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Legislation Review Committee

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

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Guide to the Digest

COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

COMMENT ON REGULATIONS

This section contains the Legislation Review Committee's reports on Regulations in accordance with section 9 of the *Legislation Review Act 1987*.

Conclusions

PART ONE – BILLS

1. ADOPTION LEGISLATION AMENDMENT (INTEGRATED BIRTH CERTIFICATES) BILL 2020

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

Commencement by proclamation

This Bill amends the *Births, Deaths and Marriages Registration Act 1995* to allow the Registrar for Births, Deaths and Marriages to issue two different birth certificates for people who are adopted, being a post-adoptive birth certificate, and an integrated birth certificate. The post-adoptive birth certificate is the certificate currently issued for adopted people, and includes the names of the adopted parents. This certificate must not indicate that the person was adopted. The integrated birth certificate will include details of the adoptive parents, in addition to details of the person's birth parents and birth siblings. This is to bring the issuing of adoptive birth certificates in line with modern adoption policy, which has a focus on open adoption practices. Both birth certificates will be valid identity documents.

The proposed Act commences by proclamation. The Committee generally prefers legislation to commence on a fixed day or on assent. However, the Committee also notes the benefits associated with a flexible start date, particularly regarding the implementation of administrative arrangements. In this instance, this is important given the need to ensure that relevant organisations are aware that an integrated birth certificate can be used for identity verification. In the circumstances, the Committee makes no further comment.

2. ANTI-DISCRIMINATION AMENDMENT (SEX WORKERS) BILL 2020*

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

Freedom of contract

The Bill seeks to amend the *Anti-Discrimination Act 1977* (the Act) by introducing a new ground of unlawful discrimination on the ground of occupation, or previous occupation, as a sex worker. The amendments set down what constitutes discrimination in work, including deciding who should be offered employment or dismissed on the basis that a person is or has been a sex worker. The Bill also sets down what constitutes unlawful discrimination on the ground of occupation as a sex worker in other areas of public life, such as education, the provision of goods and services, accommodation and membership of registered clubs.

In doing so, the Bill may have some impact on freedom of contract, that is, the freedom of parties to choose the contractual terms to which they are subject and the parties with whom they contract. However, the Committee acknowledges that statutory limitations on freedom of contract are not uncommon, for example where it is necessary to address the unequal bargaining power of parties.

Further, the Committee notes that the provisions in the Bill that set down what acts constitute unlawful discrimination against sex workers or previous sex workers in work, and in other areas of public life, are consistent with, and appear to be modelled upon, provisions in the existing Act that prescribe unlawful discriminatory acts or behaviour with respect to discrimination on other

grounds (such as age, sex and race). In the circumstances, and particularly given this consistency with existing anti-discrimination laws that limit freedom of contract, the Committee makes no further comment.

Freedom of speech

As above, the Bill seeks to amend the Act by introducing a new ground of unlawful discrimination on the basis of occupation as a sex worker. The Bill also outlines what constitutes unlawful vilification of sex workers by a public act.

Proposed subsection 50AO(1) would provide that it is unlawful for a person, by public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of people on the ground of occupation as a sex worker. Proposed section 50AA defines a "public act" as including any form of communication to the public (including print, broadcast or other recorded material), conduct observable by the public (such as gestures or displaying of clothing or signs), and the distribution of any matter to the public with the knowledge that it promotes or expresses hatred towards, serious contempt for, or severe ridicule of sex workers.

In rendering these public acts unlawful, these amendments cover a wide range of public communication and may limit the freedom of speech – the right to express information, ideas or opinions free of restrictions. It may also limit the implied freedom of political communication – the freedom to communicate about political matters.

The Committee acknowledges that statutory limitations on freedom of speech are not uncommon, for example where the content amounts to defamation, and that the intention of the Bill is to protect sex workers from vilification. The Committee also notes that proposed subsection 50AO(2) provides for exemptions including that nothing under section 50AO renders unlawful a fair report of a public act; a communication or distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege in proceedings for defamation; or a public act done in good faith for academic, artistic, scientific, research or religious discussion or instruction, or in the public interest.

In addition, the threshold for unlawful vilification of sex workers under the Bill and the threshold for unlawful vilification of people or groups on other grounds already provided for in the Act (i.e. race, transgender status, homosexuality, and HIV/AIDS), is the same. That is, a person, by a public act, inciting hatred, serious contempt for, or severe ridicule of a person or group of persons on the basis of the ground. The defences of fair report, absolute privilege etc are also the same.

In the circumstances, and particularly given that the provisions are consistent with the current laws surrounding unlawful vilification on other grounds, which also limit freedom of speech, the Committee makes no further comment.

3. EDUCATION LEGISLATION AMENDMENT (PARENTAL RIGHTS) BILL 2020*

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

Employment Rights

The Bill would amend the *Education Act 1990*, the *Education Standards Authority Act 2013*, and the *Teacher Accreditation Act 2004* to insert two new definitions – one of "matters of parental primacy" and another of "gender fluidity". In particular, "matters of parental primacy" means in

relation to the education of children, moral and ethical standards, political and social values, and matters of personal wellbeing and identity including gender and sexuality.

Further, the Bill would insert a new section 20(1A) into the *Teacher Accreditation Act 2004* that requires professional teaching standards that are developed by the NSW Education Standards Authority (the Authority) to include a requirement that all approved courses, teacher education courses, programs and professional development courses must recognise that parents are responsible for the education of children in "matters of parental primacy" and that such courses must not teach "gender fluidity". The standards must also make it a condition of accreditation of teachers and other qualified persons in schools that they must recognise that parents are responsible for education of children in "matters of parental primacy" and that they must not teach "gender fluidity" in schools.

In addition, the Bill provides that the Authority must revoke accreditation for any person if the Authority is satisfied that the person has failed to comply with any requirements of the professional teaching standards that apply to the person under the new section 20(1A).

The Bill may thereby have some impact on employment rights. The Committee notes in particular that the power it gives the Authority to revoke accreditations is wide and ill-defined. For example, it would allow the Authority to revoke a teacher's accreditation where it is satisfied the teacher has taught in a way that does not recognise the primary responsibility of parents for education in "matters of parental primacy" and the definition of "matters of parental primacy" is broad, incorporating general concepts such as "moral and ethical standards" and "political and social values". The Committee would prefer provisions that affect rights to be drafted with more precision so that their scope and content is clear. The Committee refers these matters to Parliament for consideration.

Freedom of speech

As above, the Bill would amend the *Education Act 1990*, the *Education Standards Authority Act 2013*, and the *Teacher Accreditation Act 2004* to insert two new definitions – one of "matters of parental primacy" and another of "gender fluidity".

It would also amend the *Education Act 1990* to insert a series of new provisions to restrict what can be taught in NSW schools including section 17A which provides that the education in government and non-government schools must not include the teaching of "gender fluidity"; and section 17B which provides that in government schools, the education is to consist of strictly non-ideological instruction in "matters of parental primacy".

In addition, the Bill would amend the *Education Standards Authority Act 2013* to provide that a principal function of the Authority is to ensure that the school curriculum, forms of assessment, regulatory standards for schools and teaching quality and professional standards are developed, applied and monitored to ensure that parental responsibility is recognised for education of children in "matters of parental primacy" and to ensure that "gender fluidity" is not taught in schools.

As also noted above, the Bill would amend the *Teacher Accreditation Act 2004* to require professional teaching standards to mandate that all approved courses, teacher education courses etc recognise that parents are responsible for the education of children in "matters of parental primacy", and that such courses must not teach "gender fluidity". The standards must also make it a condition of accreditation of teachers that they must recognise that parents are responsible for education of children in "matters of parental primacy" and that they must not

teach “gender fluidity” in schools. The Bill would also amend that Act to provide that the Authority must revoke the accreditations of persons who breach these provisions.

In so restricting what can be taught in schools and included in teacher education courses etc, the Bill may impact on freedom of speech – the right to express information, ideas or opinions free of restrictions. This is particularly so given the wide definition of “matters of parental primacy” discussed above – in short, the amendments may cover a significant range of communication.

This impact may be felt not only by teachers but other members of the school community, including students and parents, who could become involved in a wider range of discussion were there capacity for ideas to flow more freely.

The Committee acknowledges that statutory restrictions on freedom of speech are not uncommon and that the restrictions in question would apply in the context of the education of minors. Further, the *Education Act 1990* already contains restrictions on what can be taught in schools – section 30 mandates secular instruction in government schools and bans sectarian instruction. In addition, the Bill seeks to enshrine in NSW law the rights of parents to ensure the religious and moral education of their children in conformity with their own convictions, as recognised at international law.

Noting the competing considerations, the Committee refers these matters to Parliament to consider whether the proposed amendments are reasonable and proportionate in the circumstances.

Sex discrimination and rights of transgender and gender diverse students – “gender fluidity”

As above, the Bill restricts what can be taught in schools and included in teacher education courses etc. In particular, it would ban the teaching of “gender fluidity” in schools and teacher education courses etc; make it a condition of teacher accreditation that they do not teach it; and would provide that the Authority must revoke the accreditation of teachers who teach “gender fluidity”.

The Bill defines "gender fluidity" to mean a belief there is a difference between biological sex (including people who are, by their chromosomes, male or female but are born with disorders of sexual differentiation) and human gender and that human gender is socially constructed rather than being equivalent to a person's biological sex.

In short, if the Bill were to come into law, the idea that biological sex and human gender are different could not be discussed in schools. The Bill may thereby have some impact on students’ rights to be free from sex discrimination; and on the rights of transgender and gender diverse students. This is particularly the case if there are students within a school community who come from families that may be unfamiliar with such ideas – these students may not have a chance to consider them unless they are introduced to them in the school environment. In making these observations, the Committee acknowledges that minds may differ on these issues.

Again, the Committee appreciates that the *Education Act 1990* already contains restrictions on what can be taught in schools; and that the Bill seeks to enshrine in NSW law the rights of parents to ensure the religious and moral education of their children in conformity with their own convictions, as recognised at international law. Noting the competing considerations, the Committee refers these matters to Parliament to consider whether the provisions in question are reasonable and proportionate in the circumstances.

Sex discrimination and rights of LGBTI students – "matters of parental primacy"

As noted above, the Bill would also restrict teaching in schools about "matters of parental primacy". In particular, in government schools education would have to "consist of strictly non-ideological instruction in matters of parental primacy", schools would have to consult with parents of students about any instruction in relation to "matters of parental primacy", and no child at a government school could be required to receive any instruction in "matters of parental primacy" if the parents of the child object to the child's receiving that instruction.

As also noted, under the Bill, the recognition of "matters of parental primacy" would also be a factor in the development of school curricula and teacher training courses etc; and in teacher accreditation.

Again, "matters of parental primacy" is defined broadly in the Bill to mean "in relation to the education of children, moral and ethical standards, political and social values, and matters of personal wellbeing and identity including gender and sexuality".

Given these provisions, the Bill may limit the amount or type of education that students would otherwise receive about issues relating to gender and sexuality and may thereby have some impact on the rights of students to be free from sex discrimination, and on the rights of LGBTI students.

Again, the Committee appreciates that the *Education Act 1990* already contains restrictions on what can be taught in schools; and that the Bill seeks to enshrine in NSW law the rights of parents to ensure the religious and moral education of their children in conformity with their own convictions, as recognised at international law. Noting the competing considerations, the Committee refers these matters to Parliament to consider whether the provisions in question are reasonable and proportionate in the circumstances.

4. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (PROHIBITION OF WASTE INCINERATORS) 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*.

5. GAS LEGISLATION AMENDMENT (MEDICAL GAS SYSTEMS) BILL 2020

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

Strict liability offences

The Bill would extend the compliance and enforcement powers contained in the *Gas and Electricity (Consumer Safety) Act 2017* (GECS Act) to medical gas work, and amend the *Home Building Act 1989* to establish two new licensing categories of specialist work, for gasfitting work, and gas technician work. In doing so, a number of strict liability offence provisions would apply in respect of medical gas work e.g. for carrying out such work without proper certification, supervision or licensing, or in disregard of the applicable standards.

For example, schedule 1, item 6 would insert section 38B into the GECS Act to make it an offence for a person to carry out medical gasfitting work or medical gas technician work otherwise than in accordance with: any standards or requirements prescribed by the regulations under the GECS Act for the purposes of the proposed section; and any standards or requirements specified by the Secretary of the Ministry of Health by order in writing and published on the website of the Ministry of Health.

The maximum penalty for breaching section 38B, in the case of an individual, would be a $55,000 fine for a first offence; or an $82,500 fine or imprisonment for two years, or both, for a second or subsequent offence.

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 factor in establishing liability for an offence. The Committee notes in particular that section 38B would contain a custodial penalty.

However, the Committee acknowledges that strict liability offences are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, medical gas work is highly technical and if it is carried out without proper certification, licensing or supervision, or in contravention of applicable standards the consequences could be serious.

Having regard to these factors, and the fact that the custodial penalty for breach of section 38B could only apply in respect of a second or subsequent offence, the Committee makes no further comment.

Executive liability

As noted, schedule 1, item 6 of the Bill would insert section 38B into the GECS Act to make it an offence for a person to carry out medical gas work otherwise than in accordance with the relevant standards.

Further, schedule 1, item 13 of the Bill would amend section 63 of the GECS Act to provide that an offence against section 38B would be an executive liability offence. This would mean that where a corporation offends against section 38B, a director or other persons involved in the management of the corporation could be held liable. The Committee notes that the prosecution does not have to prove the mental element of actual knowledge on the part of the director or manager. The prosecution only needs to prove that the person ought reasonably to know that the executive liability offence, or an offence of the same type would be or is being committed, and that the person failed to take all reasonable steps to prevent or stop the commission of that offence.

The maximum penalty that would apply for this executive liability offence is the maximum penalty for the offence if committed by an individual, that is, a $55,000 fine for a first offence; or an $82,500 fine or imprisonment for two years, or both, for a second or subsequent offence.

The Committee notes that lower thresholds for the mental element that must be proved to hold a defendant liable are not unusual in regulatory contexts to encourage compliance. Further, and as noted above, medical gas work is highly technical and if it is carried out in contravention of applicable standards the consequences could be serious. It is particularly important that those in charge of operations are held to a high standard. Further, the executive liability offence in question could only attract a custodial penalty in respect of a second or subsequent offence. In the circumstances, the Committee makes no further comment.

Enforcement provisions – privilege against self-incrimination

Schedule 1, item 5 of the Bill would extend Part 7 of the GECS Act to medical gasfitting work and medical gas technician work. Part 7 contains enforcement powers including powers for authorised officers to gather information and enter premises for investigating, monitoring and enforcing compliance with and administering the Act.

In so doing, the Bill would extend the operation of this significant suite of powers to cover a wider range of work than previously. The Committee appreciates that robust enforcement powers are a necessary aspect of a comprehensive regulatory scheme, and particularly important given the safety risks should the GECS Act requirements around medical gas work be breached. In general it is appropriate that the powers contained in Part 7 should be extended to medical gas work.

However, the Committee notes the information-gathering powers contained in Part 7, section 45 of the GECS Act which provides that a person must not, without reasonable excuse refuse or fail to comply with any requirement made, or to answer any questions asked, by an authorised officer under the Act or the regulations. Significant maximum monetary penalties apply for breach of this provision, and it is unclear whether a person could refuse to answer questions or to provide information on the grounds of self-incrimination.

The Committee identifies that in extending this provision to medical gas work the Bill may have some undue impact on personal rights and liberties. The Committee refers this matter to Parliament for consideration.

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

Matter that should be included in primary legislation

As noted, the Bill would extend the compliance and enforcement powers contained in the GECS Act to medical gas work, and as part of this, schedule 1, item 4 of the Bill amends the definitions in section 4 of that Act to cater for the new medical gases category. Medical gases are defined as "a substance used for medical purposes and prescribed by the regulations as a medical gas".

The Committee would generally prefer key definitions such as this to be included in primary legislation. This is to ensure an appropriate level of parliamentary oversight. However, the Committee appreciates that in this case, locating the definition in the regulations will allow administrative flexibility to add or remove gases should changes occur in the industry. In the circumstances, the Committee makes no further comment.

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

Significant matters not subject to parliamentary scrutiny – standards for medical gas work

As noted, schedule 1, item 6 of the Bill would insert section 38B into the GECS Act to make it an offence for a person to carry out medical gas work otherwise than in accordance with: any standards or requirements prescribed by the regulations under the GECS Act for the purposes of the proposed section; and any standards or requirements specified by the Secretary of the Ministry of Health by order in writing and published on the website of the Ministry of Health.

Major maximum penalties would apply for individuals who do not meet the required standards set down in the regulations and any orders of the Secretary – a $55,000 fine for a first offence; or an $82,500 fine or imprisonment for two years, or both, for a second or subsequent offence.

The Committee considers that as the standards are tied to such significant penalties, including custodial ones, they should all be included in the regulations to ensure an appropriate level of parliamentary oversight. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. There is no such requirement for the orders of the

Secretary of the Ministry of Health. The Committee refers this matter to Parliament for consideration.

Significant matters not subject to parliamentary scrutiny – interagency arrangements

Part 6 of the GECS Act deals with accident reporting and investigations. Schedule 1, item 9 of the Bill would insert a new section 44 into Part 6. Section 44 allows certain public authorities to enter into arrangements with each other regarding investigable electrical or gas incidents.

The new section 44 would allow the Secretary of the Department of Customer Service, SafeWork NSW, the Secretary of the Department of Planning, Industry and Environment, and now the Secretary of the Department of Health to enter into such arrangements in relation to medical gas incidents and gas and electrical incidents. For example, agencies would be able to enter into information-sharing arrangements to facilitate investigations; and arrangements about the cooperative exercise of their respective functions in respect of investigable incidents.

