the Bill which fall within their portfolio responsibilities.

I acknowledge your comments in relation to provisions which expand the information sharing arrangements to enable the Commissioner of Corrective Services to share information with an Australian Intelligence Agency.

As you have pointed out, the gathering of intelligence information by CSNSW sharing of information in relation to correctional facilities is already an established practice with law enforcement agencies and interstate correctional services agencies. The sharing of this information can suppress potential security threats, and prevent criminal acts from taking place within the correctional environment and the broader community.

I trust this information is of assistance to the Committee.

Yours sincerely

Anthony Roberts MP
Minister for Counter Terrorism and Corrections

30 JAN 2020

GPO Box 5341 Sydney NSW 2001 • P: (02) 8574 5600 • F: (02) 9339 5544 • E: office@roberts.minister.nsw.gov.au

NSW GOVERNMENT
The Honourable Kevin Anderson MP
Minister for Better Regulation and Innovation

Our reference: COR-03961-2019

Ms Felicity Wilson MP
Chair
Legislation Review Committee
Parliament of New South Wales
By email: legislation.review@parliament.nsw.gov.au

Dear Ms ~~Wilson~~ Felicity MP

Thank you for your correspondence on behalf of the Legislation Review Committee.

I have considered the Committee's comments in Digest No. 8/57 concerning the Better Regulation Legislation Amendment Bill 2019, the Design and Building Practitioners Bill 2019 and the Greyhound Racing Regulation 2019. The Department's response, as summarised below, is attached (**Tab A – Department Response to Digest No. 8/57**).

Better Regulation Legislation Amendment Bill 2019

The Department notes the Committee's preference for legislation to commence on a fixed date or on assent, particularly if proposed amendments affect the rights of individuals. Although this approach may provide greater clarity to affected parties, specifying a commencement date may be unfeasible in circumstances where many stakeholders are involved and the process of developing regulations is complex. A flexible start date enables comprehensive stakeholder consultation to be conducted and the implementation of necessary administrative arrangements prior to commencement.

The Department also notes the Committee's view that penalty provisions are better contained in principal legislation to foster an appropriate level of parliamentary oversight. The Department notes that the offence provision and penalty for failure to comply with trust account requirements is already contained in the Building and Construction Industry Security of Payment Regulation 2008. All that the amendment in the Better Regulation Legislation Amendment Bill 2019 was seeking to achieve was to increase the quantum of the existing penalty in the Regulation. The new penalty amount accords with increases to other penalties contained in the principal Act. The amendment to the Building and Construction Industry Security of Payment Act 1999 relating to this matter was passed by Parliament without comment

Design and Building Practitioners Bill 2019

The Department notes the Committee's concerns regarding non-reviewable decisions that may affect an individual's reputational and economic rights. It is considered that the safeguards contained in the Bill are proportionate to the potential public safety risks and are appropriate to support natural justice.

The Bill also allows for a number of significant details to be prescribed in the regulations rather than the primary legislation. Providing these details in the regulations ensures that the requirements are appropriately refined and allow further public scrutiny through the publication of a Regulatory Impact Statement.

Greyhound Racing Regulation 2019

As observed by the Committee, the strict liability offences contained in the Regulation are appropriate to promote compliance and foster positive behavioural change within the greyhound racing industry. The sharing of personal information is also proportionately limited by safeguards that uphold procedural fairness. In these circumstances, the Department considers that the proposed provisions are appropriate and notes that the Committee makes no further comments.

For a detailed summary of the Department's response, please refer to **Tab A.**

Yours sincerely

Kevin Anderson MP
Minister for Better Regulation and Innovation

Date: 11-3-2020

Tab A – Department Response to Digest No. 8/57

Legislation Review Committee (Digest No. 8/57)

