PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

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

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Guide to the Digest

COMMENT ON BILLS

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

COMMENT ON REGULATIONS

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

Conclusions

PART ONE – BILLS

1. DRUG SUPPLY PROHIBITION ORDER PILOT SCHEME BILL 2020

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

Right to undisturbed enjoyment of premises – Power to search without a warrant

The Bill introduces new powers for police officers to stop, search and seize property without a warrant as part of a pilot program to introduce Drug Supply Prohibition Orders (DSPO). If a DSPO is in force against a person, a police officer may, without a warrant, stop, detain and search the person, enter and search a dwelling at which the person resides or premises that the police officer reasonably suspects are owned by the person, are under the direct control or management of the person or are being used by the person for an unlawful purpose involving the manufacture or supply of a prohibited drug. A police officer may also stop, detain and search a vehicle being driven, controlled or directed by the person. A police officer may also seize and detain any evidence in the course of exercising these powers. The use of these extended police powers may impact on a person's right to undisturbed enjoyment of their premises.

The Committee notes that the proposed powers would only be exercisable in the pilot scheme area for a period of 2 years, and can only be applied to an adult who has been convicted of a 'serious drug offence' in the 10 years. The Committee also acknowledges that the proposed powers and pilot scheme are intended to target convicted offenders of drug offences which involve traffickable quantities of prohibited drugs or plants, precursor substances or possession of drug manufacturing equipment. However, given the wide-ranging search and seizure powers without a warrant and significant impact to individuals subject to the Bill's provisions, the Committee refers this matter to the Parliament for its consideration.

Freedom of association

The Bill provides that an authorised magistrate may take various matters into account when deciding whether a person is likely to engage in the manufacture or supply of a prohibited drug. This includes whether a person associates with other person who are involved in the unlawful manufacture or supply of a prohibited drug, and whether the person is a member of or associates with a criminal group. These provisions may impact a person's freedom of association as contained in Article 22 of the ICCPR. The right to freedom of association protects their freedom to form and join associations to pursue a common goal, and to exchange ideas and information.

However, Article 22 also recognises that derogation from this right may be warranted in certain circumstances, including to protect public safety and public health. The Committee notes that these provisions are addressed at targeting criminal activities and specifically for association and for a trial period only. In these circumstances, the Committee makes no further comment.

Procedural fairness - Notification of reasons for order

The Bill provides that a person (including the subject of the DSPO) is not entitled to know the reasons for the decision to make the DSPO, and is not to be given access to, or provided with, a document (or a copy of a document) that formed part of the application. Upon appeal of such

an order, the Local Court is not to be provided with any document that formed part of the application for the DSPO or the reasons recorded by the authorised magistrate for making the order. As a result, a person who is the subject of such an order may not have access to procedural fairness to challenge allegations made against them which may be inconsistent or inaccurate.

The Committee notes that reasons for issuing an order may compromise police operations and for that reason are not available to offenders when served with the order or upon appeal. However the Committee notes that the absence of reasons may considerably impact the procedural fairness of persons subject to such an order. The Committee refers the matter to Parliament for its consideration.

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

Limits appeal of drug supply prohibition order

The Bill provides an avenue for appealing DSPOs. The Local Court may revoke the order if it is satisfied that the order is unreasonably onerous in the circumstances or that the subject of the order is not likely to engage in the manufacture or supply of a prohibited drug, or the risk of the subject of the DSPO engaging in the manufacture or supply of a prohibited drug could be mitigated in another way. However, the Bill limits the ability to appeal an order within the first 6 months of the DSPO being served personally on the offender or an application for the revocation of the DSPO being refused by the Local Court. This will considerably limit the appeal rights of the person subject to the order until six months after the order has been served, or a subsequent six months after a first application to revoke an order has been refused. The Committee refers this matter to Parliament for consideration of whether the limit on appeal rights are reasonable in the circumstances.

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

Commencement by proclamation

Section 2 of the Bill provides that the Act 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 persons, particularly where the legislation affects individual rights or obligations. The Committee acknowledges that the Bill is a pilot program for only certain regions of the state, and a flexible start date may be beneficial for those administering the legislation and those of the public subject to its provisions. However, as the Bill may considerably impact the personal rights and obligations of persons subject to its provisions, the Committee refers the matter to the Parliament for its consideration.

2. NATIONAL PARKS AND WILDLIFE LEGISLATION AMENDMENT (RESERVATIONS) BILL 2020

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

3. NSW JOBS FIRST BILL 2020*

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

Independence of the Advocate

Section 14 of the Bill sets out the functions of the NSW Local Jobs Advocate, including advising the Minister, the promotion of the Policy within government and local industry, and working with local industry and employee organisations to help build the future workforce. In addition, section 15 of the Bill states that the Advocate will be subject to the direction and control of the Minister, except in relation to the preparation and contents of a report that the Advocate is required by the Bill if passed, or any other Act, to provide to Parliament.

With the Advocate being under the direction and control of the Minister, the Advocate's operations and investigations will be subjected to a Minister's direction and not to Parliamentary scrutiny. This may impact on the neutrality and independence of the Advocate, especially considering the Advocate's enforcement powers. The Committee refers this matter to Parliament for its consideration as to whether the provisions relating to Ministerial control of the Advocate are sufficiently subjected to parliamentary scrutiny.

Non-reviewable decisions affecting right to reputation

The Bill provides that the Advocate may make a determination that a person has failed to comply with an information notice, the NSW Jobs First Policy, a local industry development plan, or a major projects skills development plan. The Advocate may also make a recommendation to the Minister that the person be subject to an adverse publicity notice, that must name the person, set out the reasons for the notice, and be tabled in the Parliament.

The Committee acknowledges that these powers of the Advocate and the Minister to make an adverse publicity notice are intended to ensure compliance with the NSW Jobs First Policy. However, as the issuing of such a notice may cause reputational or financial damage. This may be particularly problematic as the Bill does not provide an avenue to appeal or correct an adverse publicity notice. Given the potential for reputational or financial damage caused by a false adverse publicity notice, the Committee refers these provisions to Parliament to consider whether the powers are reasonable in the circumstances.

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

Matters deferred to the regulations – functions of the Advocate

The Bill defers some matters to the regulations. In particular, the Bill provides that some functions of the NSW Local Jobs Advocate may be prescribed by the regulations. The Committee generally substantive functions of statutory bodies to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected. However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987.* As such the Committee makes no further comment.

Wide power of delegation

The Bill grants a wide power of delegation to the Advocate for the exercise of any function of the Advocate to any person employed in the Office of the NSW Local Jobs Advocate. The functions of the Advocate that may be delegated include advising the Minister on various matters related to the NSW Jobs First Policy, working with government agencies, local industry and the private sector, and monitoring and reporting to Parliament on compliance with the NSW Jobs First Policy. In performing these functions, appropriate judgement must be used to assess compliance and advise the Minister on relevant matters.

The Committee notes that the Bill does not contain restrictions on this power to delegate, e.g. restricting delegation to people with certain qualifications or expertise. The Committee also notes that some functions of the Advocate may have an impact on reputational or financial rights or persons subjects to adverse publicity notices, as noted earlier in this report. Given this, the Committee considers the Bill should provide more clarity about the persons to whom the functions can be delegated. In the circumstances, the Committee refers this matter to Parliament for its consideration.

Henry VIII clause

The Bill contains a Henry VIII clause which allows the Regulations made for the purposes of Schedule 2 to amend the Schedule itself to provide for additional or different savings and transitional provisions. This allows the Minister to create regulations that could override the provisions of primary legislation, and thereby to legislate without reference to Parliament. The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight. However, as the amendment is limited to amendments of a savings and transitional nature, and permits additional control over the rollout of the amendments contemplated by the Bill, the Committee makes no further comment.

4. RETIREMENT VILLAGES AMENDMENT BILL 2020

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

Matters deferred to regulations

The Bill defers several matters to the regulations. In particular, the Bill provides that the Secretary must not make an exit entitlement order if the Secretary is satisfied by the operator that they have not "unreasonably delayed" the sale of a residential premises. Similarly, the Secretary can approve the extension of the period in which an operator must pay an exit entitlement, but only if satisfied that the operator has not "unreasonably delayed" the sale.

Although "unreasonably delayed" is not defined, proposed section 182AC(3) provides that the regulations may make provision for the matters the Secretary must consider when determining whether there has been an unreasonable delay.

The Second Reading Speech noted that the new exit entitlement orders are designed to address situations where there has been a delay in the sale of a property by an operator, either by delaying readying the property for sale or by not taking reasonable steps to secure the sale. Given the protective function of exit entitlement orders for residents and former residents, it may be preferable that key concepts such as the meaning of "unreasonably delayed" are defined in primary rather than subordinate legislation. However, the Second Reading Speech noted that the Government intends to consult with relevant experts in the sector to ensure the correct issues are prescribed in reference to the meaning of "unreasonably delayed." In any event, regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. As such, the Committee makes no further comment.