Further, the new section 44 would require these public authorities to jointly cause notice of any arrangements entered into under the section to be published in the Gazette as soon as practicable after they are entered into. As these arrangements concern significant matters, and as they may impact on privacy rights, the Committee would prefer them to be included in the regulations to foster an appropriate level of Parliamentary oversight. The Committee refers this matter to Parliament for consideration.

Significant matters not subject to parliamentary scrutiny – requirements and standards for authorities to be issued

Schedule 2, item 4 of the Bill would amend the definition of "specialist work" in schedule 1 to the *Home Building Act 1989* to include medical gasfitting work and medical gas technician work. This would mean that the provisions of the *Home Building Act 1989* will then apply to these occupations.

In particular, Part 3 of the *Home Building Act 1989* would consequently apply to contractor licences and supervisor and tradesperson certificates for medical gas work. Sections 20 and 25 of this Part place a number of requirements on the Secretary about when a contractor licence, or a supervisor or tradesperson certificate must be refused. These sections permit the Secretary to determine additional standards or other requirements that must be met before either a contractor licence or a certificate is issued.

Similarly, section 33D provides that a supervisor or tradesperson certificate must not be issued unless the Secretary is satisfied that the applicant has the necessary qualifications, experience and capability. Section 33D also allows the secretary to set the qualifications required to obtain a contractor licence or a supervisor or tradesperson licence, including any experience.

Where the Secretary sets such standards and requirements, the Committee understands that they are issued in an Order that is published in the NSW Government Gazette. Again, the Committee would prefer for these standards and requirements to be contained in the regulation to ensure an appropriate level of parliamentary oversight. The Committee considers that this would also foster an appropriate level of administrative flexibility – any necessary changes to the qualification requirements could proceed without the need for an amending Bill. The Committee refers this matter to Parliament for consideration.

6. POLICE AMENDMENT (PROMOTIONS) BILL 2020

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

Access to review – short timeframes and limited grounds

The Bill modifies the review process relating to Stage A (rank-based) and Stage B (position-based) promotions assessments. Officers who have completed a Stage A or Stage B assessment may apply to the Commissioner for a review within 48 hours of being notified of the outcome of the assessment. Although officers who have completed a Stage A assessment can apply for a review on one of three grounds, the outcome of Stage B assessments can only be reviewed on narrow procedural grounds.

Both clauses impose short timeframes which may limit the accessibility of reviews to officers. These are slightly shorter than some of the review periods that currently exist in the Regulation (e.g. clause 33 allows officers 72 hours to apply for a review of the result of a pre-qualifying assessment) and considerably shorter than the review period in the *Government Sector Employment (General) Rules 2014* (GSE Rules), which is 10 business days (e.g. rule 24, which relates to reviews of promotion decisions for non-executive roles). The Committee notes that the short 48-hour timeframe may practically limit the review rights of officers. The Committee refers this matter to the Parliament.

The limited procedural grounds on which a Stage B assessment can be reviewed may similarly restrict access to review. However, this may be reasonable in the circumstances given that, as the second reading speech suggests, it may be impractical for "decisions about the relative merit of one applicant compared with another" to be "constantly second-guessed." Also, the GSE Rules only allow reviews on the same procedural, rather than merit-based, ground (e.g. rule 24(2)). Accordingly, the Committee makes no further comment on this aspect of the issue.

Procedural fairness – reviews on integrity grounds

The Bill establishes a review process for decisions made on integrity grounds, such as a decision that an officer is unsuitable to participate in a process for promotion. The review is to be conducted by a person appointed by the Minister, and the procedure for conducting the review is to be determined by the appointed person. The appointed person "may", but is not bound to, consider written information provided by the officer or the Commissioner.

The Committee notes that the process outlined in proposed clauses 30 – 31 substantively mirrors the current process for reviews on integrity grounds in clauses 46 and 47 of the Regulation.

However, the Committee notes that the review process may impact on procedural fairness. For example, the procedure for the review is to be determined solely by the person conducting the review, being the appointed person. This means that procedures may not be consistent across cases involving different officers. In circumstances where the identity of the appointed person is not clear, and there may be several appointed persons, the review procedure adopted may depend on the preferences of the particular appointed person who is conducting the review.

Also, the appointed person is not bound to consider any information submitted by the officer. This may undermine the officer's right to a fair hearing, because there may be no opportunity for the officer to respond to allegations of misconduct or the consequences of proven misconduct. Further, no in-person hearing is permitted: clause 31(2). For these reasons, the Committee refers this matter to Parliament for consideration.

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

Lack of clarity – meaning of "specified misconduct"

The Bill requires that police officers provide a declaration that they have not knowingly engaged in specified misconduct or any other misconduct before being appointed to an acting position. Previously, such officers were required to provide a statutory declaration to this effect when being appointed to a position temporarily.

There appears to be no detail provided in the Act or Regulation as to the meaning of "specified misconduct"; however, different forms of misconduct are referred to in Part 8A of the Act, which governs complaints about the conduct of police officers (e.g. "police misconduct" and "serious misconduct"). The current provision also contains identical wording.

The Committee notes the public interest in maintaining high standards of integrity in the NSW Police Force. A requirement for declarations of any misconduct may help ensure that officers with a misconduct history are not promoted, even in an acting capacity.

However, the Committee notes that it is not clear from the Act what the relevant officer is meant to declare, which may make it difficult to comply with the obligation. Also, providing clarity around the meaning of misconduct may help promote the integrity of the promotions process, especially in circumstances where a statutory declaration to this effect is no longer required. The Committee refers this matter to Parliament for consideration.

Lack of clarity – integrity inquiries

The Bill imposes a duty on the Commissioner to make certain inquiries about the integrity of a non-executive police officer before allowing that officer to participate in a promotions process. Although a similar existing provision requires the Commissioner to consult the Commander, Professional Standards Command, and any other person that the Commissioner considers appropriate, the new provision has no such requirement.

The Committee notes that the meaning of "inquiries as to the integrity of the officer" may be vague in circumstances where there is a strong public interest in maintaining high standards of integrity in the NSW Police Force, and where the outcome of those inquiries may impact the eligibility of applicants for promotion.

However, there may be good reasons why the Bill does not require the Commissioner to consult the Commander specifically as to integrity matters before an officer can participate in a promotions process. For example, the promotions process may be more efficient and is still protected by appropriate safeguards, given that the Bill still requires the Commissioner to consult the Law Enforcement Conduct Commission and the Commander, Professional Standards Command before making a promotional appointment. In the circumstances, the Committee makes no further comment.

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

Matters deferred to regulations

Some matters in the Bill are deferred to the regulations. For example, when deciding promotions, the Commissioner must appoint someone who has, in the opinion of the Commissioner, the greatest merit as determined in accordance with the regulations. Although the Commissioner is also required to appoint persons to vacant specialist positions based on

merit, in that case the Act provides further guidance by nominating matters that the Commissioner should have regard to in their decision-making.

The Committee generally prefers key concepts to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights of individuals to promotion may be affected.

However, in stating that the detail regarding merit-based appointments will be in the Regulation, the Minister noted it may be more quickly updated and changed than primary legislation. The Minister further identified that this reflects the approach adopted in the *Government Sector Employment Act 2013*. In addition, the Committee notes that the Promotions Review conducted by Elizabeth Broderick AO recommended that any new recruitment process should not be embedded in legislation so that it could evolve with the needs of the NSW Police Force. In the circumstances, the Committee makes no further comment.

Commencement by proclamation

The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that a flexible start date may assist with the implementation of necessary administrative changes to internal promotion processes across a large workforce. In the circumstances, the Committee makes no further comment.

7. PUBLIC HEALTH AMENDMENT (REGISTERED NURSES IN NURSING HOMES) BILL 2020*

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

Lack of clarity – meaning of "high level" residential care

The Bill proposes to reintroduce minimum staffing in nursing homes so that a person who operates a nursing home that covers high care needs must ensure that a registered nurse is on duty at all times. It would do so by amending the *Public Health Act 2010* to insert a new definition of "nursing home". This new definition would provide, in part, that a nursing home is "a facility at which residential care within the meaning of the *Aged Care Act 1997* of the Commonwealth is provided, being a facility at which a high level of residential care (however described under or in accordance with the Act) is provided".

However, the Committee notes that the *Aged Care Act 1997* (Cth) does not appear to define "high level of residential care." It is also unclear where the meaning of this term may be defined elsewhere, that is, "in accordance with that Act".

It may therefore be unclear as to which facilities the obligation to keep a registered nurse on duty would apply. Further, contravention of the requirement to keep a registered nurse on duty could result in an operator being fined up to $11,000. The Committee prefers provisions contravention of which may result in a penalty to be drafted with sufficient precision so that their scope and content is clear.

The Committee notes that some guidance is provided as to which facilities would be affected because "residential care" is defined by the *Aged Care Act 1997* (Cth). However, again, that definition may not clarify the meaning of a "high level" of such care. In the circumstances, the Committee refers this matter to Parliament to consider whether the provision is drafted with

sufficient precision given the significant maximum penalty that would apply if it were contravened.

8. ROADS AMENDMENT (TOLL-FREE PERIOD) BILL 2020*

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

Right to compensation, retrospectivity and freedom of contract

Schedule 1 of the Bill would amend the *Roads Act 1993* to insert a new Division 2A into Part 13. Proposed section 216A requires the Minister to declare a toll-free period for every tollway that is opened for the use of the public after the Bill comes into effect.

The Bill is drafted to retrospectively affect existing contracts. Proposed section 216A provides that the declaration of a toll-free period does not constitute a breach of the contract; and no person can bring an action to recover damages as a result of such a declaration. The Bill may thereby impact on freedom of contract – the freedom of parties to decide on the contractual terms to which they are subject.

Proposed section 216B deals with compensation. It provides that if a toll operator claims loss resulting from the declaration of a toll-free period, the State must negotiate in good faith with the toll operator to agree to compensation and, in doing so, take into account any existing contractual arrangements concerning the determination of compensation that would normally be payable. Further, if the parties cannot reach agreement the toll operator is to be compensated by the contract for the operation of the tollway or the collection of tolls and charges on the tollway being extended by a period of time declared by the Minister at the end of the contract.

The Committee notes that there is therefore no absolute right to compensation for losses sustained by the toll operator as the result of the declaration of a toll-free period. Although the State must negotiate in good faith and take into account any contract with the toll operator, it ultimately retains some discretion around the method to arrive at an appropriate level of compensation.

The Committee acknowledges the Bill seeks to balance the contractual and compensation rights of toll operators with any public interest in toll-free periods. However, the Committee refers these matters to Parliament to consider whether the provisions are reasonable in the circumstances.

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

Length of toll-free period not subject to parliamentary scrutiny

As noted, schedule 1 of the Bill would amend the *Roads Act 1993* to insert a new Division 2A into Part 13. Proposed section 216A requires the Minister to declare, by order published in the NSW Government Gazette, a toll-free period for every tollway that is opened for the use of the public after the Bill comes into effect.

However, the Bill makes no provision for the length of the toll-free period, nor does it require this to be set by regulation. Therefore, there is no parliamentary scrutiny over this matter. On one view, the scope of toll concessions to the public is a significant matter that should receive a level of parliamentary scrutiny. On another view, it is more appropriate that the Bill set the

principle of a toll-free period whilst granting the Executive the flexibility to determine its scope, as a party to the relevant contracts.

The Committee considers that a more appropriate balance may be struck if the length of the toll-free periods were to be set by regulation. This would allow the Executive the flexibility to set the periods without the need for an amending Bill, whilst providing some opportunity for parliamentary scrutiny. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. The Committee refers the matter to Parliament for consideration.

PART TWO – REGULATIONS

1. COMMUNITY GAMING REGULATION 2020

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

Penalties prescribed in regulation

The Regulation creates several offences. For example, subclause 22(1) provides that a person or body that conducts a gaming activity must ensure that every requirement of Division 2 or 3 of Part 4 of the Regulation that relates to the gaming activity, including the conduct of the gaming activity and the proceeds of the activity, is complied with. The maximum penalty that applies in respect of any of these offences is a $5,500 fine.

The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, given the regulatory context; the fact that it may be more administratively efficient to proceed by regulation (e.g. if changes are required to keep pace with developments in the industry); and the fact that the penalties are relatively modest, the Committee makes no further comment.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Vague and ill-defined powers

The Regulation grants the Secretary some powers that may be ill-defined and that could benefit from further clarification, including clauses 16 and 54.

Clause 16, which governs the issue of authorities to conduct permitted gaming activities, allows the Secretary to grant an authority for a shorter term than that nominated by the applicant if satisfied that it is in the "public interest" to do so. However, "public interest" is not defined. Similarly, clause 54 provides that the Secretary may waive, reduce, postpone or refund a fee in "special circumstances" although that term is not defined either.

In relation to clause 16, the Committee notes that failing to clarify the meaning of "public interest" may impact on applicants' rights to engage in an otherwise lawful activity, or place additional regulatory burden on them by requiring them to obtain further authorisations. Similarly, the broad nature of the power in clause 54 to lower fees in "special circumstances" may raise questions about why fees are, or are not, lowered in a particular case. The Committee prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and content is clear.

The Committee acknowledges that it is important in a regulatory context for the Secretary to retain a level of discretion. This may include a flexible power to issue shorter approvals in

relation to a potentially harmful activity such as gaming, or to vary fee requirements if the applicant is affected by special circumstances such as a natural disaster. However, it may be that the clauses in question would benefit from the inclusion of a non-exhaustive list of criteria to guide decision-making, thereby balancing the competing considerations of precise drafting and administrative discretion.

Nonetheless, the Regulation was subject to public consultation and it is understood that stakeholder feedback was taken into account in its development. In the circumstances, the Committee makes no further comment.

2. PROTECTION OF THE ENVIRONMENT OPERATIONS (GENERAL) AMENDMENT (NATIVE FOREST BIOMATERIAL) REGULATION 2020

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

Matter that should be included in the Regulation – premises exempted

Under clause 97 of the *Protection of the Environment Operations (General) Regulation 2009*, the occupier of any premises who causes or allows native forest bio-material to be burned in any electricity generating work in or on those premises is guilty of an offence attracting significant maximum monetary penalties.

The Regulation creates a limited exception to this prohibition, and premises granted such an exemption are nominated by the Environment Protection Authority by notice published in the NSW Government Gazette. Similarly, the Environment Protection Authority may, by notice published in the NSW Government Gazette vary or revoke such an exemption.

The Committee considers that it may be preferable for these exemptions, variations and revocations to be effected by Regulation. That is, those premises granted such exemptions could be listed in a schedule to the Regulation and any variations or revocations carried out by amending that schedule. This would ensure parliamentary oversight over a significant matter – the grant of exemptions to engage in activity that would ordinarily attract significant penalties under environmental legislation. Under the *Interpretation Act 1987*, Regulations must be tabled in Parliament and are subject to disallowance. There is no such requirement for notices published in the Gazette.

However, as the overriding principle – the ability to grant exemptions – is included in the Regulation, and as there is a requirement for exemptions so granted to be made public, the Committee makes no further comment.

3. STRATA SCHEMES MANAGEMENT AMENDMENT (BUILDING DEFECTS SCHEME) REGULATION 2020

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

Strict Liability offences

The Regulation amends the *Strata Schemes Management Regulation 2016* (the primary Regulation) in relation to the scheme established under Part 11 of the *Strata Schemes Management Act 2015* (the Act) for rectifying building defects in new strata schemes. Part 11 of the Act applies to building work carried out on a building, or on part of a building that is part of the parcel of a strata scheme, and is either residential building work or carried out on a building, or a part of a building, used or proposed to be used for mixed use purposes that include residential purposes.

The Part provides that developers must appoint a building inspector to carry out an inspection of the building work. Further, it details how this inspector is to be appointed, what must be contained in the inspector's interim and final reports, and how defects are to be addressed.

The Regulation creates a number of requirements for the administration of the scheme established under Part 11, which are backed by offence provisions. For example, the Regulation provides that the Secretary can impose a condition on a building inspector as regards the exercise of his or her functions, by way of written notice. If a building inspector fails to comply with any applicable conditions so imposed, a maximum fine of $22,000 can be issued in the case of a corporation, or $11,000 in any other case.

The offences so created by the Regulation are strict liability ones. The Committee generally comments on strict liability offences as they depart from the common law principle that mens rea, or the mental element, is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalties for the offences are monetary, not custodial. In the circumstances, the Committee makes no further comment.

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

Matters that should be included in primary legislation

As above, the Regulation contains offence provisions, some of them with maximum penalties attached as high as $22,000 in the case of a corporation, or $11,000 in any other case.

The Committee prefers offences which set significant penalties to be included in primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight. The Committee refers this matter to Parliament for its consideration.

Part One – Bills

1. Adoption Legislation Amendment (Integrated Birth Certificates) Bill 2020

Date introduced	5 August 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 to amend the *Adoption Act 2000* and the *Births, Deaths and Marriages Registration Act 1995* as follows—

(a) to provide that the Registrar of Births, Deaths and Marriages may issue a certificate containing the information recorded for an adoption on the Births, Deaths and Marriages Register and the corresponding information, if any, known to the Registrar about the birth contained on the Register (an integrated birth certificate),

(b) to require an integrated birth certificate to be issued by the Registrar for an adoption registered on or after the commencement of the proposed Act in addition to existing requirements,

(c) to provide for access entitlements in relation to an integrated birth certificate with respect to both adoptions given effect to by an adoption order made on or after the commencement of the Adoption Amendment Act 2008 and adoptions given effect to by an adoption order made before the commencement of that Act,

(d) to specify the way an application for an integrated birth certificate is to be made,

(e) to provide for the management of a contact veto in relation to the supply of an integrated birth certificate,

(f) to make other consequential amendments.

