PARLIAMENT OF NEW SOUTH WALES

# Legislation Review Committee

## LEGISLATION REVIEW DIGEST

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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. LOCAL GOVERNMENT AMENDMENT (PECUNIARY INTERESTS DISCLOSURE) BILL 2020*

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

*Right to privacy*

The Bill requires councillors, delegates and designated persons to publish their pecuniary interest disclosures – if required under a relevant code of conduct – on Council's website. A person is a delegate if a function of council has been delegated to them under section 377 of the *Local Government Act 1993*, while a designated person may include a general manager of council, a person occupying a senior staff position in council, or a person of a class prescribed by the regulations.

The Committee notes that requiring the pecuniary interest disclosures of certain individuals, particularly council staff or other persons prescribed by the regulations, may impact on their right to privacy. However, publication is only necessary if the relevant code of conduct requires that individual to make a pecuniary interest disclosure. That said, the Model Code of Conduct published by the Office of Local Government in 2020 may also require the disclosure of certain interests of a wide range of relatives, including siblings, grandparents, nieces and nephews, provided that the relevant person is aware of the interest and the interest is not remote or insignificant.

However, the right to privacy must also be balanced against the public interest in ensuring that the pecuniary interests of decision-makers – or those who may make recommendations to councillors about planning decisions, such as senior council staff – are sufficiently transparent. This may assist in promoting information access, preventing conflicts of interest and maintaining public confidence in local planning processes. The second reading speech also notes that the Bill has been introduced in circumstances where some Councils do not appear to comply with the guidelines issued by the Information Commissioner under the *Government Information (Public Access) Act 2009*, which require publication of disclosures on the Council website. In such circumstances, the Committee makes no further comment.

2. LOCAL LAND SERVICES AMENDMENT (MISCELLANEOUS) BILL 2020

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

*Community rights to be consulted about development decisions – removal of requirements for development consent*

The Bill seeks to remove several requirements for land owners to obtain development consent under Parts 4 and 5 of the *Environmental Planning and Assessment Act 1979* (the EPA Act).

In doing so, the Committee notes that the Bill would remove local councils' ability to assess development applications, engage with relevant neighbour and community stakeholders, and make recommendations regarding the proposed development changes. It may thereby impact

on the rights of these stakeholders to participate in such processes and be consulted about issues that may affect them.

However, the Committee acknowledges that these changes are to streamline the approval process of private and native forestry clearing for landholders, who are also required to obtain separate approval from Local Land Services. In the second reading speech, the Minister also noted that private native forestry is a low-impact activity occurring rarely on agricultural land and is not a permanent land use change. Under these circumstances, the Committee makes no further comment.

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

*Commencement by proclamation*

Clause 2 of the Bill provides that the proposed Act is to commence by proclamation. The Committee generally prefers legislation affecting rights and obligations to commence on a fixed date or on assent to give certainty to those affected.

In this case, the Committee acknowledges that a flexible start date may facilitate the various administrative arrangements that will be required to implement the amendments to several Acts and legislative instruments proposed by the Bill. These include the *Environmental Planning Assessment Act 1979,* the *Fisheries Management Act 1994,* the *Forestry Act 2012,* the *State Environmental Planning Policy (Koala habitat Protection) 2019* and the *State Environmental Planning Policy No 44 – Koala Habitat Protection*. However, as these amendments will change the obligations of individual landowners when making applications for private native forestry land clearing, a fixed start date may be preferable to provide certainty to those affected. The Committee refers this provision to the Parliament to consider whether it is reasonable in the circumstances.

3. MARINE POLLUTION AMENDMENT (REVIEW) BILL 2020

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

*Strict liability offence: defective or modified sewerage systems*

Schedule 1, item 25 of the Bill seeks to amend the *Marine Pollution Act 2012* (the Act) to insert a new section 55A. This new section would create an offence for ship masters and owners who operate or own (respectively) a prescribed vessel with a sewerage system, or part of a sewerage system, which is defective or has been altered or modified in a way that enables the discharge of sewage in contravention of Part 6 of the Act. The maximum penalty for a large ship would be $55,000 in the case of an individual or $275,000 for a corporation; with maximum penalties for ships prescribed by the regulations to be set down in the regulations.

An existing offence under section 55 of the Act imposes a penalty larger than the amounts outlined above for actually discharging sewage into State waters. The new offence is designed to go further, addressing faulty systems before any illegal discharge of sewage has taken place.

The Committee identifies that the offence created by the Bill is one of strict liability. 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. That is, the shipmaster or owner need not know that a sewage system is defective to be an offender and be penalised.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the offence provision is designed to proactively prevent illegal discharge of sewage given the associated risk to human health and the marine environment. Further, the maximum penalties for the offences would appear to be monetary, not custodial. Notwithstanding this, the maximum penalties to be set down in the regulations for certain ships remain unknown. Owing to this factor, the Committee refers the provisions to Parliament for consideration.

*Strict liability offence: non-compliance with marine pollution removal notice (derelict vessels)*

Under section 201(1) of the Act, the Minister may, if the Minister is of the opinion that the discharge of marine pollutants from (or within) any ship or place on land in which any activity is carried on is causing or is likely to cause a marine pollution incident, by notice in writing, direct the master of the ship, responsible person or person carrying on the activity, to cease carrying on the activity, or any specified aspect of it, for such period as is specified in the notice. Failure to do so without a reasonable excuse constitutes an offence, the maximum penalties for which are (a) for a corporation—$1,000,000 and, for a continuing offence, a further penalty of $120,000 for each day the offence continues, or (b) for an individual—$250,000 and, for a continuing offence, a further penalty of $60,000 for each day the offence continues.

Schedule 1.1, item 84 of the Bill seeks to insert a new section 202A into the Act which creates a further offence. If the Minister is of the opinion that a vessel has been abandoned, is out-of-commission or derelict, and marine pollutants are, or have been, carried on the vessel, the Minister may, by written notice given to the owner of the vessel, direct the owner to do a wide variety of things. Those actions include "any action" specified in the notice, "within the period specified in the notice". The Committee notes that this creates a positive obligation for the recipient to do anything the Minister so directs in the notice, as opposed to ceasing all or any part of the polluting behaviour under existing offence provisions.

Further, the Committee identifies that there are no restrictions on the terms of any marine pollution notice, including minimum timeframes for an owner to act on the notice. For example, the Minister may require the removal/remediation of an abandoned vessel, that once had marine pollutants on board, within one hour. Failure to do so could result in a maximum penalty of $1,000,000 against a corporation.

The Committee refers these matters to Parliament to consider whether the strict liability offence in Schedule 1.1, item 84 of the Bill is reasonable in the circumstances, having particular regard to whether any restrictions (such as a minimum reasonable timeframe) on a marine pollution removal notice should be considered.

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

*Removal of NSW Civil and Administrative Tribunal avenue of review*

Schedule 2.3, item 20 of the Bill seeks to amend the *Marine Pollution Regulation 2014* by removing the ability for masters and owners of ships to apply to the NSW Civil and Administrative Tribunal (NCAT) for a review of certain decisions made by the Minister. One of those decisions is a Minister's decision to refuse to issue a NSW sewage pollution prevention certificate. This certificate is required for any "prescribed ship" (being any large vessels on overseas voyages, any vessels required to carry such a certificate under the laws of another State or the Northern Territory, or any ship prescribed by the Regulations) to commence a voyage. Failure to obtain such a certificate before embarking is a strict liability offence committed by

both the shipmaster and owner of the vessel. Penalties include a maximum custodial sentence of up to four years and/or financial penalties. Therefore, obtaining a sewage pollution prevention certificate is critical for shipmasters and owners.

The amendments above would mean that the Minister could refuse to provide a sewage pollution prevention certificate to a prescribed ship preventing it from beginning its voyage – which may have significant economic consequences for those affected – and such a decision would no longer be reviewable by NCAT. In the circumstances, the Committee refers the matter to Parliament for its consideration as to whether the Bill's removal of NCAT review provisions in the Regulations is appropriate in the circumstances.

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

*Commencement by proclamation*

Clause 2 of the Bill provides that schedule 1.1 items 6, 65-69 and 92; and schedule 2.5 item 2 are to commence on a day or days to be appointed by proclamation. It thereby provides the Executive with unilateral authority to commence these provisions. The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. The provisions in question deal with the requirements of vessel owners to obtain sewage pollution prevention certificates before voyages, and the classification of waters affected by the Act.

The Committee acknowledges that were it not for the Bill's provisions regarding commencement by proclamation, the provisions in question would commence on assent, along with the rest of the Bill's provisions. This may not allow enough time for operational arrangements to be made to successfully implement the provisions in question. For example, given that certificates may need to be re-issued and obtained by numerous vessel owners under Schedules 1.1, items 65-69, the delayed start of these particular requirements may allow Transport for NSW and the shipping industry to prepare for the commencement of the provisions without delaying passage of the Bill more generally. Further, the delayed implementation of Schedule 2.5, item 2 may give the Minister and port authorities more time to determine water boundaries and where the Act applies. A more flexible start date may assist in this regard. In the circumstances, the Committee makes no further comment.

4. ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2020

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

*Increased statutes of limitation*

The Bill contains amendments to increase the statute of limitations for proceedings for certain offences. For example, schedule 1, item 29 of the Bill seeks to insert a new section 202 into the *Road Transport Act 2013* to extend from six months to two years the period within which proceedings may be brought for certain offences under that Act.

In so extending the limitation periods the Bill may expose a person to a penalty for conduct for which a prosecution would not otherwise be possible. However, the Committee notes that Transport for NSW has encountered difficulties in completing investigations for serious and complex matters within a six-month time frame, and that the amendments are intended to provide adequate time to conduct investigations. Further, it is understood that the increased statute of limitations aligns with provisions contained in legislation similar to the *Road Transport*

*Act 2013*, and the Committee notes that a time period of two years is still quite modest. In the circumstances, the Committee makes no further comment.

*Right to privacy – release of photographs*

Schedule 1, item 14 of the Bill seeks to amend section 57 of the *Road Transport Act 2013* to authorise Transport for NSW to release to other government agencies certain photographs stored by Transport for NSW: with the consent of the person whose likeness is shown in the photograph or on the database; and to NSW Fair Trading for the purposes of issuing licences under the *Tattoo Parlours Act 2012*.

In allowing Transport for NSW to release the photographs to NSW Fair Trading for the purposes of issuing tattoo parlour licences, and without requiring the relevant person's consent, the provisions in question may impact on privacy rights. However, as this exception is limited to a specific purpose, is transparently stated in primary legislation, and may streamline administrative requirements for people applying for tattoo parlour licences, the Committee considers that it is reasonable in the circumstances and makes no further comment.

*Increased penalties*

Schedule 1, item 25 of the Bill seeks to amend sections 188(1) and 189(4) of the *Road Transport Act 2013* to increase the maximum penalty from an $11,000 fine to a $22,000 fine for a corporation that commits an offence relating to failing to correctly nominate the person in charge of the vehicle at the time of an offence.

The Committee generally comments on significant increases in penalties as they have the potential to result in excessive punishment. However, the Committee understands that there are cases where companies do not nominate the driver responsible for camera-detected offences committed in a company-registered vehicle meaning that drivers who have committed these offences are not identified and cannot be held accountable. By increasing maximum penalties for such company conduct the Bill seeks to signal the importance of holding drivers accountable for camera-detected offences that can have serious road safety implications. In the circumstances, the Committee makes no further comment.

*Increased police powers to issue immediate suspension notices*

Section 224 of the *Road Transport Act 2013* provides that a police officer may give a driver an immediate licence suspension notice in certain circumstances. Schedule 1, item 31 of the Bill seeks to amend section 224 to expand the circumstances under which such an immediate suspension notice can be issued. In particular, it would allow a police officer to issue a licence suspension notice immediately to a foreign driver licence holder if it appears to the police officer that the holder has exceeded the speed limit by more than 30km per hour but less than 45km per hour.

The Bill thereby expands police powers to immediately suspend a driver licence. This effectively subjects the affected driver to a penalty without the benefit of him or her being able to present his or her case to an independent third party (e.g. a magistrate) who could decide whether such a penalty is warranted. While police decisions to give a person an immediate licence suspension notice can be appealed to the Local Court under Part 7.8 of the *Road Transport Act 2013*, persons issued with a notice would be stopped from driving in the intervening period between the police decision and the date when the matter is listed for hearing at the Court.

However, the Committee understands that the amendments contained in schedule 1, item 31 are intended to respond to a significant number of casualty crashes in NSW in the last five years involving overseas licence holders. Having regard to this, and the fact that a person issued with an immediate licence suspension notice does have the abovementioned appeal rights to the Local Court, the Committee considers that the amendments in question may be reasonable in the circumstances and makes no further comment.

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

*Matters that should be included in primary legislation*

Section 23 of the *Road Transport Act 2013* allows the Governor to make regulations and rules, not inconsistent with the Act, for or with respect to any matter that by the Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to the Act. Further, schedule 1 of the Act sets down examples of these statutory rule-making powers.

Schedule 1, item 37 of the Bill seeks to amend Schedule 1 to the Act to enable these statutory rules to provide for the cancellation or suspension of the registration of a registrable vehicle "on the grounds of offensive or discriminatory material displayed on the vehicle, including the circumstances in which material is considered to be offensive or discriminatory".

The Bill thereby leaves it to the statutory rules to define what is "offensive" and "discriminatory" for the purposes of the provisions. The Committee would prefer for significant matters such as these – i.e. definitions relating to whether a person is to have his or her vehicle registration cancelled or suspended – to be set down in primary rather than subordinate legislation. The Committee notes that the provisions in question are also significant because they may have implications for affected persons' freedom of speech – that is, the right to express information, ideas or opinions free of restrictions.

If the definitions of what is to be considered "offensive" and "discriminatory" were set down in primary legislation this would give Parliament greater opportunity to oversight whether an appropriate balance is struck between competing considerations. It would be appropriate however for regulations to be made to supplement or expand on the definitions of "offensive" or "discriminatory" to take account of changing circumstances. The Committee refers the matter to Parliament for consideration.

5. STRONGER COMMUNITIES LEGISLATION AMENDMENT (MISCELLANEOUS) BILL 2020

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

*Right to a fair trial – victim impact statements*

Schedule 1.3 and schedule 1.6, items 7 to 9 of the Bill seek to amend the *Childrens (Criminal Proceedings) Act 1987* and the *Crimes (Sentencing Procedure) Act 1999* to provide that a victim impact statement may be tendered in, and considered by, the Children's Court in relation to certain offences.

In particular, the Committee notes that the amendments would expand the Children's Court victim impact statement regime to include strictly indictable offences. The Committee notes further that victim impact statements can be highly emotionally charged and that extending the circumstances under which they can considered in matters before the Children's Court may have the potential to be prejudicial to juvenile offenders, affecting their right to a fair trial.