Department Response

Better Regulation Legislation Amendment Bill 2019			
Inappropriately delegates legislative powers			
Issue	**Legislation**	**LRC comments**	**Department response**
Commencement by proclamation	Various	The Bill provides for certain amendments to commence on day(s) to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent, particularly if it affects the rights and obligations of individuals. While a flexible start date may assist with implementing administrative arrangements, parties affected by the amendments may benefit from having certainty about when the changes apply to them.	The comments of the Committee are noted. Some of the amendments in the Bill require supporting Regulations. Specifying the exact commencement date for these amendments is unfeasible as the process of developing Regulations can be complex. The process generally involves many stakeholders including public consultation. It may also require extensive ICT changes to be made and the development of communication packages to advise industry of changes. It is anticipated that these administrative arrangements will adequately inform affected parties about the incoming changes and their impact upon commencement.
Matters that should be dealt with in principal legislation	*Building and Construction Industry Security of Payment Act 1999*	The Bill significantly increases the maximum penalty that may be imposed by the regulations for failure to comply with trust account requirements for retention money.	The comments of the Committee are noted. The offence provision and penalty for failure to comply with trust account requirements is already contained in the Building and Construction Industry Security of Payment

Tab A – Department Response to Digest No. 8/57

Better Regulation Legislation Amendment Bill 2019			
		The Committee prefers penalty provisions to be contained in principal legislation to foster an appropriate level of parliamentary oversight. This is particularly the case where the penalties set are significant.	Regulation 2008. All that the amendment in the Better Regulation Legislation Amendment Bill 2019 was seeking to achieve was to increase the quantum of the existing penalty in the Regulation. The new penalty amount accords with increases to other penalties contained in the principal Act. The amendment to the Building and Construction Industry Security of Payment Act 1999 relating to this matter was passed by Parliament without comment

Design and Building Practitioners Bill 2019			
Makes rights, liberties or obligations dependent upon non-reviewable decisions			
Issue	**Legislation**	**LRC comments**	**Department response**
Non-reviewable decisions affecting reputational and economic rights	*Design and Building Practitioners Bill 2019*	The Bill allows the Secretary to publish a notice, warning persons of the risks of dealing with a specified practitioner or any other person the Secretary reasonably believes may have breached the Act or regulations. There does not appear to be provision for such a decision to be reviewed by the NSW Civil and Administrative Tribunal. Therefore, the Bill may allow a non-reviewable decision to be made that may affect the reputational and economic rights of persons concerned.	The comments of the Committee are noted. It is considered that the safeguards observed by the Committee are proportionate to the potential public safety risks and are appropriate to support natural justice.

Tab A – Department Response to Digest No. 8/57

Design and Building Practitioners Bill 2019			
		The Bill does contain safeguards and the person concerned must generally be given the opportunity to make representations prior to such notices being published. In addition, there may be some cases where it is in the public interest for a warning notice to be published swiftly. Notwithstanding this, the Committee refers the provisions to Parliament to consider whether they are reasonable in the circumstances.	
Inappropriately delegates legislative powers			
Issue	**Legislation**	**LRC comments**	**Department response**
Matters that should be included in primary legislation	*Design and Building Practitioners Bill 2019*	The Bill allows a number of significant details e.g. key definitions and offence provisions, to be dealt with in the regulations. The Committee acknowledges that such an approach will provide flexibility, allowing swifter implementation of the necessary arrangements to support a complex and comprehensive new scheme. However, the Committee prefers significant details such as these to be included in primary legislation to foster an appropriate level of parliamentary oversight.	The comments of the Committee are noted. The Bill sought to establish a range of new requirements on design and building practitioners. As observed by the Committee, allowing for details to be prescribed in the regulations is considered appropriate to ensure that the requirements are refined appropriately. It is noted that providing such details in the regulations will also ensure further public scrutiny and stakeholder consultation through the publication of a Regulatory Impact Statement.

Tab A – Department Response to Digest No. 8/57

Greyhound Racing Regulation 2019			
Trespasses unduly on personal rights and liberties			
Issue	**Legislation**	**LRC comments**	**Department response**
Strict liability	*Greyhound Racing Regulation 2019*	The Regulation contains a number of strict liability offences. The Committee generally comments on strict liability offences as they derogate from the common law principle that mens rea must be prove to hold a person liable. The Committee however notes that strict liability offences are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. The Committee further notes that the Regulation is part of a wider reform process seeking to implement a number of recommendations of the Greyhound Industry Reform Panel. In the circumstances, the Committee makes no further comment.	The comments of the Committee are noted. As observed by the Committee, the strict liability offences in the Regulation apply to promote compliance and foster positive behavioural change within the industry.
Right to privacy	*Greyhound Racing Regulation 2019*	The Regulation allows the Greyhound Welfare and Integrity Commission to share personal information contained in registers associated with registered greyhounds, racing industry participants and trial tracks. This may impact on the privacy rights of the individuals involved. However, the Committee notes that such information is shared to select organisations involved in the regulation of greyhound racing,	The comments of the Committee are noted. As observed by the Committee, sharing of personal information is limited to relevant regulatory and enforcement bodies. The Regulatory Impact Statement for the Regulation also provides that the sharing of such information is 'critical to effective lifecycle tracking, identification of industry trends and