BACKGROUND

2. In the Second Reading speech, the Attorney General, the Hon. Mark Speakman SC MP outlined the recent history of adoption reform in NSW, and Australia more broadly, stating that:

> In Australia we have been on a journey towards modern open adoption practice, learning from both our history and a clearer understanding of the best interests of the child. Over the years, significant legislative reforms in New South Wales have embedded modern open adoption practice in our State. In 2008 the Adoption Act 2000 was amended to establish the practice of

> open adoption. These amendments established equitable and open rights to access information such as birth certificates and applied to all applications for adoptions from 1 January 2010. Since this reform all adoptions in New South Wales are now open, reflecting contemporary understandings of the needs and best interests of the child.

3. The Attorney General went on to tell the Parliament that this contemporary understanding of adoption was not reflected in the practices governing the issuing of birth certificates for people who are adopted, stating that:

> Unlike adoption laws, the legislation governing post-adoptive birth certificates has not changed since 1965. It is inconsistent with the principles underpinning current adoption practice and with the legal framework that now surrounds adoption in New South Wales.

4. When describing current practices regarding post-adoptive birth certificates, the Attorney General told the Parliament that:

> Once the adoption order is made the Registrar of Births, Deaths and Marriages issues a post-adoptive birth certificate for the child, which supersedes the original birth certificate and becomes the current record of birth. The post-adoptive birth certificate records the child's adoptive parents but makes no reference to the child's birth parents.

5. The Attorney General went on to outline the changes proposed in the Bill, stating that:

> This bill will authorise the issuing of integrated birth certificates [IBCs] for adopted persons. Going forward adopted people will receive two birth certificates. The first certificate will be the existing post-adoptive birth certificate and the second will be an IBC, which will include information about an adopted person's birth parents and birth siblings as well as their adoptive parents and adoptive siblings. Both the post-adoptive birth certificate and the IBC will be valid identity documents, allowing adopted persons to choose which certificate they wish to use for legal identification purposes. This reform will modernise birth certificates for adopted people and reflect the contemporary shift towards open adoption in New South Wales.

6. When explaining why this change is necessary, the Attorney General referred to a number of reports and inquiries that have been undertaken relating to modern adoption practices, and post-adoptive birth certificates. This included the NSW Law Reform Commission's 1997 report, *Report 81: Review of the Adoption of Children Act 1965 (NSW)*[1], which:

> ….recommended that adopted people should have the option of applying for a birth certificate in one or both of two forms: firstly, the current post-adoptive birth certificate that shows only the details of the person's adoptive parents and adoptive siblings, if any; and, secondly, a birth certificate that details both the person's birth parents and any birth siblings and their adoptive family and the date of adoption. It concluded that issuing both certificates was the only practicable solution to an unsatisfactory system.

7. The Attorney General told the Parliament that failing to provide an opportunity to ensure adopted people have access to a birth certificate that reflects the details of both their adoptive family and their birth family has ongoing negative impacts for adoptees. It was also noted that "naming birth parents on an IBC supports a child's right to know their

[1] NSW Law Reform Commission, *Report 81: Review of the Adoption of Children Act 1965 (NSW)*, https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-81.pdf , viewed 7 August 2020.

origins, is likely to support openness in the adoptive family and may encourage ongoing relationships with birth families".

ISSUES CONSIDERED BY THE COMMITTEE

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

Commencement by proclamation

8. Clause 2 of the Bill provides that the proposed Act commences on a day or days to be appointed by proclamation.

9. When speaking to why the Bill will commence by proclamation, the Attorney General told the Parliament that:

> This will allow time to communicate with affected stakeholders about these changes before they come into effect. Birth certificates may be required by a wide range of agencies, businesses and organisations. They are used by schools, employers, and banks, and are required to access various services and benefits. As a primary identity document, birth certificates are also used to create other secondary documents, such as a driver's licence or passport.

10. The Attorney General went on the outline why this communication with stakeholders is necessary, stating that:

> Communication with the diverse range of stakeholders that may encounter IBCs is needed to ensure that the introduction of IBCs does not cause confusion. While the form of the IBC is designed to make it user friendly, strategic communications will be vital to support awareness and use of the IBC as a valid identity document. Without this, organisations and individuals that are not familiar with IBCs may not understand that they may be used for identity verification.

11. Schedule 2 of the Bill amends section 25A of the *Births, Deaths and Marriages Registration Act 1995* to provide that the Registrar of Births, Deaths and Marriages can issue two birth certificates for people who have been adopted. These are a post-adoptive birth certificate, and an integrated birth certificate.

12. The post-adoptive birth certificate is the birth certificate currently issued for adopted persons, and must not contain any information that indicates the person is adopted. The information required to be contained in this certificate is the information that must be recorded when registering an adoption, as required by section 24(2) of the *Births, Deaths and Marriages Registration Act 1995*. This includes details of the adoptive parents, and adopted siblings.

13. The integrated birth certificate will include the same information as the post-adoptive birth certificate, as it relates to the adoptive family, in addition to information relating to the adopted person's birth family. This certificate will include the information that must be recorded when registering a birth, as required by section 17(1) of the *Births, Deaths and Marriages Registration Act 1995*. This information, as set out by section 6 of the *Births Deaths and Marriages Registration Regulation 2017,* includes details of the birth parents, details of any other children of the birth parents and if either of the birth parents are of Aboriginal or Torres Strait Islander origin.

14. For any adoptions registered after the commencement of the Act, both a post-adoptive birth certificate and an integrated birth certificate will be issued.

This Bill amends the *Births, Deaths and Marriages Registration Act 1995* to allow the Registrar for Births, Deaths and Marriages to issue two different birth certificates for people who are adopted, being a post-adoptive birth certificate, and an integrated birth certificate. The post-adoptive birth certificate is the certificate currently issued for adopted people, and includes the names of the adopted parents. This certificate must not indicate that the person was adopted. The integrated birth certificate will include details of the adoptive parents, in addition to details of the person's birth parents and birth siblings. This is to bring the issuing of adoptive birth certificates in line with modern adoption policy, which has a focus on open adoption practices. Both birth certificates will be valid identity documents.

The proposed Act commences by proclamation. The Committee generally prefers legislation to commence on a fixed day or on assent. However, the Committee also notes the benefits associated with a flexible start date, particularly regarding the implementation of administrative arrangements. In this instance, this is important given the need to ensure that relevant organisations are aware that an integrated birth certificate can be used for identity verification. In the circumstances, the Committee makes no further comment.

2. Anti-Discrimination Amendment (Sex Workers) Bill 2020*

Date introduced	5 August 2020
House introduced	Legislative Council
Member responsible	Ms Abigail Boyd MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Anti-Discrimination Act 1977* (the Principal Act) to make it unlawful to discriminate against persons on the ground the persons are, or have been, sex workers.

BACKGROUND

2. In the second reading speech regarding the Bill, Ms Abigail Boyd MLC noted that the Bill intended to protect sex workers from discrimination and stated:

> Sex workers are routinely discriminated against for their chosen occupation. They are denied housing, refused services and forced to endure the entrenched stigma embedded deep within our society, day in and day out. It is time for that to end.

3. Ms Boyd noted that sex workers face discrimination in areas of their life including employment, accommodation and the provision of goods and services, and are at higher risk of harassment and sexual assault:

> The bill will provide much-needed protections for thousands of sex workers in New South Wales. Those workers have countless stories of discrimination—everything from a nudge and a wink to the loss of housing or employment, the denial of essential services and serious assault.
>
> … There is evidence that the assault and harassment of sex workers is under-reported. The Australian Centre for the Study of Sexual Assault found that the primary reason for non-reporting by sex workers is a lack of faith that the police and courts will hold offenders accountable. Assault and workplace harassment are already offences and the bill does not directly address them, but discrimination is systemic. Addressing some problems directly will help to address other problems indirectly.

4. Ms Boyd also noted that the Bill was developed by the Greens in close association with the Scarlet Alliance, the Australian Sex Workers Association and the Sex Workers Outreach Project.

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

6. The Act currently outlaws racial discrimination; sex discrimination; discrimination on transgender grounds; discrimination on the ground of marital or domestic status;

discrimination on the ground of disability; discrimination on the ground of a person's responsibility as a carer; discrimination on the ground of homosexuality; compulsory retirement from employment on the ground of age; HIV/AIDS vilification; and age discrimination.

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

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

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

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

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

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

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

ISSUES CONSIDERED BY THE COMMITTEE

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

Freedom of contract

14. Schedule 1 of the Bill seeks to amend the Act by inserting Part 4H, which would create a new ground of unlawful discrimination on the ground that persons are, or have been, sex workers.

15. Proposed section 50AA defines "sex worker" as meaning "a person who provides sexual services on a commercial basis".

16. Proposed subsection 50AB(1) sets down what constitutes discrimination on the grounds of occupation as a sex worker:

> (1) A person (*the perpetrator*) discriminates against another person (*the aggrieved person*) on the ground the person is, or has been, a sex worker if the perpetrator—
>
> (a) on the ground the aggrieved person is, or has been, a sex worker, treats the aggrieved person less favourably than in the same circumstances, or circumstances that are not materially

different, the perpetrator treats or would treat a person who is not, or has not been, a sex worker, or

(b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not, or have not been, sex workers comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

17. Proposed Division 2 of Part 4H sets down what acts constitute unlawful discrimination in work, and covers applicants and employees, commission agents, contract workers partnerships, local government councillors, industrial organisations, qualifying bodies and employment agencies.

18. Proposed Division 3 of Part 4H sets down what acts constitute unlawful discrimination in other areas of public life including education, the provision of goods and services, accommodation, and membership of registered clubs.

19. Upon the Bill's introduction, Ms Boyd stated:

> The provisions of the bill mirror similar provisions of the Anti-Discrimination Act. Fifteen distinct provisions make discriminatory treatment of sex workers or those who were previously sex workers unlawful in various contexts. Division 2 makes it unlawful to discriminate in work on the grounds of a person's occupation as a sex worker.

20. Indeed, the provisions in the Bill setting down:

- what acts constitute unlawful discrimination against sex workers or previous sex workers in work; and
- what acts constitute unlawful discrimination against sex workers or previous sex workers in other areas of public life;

are consistent with, and appear to be modelled on, provisions in the existing Act that prescribe unlawful discriminatory acts or behaviour with respect to discrimination on other grounds such as age, sex and race.

21. For example, proposed section 50AC provides that it is unlawful for an employer to discriminate against a person on the ground the person is or has been a sex worker in:

- the arrangements the employer makes for deciding who should be offered employment, or
- deciding who should be offered employment, or
- the terms on which employment is offered.

22. Similarly, proposed section 50AC prescribes that it is unlawful for an employer to discriminate against an employee on the ground the person is, or has been, a sex worker:

- in the terms or conditions of employment given to the employee, or

- by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, or
- by dismissing the employee, or
- by subjecting the employee to any other detriment.

23. The existing Act contains very similar provisions in respect of racial discrimination (section 8); sex discrimination (section 25); discrimination on transgender grounds (section 38C); discrimination on the grounds of marital or domestic status (section 40); discrimination on the ground of disability (section 49D); discrimination on the grounds of a person's responsibility as a carer (section 49V); discrimination on the ground of homosexuality (section 49ZH); and age discrimination (section 49ZYB).

24. As noted, proposed Division 3 of Part 4H would also make it unlawful to discriminate on the ground of occupation as a sex worker in a number of other areas of public life, including education (section 50AK); the provision of goods and services (section 50AL); accommodation (section 50AM); and membership of registered clubs (section 50AN).

25. Again, the existing Act contains very similar provisions making it unlawful to discriminate in these areas of public life on other grounds including race (Part 2, Division 3); sex (Part 3, Division 3); transgender status (Part 3A, Division 3); marital or domestic status (Part 4, Division 3); disability (Part 4A, Division 3); homosexuality (Part 4C, Division 3); and age (Part 4G, Division 3).

The Bill seeks to amend the *Anti-Discrimination Act 1977* (the Act) by introducing a new ground of unlawful discrimination on the ground of occupation, or previous occupation, as a sex worker. The amendments set down what constitutes discrimination in work, including deciding who should be offered employment or dismissed on the basis that a person is or has been a sex worker. The Bill also sets down what constitutes unlawful discrimination on the ground of occupation as a sex worker in other areas of public life, such as education, the provision of goods and services, accommodation and membership of registered clubs.

In doing so, the Bill may have some impact on freedom of contract, that is, the freedom of parties to choose the contractual terms to which they are subject and the parties with whom they contract. However, the Committee acknowledges that statutory limitations on freedom of contract are not uncommon, for example where it is necessary to address the unequal bargaining power of parties.

Further, the Committee notes that the provisions in the Bill that set down what acts constitute unlawful discrimination against sex workers or previous sex workers in work, and in other areas of public life, are consistent with, and appear to be modelled upon, provisions in the existing Act that prescribe unlawful discriminatory acts or behaviour with respect to discrimination on other grounds (such as age, sex and race). In the circumstances, and particularly given this consistency with existing anti-discrimination laws that limit freedom of contract, the Committee makes no further comment.

Freedom of speech

26. As noted above, the Bill seeks to create a new ground of unlawful discrimination on the basis of occupation as a sex worker by inserting a new Part 4H into the Act. Division 4 of Part 4H provides for what constitutes the unlawful vilification of sex workers.

27. Proposed subsection 50AO(1) sets down that it is unlawful for a person, by public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of people on the ground of occupation as a sex worker.

28. Under proposed section 50AA, a "public act" is defined as including:

- any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
- any other conduct observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
- the distribution or dissemination of any matter to the public with knowledge the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of—
  - (i) a person on the ground the person is, or has been, a sex worker, or
  - (ii) a group of persons on the ground the members of the group are, or have been, sex workers.

29. Proposed subsection 50AO(2) provides that nothing under this section renders unlawful:

- a fair report of a public act referred to in subsection (1), or
- a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege, whether under the *Defamation Act 2005* or otherwise, in proceedings for defamation, or
- a public act, done reasonably and in good faith, for the purpose of academic, artistic, scientific, research or religious discussion or instruction, or another purpose in the public interest including discussion, debate, an exhibition or a show about an act or matter.

30. These provisions regarding vilification and the definition of public act are consistent with, and appear to have been modelled on, what the existing Act has identified as unlawful vilification and definitions of a public act for vilification on other grounds including racial vilification (Part 2, Division 3A); transgender vilification (Part 3A, Division 5); homosexual vilification (Part 4C, Division 4); and HIV/AIDS vilification (Part 4F).

31. More particularly, the threshold for unlawful vilification of sex workers under the Bill; and the threshold for unlawful vilification in all these other contexts provided for in the existing Act is the same – a person, by a public act, inciting hatred, serious contempt for, or severe ridicule of a person or group of persons on the basis of the ground. In addition, the defences of fair report, absolute privilege etc are the same.

As above, the Bill seeks to amend the Act by introducing a new ground of unlawful discrimination on the basis of occupation as a sex worker. The Bill also outlines what constitutes unlawful vilification of sex workers by a public act.

Proposed subsection 50AO(1) would provide that it is unlawful for a person, by public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of people on the ground of occupation as a sex worker. Proposed section 50AA defines a "public act" as including any form of communication to the public (including print, broadcast or other recorded material), conduct observable by the public (such as gestures or displaying of clothing or signs), and the distribution of any matter to the public with the knowledge that it promotes or expresses hatred towards, serious contempt for, or severe ridicule of sex workers.

In rendering these public acts unlawful, these amendments cover a wide range of public communication and may limit the freedom of speech – the right to express information, ideas or opinions free of restrictions. It may also limit the implied freedom of political communication – the freedom to communicate about political matters.

The Committee acknowledges that statutory limitations on freedom of speech are not uncommon, for example where the content amounts to defamation, and that the intention of the Bill is to protect sex workers from vilification. The Committee also notes that proposed subsection 50AO(2) provides for exemptions including that nothing under section 50AO renders unlawful a fair report of a public act; a communication or distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege in proceedings for defamation; or a public act done in good faith for academic, artistic, scientific, research or religious discussion or instruction, or in the public interest.

In addition, the threshold for unlawful vilification of sex workers under the Bill and the threshold for unlawful vilification of people or groups on other grounds already provided for in the Act (i.e. race, transgender status, homosexuality, and HIV/AIDS), is the same. That is, a person, by a public act, inciting hatred, serious contempt for, or severe ridicule of a person or group of persons on the basis of the ground. The defences of fair report, absolute privilege etc are also the same.

In the circumstances, and particularly given that the provisions are consistent with the current laws surrounding unlawful vilification on other grounds, which also limit freedom of speech, the Committee makes no further comment.

3. Education Legislation Amendment (Parental Rights) Bill 2020*

Date introduced	5 August 2020
House introduced	Legislative Council
Member responsible	The Hon. Mark Latham MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Education Act 1990* (the principal Act) as follows—

a. to clarify that parents and not schools are primarily responsible for the development and formation of their children in relation to core values such as ethical and moral standards, social and political values and an understanding of personal identity, including in relation to gender and sexuality;

b. to prohibit the teaching of the ideology of gender fluidity to children in schools;

c. to provide that schools should not usurp the role of parents – that teaching in relation to core values is to be strictly non-ideological and should not advocate or promote dogmatic or polemical ideology that is inconsistent with the values held by parents of students;

d. to ensure that curriculum, syllabuses, and courses of instruction at all levels of schooling do not include the teaching of gender fluidity and recognise parental primacy in relation to core values;

e. to ensure that all school staff - including non-teaching staff, counsellors, advisors and consultants - do not teach gender fluidity and that such staff undertake their duties and engage with students in schools in a way that recognises parental primacy in relation to core values;

f. to require schools at the beginning of each academic year to consult with parents about courses of study that will include teaching on core values;

g. to allow parents to withdraw students from instruction on core values where parents object to the particular teaching on these matters of parental primacy;

h. to require the NSW Education Standards Authority to monitor the compliance by government schools with the requirements to not teach gender fluidity and to recognise parental primacy in relation to core values;

i. to provide for a review after two years of the compliance of schools with these requirements and for that review to be tabled in both Houses of the NSW Parliament.