However, the Committee also identifies that victim impact statements provide a victim with the opportunity to explain to the court the impact and harm that an offence has had on them. Further, the persons who would be required to consider the victim impact statements under the amendments are trained judicial officers of the Children's Court with expertise in handing down appropriate sentences for offending. Owing to this safeguard, and the competing considerations, the Committee makes no further comment.

*Right to a fair trial – tendency or coincidence offences to be heard together*

Schedule 1.8, item 3 of the Bill seeks to amend the *Criminal Procedure Act 1986* to insert a new section 29A that would require proceedings for offences alleged to have been committed by the same person to be heard together if they are charged in the same indictment or listed together and the prosecution intends to lead tendency evidence or coincidence evidence that relates to the offences.

This amendment complements the *Evidence Amendment (Tendency and Coincidence) Act 2020* which commenced on 1 July 2020. This amendment Act responded to the recommendations of the Royal Commission into Institutional Response to Child Sexual Abuse (the Royal Commission) and the Committee commented on the amendments contained therein in its Digest No.11/57.

The Committee noted in Digest No.11/57 that the amendments made a number of changes to the *Evidence Act 1995* concerning the admissibility of tendency and coincidence evidence; and that these changes may impact on the defendant's right to a fair trial, including the right to be presumed innocent unless guilt is proved beyond reasonable doubt. The Committee identified that the changes were likely to allow evidence to be admitted that would have been excluded were it not for the changes, with the possibility that some such evidence could be unfairly prejudicial to a defendant in a given case.

In requiring proceedings for offences alleged to have been committed by the same person to be heard together if they are charged in the same indictment or listed together and the prosecution intends to lead tendency evidence or coincidence evidence that relates to the offences; the current Bill may add to these concerns of unfair prejudice to a defendant in a particular case.

However, the Committee notes that the new section 29A would be subject to section 21(2) of the *Criminal Procedure Act 1986* to ensure that courts retain discretion to ensure that where there is a chance that an accused person will not receive a fair trial, counts on an indictment can still be separated. The Committee refers the proposed new section 29A to Parliament to consider whether the defendant's right to a fair trial is adequately protected in the circumstances.

*Right to a fair trial – standard of proof*

Schedule 1.8, item 8 of the Bill also relates to the abovementioned tendency and coincidence reforms. It seeks to amend the *Criminal Procedure Act 1986* to insert a new section 161A. Subsection 161A(1) would prevent a jury being directed that evidence adduced as tendency evidence or coincidence evidence must be proved beyond reasonable doubt. In doing so, the Bill may have some impact on the defendant's right to a fair trial and to be presumed innocent unless guilt is proved beyond reasonable doubt.

However, the new section 161A contains exceptions so that subsection 161A(1) would not apply if the court is satisfied that there is a significant possibility that a jury will rely on an act or omission as being essential to its reasoning in reaching a finding of guilt; and evidence of the act or omission has been adduced as tendency evidence or coincidence evidence.

Further, if evidence is adduced as both tendency evidence or coincidence evidence and as proof of an element or essential fact of a charge before the jury, the jury may be directed that the evidence needs to be proved beyond reasonable doubt, but only to the extent that it is adduced as proof of the element or essential fact.

In addition, the new subsection 161A implements a recommendation of the Royal Commission into Institutional Response to Child Sexual Abuse that tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt.

The Committee refers the new section 161A to Parliament to consider whether the exceptions to subsection 161A(1) adequately protect a defendant's right to a fair trial and to be presumed innocent beyond a reasonable doubt.

*Right to a fair trial – prescribed sexual offences*

Schedule 1.8, item 2 of the Bill seeks to amend section 3 of the *Criminal Procedure Act 1986* to provide that offences under the *Crimes Act 1900* relating to recording or distributing, or threatening to record or distribute, intimate images without consent are "prescribed sexual offences".

Special arrangements for giving evidence are extended to victims of "prescribed sexual offences". The amendments would mean that victims of the abovementioned offences would have the benefit of these special arrangements for the first time.

By expanding the range of offences for which victims can access special arrangements for giving evidence, the Bill may have some impact on the right to a fair trial. For example, the special arrangements include the option to give evidence by alternative arrangements such as CCTV. Such arrangements may have some impact on the ability of the Court or juries to assess witness demeanour and weigh their evidence.

However, such considerations must be balanced against the need to provide protections to victims who are giving evidence about sexual offences, and to appropriately acknowledge and manage the associated trauma. In the case of evidence given by CCTV, a Court is able to both see and hear the relevant person. In the circumstances, the Committee makes no further comment.

*Right to a fair trial – shortened period to give notice of alibi*

Schedule 1.8, item 7 of the Bill seeks to amend section 150 of the *Criminal Procedure Act 1986* to shorten by 14 days the period in which an accused person must give notice of particulars of an alibi to the Director of Public Prosecutions and file a copy of the notice with the court before being able to adduce evidence in support of the alibi without leave of the court.

In so shortening the timeframes for a defendant to prepare this element of his or her case, the amendments may have some impact on the right to a fair trial. However, the Committee acknowledges the amendments are intended to assist with the case management of the large volume of matters in the District Court. Further, if the timeframes were not complied with it appears that evidence in support of the alibi could still be adduced with the leave of the Court. Given the competing considerations, the Committee refers this matter to Parliament to consider whether the amendment is reasonable in the circumstances.

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

Section 22C of the *Evidence (Audio and Audio Visual Links) Act 1998* makes special provision for the COVID-19 pandemic, providing for an accused person to appear by way of audio-visual link in certain proceedings including bail proceedings where the court directs. However, the court is only to make such a direction if it is interests of justice having regard to certain matters including the public health risk posed by the COVID-19 pandemic.

Schedule 1.9 of the Bill seeks to amend section 22C to provide that an appearance of an accused person in any proceedings under section 22C can take place by way of audio visual link from a place within or outside NSW, including a place outside Australia, if the court directs or the parties to the proceedings consent.

The Bill thereby arguably expands the circumstances under which the court can direct an accused person to appear by way of audio visual link (on another view it merely clarifies that section 22C applies to those giving evidence outside NSW). In so doing it may further remove rights of an accused person to appear in person and interact fully with his or her legal representatives, impacting on the right to a fair trial or fair bail hearing.

However, various safeguards apply including that if an audio-visual link is used, the court must be satisfied that parties have reasonable opportunity for private communication with their legal representatives. Further, the provisions are an extraordinary measure to respond to the public health risk created by COVID-19, ensuring that an accused person is not unnecessarily required to cross borders, particularly where movement is restricted by a public health order. They are also time limited with section 22C to last no longer than 12 months after its commencement.

In the circumstances, the Committee considers the amendments contained in schedule 1.9 of the Bill are reasonable and makes no further comment.

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

*Wide and ill-defined administrative power – statutory time limits*

The *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Bill 2020* which passed Parliament on 13 May 2020 and was assented to on 14 May 2020 amended the *Interpretation Act 1987* to insert Part 12 "Special provisions for COVID-19 pandemic". This Part contains special provisions relating to statutory time periods, and altered arrangements for physical attendance and meetings, arising from the COVID-19 pandemic.

The Committee discussed these amendments in its Digest No. 15/57. In particular, it noted that the new Part 12 provides powers for an authorised person to modify statutory time periods if the person is satisfied that the modification, waiver or agreement is reasonable for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. Similarly, the new Part 12 inserts a regulation-making power into the *Interpretation Act* to allow modification of statutory time periods. Again, the power can only be used to respond to the public health emergency caused by COVID-19.

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

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

In coming to this conclusion, the Committee noted safeguards contained in Part 12 including that the powers can only be used for the purposes of responding to the public health emergency created by COVID-19 and that accordingly, the provisions are subject to a sunset clause and would be automatically repealed no later than 31 December 2020. Further, regulations could not be made under the provisions to shorten statutory time periods or extend them beyond 31 December 2020.

However, the current Bill seeks to amend Part 12 of the *Interpretation Act 1987* so that Part 12 and the special arrangements contained therein are extended until 26 March 2020 instead of 31 December 2020.

Whilst noting this time extension, and the fact that the provisions in question which raised the concerns will now apply for a longer period, the Committee again considers the arrangements are reasonable in the extraordinary circumstances created by the continuing COVID-19 pandemic, and makes no further comment.

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

*Commencement by proclamation*

Subclause 2(3) of the Bill provides that the amendments contained in schedule 1.8, items 9 to 13 of the Bill are to commence on a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected parties. However, as the amendments in question relate to case management procedures in the District Court, a flexible start date may be desirable to allow time to implement any necessary administrative changes. In the circumstances, the Committee makes no further comment.

*Matters that should be included in primary legislation*

Schedule 2.2, item 1 of the Bill seeks to amend section 85 of the *Children's Guardian Act 2019* to provide for information about certain persons to be kept on an authorised carers register including authorised carers and persons who reside on the same property as an applicant for authorisation as an authorised carer for 3 weeks or more.

Further, schedule 2.2, items 3 and 4 of the Bill seek to amend section 85 of the *Children's Guardian Act 2019* to enable the Children's Guardian and a person prescribed by the regulations to collect, use or disclose information for the purposes of keeping a register.

Given that collecting, using or disclosing information for the purposes of keeping a register may impact on the privacy rights of a person whose information is kept on such a register, the Committee considers that the persons who have authority to do so under section 85, should be clearly set down in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight over the arrangements made. The Committee refers the matter to Parliament for consideration.

PART TWO – REGULATIONS

1. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (X-RAY SCANNING) REGULATION 2020

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

*Right to privacy*

The Regulation amends the *Crimes (Administration of Sentences) Regulation 2014* (the primary Regulation) regarding the control of visits to correctional centres. The Regulation inserts clause 93(2A) which provides that an authorised officer can require a visitor to submit to scanning by means of an X-ray scanning device. The Regulation also amends subclause 93(7) of the primary Regulation to provide that an authorised officer may refuse to allow a person to visit a correctional centre if the person fails to comply with a requirement to submit to x-ray scanning under subclause 93(2A).

By including these new measures, the Regulation expands the powers of correctional officers and may impact on a person's right to privacy. However, the Committee notes that the Regulation is made under the *Crimes (Administration of Sentences) Act 1999*, the objects of which are to ensure that offenders held in custody are supervised in a safe, secure and humane manner, to provide for their rehabilitation, and to ensure the safety of the persons who have custody of such offenders (section 2A). The power to require a visitor to submit to x-ray scanning may assist authorised officers to identify and manage possible persons or items that may pose a threat to safety and security within a correctional centre. The Committee considers this reasonable in the circumstances and makes no further comment.

2. PUBLIC HEALTH AMENDMENT (COVID-19 BORDER CONTROL – TRANSITING ACT RESIDENTS) REGULATION 2020

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

*Penalty notice offences – right to a fair trial*

On 8 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* (the Order) came into force under which the Minister for Health and Medical Research directed that an "affected person" must not enter NSW unless the person is authorised to do so. The Order defined an "affected person" to be a person who has been in Victoria within the previous 14 days.

Further, on 13 August 2020, the *Public Health (COVID-19 Border Control) Amendment (Transiting ACT Residents) Order* (the Amendment Order) commenced, which amended the Order by inserting clauses 8B and 8C into it. Clause 8B provided that subclause 5(1) of the Order directing that an "affected person" must not enter NSW unless the person is authorised to enter NSW did not apply to an "exempt person" transiting through NSW to the ACT, who complied with certain conditions. An "exempt person" meant an ACT resident who was the subject of an Entry Authorisation Certificate, and was in Victoria immediately before the commencement of the clause.

Clause 8C provided that a person who travelled through NSW under clause 8B must not enter NSW until a period of at least 14 days had elapsed since the person entered the ACT under that clause.

The Regulation amends the *Public Health Regulation 2012* to allow a $5000 penalty notice to be issued for offending against section 10 of the *Public Health Act 2010* by contravening clause 8B

or 8C of the Order, that is, by contravening the conditions set down in clauses 8B or 8C when transiting through NSW to the ACT in accordance with the exemption set down in clause 8B.

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

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

*Freedom of movement*

As above, the Regulation allows for a $5000 penalty notice to be issued for an offence against section 10 of the Public Health Act 2010 involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.

Such conditions were set out in clauses 8B and 8C of the Order and included transiting through NSW to the ACT by the route designated by the Commissioner of Police, directly to the ACT without stopping, except in narrow circumstances (e.g. for a fatigue or hygiene break or in an emergency); only travelling between the hours of 9am and 3pm; and not re-entering NSW until a period of at least 14 days had elapsed since the person entered the ACT.

By providing that a person can receive a significant on-the-spot penalty for travelling from Victoria, through NSW and into the ACT without complying with strict conditions, the Regulation is part of a regime that restricts freedom of movement. This right is contained in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. This Article protects the right to move freely in a country for those who are lawfully within that country; the right to leave any country; and the right to enter a country of which you are a citizen.

However, Article 12 also recognises that derogation from this right may be warranted in certain circumstances, including to protect public health. The Committee considers that as the Regulation is part of a regime to respond to COVID-19 and stop its spread following an increase in community transmission in Victoria, it fits within the public health exemption, and that the limits placed on freedom of movement are reasonable in the circumstances.

This is particularly so as the associated Order was time limited to automatically expire 90 days after it commenced, and it was repealed on 2 October 2020 (the provisions set down in clauses 8B and 8C being repealed before that). While a similar Order, the Public Health (COVID-19 Border Control) Order (No 2) 2020 commenced on the same day (2 October), in making this second Order the Minister again had to outline the public health grounds for making such an Order (set out in clause 4), and it too will automatically expire 90 days after its commencement unless earlier revoked (as per subsection 7(5) of the Act).

In short, in the extraordinary circumstances created by COVID-19, and given the abovementioned time limits and other safeguards, the Committee considers that the Regulation, and the regime of which it is part, place reasonable limits on freedom of movement, and 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 allows for a $5000 penalty notice to be issued for an offence against section 10 of the Public Health Act 2010 involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.

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

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

# Part One – Bills

# 1. Local Government Amendment (Pecuniary Interests Disclosure) Bill 2020*

| | |
|---|---|
| Date introduced | 15 October 2020 |
| House introduced | Legislative Assembly |
| Member responsible | Mr Greg Warren MP |
| | *Private Member's Bill |

## PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Local Government Act 1993* to require returns disclosing interests lodged by certain persons with the general manager of a council under a code of conduct to be published on the council's website.

## BACKGROUND

2. In the second reading speech, Mr Greg Warren explained the context to the Bill:

> Ultimately, clause 4.21 of the Model Code of Conduct …and the Local Government (General) Regulation 2005 requires councillors and designated persons to make and lodge with the general manager a disclosure of interests return …
>
> That is what is in place at the moment but the reality is there are some unclear regulations in place whereby councillors or other required persons can do their declaration but they do not have to disclose it in a manner that is easily accessible for local communities. Ultimately there are provisions in place in some councils where they have to make an appointment to go and meet with the councillor or the director to view the disclosure. That is not consistent with community expectation and it is not consistent with what I feel and the New South Wales Opposition feels is consistent with the integrity that we require in local government.
>
> Of course clause 4.27 of the code says that information contained in returns made and lodged under clause 4.21 is to be made publicly available in accordance with the requirements of the Government Information (Public Access) Act 2009, otherwise known as the GIPA Act, and the Government Information (Public Access) Regulation 2009, which is known as the GIPA Regulation, and any guidelines issued by the Information Commissioner.