Greyhound Racing Regulation 2019			
		animal welfare and law enforcement bodies. The Commission may also refuse a request for access to information as long as reasons for the refusal are provided. In the circumstances, the Committee makes no further comment.	national monitoring of non-complying industry participants'.

The Honourable Kevin Anderson MP
Minister for Better Regulation and Innovation

Our reference: COR-04140-2019
Your reference: LAC19/113.09

Ms Felicity Wilson MP
Chair, Legislation Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

By email: legislation.review@parliament.nsw.gov.au

Dear Ms Wilson

Digest No. 9/57 of the Legislation Review Committee

I refer to your correspondence regarding the Legislative Review Committee's views on the *Work Health and Safety Amendment (Review) Bill 2019.*

I note the Committee's comments regarding the *Work Health and Safety Amendment (Review) Bill 2019.* The proposed provisions of the Amendment Bill seek to strike a balance in enabling the regulator to exercise its relevant powers and maintaining measures regarding a person's right to privacy and privilege against self-incrimination, while recognising the public interest in ensuring compliance with work health and safety laws.

I note the Committee makes no further comment on any of the issues raised.

Thank you for bringing these matters to my attention and the valuable ongoing contribution the Committee makes in ensuring robust legislation in NSW. Should there be any further policy and regulatory changes related to these provisions, the comments of the Committee will be considered.

Yours sincerely

Kevin Anderson MP
Minister for Better Regulation and Innovation

Date: 23/12/19

NSW GOVERNMENT
The Honourable Anthony Roberts MP
Minister for Counter Terrorism and Corrections

CESC20/00374
IM20/6490
Your ref: LAC20/007.01

Ms Felicity Wilson MP
Chair
Legislation Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

Dear Ms Wilson Felicity

Thank you for your letter of 26 February 2020 outlining the comments of the Legislation Review Committee in relation to the *Crimes (Administration of Sentences) Amendment (Use of Force) Regulation 2019* and providing the opportunity to respond to the Committee's comments.

I acknowledge your comments in relation to the Amendment Regulation, which adds an additional circumstance in which force may be used on an inmate to allow treatment (including medication) to be given to an inmate in accordance with section 84 of the *Mental Health Act 2007.*

As you have pointed out, a number of safeguards exist in relation to the use of force in these circumstances. This includes the preconditions of necessity and proportionality outlined in clause 131(1)-(3) of the *Crimes (Administration of Sentences) Regulation 2014.* It is also a requirement that every use of force be reported (except where clause 133(4) applies) and reviewed.

The use of force to assist Justice Health & Forensic Mental Health Network medical personnel administer enforced medication can prevent serious harm to an inmate's health, and ensure the safety of staff and other inmates.

I trust this information is of assistance to the Committee.

Yours sincerely

Anthony Roberts MP
Minister for Counter Terrorism and Corrections

18 MAR 2020

GPO Box 5341 Sydney NSW 2001 • P: (02) 8574 5600 • F: (02) 9339 5544 • E: office@roberts.minister.nsw.gov.au

NSW GOVERNMENT
The Hon. Brad Hazzard MP
Minister for Health and Medical Research

Ms Felicity Wilson MP
Chair
Legislation Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

Your ref LAC20/007.01
Our ref M20/1241

Dear Ms Wilson

Thank you for your letter about the review by the Legislation Review Committee of the Poisons and Therapeutic Goods Amendment (Cannabis Medicines) Regulation 2019 (the Regulation).

The committee highlighted the number of strict liability offences in the Regulation. The use of four strict liability offences in the Regulation is considered appropriate, to ensure integrity of the regulatory framework governing the circumstances in which unregistered drugs of addiction are prescribed and supplied to patients.