2. The Bill also amends the *Education Standards Authority Act 2013* to provide that a function of the NSW Education Standards Authority includes a requirement to ensure that the school curriculum and teaching standards are developed and applied in a way which does not teach gender fluidity and which recognises the primacy of parents in relation to core values.

3. The Bill also amends the *Teacher Accreditation Act 2004* to require that all approved teacher education courses recognise the primacy of parents in relation to core values and do not teach gender fluidity and ensure that it is a condition of the accreditation of teachers and other staff that they recognise the primacy of parents in relation to core values and that they do not teach gender fluidity.

BACKGROUND

4. In the second reading speech to Parliament, the Hon. Mark Latham MLC stated that the Bill covers two particular issues affecting schools – the teaching of gender fluidity, and parental rights:

> The purpose of the *Education Legislation Amendment (Parental Rights) Bill 2020* is to legislate two decisions: to outlaw gender fluidity teaching, course development and teacher training in the New South Wales education system; and to reassert the rights and role of parents in the moral, ethical, political and social development of their children such that no school should be teaching material in those fields against the wishes of parents.

5. Mr Latham noted that in 2017, the NSW Government discontinued the Safe Schools Program and stated:

> To properly ban Safe Schools, the New South Wales Government needs to kill cold dead the core promise of Safe Schools and the premise on which it was based – that teachers have a legitimate role to play in shaping the morality of children on personal identity questions such as gender and sexuality. These matters must be the sole preserve of families and that is what this parental rights bill aims to achieve.

6. Mr Latham also referred to international law:

> This bill makes an important statement about the role of parents. It says that parents have rights – basic, fundamental human rights – in the education of their children. The bill enshrines in New South Wales law Article 18 of the International Covenant on Civil and Political Rights. This is an international standard. I quote Article 18(4): "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable legal guardians to ensure the religious and moral education of their children in conformity with their own convictions".

7. Mr Latham stated that the bill seeks to amend three Acts: the *Education Act 1990*, the *Education Standards Authority Act 2013*, and the *Teacher Accreditation Act 2004*. Mr Latham told Parliament that the Bill inserts two new definitions into each of these Acts to provide that:

   - "Matters of parental primacy" means in relation to the education of children, moral and ethical standards, political and social values, and matters of personal wellbeing and identity including gender and sexuality.

- "Gender fluidity" means a belief there is a difference between biological sex (including people who are, by their chromosomes, male or female but are born with disorders of sexual differentiation) and human gender and that human gender is socially constructed rather than being equivalent to a person's biological sex.

8. Further, Mr Latham noted subsection 4(b) of the *Education Act 1990*. Section 4 sets down the principles on which the Act is based and subsection 4(b) provides that "the education of a child is primarily the responsibility of the child's parents". Mr Latham stated that the Bill would amend this subsection to add the words "…which includes the responsibility of parents for the teaching and formation of their children in matters of parental primacy".

9. Mr Latham also noted schedule 1, item 10 of the Bill which inserts a series of new sections into the *Education Act 1990* including:

- Section 17A which provides that the education in government and non-government schools must not include the teaching of gender fluidity.

- Section 17B which provides that in government schools, the education is to consist of strictly non-ideological instruction in matters of parental primacy.

- Section 17D which provides that no child at a government school is to be required to receive any instruction in matters of parental primacy if the parents of the child object to the child's receiving that instruction.

- Section 17E which mandates consultation with parents so that, at the beginning of each school year, all government schools must provide a summary of the content being taught in relevant courses of study about matters of parental primacy by publishing that summary on the school's website and notifying parents. As part of this notification, government schools must consult with the parents of students about any instruction in relation to matters of parental primacy and must teach courses of study consistently with the principles in section 4, the objects in section 6 and the obligations in sections 17A and 17B.

10. In addition, Mr Latham stated that the Bill would amend the *Teacher Accreditation 2004*. In particular, schedule 3 of the Bill would insert a new section 20(1A) into that Act to provide that professional teaching standards must:

- include a requirement that all approved courses, teacher education courses, programs and professional development courses:
    - recognise that parents are primarily responsible for the education of their children in relation to matters of parental primacy, and
    - do not include the teaching of gender fluidity, and
- stipulate as a condition of the accreditation of teachers and other qualified persons under the Act that those persons:
    - must recognise that parents are primarily responsible for the development and formation of their children in relation to matters of parental primacy; and

- must not teach gender fluidity.

11. Further, schedule 3 of the Bill would insert a new subsection 24(1)(g) into the *Teacher Accreditation Act 2004* to provide that the NSW Education Standards Authority must revoke the accreditation of any person if the Authority is satisfied that the person has failed to comply with any requirements of the professional teaching standards that apply to the person under the new section 20(1A).

ISSUES CONSIDERED BY THE COMMITTEE

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

Employment Rights

12. As above, the Bill would amend the *Education Act 1990*, the *Education Standards Authority Act 2013*, and the *Teacher Accreditation Act 2004* to insert two new definitions into each of these Acts to provide that:

- "Matters of parental primacy" means in relation to the education of children, moral and ethical standards, political and social values, and matters of personal wellbeing and identity including gender and sexuality.

- "Gender fluidity" means a belief there is a difference between biological sex (including people who are, by their chromosomes, male or female but are born with disorders of sexual differentiation) and human gender and that human gender is socially constructed rather than being equivalent to a person's biological sex.

13. Further, schedule 3, item 2 of the Bill would amend the *Teacher Accreditation Act 2004*, which is an Act to make provision for professional teaching standards and accreditation of teachers in relation to those standards. The Bill would insert a new section 20(1A), to provide that professional teaching standards must:

- include a requirement that all approved courses, teacher education courses, programs and professional development courses:
  - recognise that parents are primarily responsible for the education of their children in relation to matters of parental primacy, and
  - do not include the teaching of gender fluidity, and
- stipulate as a condition of the accreditation of teachers and other qualified persons under the Act that those persons:
  - must recognise that parents are primarily responsible for the development and formation of their children in relation to matters of parental primacy; and
  - must not teach gender fluidity.

14. In addition, schedule 3, item 3 of the Bill would insert a new subsection 24(1)(g) into the *Teacher Accreditation Act 2004* to provide that the NSW Education Standards Authority (the Authority) must revoke the accreditation of any person if the Authority is satisfied

that the person has failed to comply with any requirements of the professional teaching standards that apply to the person under the new section 20(1A).

15. Mr Latham told Parliament: "My bill outlaws gender fluidity teaching, course development and teacher training and ends the accreditation and thus the employment of any individual breaking the law".

> **The Bill would amend the *Education Act 1990*, the *Education Standards Authority Act 2013*, and the *Teacher Accreditation Act 2004* to insert two new definitions – one of "matters of parental primacy" and another of "gender fluidity". In particular, "matters of parental primacy" means in relation to the education of children, moral and ethical standards, political and social values, and matters of personal wellbeing and identity including gender and sexuality.**
>
> **Further, the Bill would insert a new section 20(1A) into the *Teacher Accreditation Act 2004* that requires professional teaching standards that are developed by the NSW Education Standards Authority (the Authority) to include a requirement that all approved courses, teacher education courses, programs and professional development courses must recognise that parents are responsible for the education of children in "matters of parental primacy" and that such courses must not teach "gender fluidity". The standards must also make it a condition of accreditation of teachers and other qualified persons in schools that they must recognise that parents are responsible for education of children in "matters of parental primacy" and that they must not teach "gender fluidity" in schools.**
>
> **In addition, the Bill provides that the Authority must revoke accreditation for any person if the Authority is satisfied that the person has failed to comply with any requirements of the professional teaching standards that apply to the person under the new section 20(1A).**
>
> **The Bill may thereby have some impact on employment rights. The Committee notes in particular that the power it gives the Authority to revoke accreditations is wide and ill-defined. For example, it would allow the Authority to revoke a teacher's accreditation where it is satisfied the teacher has taught in a way that does not recognise the primary responsibility of parents for education in "matters of parental primacy" and the definition of "matters of parental primacy" is broad, incorporating general concepts such as "moral and ethical standards" and "political and social values". The Committee would prefer provisions that affect rights to be drafted with more precision so that their scope and content is clear. The Committee refers these matters to Parliament for consideration.**

Freedom of speech

16. As above, the Bill would amend the *Education Act 1990*, the *Education Standards Authority Act 2013*, and the *Teacher Accreditation Act 2004* to insert definitions of "gender fluidity" and "matters of parental primacy".

17. Further, the Bill would amend the *Education Act 1990* to insert a series of new provisions to restrict what can be taught in NSW schools including:

- section 17A which provides that the education in government and non-government schools must not include the teaching of gender fluidity, and

- section 17B which provides that in government schools, the education is to consist of strictly non-ideological instruction in matters of parental primacy.

18. The Committee notes that the *Education Act 1990* already places restrictions on what can be taught in schools. Section 30 provides that in government schools education is to consist of strictly non-sectarian and secular instruction.

19. Schedule 2 of the Bill would also amend the *Education Standards Authority Act 2013* to provide that a principal function of the Authority is to ensure that the school curriculum, forms of assessment, regulatory standards for schools and teaching quality and professional standards are developed, applied and monitored to ensure that parental responsibility is recognised for education of children in matters of parental primacy and to ensure that gender fluidity is not taught in schools.

20. As also noted above, the Bill would also amend the *Teacher Accreditation Act 2004* to:

- Insert a new section 20(1A) that requires professional teaching standards that are developed by the Authority to include a requirement that all approved courses, teacher education courses, programs and professional development courses must recognise that parents are responsible for the education of children in matters of parental primacy and that such courses must not teach gender fluidity. The standards must also make it a condition of accreditation of teachers and other qualified persons in schools that they must recognise that parents are responsible for education of children in matters of parental primacy and that they must not teach gender fluidity in schools.

- Provide that the Authority must revoke accreditation for any person if the Authority is satisfied that the person has failed to comply with any requirements of the professional teaching standards that apply to the person under the new section 20(1A).

As above, the Bill would amend the *Education Act 1990*, the *Education Standards Authority Act 2013*, and the *Teacher Accreditation Act 2004* to insert two new definitions – one of "matters of parental primacy" and another of "gender fluidity".

It would also amend the *Education Act 1990* to insert a series of new provisions to restrict what can be taught in NSW schools including section 17A which provides that the education in government and non-government schools must not include the teaching of "gender fluidity"; and section 17B which provides that in government schools, the education is to consist of strictly non-ideological instruction in "matters of parental primacy".

In addition, the Bill would amend the *Education Standards Authority Act 2013* to provide that a principal function of the Authority is to ensure that the school curriculum, forms of assessment, regulatory standards for schools and teaching quality and professional standards are developed, applied and monitored to ensure that parental responsibility is recognised for education of children in

"matters of parental primacy" and to ensure that "gender fluidity" is not taught in schools.

As also noted above, the Bill would amend the *Teacher Accreditation Act 2004* to require professional teaching standards to mandate that all approved courses, teacher education courses etc recognise that parents are responsible for the education of children in "matters of parental primacy", and that such courses must not teach "gender fluidity". The standards must also make it a condition of accreditation of teachers that they must recognise that parents are responsible for education of children in "matters of parental primacy" and that they must not teach "gender fluidity" in schools. The Bill would also amend that Act to provide that the Authority must revoke the accreditations of persons who breach these provisions.

In so restricting what can be taught in schools and included in teacher education courses etc, the Bill may impact on freedom of speech – the right to express information, ideas or opinions free of restrictions. This is particularly so given the wide definition of "matters of parental primacy" discussed above – in short, the amendments may cover a significant range of communication.

This impact may be felt not only by teachers but other members of the school community, including students and parents, who could become involved in a wider range of discussion were there capacity for ideas to flow more freely.

The Committee acknowledges that statutory restrictions on freedom of speech are not uncommon and that the restrictions in question would apply in the context of the education of minors. Further, the *Education Act 1990* already contains restrictions on what can be taught in schools – section 30 mandates secular instruction in government schools and bans sectarian instruction. In addition, the Bill seeks to enshrine in NSW law the rights of parents to ensure the religious and moral education of their children in conformity with their own convictions, as recognised at international law.

Noting the competing considerations, the Committee refers these matters to Parliament to consider whether the proposed amendments are reasonable and proportionate in the circumstances.

Sex discrimination and rights of transgender and gender diverse students – "gender fluidity"

21. As above, the Bill restricts what can be taught in schools and included in teacher education courses etc. In particular, it would ban the teaching of "gender fluidity" in schools and teacher education courses etc; make it a condition of teacher accreditation that they do not teach it; and would provide that the Authority must revoke the accreditation of teachers who teach "gender fluidity".

22. As also noted above, the Bill defines "gender fluidity" to mean a belief there is a difference between biological sex (including people who are, by their chromosomes, male or female but are born with disorders of sexual differentiation) and human gender and that human gender is socially constructed rather than being equivalent to a person's biological sex.

As above, the Bill restricts what can be taught in schools and included in teacher education courses etc. In particular, it would ban the teaching of "gender

fluidity" in schools and teacher education courses etc; make it a condition of teacher accreditation that they do not teach it; and would provide that the Authority must revoke the accreditation of teachers who teach "gender fluidity".

The Bill defines "gender fluidity" to mean a belief there is a difference between biological sex (including people who are, by their chromosomes, male or female but are born with disorders of sexual differentiation) and human gender and that human gender is socially constructed rather than being equivalent to a person's biological sex.

In short, if the Bill were to come into law, the idea that biological sex and human gender are different could not be discussed in schools. The Bill may thereby have some impact on students' rights to be free from sex discrimination; and on the rights of transgender and gender diverse students. This is particularly the case if there are students within a school community who come from families that may be unfamiliar with such ideas – these students may not have a chance to consider them unless they are introduced to them in the school environment. In making these observations, the Committee acknowledges that minds may differ on these issues.

Again, the Committee appreciates that the *Education Act 1990* already contains restrictions on what can be taught in schools; and that the Bill seeks to enshrine in NSW law the rights of parents to ensure the religious and moral education of their children in conformity with their own convictions, as recognised at international law. Noting the competing considerations, the Committee refers these matters to Parliament to consider whether the provisions in question are reasonable and proportionate in the circumstances.

Sex discrimination and rights of LGBTI students – "matters of parental primacy"

23. As noted above, the Bill would also restrict teaching in schools about "matters of parental primacy". As also noted "matters of parental primacy" is defined broadly to mean "in relation to the education of children, moral and ethical standards, political and social values, and matters of personal wellbeing and identity including gender and sexuality".

24. In particular, the Bill would amend subsection 4(b) of the *Education Act 1990*. Section 4 sets down the principles on which the Act is based and subsection 4(b) provides that "the education of a child is primarily the responsibility of the child's parents" and the Bill would amend this subsection to add the words "…which includes the responsibility of parents for the teaching and formation of their children in matters of parental primacy".

25. Further, the Bill would amend the *Education Act 1990* to insert a series of new provisions including:

- section 17B which provides that in government schools, the education is to consist of strictly non-ideological instruction in matters of parental primacy,
- section 17D which provides that no child at a government school is to be required to receive any instruction in matters of parental primacy if the parents of the child object to the child's receiving that instruction,

- section 17E which provides that at the beginning of each school year, all government schools must provide a summary of the content being taught in relevant courses of study about matters of parental primacy by publishing that summary on the school's website and notifying parents. As part of this notification, government schools must consult with parents of students about any instruction in relation to matters of parental primacy and must teach courses of study consistently with the principles in section 4 of the Act, the objects in section 6 of the Act, and the obligations in section 17B, and 17A (relating to gender fluidity – see above).

26. As also noted, the recognition of "matters of parental primacy" would also be a factor in the development of school curricula and teacher training courses etc; and in teacher accreditation.

As noted above, the Bill would also restrict teaching in schools about "matters of parental primacy". In particular, in government schools education would have to "consist of strictly non-ideological instruction in matters of parental primacy", schools would have to consult with parents of students about any instruction in relation to "matters of parental primacy", and no child at a government school could be required to receive any instruction in "matters of parental primacy" if the parents of the child object to the child's receiving that instruction.

As also noted, under the Bill, the recognition of "matters of parental primacy" would also be a factor in the development of school curricula and teacher training courses etc; and in teacher accreditation.

Again, "matters of parental primacy" is defined broadly in the Bill to mean "in relation to the education of children, moral and ethical standards, political and social values, and matters of personal wellbeing and identity including gender and sexuality".

Given these provisions, the Bill may limit the amount or type of education that students would otherwise receive about issues relating to gender and sexuality and may thereby have some impact on the rights of students to be free from sex discrimination, and on the rights of LGBTI students.

Again, the Committee appreciates that the *Education Act 1990* already contains restrictions on what can be taught in schools; and that the Bill seeks to enshrine in NSW law the rights of parents to ensure the religious and moral education of their children in conformity with their own convictions, as recognised at international law. Noting the competing considerations, the Committee refers these matters to Parliament to consider whether the provisions in question are reasonable and proportionate in the circumstances.

4. Environmental Planning and Assessment Amendment (Prohibition of Waste Incinerators) Bill 2020*

Date introduced	5 August 2020
House introduced	Legislative Council
Member responsible	Ms Cate Faehrmann MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to prohibit new development for the purposes of waste-to-energy incinerators.