Commencement by proclamation

The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that a flexible start date may enable aged care operators, the Secretary, and the NSW Civil and

Administrative Tribunal to make the necessary administrative arrangements to support the new scheme. The Second Reading Speech also noted that the supporting regulations are still being drafted. In the circumstances, the Committee makes no further comment.

5. STRONGER COMMUNITIES LEGISLATION AMENDMENT (DOMESTIC VIOLENCE) BILL 2020

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

Lack of certainty and clarity – apprehended violence orders

Schedule 1, item 2 of the Bill seeks to amend the *Crimes (Domestic and Personal Violence) Act 2007* (CDVP Act) to insert a new section 27(3A) which would provide that an existing apprehended violence order does not prevent an application being made for a provisional order.

Further, schedule 1, item 3 of the Bill seeks to insert a new section 28B into the CDVP Act which would apply if an apprehended violence order is already in force against the defendant for the protection of a particular person. Section 28B would provide that an issuing officer must not make a prohibition or restriction in a provisional order that would be inconsistent with a prohibition or restriction in the existing order if the effect would be to decrease the protection afforded to the protected person under the existing order.

Section 28B would also provide that a prohibition or restriction specified in a provisional order that is inconsistent with a prohibition or restriction specified in the existing order in a way that would decrease the protection afforded to the protected person under the existing order has no effect.

In addition, schedule 1, item 18 of the Bill seeks to insert a new section 81A into the CDVP Act to provide that if multiple apprehended violence orders relating to the same defendant and protected person are in force, and there is a prohibition or restriction specified in the orders that is inconsistent with or contrary to another order, the most recent prohibition or restriction prevails. However these provisions are subject to proposed section 28B.

By allowing more than one apprehended violence order to be made in respect of the same defendant and protected person, the Bill may create a lack of certainty and clarity. This lack of clarity may be compounded by the fact that proposed section 81A requires compliance with the most recent order to the extent of any inconsistency, except as regards prohibitions or restrictions in a provisional order that afford the protected person less protection. In that case, it appears the previous order would prevail to the extent necessary, pursuant to proposed section 28B. In short, there is arguably no clear cut rule as to which order or restrictions and prohibitions prevail – the general rule is subject to an exception which could create confusion for defendants.

If an apprehended violence order is made, the defendant is not given a criminal record but if he or she breaches the order, it is a criminal offence. Therefore, it is important that they know the exact restrictions to which they are subject under the order. The Committee appreciates that the provisions in question are intended to facilitate an urgent response to protect victims – that is, to enable police to immediately vary the conditions of an order provisionally to respond to increased risk. Further, there are requirements for the provisional order to be brought before a court to decide whether it should stand/be varied etc, but this may not happen for 28 days or more. Noting the competing considerations, the Committee refers the provisions to Parliament to consider whether they are reasonable in the circumstances or may create an undue lack of clarity.

Review rights – apprehended violence orders

Currently, under section 29(3)of the CDPV Act, a provisional apprehended violence order has to be listed before a local court on the next domestic violence list day, and section 29(3)(b) provides that this must be no more than 28 days from the date on which it was made. The court would then replace the provisional order with an interim or final apprehended violence order or dismiss the application (unless it was withdrawn).

This requirement is currently subject to special provisions inserted in response to the COVID-19 pandemic. Section 29(4) provides that during the "prescribed period" a reference to 28 days in section 29(3)(b) is taken to be a reference to 6 months. That is, these special provisions extend the length of time within which the provisional order must be listed from 28 days to 6 months, during the "prescribed period" – the "prescribed period" being from the commencement of the special provisions, up until 26 March 2021.

However, schedule 1, item 5 of the Bill seeks to insert a new section 29(3A) into the CDPV Act which would provide that failure to comply with section 29(3)(b) does not affect the validity of the provisional order if the failure is due to court sitting arrangements that prevent the matter from being heard by the appropriate court. That is, if owing to court sitting arrangements a provisional order contains a date that is more than 28 days after the making of the provisional order, but is the next date on which the matter can be listed on a domestic violence list at the appropriate court, the validity of the order is not affected.

The Committee identifies that the proposed amendments may thereby impact on the review rights of a defendant to a provisional apprehended violence order. He or she could be subject to the restrictions and prohibitions contained in the order for more than 28 days without the opportunity to have the matter reviewed by a court to consider whether these restrictions are warranted. Further, the proposed amendments provide no alternative time limit within which provisional orders must be listed to remain valid – they are open-ended.

While delays may be justified if court sitting dates are affected by an emergency situation caused by COVID-19, the proposed amendments are not tied to COVID-19 – they would apply more generally. In the circumstances, the Committee refers the provisions in question to Parliament to consider their impact on defendants' rights of review.

Right to a fair trial – principles of open justice

Schedule 2, item 3 of the Bill seeks to insert a new Division 5 into the *Criminal Procedure Act 1986*. Proposed section 289U of that Division would provide that any part of domestic violence proceedings in which a complainant gives evidence must be held in closed court unless the court otherwise directs.

Further, the court could only make such a direction that a part of the proceedings be heard in open court if: a party to the proceedings requests; and if the court is satisfied that "special reasons in the interests of justice" require the part of the proceedings to be held in open court; or the complainant consents to giving their evidence in open court. In addition, the principle that proceedings for an offence should generally be open or public in nature, or that justice should be seen to be done, does not of itself constitute "special reasons in the interests of justice" requiring the part of the proceedings to be held in open court.

The Committee notes that these provisions of the Bill impact on principles of open justice which are fundamental to ensuring the accused's right to a fair trial. By requiring matters to be heard

in open court, proceedings are subject to public scrutiny. This promotes confidence in the courts and prevents any abuses going undetected.

The Committee acknowledges that the amendments in question are designed to recognise the particular dynamics of domestic violence matters and to balance the public interest in principles of open justice with the need to protect vulnerable witnesses. Further, a court could still direct that a matter be heard in open court if a party to proceedings requests and the court is satisfied that there are "special reasons in the interests of justice" to do so. Notwithstanding these factors, as principles of open justice are fundamental to the criminal justice system in Australia, the Committee refers the amendments in question to Parliament to consider whether they impact unduly on the right to a fair trial.

Right to a fair trial – ability to give evidence by audio-visual link

As noted, schedule 2, item 3 of the Bill seeks to insert a new Division 5 into the *Criminal Procedure Act 1986* applying to certain domestic violence proceedings. Proposed section 289V of that Division would provide that a complainant in such proceedings can give evidence by alternative means. In particular, they can, but may choose not to give evidence from a place other than the courtroom by audio visual link or "other technology that enables communication between the place and the courtroom".

By allowing evidence to be given by audio visual link or similar technology, the Bill may impact on the right to a fair trial. Such arrangements may have some impact on the ability of the court or juries to assess witness demeanour and weigh their evidence. In particular, evidence given by audio visual link would enable the court to see and hear the witness but it is unclear if this is the case with "other technology that enables communication between the place and the courtroom".

The Committee again acknowledges that amendments such as these are designed to recognise the particular dynamics of domestic violence matters and to provide appropriate protections to vulnerable witnesses. Further, the Bill provides a safeguard so that a court can order a complainant not to give evidence by alternative means – but the court can only do so if the court is satisfied that there are special reasons in the interests of justice for the evidence not to be so given.

The Committee considers that the amendments would be more appropriately drafted if they made it clear that any technology allowing the complainant to give evidence by alternative means also allowed the court to both see and hear the complainant. This would better balance the need to protect vulnerable witnesses with the defendant's right to a fair trial. The Committee refers this matter to Parliament for consideration.

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

Commencement by proclamation

Clause 2 of the Bill provides for the proposed Act to commence on assent except for schedule 1, items 1 and 10-12. The Committee generally prefers legislation affecting rights and obligations to commence on assent, or on a fixed date, to provide certainty to those affected.

Schedule 1, items 11 and 12 seek to amend section 39 of the CDVP Act so that an apprehended domestic violence order made at the time of the conviction of a person sentenced to a term of imprisonment for a serious offence will remain in force for an additional two years after the end of the person's imprisonment, or another period specified by the sentencing court.

Further, schedule 1, item 10 would amend section 36 (c) of the CDPV Act to provide that every apprehended violence order prohibits a defendant from harming an animal belonging to or in the possession of a protected person or a person with whom the protected person has a domestic relationship.