3. Mr Warren further noted that the Information Commissioner had issued a guideline requiring Councils to publish pecuniary interest disclosures on their website unless it would impose unreasonable additional costs on Council or there was an overriding public interest against disclosure.

4. It is also noted that the Information and Privacy Commission recently published a report into the information access practices of Clarence Valley Council. The audit was initiated

after the Council resolved in November 2019 that it would not publish the pecuniary interest disclosures of Councillors or designated persons on its website.[1]

## ISSUES CONSIDERED BY THE COMMITTEE

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

*Right to privacy*

5. Clause 3 of the Bill amends the *Local Government Act 1993* by inserting new section 440AAC. According to the explanatory note, the proposed section requires councillors, delegates and designated persons who have lodged with the general manager of a council a return disclosing interests required under a code of conduct to publish the return on the council's website. The Bill defines "delegate" as a person to whom a function of council has been delegated under section 377 of the LG Act. A "designated person" means a general manager of the council, a person occupying a senior staff position in the council, or a person of a class prescribed by the regulations.

6. In 2020, the Office of Local Government published a Model Code of Conduct for Councils in NSW.[2] The Model Code of Conduct requires councillors and designated persons to disclose their own interests and those of their spouse or de facto and relatives. "Relatives" is defined to include siblings, children, but also nieces, nephews, and their partners. However, such interests only need to be disclosed if the relevant person is aware of the interests, and the interest is "so remote or insignificant that it could not reasonably be regarded as likely to influence any decision you might make in relation to a matter…"[3]

**The Bill requires councillors, delegates and designated persons to publish their pecuniary interest disclosures – if required under a relevant code of conduct – on Council's website. A person is a delegate if a function of council has been delegated to them under section 377 of the *Local Government Act 1993*, while a designated person may include a general manager of council, a person occupying a senior staff position in council, or a person of a class prescribed by the regulations.**

**The Committee notes that requiring the pecuniary interest disclosures of certain individuals, particularly council staff or other persons prescribed by the regulations, may impact on their right to privacy. However, publication is only necessary if the relevant code of conduct requires that individual to make a pecuniary interest disclosure. That said, the Model Code of Conduct published by the Office of Local Government in 2020 may also require the disclosure of certain interests of a wide range of relatives, including siblings, grandparents, nieces and nephews, provided that the relevant person is aware of the interest and the interest is not remote or insignificant.**

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[1] Information and Privacy Commission, September 2020, *Clarence Valley Council – Compliance with the Open Access requirements of the GIPA Act*, https://www.ipc.nsw.gov.au/sites/default/files/2020-09/Clarence_Valley_Council_Compliance_Report_September_2020.pdf, viewed 15 October 2020, p.5.

[2] Office of Local Government, undated, *Model Code of Conduct for Councils in NSW 2020*, https://www.olg.nsw.gov.au/wp-content/uploads/2020/08/Model-Code-of-Conduct-2020.pdf, viewed 15 October 2020, part 4.

[3] Ibid, p.15.

**However, the right to privacy must also be balanced against the public interest in ensuring that the pecuniary interests of decision-makers – or those who may make recommendations to councillors about planning decisions, such as senior council staff – are sufficiently transparent. This may assist in promoting information access, preventing conflicts of interest and maintaining public confidence in local planning processes. The second reading speech also notes that the Bill has been introduced in circumstances where some Councils do not appear to comply with the guidelines issued by the Information Commissioner under the *Government Information (Public Access) Act 2009*, which require publication of disclosures on the Council website. In such circumstances, the Committee makes no further comment.**

# 2. Local Land Services Amendment (Miscellaneous) Bill 2020

| | |
|---|---|
| Date introduced | 14 October 2020 |
| House introduced | Legislative Assembly |
| Minister responsible | The Hon Adam Marshall MP |
| Portfolio | Agriculture and Western NSW |

## PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows—

(a) to remove the application of *State Environmental Planning Policy (Koala Habitat Protection) 2019* to land to which Parts 5A and 5B of the *Local Land Services Act 2013* (the Act) apply, while preserving the application of *State Environmental Planning Policy No 44—Koala Habitat Protection* to certain core koala habitats in the local government areas of Ballina, Coffs Harbour, Kempsey, Lismore and Port Stephens,

(b) to remove requirements imposed by other legislation, including the requirement for development consent under the *Environmental Planning and Assessment Act 1979*, in relation to carrying out private native forestry that is authorised by a private native forestry plan under Part 5B of the Act,

(c) to extend the maximum duration of private native forestry plans made under Part 5B of the Act to 30 years,

(d) to require the Minister for Agriculture and Western New South Wales to consult with the Minister administering Part 7A of the *Fisheries Management Act 1994* and the Minister administering the *Forestry Act 2012* before making a private native forestry code of practice,

(e) to allow native vegetation clearing in certain circumstances on land that is used for agricultural purposes without the need for authorisation under other legislation.

## BACKGROUND

2. In the second reading speech, the Hon. Adam Marshall MP provided the following background about the purpose of the Bill regarding the operation of the koala habitat protection State Environmental Planning Policy (SEPP):

> This bill, which would be better characterised as the Local Land Services decoupling bill, supports and strengthens the Local Land Services Act while ensuring that the State Environmental Planning Policy (Koala Habitat Protection) applies exactly where it is most needed. The Local Land Services Act, made for farmers after years of consultation with farmers, is the pre-eminent Act on rural regulated land. It is calibrated for farmers and for the active management of land for agriculture in this State. That must be defended—robustly, if necessary. This bill stops the

unintended impacts of the koala habitat protection State Environmental Planning Policy [SEPP] on farmers taking effect.

3. The Minister continued:

> But it does not stop there. It also stops local councils from having the ability to block a landholder's right to conduct legal and authorised private and native forestry on their property. The bill also resolves a longstanding issue whereby farmers in environmental zones found themselves faced with abundant uncertainty over how they could continue farming once the environmental zone was in place. It does this by removing them from the planning system and putting them back in the Local Land Services Act tent. Today the amendments I am introducing to the Local Land Services Act, on the one hand, ensure farmers can continue to farm happily alongside koalas and, on the other hand, ensure any development applications consider koala habitat when, and if, that development involves the removal of native vegetation.

4. The Minister stated that the Bill proposes six areas of reform to the *Local Land Services Act 2013* and outlined the following particular aspects of the Bill noting that it:

- Amends section 60P and other associated sections of the *Local Land Services Act* to clarify the limitations of planning instruments for clearing vegetation and ensure that rural landholders can consistently undertake low-risk infrastructure management activities under the Land Management Framework.

- Amends section 60I to ensure that existing approved areas of core koala habitat under the previous *State Environmental Planning Policy No. 44 – Koala Habitat Protection* continue to be protected and that the existing koala plans of management in the Ballina, Coffs Harbour, Kempsey, Lismore and Port Stephens local government areas are recognised under the Land Management Framework. The Bill also amends section 60N to clarify offences under planning legislation and the Local Land Services Act's unauthorised clearing penalties of up to $5 million to ensure any illegal activities are caught by the appropriate framework.

- Removes the requirement for landholders to obtain both a private native forestry plan and a separate approval from their local council to ensure that Local Land Services acts as a 'one-stop-shop' for all landholders. The Bill also implements Recommendation 7 of the 2014 Independent Biodiversity Legislation Review Panel's Final Report, which recommended that timber harvesting on private land not be regulated as a form of land-use change.[4]

- Increases private native forestry plan approval periods from 15 to 30 years to provide farmers with certainty and security to invest in long-term forest management and harmonise private native forestry plan approvals with native hardwood regeneration periods. This amendment also seeks to remove incentives for farmers to harvest before their forests reach their environmental and commercial maturity.

- Provides the Minister administering the *Forestry Act 2012* a role in making the Private Native Forestry (PNF) Codes of Practice and requiring them to ensure the

[4] Independent Biodiversity Legislation Review Panel, *A Review of Biodiversity Legislation in NSW Final Report*, 18 December 2014, https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/review-biodiversity-legislation-nsw-final-report-2014.pdf.

PNF is conducted in accordance with the principles of ecologically sustainable forest management.

- Ensures that routine agricultural activities on existing agricultural land will not be impacted by the advent of introduction of planning instruments such as environmental zones.

5. The Minister particularly emphasised that the Bill is intended to ensure the consistent regulation of primary production across NSW:

> With the endorsement of the Minister for Planning and Public Spaces, I make this statement now in this second reading speech: There will be no ministerial direction requiring any local council to zone core koala habitat as an environmental zone—period. The Local Land Services Amendment (Miscellaneous) Bill 2020 will help to ensure that primary production is regulated consistently and fairly right across New South Wales, making it easier for the agriculture and forestry sectors to invest in the future. Government action now is essential to reduce regulatory burden and simplify the interaction between areas requiring additional environmental protection on rural land.

## ISSUES CONSIDERED BY THE COMMITTEE

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

*Community rights to be consulted about development decisions – removal of requirements for development consent*

6. Schedule 1, clause 14 of the Bill inserts proposed section 60ZSA into the *Local Land Services Act 2013,* which provides that a forestry operation authorised under Part 5B of that Act does not require development consent under Part 4 of the *Environmental Planning and Assessment Act 1974* (the EPA Act).

7. Proposed subsection 60ZSA also provides that Part 5 of the EPA Act does not apply to the carrying out, or the authorisation under this Part, of forestry operations. Similarly, the Bill omits section 60ZY of the *Local Land Services Act 2013* to remove approval requirements under Part 5 of the EPA Act.

8. Proposed subsection 60ZSA(4) provides that an environmental planning instrument made under the EPA Act cannot prohibit, require development consent for or otherwise restrict forestry operations.

9. In the second reading speech to the Bill, the Minister commented on the removal of these development consents:

> This reform will remove the requirement for a landholder to obtain both a private native forestry plan and separate—and often duplicative—approval from their local council. This dual consent feature serves no purpose for either industry or councils. Private native forestry is a low-impact activity occurring rarely on agricultural land. It is not a form or permanent land use change. At present, a landholder could meet all the requirements to obtain a private native forestry approval with Local Land Services, but still have to obtain a separate and inconsistently administered approval from their local council. The current dual consent approval pathway means that a neighbour across a council boundary may actually be subject to completely different consent requirements from that respective council for the same activities in the same forest while undertaking private native forestry. In addition, some local government areas

require development consent for forestry on land zoned for primary production while more intensive land uses, such as extensive agriculture, are permitted without consent. Those inconsistencies are a direct impediment to the private native forestry [PNF] industry, which is a highly sustainable industry underpinned by retention requirements for biodiversity.

**The Bill seeks to remove several requirements for land owners to obtain development consent under Parts 4 and 5 of the *Environmental Planning and Assessment Act 1979* (the EPA Act).**

**In doing so, the Committee notes that the Bill would remove local councils' ability to assess development applications, engage with relevant neighbour and community stakeholders, and make recommendations regarding the proposed development changes. It may thereby impact on the rights of these stakeholders to participate in such processes and be consulted about issues that may affect them.**

**However, the Committee acknowledges that these changes are to streamline the approval process of private and native forestry clearing for landholders, who are also required to obtain separate approval from Local Land Services. In the second reading speech, the Minister also noted that private native forestry is a low-impact activity occurring rarely on agricultural land and is not a permanent land use change. Under these circumstances, the Committee makes no further comment.**

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

*Commencement by proclamation*

10. Clause 2 of the Bill provides that the Act is to commence on a day or days appointed by proclamation.

**Clause 2 of the Bill provides that the proposed Act is to commence by proclamation. The Committee generally prefers legislation affecting rights and obligations to commence on a fixed date or on assent to give certainty to those affected.**

**In this case, the Committee acknowledges that a flexible start date may facilitate the various administrative arrangements that will be required to implement the amendments to several Acts and legislative instruments proposed by the Bill. These include the *Environmental Planning Assessment Act 1979,* the *Fisheries Management Act 1994,* the *Forestry Act 2012,* the *State Environmental Planning Policy (Koala habitat Protection) 2019* and the *State Environmental Planning Policy No 44 – Koala Habitat Protection*. However, as these amendments will change the obligations of individual landowners when making applications for private native forestry land clearing, a fixed start date may be preferable to provide certainty to those affected. The Committee refers this provision to the Parliament to consider whether it is reasonable in the circumstances.**

# 3. Marine Pollution Amendment (Review) Bill 2020

| | |
|---|---|
| Date introduced | 15 October 2020 |
| House introduced | Legislative Assembly |
| Minister responsible | The Hon Andrew Constance MP |
| Portfolio | Transport and Roads |

## PURPOSE AND DESCRIPTION

1. The objects of this Bill are to amend the *Marine Pollution Act 2012* to:

   i. address recommendations of the 2019 statutory review of the *Marine Pollution Act 2012*, and

   ii. ensure consistency between the Act, the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* of the Commonwealth and the *International Convention for the Prevention of Pollution from Ships* (MARPOL), and

   iii. provide for enforcement powers about the maintenance of sewage pollution prevention equipment, and

   iv. provide for preventative action against marine pollution in relation to abandoned, derelict or out-of-commission vessels, and make other minor and consequential amendments.

## BACKGROUND

2. As noted, the Bill seeks to amend the *Marine Pollution Act 2012* (the Act) to address recommendations of the 2019 statutory review of the *Marine Pollution Act 2012* prepared by Transport for NSW (the Report).[5]

3. The Act is recognised in the Report as a fundamental tool for ensuring water pollution is addressed and prevented in NSW. The Report states at [3.2]:

> In NSW, the Marine Pollution Act and the POEO Act both operate in NSW waters to address pollution. The Act applies from the low water mark on the coast to three nautical miles (5.6 kilometres) out to sea, and to other waters specified in the Regulations. Beyond three nautical miles, the Commonwealth has jurisdiction so the POTS Act applies.

4. The Report also notes emerging trends that necessitated a review of the Act at [3.3]:

> Global seaborne trade volumes continue to grow - global trade expanded by four percent in 2017, and similar growth is expected over the next five years. Since 2011, there has been an increase

[5] Transport for NSW, 'Discussion paper: Review of the NSW Marine Pollution Act 2012', September 2019, <https://media.opengov.nsw.gov.au/pairtree_root/a7/bc/de/0a/88/3a/4d/1d/a6/5a/dc/76/3a/7d/f9/31/obj/171776.pdf> viewed 15 October 2020.