BACKGROUND

2. In the Second Reading Speech, Ms Cate Faehrmann MLC told the Parliament that:

> The bill amends the Environmental Planning and Assessment Act 1979 by introducing a prohibition on certain waste-to-energy incinerators. For the purposes of the bill, waste-to-energy incinerators are incinerators that function by burning plastic and industrial waste.

3. Ms Faehrmann outlined the reasons for the Bill, stating that:

> Waste incinerators have been identified by the World Health Organization as one of the largest producers of dioxins, which can cause reproductive and developmental problems, damage the immune system, cause interference with hormones and cause cancer.

4. Ms Faehrmann went on to describe how the prohibition would operate, stating that:

> The prohibition applies to pending applications for development consent or for certain planning approvals, and will not apply to developments that are subject to existing development consent or certain existing planning approvals. In other words, the bill will draw a line in the sand and provide assurances for communities across New South Wales that toxic waste-to-energy incinerators will never gain a foothold in this State.

5. When speaking to the operation of the Bill, Ms Faehrmann noted some exceptions to the proposed general prohibition on waste-to-energy incinerators, stating that:

> There are certain waste fuels that the bill does not apply to, including biomass from agriculture, clinical and related waste, forestry and sawmilling residue, landfill gas and biogas, organic residue from virgin paper pulp activities, recovered waste oil, source-separated green waste, uncontaminated wood waste and waste tyres for use in a cement kiln. Those fuels are all based upon the EPA's Eligible Waste Fuel Guidelines and represent existing fuel incinerator projects.

6. Ms Faehrmann went on to identify additional exceptions to the prohibition, telling the Parliament that:

Importantly, the prohibition does not apply to waste and energy incinerators that treat only clinical or related waste, or waste that has been declared an exempt waste fuel by the Act. This ensures that the bill will not change the existing provisions for waste-to-energy projects that are currently permissible under the NSW Energy from Waste Policy Statement.

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*.

5. Gas Legislation Amendment (Medical Gas Systems) Bill 2020

Date introduced	4 August 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Gas and Electricity (Consumer Safety) Act 2017* and the *Home Building Act 1989* to provide for a regulatory scheme for persons and other entities involved in medical gas systems in health and medical facilities.

2. The amendments will require a person who contracts for or carries out certain medical gasfitting work and medical gas technician work to hold a relevant specialist work licence or supervisor or tradesperson certificate under the *Home Building Act 1989* in a manner similar to electricians and plumbers.

BACKGROUND

3. In the second reading speech, the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, told Parliament that the Bill delivered on the NSW Government's promise to introduce a licensing regulatory system for those who carry out medical gas work. This follows two incidents at the Bankstown-Lidcombe Hospital where two babies, John Ghanem and Amelia Khan were mistakenly administered nitrous oxide instead of oxygen. The Minister stated:

> …nobody wants to see a tragedy repeated like the one we saw at Bankstown-Lidcombe Hospital. As I undertook then, the Government has taken the steps necessary to provide a strong, robust licensing framework for those persons installing and working on medical gases in New South Wales.

4. The Minister told Parliament that the Bill would extend the compliance and enforcement powers contained in the *Gas and Electricity (Consumer Safety) Act 2017* to medical gas work, and amend the *Home Building Act 1989* to establish two new licensing categories of specialist work. One category would deal with medical gasfitting work and the other would deal with medical gas technician work. The Minister explained:

> Medical gasfitting work means the construction, installation, replacement, repair, alteration, maintenance of the installation or testing of medical gas installation. Quite simply, this is the work done to install the pipes and the installation necessary to convey the medical gases…Medical gas technicians are the persons responsible for the smooth running of the medical gas installation. They respond to alarm systems, conduct regular testing and checks, and conduct the final testing, termed "commissioning", before medical installations go live. However, they do not do repairs to the installation as this is the job of the medical gasfitter.

5. The Minister also stated that the Bill had been the subject of significant consultation with industry stakeholders:

> …the Government has partnered with key stakeholders representing all areas of the medical gas industry and listened to their feedback. This bill and its policy proposals have already been the subject of significant targeted industry consultation. The Government has facilitated the feedback of stakeholders through the release of a consultation paper and a draft of the bill, and held three comprehensive round tables…Importantly, we have also actioned a large amount of that feedback directly through this bill.

6. In a departure from the norm, the Bill passed Parliament on 6 August 2020, two days after it was introduced.[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 become an Act (see *Legislation Review Act 1987*, s8A(2)). In accordance with its usual practice, the Committee has commented on any issues raised by the Bill as introduced.

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability offences

7. As noted, the Bill would extend the compliance and enforcement powers contained in the *Gas and Electricity (Consumer Safety) Act 2017* (GECS Act) to medical gas work, and amend the *Home Building Act 1989* to establish two new licensing categories of specialist work, for gasfitting work, and gas technician work. In doing so, a number of strict liability offence provisions would apply in respect of medical gas work.

8. More specifically, schedule 1 item 5 of the Bill would extend Parts 6 and 7 of the GECS Act to medical gasfitting work and medical gas technician work. Part 6 of that Act deals with accident reporting and investigations, and part 7 with enforcement provisions. Further schedule 1 item 6 inserts new strict liability offence provisions into that Act.

9. For example, schedule 1, item 6 would insert section 38A into the GECS Act to make it an offence to carry out medical gasfitting work or medical gas technician work, or employ any other person to carry out medical gasfitting work or medical gas technician work, unless the person by whom the work is carried out is appropriately certified or does so under appropriate supervision. The maximum penalty for doing so is a $110,000 fine in the case of a corporation or a $22,000 fine in any other case.

10. Similarly, schedule 1, item 6 would insert section 38B into the GECS Act to make it an offence for a person to carry out medical gasfitting work or medical gas technician work otherwise than in accordance with:

- any standards or requirements prescribed by the regulations under the GECS Act for the purposes of the proposed section,

[2] See Legislative Assembly Standing Order 188(9) and (10) which provide that immediately following the mover's second reading speech, the debate shall be adjourned; and the mover shall ask the Speaker to fix the resumption of the debate as an Order of the Day for a future day which shall be at least five clear days ahead, *Legislative Assembly Consolidated Standing and Sessional Orders and Resolutions of the House, 57th Parliament*, March 2020.

- any standards or requirements specified by the Secretary of the Ministry of Health by order in writing and published on the website of the Ministry of Health.

11. The maximum penalty for breaching this provision would be:

- in the case of an individual, a $55,000 fine for a first offence; or an $82,500 fine or imprisonment for two years, or both, for a second or subsequent offence,

- in the case of a corporation, a $550,000 fine for a first offence, or an $825,000 fine for a second or subsequent offence.

12. Similarly, schedule 2, item 4 of the Bill would amend the definition of "specialist work" in schedule 1 to the *Home Building Act 1989* to include medical gasfitting work and medical gas technician work. This would mean that the provisions of the *Home Building Act 1989* will then apply to these occupations. The Minister explained:

> As specialist occupations, the Act establishes a number of different forms of licences and certificates. These are contractor licences, supervisor certificates and tradesperson certificates. Persons wishing to carry out medical gasfitting and medical gas technician work will be required to obtain an appropriate licence or certificate.

13. This in turn means that certain strict liability offence provisions already contained in the *Home Building Act 1989* would apply in respect of medical gas work. For example, section 12 of this Act addresses unlicensed work and provides that an individual must not do "specialist work" except if they hold a contractor licence or as an employee of the holder of such a contractor licence. A maximum penalty of a $110,000 fine in the case of a corporation or a $22,000 fine in any other case applies for breach of this provision.

The Bill would extend the compliance and enforcement powers contained in the *Gas and Electricity (Consumer Safety) Act 2017* (GECS Act) to medical gas work, and amend the *Home Building Act 1989* to establish two new licensing categories of specialist work, for gasfitting work, and gas technician work. In doing so, a number of strict liability offence provisions would apply in respect of medical gas work e.g. for carrying out such work without proper certification, supervision or licensing, or in disregard of the applicable standards.

For example, schedule 1, item 6 would insert section 38B into the GECS Act to make it an offence for a person to carry out medical gasfitting work or medical gas technician work otherwise than in accordance with: any standards or requirements prescribed by the regulations under the GECS Act for the purposes of the proposed section; and any standards or requirements specified by the Secretary of the Ministry of Health by order in writing and published on the website of the Ministry of Health.

The maximum penalty for breaching section 38B, in the case of an individual, would be a $55,000 fine for a first offence; or an $82,500 fine or imprisonment for two years, or both, for a second or subsequent offence.

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 factor in establishing liability for an offence. The Committee notes in particular that section 38B would contain a custodial penalty.

However, the Committee acknowledges that strict liability offences are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, medical gas work is highly technical and if it is carried out without proper certification, licensing or supervision, or in contravention of applicable standards the consequences could be serious.

Having regard to these factors, and the fact that the custodial penalty for breach of section 38B could only apply in respect of a second or subsequent offence, the Committee makes no further comment.

Executive liability

14. As above, schedule 1, item 6 would insert section 38B into the GECS Act to make it an offence for a person to carry out medical gasfitting work or medical gas technician work otherwise than in accordance with:

- any standards or requirements prescribed by the regulations under the GECS Act for the purposes of the proposed section,
- any standards or requirements specified by the Secretary of the Ministry of Health by order in writing and published on the website of the Ministry of Health.

15. The maximum penalty for breaching this provision would be:

- in the case of an individual, a $55,000 fine for a first offence; or an $82,500 fine or imprisonment for two years, or both, for a second or subsequent offence,
- in the case of a corporation, a $550,000 fine for a first offence, or an $825,000 fine for a second or subsequent offence.

16. Further, schedule 1, item 13 of the Bill would amend section 63 of the GECS Act to provide that an offence against section 38B would be an executive liability offence. This would mean that where a corporation offends against section 38B, a director or other persons involved in the management of the corporation could be held liable where that person:

- knows or ought reasonably to know that the executive liability offence (or an offence of the same type) would be or is being committed, and
- fails to take all reasonable steps to prevent or stop the commission of that offence (see section 63(2)).

17. The maximum penalty that would apply for this executive liability offence, is the maximum penalty for the offence if committed by an individual, that is, a $55,000 fine for a first offence; or an $82,500 fine or imprisonment for two years, or both, for a second or subsequent offence (see section 63(2)).

As noted, schedule 1, item 6 of the Bill would insert section 38B into the GECS Act to make it an offence for a person to carry out medical gas work otherwise than in accordance with the relevant standards.

Further, schedule 1, item 13 of the Bill would amend section 63 of the GECS Act to provide that an offence against section 38B would be an executive liability

offence. This would mean that where a corporation offends against section 38B, a director or other persons involved in the management of the corporation could be held liable. The Committee notes that the prosecution does not have to prove the mental element of actual knowledge on the part of the director or manager. The prosecution only needs to prove that the person ought reasonably to know that the executive liability offence, or an offence of the same type would be or is being committed, and that the person failed to take all reasonable steps to prevent or stop the commission of that offence.

The maximum penalty that would apply for this executive liability offence is the maximum penalty for the offence if committed by an individual, that is, a $55,000 fine for a first offence; or an $82,500 fine or imprisonment for two years, or both, for a second or subsequent offence.

The Committee notes that lower thresholds for the mental element that must be proved to hold a defendant liable are not unusual in regulatory contexts to encourage compliance. Further, and as noted above, medical gas work is highly technical and if it is carried out in contravention of applicable standards the consequences could be serious. It is particularly important that those in charge of operations are held to a high standard. Further, the executive liability offence in question could only attract a custodial penalty in respect of a second or subsequent offence. In the circumstances, the Committee makes no further comment.

Enforcement provisions – privilege against self-incrimination

18. As noted, schedule 1, item 5 of the Bill would extend Part 7 of the GECS Act, which contains enforcement powers, to medical gasfitting work and medical gas technician work. In the second reading speech, the Minister explained:

> Part 7 of the Gas and Electricity (Consumer Safety) Act enforcement…provisions will now also apply to medical gasfitting work and medical gas technician work to provide a robust investigation and enforcement framework. This provides authorised officers with a suite of powers necessary to do their job effectively, including powers for authorised officers to gather information and enter premises for investigating, monitoring and enforcing compliance and administering the Act.

19. In particular, Part 7, section 45 of the GECS Act relates to information-gathering powers and provides that a person must not, without reasonable excuse refuse or fail to comply with any requirement made, or to answer any questions asked, by an authorised officer under the Act or the regulations. The maximum penalty for breaching the provision is a $55,000 fine in the case of a corporation, and a $16,500 fine in the case of an individual.

20. "Reasonable excuse" is not defined, and it is not clear if a person could refuse to provide documents or information, or answer a question, on the grounds of self-incrimination. However, to be found guilty of an offence under the section, the person must be warned that a failure to comply is an offence.

21. An "authorised officer" is defined by section 4 of the GECS Act to mean any investigator or any other person appointed by the Secretary to exercise functions of an authorised officer under the Act.[3]

22. Similarly, Part 7 contains powers for authorised officers to enter premises without a warrant. For example, under section 48 if the Secretary believes on reasonable grounds that there are in any place documents evidencing conduct in connection with:

- an electrical article or a gas appliance, or
- an electrical installation or a gas installation, or
- a serious electrical accident or a serious gas accident,

in contravention of the Act or regulations, an authorised officer can, with written authority of the Secretary enter the place, inspect any documents and make copies of them or take extracts from them. However, a safeguard applies: powers of entry under the Act cannot be exercised in respect of residential premises except with the permission of the occupier of the premises or under the authority of a search warrant (section 47).

Schedule 1, item 5 of the Bill would extend Part 7 of the GECS Act to medical gasfitting work and medical gas technician work. Part 7 contains enforcement powers including powers for authorised officers to gather information and enter premises for investigating, monitoring and enforcing compliance with and administering the Act.

In so doing, the Bill would extend the operation of this significant suite of powers to cover a wider range of work than previously. The Committee appreciates that robust enforcement powers are a necessary aspect of a comprehensive regulatory scheme, and particularly important given the safety risks should the GECS Act requirements around medical gas work be breached. In general it is appropriate that the powers contained in Part 7 should be extended to medical gas work.

However, the Committee notes the information-gathering powers contained in Part 7, section 45 of the GECS Act which provides that a person must not, without reasonable excuse refuse or fail to comply with any requirement made, or to answer any questions asked, by an authorised officer under the Act or the regulations. Significant maximum monetary penalties apply for breach of this provision, and it is unclear whether a person could refuse to answer questions or to provide information on the grounds of self-incrimination.

[3] The Secretary is in turn defined by section 4 of the GECS Act to mean the Commissioner for Fair Trading or if there is no such Commissioner employed, the Secretary of the Department of Finance, Services and Innovation (now the Department of Customer Service – see *Administrative Arrangements (Administrative Changes – Public Service Agencies Order) 2019* [NSW] available at NSW Legislation website: https://www.legislation.nsw.gov.au/regulations/2019-159.pdf, viewed 10 August 2020).

The Committee identifies that in extending this provision to medical gas work the Bill may have some undue impact on personal rights and liberties. The Committee refers this matter to Parliament for consideration.

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

Matter that should be included in primary legislation

23. As noted, the Bill would extend the compliance and enforcement powers contained in the GECS Act to medical gas work, and as part of this schedule 1, item 4 of the Bill amends the definitions in section 4 of that Act to cater for the new medical gases category. Medical gases are defined as "a substance used for medical purposes and prescribed by the regulations as a medical gas".

24. Regarding this definition, the Minister told Parliament that:

> By prescribing specific medical gases in the regulations, this bill…allow[s] the Government to finalise stakeholder consultation before prescribing specific gases and gives it the flexibility to add or remove specific gases as needed to respond to the changing nature of the industry.

As noted, the Bill would extend the compliance and enforcement powers contained in the GECS Act to medical gas work, and as part of this, schedule 1, item 4 of the Bill amends the definitions in section 4 of that Act to cater for the new medical gases category. Medical gases are defined as "a substance used for medical purposes and prescribed by the regulations as a medical gas".

The Committee would generally prefer key definitions such as this to be included in primary legislation. This is to ensure an appropriate level of parliamentary oversight. However, the Committee appreciates that in this case, locating the definition in the regulations will allow administrative flexibility to add or remove gases should changes occur in the industry. In the circumstances, the Committee makes no further comment.

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

Significant matters not subject to parliamentary scrutiny – standards for medical gas work

25. As noted previously, schedule 1, item 6 of the Bill would insert section 38B into the GECS Act to make it an offence for a person to carry out medical gasfitting work or medical gas technician work otherwise than in accordance with:

- any standards or requirements prescribed by the regulations under the GECS Act for the purposes of the proposed section,
- any standards or requirements specified by the Secretary of the Ministry of Health by order in writing and published on the website of the Ministry of Health.

26. The maximum penalty for breaching this provision would be:

- in the case of an individual, a $55,000 fine for a first offence; or an $82,500 fine or imprisonment for two years, or both, for a second or subsequent offence,

- in the case of a corporation, a $550,000 fine for a first offence, or an $825,000 fine for a second or subsequent offence.

27. In relation to these standards, the Minister told Parliament:

> Australian standards will play a very important role in the legislation. Standards Australia, an independent organisation, is tasked with developing Australian standards, which set out specifications, procedures and guidelines that aim to ensure products, services and systems are safe, consistent and reliable. Standards are developed in close consultation with stakeholders…The Australian standards that relate directly to medical gases will be incorporated into the regulations.

28. With regard to the standards or requirements specified by the Secretary of the Ministry of Health, the Minister also stated:

> The bill also provides the Ministry of Health a key role in issuing policy guidelines in relation to the installation and commissioning of a medical gas installation to ensure the best practice is observed in this most important area at all times.