The Committee acknowledges that it may be appropriate for these amendments to commence on assent given that this would allow time for courts and police to undertake the necessary administrative arrangements e.g. make appropriate system changes, undertake training, and amend standard documentation relating to apprehended violence orders. It therefore makes no further comment in respect of these amendments.

However, schedule 1, item 1 seeks to amend section 7 of the CDPV Act to include conduct that causes reasonable apprehension of harm to an animal belonging to or in the possession of the protected person within the definition of "intimidation". It is understood from the Second Reading Speech that changing the definition of "intimidation" will clarify and streamline the application of the offence of stalking or intimidation under section 13 of the CDPV Act and that a person who engages in that conduct is guilty of an offence that carries a maximum penalty of five years imprisonment or a $5,500 fine, or both.

The Committee considers that changes to definitions that may impact on whether or not a person is found guilty of an offence attracting custodial penalties should commence on a fixed date or on assent. It therefore refers the commencement by proclamation of the amendment in schedule 1, item 1 of the Bill to Parliament for consideration.

6. WORK HEALTH AND SAFETY AMENDMENT (FOOD DELIVERY WORKERS) BILL 2020*

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

Strict liability

The Bill seeks to amend the *Work Health and Safety Act 2011* to insert a new section 26A. The new section imposes a duty on persons conducting a business that involves the delivery of food or drink to ensure protective equipment is provided to workers riding a bicycle or motorbike. The protective equipment to be provided includes a raincoat, reflective vest, approved bicycle helmet and lights and reflector (when riding a bicycle), and an approved motor bike helmet and boots (when riding a motor bike). In doing so, the Bill imposes a strict liability requirement on persons conducting a business of this nature.

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. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the requirement is intended to provide additional protection to delivery workers while on the road. However, given the offences and the significant penalties that may be applicable to individuals in particular, the Committee refers these provisions to Parliament for their consideration of whether the strict liability requirements are reasonable 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 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 as the Bill intends to amend an industry-wide standard of minimum protection requirements and impose a duty of care to these workers, a flexible start date may be afford these workplaces notice of when the changes will commence and allow time to appropriately implement these changed workplace practices. In this case, the Committee makes no further comment.

PART TWO – REGULATIONS

1. BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT REGULATION 2020

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

Significant increase in penalties

The *Building and Construction Industry Security of Payment Regulation 2008* appears to largely remake the previous 2008 Regulation, but increases penalties for corporations from 200 to 1,000 penalty units (that is, from around $22,000 to $110,000) in relation to a number of offences. These include offences such as failing to notify a bank that the trust account has been created under the Regulation, or failing to notify the Secretary of certain matters relating to the account within 10 business days. The Regulation also creates a new offence for where a contractor pays retention moneys into the trust account later than 5 business days after the head contractor is required to retain that money. The Committee notes that these are strict liability offences.

The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and strict liability offences are also contained in the 2008 Regulation. Further, the maximum penalties for the offences are monetary, not custodial. However, in relation to corporations, the maximum penalties for these strict liability offences are significantly higher than those that existed in the previous regulation. For these reasons, the Committee refers this matter to the Parliament for its consideration.

2. ROYAL BOTANIC GARDENS AND DOMAIN TRUST REGULATION 2020

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

Freedom of movement

The *Royal Botanic Gardens and Domain Trust Regulation 2013* allowed running or jogging anywhere in the Domain, provided the person(s) involved remained on the paths. This approach was mirrored with respect to cycling, which could be done anywhere in the Domain. Under the proposed *Royal Botanic Gardens and Domain Trust Regulation 2020*, groups of ten or more people cannot jog or run in a group in the Gardens, nor can anyone organise a footrace in the Domain or the Gardens without Trust approval (whether for profit or not). In addition, while cyclists in the Domain may be riding in an area which has been designated by the Trust as suitable for cycling, they cannot do so alongside two or more others. This prohibition did not previously exist under the 2013 Regulation. The Regulation changes the way in which the public

may use the Trust lands by partially restricting free movement in the space and may therefore impact a person's right to freedom of movement.

The Committee notes that the RIS states that partitioning certain areas of the Domain will better preserve the wider greenspace and commercialising access to certain areas will fund maintenance costs. Noting these factors, the Committee refers the regulation to Parliament, with particular regard to the potential to reduce public access and potential for commercialisation of the space.

Common law right to peaceful assembly

The *Royal Botanic Gardens and Domain Trust Regulation 2020* creates an offence to participate in public meetings, functions, demonstrations or other public gatherings in the Domain without permission from the Trust. Its predecessor, the *Royal Botanic Gardens and Domain Trust Regulation 2013,* appeared to allow such assemblies during daylight hours without consent of the Trust. Further, both organisers and participants of a relevant public meeting, function or demonstration could now be guilty of an offence. Previously, it appeared that only a person addressing such a demonstration or activity in the Domain before sunrise or after sunset could be guilty of an offence.

The Committee notes that the Regulation may potentially impact on the right to freedom of assembly. Although the Trust may still grant permission to undertake a public meeting or demonstration in the Domain, there appears to be no review process which governs the grant of permits. As such, the Committee refers this matter to the Parliament for consideration.

The *Royal Botanic Gardens and Domain Trust Regulation 2020* introduces a power for authorised officers to seize and store, at the cost to the legal owner and without risk or liability being assumed by the relevant authority or authorised officer, any equipment being used for a prohibited purpose under the Regulation which is not removed "immediately" after the owner is directed to do so by an authorised officer.

This power may impact the property rights of affected individuals as it could constitute seizure without a warrant, which is normally required for seizure of goods. Also, "immediately" is not defined, and so it may be unclear what amount of time would justify the seizure or property. Although the seizure power only relates to activities which are prohibited under the Regulation, the relevant clause includes a wide range of common activities such as busking, filming for commercial purposes, and public demonstrations. For these reasons, the Committee refers this matter to Parliament for consideration.

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

Personal training prohibited without consent

The *Royal Botanic Gardens and Domain Trust Regulation 2020* prevents the private (or not-for-profit) operation of fitness classes, exercise programs or personal training in the Domain, where that activity was previously allowed without consent from the Trustee. The Regulatory Impact Statement indicates that certain areas of the Domain will be partitioned for commercial exercise and fitness purposes. Access may need to be granted by the Trust and that access may come at a cost, at the discretion of the Trustee.

This change may have an adverse impact on the fitness community, particularly any persons or groups who run private or personal fitness classes or tests who were previously able to engage in that activity without consent from the Trustee. A person who is guilty of the new offence

could receive a penalty of around $750. However, there may be good policy reasons for commercial users to seek consent for the use of public space. Also, the Regulation appears to have been drafted following a period of consultation which included sporting groups. As such, the Committee makes no further comment.

3. WATER NSW REGULATION 2020

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

Strict liability offences – certain offensive conduct

The *Water NSW Regulation 2020* creates an offence for certain offensive conduct on Schedule 1 or 2 lands. This conduct includes behaving in a disorderly manner, using insulting or offensive language, or using a radio, television or other similar device in a manner likely to interfere with or cause a nuisance to a person or animal.

The proposed new offence is a strict liability one. 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. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalties for the offences are monetary, not custodial.

However, the contemplated offences carry a maximum total penalty of 200 penalty units, or $22,000. This appears to be much larger than the penalty for substantially similar offences in the *National Parks and Wildlife Service Regulation 2019*. There also appears to be no 'move-on' or similar warning mechanism that is seen in some other disorderly conduct offences (for example, see section 9 of the *Summary Offences Act 1988*). For these reasons, and noting again the strict liability nature of the offence, the Committee refers this matter to the Parliament.

Freedom of movement and enjoyment of public space - prohibiting the use of drones

The Regulation introduces a prohibition on the use of drones over Schedule 1 and Schedule 2 lands. Schedule 1 and 2 lands mainly consist of catchment areas across the state which are managed by Water NSW. There appears to be no proposed system in the Regulation for drone users to seek approval from authorised officers before obtaining a permit to fly a drone over Schedule 1 and 2 lands. Such a permit system appears to apply to drones used in national parks.

The new prohibition on drones potentially trespasses on freedom of movement and the enjoyment of public space. While the RIS notes that the clause is designed to protect catchment infrastructure and the wellbeing of visitors, it appears that some other public lands such as national parks may not be affected by a similar prohibition. There also appear to be several catchment areas across the state, including the Warragamba catchment area, which may be affected. As such, the Committee refers this matter to Parliament for its consideration.