> in most forms of vessel activity in Australia's marine waters. NSW ports represent a significant proportion of this activity, with 6,225 commercial vessels visiting NSW ports during 2017/18.This increasing maritime/shipping activity increases the potential for environmental incidents. However, ongoing improvements in the management of commercial vessels are resulting in mitigation and minimisation of the associated risks.

5. In addition, the Report notes that material discharged from shipping operations and incidents is considered one of the sources of potential coastal and marine pollution in NSW, focusing in particular on:

   i. oil spills,

   ii. noxious liquid substances,

   iii. discharge of raw sewage, and

   iv. dumping of garbage.

6. The Report concluded that:

> Marine debris in particular is recognised as a globally relevant pressure in the marine environment, with increasing reports of impacts on marine biodiversity reported during the past four decades.

7. In the second reading speech, the Hon. Andrew Constance MP, Minister for Transport and Roads stated that:

> The amendments in the bill are designed to improve consistency of coverage across New South Wales for vessels; to strengthen the protection of New South Wales State waters from pollution, and in particular sewerage pollution; to streamline and simplify the Act; and to update the Act to align with national and international best practice in shipping and port operations.

8. The Minister described the increased reach of the Act under the Bill's reforms:

> The statutory review noted that under current legislation different pollution requirements apply for vessels in coastal waters compared to vessels in inland waters, and they apply under different Acts. To address this the bill will broaden the application of the Marine Pollution Act to cover all State waters, including inland waters such as the Murray, Murrumbidgee and Darling rivers and estuaries, as well as coastal waters and all port waters. This change means consistent standards for vessels will apply across all New South Wales waters. It is designed to improve the further consistency of the marine pollution legislation with MARPOL and Commonwealth legislation. The Marine Pollution Act will also now apply to recreational vehicles that are currently only covered under the Protection of the Environment Operations Act 1997. The effect of this change is to make clear in the Act the administrative requirements for some recreational vessel owners, which are not very onerous.

## ISSUES CONSIDERED BY THE COMMITTEE

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

*Strict liability offence: defective or modified sewerage systems*

9. Schedule 1.1, item 25 of the Bill seeks to amend the Act to insert a new section 55A, which states:

**55A Offence to have defective, altered or modified sewage systems**

(1) The master and the owner of a prescribed vessel in State waters are each guilty of an offence if a sewage system, or part of the sewage system, on the prescribed vessel is defective or has been altered or modified in a way that enables the discharge of sewage in contravention of this Part.

Maximum penalty for a large ship—
(a) for an individual—$55,000, or
(b) for a corporation—$275,000,

Maximum penalty for a ship prescribed by the regulations for the purposes of this section—an amount prescribed by the regulations.

(2) In this section—
**prescribed vessel** means—
(a) a large ship, or
(b) a ship prescribed by the regulations for the purposes of this section.

**sewage system**, for a prescribed vessel, includes the following—
(a) a holding tank to collect and store sewage,
(b) a sewage treatment plant certified to meet the requirements—
(i) of the regulations giving effect to Regulation 9.1.1 of Annex IV of MARPOL, or
(ii) prescribed by the regulations,
(c) portable tanks, including toilet cassettes, for discharge into a reception facility,
(d) a comminuting and disinfecting system—
(i) approved by orders made under the regulations, giving effect to Regulation 9.1.2 of Annex IV of MARPOL, or
(ii) approved under the regulations.

10. Under section 55 of the Act, an offence already exists in circumstances where a person is "responsible for the discharge of any sewage from a large ship into State waters". This offence carries significantly higher penalties than those imposed under the proposed new section 55A above – in the case of an individual $220,000, and in the case of a corporation $1,100,000. This offence will remain.

11. Proposed section 55A is designed to go further than the existing offence under section 55 by addressing the risk of any discharge before it occurs. As set out in the Report at [5.3]:

> Improper installation of sewage equipment can cause illegal discharges of sewage to occur. Sewage equipment can also be altered or modified in ways that enable illegal discharges or disguise illegal discharges. Untreated sewage poses serious risks to human life and the marine environment. Effective preventative measures are required under the Act to address this risk before illegal discharges of sewage from vessels occur into NSW waters.

12. In the Bill's second reading speech, the Minister noted:

> Untreated sewage poses serious risk to human health and the marine environment… I emphasise that this is a preventative measure to enforce sewage requirements before a pollution incident actually occurs.

**Schedule 1, item 25 of the Bill seeks to amend the *Marine Pollution Act 2012* (the Act) to insert a new section 55A. This new section would create an offence for ship masters and owners who operate or own (respectively) a prescribed vessel**

**with a sewerage system, or part of a sewerage system, which is defective or has been altered or modified in a way that enables the discharge of sewage in contravention of Part 6 of the Act. The maximum penalty for a large ship would be $55,000 in the case of an individual or $275,000 for a corporation; with maximum penalties for ships prescribed by the regulations to be set down in the regulations.**

**An existing offence under section 55 of the Act imposes a penalty larger than the amounts outlined above for actually discharging sewage into State waters. The new offence is designed to go further, addressing faulty systems before any illegal discharge of sewage has taken place.**

**The Committee identifies that the offence created by the Bill is one of strict liability. 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. That is, the shipmaster or owner need not know that a sewage system is defective to be an offender and be penalised.**

**The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the offence provision is designed to proactively prevent illegal discharge of sewage given the associated risk to human health and the marine environment. Further, the maximum penalties for the offences would appear to be monetary, not custodial. Notwithstanding this, the maximum penalties to be set down in the regulations for certain ships remain unknown. Owing to this factor, the Committee refers the provisions to Parliament for consideration.**

*Strict liability offence: non-compliance with marine pollution removal notice (derelict vessels)*

13. Under section 201(1) of the Act, the Minister can issue marine pollution prohibition notices where he or she "is of the opinion that the discharge of marine pollutants from (or within) any ship or place on land in which any activity is carried on is causing or is likely to cause a marine pollution incident and that the giving of the notice is warranted".

14. In particular, in the above circumstances, the Minister may, by notice in writing, direct the master of the ship, responsible person or person carrying on the activity, to cease carrying on the activity, or any specified aspect of it, for such period as is specified in the notice. Failure to do so without a reasonable excuse constitutes an offence, the maximum penalties for which are:

    a. for a corporation—$1,000,000 and, for a continuing offence, a further penalty of $120,000 for each day the offence continues, or

    b. for an individual—$250,000 and, for a continuing offence, a further penalty of $60,000 for each day the offence continues.

15. Schedule 1.1, item 84 of the Bill seeks to insert a new section 202A into the Act which creates a further offence:

| | |
|---|---|
| **202A** | **Preventative action for abandoned, out-of-commission or derelict vessels** |

(1) This section applies if the Minister is of the opinion that—

(a) a vessel has been abandoned, is out-of-commission or derelict, and
(b) marine pollutants are, or have been, carried on the vessel.

(2) The Minister may, by written notice given to the owner of the vessel, direct the owner to do any of the following—

(a) the action specified in the notice, within the period specified in the notice,
(b) take action to prevent, minimise, remove, disperse or destroy a marine pollutant or prevent, minimise or mitigate pollution that is likely to occur,
(c) take action to ascertain the nature and extent of the possible pollution,
(d) prepare and carry out a remedial course of action.

…

(5) A person given a marine pollution removal notice who, without reasonable excuse, does not comply with the notice is guilty of an offence.
Maximum penalty—
(a) for a corporation—$1,000,000 and, for a continuing offence, a further penalty of $120,000 for each day the offence continues, or
(b) for an individual—$250,000 and, for a continuing offence, a further penalty of $60,000 for each day the offence continues.

16. Proposed section 202A is designed to address the risk perceived in the Report that:

[While] the Act authorises the Minister to take any preventative or clean-up action believed necessary to combat a pollution incident … action can only take place in circumstances where it is believed that; a) a relevant discharge of a marine pollutant has occurred or is occurring, or b) there is a probability of a relevant discharge of a marine pollutant occurring.

These scenarios do not adequately cover instances where derelict or out-of-commission vessels are not attended to, or are abandoned by the owner. This potentially limits the State's ability to take proactive measures to remove marine pollutants from certain vessels within NSW waters on behalf of the community.

**Under section 201(1) of the Act, the Minister may, if the Minister is of the opinion that the discharge of marine pollutants from (or within) any ship or place on land in which any activity is carried on is causing or is likely to cause a marine pollution incident, by notice in writing, direct the master of the ship, responsible person or person carrying on the activity, to cease carrying on the activity, or any specified aspect of it, for such period as is specified in the notice. Failure to do so without a reasonable excuse constitutes an offence, the maximum penalties for which are (a) for a corporation—$1,000,000 and, for a continuing offence, a further penalty of $120,000 for each day the offence continues, or (b) for an individual—$250,000 and, for a continuing offence, a further penalty of $60,000 for each day the offence continues.**

**Schedule 1.1, item 84 of the Bill seeks to insert a new section 202A into the Act which creates a further offence. If the Minister is of the opinion that a vessel has**

**been abandoned, is out-of-commission or derelict, and marine pollutants are, or have been, carried on the vessel, the Minister may, by written notice given to the owner of the vessel, direct the owner to do a wide variety of things. Those actions include "any action" specified in the notice, "within the period specified in the notice". The Committee notes that this creates a positive obligation for the recipient to do anything the Minister so directs in the notice, as opposed to ceasing all or any part of the polluting behaviour under existing offence provisions.**

**Further, the Committee identifies that there are no restrictions on the terms of any marine pollution notice, including minimum timeframes for an owner to act on the notice. For example, the Minister may require the removal/remediation of an abandoned vessel, that once had marine pollutants on board, within one hour. Failure to do so could result in a maximum penalty of $1,000,000 against a corporation.**

**The Committee refers these matters to Parliament to consider whether the strict liability offence in Schedule 1.1, item 84 of the Bill is reasonable in the circumstances, having particular regard to whether any restrictions (such as a minimum reasonable timeframe) on a marine pollution removal notice should be considered.**

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

*Removal of NSW Civil and Administrative Tribunal avenue of review*

17. Sections 152(1) and (2) of the Act set down requirements for the masters and owners of "large ships" to have sewage pollution prevention certificates in force in respect of the ship.

18. Schedule 1, items 65 and 66 of the Bill retains the substance of these requirements whilst making some amendments. After these amendments, section 152(1) would read:

**Section 152(1)**

The master of a prescribed ship must not begin a voyage unless—

(a) there is a sewage pollution prevention certificate in force for the ship, and
(b) the sewage pollution prevention certificate complies with—
  (i) the condition imposed by Regulation 4.7 of Annex IV of MARPOL, or
  (ii) the conditions, if any, prescribed by the regulations.

Maximum penalty: $11,000 or imprisonment for 4 years, or both.

19. Further, after the amendments section 152(2) would read:

**Section 152(2)**

The owner of a prescribed ship must not permit the ship to begin a voyage unless—
(a) there is a sewage pollution prevention certificate in force for the ship, and

(b) the sewage pollution prevention certificate complies with—
(i) the condition imposed by Regulation 4.7 of Annex IV of MARPOL, or
(ii) the conditions, if any, prescribed by the regulations.

Maximum penalty:
(a) in the case of an individual—$11,000 or imprisonment for 4 years, or both, or
(b) in the case of a corporation—$55,000.

20. These are the same penalties that currently apply under the Act. However Schedule 1, item 68 of the Bill would introduce a definition for "prescribed ship" as referred to in proposed sections 152(1) and (2) above that is broader than the current definition of "large ship". The proposed definition under the Bill is as follows:

**Section 152(4)**

***Prescribed ship*** means—

(a) a large ship on an overseas voyage, or

(b) a vessel required to carry a sewage pollution prevention certificate under the laws of another State or the Northern Territory, or

(c) a ship prescribed by the regulations for the purposes of this section.

21. The Committee also notes that section 155(3) of the Act sets down the requirements around the Minister issuing a NSW sewage pollution prevention certificate, providing that he or she can issue such a certificate in relation to a ship only if:

a. the Minister receives declarations of survey in respect of the ship (whether conducted under section 154 or provided under that section), and

b. the Minister is satisfied that the ship is constructed in accordance with Annex IV of MARPOL and the ship's structure, equipment, systems, fittings, arrangements and material fully comply with the relevant provisions of MARPOL.

22. Schedule 2.3, item 20 of the Bill seeks to amend the *Marine Pollution Regulation 2014* by removing Clause 61 of the Regulation which states that Ministers' decisions to refuse to issue a sewage pollution prevention certificate under section 155(3) of the Act are reviewable by the NSW Civil and Administrative Tribunal:

**61 Decisions that are reviewable by Civil and Administrative Tribunal**
For the purposes of section 244 of the Act, a person aggrieved by any of the following decisions may apply to the Civil and Administrative Tribunal for an administrative review under the Administrative Decisions Review Act 1997—

…
(c) a refusal to issue a NSW sewage pollution prevention certificate under section 155(3) of the Act
…

**Schedule 2.3, item 20 of the Bill seeks to amend the *Marine Pollution Regulation 2014* by removing the ability for masters and owners of ships to apply to the NSW Civil and Administrative Tribunal (NCAT) for a review of certain decisions made**

**by the Minister. One of those decisions is a Minister's decision to refuse to issue a NSW sewage pollution prevention certificate. This certificate is required for any "prescribed ship" (being any large vessels on overseas voyages, any vessels required to carry such a certificate under the laws of another State or the Northern Territory, or any ship prescribed by the Regulations) to commence a voyage. Failure to obtain such a certificate before embarking is a strict liability offence committed by both the shipmaster and owner of the vessel. Penalties include a maximum custodial sentence of up to four years and/or financial penalties. Therefore, obtaining a sewage pollution prevention certificate is critical for shipmasters and owners.**

**The amendments above would mean that the Minister could refuse to provide a sewage pollution prevention certificate to a prescribed ship preventing it from beginning its voyage – which may have significant economic consequences for those affected – and such a decision would no longer be reviewable by NCAT. In the circumstances, the Committee refers the matter to Parliament for its consideration as to whether the Bill's removal of NCAT review provisions in the Regulations is appropriate in the circumstances.**

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

*Commencement by proclamation*

23. Clause 2 of the Bill provides that schedule 1.1 items 6, 65-69 and 92; and schedule 2.5 item 2 are to commence on a day or days to be appointed by proclamation.

24. Schedule 1.1, item 6 of the Bill omits the definition of "survey authority" from the Act and is a consequential amendment.

25. Schedule 1.1, items 65-69 of the Bill deal with requirements to obtain sewage pollution prevention certificates before vessels depart.

26. Schedule 1, item 92 of the Bill allows the Regulations to prescribe the category or categories of vessels required to have sewage pollution prevention certificates, and the issue, survey, duration, renewal and cancellation or otherwise of the certificates.