29. On penalties for those who do not meet the standards, the Minister told Parliament:

> Major penalties will apply for work that does not meet the requisite standard. This inclusion of penalties further demonstrates the importance and seriousness of licensees having to observe the requirements of the Australian standards and any policy documents issued by the Ministry for Health.

As noted, schedule 1, item 6 of the Bill would insert section 38B into the GECS Act to make it an offence for a person to carry out medical gas work otherwise than in accordance with: any standards or requirements prescribed by the regulations under the GECS Act for the purposes of the proposed section; and any standards or requirements specified by the Secretary of the Ministry of Health by order in writing and published on the website of the Ministry of Health.

Major maximum penalties would apply for individuals who do not meet the required standards set down in the regulations and any orders of the Secretary – a $55,000 fine for a first offence; or an $82,500 fine or imprisonment for two years, or both, for a second or subsequent offence.

The Committee considers that as the standards are tied to such significant penalties, including custodial ones, they should all be included in the regulations to ensure an appropriate level of parliamentary oversight. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. There is no such requirement for the orders of the Secretary of the Ministry of Health. The Committee refers this matter to Parliament for consideration.

Significant matters not subject to parliamentary scrutiny – interagency arrangements

30. As noted earlier, Part 6 of the GECS Act deals with accident reporting and investigations. Schedule 1, item 9 of the Bill would insert a new section 44 into Part 6. Section 44 would allow certain public authorities to enter into arrangements with each other regarding investigable electrical or gas incidents.

31. The new section 44 would allow the Secretary of the Department of Customer Service; SafeWork NSW; the Secretary of the Department of Planning, Industry and Environment; and now the Secretary of the Department of Health to enter into such arrangements in relation to medical gas incidents and gas and electrical incidents. These arrangements could cover:

- the referral of investigable incidents:
    - to SafeWork NSW for investigation or other action under the *Work Health and Safety Act 2011*, or
    - to the Secretary of the Department of Customer Service for investigation under the GECS Act, or
    - to the Secretary of the Department of Planning, Industry and Environment, for investigation or other action under the *Electricity Supply Act 1995* or the *Gas Supply Act 1996*, or
    - to the Secretary of the Department of Health for investigation or other action under any legislation administered by the Minister for Health,
- matters concerning an investigable incident that is the subject of investigation or other action by more than one of those persons at the same time,
- the cooperative exercise of the respective functions of those persons in respect of investigable incidents,
- the sharing of information relevant to, and for the purposes or, enabling or assisting any of them to carry out their functions under Part 6 of the GECS Act.

32. Further, the new section 44 would require these Secretaries and SafeWork NSW to jointly cause notice of any arrangements entered into under the section to be published in the Gazette as soon as practicable after they are entered into. However, failure to publish any such arrangements does not affect their validity.

33. The Minister told Parliament:

> In investigating serious medical incidents it will be necessary for various government agencies to enter into arrangements. This will ensure that agencies can cooperate fully and use all available resources so that investigations can be conducted and concluded as quickly as possible. That is why a new section 44 has been inserted into the Gas and Electricity (Consumer Safety) Act to replace the current section 44.
>
> New section 44 will extend the current arrangements to allow the secretary of the Department of Customer Service, SafeWork NSW, the secretary of the Department of Planning, Industry and Environment and the secretary of the Department of Health to enter into any such arrangements in relation to medical gas incidents as well as gas and electrical incidents. The agencies will also be able to enter into information-sharing arrangements to facilitate investigations. For transparency any such arrangements will be published in the New South Wales Government Gazette.

Part 6 of the GECS Act deals with accident reporting and investigations. Schedule 1, item 9 of the Bill would insert a new section 44 into Part 6. Section 44 allows

certain public authorities to enter into arrangements with each other regarding investigable electrical or gas incidents.

The new section 44 would allow the Secretary of the Department of Customer Service, SafeWork NSW, the Secretary of the Department of Planning, Industry and Environment, and now the Secretary of the Department of Health to enter into such arrangements in relation to medical gas incidents and gas and electrical incidents. For example, agencies would be able to enter into information-sharing arrangements to facilitate investigations; and arrangements about the cooperative exercise of their respective functions in respect of investigable incidents.

Further, the new section 44 would require these public authorities to jointly cause notice of any arrangements entered into under the section to be published in the Gazette as soon as practicable after they are entered into. As these arrangements concern significant matters, and as they may impact on privacy rights, the Committee would prefer them to be included in the regulations to foster an appropriate level of Parliamentary oversight. The Committee refers this matter to Parliament for consideration.

Significant matters not subject to parliamentary scrutiny – requirements and standards for authorities to be issued

34. As noted, schedule 2, item 4 of the Bill would amend the definition of "specialist work" in schedule 1 to the *Home Building Act 1989* to include medical gasfitting work and medical gas technician work. This would mean that the provisions of the *Home Building Act 1989* will then apply to these occupations.

35. In particular, Part 3 of the *Home Building Act 1989* would consequently apply to contractor licences and supervisor and tradesperson certificates for medical gasfitting and medical gas technician work. Sections 20 and 25 of this Part place a number of requirements on the Secretary about when a contractor licence, or a supervisor or tradesperson certificate must be refused. They also allow the Secretary to determine additional standards or other requirements that must be met before a contractor licence or a certificate is issued. Regarding this, the Minister told Parliament:

> Sections 20 and 25 of the Home Building Act permit the regulations to fix and provide for the secretary to determine additional standards or other requirements that must be met before either a contractor licence or a certificate is issued. The regulation will allow the secretary to set the qualification and experience component for both authorities in an Order to be published in the Gazette.

36. Similarly, section 33D of Part 3 of the *Home Building Act 1989* would apply to medical gas work. This section provides that a supervisor or tradesperson certificate must not be issued unless the Secretary is satisfied that the applicant has the necessary qualifications, experience and capability. Again, section 33D allows the Secretary to set the qualifications required to obtain a contractor licence or a supervisor or tradesperson licence. Regarding this, the Minister told Parliament:

> Section 33D allows the secretary to set the qualifications required to obtain a contractor licence or a supervisor or tradesperson licence, including any experience. This provides the flexibility necessary to tailor experience requirements for a supervisor or lower level. These requirements

are approved by the Commissioner for [Fair] Trading in an order and published in the *NSW Government Gazette*. They can therefore be readily reviewed and amended if necessary.

Schedule 2, item 4 of the Bill would amend the definition of "specialist work" in schedule 1 to the *Home Building Act 1989* to include medical gasfitting work and medical gas technician work. This would mean that the provisions of the *Home Building Act 1989* will then apply to these occupations.

In particular, Part 3 of the *Home Building Act 1989* would consequently apply to contractor licences and supervisor and tradesperson certificates for medical gas work. Sections 20 and 25 of this Part place a number of requirements on the Secretary about when a contractor licence, or a supervisor or tradesperson certificate must be refused. These sections permit the Secretary to determine additional standards or other requirements that must be met before either a contractor licence or a certificate is issued.

Similarly, section 33D provides that a supervisor or tradesperson certificate must not be issued unless the Secretary is satisfied that the applicant has the necessary qualifications, experience and capability. Section 33D also allows the secretary to set the qualifications required to obtain a contractor licence or a supervisor or tradesperson licence, including any experience.

Where the Secretary sets such standards and requirements, the Committee understands that they are issued in an Order that is published in the NSW Government Gazette. Again, the Committee would prefer for these standards and requirements to be contained in the regulation to ensure an appropriate level of parliamentary oversight. The Committee considers that this would also foster an appropriate level of administrative flexibility – any necessary changes to the qualification requirements could proceed without the need for an amending Bill. The Committee refers this matter to Parliament for consideration.

6. Police Amendment (Promotions) Bill 2020

Date introduced	6 August 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. David Elliott MP
Portfolio	Police and Emergency Services

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

   (a) to amend the *Police Act 1990* and the *Police Regulation 2015* to modernise the promotions process for non-executive police officers to the ranks of sergeant, inspector and superintendent by replacing the promotion lists process with a merit-based process,

   (b) to make amendments consequential on the establishment of the new process and other savings and transitional provisions.

BACKGROUND

2. In the second reading speech, the Minister described the Bill as giving effect to a merit-based and modern promotion system for non-executive police officers, being sergeants, inspectors and superintendents.[4] The Minister stated that promotions will be based on the merit of a candidate matched to a specific advertised position, as occurs in the broader public sector, rather than officers being allocated from a promotions list for the next available vacancy.

3. The Bill has also been introduced following a July 2019 review conducted by the former Australian Sex Discrimination Commissioner Elizabeth Broderick AO at the request of the Police Commissioner, Michael Fuller, APM, which consulted 3,500 members of the NSW Police Force (Promotions Review).[5] The Promotions Review examined the current promotions process and potential obstacles to women's career progression in the NSW Police Force. The Minister stated that while the non-legislative recommendations of the Promotions Review have already been implemented, the Bill now enacts a recommendation that a merit-based recruitment process be adopted.

4. The Minister further noted that the reformed promotions process has been developed in agreement with the Police Association of NSW and has the broad support of most of the NSW Police Force. The Minister described how the process has been modified as follows:

[4] Sections 62 and 63 of the *Police Act 1990* provide that non-executive police officers are all police officers other than the Commissioner and NSW Police Force senior executives.

[5] Elizabeth Broderick & Co, *Final Report into the NSW Police Promotions System*, July 2019, http://elizabethbroderick.com.au/wp-content/uploads/Final-Report-into-the-NSW-Police-Promotions-System.pdf, viewed 11 August 2020.

> The scheme retains the rank-based assessment component of the current promotions system and adds an additional position-based assessment component to ensure that once an officer is assessed by the commissioner as "fit for rank" she or he then also demonstrates they are "fit for job" by applying and undergoing a comparability assessment with other fit-for-rank applicants. In this way the NSW Police Force is able to identify the most suitable candidate for the position.

5. The Minister also provided further detail on how the Bill amends the *Police Regulation 2015* (the Regulation) to create a "Stage A" (a rank-based assessment) and "Stage B" (a position-based assessment) of the promotions process:

> Most significantly schedule 2 amends the regulations to provide for the following elements of the new promotions system: eligibility criteria for participation in the promotion process, including completion of the required time at rank, and an integrity check; successful completion of "Stage A" of the promotions process, which is a rank-based assessment. This ensures officers are rank-ready before they may begin applying for positions at the promotion rank; successful completion of "Stage B" of the promotions process, which requires an officer to apply for an advertised position and undertake a position-based assessment for that position. This process is merit-based and provides for applicants to be compared against each other and the pre-established standards for the position.

ISSUES CONSIDERED BY THE COMMITTEE

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

Access to review – short timeframes and limited grounds

6. Schedule 2, item 3 of the Bill amends the Regulation to omit Divisions 3–7 of Part 2 and inserts proposed Division 3, which contains provisions that give effect to the new process for the promotion of non-executive police officers.

7. Proposed clause 24(3)(b) states that an officer may apply to the Commissioner for a review of a rank-based assessment ("Stage A" of the promotions process) within 48 hours after the officer is notified of the Commissioner's determination. An application for review can be made on grounds set out in clause 24(2), including that:

   (a) the whole or a part of the process relating to the assessment was irregular,

   (b) the outcome of the assessment of the officer's capabilities was unreasonable, having regard to all the circumstances,

   (c) the outcome of an assessment of the officer's technical skills and operational knowledge was incorrect, having regard to all the circumstances.

8. Proposed clause 25 similarly provides that an officer may apply to the Commissioner for a review of a position-based assessment ("Stage B" of the promotions process) within 48 hours on the grounds that a whole or a part of the process relating to the assessment was irregular. Clause 25(2) makes clear that this excludes merits review of the outcome.

> **The Bill modifies the review process relating to Stage A (rank-based) and Stage B (position-based) promotions assessments. Officers who have completed a Stage A or Stage B assessment may apply to the Commissioner for a review within 48 hours of being notified of the outcome of the assessment. Although officers who have completed a Stage A assessment can apply for a review on one of three**

grounds, the outcome of Stage B assessments can only be reviewed on narrow procedural grounds.

Both clauses impose short timeframes which may limit the accessibility of reviews to officers. These are slightly shorter than some of the review periods that currently exist in the Regulation (e.g. clause 33 allows officers 72 hours to apply for a review of the result of a pre-qualifying assessment) and considerably shorter than the review period in the *Government Sector Employment (General) Rules 2014* (GSE Rules), which is 10 business days (e.g. rule 24, which relates to reviews of promotion decisions for non-executive roles). The Committee notes that the short 48-hour timeframe may practically limit the review rights of officers. The Committee refers this matter to the Parliament.

The limited procedural grounds on which a Stage B assessment can be reviewed may similarly restrict access to review. However, this may be reasonable in the circumstances given that, as the second reading speech suggests, it may be impractical for "decisions about the relative merit of one applicant compared with another" to be "constantly second-guessed." Also, the GSE Rules only allow reviews on the same procedural, rather than merit-based, ground (e.g. rule 24(2)). Accordingly, the Committee makes no further comment on this aspect of the issue.

Procedural fairness – reviews on integrity grounds

9. Schedule 2, item 3 of the Bill inserts new clauses 30 and 31 into the Regulation, which govern the procedure for reviewing decisions made on integrity grounds. For example, a decision that an officer is unsuitable to participate in a process for promotion or to suspend or remove an officer from any part of a promotional process. This refers to the requirement in proposed clause 21 of the Regulation that, after making inquiries about integrity matters as required by proposed section 71(1) of the Act (see Schedule 1, item 14 of the Bill), the Commissioner is satisfied that the officer is suitable to participate in the promotions process.

10. Proposed clause 30 requires the Commissioner to refer the matter to the person appointed by the Minister for the purposes of conducting the review on integrity grounds (the appointed person). Proposed clause 31(1) then provides that the procedure for conducting the review is to be determined by the appointed person. However, subclause (3) provides that the appointed person "may" consider any written information provided by the officer or Commissioner. Under proposed clause 32, decisions of the appointed person are taken to be decisions of the Commissioner, are final and not subject to further review.

The Bill establishes a review process for decisions made on integrity grounds, such as a decision that an officer is unsuitable to participate in a process for promotion. The review is to be conducted by a person appointed by the Minister, and the procedure for conducting the review is to be determined by the appointed person. The appointed person "may", but is not bound to, consider written information provided by the officer or the Commissioner.

The Committee notes that the process outlined in proposed clauses 30 – 31 substantively mirrors the current process for reviews on integrity grounds in clauses 46 and 47 of the Regulation.

However, the Committee notes that the review process may impact on procedural fairness. For example, the procedure for the review is to be determined solely by the person conducting the review, being the appointed person. This means that procedures may not be consistent across cases involving different officers. In circumstances where the identity of the appointed person is not clear, and there may be several appointed persons, the review procedure adopted may depend on the preferences of the particular appointed person who is conducting the review.

Also, the appointed person is not bound to consider any information submitted by the officer. This may undermine the officer's right to a fair hearing, because there may be no opportunity for the officer to respond to allegations of misconduct or the consequences of proven misconduct. Further, no in-person hearing is permitted: clause 31(2). For these reasons, the Committee refers this matter to Parliament for consideration.

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

Lack of clarity – meaning of "specified misconduct"

11. Schedule 1, item 12 inserts a new section 68 into the *Police Act 1990* (the Act) which removes the requirement for non-executive police officers to provide a statutory declaration before being appointed to an acting position (which, under changes to section 66A, cannot exceed 12 months). Such officers will now simply have to provide a declaration (i.e., not a statutory declaration) that they have "not knowingly engaged in specified misconduct or any other misconduct".

The Bill requires that police officers provide a declaration that they have not knowingly engaged in specified misconduct or any other misconduct before being appointed to an acting position. Previously, such officers were required to provide a statutory declaration to this effect when being appointed to a position temporarily.

There appears to be no detail provided in the Act or Regulation as to the meaning of "specified misconduct"; however, different forms of misconduct are referred to in Part 8A of the Act, which governs complaints about the conduct of police officers (e.g. "police misconduct" and "serious misconduct"). The current provision also contains identical wording.

The Committee notes the public interest in maintaining high standards of integrity in the NSW Police Force. A requirement for declarations of any misconduct may help ensure that officers with a misconduct history are not promoted, even in an acting capacity.

However, the Committee notes that it is not clear from the Act what the relevant officer is meant to declare, which may make it difficult to comply with the obligation. Also, providing clarity around the meaning of misconduct may help promote the integrity of the promotions process, especially in circumstances where a statutory declaration to this effect is no longer required. The Committee refers this matter to Parliament for consideration.

Lack of clarity – integrity inquiries

12. Schedule 1, item 14 of the Bill inserts a new section 71(1)(a) into the Act which imposes a duty on the Commissioner to make inquiries as to the integrity of a non-executive police officer before allowing them to participate in a process under which they may be promoted to the rank of sergeant, inspector or superintendent.

13. Under section 71(1)(a) of the Act, the Commissioner currently has a similar duty in relation to officers who are selected to participate in a program which makes them eligible for future appointments to a designated rank. However, that provision specifically requires the Commissioner to consult with the Commander, Professional Standards Command.

14. Proposed section 71(1)(b) also requires the Commissioner to makes inquiries with the following bodies as to the integrity of the officer before making a promotional appointment: the Law Enforcement Conduct Commission (LECC); Commander, Professional Standards Command; and any other person that they consider appropriate. This is also required by the existing provision.

15. Schedule 1, item 14 also modifies section 71(3) of the Act so that the LECC and Commander, Professional Standards Command are only required to furnish a report to the Commissioner in relation to inquiries made under section 71(1)(b); that is, in relation to a proposed promotional appointment. Previously, a report was required prior to selection into an eligibility program for a rank of police officer as well as prior to a promotion.