Part One – Bills

1. Drug Supply Prohibition Order Pilot Scheme Bill 2020

Date introduced	22 October 2020
House introduced	Legislative Council
Member introducing	The Hon. Scott Farlow MLC on behalf of the Hon. Damien Tudehope MLC
Minister responsible	The Hon. David Elliot MP
Portfolio	Police and Emergency Services

PURPOSE AND DESCRIPTION

1. The object of this Bill is to establish a pilot scheme for drug supply prohibition orders in 4 pilot scheme areas. During the pilot scheme, a police officer will be able to seek the making of a drug supply prohibition order against a person who is over 18 years of age and has been convicted of a serious drug offence. The order, if made, will permit a police officer to stop, detain and search the person and search certain vehicles, vessels, aircraft or premises without the requirement for a warrant. These powers are only able to be exercised in a pilot scheme area

BACKGROUND

2. The Bill introduces the Drug Supply Prohibition Order Pilot Scheme in the specified pilot scheme area (being the Bankstown Police Area Command and the Coffs-Clarence, and the Hunter Valley and Orana Mid-Western Police Districts) for a period of two years after the commencement of the proposed Act.

3. In the Bill's second reading speech, the Hon. Scott Farlow MLC, who introduced the Bill on behalf of the Minister, noted that the Bill delivered an election commitment of the NSW Government:

> The bill implements the New South Wales Government's election commitment to introduce drug supply prohibition orders, or DSPOs, which will give police new powers to search convicted drug dealers and manufacturers, as well as their homes and vehicles, at any time without a warrant. The New South Wales Government made that commitment at the last election to provide police with an additional strategic tool to prevent and disrupt the supply and manufacture of prohibited drugs, and to deal with serious drug offenders who have re-engaged or are likely to re-engage with drug supply or manufacture activities.

4. Mr Farlow provided further context for the Bill:

> To that end, it is anticipated that the DSPO scheme will serve two purposes. First, it will assist police to gather evidence of drug supply and drug manufacture effectively and efficiently. Second, it will have a deterrent effect on a person subject to a DSPO, who may reconsider whether re-engaging in a lifestyle involving the manufacture or supply of illicit drugs is worth the

increased risk of police detection and further conviction. Under the DSPO scheme, police will be able to apply for a DSPO against the person who is 18 years of age or older and has been convicted of a serious drug offence in the past 10 years. For the purposes of the DSPO scheme, a serious drug offence will include drug supply or manufacture offences involving more than the trafficable quantity of a prohibited drug and other drug offences relating to the supply or manufacture of prohibited drugs. A DSPO application will be made to an authorised magistrate on an ex-parte basis.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to undisturbed enjoyment of premises – Power to search without a warrant

5. The Bill sets out the legislative framework for a new Drug Supply Prohibition Order Pilot Scheme (DSPO) to be trialled in specified pilot scheme areas within NSW. As part of the scheme, section 9 of the Bill provides that an authorised magistrate may, on the application of a police officer, make a drug supply prohibition order against a person. Such an order may be made if the magistrate is satisfied that the person is an eligible person and likely to engage in the manufacture or supply of a prohibited drug.

6. Section 5 of the Bill defined an "eligible person" as a person who has been convicted of a serious drug offence within 10 years before the application day, and (b) is at least 18 years of age on the application day.

7. Section 4(1) of the Bill provides that if such a drug supply prohibition order is in force against a person, a police officer may, without a warrant:

- Stop, detain and search the person, and no other person.
- Enter and search a dwelling at which the person resides, a premises that the police officer reasonably suspects are owned by the person or under the direct control or management of that person, or a premises that the police officer reasonably suspects are being used by the person for an unlawful purpose involving the manufacture or supply of a prohibited drug.
- Stop, detain and search a vehicle being driven by or under the control or management of the person occupied by the person, or parked on an area that is part of the searchable premises, but not if the area is shared with another dwelling or premises unless the police officer reasonably suspects that the vehicle is being used by the person in relation to the manufacture or supply of a prohibited drug.

8. Subsection 4(2) provides that the police officer may seize and detain all or part of a thing that the police officer suspects on reasonable grounds that it:

- May provide evidence of the commission of a drug related offence
- Is stolen or otherwise unlawfully obtained
- May provide evidence of the commission of a related offence under Part 4, Division 1 of the *Law Enforcement (Powers and Responsibilities) Act 2002,* or an offence involving a prohibited drug

- Is a dangerous article within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*

9. Subsection 4(3) provides that a police officer may only exercise these search power if:

- the power is exercised in a pilot scheme area or an area that the police officer reasonably believes to be in a pilot scheme area, and

- the exercise of the power, other than a power exercised under subsection (2), is reasonably required to decide whether the person is involved in the commission of an offence involving a prohibited drug.

10. Subsections 4(4)-(7) provides certain safeguards and requirements for the use of these search powers, including that the Commissioner of Police must ensure that the subject of a DSPO is given written notice about a search as soon as practicable after the search if they were not present while it was taking place (s 4(4)) which specifies the date and address of the search (s 4(5)), that that *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search carried out under this Act including additional limitations on the exercise of the powers under this section (s 4(6), and that a strip search of a person must not be carried out when exercising this power (s 4(7)). [NB: I feel like this should be separated into sentences?]

11. Section 12 of the Bill provides that a drug supply prohibition order commences from the time it is made and remains in force until the end of specified period being not less than 6 months, the end of the pilot scheme period, or until the order is revoked.

12. Section 10(2) of the Bill provides that in deciding whether to make a drug supply prohibition order, an authorised magistrate may take into account whether there are other practicable alternative means that may be reasonably available that could be used to reduce the risk that the person will engage in the manufacture or supply of a prohibited drug.

The Bill introduces new powers for police officers to stop, search and seize property without a warrant as part of a pilot program to introduce Drug Supply Prohibition Orders (DSPO). If a DSPO is in force against a person, a police officer may, without a warrant, stop, detain and search the person, enter and search a dwelling at which the person resides or premises that the police officer reasonably suspects are owned by the person, are under the direct control or management of the person or are being used by the person for an unlawful purpose involving the manufacture or supply of a prohibited drug. A police officer may also stop, detain and search a vehicle being driven, controlled or directed by the person. A police officer may also seize and detain any evidence in the course of exercising these powers. The use of these extended police powers may impact on a person's right to undisturbed enjoyment of their premises.

The Committee notes that the proposed powers would only be exercisable in the pilot scheme area for a period of 2 years, and can only be applied to an adult who has been convicted of a 'serious drug offence' in the 10 years. The Committee also acknowledges that the proposed powers and pilot scheme are intended to target convicted offenders of drug offences which involve traffickable quantities

of prohibited drugs or plants, precursor substances or possession of drug manufacturing equipment. However, given the wide-ranging search and seizure powers without a warrant and significant impact to individuals subject to the Bill's provisions, the Committee refers this matter to the Parliament for its consideration.

Freedom of association

13. Section 10 of the Bill outlines matters to be taken into account by an authorised magistrate when deciding whether a person is likely to engage in the manufacture or supply of a prohibited drug.

14. Subsection 10(1)(b) provides that a magistrate may consider whether the person associates with other persons, other than in relation to a lawful drug treatment or rehabilitation program, who are involved in the manufacture or supply of a prohibited drug.

15. Subsection 10(1)(c) provides that a magistrate may also consider whether the person is a member of, or associates with, a criminal group within the meaning of section 93S of the *Crimes Act 1900*.

16. In the Second Reading Speech, Mr Farlow noted the intent of the overall scheme:

> …it is anticipated that the DSPO scheme will serve two purposes. First, it will assist police to gather evidence of drug supply and drug manufacture effectively and efficiently. Second, it will have a deterrent effect on a person subject to a DSPO, who may reconsider whether re-engaging in a lifestyle involving the manufacture or supply of illicit drugs is worth the increased risk of police detection and further conviction.

17. Mr Farlow further noted the operation of section 10:

> Clause 10 of the bill provides a list of matters the authorised magistrate may take into account when determining that a person is likely to engage in the manufacture or supply of a prohibited drug. The list is not exhaustive but includes criminal intelligence, assets or cash out of proportion to income, and drug related associates. The authorised magistrate retains discretion when considering the application to take into account any matter that they consider to be relevant.

The Bill provides that an authorised magistrate may take various matters into account when deciding whether a person is likely to engage in the manufacture or supply of a prohibited drug. This includes whether a person associates with other person who are involved in the unlawful manufacture or supply of a prohibited drug, and whether the person is a member of or associates with a criminal group. These provisions may impact a person's freedom of association as contained in Article 22 of the ICCPR. The right to freedom of association protects their freedom to form and join associations to pursue a common goal, and to exchange ideas and information.

However, Article 22 also recognises that derogation from this right may be warranted in certain circumstances, including to protect public safety and public health. The Committee notes that these provisions are addressed at targeting criminal activities and specifically for association and for a trial period only. In these circumstances, the Committee makes no further comment.