27. Schedule 2.5, item 2 of the Bill omits the definition of "State waters" from the *Fire and Rescue NSW Act 1989*. Schedule 2.1, items 1-4 of the Bill effectively introduce a new concept of "Prescribed waters", effective on assent, which includes (in addition to the coastal waters of the state, and waters within boundaries of a port under the *Ports and Maritime Administration Act 1995*) any such waters within NSW as determined by the Regulations.

**Clause 2 of the Bill provides that schedule 1.1 items 6, 65-69 and 92; and schedule 2.5 item 2 are to commence on a day or days to be appointed by proclamation. It thereby provides the Executive with unilateral authority to commence these provisions. The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. The provisions in question deal with the requirements of vessel owners to obtain sewage pollution prevention certificates before voyages, and the classification of waters affected by the Act.**

**The Committee acknowledges that were it not for the Bill's provisions regarding commencement by proclamation, the provisions in question would commence on assent, along with the rest of the Bill's provisions. This may not allow enough time for operational arrangements to be made to successfully implement the provisions in question. For example, given that certificates may need to be re-issued and obtained by numerous vessel owners under Schedules 1.1, items 65-69, the delayed start of these particular requirements may allow Transport for NSW and the shipping industry to prepare for the commencement of the provisions without delaying passage of the Bill more generally. Further, the delayed implementation of Schedule 2.5, item 2 may give the Minister and port authorities more time to determine water boundaries and where the Act applies. A more flexible start date may assist in this regard. In the circumstances, the Committee makes no further comment.**

# 4. Road Transport Legislation Amendment Bill 2020

| | |
|---|---|
| Date introduced | 15 October 2020 |
| House introduced | Legislative Assembly |
| Minister responsible | The Hon. Andrew Constance MP |
| Portfolio | Transport and Roads |

## PURPOSE AND DESCRIPTION

1. The object of this Bill is to make miscellaneous amendments to the *Road Transport Act 2013* and related legislation following a statutory review of the Act.

2. The Bill amends the *Road Transport Act 2013* (the principal Act) as follows—

   (a) to increase from 6 months to 2 years the period within which proceedings for certain offences must be commenced,

   (b) to require Transport for NSW, when cancelling or suspending a driver licence for certain speeding offences or alcohol or other drug related driving offences, to take into account any period of suspension already served by the driver,

   (c) to allow the Commissioner of Police to suspend a foreign driver licence holder who is caught speeding by more than 30 kilometres per hour or who has been issued with penalty notices for offences for which the total demerit point value is 13 or more,

   (d) to allow statutory rules to provide for the suspension or cancellation of the registration of a motor vehicle if it displays offensive or discriminatory material,

   (e) to make other minor and miscellaneous amendments.

3. The Bill also—

   (a) amends the *Driving Instructors Act 1992* to remove the requirement for the Commissioner of Police to inquire into the character of applicants for driving instructor licences, and

   (b) amends the *Photo Card Act 2005* to enable—

      (i) Transport for NSW to use and release information contained in the Photo Card Register for purposes related to digital Photo Cards, and

      (ii) the statutory rules to provide for the use of personal or commercially sensitive information in the Photo Card Register, and

   (c) amends the *Road Transport (General) Regulation 2013* to—

(i) increase from 6 months to 2 years the period within which proceedings for certain offences under the *Road Transport (Vehicle Registration) Regulation 2017* must be commenced, and

(i) make consequential amendments, and

(d) amends the *Road Transport (Vehicle Registration) Regulation 2017* to enable Transport for NSW to suspend the registration of a registrable vehicle if the registered operator of the vehicle has committed the offence of failing to nominate the driver of a vehicle who committed a camera recorded offence, rather than only if it is the registered operator's second or subsequent offence of that kind, and

(e) makes consequential amendments to the *Fines Act 1996* and the *Road Transport (Driver Licensing) Regulation 2017*.

## BACKGROUND

4. The Bill follows a statutory review of the *Road Transport Act 2013*, making amendments to that Act and related legislation. In the second reading speech, the Hon. Andrew Constance MP, Minister for Roads and Transport stated:

> The bill proposes amendments to the Road Transport Act 2013, the Driving Instructors Act 1992, the Photo Card Act 2005 and consequential amendments to the Fines Act 1996 to support improved road safety and customer outcomes, reduce red tape and increase the effectiveness of Transport for NSW as a regulator. The review report…found that the policy objectives of the Act remain valid, and the terms of the Act meet the community's needs and are considered appropriate for securing its objectives.

5. The Minister also told Parliament that the Bill includes amendments that were identified outside the review process but that have been incorporated into the Bill for efficiency and timeliness. The Minister stated that these amendments "did not form part of the statutory review but in the interests of streamlining processes and improving road safety they are significant amendments to the legislation".

## ISSUES CONSIDERED BY THE COMMITTEE

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

*Increased statutes of limitation*

6. The Bill contains amendments to increase the statute of limitations for proceedings for certain offences.

7. Schedule 1, item 29 of the Bill seeks to insert a new section 202 into the *Road Transport Act 2013* to extend the period within which proceedings may be brought for certain offences under that Act including obtaining a driver licence by false statements (section 49(1)) and making a licence application whilst disqualified (section 54(1)(b)). Currently proceedings must be brought within 6 months, the new section 202 would extend this to two years.

8. Similarly, schedule 2.4, item 2 of the Bill seeks to insert a new clause 149 into the *Road Transport (General) Regulation 2013* to prescribe further offences for which the extended limitation period of two years would apply pursuant to the new section 202. These include

an offence relating to record keeping requirements under the *Road Transport (Vehicle Registration) Regulation 2017* (clause 93).

9. In the second reading speech, the Minister provided the following background to these changes, noting that the increased statutes of limitation would provide adequate time to conduct investigations relating to offences:

> [The Bill] proposes to increase the statute of limitations for proceedings for limited and specific offences under the Act and regulations from six months to two years.
>
> Currently, proceedings for a breach of the Act or its regulations must generally be commenced no later than six months after the date on which the alleged offence is committed. Transport for NSW has encountered difficulties in completing investigations for serious and complex matters within a six-month time frame, especially for matters related to driver licence fraud and rebirthing or cloning of motor vehicles. There is already an exemption for camera-detected offences, which provide a 12-month period to account for the additional time taken for processes associated with driver nomination. There are a number of other serious offences where an increase in the statute of limitations is also required to satisfactorily complete an investigation and gather the required evidence to launch a prosecution. These offences include serious driving offences under the Act involving death or injury.

10. The Minister also noted that:

> Increasing the statute of limitations to two years for these types of offences will align the Act with provisions contained in similar legislation, including the Heavy Vehicle National Law (NSW), the Point to Point Transport (Taxis and Hire Vehicles) Act 2016 and the Marine Safety Act 1998.

> **The Bill contains amendments to increase the statute of limitations for proceedings for certain offences. For example, schedule 1, item 29 of the Bill seeks to insert a new section 202 into the *Road Transport Act 2013* to extend from six months to two years the period within which proceedings may be brought for certain offences under that Act.**
>
> **In so extending the limitation periods the Bill may expose a person to a penalty for conduct for which a prosecution would not otherwise be possible. However, the Committee notes that Transport for NSW has encountered difficulties in completing investigations for serious and complex matters within a six-month time frame, and that the amendments are intended to provide adequate time to conduct investigations. Further, it is understood that the increased statute of limitations aligns with provisions contained in legislation similar to the *Road Transport Act 2013*, and the Committee notes that a time period of two years is still quite modest. In the circumstances, the Committee makes no further comment.**

*Right to privacy – release of photographs*

11. Schedule 1, item 14 of the Bill seeks to amend section 57 of the *Road Transport Act 2013* to authorise Transport for NSW to release certain photographs stored by Transport for NSW:

- with the consent of the person whose likeness is shown in the photograph or on the database; and

- to the Secretary within the meaning of the *Tattoo Parlours Act 2012* for the purpose of enabling the Secretary to exercise functions in relation to licences under that Act.

12. In the second reading speech, the Minister provided the following background to the amendments:

> To improve customer outcomes and support the priority of Tell Government Once it is proposed to amend section 57 of the Act to permit Transport for NSW to release a photograph to other government agencies with the consent of the customer and to NSW Fair Trading for the purposes of issuing tattoo parlour licenses.
>
> **Schedule 1, item 14 of the Bill seeks to amend section 57 of the *Road Transport Act 2013* to authorise Transport for NSW to release to other government agencies certain photographs stored by Transport for NSW: with the consent of the person whose likeness is shown in the photograph or on the database; and to NSW Fair Trading for the purposes of issuing licences under the *Tattoo Parlours Act 2012*.**
>
> **In allowing Transport for NSW to release the photographs to NSW Fair Trading for the purposes of issuing tattoo parlour licences, and without requiring the relevant person's consent, the provisions in question may impact on privacy rights. However, as this exception is limited to a specific purpose, is transparently stated in primary legislation, and may streamline administrative requirements for people applying for tattoo parlour licences, the Committee considers that it is reasonable in the circumstances and makes no further comment.**

*Increased penalties*

13. The Bill contains some provisions which, if enacted, would increase penalties. In particular, schedule 1, item 25 seeks to amend sections 188(1) and 189(4) of the *Road Transport Act 2013* to increase the maximum penalty from an $11,000 fine to a $22,000 fine for a corporation that commits an offence relating to failing to correctly nominate the person in charge of the vehicle at the time of an offence.

14. In the second reading speech, the Minister provided the following background to the amendment:

> It is also proposed to amend the Act to increase penalties for companies that fail to nominate or correctly identify drivers for camera-detected offences. Statistics provided by Revenue NSW indicate that in the 2019-20 financial year there were around 7,000 occasions where a company did not nominate the driver responsible for a camera-detected offence committed in a company registered vehicle. That means almost 7,000 drivers who committed these offences were not identified and therefore could not be held accountable for their driving behaviour through the application of the demerit points or even a licence sanction. That is not acceptable. There is no doubt, given the serious road safety implications of this type of behaviour, that this is an important step forward. As a result it is proposed to amend the Act to increase the amount of court fines for offences under the Act for a company that fails to nominate or supply information required to identify a driver who commits a camera-detected offence from 100 penalty units, or $11,000, to 200 penalty units, or $22,000.
>
> **Schedule 1, item 25 of the Bill seeks to amend sections 188(1) and 189(4) of the *Road Transport Act 2013* to increase the maximum penalty from an $11,000 fine**

**to a $22,000 fine for a corporation that commits an offence relating to failing to correctly nominate the person in charge of the vehicle at the time of an offence.**

**The Committee generally comments on significant increases in penalties as they have the potential to result in excessive punishment. However, the Committee understands that there are cases where companies do not nominate the driver responsible for camera-detected offences committed in a company-registered vehicle meaning that drivers who have committed these offences are not identified and cannot be held accountable. By increasing maximum penalties for such company conduct the Bill seeks to signal the importance of holding drivers accountable for camera-detected offences that can have serious road safety implications. In the circumstances, the Committee makes no further comment.**

*Increased police powers to issue immediate suspension notices*

15. Section 224 of the *Road Transport Act 2013* provides that a police officer may give a driver an immediate licence suspension notice in certain circumstances.

16. Schedule 1, item 31 of the Bill seeks to amend section 224 to expand the circumstances under which such an immediate suspension notice can be issued. In particular, it would allow a police officer to issue a licence suspension notice immediately to a foreign driver licence holder if it appears to the police officer that the holder has exceeded the speed limit by more than 30km per hour but less than 45km per hour.

17. Decisions of a police officer to give a person an immediate licence suspension notice can be appealed to the Local Court under Part 7.8 of the *Road Transport Act 2013*.

18. In the second reading speech, the Minister provided the following background to the amendment contained in schedule 1, item 31 of the Bill:

> Sadly, over the last five years there has been a total of 2,408 casualty crashes involving overseas licence holders, including 36 fatalities and 574 serious injuries. The next amendment is proposed to improve the management of overseas drivers in New South Wales by providing the police with the power to issue a notice to an overseas driver withdrawing their visiting driver privileges at the roadside for three months when detected speeding more than 30 kilometres per hour.

**Section 224 of the *Road Transport Act 2013* provides that a police officer may give a driver an immediate licence suspension notice in certain circumstances. Schedule 1, item 31 of the Bill seeks to amend section 224 to expand the circumstances under which such an immediate suspension notice can be issued. In particular, it would allow a police officer to issue a licence suspension notice immediately to a foreign driver licence holder if it appears to the police officer that the holder has exceeded the speed limit by more than 30km per hour but less than 45km per hour.**

**The Bill thereby expands police powers to immediately suspend a driver licence. This effectively subjects the affected driver to a penalty without the benefit of him or her being able to present his or her case to an independent third party (e.g. a magistrate) who could decide whether such a penalty is warranted. While police decisions to give a person an immediate licence suspension notice can be appealed to the Local Court under Part 7.8 of the *Road Transport Act 2013*, persons issued with a notice would be stopped from driving in the intervening**

**period between the police decision and the date when the matter is listed for hearing at the Court.**

**However, the Committee understands that the amendments contained in schedule 1, item 31 are intended to respond to a significant number of casualty crashes in NSW in the last five years involving overseas licence holders. Having regard to this, and the fact that a person issued with an immediate licence suspension notice does have the abovementioned appeal rights to the Local Court, the Committee considers that the amendments in question may be reasonable in the circumstances and makes no further comment.**

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

*Matters that should be included in primary legislation*

19. Section 23 of the *Road Transport Act 2013* allows the Governor to make regulations and rules, not inconsistent with the Act, for or with respect to any matter that by the Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to the Act. Further, schedule 1 of the Act sets down examples of these statutory rule-making powers.

20. Schedule 1, item 37 of the Bill seeks to amend Schedule 1 to the Act to enable these statutory rules to provide for the cancellation or suspension of the registration of a registrable vehicle "on the grounds of offensive or discriminatory material displayed on the vehicle, including the circumstances in which material is considered to be offensive or discriminatory".

21. In the second reading speech, the Minister provided the following background to the amendments:

> [The Bill] will create a statutory rule-making power in the Act to manage offensive imagery or slogans displayed on a vehicle. This will allow Transport for NSW to impose a registration sanction on the vehicle when the offensive material is not removed. This amendment will align New South Wales laws with other jurisdictions that have already taken action to stamp out offensive advertising on motor vehicles. I think most members would agree with some of the offensive vehicles we have seen on the road, that this amendment is designed to get consistency across the Commonwealth.