> **The Bill imposes a duty on the Commissioner to make certain inquiries about the integrity of a non-executive police officer before allowing that officer to participate in a promotions process. Although a similar existing provision requires the Commissioner to consult the Commander, Professional Standards Command, and any other person that the Commissioner considers appropriate, the new provision has no such requirement.**
>
> **The Committee notes that the meaning of "inquiries as to the integrity of the officer" may be vague in circumstances where there is a strong public interest in maintaining high standards of integrity in the NSW Police Force, and where the outcome of those inquiries may impact the eligibility of applicants for promotion.**
>
> **However, there may be good reasons why the Bill does not require the Commissioner to consult the Commander specifically as to integrity matters before an officer can participate in a promotions process. For example, the promotions process may be more efficient and is still protected by appropriate safeguards, given that the Bill still requires the Commissioner to consult the Law Enforcement Conduct Commission and the Commander, Professional Standards Command before making a promotional appointment. In the circumstances, the Committee makes no further comment.**

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

Matters deferred to regulations

16. The Bill defers some matters to the regulations. For example, Schedule 1, item 7 amends section 66(4) of the Act so that the Commissioner must appoint a person by way of promotion who has, in the opinion of the Commissioner, the greatest merit as determined

in accordance with the regulations. Schedule 1, item 9 also amends section 66AA in a similar way.

17. The Minister noted in the second reading speech that the detail regarding merit-based appointments will be in the Regulation as it can be more quickly updated and changed that primary legislation. The Minister further noted that this reflects the approach adopted in the Government Sector Employment Act 2013. Notably, the Promotions Review also recommended that any new recruitment process should not be embedded in legislation so that it could evolve with the needs of the NSW Police Force.[6]

Some matters in the Bill are deferred to the regulations. For example, when deciding promotions, the Commissioner must appoint someone who has, in the opinion of the Commissioner, the greatest merit as determined in accordance with the regulations. Although the Commissioner is also required to appoint persons to vacant specialist positions based on merit, in that case the Act provides further guidance by nominating matters that the Commissioner should have regard to in their decision-making.

The Committee generally prefers key concepts to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights of individuals to promotion may be affected.

However, in stating that the detail regarding merit-based appointments will be in the Regulation, the Minister noted it may be more quickly updated and changed than primary legislation. The Minister further identified that this reflects the approach adopted in the *Government Sector Employment Act 2013*. In addition, the Committee notes that the Promotions Review conducted by Elizabeth Broderick AO recommended that any new recruitment process should not be embedded in legislation so that it could evolve with the needs of the NSW Police Force. In the circumstances, the Committee makes no further comment.

Commencement by proclamation

18. The Bill provides that the Act is to commence on a day or days appointed by proclamation.

The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that a flexible start date may assist with the implementation of necessary administrative changes to internal promotion processes across a large workforce. In the circumstances, the Committee makes no further comment.

[6] Elizabeth Broderick & Co, *Final Report into the NSW Police Promotions System*, recommendation 1, p12.

7. Public Health Amendment (Registered Nurses in Nursing Homes) Bill 2020*

Date introduced	26 August 2020
House introduced	Legislative Council
Member responsible	The Hon. Mark Banasiak MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. At present under section 104 of the *Public Health Act 2010*, a registered nurse is required to be on duty in a nursing home at all times. The object of this Bill is to ensure that this requirement is continued by updating the definition of nursing home so that it is consistent with the terminology relating to aged care facilities under the *Aged Care Act 1997* of the Commonwealth.

BACKGROUND

2. In the second reading speech, the Hon. Mark Banasiak MLC noted that a previous version of the Bill was introduced into Parliament in 2016 by the Hon. Robert Brown MLC of the Shooters, Fishers and Farmers Party. However, it was not passed by the Parliament.[7]

3. Mr Banasiak also noted that a 2015 Legislative Council inquiry recommended that the changes proposed in the Bill be enacted.[8]

4. Currently, under section 104 of the *Public Health Act 2010* (the Act), a person who operates a nursing home must ensure that a registered nurse is on duty at the nursing home at all times. Further, section 5 of the Act provides that "nursing home" means a facility at which residential care (within the meaning of the *Aged Care Act 1997* of the Commonwealth) is provided being:

    - a facility at which that care is provided in relation to an allocated place (within the meaning of that Act), that requires a high level of residential care (within the meaning of that Act), or

    - a facility that belongs to a class of facilities prescribed by the regulations.

[7] *Public Health Amendment (Registered Nurses in Nursing Homes) Bill 2016*, https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3301, viewed 26 August 2020.

[8] Legislative Council of New South Wales, General Purpose Standing Committee No. 3, 29 October 2015, *Registered nurses in New South Wales nursing homes*, https://www.parliament.nsw.gov.au/lcdocs/inquiries/2275/Report%2032%20-%20Registered%20nurses%20in%20New%20South%20Wales%20n.pdf, viewed 26 August 2020. See for example recommendation 7.

5. However, Mr Banasiak stated that as a result of changes to the Commonwealth *Aged Care Act 1997* in 2014, this requirement for a registered nurse to be on duty at nursing homes was made defunct:

> The present situation came about on 1 July 2014 when changes to the Commonwealth Aged Care Act 1997 came into effect. The amendments were designed to change funding arrangements for those in residential care and to streamline transfers between low-care and high-care settings. As an indirect consequence, the definition of a nursing home in Commonwealth legislation was removed. That had a flow-on effect to the New South Wales Public Health Act 2010 because it relied on that definition in the Commonwealth Act. Unfortunately, with Federal amendments to the Commonwealth Aged Care Act 1997 and a small change to the definition of the term "nursing home", the requirement was made defunct.

6. Mr Banasiak said that the NSW Government implemented grandfather provisions in response to these amendments:

> … the former health Minister, Jillian Skinner, grandfathered the provision for all nursing homes that were in operation before 1 July 2014 in the Public Health Amendment (Nursing Homes) Regulation 2014. Therefore, only nursing homes that commence operation after 1 July 2014 are legally required to keep registered nurses on shift.

7. Mr Banasiak told Parliament that the Bill proposes to reintroduce minimum staffing in nursing homes, covering high care needs only. It does so by omitting the current definition of "nursing home" in the Act and instead inserts a provision that "nursing home" means a facility at which residential care within the meaning of the *Aged Care Act 1997* of the Commonwealth is provided, being:

- a facility at which a high level of residential care (however described under or in accordance with the Act) is provided, or
- a facility of a class prescribed by the regulations.

8. Mr Banasiak further told Parliament that it is essential that a registered nurse is on duty at nursing homes:

> It is essential that a registered nurse is on hand to pick up on medication errors in an aged-care facility as they can be life-threatening. It is essential that a registered nurse be available to perform resuscitation and to recognise and respond appropriately to the onset of more serious conditions. Moreover, a registered nurse, based on clinical judgement, can decide whether hospital admission is required.

9. Mr Banasiak also stated that the Bill was now even more important given the COVID-19 pandemic.

10. In addition, Mr Banasiak stated that the requirement to have a registered nurse on staff in an aged care facility had been part of the law in NSW for some years:

> The requirement to have a registered nurse on staff in an aged care facility at all times has been the standard practice in this State for over 30 years, and arguably since 1971. Indeed, although the requirement is in section 104 of the Public Health Act 2010, this standard has been a requirement since the passage of the Nursing Homes Act 1988.

ISSUES CONSIDERED BY THE COMMITTEE

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

Lack of clarity – meaning of "high level" residential care

11. As noted, the Bill proposes to reintroduce minimum staffing in nursing homes so that a person who operates a nursing home that covers high care needs must ensure that a registered nurse is on duty at the nursing home at all times.

12. The Bill would do so by amending the Act to insert a new definition of "nursing home". This new definition would provide that a nursing home is "a facility at which residential care within the meaning of the *Aged Care Act 1997* of the Commonwealth is provided, being:

- a facility at which a high level of residential care (however described under or in accordance with the Act) is provided, or
- a facility of a class prescribed by the regulations".

13. An operator who contravenes these provisions would be subject to a maximum penalty of an $11,000 fine (see section 104 of the Act).

14. "Residential care" is defined by the section 41.3 of the *Aged Care Act 1997* of the Commonwealth to mean personal care or nursing care, or both personal care and nursing care, that:

- .is provided to a person in a residential facility in which the person is also provided with accommodation that includes:
  - appropriate staffing to meet the nursing and personal care needs of the person; and
  - meals and cleaning services; and
  - furnishings, furniture and equipment for the provision of that care and accommodation; and
  - meets any other requirements specified in the Subsidy Principles.

15. Section 41.3 further provides that residential care does not include any of the following:

- care provided to a person in the person's private home,
- care provided in a hospital or in a psychiatric facility,
- care provided in a facility that primarily provides care to people who are not frail and aged,
- care that is specified in the Subsidy Principles not to be residential care.

16. However, the *Aged Care Act 1997* of the Commonwealth does not appear to define what constitutes "high level" residential care. It appears that a definition of "high level of residential care" was repealed in 2013 when the Commonwealth Parliament passed the

Aged Care (Living Longer Living Better) Bill 2013.[9] It is also not clear whether "high level of residential care" is a concept defined elsewhere, that is, "in accordance with the Act."

The Bill proposes to reintroduce minimum staffing in nursing homes so that a person who operates a nursing home that covers high care needs must ensure that a registered nurse is on duty at all times. It would do so by amending the *Public Health Act 2010* to insert a new definition of "nursing home". This new definition would provide, in part, that a nursing home is "a facility at which residential care within the meaning of the *Aged Care Act 1997* of the Commonwealth is provided, being a facility at which a high level of residential care (however described under or in accordance with the Act) is provided".

However, the Committee notes that the *Aged Care Act 1997* (Cth) does not appear to define "high level of residential care." It is also unclear where the meaning of this term may be defined elsewhere, that is, "in accordance with that Act".

It may therefore be unclear as to which facilities the obligation to keep a registered nurse on duty would apply. Further, contravention of the requirement to keep a registered nurse on duty could result in an operator being fined up to $11,000. The Committee prefers provisions contravention of which may result in a penalty to be drafted with sufficient precision so that their scope and content is clear.

The Committee notes that some guidance is provided as to which facilities would be affected because "residential care" is defined by the *Aged Care Act 1997* (Cth). However, again, that definition may not clarify the meaning of a "high level" of such care. In the circumstances, the Committee refers this matter to Parliament to consider whether the provision is drafted with sufficient precision given the significant maximum penalty that would apply if it were contravened.

[9] Parliament of Australia, introduced 13 March 2013, *Aged Care (Living Longer Living Better) Bill 2013*, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4980 , viewed 26 August 2020. See for example Schedule 3, Part 1, Item 267 of the Bill that was passed by both Houses, which appears to repeal the definition of "high level of residential care", and the second reading speech.

8. Roads Amendment (Toll-Free Period) Bill 2020*

Date introduced	5 August 2020
House introduced	Legislative Council
Member responsible	The Hon. John Graham MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Roads Act 1993* as follows—

   (a) to provide for the declaration of toll-free periods for new tollways,

   (b) to provide for the compensation of tollway operators for any consequent loss of revenue.

BACKGROUND

2. In the second reading speech, the Hon. John Graham MLC told Parliament that the Bill calls for a compulsory toll-free period for the opening of any new toll road in NSW "to ensure both fairness and safety as road users adapt to the toll and make commute adjustments".

3. Mr Graham stated that without a toll-free period there is a risk of accidents:

> Without a toll-free period there is always a risk that drivers will make last minute changes to avoid the toll. We have seen evidence of drivers queuing up to exit motorways to avoid new tolls. The danger to drivers was shown clearly when there was a spate of high profile accidents in the first few months of the M4 opening in 2019. Incidents included motorists stopping in lanes, crossing barriers and reversing near the entrance to the tollway, despite large signs advertising that drivers were nearing the toll road.

4. Mr Graham also stated that the NRMA supports toll-free periods as did a 2005 review conducted by Professor David Richmond AO[10]:

> I recognise that the NRMA has consistently advocated for toll-free periods at the opening of new tollways...Peter Khoury from the NRMA has particularly drawn attention to the 2005 Richmond review. That review called for mandatory toll-free periods on any new toll road that opened.

[10] Richmond, D.T. (2005) *Review of Future Provisions of Motorways in NSW*, Sydney: Premier's Department.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to compensation, retrospectivity and freedom of contract

5. Schedule 1 of the Bill would amend the *Roads Act 1993* to insert a new Division 2A into Part 13. Proposed section 216A contains provisions for the Minister to declare a toll-free period.

6. Subsection 1 requires the Minister to declare, by order published in the NSW Government Gazette, a toll-free period for every tollway that is opened for the use of the public after the section commences. Subsection 2 provides that the declared toll-free period is to commence on the opening of the tollway.

7. Subsection 3 provides that during the toll-free period, the toll operator must not collect a toll from any driver using the tollway; and subsection 4 provides that a driver who does not pay a toll during the toll-free period does not commit an offence.

8. Subsection 5 relates to the contract between the State and the toll operator and provides that the declaration of a toll-free period does not constitute a breach, repudiation or frustration of the contract. Further, subsection 6 provides that no person can bring an action to recover damages as a result of the declaration of a toll-free period.

9. Proposed section 216B deals with compensation. It provides:

- If a toll operator claims a loss as a result of the declaration of a toll-free period, the State is to negotiate in good faith with the toll operator to try to agree on compensation and in doing so is to take into account any existing contractual provisions concerning the determination of compensation payable to the toll operator.

- If the State and the toll operator are unable to reach agreement, the toll operator is to be compensated by the contract for the operation of the tollway or collection of tolls and charges on the tollway being extended by a period of time declared by the Minister by order published in the NSW Government Gazette.

10. Regarding compensation, Mr Graham told Parliament:

> If the State and the toll operator are unable to reach agreement, the toll operator is to be compensated by the contract for the operation of the tollway or the collection of tolls and charges on the tollway being extended by a period of time declared by the Minister at the end of the contract. We see the provision as a measure that protects the public interest. It does not seek to overly constrain any negotiation but provides a framework for implementing toll-free periods if there is not a contract or if there is some logjam.

11. Mr Graham continued:

> One of the ways in which other jurisdictions have sought to negotiate such matters is by the use of shadow tolls. They are often per-vehicle amounts paid to a tollway operator and might be based on the type of vehicle and the distance travelled. They may be calculated over a period or over the length of the concession. The adoption of such an approach would be a policy matter for the Government.

Schedule 1 of the Bill would amend the *Roads Act 1993* to insert a new Division 2A into Part 13. Proposed section 216A requires the Minister to declare a toll-free period for every tollway that is opened for the use of the public after the Bill comes into effect.

The Bill is drafted to retrospectively affect existing contracts. Proposed section 216A provides that the declaration of a toll-free period does not constitute a breach of the contract; and no person can bring an action to recover damages as a result of such a declaration. The Bill may thereby impact on freedom of contract – the freedom of parties to decide on the contractual terms to which they are subject.

Proposed section 216B deals with compensation. It provides that if a toll operator claims loss resulting from the declaration of a toll-free period, the State must negotiate in good faith with the toll operator to agree to compensation and, in doing so, take into account any existing contractual arrangements concerning the determination of compensation that would normally be payable. Further, if the parties cannot reach agreement the toll operator is to be compensated by the contract for the operation of the tollway or the collection of tolls and charges on the tollway being extended by a period of time declared by the Minister at the end of the contract.

The Committee notes that there is therefore no absolute right to compensation for losses sustained by the toll operator as the result of the declaration of a toll-free period. Although the State must negotiate in good faith and take into account any contract with the toll operator, it ultimately retains some discretion around the method to arrive at an appropriate level of compensation.

The Committee acknowledges the Bill seeks to balance the contractual and compensation rights of toll operators with any public interest in toll-free periods. However, the Committee refers these matters to Parliament to consider whether the provisions are reasonable in the circumstances.

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

Length of toll-free period not subject to parliamentary scrutiny

12. As above, Schedule 1 of the Bill would amend the *Roads Act 1993* to insert a new Division 2A into Part 13. Proposed section 216A contains provisions for the Minister to declare a toll-free period.

13. Subsection 1 requires the Minister to declare, by order published in the NSW Government Gazette, a toll-free period for every tollway that is opened for the use of the public after the section commences; and subsection 2 provides that the declared toll-free period is to commence on the opening of the tollway.

14. The Bill makes no provision for the length of the toll-free period and Mr Graham told Parliament that this should be an "operational decision":

> Importantly, the Bill does not specify the length of the toll-free period. We are not seeking to tie the Minister's hands here: the length of the toll-free period should be an operational decision.

The approach the Opposition has taken to this Bill is twofold. First, we think that a toll-free period is an important principle and we are prepared to insist that it should be in place by law. Secondly, we believe that it is the Government's role to manage the operational decisions for these toll roads, so we will not be seeking to tie the hands of the Government on the length of the toll-free period. We are not seeking to override the contracts the State might have entered into with toll contractors, but rather to work within that existing framework.

As noted, schedule 1 of the Bill would amend the *Roads Act 1993* to insert a new Division 2A into Part 13. Proposed section 216A requires the Minister to declare, by order published in the NSW Government Gazette, a toll-free period for every tollway that is opened for the use of the public after the Bill comes into effect.

However, the Bill makes no provision for the length of the toll-free period, nor does it require this to be set by regulation. Therefore, there is no parliamentary scrutiny over this matter. On one view, the scope of toll concessions to the public is a significant matter that should receive a level of parliamentary scrutiny. On another view, it is more appropriate that the Bill set the principle of a toll-free period whilst granting the Executive the flexibility to determine its scope, as a party to the relevant contracts.