Procedural fairness - Notification of reasons for order

18. Proposed section 9 outlines the provisions for the making of a drug supply prohibition order by a magistrate. Subsection 9(8) provides that except as otherwise provided for in the Act, a person (including the subject of the DSPO) is not entitled to know the reasons for the decision to make the DSPO, and is not to be given access to, or provided with, a document (or a copy of a document) that formed part of the application.

19. Section 13 outlines provisions for appealing such an order. Section 13(6) states that the Local Court is not to be provided with any document that formed part of the application for the DSPO or the reasons recorded by the authorised magistrate for making the order.

> **The Bill provides that a person (including the subject of the DSPO) is not entitled to know the reasons for the decision to make the DSPO, and is not to be given access to, or provided with, a document (or a copy of a document) that formed part of the application. Upon appeal of such an order, the Local Court is not to be provided with any document that formed part of the application for the DSPO or the reasons recorded by the authorised magistrate for making the order. As a result, a person who is the subject of such an order may not have access to procedural fairness to challenge allegations made against them which may be inconsistent or inaccurate.**
>
> **The Committee notes that reasons for issuing an order may compromise police operations and for that reason are not available to offenders when served with the order or upon appeal. However the Committee notes that the absence of reasons may considerably impact the procedural fairness of persons subject to such an order. The Committee refers the matter to Parliament for its consideration.**

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

Limits appeal of drug supply prohibition order

20. Section 13 outlines the provisions for the revocation of a DSPO. Section 13(1) of the Bill provides that the subject of a DSPO may apply to the Local Court to have the DSPO revoked. In such an application, the Commissioner of Police is the respondent (s 13(2) and the Local Court may affirm, vary or revoke the order (s 13(4)).

21. Section 13(5) of the Bill provides that the Local Court may revoke the DSPO only if satisfied that:

- the DSPO is unreasonably onerous in the circumstances, or
- the subject of the DSPO is not likely to engage in the manufacture or supply of a prohibited drug, or
- the risk of the subject of the DSPO engaging in the manufacture or supply of a prohibited drug could be mitigated in another way.

22. Section 13(8) of the Bill states that an application for the revocation of a DSPO must not be made by the subject of the DSPO within six months after a copy of the DSPO has been

served personally on the subject of the DSPO, or an application for the revocation of the DSPO is refused by the Local Court.

The Bill provides an avenue for appealing DSPOs. The Local Court may revoke the order if it is satisfied that the order is unreasonably onerous in the circumstances or that the subject of the order is not likely to engage in the manufacture or supply of a prohibited drug, or the risk of the subject of the DSPO engaging in the manufacture or supply of a prohibited drug could be mitigated in another way. However, the Bill limits the ability to appeal an order within the first 6 months of the DSPO being served personally on the offender or an application for the revocation of the DSPO being refused by the Local Court. This will considerably limit the appeal rights of the person subject to the order until six months after the order has been served, or a subsequent six months after a first application to revoke an order has been refused. The Committee refers this matter to Parliament for consideration of whether the limit on appeal rights are reasonable in the circumstances.

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

Commencement by proclamation

23. Section 2 of the Bill provides that the Act commence on a day or days to be appointed by proclamation.

Section 2 of the Bill provides that the Act 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 persons, particularly where the legislation affects individual rights or obligations. The Committee acknowledges that the Bill is a pilot program for only certain regions of the state, and a flexible start date may be beneficial for those administering the legislation and those of the public subject to its provisions. However, as the Bill may considerably impact the personal rights and obligations of persons subject to its provisions, the Committee refers the matter to the Parliament for its consideration.

2. National Parks and Wildlife Legislation Amendment (Reservations) Bill 2020

Date introduced	22 October 2020
House introduced	Legislative Council
Member introducing	The Hon. Ben Franklin MLC on behalf of the Hon. Damien Tudehope MLC
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *National Parks and Wildlife Act 1974* (the principal Act) for the following purposes—

(a) to revoke the reservation of the following land and to vest the land in the Minister for the purposes of Part 11 of the principal Act, which enables the Minister to sell, grant leases of, dispose of or otherwise deal with the land—

(i) about 0.38 hectares of Abercrombie River National Park,
(ii) about 15.39 hectares of Davidson Whaling Station Historic Site,
(iii) about 16.61 hectares of Macquarie Pass National Park,
(iv) about 1.91 hectares of Mount Jerusalem National Park,
(v) about 0.42 hectares of Munghorn Gap Nature Reserve,
(vi) about 6.05 hectares of Queens Lake State Conservation Area,
(vii) about 0.6 hectares of Roto House Historic Site,

(b) to revoke the reservation of the following land and to vest the land in Transport for NSW—

(i) about 184 square metres of Kororo Nature Reserve,
(ii) about 5.4 hectares of Western Sydney Regional Park,

(c) to revoke the reservation of about 45.2 hectares of Winburndale Nature Reserve and to vest the land in the Minister administering the *Forestry Act 2012*,

(d) to provide that the Minister must not transfer the parts of the land currently forming part of the following reservations, unless the Minister is satisfied that appropriate compensation has been provided—

(i) Abercrombie River National Park,
(ii) Macquarie Pass National Park,
(iii) Mount Jerusalem National Park,
(iv) Munghorn Gap Nature Reserve,

(v) Western Sydney Regional Park.

BACKGROUND

2. The Bill amends the *National Parks and Wildlife Act 1974* (the principal Act), which sets out the legislative framework for the establishment, preservation and management of national parks, historic sites and certain other areas, and the protection of certain Aboriginal objects.

3. The Hon. Ben Franklin MLC, who introduced the Bill on behalf of the Minister the Hon. Damien Tudehope MLC, stated in the Second Reading Speech that the Bill's amendments seek to revoke the reservation on certain land:

> The bill to amend the National Parks and Wildlife Act 1974 will adjust park boundaries to ensure appropriate management and allow upgrades of roads and other priority public infrastructure. It will facilitate the transfer of land of high cultural significance to the Aboriginal community and support expansion of the Port Macquarie Koala Hospital. The bill will also enable the harvesting of existing pine plantations to proceed by correcting an historical error. Finally, it will deliver commitments associated with a legally enforceable undertaking. National parks are our most precious environmental assets. They protect places of outstanding natural and cultural value and spectacular landscapes, and provide a vast array of recreational and visitor opportunities that underpin much of the New South Wales tourism industry.

4. Mr Franklin further acknowledged the importance of national parks and noted that the Bill's proposal to remove land from national parks was intended in the public interest:

> The events of the 2019-20 summer have brought home just how important our national parks and reserves are, as people have flocked to enjoy all that they have to offer. National parks are protected in perpetuity. The requirement for Parliament to approve any proposal to remove land from our national parks is an important mechanism to safeguard the State's conservation assets. I can assure the House that the proposals contained in the bill are in the public interest. They are necessary because there is no other feasible option and they do not result in any net loss of conservation values. In recognition of the need to ensure a balance between supporting essential infrastructure projects and conservation objectives, where relevant, the bill will ensure that appropriate compensation is provided for revocation of land from the national parks system. This longstanding practice has been followed for similar bills over many years.

5. Mr Franklin also noted that the revocation of some land from the Davidson Whaling Station Historic Site was to be transferred to the Aboriginal community to address historical errors:

> I take this opportunity to highlight the proposed revocation of about 15.4 hectares from the Davidson Whaling Station historic site near Eden. This is a particularly significant outcome of this bill as it will facilitate the future transfer of this culturally significant area to the Aboriginal community and will support resolution of longstanding issues related to the regional forest agreement process of the late 1990s. The revocation and eventual transfer of this land to the Eden Local Aboriginal Land Council will deliver on the agreed outcomes of the whole-of-government Eden Solution Brokerage Accord. This was endorsed by the New South Wales Government in 2017 as the framework to resolve concerns related to the 1999 regional forest agreement. The land to be revoked from the Davidson Whaling Station historic site is of significant Aboriginal cultural heritage value. When transferred to the Eden Local Aboriginal Land Council, it will ensure that the Aboriginal community has responsibility for management of this land.

ISSUES CONSIDERED BY THE COMMITTEE

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

3. NSW Jobs First Bill 2020*

Date introduced	22 October 2020
House introduced	Legislative Assembly
Member responsible	Yasmin Catley MP
	* Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to—

   (a) promote investment in local industry and job creation by encouraging the use of locally manufactured materials and the use of local service providers, and

   (b) promote investment in education and training by requiring the use of local apprentices, trainees and cadets on major projects, and

   (c) establish the NSW Local Jobs Advocate to undertake a range of functions to promote local employment and training.