The Regulation seeks to ensure appropriate regulation of unregistered drugs of addiction. In particular, the Regulation requires medical practitioners to obtain an authority under the Poisons and Therapeutic Goods Regulation 2008 before supplying or prescribing certain specified unregistered drugs of addiction, for the purposes of a clinical trial. Strict liability offences are generally recognised as necessary in circumstances where there is public interest in ensuring that regulatory schemes are observed. It can be reasonably expected that a person was aware of their duties and obligations. The use of these offences is particularly relevant in the context of regimes governing public health.

The use of strict liability offences in this context is considered appropriate, particularly noting the repercussions on the health and safety of patients where these substances are used in clinical trials without authority, or are prescribed by persons who are not medical practitioners. The strict liability offence provisions will complement the existing framework, governing existing stand-alone criminal offences throughout the *Poisons and Therapeutic Act 1966* and Poisons and Therapeutic Goods Regulation 2008. This includes matters such as the unauthorised supply of particular types of drugs of addiction and inappropriate prescription/supply of these substances.

Thank you again for writing. If you would like more information, please contact Ms Anna Read, Senior Legal Officer, NSW Ministry of Health, at anna.read@health.nsw.gov.au or on 9424 5863.

Yours sincerely

20 MAR 2020

The Hon. Brad Hazzard MP
Minister for Health and Medical Research

The Honourable Kevin Anderson MP
Minister for Better Regulation and Innovation

Our reference: COR-00914-2020
Your reference: LAC20/007.01

Felicity Wilson MP
Chair
Legislation Review Committee
By email: legislation.review@parliament.nsw.gov.au

Dear Ms Wilson

Digest No.10/57 of the Legislation Review Committee

I refer to your correspondence regarding the Legislative Review Committee's views on the *Work Health and Safety Amendment (Miscellaneous) Regulation 2019* (the **Amendment Regulation**).

The Amendment Regulation was introduced to complement the reforms contained in the *Work Health and Safety Amendment (Review) Bill 2019* to streamline investigations and increase deterrence, as well as extend transitional arrangements for plant item registration, facilitate information sharing between agencies whose regulatory responsibilities intersect and rectify a minor drafting error.

I note the Committee's comments regarding the Amendment Regulation and that the Committee makes no further comment on the issues raised around confidentiality of information. I also note that the Committee has referred the matter of the introduction of two new penalty notices to Parliament for its consideration.

The two new penalty notices are designed to deter persons conducting a business or undertaking from failing to notify the regulator of a notifiable incident as required and for failing to display an inspector issued notice at or close to the affected location within the workplace. The amounts gazetted for these penalty notices are in line with the ratio of the maximum court ordered penalty for the associated offences, which is the same approached used for other penalty notices that appear in the *Work Health and Safety Regulation 2017*. Their size reflects the serious nature of the offences. I note that a person may seek a review of an inspector's decision to issue a penalty notice.

Thank you for bringing these matters to my attention. Should you have any further questions please contact Maggie Phang, A/Director Policy and Strategy on (02) 8276 8394.

Yours sincerely

Kevin Anderson MP
Minister for Better Regulation and Innovation

Date: 06/04/20

GPO Box 5341 Sydney NSW 2001 ▪ P: (02) 8574 5550 ▪ F: (02) 9339 5584 ▪ W: nsw.gov.au

NSW GOVERNMENT
The Honourable Victor Dominello MP
Minister for Customer Service

Our reference: COR-01888-2020

Felicity Wilson MP
Chair
Legislation Review Committee

By email: legislation.review@parliament.nsw.gov.au

Dear Ms Wilson Felicity

***Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Bill 2020 and* Motor Accidents Guidelines Version 5**

Thank you for the Legislation Review Committee's consideration of the *Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Bill 2020* (Bushfire Relief Bill) and the Motor Accidents Guidelines Version 5 and its comments.

Bushfire Relief Bill
I note the Committee's comments on the Bushfire Relief Bill, which received assent on 25 March 2020.

The Committee raised concerns about appropriate Parliamentary oversight of the powers to provide fee relief, the powers of the CEO of Service NSW (SNSW) and the expansion of SNSW's functions. The powers were drafted in consultation with the Parliamentary Counsel to provide relief during and after the bushfire crisis. The powers are broad to ensure the Government can deliver relief and respond quickly and effectively in other emergencies and unforeseen events in future. This capacity is particularly important given the current circumstances that we are experiencing with COVID-19.