The Committee considers that a more appropriate balance may be struck if the length of the toll-free periods were to be set by regulation. This would allow the Executive the flexibility to set the periods without the need for an amending Bill, whilst providing some opportunity for parliamentary scrutiny. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. The Committee refers the matter to Parliament for consideration.

Part Two – Regulations

1. Community Gaming Regulation 2020

Date tabled	LA: 28 July 2020 LC: 4 August 2020
Disallowance date	LA: 20 October 2020 LC: 20 October 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The Regulation, which is made under the *Community Gaming Act 2018* (the Act) replaces the *Lotteries and Art Unions Regulation 2014*. The Act passed Parliament on 17 October 2018, replacing the *Lotteries and Art Unions Act 1902*, but only commenced on 1 July 2020 when the Regulation came into effect.[11]

2. According to the Regulatory Impact Statement for the Regulation (the RIS), the Act regulates community gaming activities in the charitable and not-for-profit sectors, the broader community where such activities are conducted for social purposes, and trade promotions in the commercial sector.[12]

3. The new regulatory framework aims to adopt a "modern, streamlined, principles-based approach" that more appropriately reflects the risks of specific gaming activities. It follows a review of previous legislation undertaken by Liquor and Gaming NSW in 2016-17 which found that it was "complex, confusing and overly-prescriptive".[13]

4. The Regulation was released in draft for public consultation from 10 January to 7 February 2020, and received feedback from 16 stakeholders which NSW Fair Trading advised would be analysed in the developing the final Regulation.[14]

5. The objects of the Regulation are as follows:

[11] The historical notes to the *Community Gaming Act 2018* indicate that it commenced by proclamation on 1 July 2020. The Regulation also commenced on 1 July 2020: cl 2.

[12] NSW Fair Trading, *Regulatory Impact Statement: Community Gaming Regulation 2020*, January 2020, https://www.fairtrading.nsw.gov.au/consultation-tool/community-gaming-regulations, viewed 11 August 2020, p1.

[13] *Regulatory Impact Statement*, p1.

[14] See NSW Fair Trading website: https://www.fairtrading.nsw.gov.au/consultation-tool/community-gaming-regulations. Under s5(4) of the *Subordinate Legislation Act 1989*, where a statutory rule is made, a copy of the regulatory impact statement and all written comments and submissions received are to be forwarded to the Legislation Review Committee within 14 days after it is published. The Committee has received 16 submissions regarding the Regulation.

(a) to prescribe gaming activities that are permitted under the *Community Gaming Act 2018* and the requirement for each of those gaming activities,

(b) to specify gaming activities from which an authority must be obtained and to provide for applications and other matters relating to authorities,

(c) to prescribe general requirements relating to gaming activities, including requirements as to fairness, rules, prizes, records and payment of proceeds,

(d) to prohibit certain advertisements of permitted gaming activities,

(e) to make further provision with respect to who is taken to conduct gaming activities,

(f) to require gaming activities with annual gross proceeds exceeding $250,000 to be audited,

(g) to prescribe fees for authorities,

(h) to specify offences for which a penalty notice may be issued.

6. As noted, the Regulation is made under the Act including sections 6(2)(e), 8(5)(a), 10, 11, 12(1)(d), 13(4), 46 and 49 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Penalties prescribed in regulation

7. Clauses 22 and 23 of the Regulation prescribe penalties for various offences. For example, subclause 22(1) provides that a person or body that conducts a gaming activity must ensure that every requirement of Division 2 or 3 of Part 4 of the Regulation that relates to the gaming activity, including the conduct of the gaming activity and the proceeds of the activity, is complied with.

8. Divisions 2 sets down the general requirements for gaming activities including as to fairness, rules, records and payment of proceeds. Division 3 sets down the general requirements relating to prizes.

9. An offence against subclause 22(2) attracts a maximum penalty of a $5,500 fine.

> **The Regulation creates several offences. For example, subclause 22(1) provides that a person or body that conducts a gaming activity must ensure that every requirement of Division 2 or 3 of Part 4 of the Regulation that relates to the gaming activity, including the conduct of the gaming activity and the proceeds of the activity, is complied with. The maximum penalty that applies in respect of any of these offences is a $5,500 fine.**
>
> **The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, given the regulatory context; the fact that it may be more administratively efficient to proceed by regulation (e.g. if changes are required to keep pace with**

developments in the industry); and the fact that the penalties are relatively modest, the Committee makes no further comment.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Vague and ill-defined powers

10. The Regulation contains some powers that may be vague and ill-defined. For example, Part 3 deals with authorities. An authority is defined by the Act to mean "an authority to conduct a permitted gaming activity granted under the regulations".[15] Subclause 16(1) of Part 3 of the Regulation provides that an applicant can nominate a term of 1, 3 or 5 years for the duration of an authority. Further, subclause 16(2) provides that the Secretary can grant or renew an authority for the nominated term or, if satisfied that it is in the public interest to do so, a shorter term than the nominated term.[16]

11. Clause 16 does not set down any criteria that the Secretary is to take into account in determining whether it is in the "public interest" to issue an authority or renewal for a shorter term. However, subclause 16(4) provides that where the Secretary grants the authority or renewal for a shorter term than the nominated term, the Secretary is to refund the difference.

12. Similarly, clause 54 provides that the Secretary may waive, reduce, postpone or refund a fee paid or payable under the Act or Regulation if satisfied that it is appropriate to do so because the applicant is suffering financial hardship or there are "special circumstances". "Special circumstances" is not defined although there is a note under the provision that an example of such circumstances is those involving a natural disaster or recovery from natural disaster.

13. As noted above, a draft of the Regulation was subject to public consultation earlier in 2020 and received feedback from 16 stakeholders which NSW Fair Trading advised would be analysed in the developing the final Regulation.[17]

The Regulation grants the Secretary some powers that may be ill-defined and that could benefit from further clarification, including clauses 16 and 54.

Clause 16, which governs the issue of authorities to conduct permitted gaming activities, allows the Secretary to grant an authority for a shorter term than that nominated by the applicant if satisfied that it is in the "public interest" to do so. However, "public interest" is not defined. Similarly, clause 54 provides that the Secretary may waive, reduce, postpone or refund a fee in "special circumstances" although that term is not defined either.

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[15] *Community Gaming Act 2018*, s4(1). An authority may be granted subject to conditions: s11(5).

[16] The Secretary is defined by section 4 of the *Community Gaming Act 2018* to mean the Commissioner for Fair Trading or if there is no such Commissioner employed, the Secretary of the Department of Finance, Services and Innovation (now the Department of Customer Service – see *Administrative Arrangements (Administrative Changes – Public Service Agencies Order) 2019* [NSW] available at NSW Legislation website: https://www.legislation.nsw.gov.au/regulations/2019-159.pdf, viewed 10 August 2020).

[17] See NSW Fair Trading website: https://www.fairtrading.nsw.gov.au/consultation-tool/community-gaming-regulations. Under s5(4) of the *Subordinate Legislation Act 1989*, where a statutory rule is made, a copy of the regulatory impact statement and all written comments and submissions received are to be forwarded to the Legislation Review Committee within 14 days after it is published. The Committee has received 16 submissions regarding the Regulation.

In relation to clause 16, the Committee notes that failing to clarify the meaning of "public interest" may impact on applicants' rights to engage in an otherwise lawful activity, or place additional regulatory burden on them by requiring them to obtain further authorisations. Similarly, the broad nature of the power in clause 54 to lower fees in "special circumstances" may raise questions about why fees are, or are not, lowered in a particular case. The Committee prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and content is clear.

The Committee acknowledges that it is important in a regulatory context for the Secretary to retain a level of discretion. This may include a flexible power to issue shorter approvals in relation to a potentially harmful activity such as gaming, or to vary fee requirements if the applicant is affected by special circumstances such as a natural disaster. However, it may be that the clauses in question would benefit from the inclusion of a non-exhaustive list of criteria to guide decision-making, thereby balancing the competing considerations of precise drafting and administrative discretion.

Nonetheless, the Regulation was subject to public consultation and it is understood that stakeholder feedback was taken into account in its development. In the circumstances, the Committee makes no further comment.

2. Protection of the Environment Operations (General) Amendment (Native Forest Biomaterial) Regulation 2020

Date tabled	LC: 25 August 2020 LA: To be determined
Disallowance date	LC: 10 November 2020 LA: To be determined
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy and Environment

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide a limited exception to the prohibition on burning native forest bio-material to generate electricity. The exception is only available in respect of premises to which an environment protection licence that authorises the carrying out of scheduled activities (within the meaning of the *Protection of the Environment Operations Act 1997*) applies and that the EPA has nominated for the purposes of the exception. The exception is also limited to native forest bio-material obtained from certain sources, including trees cleared in accordance with development consent or any other approval under the *Environmental Planning and Assessment Act 1979*, trees removed or lopped by a roads authority in accordance with the *Roads Act 1993* and land lawfully cleared as part of recovery or clean-up works in a natural disaster area.

2. This Regulation is made under the *Protection of the Environment Operations Act 1997*, including section 323 and Schedule 2 (the general regulation-making power).

ISSUES CONSIDERED BY COMMITTEE

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

Matter that should be included in the Regulation – premises exempted

3. Under clause 97 of the *Protection of the Environment Operations (General) Regulation 2009*, the occupier of any premises who causes or allows native forest bio-material to be burned in any electricity generating work in or on those premises is guilty of an offence attracting a maximum penalty of a $44,000 fine for corporations, or a $22,000 fine for individuals.

4. As above, the Regulation provides a limited exception to this prohibition. Under clause 97A(1)(b) of the Regulation, premises granted such an exemption are nominated by the Environment Protection Authority by notice published in the NSW Government Gazette.

Similarly, under clause 97A(1)(2), the Environment Protection Authority may, by notice published in the NSW Government Gazette vary or revoke such an exemption.

Under clause 97 of the *Protection of the Environment Operations (General) Regulation 2009*, the occupier of any premises who causes or allows native forest bio-material to be burned in any electricity generating work in or on those premises is guilty of an offence attracting significant maximum monetary penalties.

The Regulation creates a limited exception to this prohibition, and premises granted such an exemption are nominated by the Environment Protection Authority by notice published in the NSW Government Gazette. Similarly, the Environment Protection Authority may, by notice published in the NSW Government Gazette vary or revoke such an exemption.

The Committee considers that it may be preferable for these exemptions, variations and revocations to be effected by Regulation. That is, those premises granted such exemptions could be listed in a schedule to the Regulation and any variations or revocations carried out by amending that schedule. This would ensure parliamentary oversight over a significant matter – the grant of exemptions to engage in activity that would ordinarily attract significant penalties under environmental legislation. Under the *Interpretation Act 1987*, Regulations must be tabled in Parliament and are subject to disallowance. There is no such requirement for notices published in the Gazette.

However, as the overriding principle – the ability to grant exemptions – is included in the Regulation, and as there is a requirement for exemptions so granted to be made public, the Committee makes no further comment.

3. Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020

Date tabled	LA: 28 July 2020 LC: 4 August 2020
Disallowance date	LA: 20 October 2020 LC: 20 October 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Strata Schemes Management Regulation 2016*, in relation to the scheme for rectifying building defects in new strata schemes under Part 11 of the *Strata Schemes Management Act 2015* (as amended by the *Strata Schemes Management Amendment (Building Defects Scheme) Act 2018*).

2. This Regulation makes provision with respect to the following—

   (a) the persons qualified to be appointed as building inspectors for the purposes of that Part,

   (b) the role of certain professional associations (authorised professional associations) in determining whether persons are qualified to be appointed as building inspectors

   (c) the keeping of registers by authorised professional associations of those qualified persons,

   (d) the imposition of conditions by the Commissioner for Fair Trading (the Secretary) on the exercise of functions by building inspectors,

   (e) protecting authorised professional associations from liability when exercising certain functions,

   (f) the requirements relating to the nomination by the developer of a strata scheme of a building inspector for approval by the owners corporation for the scheme,

   (g) the documents that the developer of a strata scheme must provide to a building inspector and the Secretary when lodging a building bond,

   (h) authorising the developer for a strata scheme to appoint a builder to rectify defective building work who is not the builder responsible for the work when that builder is unavailable for certain reasons,

(i) the calculation of the contract price for building work for the purposes of determining the amount required to be secured by a building bond in relation to that work,

(j) the lapsing of a building bond,

(k) enabling the Secretary to require the developer of a strata scheme to provide information or documents, additional to those required to accompany a building bond, to substantiate the contract price used to calculate the amount of the building bond,

(l) the procedures relating to applications for, and the payment of, amounts secured by a building bond,

(m) the fee payable by the developer of a strata scheme when the Secretary arranges for the appointment of a building inspector,

(n) offences for which penalty notices may be issued,

(o) law revision amendments.

3. This Regulation is made under the *Strata Schemes Management Act 2015*, including sections 15(p), 189 (definition of contract price), 193(2), 198A(1)(b), 204(3), 206(7), 209(2), 213(3), 213B(2) (definition of professional association), 214, 250(2) and (4) and 271 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict Liability offences

4. The Regulation amends the *Strata Schemes Management Regulation 2016* (the primary Regulation) in relation to the scheme established under Part 11 of the *Strata Schemes Management Act 2015* (the Act) for rectifying building defects in new strata schemes.

5. Part 11 of the Act applies to building work carried out on a building, or on part of a building that is part of the parcel of a strata scheme, and is either:

(a) residential building work, or

(b) carried out on a building, or a part of a building, used or proposed to be used for mixed use purposes that include residential purposes.

6. The Part provides that developers must appoint a building inspector to carry out an inspection of the building work. Further, it details how this inspector is to be appointed, what must be contained in the inspector's interim and final reports, and how defects are to be addressed.

7. The Regulation creates a number of requirements for the administration of the scheme established under Part 11, which are backed by offence provisions.

8. For example, the Regulation creates requirements around 'strata inspector panels'. Schedule 1, clauses 4 and 5 of the Regulation insert a new Part 8 into the primary Regulation. Clause 45 of that Part provides that an 'authorised professional association' can establish and maintain a 'strata inspector panel' for building work of a particular kind. An 'authorised professional association' is defined to mean a number of listed associations, for instance, the Housing Industry Association Ltd, or the Master Builders Association of NSW Pty Ltd (clause 44).

9. Clause 45 further provides that an association can appoint an individual to be a member of the panel if satisfied that he or she is appropriately qualified to carry out building inspector functions in relation to that kind of building work. In addition, clause 45 provides that a member of the panel is qualified under section 193(2) of the Act as a building inspector for that kind of building work. That is, he or she can carry out the functions of a building inspector under Part 11 of the Act for that kind of building work e.g. identifying defective building work and specifying how it should be rectified.

10. Clause 45A of the new Part 8 provides that an authorised professional association must keep a register of members of any strata inspector panel that it establishes, which must contain certain particulars including:

    - Members' names, business addresses and other contact details
    - Relevant formal qualifications; and
    - Any other particular that the association considers appropriate.

11. Further, this register must be made publicly available, free of charge. Failure to comply with these requirements is an offence for which the maximum penalty is a $4,400 fine.

12. Another requirement created by the Regulation relates to conditions imposed on building inspectors by the Secretary[18]. Section 214(1)(a3) of the Act provides that Regulations can be made with respect to the conditions that the Secretary can impose on the exercise by building inspectors of their functions under Part 11.

13. Accordingly, in inserting the new Part 8 (clause 45C) into the primary Regulation, the Regulation provides that the Secretary can impose a condition on a building inspector as regards the exercise of his or her functions, by way of written notice. In doing so, the Secretary can impose the conditions on a specific building inspector, or on a class of building inspectors. If a building inspector fails to comply with any applicable conditions imposed under this clause, a maximum fine of $22,000 can be issued in the case of a corporation, or $11,000 in any other case.

The Regulation amends the *Strata Schemes Management Regulation 2016* (the primary Regulation) in relation to the scheme established under Part 11 of the *Strata Schemes Management Act 2015* (the Act) for rectifying building defects in new strata schemes. Part 11 of the Act applies to building work carried out on a building, or on part of a building that is part of the parcel of a strata scheme, and is either residential building work or carried out on a building, or a part of a

[18] The Secretary is defined in section 4 of the *Strata Schemes Management Act 2015* to mean the Commissioner for Fair Trading, Department of Finance, Services and Innovation, or if there is no person employed as Commissioner for Fair Trading – the Secretary of the Department of Finance, Services and Innovation.

building, used or proposed to be used for mixed use purposes that include residential purposes.

The Part provides that developers must appoint a building inspector to carry out an inspection of the building work. Further, it details how this inspector is to be appointed, what must be contained in the inspector's interim and final reports, and how defects are to be addressed.

The Regulation creates a number of requirements for the administration of the scheme established under Part 11, which are backed by offence provisions. For example, the Regulation provides that the Secretary can impose a condition on a building inspector as regards the exercise of his or her functions, by way of written notice. If a building inspector fails to comply with any applicable conditions so imposed, a maximum fine of $22,000 can be issued in the case of a corporation, or $11,000 in any other case.

The offences so created by the Regulation are strict liability ones. The Committee generally comments on strict liability offences as they depart from the common law principle that mens rea, or the mental element, is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalties for the offences are monetary, not custodial. In the circumstances, the Committee makes no further comment.

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

Matters that should be included in primary legislation

14. As above, the Regulation contains offence provisions, some of them with maximum penalties attached as high as $22,000 in the case of a corporation, or $11,000 in any other case.

As above, the Regulation contains offence provisions, some of them with maximum penalties attached as high as $22,000 in the case of a corporation, or $11,000 in any other case.

The Committee prefers offences which set significant penalties to be included in primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight. The Committee refers this matter to Parliament for its consideration.

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.