BACKGROUND

2. In the Bill's Second Reading Speech, Ms Yasmin Catley MP noted that the Bill introduced amendments to support "local jobs and local communities" as part of Labor's NSW Made Policy and stated:

> We cannot give up on the ingenuity, innovation and expertise of local engineers and designers. We cannot continue to justify the economic nonsense of sending taxpayers' money offshore on services sector work that could be done and should be done here locally. Moreover, we cannot keep perpetuating the lie that there is a skills shortage or an expertise shortage in this country or that Australia and New South Wales cannot make things or do things locally.

3. Ms Catley went further to identify the objectives of the Bill:

> We want to make sure good businesses thrive and we believe that the State has a responsibility to offer these businesses the opportunity to do just that. The State Government is one of the nation's biggest customers. New South Wales spends approximately $34 billion per annum on goods and services. That is everything from multibillion dollar ferry and train procurement contracts down to the pens and pencils in our schools. But too much of that public money is being sent overseas when it could be kept here working harder for the local economy. Sadly, too much of that public money is being wasted.

4. The Bill creates an obligation on the Minister to develop a 'NSW Jobs First Policy' (Policy), within the parameters and requirements of the Bill. All government agencies must comply with the Policy themselves and ensure that any contractors who contract with the agency also comply with the Policy.

5. The Bill creates a role, to be filled by the Governor, being the NSW Local Jobs Advocate (Advocate) who has various investigatory and reporting functions under the Bill. The

Advocate is subject to the direction and control of the Minister, except in relation to the preparation and contents of a report that the Advocate is required to draft and provide to Parliament. The Advocate is given powers to compel the production of documents, issue compliance notices to contractors or government agencies and recommend to the Minister that an adverse publicity notice be issued.

6. Notably, government agencies can be exempted from the Policy (for certain projects only) at the Minsters' discretion and provided that exemption is disclosed to the Advocate within a month and is included in the agency's annual report.

7. The Bill requires that a person:

- tendering to a government agency for a contract for a 'significant project' or a 'strategic project' submit a local industry development plan to the relevant government agency and the Advocate; or

- tendering to a government agency for a contract for a 'major project' submit a major projects skills development plan to the relevant government agency and the Advocate.

8. The Bill makes further amendments including an increase in reporting requirements for Government agencies and grants further powers to the Minister to set the minimum requirements for various projects.

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

Independence of the Advocate

9. Proposed section 14 of the Bill sets out the functions of the NSW Local Jobs Advocate, including advising the Minister on various matters related to the NSW Local jobs First Policy, promotion of the Policy within government and local industry, and working with local industry, employee organisations and the education and training sector to facilitate and strengthen collaboration between industry and the education and training sector to help build the future workforce.

10. Proposed section 15 of the Bill provides that the Advocate is "subject to the direction and control of the Minister", except in relation to the preparation and contents of a report that the Advocate is required by the Bill if passed, or any other Act, to provide to Parliament.

11. Part 5 of the Bill sets out provision for the information and enforcement powers of the advocate, including the power to request information (s 17), request a government agency to conduct an audit (s 18), require information from persons and issue compliance notices (ss19-20), and the recommendation of issuing adverse publicity notices (s22).

12. In the Second Reading Speech, Ms Catley noted:

> We invited a number of peak bodies, business representatives and industry stakeholders to Parliament to seek their input on this legislation. They made clear that they wanted an enforcement regime that would ensure that nobody could manipulate those new rules and avoid

their responsibilities. They want a level playing field and that means they are willing to be held to a clear set of rules. That willingness comes because they know that a level playing field gives them a fresh opportunity to win government work.

Section 14 of the Bill sets out the functions of the NSW Local Jobs Advocate, including advising the Minister, the promotion of the Policy within government and local industry, and working with local industry and employee organisations to help build the future workforce. In addition, section 15 of the Bill states that the Advocate will be subject to the direction and control of the Minister, except in relation to the preparation and contents of a report that the Advocate is required by the Bill if passed, or any other Act, to provide to Parliament.

With the Advocate being under the direction and control of the Minister, the Advocate's operations and investigations will be subjected to a Minister's direction and not to Parliamentary scrutiny. This may impact on the neutrality and independence of the Advocate, especially considering the Advocate's enforcement powers. The Committee refers this matter to Parliament for its consideration as to whether the provisions relating to Ministerial control of the Advocate are sufficiently subjected to parliamentary scrutiny.

Non-reviewable decisions affecting right to reputation

13. Sections 22 and 23 of the Bill set out the Advocate's powers to make determinations and adverse publicity notices.

14. Subsections 22(1)-(2) provide that the Advocate may make a determination that a person had failed to comply with an information notice, the NSW Jobs First Policy, a local industry development plan, or a major projects skills development plan. Subsection 22(3)(a) provides that the Advocate may recommend to the Minister that that the person be issued with an adverse publicity notice. Subsection 22(4) provides that the person may, within 7 days after the Advocate has advised the person of the determination and recommendation, respond to the Advocate about the recommendation that an adverse publicity notice be issued by the Minister. Under subsection 22(5), the Advocate has qualified privilege in proceedings for defamation arising out of a determination or recommendation made under this section.

15. Section 23 of the Bill provides that the Minister may issue an adverse publicity notice about a person after receiving a recommendation under section 22(3)(a). Subsection 23(2) provides that an adverse publicity notice must name the person to whom the adverse publicity notice relates, and set out the reasons the notice is issued, and be tabled by the Minister in Parliament.

16. The Bill does not contain provisions to appeal or correct an adverse publicity notice once it has been issued.

The Bill provides that the Advocate may make a determination that a person has failed to comply with an information notice, the NSW Jobs First Policy, a local industry development plan, or a major projects skills development plan. The Advocate may also make a recommendation to the Minister that the person be subject to an adverse publicity notice, that must name the person, set out the reasons for the notice, and be tabled in the Parliament.

The Committee acknowledges that these powers of the Advocate and the Minister to make an adverse publicity notice are intended to ensure compliance with the NSW Jobs First Policy. However, as the issuing of such a notice may cause reputational or financial damage. This may be particularly problematic as the Bill does not provide an avenue to appeal or correct an adverse publicity notice. Given the potential for reputational or financial damage caused by a false adverse publicity notice, the Committee refers these provisions to Parliament to consider whether the powers are reasonable in the circumstances.

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

Matters deferred to the regulations – functions of the Advocate

17. Proposed section 14 of the Bill sets out the functions of the NSW Local Jobs Advocate to include, among other functions, to advise the Minister matters related to the development of the NSW Jobs First Policy, to promote the NSW Jobs First Policy within government and local industry, to advocate in favour of government agencies and the private sector procuring goods and services from local industry based in New South Wales and to monitor and report to Parliament on compliance with the NSW Jobs First Policy including exemptions granted by the Minister from compliance with the NSW Jobs First Policy.

18. Subsection 14(1)(k) also provides that the Advocate also has "any other functions prescribed by the regulations for the purposes of this section."

The Bill defers some matters to the regulations. In particular, the Bill provides that some functions of the NSW Local Jobs Advocate may be prescribed by the regulations. The Committee generally substantive functions of statutory bodies to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected. However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987.* As such the Committee makes no further comment.

Wide power of delegation

19. Proposed section 16 of the Bill provides that the exercise of any function of the Advocate (other than this power of delegation) may be delegated by the Advocate to any person employed in the Office of the NSW Local Jobs Advocate.

20. The functions of the advocate are set out in section 14 (as noted above) and include, among other things, advising the Minister on various matters related to the NSW jobs First Policy, promoting the NSW Jobs First Policy, advocate in favour of government agencies and the private sector, to work with local industry, employee organisations and the education and training sector, and to monitor and report to Parliament on compliance with the NSW Jobs First Policy.

The Bill grants a wide power of delegation to the Advocate for the exercise of any function of the Advocate to any person employed in the Office of the NSW Local Jobs Advocate. The functions of the Advocate that may be delegated include advising the Minister on various matters related to the NSW Jobs First Policy, working with government agencies, local industry and the private sector, and monitoring and reporting to Parliament on compliance with the NSW Jobs First

Policy. In performing these functions, appropriate judgement must be used to assess compliance and advise the Minister on relevant matters.

The Committee notes that the Bill does not contain restrictions on this power to delegate, e.g. restricting delegation to people with certain qualifications or expertise. The Committee also notes that some functions of the Advocate may have an impact on reputational or financial rights or persons subjects to adverse publicity notices, as noted earlier in this report. Given this, the Committee considers the Bill should provide more clarity about the persons to whom the functions can be delegated. In the circumstances, the Committee refers this matter to Parliament for its consideration.

Henry VIII clause

21. Schedule 2 (Savings, transitional and other provisions) to the Bill sets out savings, transitional and other provisions. Subclause 1(4) provides that the Regulations made for the purposes of this clause may amend this Schedule to provide for additional or different savings and transitional provisions instead of including the provisions in the regulations.