The provision of fee relief will be subject to appropriate government approvals and oversight. The amendments provide greater consistency with other legislation in the portfolio and standardise the regulation making powers. In most principal Acts, there was already a regulation making power to either waive, reduce, postpone or refund fees. To ensure public disclosure and oversight of how the proposed fee waiver measures are implemented, SNSW will report on the type, number and dollar value of fees waived via its Annual Report.

The Bill does not give the CEO of SNSW any additional powers without approval from the Minister, delegation from another Minister or notice from a Government agency or agency head. The Minister can direct the CEO of SNSW to deliver functions relating to the delivery of Government services to the people of NSW. This will allow SNSW to deliver transactions and services when there is no agency owner to delegate or confer to. It is important, particularly in times of disaster and crisis, that SNSW can deliver support and other services to the people of NSW with minimal red tape.

As you have noted, the Bill also allows SNSW to deliver new functions where prescribed by regulation. This gives SNSW the flexibility it needs to quickly stand up new customer service functions which are not provided for in the Act, in response to future disasters and emergencies.

In summary, these amendments will provide the flexibility SNSW needs to respond to current and future disasters or emergencies and to support the people of NSW in times of need.

GPO Box 5341 Sydney NSW 2001 ▪ P: (02) 8574 6607 ▪ F: (02) 9339 5526 ▪ W: nsw.gov.au

Motor Accident Guidelines Version 5

I note your comments on the impact of the Motor Accident Guidelines Version 5 on personal rights and liberties and the regulatory impact on the business community. In respect of each of the issues you raised, I comment as follows:

- Retrospectivity – Retrospective effect of the Guidelines is necessary to support delivery of the objectives of the primary legislation under which the Guidelines are made, the *Motor Accident Injuries Act 2017* which came into force in December 2017. The requirements for assessing the degree of permanent impairment resulting from an injury caused by a motor accident remain unchanged since the publication of the Motor Accident Guidelines Version 1.
- Privacy – Publication of decisions – I note the Committee's comments that provisions for withholding confidential or sensitive information sufficiently safeguard the privacy of individuals.
- Privacy – Surveillance of claimants – I note the Committee's comments that the limited circumstances in which an insurer can conduct surveillance sufficiently safeguard the privacy of individuals.
- Impact on business – Restrictions on the setting of insurance premiums – I note the Committee's comment that the administrative requirements for insurers under the Guidelines contribute to the aims of the CTP scheme.
- Impact on business – Administrative burden – I note the Committee's comment that the administrative requirements for insurers under the Guidelines contribute to the aims of the CTP scheme.

Please contact Cheri Boxoen, Principal Policy Officer, Office of the Secretary, Department of Customer Service cheri.boxoen@customerservice.nsw.gov.au, if you wish to discuss any aspect of this matter.

Yours sincerely

Victor Dominello MP
Minister for Customer Service

Date: 30.4.20

NSW GOVERNMENT
The Hon. David Elliott MP
Minister for Police and Emergency Services

Your Ref: LAC20/007.02

Felicity Wilson MP
Chair
Legislation Review Committee
Parliament House
SYDNEY NSW 2000

Dear Ms Wilson

Thank you for your correspondence.

The provisions contained in the *Firearms and Weapons Legislation Amendment (Criminal Use) Bill* 2020 are balanced provisions targeting serious criminal activity, not the legitimate firearms regime. These provisions are the end result of formal reviews by both the NSW Ombudsman and the National Firearms and Weapons Policy Working Group. These provisions are appropriate and reasonable in the circumstances.

Self-incrimination and the right to silence
This Government respects the principle of law regarding self-incrimination. This principle should not impede the investigations of the NSW Police Force which are conducted according to law and in good faith.

The *Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020* creates new offences prohibiting the unauthorised manufacture of firearms and firearms parts, including precursors such digital blueprints and computer software.

The corresponding new seizure powers would allow a police officer to seize any firearm, firearm part or firearm precursor including a computer or data storage device that the officer suspects on reasonable grounds while have been used in the commission of an offence, or may provide evidence of the commission of an offence.

The NSW Police Force has no current power in the *Firearms Act 1996* or in the *Weapons Prohibition Act 1998* to require an owner or person with knowledge of such a computer or date storage device to disclose passwords or codes to access this electronic equipment which has been lawfully seized.