**Section 23 of the *Road Transport Act 2013* allows the Governor to make regulations and rules, not inconsistent with the Act, for or with respect to any matter that by the Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to the Act. Further, schedule 1 of the Act sets down examples of these statutory rule-making powers.**

**Schedule 1, item 37 of the Bill seeks to amend Schedule 1 to the Act to enable these statutory rules to provide for the cancellation or suspension of the registration of a registrable vehicle "on the grounds of offensive or discriminatory material displayed on the vehicle, including the circumstances in which material is considered to be offensive or discriminatory".**

**The Bill thereby leaves it to the statutory rules to define what is "offensive" and "discriminatory" for the purposes of the provisions. The Committee would prefer**

**for significant matters such as these – i.e. definitions relating to whether a person is to have his or her vehicle registration cancelled or suspended – to be set down in primary rather than subordinate legislation. The Committee notes that the provisions in question are also significant because they may have implications for affected persons' freedom of speech – that is, the right to express information, ideas or opinions free of restrictions.**

**If the definitions of what is to be considered "offensive" and "discriminatory" were set down in primary legislation this would give Parliament greater opportunity to oversight whether an appropriate balance is struck between competing considerations. It would be appropriate however for regulations to be made to supplement or expand on the definitions of "offensive" or "discriminatory" to take account of changing circumstances. The Committee refers the matter to Parliament for consideration.**

# 5. Stronger Communities Legislation Amendment (Miscellaneous) Bill 2020

| | |
|---|---|
| Date introduced | 14 October 2020 |
| House introduced | Legislative Assembly |
| Minister responsible | The Hon. Mark Speakman SC |
| Portfolio | Attorney General |

## PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend various Acts and a Regulation relating to the Communities and Justice portfolio, and to make other miscellaneous amendments.

2. Schedule 1 amends the following Acts and Regulation—

   (a) *Bail Act 2013,*

   (b) *Bail Regulation 2014,*

   (c) *Children (Criminal Proceedings) Act 1987,*

   (d) *Crimes Act 1900,*

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

   (f) *Crimes (Sentencing Procedure) Act 1999,*

   (g) *Criminal Appeal Act 1912,*

   (h) *Criminal Procedure Act 1986,*

   (i) *Evidence (Audio and Audio Visual Links) Act 1998,*

   (j) *Supreme Court Act 1970.*

3. Schedule 2 amends the following Acts—

   (a) *Children and Young Persons (Care and Protection) Act 1998,*

   (b) *Children's Guardian Act 2019,*

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

   (d) *Interpretation Act 1987,*

   (e) *Mental Health and Cognitive Impairment Forensic Provisions Act 2020,*

   (f) *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020,*

(g) *Victims Rights and Support Act 2013.*

## BACKGROUND

4. In the second reading speech the Hon Mark Speakman SC MP, Attorney General, stated that the Bill "introduces a number of amendments to address developments in case law to support procedural improvements and to close gaps in the law that become apparent".

5. The Attorney General also told Parliament that most of the Bill's proposed amendments "relate to improving criminal procedure" but that "the bill also proposes amendments to extend the sunset of two COVID-19 emergency provisions to 26 March 2021 to align with the sunset of other COVID-19 provisions".

6. In addition, the Attorney General stated that miscellaneous amendment Bills are typically introduced each parliamentary session as part of the Government's legislative review and monitoring program. However, in a departure from the norm, four such miscellaneous Bills will be introduced this parliamentary session:

> …this year, owing to delays and disruption caused by the COVID-19 pandemic, the miscellaneous amendments bill was not able to be introduced in the first session of Parliament. Instead, four separate miscellaneous bills are being introduced in this session. The division of the proposals into four bills is necessary due to the large number of reform proposals. The four bills have been organised thematically, which will assist parliamentary consideration.

7. The Committee commented on the first two such Bills, the *Stronger Communities Legislation Amendment (Courts and Civil) Bill 2020* and the *Stronger Communities Legislation Amendment (Crimes) Bill 2020* in its Digest No. 20/57, tabled in Parliament on 22 September 2020.

## ISSUES CONSIDERED BY THE COMMITTEE

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

*Right to a fair trial – victim impact statements*

8. Schedule 1.3 and Schedule 1.6, items 7 to 9 of the Bill seek to amend the *Childrens (Criminal Proceedings) Act 1987* and the *Crimes (Sentencing Procedure) Act 1999* to provide that a victim impact statement may be tendered in, and considered by, the Children's Court in relation to certain offences. This includes a wide variety of offences including the following offences under the *Crimes Act 1900*:

- Production, dissemination or possession of child abuse material (section 91H);
- Voyeurism (section 91J);
- Filming a person engaged in a private act (section 91K);
- Filming a person's private parts (section 91L);
- Recording an intimate image without consent (section 91P);
- Distributing an intimate image without consent (section 91Q);
- Threatening to record or distribute an intimate image (section 91R).

9. It also includes any offence that is not referred to in Table 2 of Schedule 1 to the *Criminal Procedure Act 1986* (that is, indictable offences that are to be dealt with summarily unless the prosecution elects otherwise) and the offence is:

- an offence that results in the death of, or actual physical bodily harm to, any person, or
- an offence that involves an act of actual or threatened violence, or an offence for which a higher maximum penalty may be imposed if the offence results in the death of, or actual physical bodily harm to, any person than may be imposed if the offence does not have that result, or
- a prescribed sexual offence.

10. In the second reading speech, the Attorney General provided the following background to the amendments:

> Schedules 1.3 and 1.6 [7] to [9] to the bill introduce amendments to the Children (Criminal Proceedings) Act 1987 and the Crimes (Sentencing Procedure) Act 1999 to clarify that victim impact statements are admissible in the Children's Court for the same offences as in the Local Court, and also enable them to be made for strictly indictable offences. Victim impact statements can be an important part of the sentencing process, and provide a victim with the opportunity to explain to the court the impact and harm that an offence has had on them.

11. In particular, the Attorney General noted that the amendments would expand the Children's Court victim impact statement regime to include strictly indictable offences:

> The statutory scheme for victim impact statements is provided by part 3, division 2 of the Crimes (Sentencing Procedure) Act. Section 27 of this Act sets out the jurisdictions in which division 2 applies. However, the Children's Court is not currently listed. Rather, section 330 of the Children (Criminal Proceedings) Act 1987 explicitly states that the provisions of the Crimes (Sentencing Procedure) Act 1999 that relate to victim impact statements apply to any offence dealt with by the Children's Court as if it were the Local Court. However, this means that the Children's Court is subject to the same limitations as set for the Local Court—namely, that a victim impact statement can be made in respect of certain eligible offences but cannot be made in respect of strictly indictable offences.

12. The Attorney General continued:

> This amendment clarifies the law by expressly providing for Children's Court victim impact statements eligibility in section 27 of the Crimes (Sentencing Procedure) Act so that victim impact statement provisions for all jurisdictions are set out in one Act. This will remove the potential for irregular or inconsistent interpretations of existing legislation. It also expands the Children's Court victim impact statement regime to include strictly indictable offences. This resolves what appears to be an unintended consequence of matching the Children's Court victim impact statement regime to that of the Local Court, where those offences are not dealt with.

> **Schedule 1.3 and schedule 1.6, items 7 to 9 of the Bill seek to amend the *Childrens (Criminal Proceedings) Act 1987* and the *Crimes (Sentencing Procedure) Act 1999* to provide that a victim impact statement may be tendered in, and considered by, the Children's Court in relation to certain offences.**

> **In particular, the Committee notes that the amendments would expand the Children's Court victim impact statement regime to include strictly indictable offences. The Committee notes further that victim impact statements can be**

**highly emotionally charged and that extending the circumstances under which they can considered in matters before the Children's Court may have the potential to be prejudicial to juvenile offenders, affecting their right to a fair trial.**

**However, the Committee also identifies that victim impact statements provide a victim with the opportunity to explain to the court the impact and harm that an offence has had on them. Further, the persons who would be required to consider the victim impact statements under the amendments are trained judicial officers of the Children's Court with expertise in handing down appropriate sentences for offending. Owing to this safeguard, and the competing considerations, the Committee makes no further comment.**

*Right to a fair trial – tendency or coincidence offences to be heard together*

13. Schedule 1.8, item 3 of the Bill seeks to amend the *Criminal Procedure Act 1986* to insert a new section 29A that would require proceedings for offences alleged to have been committed by the same person to be heard together if they are charged in the same indictment or listed together and the prosecution intends to lead tendency evidence or coincidence evidence that relates to the offences.

14. However, this new section would be subject to section 21(2) of the *Criminal Procedure Act 1986* which provides that if of the opinion:

- that an accused person may be prejudiced or embarrassed in his or her defence by reason of being charged with more than one offence in the same indictment, or

- that for any other reason it is desirable to direct that an accused person be tried separately for any one or more offences charged in an indictment,

the court may order a separate trial of any count or counts of the indictment.

15. In the second reading speech, the Attorney General noted that the amendment contained in schedule 1.8, item 3 complements the *Evidence Amendment (Tendency and Coincidence) Act 2020* which was passed by the Parliament in June 2020 and commenced on 1 July 2020. This amendment Act responded to the recommendations of the Royal Commission into Institutional Response to Child Sexual Abuse (the Royal Commission).

16. The Committee commented on this amendment Act at the Bill stage (the *Evidence Amendment (Tendency and Coincidence) Bill 2020*) in its Digest No. 11/57. The Committee noted that the Bill made a number of changes to the *Evidence Act 1995* concerning the admissibility of tendency and coincidence evidence; and that these changes may impact on the defendant's right to a fair trial, including the right to be presumed innocent unless guilt is proved beyond reasonable doubt. The Committee noted that the changes were likely to allow evidence to be admitted that would have been excluded were it not for the changes, with the possibility that some such evidence could be unfairly prejudicial to a defendant in a given case.

17. In discussing the changes contained in schedule 1.8, item 3 of the current Bill, the Attorney General stated:

> I am pleased to introduce…amendments to the Criminal Procedure Act 1986 to support the reforms implemented earlier this year through the Evidence Amendment (Tendency and Coincidence) Act 2020, which will ensure greater admissibility of tendency and coincidence evidence in child sexual offence proceedings.
>
> These amendments will improve how proceedings are conducted to allow for a complete picture of an accused's alleged criminality to be presented and appropriately considered by a tribunal of fact. The first amendment…creates a legislative presumption in favour of joint trials where a defendant has been accused of multiple offences that the prosecution is seeking to rely on as tendency or coincidence evidence. The presumption applies regardless of whether the court has allowed the prosecution to rely on the evidence as tendency or coincidence evidence.

18. The Attorney General also noted that while the joint trials reform was not recommended by the Royal Commission the amendment reflects the community's expectation that a jury should be apprised of all the circumstances of an accused's alleged actions whilst balancing the right to a fair trial:

> Whilst this reform was not recommended by the royal commission, the royal commission did explain at page 649 of its criminal justice report that it "strongly agrees with the sentiment that there should be more joint trials." Despite the royal commission's decision not to recommend legislative reform to this effect, this moment is important as it reflects the community expectation that a jury should be apprised of all the circumstances of an accused's alleged actions whilst balancing the right to a fair trial.

19. The Attorney General also noted that, as above, the new section 29A would be subject to section 21(2) of the *Criminal Procedure Act 1986* to protect the defendant's right to a fair trial:

> The royal commission expressed concern that a presumption in favour of joint trials would not be used by the prosecution because of the risk that resulting convictions would be overturned on appeal. To address this concern, new section 29A has been drafted to ensure that courts retain ample discretion to ensure that where there is a chance that an accused person will not receive a fair trial, counts on an indictment can still be separated.

**Schedule 1.8, item 3 of the Bill seeks to amend the *Criminal Procedure Act 1986* to insert a new section 29A that would require proceedings for offences alleged to have been committed by the same person to be heard together if they are charged in the same indictment or listed together and the prosecution intends to lead tendency evidence or coincidence evidence that relates to the offences.**

**This amendment complements the *Evidence Amendment (Tendency and Coincidence) Act 2020* which commenced on 1 July 2020. This amendment Act responded to the recommendations of the Royal Commission into Institutional Response to Child Sexual Abuse (the Royal Commission) and the Committee commented on the amendments contained therein in its Digest No.11/57.**

**The Committee noted in Digest No.11/57 that the amendments made a number of changes to the *Evidence Act 1995* concerning the admissibility of tendency and coincidence evidence; and that these changes may impact on the defendant's right to a fair trial, including the right to be presumed innocent unless guilt is proved beyond reasonable doubt. The Committee identified that the changes were likely to allow evidence to be admitted that would have been excluded**

**were it not for the changes, with the possibility that some such evidence could be unfairly prejudicial to a defendant in a given case.**

**In requiring proceedings for offences alleged to have been committed by the same person to be heard together if they are charged in the same indictment or listed together and the prosecution intends to lead tendency evidence or coincidence evidence that relates to the offences; the current Bill may add to these concerns of unfair prejudice to a defendant in a particular case.**

**However, the Committee notes that the new section 29A would be subject to section 21(2) of the *Criminal Procedure Act 1986* to ensure that courts retain discretion to ensure that where there is a chance that an accused person will not receive a fair trial, counts on an indictment can still be separated. The Committee refers the proposed new section 29A to Parliament to consider whether the defendant's right to a fair trial is adequately protected in the circumstances.**

*Right to a fair trial – standard of proof*

20. Schedule 1.8, item 8 of the Bill also relates to the abovementioned tendency and coincidence reforms. It seeks to amend the *Criminal Procedure Act 1986* to insert a new section 161A to prevent a jury being directed that evidence adduced as tendency evidence or coincidence evidence must be proved beyond reasonable doubt except in limited circumstances.

21. In particular, the new section 161A provides that:

1) a jury must not be directed that evidence needs to be proved beyond reasonable doubt to the extent that it is adduced as tendency evidence or coincidence evidence.

2) if evidence is adduced as both tendency evidence or coincidence evidence and as proof of an element or essential fact of a charge before the jury, the jury may be directed that the evidence needs to be proved beyond reasonable doubt, but only to the extent that it is adduced as proof of the element or essential fact.

3) Subsection (1) does not apply if a court is satisfied:

a. there is a significant possibility that a jury will rely on an act or omission as being essential to its reasoning in reaching a finding of guilt, and

b. evidence of the act or omission has been adduced as tendency evidence or coincidence evidence.

22. In the second reading speech, the Attorney General stated that these amendments implemented a recommendation of the Royal Commission:

> The second supplementary amendment to the Criminal Procedure Act is in schedule 1.8 [8] to the bill. It clarifies that a jury should not be directed as to the standard of proof required in relation to tendency and coincidence evidence. This implements recommendation 48 of the royal commission. This recommendation was that, "tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt." This recommendation is largely consistent with provisions in Victorian legislation, supported by the royal commission, which makes it clear that a judge may not direct

a jury that any matters other than the elements of the charged offence need to be proved beyond reasonable doubt.