The Bill contains a Henry VIII clause which allows the Regulations made for the purposes of Schedule 2 to amend the Schedule itself to provide for additional or different savings and transitional provisions. This allows the Minister to create regulations that could override the provisions of primary legislation, and thereby to legislate without reference to Parliament. The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight. However, as the amendment is limited to amendments of a savings and transitional nature, and permits additional control over the rollout of the amendments contemplated by the Bill, the Committee makes no further comment.

4. Retirement Villages Amendment Bill 2020

Date introduced	22 October 2020
House introduced	Legislative Council
Member introducing	The Hon. Natasha Maclaren-Jones MLC on behalf of the Hon. Damien Tudehope MLC
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and innovation

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Retirement Villages Act 1999* as follows—

(a) to enable the Secretary of the Department of Customer Service to make an order requiring an operator of a retirement village to pay a resident of the retirement village the amount that the resident will be entitled to once the resident's residential premises are sold (the *exit entitlement*) in circumstances where the resident has moved out or intends to move out, and the premises have not yet been sold,

(b) to require an operator of a retirement village to pay part of the resident's exit entitlement directly to an aged care facility in which the resident resides or proposes to reside as payment for the accommodation in the facility, instead of paying the exit entitlement to the resident, in certain circumstances where the premises in the retirement village have not yet been sold,

(c) to provide that a former resident of residential premises in a retirement village is not required to pay recurrent charges to the operator of the retirement village once 42 days have passed since the former resident permanently vacated the premises,

(d) to make other minor and consequential amendments.

2. The Bill also makes a minor amendment to an uncommenced provision in the *Retirement Villages Amendment Act 2018* that relates to asset management plans prepared by operators of retirement villages.

BACKGROUND

3. In her Second Reading Speech, The Hon. Natasha Maclaren-Jones MLC, who introduced the Bill on behalf of The Hon. Damien Tudehope MLC, noted that the Bill represents the latest tranche of reforms following a 2017 review of the sector[1] led by Kathryn Greiner, AO:

[1] See Kathryn Greiner AO, 15 December 2017, *Inquiry into the NSW Retirement Village Sector*, https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0008/381572/Inquiry_into_the_NSW_Retirement_Village_Sector_Report.pdf , viewed 27 October 2020.

> Today we build on those reforms to implement some of the key recommendations of the Greiner review to reduce the burden and uncertainty for residents of ongoing recurrent charges when a resident leaves a village, and of costs and liability when a resident's unit remains unsold. We took those reforms to the last election …

4. According to the Second Reading Speech, the focus of the proposed reforms in the Bill is "enhancing rights and safeguards of registered interest holders." It is also noted that there are regulations being developed at present to support the Bill.

5. Ms Maclaren-Jones acknowledged that the proposed reforms will impact retirement village operators, but noted that the Bill had been subject to extensive public consultation:

> The Government is mindful that those changes will also impact operators across the State, including their budgets and how they interact with residents. Despite the impacts that those changes may have on operators in the short term, we are confident that the changes will effect a fairer and more sustainable sector in the long term. The Government has been most pleased with the coalition of support it has received for the bill from stakeholders representing residents, operators and those in the aged care space, including the Retirement Village Residents Association and the Property Council of Australia. The continued viability of the sector is important and the ability to work with peak bodies to finalise those proposals following extensive public consultation, in which the Government received over 700 submissions, has ensured that the bill before the House is fair and balanced.

ISSUES CONSIDERED BY THE COMMITTEE

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

Matters deferred to regulations

6. Schedule 1, item 13 of the Bill inserts new Part10AA – Payments if certain residential premises not sold. Division 2 of that Part governs the making of exit entitlement orders, which is an order made by the Secretary directing the operator of a retirement village to pay the exit entitlement to the former occupant: proposed section 182AB(2).

7. However, the Secretary must not make an exit entitlement order if the Secretary is satisfied by the operator that they have not unreasonably delayed the sale of the residential premises: proposed section 182AC(2). Although "unreasonably delayed" is not defined, proposed section 182AC(3) provides that the regulations may make provisions for matters the Secretary must consider when determining whether the operator has unreasonably delayed a sale.

8. The Second Reading Speech noted that it is normally the operator who has control of the sale of the property, on behalf of a former resident who has already left the village. The Second Reading Speech also stated that the new exit entitlement orders are designed to address situations where there has been a delay in the sale of the property due to the operator, either by delaying getting the property ready for sale or through not taking reasonable steps to secure a sale.

9. Under proposed section 182AE, the Secretary may, upon application by an operator of a retirement village, approve the extension of the period in which the operator has to pay an exit entitlement. However, the Secretary may only approve a longer period if satisfied that the operator has not unreasonably delayed the sale.

The Bill defers several matters to the regulations. In particular, the Bill provides that the Secretary must not make an exit entitlement order if the Secretary is satisfied by the operator that they have not "unreasonably delayed" the sale of a residential premises. Similarly, the Secretary can approve the extension of the period in which an operator must pay an exit entitlement, but only if satisfied that the operator has not "unreasonably delayed" the sale.

Although "unreasonably delayed" is not defined, proposed section 182AC(3) provides that the regulations may make provision for the matters the Secretary must consider when determining whether there has been an unreasonable delay.

The Second Reading Speech noted that the new exit entitlement orders are designed to address situations where there has been a delay in the sale of a property by an operator, either by delaying readying the property for sale or by not taking reasonable steps to secure the sale. Given the protective function of exit entitlement orders for residents and former residents, it may be preferable that key concepts such as the meaning of "unreasonably delayed" are defined in primary rather than subordinate legislation. However, the Second Reading Speech noted that the Government intends to consult with relevant experts in the sector to ensure the correct issues are prescribed in reference to the meaning of "unreasonably delayed." In any event, regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. As such, the Committee makes no further comment.

Commencement by proclamation

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

The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that a flexible start date may enable aged care operators, the Secretary, and the NSW Civil and Administrative Tribunal to make the necessary administrative arrangements to support the new scheme. The Second Reading Speech also noted that the supporting regulations are still being drafted. In the circumstances, the Committee makes no further comment.

5. Stronger Communities Legislation Amendment (Domestic Violence) Bill 2020

Date introduced	22 October 2020
House introduced	Legislative Assembly
Member responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Crimes (Domestic and Personal Violence) Act 2007* and the *Criminal Procedure Act 1986* in relation to domestic violence matters, including as follows—

(a) to extend the meaning of intimidation, as defined in the *Crimes (Domestic and Personal Violence) Act 2007* to include harm to an animal in particular circumstances,

(b) to ensure police officers may issue a provisional apprehended domestic violence order where there is a comparable interim or final order already in place and provide for the provisional order to be taken to be an application under Part 10 of the *Crimes (Domestic and Personal Violence) Act 2007*,

(c) to require that an apprehended domestic violence order, imposed by the court for certain offenders who are sentenced to imprisonment, continues for a period of 2 years after the term of imprisonment is completed, or another period specified by the court,

(d) to provide that a court may grant leave to make an application to vary or revoke an indefinite apprehended domestic violence order if it is in the interests of justice,

(e) to clarify that the prohibition imposed by an apprehended violence order under the *Crimes (Domestic and Personal Violence) Act 2007* relating to destroying or damaging property of a protected person, which is taken to be specified in every order, extends to the harming of an animal,

(f) to provide that certain parts of domestic violence proceedings in which a complainant gives evidence must be held in closed court, unless a court otherwise directs,

(g) to provide domestic violence complainants with the entitlement to give evidence using alternative arrangements or by alternative means, including audio visual link, in certain domestic violence proceedings,

(h) to amend the *Criminal Procedure Act 1986* to provide for a warning that may be given by a Judge in relation to domestic violence offences,

(i) to make minor and consequential amendments.

2. The Bill also repeals the *Crimes Legislation Amendment Act 2018*.

BACKGROUND

3. In the Second Reading Speech, the Hon. Mark Speakman SC MP told Parliament that the Bill introduces amendments to "support procedural improvements and close gaps in the law that have become apparent" thereby empowering victims and survivors of domestic violence to report abuse, and assisting them through proceedings:

> Courts can be a daunting place for victims of domestic and family violence. The processes can be overwhelming. Domestic violence is a complex crime like no other because of the intimate relationships between perpetrators and victims. Those close personal connections intertwine complainants and defendants in ways that maintain a callous grip on victims. This grip can silence reports of abuse, delay reports when victims are brave enough to come forward, and intimidate victims to discontinue cooperating with prosecutions. These challenges create obstacle—and therefore potential disincentives—for victims to act on the horrific abuse that they continue to endure.