In this day and age, this is akin to not being able to open a filing cabinet or drawer which has been lawfully seized. Police can seize physical items under warrant, charge anyone hindering a search and use reasonable force to, for example, break open a cabinet or safe. In contrast, in the case of electronic devices, where the vast majority of information is kept in this technological age, access to relevant evidence can be easily thwarted.

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Encryption or security features are used by criminals to hide evidence relating to illicit activities. While there is some limited technical capability to bypass encryption on seized devices, the wait for specialist units within police to conduct an initial examination can be months.

The proposed power allowing a police officer to direct a person responsible for a thing that has been seized to provide information including a password to enable the officer to access information held in the thing, is entirely reasonable to support enforcement of the new offence of taking part in unauthorised manufacture of a firearm, and the power to seize computer and data storage devices which a police officer reasonably believes may contain evidence of the commission of an offence. The intent of these provisions may be defeated if the police officer did not have this power.

The Government believes the proposal does not trespass on a person's right to silence. The power forms part of the lawful execution of search and investigative processes. The legislation does not permit law enforcement officers to use these powers to obtain information that does not directly relate to the express purposes in the Act.

The offence being investigated, that requires such a power, is a serious offence. It carries a degree of severity that warrants clear and effective investigative powers by law enforcement officers. The powers can only be used as reasonably necessary to investigate the illegal manufacturing of firearms offence. Law enforcement will still be required to complete all other investigative steps in identifying any evidence.

Search powers

The Bill intends to clarify this aspect of a Firearms Prohibition Order (FPO) search to make the parameters of the search powers clear.

The Ombudsman acknowledged the logic of the search powers including other persons present on the premises: *... no ancillary search power ...may present a difficulty for police if a person, who is not the subject of an FPO, hides a firearm, firearm part or ammunition on their person in an effort to prevent police from finding the item at the premises.*

The report went on to note, *A number of submissions made to this review argued that the NSW Police Force should be provided with ancillary search powers... Police require sufficient powers to support the execution of an FPO search in a manner that enables the identification of firearms, firearm parts and ammunition that may be on the premises. We consider that this balance is best achieved by giving police the same powers to search other people present at the premises as they would have when executing a search warrant*[1].

The search powers are reasonable and proportionate in the circumstances.

Commencement by proclamation

The operational implementation of the provisions will take time.

Those provisions relating to reviews of Firearms Prohibition Orders, in particular, have significant resource implications for the NSW Police Force. The NSW Police need to get this right and delaying commencement will ensure that all the changes necessary to policies, procedures and training will take place; as well as allocation of resources to give effect to the Bill.

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[1] Page 78: https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0016/37132/Review-of-police-use-of-firearms-prohibition-order-search-powers.pdf

The commencement will occur as soon as possible and as such commencement by proclamation is reasonable in the circumstances.

I trust this is of assistance to the Committee

Yours sincerely

The Hon. David Elliott MP
Minister for Police and Emergency Services

30 April 2020

GPO Box 5341 Sydney NSW 2001 ▪ P: (02) 8574 6290 ▪ F: (02) 9339 5564 ▪ W: nsw.gov.au

The Hon Damien Tudehope MLC
Minister for Finance and Small Business,
Vice-President of the Executive Council and
Leader of the Government in the Legislative Council

22 May 2020

Ms Felicity Wilson MP
Chair
Legislation Review Committee
Parliament of New South Wales

By email

Your ref: LAC20/007.05

Dear Chair

Thank you for the opportunity to respond to the issues raised by the Legislation Review Committee in its consideration of the *Retail and Other Commercial Leases (COVID-19) Regulation 2020.*

The Committee considers the possibility that the regulation may impact on property rights and freedom of contract and have an adverse impact on the business community. However, the Committee concludes that "*the Regulation is a reasonable and proportionate response to the far-reaching economic consequences of COVID-19*".

The Committee also notes that while it "*generally prefers significant matters … to be included in primary legislation*", it concludes that "*in the current case and given the emergency created by COVID-19, the Committee considers that it may be reasonable to include such provisions in subordinate legislation*".

I agree with these conclusions reached by the Committee.

Yours sincerely

Damien Tudehope MLC
Minister for Finance and Small Business,
Vice-President of the Executive Council and
Leader of the Government in the Legislative Council

GPO Box 5341 Sydney NSW 2001
Phone: (61 2) 8574 6450 www.nsw.gov.au/ministertudehope