**Schedule 1.8, item 8 of the Bill also relates to the abovementioned tendency and coincidence reforms. It seeks to amend the *Criminal Procedure Act 1986* to insert a new section 161A. Subsection 161A(1) would prevent a jury being directed that evidence adduced as tendency evidence or coincidence evidence must be proved beyond reasonable doubt. In doing so, the Bill may have some impact on the defendant's right to a fair trial and to be presumed innocent unless guilt is proved beyond reasonable doubt.**

**However, the new section 161A contains exceptions so that subsection 161A(1) would not apply if the court is satisfied that there is a significant possibility that a jury will rely on an act or omission as being essential to its reasoning in reaching a finding of guilt; and evidence of the act or omission has been adduced as tendency evidence or coincidence evidence.**

**Further, if evidence is adduced as both tendency evidence or coincidence evidence and as proof of an element or essential fact of a charge before the jury, the jury may be directed that the evidence needs to be proved beyond reasonable doubt, but only to the extent that it is adduced as proof of the element or essential fact.**

**In addition, the new subsection 161A implements a recommendation of the Royal Commission into Institutional Response to Child Sexual Abuse that tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt.**

**The Committee refers the new section 161A to Parliament to consider whether the exceptions to subsection 161A(1) adequately protect a defendant's right to a fair trial and to be presumed innocent beyond a reasonable doubt.**

*Right to a fair trial – prescribed sexual offences*

23. Schedule 1.8, item 2 of the Bill seeks to amend section 3 of the *Criminal Procedure Act 1986* to provide that offences under the *Crimes Act 1900* relating to recording or distributing, or threatening to record or distribute, intimate images without consent are "prescribed sexual offences".

24. In the second reading speech, the Attorney General explained that special arrangements for giving evidence are extended to victims of "prescribed sexual offences". Therefore, these amendments would mean that victims of the abovementioned offences would have the benefit of these special arrangements for the first time:

> Schedule 1.8 [2] to the bill amends section 3 of the Criminal Procedure Act to include offences relating to the recording and distribution of intimate images without consent in the definition of "prescribed sexual offence". These offences have been referred to colloquially as "revenge porn" offences. Under part 5 of the Criminal Procedure Act, special arrangements for giving evidence are extended to victims of prescribed sexual offences in order to minimise the stress they may experience while fulfilling a crucial role in the prosecution of these offences.
>
> These arrangements include requirements for the proceedings to be held in a closed court while a complainant in proceedings for a prescribed sexual offence is giving evidence, the option to

give evidence by alternative arrangements such as CCTV, and entitlements to have a support person present while giving evidence.

25. The Attorney General continued:

> Sections 91P and 91Q of the Crimes Act 1900 make it an offence to record or distribute an intimate image without consent, and section 91R makes it an offence to threaten to record or distribute an intimate image. These offences are not currently included amongst the prescribed sexual offences for which special arrangements for giving evidence are available.

26. The Attorney General also stated that it was important the special arrangements be extended for these extra offences, which like the offences already covered, can inflict significant psychological distress on victims:

> Whilst these offences may not involve a physical assault, they are undeniably offences of a sexual nature that have the potential to inflict significant psychological distress on victims, especially when recounting them in evidence. Often their evidence can include having to examine and to comment on intimate imagery of themselves and being extensively questioned around the context of the material, including its creation and distribution. This proposal will provide important and appropriate protections to this class of victims. This amendment will ensure that these victims are afforded the same protections as victims of other sexual offences while participating in the criminal justice system.

**Schedule 1.8, item 2 of the Bill seeks to amend section 3 of the *Criminal Procedure Act 1986* to provide that offences under the *Crimes Act 1900* relating to recording or distributing, or threatening to record or distribute, intimate images without consent are "prescribed sexual offences".**

**Special arrangements for giving evidence are extended to victims of "prescribed sexual offences". The amendments would mean that victims of the abovementioned offences would have the benefit of these special arrangements for the first time.**

**By expanding the range of offences for which victims can access special arrangements for giving evidence, the Bill may have some impact on the right to a fair trial. For example, the special arrangements include the option to give evidence by alternative arrangements such as CCTV. Such arrangements may have some impact on the ability of the Court or juries to assess witness demeanour and weigh their evidence.**

**However, such considerations must be balanced against the need to provide protections to victims who are giving evidence about sexual offences, and to appropriately acknowledge and manage the associated trauma. In the case of evidence given by CCTV, a Court is able to both see and hear the relevant person. In the circumstances, the Committee makes no further comment.**

*Right to a fair trial – shortened period to give notice of alibi*

27. Schedule 1.8, item 7 of the Bill seeks to amend section 150 of the *Criminal Procedure Act 1986* to shorten the period in which an accused person must give notice of particulars of an alibi to the Director of Public Prosecutions and file a copy of the notice with the court before being able to adduce evidence in support of the alibi without leave of the court.

28. In the second reading speech, the Attorney General provided the following background to the amendment:

> Schedule 1.8 will amend section 150 of the Criminal Procedure Act to change the time frame for service of alibi notices from 42 days prior to trial to 56 days prior to trial. In order to manage trials more effectively, the District Court now schedules readiness hearings in all trial matters eight weeks prior to trial, being 56 days. This amendment will mean that alibi notices must be filed by the date of the readiness hearing to ensure the court will be able to case manage matters in a meaningful way with more transparency. This will ensure adequate trial estimates will be set, assisting with listing practices. The amendment also gives legislative support to District Court practice note 18, providing for consistency between legislation and practice.

**Schedule 1.8, item 7 of the Bill seeks to amend section 150 of the *Criminal Procedure Act 1986* to shorten by 14 days the period in which an accused person must give notice of particulars of an alibi to the Director of Public Prosecutions and file a copy of the notice with the court before being able to adduce evidence in support of the alibi without leave of the court.**

**In so shortening the timeframes for a defendant to prepare this element of his or her case, the amendments may have some impact on the right to a fair trial. However, the Committee acknowledges the amendments are intended to assist with the case management of the large volume of matters in the District Court. Further, if the timeframes were not complied with it appears that evidence in support of the alibi could still be adduced with the leave of the Court. Given the competing considerations, the Committee refers this matter to Parliament to consider whether the amendment is reasonable in the circumstances.**

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

29. Section 22C of the *Evidence (Audio and Audio Visual Links) Act 1998* makes special provisions for appearance in certain court proceedings because of the COVID-19 pandemic. In particular, it provides that during the "prescribed period" – a date no more than 12 months after the commencement of the section, prescribed by the regulations:

- The appearance of an accused person in any proceedings relating to bail is to take place by way of audio visual link unless the court otherwise directs. (subsection 22C(2);
- The appearance of an accused person (other than an accused detainee) in any proceedings other than physical appearance proceedings may take place by way of audio visual link if the court directs or the parties to the proceedings consent (subsection 22C(2A));
- The appearance of an accused person in any physical appearance proceedings (other than proceedings relating to bail or proceedings prescribed by the regulations) may take place by way of audio visual link if the court directs (subsection 22C(3)).

30. However, subsection 22C(6) provides that the court is to make such a direction only if it is interests of justice having regard to the following:

- the public health risk posed by the COVID-19 pandemic,

- the efficient use of available judicial and administrative resources,
- any relevant matter raised by a party to the proceedings,
- any other matter that the court considers relevant.

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

32. Schedule 1.9 of the Bill seeks to amend section 22C of the *Evidence (Audio and Audio Visual Links) Act 1998* to insert a new subsection 7A that provides that an appearance of an accused person in any proceedings under section 22C can take place by way of audio visual link from a place within or outside NSW, including a place outside Australia, if the court directs or the parties to the proceedings consent.

33. In the second reading speech, the Attorney General provided the following background to the amendment:

> Schedule 1.9 to the bill amends the temporary COVID-19 provisions in section 22C of the Evidence (Audio and Visual Links) Act 1998 to clarify that an accused person who is not in custody is able to appear via audiovisual link—AVL for short—from outside New South Wales as well as from within the jurisdiction. This will ensure that an accused person is not required to cross borders, particularly where movement is restricted by public health order, in circumstances where AVL can be appropriately used.

**Section 22C of the *Evidence (Audio and Audio Visual Links) Act 1998* makes special provision for the COVID-19 pandemic, providing for an accused person to appear by way of audio-visual link in certain proceedings including bail proceedings where the court directs. However, the court is only to make such a direction if it is interests of justice having regard to certain matters including the public health risk posed by the COVID-19 pandemic.**

**Schedule 1.9 of the Bill seeks to amend section 22C to provide that an appearance of an accused person in any proceedings under section 22C can take place by way of audio visual link from a place within or outside NSW, including a place outside Australia, if the court directs or the parties to the proceedings consent.**

**The Bill thereby arguably expands the circumstances under which the court can direct an accused person to appear by way of audio visual link (on another view it merely clarifies that section 22C applies to those giving evidence outside NSW). In so doing it may further remove rights of an accused person to appear in person and interact fully with his or her legal representatives, impacting on the right to a fair trial or fair bail hearing.**

**However, various safeguards apply including that if an audio-visual link is used, the court must be satisfied that parties have reasonable opportunity for private communication with their legal representatives. Further, the provisions are an extraordinary measure to respond to the public health risk created by COVID-19, ensuring that an accused person is not unnecessarily required to cross borders, particularly where movement is restricted by a public health order. They are also**

**time limited with section 22C to last no longer than 12 months after its commencement.**

**In the circumstances, the Committee considers the amendments contained in schedule 1.9 of the Bill are reasonable and makes no further comment.**

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

*Wide and ill-defined administrative power – statutory time limits*

34. The *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Bill 2020* which passed Parliament on 13 May 2020 and was assented to on 14 May 2020 amended the *Interpretation Act 1987* to insert Part 12 "Special provisions for COVID-19 pandemic". This Part contains special provisions relating to statutory time periods, and altered arrangements for physical attendance and meetings, arising from the COVID-19 pandemic.

35. The Committee discussed these amendments in its Digest No. 15/57. In particular it noted section 84 of the new Part 12 which allows an authorised person to modify statutory time periods. Subsection 84(1) provides that section 84 applies if a person is authorised or required under an Act to take any of the following actions:

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

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

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

38. In addition, the Committee noted that Part 12 contains safeguards regarding the use of this power. If a period is extended, suspended or waived under subsection 84(2), the period may only be extended, suspended or waived to a day no later than 31 December 2020 (subsection 84(3)). Further, if it is agreed under subsection 84(2) that a thing may be done or omitted to be done despite the expiry of the period, the day by which it is agreed the thing may be done or omitted to be done may be no later than 31 December 2020 (subsection 84(4)).

39. The Committee also noted section 85 of Part 12 which creates a regulation-making power to modify or suspend statutory time periods. Subsection 85(1) provides that the section applies if an Act (a “relevant Act”) provides for a period:

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

40. Subsection 85(2) provides that a regulation can be made under section 85 or a "relevant Act" to modify or extend the period. It is understood that examples of such periods would include time limits for civil and criminal procedures and processes such as limitation periods and times for giving notices, lodging applications and filing documents.

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

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

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

43. However, the current Bill seeks to amend Part 12 of the *Interpretation Act 1987* so that Part 12 and the special arrangements contained therein are extended until 26 March 2020 instead of 31 December 2020.

> **The *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Bill 2020* which passed Parliament on 13 May 2020 and was assented to on 14 May 2020 amended the *Interpretation Act 1987* to insert Part 12 "Special provisions for COVID-19 pandemic". This Part contains special provisions relating to statutory time periods, and altered arrangements for physical attendance and meetings, arising from the COVID-19 pandemic.**
>
> **The Committee discussed these amendments in its Digest No. 15/57. In particular, it noted that the new Part 12 provides powers for an authorised person to modify statutory time periods if the person is satisfied that the modification, waiver or agreement is reasonable for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. Similarly, the new Part 12 inserts a regulation-making power into the *Interpretation Act* to allow modification of statutory time periods. Again, the power can only be used to respond to the public health emergency caused by COVID-19.**
>
> **Further, the Committee noted that as the *Interpretation Act* applies to all Acts and instruments in NSW, these provisions create wide administrative powers to modify statutory time periods. In addition the Committee identified that as the statutory time periods relate to such things as time limits for civil and criminal procedures, the provisions may have some impact on individual rights and obligations.**

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

**In coming to this conclusion, the Committee noted safeguards contained in Part 12 including that the powers can only be used for the purposes of responding to the public health emergency created by COVID-19 and that accordingly, the provisions are subject to a sunset clause and would be automatically repealed no later than 31 December 2020. Further, regulations could not be made under the provisions to shorten statutory time periods or extend them beyond 31 December 2020.**

**However, the current Bill seeks to amend Part 12 of the *Interpretation Act 1987* so that Part 12 and the special arrangements contained therein are extended until 26 March 2020 instead of 31 December 2020.**

**Whilst noting this time extension, and the fact that the provisions in question which raised the concerns will now apply for a longer period, the Committee again considers the arrangements are reasonable in the extraordinary circumstances created by the continuing COVID-19 pandemic, and makes no further comment.**

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

*Commencement by proclamation*

44. Subclause 2(3) of the Bill provides that the amendments contained in schedule 1.8, items 9 to 13 of the Bill are to commence on a day or days to be appointed by proclamation.

45. According to the explanatory note to the Bill, schedule 1.8, items 9 to 13 seek to amend the *Criminal Procedure Act 1986* to provide for the District Court to case manage prosecutions brought under the *Work Health and Safety Act 2011* and ensure that case management is not frustrated by the specific ways in which evidence is gathered under that Act.

46. In the second reading speech, the Attorney General provided the following further background to the amendments:

> The bill also amends the Criminal Procedure Act to extend case management provisions so that they apply to Work Health and Safety Act prosecutions in the District Court and to provide an additional means of providing a witness's evidence, being evidence obtained under the powers of the regulator to compel evidence under the Work Health and Safety Act. Currently, Work Health and Safety Act prosecutions in the District Court are not subject to case management provisions under the Criminal Procedure Act. Despite this, District Court criminal jurisdiction practice note 16 requires defendants in those matters to make certain pre-trial disclosures, similar to those required in other summary prosecutions and indictable prosecutions. However, without a legislative basis, such disclosures may be beyond the power of the District Court.

47. The Attorney General continued:

The case management provisions outlined in part 2A of the Criminal Procedure Act require the prosecution to provide a copy of the affidavit or statement of each witness whose evidence will be adduced at the hearing. In practice, the Work Health and Safety Act provides the regulator with the power to compel witnesses to provide evidence in relation to work health and safety breaches. In order to ensure that Work Health and Safety Act prosecutions do not incur sanctions for failing to provide formal witness statements as outlined in section 247E of the Criminal Procedure Act, the amendments contained in schedule 1.8 [9] to [13] will ensure that the regulator can comply with the case management provisions by producing evidence obtained under any of the compulsory evidence powers in the Work Health and Safety Act, whilst giving the District Court the power to case manage these prosecutions effectively.

**Subclause 2(3) of the Bill provides that the amendments contained in schedule 1.8, items 9 to 13 of the Bill are to commence on a day or days to be appointed by proclamation.**

**The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected parties. However, as the amendments in question relate to case management procedures in the District Court, a flexible start date may be desirable to allow time to implement any necessary administrative changes. In the circumstances, the Committee makes no further comment.**

*Matters that should be included in primary legislation*

48. Schedule 2.2, item 1 of the Bill seeks to amend section 85 of the *Children's Guardian Act 2019* to provide for information about the following persons to be kept on an authorised carers register:

- authorised carers,
- applicants for authorisation as authorised carers,
- persons who, under section 10 of the *Child Protection (Working with Children) Act 2012*, are required to hold a working with children check clearance because the person resides on the same property as an authorised carer for 3 weeks or more,
- persons who reside on the same property as an applicant for authorisation as an authorised carer for 3 weeks or more.

49. Further, schedule 2.2, items 3 and 4 of the Bill seek to amend section 85 of the *Children's Guardian Act 2019* to enable the Children's Guardian and a person prescribed by the regulations to collect, use or disclose information for the purposes of keeping a register.

**Schedule 2.2, item 1 of the Bill seeks to amend section 85 of the *Children's Guardian Act 2019* to provide for information about certain persons to be kept on an authorised carers register including authorised carers and persons who reside on the same property as an applicant for authorisation as an authorised carer for 3 weeks or more.**

**Further, schedule 2.2, items 3 and 4 of the Bill seek to amend section 85 of the *Children's Guardian Act 2019* to enable the Children's Guardian and a person**

**prescribed by the regulations to collect, use or disclose information for the purposes of keeping a register.**

**Given that collecting, using or disclosing information for the purposes of keeping a register may impact on the privacy rights of a person whose information is kept on such a register, the Committee considers that the persons who have authority to do so under section 85, should be clearly set down in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight over the arrangements made. The Committee refers the matter to Parliament for consideration.**

# Part Two – Regulations

# 1. Crimes (Administration of Sentences) Amendment (X-ray Scanning) Regulation 2020

| | |
|---|---|
| Date tabled | LA: 15 September 2020<br>LC: 25 August 2020 |
| Disallowance date | LA: 17 November 2020<br>LC: 10 November 2020 |
| Minister responsible | The Hon. Anthony Roberts MP |
| Portfolio | Counter Terrorism and Corrections |

## PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide that a visitor to a correctional centre may be required to submit to scanning by means of an X-ray scanning device.

2. This Regulation is made under the *Crimes (Administration of Sentences) Act 1999*, including sections 79(1)(i) 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

*Right to privacy*

3. The Regulation is made under the *Crimes (Administration of Sentences) Act 1999*, the objects of which are to ensure that offenders held in custody are supervised in a safe, secure and humane manner, to provide for their rehabilitation, and to ensure the safety of the persons who have custody of such offenders (section 2A).

4. The Regulation amends the *Crimes (Administration of Sentences) Regulation 2014* (the primary Regulation) regarding the control of visits to correctional centres. Clause 93 of the primary Regulation already provided that authorised officers could make requirements of visitors. For example:

   - clause 93(1) provides that an authorised officer can require a visitor to produce evidence of their name and address and state the purpose of their visit, and

   - clause 93(3) provides that an authorised officer can require a visitor to remove any face covering worn by the visitor.

5. The Regulation inserts clause 93(2A) which provides, in addition, that an authorised officer can require a visitor to submit to scanning by means of an X-ray scanning device.

6. The Regulation also amends subclause 93(7) of the primary Regulation to provide that an authorised officer may refuse to allow a person to visit a correctional centre if the person fails to comply with a requirement to submit to x-ray scanning under subclause 93(2A). Prior to this, subclause 93(7) of the primary Regulation already provided that an authorised officer could refuse to allow a person to visit a correctional centre if the person fails to comply with a requirement under subclauses 93(1) or (3).

**The Regulation amends the *Crimes (Administration of Sentences) Regulation 2014* (the primary Regulation) regarding the control of visits to correctional centres. The Regulation inserts clause 93(2A) which provides that an authorised officer can require a visitor to submit to scanning by means of an X-ray scanning device. The Regulation also amends subclause 93(7) of the primary Regulation to provide that an authorised officer may refuse to allow a person to visit a correctional centre if the person fails to comply with a requirement to submit to x-ray scanning under subclause 93(2A).**

**By including these new measures, the Regulation expands the powers of correctional officers and may impact on a person's right to privacy. However, the Committee notes that the Regulation is made under the *Crimes (Administration of Sentences) Act 1999*, the objects of which are to ensure that offenders held in custody are supervised in a safe, secure and humane manner, to provide for their rehabilitation, and to ensure the safety of the persons who have custody of such offenders (section 2A). The power to require a visitor to submit to x-ray scanning may assist authorised officers to identify and manage possible persons or items that may pose a threat to safety and security within a correctional centre. The Committee considers this reasonable in the circumstances and makes no further comment.**

# 2. Public Health Amendment (COVID-19 Border Control – Transiting ACT Residents) Regulation 2020

| | |
|---|---|
| Date tabled | LA: 15 September 2020<br>LC: 25 August 2020 |
| Disallowance date | LA: 17 November 2020<br>LC: 10 November 2020 |
| Minister responsible | The Hon. Brad Hazzard MP |
| Portfolio | Health and Medical Research |

## PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a condition applying to certain ACT residents transiting through NSW to the ACT in accordance with an exemption under the *Public Health (COVID-19 Border Control) Order 2020*.

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

## ISSUES CONSIDERED BY THE COMMITTEE

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

*Penalty notice offences – right to a fair trial*

3. Under subsections 7(1) and (2) of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, the Minister may take such action, and may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

4. Under subsection 7(4) of the Act, such an order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order. In addition, subsection 7(5) provides that, unless earlier revoked, such an order expires at the end of 90 days after it was made, or earlier if so specified in the order. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction.

5. On 7 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* (the Order) was published in the NSW Government Gazette, and commenced the following day (clause 2). The object of the Order was to restrict entry into NSW of persons who had been in Victoria within the previous 14 days before entry.

6. The Minister made the Order under section 7 of the Act, directing under subclause 5(1) that an "affected person" must not enter NSW unless the person is authorised to enter NSW. Subclause 5(2) provided that a person was authorised to enter NSW if they belonged to a specified class of persons, held a current entry permit and complied with specified conditions. Clause 3 of the Order defined an "affected person" to be a person who has been in Victoria within the previous 14 days.

7. Clause 4 of the Order also set down the Minister's grounds for concluding that a situation had arisen that was, or was likely to be, a risk to public health (and thus his grounds for making the Order under section 7 of the Act), which were that:

    - public health authorities both internationally and in Australia had been monitoring and responding to outbreaks of COVID-19, also known as Novel Coronavirus 2019,
    - COVID-19 is a potentially fatal condition and is also highly contagious,
    - a number of cases of individuals with COVID-19 had now been confirmed in NSW, as well as other Australian jurisdictions,
    - recent cases of unexpected community transmission of COVID-19 in Victoria, with restrictions on the movement of people being put in place in certain hotspot areas,
    - the Victorian Government and the NSW Government had agreed that the border should, subject to exceptions determined by the Government of NSW, be closed until community transmission of COVID-19 in Victoria was contained.

8. On 13 August 2020, the *Public Health (COVID-19 Border Control) Amendment (Transiting ACT Residents) Order 2020* (the Amendment Order) commenced to create an exemption to the Order for certain ACT residents transiting through NSW to the ACT. The Amendment Order inserted clauses 8B and 8C into the Order. Clause 8B provided that subclause 5(1) of the Order directing that an "affected person" must not enter NSW unless the person is authorised to enter NSW did not apply to an "exempt person" who complied with certain conditions. In particular, the "exempt person" had to:

    - immediately before entering NSW, if the person was the driver of a vehicle, ensure that the vehicle had sufficient petrol to travel to the ACT without refuelling, and
    - after entering NSW, travel, by the route designated by the Commissioner of Police, directly to the ACT without stopping, except—
        - for a fatigue or hygiene break at a safe location designated by the Commissioner of Police, or
        - to obtain urgent medical care, or
        - to deal with an emergency, and
    - while in NSW—

- maintain an appropriate physical distance from any person who is not travelling with the exempt person, and
- travel only between the hours of 9.00 am and 3.00 pm, and

- at all times—
  - carry the person's Entry Authorisation Certificate, and
  - produce the Entry Authorisation Certificate for inspection by an enforcement officer if requested to do so by the enforcement officer.

9. Further, clause 8B provided that the "exempt person" must not enter NSW again from Victoria after transiting through NSW under the clause. Clause 8B also provided that for the purposes of the clause:

- "ACT resident" meant a person whose usual place of residence is the Australian Capital Territory.
- "Entry Authorisation Certificate" meant an Entry Authorisation Certificate issued by the Chief Health Officer of the Australian Capital Territory that grants the person subject to the certificate authority to enter the Australian Capital Territory.
- "Exempt person" meant an ACT resident who: (a) was the subject of an Entry Authorisation Certificate, and (b) was in Victoria immediately before the commencement of the clause.

10. Clause 8B also provided for its own repeal at 3:00pm on 17 August 2020.

11. As noted, the Amendment Oder also inserted Clause 8C into the Order and this clause provided that a person who travelled through NSW under clause 8B must not enter NSW until a period of at least 14 days had elapsed since the person entered the ACT under that clause. Clause 8C provided for its own repeal on 1 September 2020.

12. The Regulation amends the *Public Health Regulation 2012* to allow a $5000 penalty notice to be issued for offending against section 10 of the Act by contravening clause 8B or 8C of the Order, that is, by contravening the conditions set down in clauses 8B or 8C when transiting through NSW to the ACT in accordance with the exemption set down in clause 8B.

**On 8 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* (the Order) came into force under which the Minister for Health and Medical Research directed that an "affected person" must not enter NSW unless the person is authorised to do so. The Order defined an "affected person" to be a person who has been in Victoria within the previous 14 days.**

**Further, on 13 August 2020, the *Public Health (COVID-19 Border Control) Amendment (Transiting ACT Residents) Order* (the Amendment Order) commenced, which amended the Order by inserting clauses 8B and 8C into it. Clause 8B provided that subclause 5(1) of the Order directing that an "affected person" must not enter NSW unless the person is authorised to enter NSW did not apply to an "exempt person" transiting through NSW to the ACT, who**

**complied with certain conditions. An "exempt person" meant an ACT resident who was the subject of an Entry Authorisation Certificate, and was in Victoria immediately before the commencement of the clause.**

**Clause 8C provided that a person who travelled through NSW under clause 8B must not enter NSW until a period of at least 14 days had elapsed since the person entered the ACT under that clause.**

**The Regulation amends the *Public Health Regulation 2012* to allow a $5000 penalty notice to be issued for offending against section 10 of the *Public Health Act 2010* by contravening clause 8B or 8C of the Order, that is, by contravening the conditions set down in clauses 8B or 8C when transiting through NSW to the ACT in accordance with the exemption set down in clause 8B.**

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

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

*Freedom of movement*

13. As above, the Regulation allows for a $5000 penalty notice to be issued for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.

14. As noted, such conditions were set out in clauses 8B and 8C of the Order and include transiting through NSW to the ACT by the route designated by the Commissioner of Police, directly to the ACT without stopping, except in narrow circumstances (e.g. for a fatigue or hygiene break or in an emergency); only travelling between the hours of 9am and 3pm; and not re-entering NSW until a period of at least 14 days had elapsed since the person entered the ACT.

15. As is also noted above, the Order was made under section 7 of the Act, subsection 7(5) of which provides that, unless earlier revoked, orders so made expire at the end of 90 days after they are made, or earlier if so specified in the Order.

16. In this case, the Order commenced on 8 July 2020 (clause 2) and was repealed on 2 October 2020 under clause 14 of the *Public Health (COVID-19 Border Control) Order (No 2) 2020* (the second Order), which itself commenced on 2 October (clause 2). Although as

described earlier, clauses 8B and 8C of the Order did not commence until 13 August 2020, and were repealed on 17 August 2020 and 1 September 2020 respectively.

17. The second Order covers similar matter to the original Order, restricting entry to NSW for persons who have been in Victoria, subject to certain exceptions. Like the original Order, it sets out the Minister's grounds for concluding that there is a risk to public health (clause 4), and thus his reasons for making the second Order pursuant to section 7 of the Act. Further, like the original Order, the second Order will expire at the end of 90 days after its commencement pursuant to subsection 7(5) of the Act, unless earlier revoked.

**As above, the Regulation allows for a $5000 penalty notice to be issued for an offence against section 10 of the Public Health Act 2010 involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.**

**Such conditions were set out in clauses 8B and 8C of the Order and included transiting through NSW to the ACT by the route designated by the Commissioner of Police, directly to the ACT without stopping, except in narrow circumstances (e.g. for a fatigue or hygiene break or in an emergency); only travelling between the hours of 9am and 3pm; and not re-entering NSW until a period of at least 14 days had elapsed since the person entered the ACT.**

**By providing that a person can receive a significant on-the-spot penalty for travelling from Victoria, through NSW and into the ACT without complying with strict conditions, the Regulation is part of a regime that restricts freedom of movement. This right is contained in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. This Article protects the right to move freely in a country for those who are lawfully within that country; the right to leave any country; and the right to enter a country of which you are a citizen.**

**However, Article 12 also recognises that derogation from this right may be warranted in certain circumstances, including to protect public health. The Committee considers that as the Regulation is part of a regime to respond to COVID-19 and stop its spread following an increase in community transmission in Victoria, it fits within the public health exemption, and that the limits placed on freedom of movement are reasonable in the circumstances.**

**This is particularly so as the associated Order was time limited to automatically expire 90 days after it commenced, and it was repealed on 2 October 2020 (the provisions set down in clauses 8B and 8C being repealed before that). While a similar Order, the Public Health (COVID-19 Border Control) Order (No 2) 2020 commenced on the same day (2 October), in making this second Order the Minister again had to outline the public health grounds for making such an Order (set out in clause 4), and it too will automatically expire 90 days after its commencement unless earlier revoked (as per subsection 7(5) of the Act).**

**In short, in the extraordinary circumstances created by COVID-19, and given the abovementioned time limits and other safeguards, the Committee considers that the Regulation, and the regime of which it is part, place reasonable limits on freedom of movement, and 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*

18. As above, the Regulation allows for a $5000 penalty notice to be issued for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.

> **As above, the Regulation allows for a $5000 penalty notice to be issued for an offence against section 10 of the Public Health Act 2010 involving a contravention of a condition applying to certain ACT residents transiting from Victoria through NSW to the ACT in accordance with an exemption under clause 8B of the Order.**
>
> **The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large, on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.**
>
> **However, given the severe circumstances surrounding the COVID-19 pandemic – in this case the recent increased community transmission in Victoria – it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. In the extraordinary circumstances, the Committee makes no further comment.**

# Appendix One – Functions of the Committee

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

**8A Functions with respect to Bills**

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

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

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

i trespasses unduly on personal rights and liberties, or

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

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

iv inappropriately delegates legislative powers, or

v insufficiently subjects the exercise of legislative power to parliamentary scrutiny

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

**9 Functions with respect to Regulations**

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

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

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

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

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

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

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

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

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

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

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

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

2 Further functions of the Committee are:

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

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

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