4. The Attorney General continued:

> Reforms contained within today's bill seek to ease that burden. We want victim-survivors to feel empowered to report abuse and to be confident that, when they take that courageous step, they will be supported during proceedings. These amendments will provide greater protections for domestic violence victims when giving evidence and ensure that they will continue to be protected upon the release of the offender from custody, improve court procedures for criminal and apprehended domestic violence order [ADVO] proceedings, and explicitly recognise the intersection between animal abuse and domestic violence.

ISSUES CONSIDERED BY THE COMMITTEE

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

Lack of certainty and clarity – apprehended violence orders

5. An apprehended violence order is a court order protecting an applicant from a person he or she fears e.g. a person who has hurt, threatened or intimidated them. If an apprehended violence order is made, the defendant is not given a criminal record but if he or she breaches the order, it is a criminal offence.[2]

6. A provisional apprehended violence order is an order made by the police or a court in response to an urgent application, where the police believe a person is in need of immediate protection. It contains orders that tell the defendant what he or she can or cannot do e.g. a provision that he or she cannot go within 100 metres of a certain place or person; or a provision that he or she must surrender all firearms and related licences to police.[3]

7. Currently, under section 29(3) of the *Crimes (Domestic and Personal Violence) Act 2007* ("the CDPV Act"), a provisional order has to be listed before a local court on the next domestic violence list day, and no more than 28 days from the date on which it was made. The court will then replace the provisional order with an interim or final apprehended

[2] See https://lawaccess.nsw.gov.au/Pages/representing/lawassist_avo.sapx, viewed 23 October 2020.

[3] See https://lawaccess.nsw.gov.au/Pages/representing/lawassist_avo.sapx; and https://lawaccess.nsw.gov.au/Documents/sample-provisional_advo_explained.pdf viewed 23 October 2020.

violence order or dismiss the application (unless it was withdrawn).[4] However, special provisions inserted in response to the COVID-19 pandemic extend the length of time within which the provisional order must be listed from 28 days to 6 months, during the "prescribed period" that is, up until 26 March 2021.[5]

8. Schedule 1, item 2 of the Bill seeks to insert a new section 27(3A) into the CDVP Act which would provide that an existing apprehended violence order does not prevent an application being made for a provisional order.

9. Further, schedule 1, item 3 of the Bill seeks to insert a new section 28B into the CDVP Act which would apply if an apprehended violence order is already in force against the defendant for the protection of a particular person. Section 28B would provide:

- An issuing officer must not make a prohibition or restriction in a provisional order that would be inconsistent with a prohibition or restriction in the existing order if the effect would be to decrease the protection afforded to the protected person under the existing order.

- A prohibition or restriction specified in a provisional order that is inconsistent with a prohibition or restriction specified in the existing order in a way that would decrease the protection afforded to the protected person under the existing order has no effect.

10. Further, schedule 1, item 18 of the Bill seeks to insert a new section 81A into the CDVP Act to provide that if multiple apprehended violence orders relating to the same defendant and protected person are in force, and there is a prohibition or restriction specified in the orders that is inconsistent with or contrary to another order, the most recent prohibition or restriction prevails. However these provisions are subject to proposed section 28B.

11. In the Second Reading Speech, the Attorney General provided the following background:

> The bill also introduces three clarifying amendments to part 7 of the CDPV Act to support the use of provisional ADVOs: first, to state explicitly that the existence of an interim or final court order does not prevent a provisional order under part 7 to be applied for and made; second, to specify that a provisional order made under part 7 must not decrease the protection afforded to the protected person by any existing ADVO; and, third, to specify that where conditions between multiple orders are contradictory or inconsistent, the latest in time will prevail. The existing requirements for provisional orders under part 7 will continue to apply where police are using this power to issue a provisional order—where a court-issued ADVO already exists—to address urgent increased risk. This includes that a police officer must have: "… good reason to believe a provisional order needs to be made immediately to ensure the safety and protection of the person who would be protected by the provisional order or to prevent substantial damage to any property of that person".

12. The Attorney General also told Parliament that these changes were needed to facilitate an urgent response in cases of increased risk:

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[4] See https://lawaccess.nsw.gov.au/Pages/representing/lawassist_avo.sapx viewed 23 October 2020; and *Crimes (Domestic and Personal Violence) Act 2007*, ss29(1)-(3).

[5] See *Crimes (Domestic and Personal Violence) Act 2007*, ss29(4) and (5); and *Crimes (Domestic and Personal Violence) Regulation 2019*, cl 5A.

It is important to allow police to vary the conditions of an ADVO provisionally in circumstances that require an urgent response due to increased risk. There may not always be time to wait for a court listing in order to make the order or variation to the existing conditions of the ADVO, as required.

Schedule 1, item 2 of the Bill seeks to amend the *Crimes (Domestic and Personal Violence) Act 2007* (CDVP Act) to insert a new section 27(3A) which would provide that an existing apprehended violence order does not prevent an application being made for a provisional order.

Further, schedule 1, item 3 of the Bill seeks to insert a new section 28B into the CDVP Act which would apply if an apprehended violence order is already in force against the defendant for the protection of a particular person. Section 28B would provide that an issuing officer must not make a prohibition or restriction in a provisional order that would be inconsistent with a prohibition or restriction in the existing order if the effect would be to decrease the protection afforded to the protected person under the existing order.

Section 28B would also provide that a prohibition or restriction specified in a provisional order that is inconsistent with a prohibition or restriction specified in the existing order in a way that would decrease the protection afforded to the protected person under the existing order has no effect.

In addition, schedule 1, item 18 of the Bill seeks to insert a new section 81A into the CDVP Act to provide that if multiple apprehended violence orders relating to the same defendant and protected person are in force, and there is a prohibition or restriction specified in the orders that is inconsistent with or contrary to another order, the most recent prohibition or restriction prevails. However these provisions are subject to proposed section 28B.

By allowing more than one apprehended violence order to be made in respect of the same defendant and protected person, the Bill may create a lack of certainty and clarity. This lack of clarity may be compounded by the fact that proposed section 81A requires compliance with the most recent order to the extent of any inconsistency, except as regards prohibitions or restrictions in a provisional order that afford the protected person less protection. In that case, it appears the previous order would prevail to the extent necessary, pursuant to proposed section 28B. In short, there is arguably no clear cut rule as to which order or restrictions and prohibitions prevail – the general rule is subject to an exception which could create confusion for defendants.

If an apprehended violence order is made, the defendant is not given a criminal record but if he or she breaches the order, it is a criminal offence. Therefore, it is important that they know the exact restrictions to which they are subject under the order. The Committee appreciates that the provisions in question are intended to facilitate an urgent response to protect victims – that is, to enable police to immediately vary the conditions of an order provisionally to respond to increased risk. Further, there are requirements for the provisional order to be brought before a court to decide whether it should stand/be varied etc, but this may not happen for 28 days or more. Noting the competing considerations, the

Committee refers the provisions to Parliament to consider whether they are reasonable in the circumstances or may create an undue lack of clarity.

Review rights – apprehended violence orders

13. As noted above, currently, under section 29(3)of the CDPV Act, a provisional order has to be listed before a local court on the next domestic violence list day, and section 29(3)(b) provides that this must be no more than 28 days from the date on which it was made. The court would then replace the provisional order with an interim or final apprehended violence order or dismiss the application (unless it was withdrawn).[6]

14. As also noted, this requirement is currently subject to special provisions inserted in response to the COVID-19 pandemic. Section 29(4) provides that during the "prescribed period" a reference to 28 days in section 29(3)(b) is taken to be a reference to 6 months. That is, these special provisions extend the length of time within which the provisional order must be listed from 28 days to 6 months, during the "prescribed period" – the "prescribed period" being from the commencement of these special provisions, up until 26 March 2021.[7]

15. However, schedule 1, item 5 of the Bill seeks to insert a new section 29(3A) into the CDPV Act which would provide that failure to comply with section 29(3)(b) does not affect the validity of the provisional order if the failure is due to court sitting arrangements that prevent the matter from being heard by the appropriate court. That is, if owing to court sitting arrangements a provisional order contains a date that is more than 28 days after the making of the provisional order, but is the next date on which the matter can be listed on a domestic violence list at the appropriate court, the validity of the order is not affected.

16. In the Second Reading Speech, the Attorney General provided the following background to the proposed amendments:

> Schedule 1 [5] to the bill also makes a related amendment to section 29 of the CDPV Act to ensure that a failure to comply with the requirement to list a provisional ADVO for court consideration within 28 days does not invalidate the provisional order or application if the failure arises as a result of the appropriate court's sitting arrangements.
>
> At present, the requirement to list within 28 days means that some regional ADVO matters cannot be listed at the nearest court because of the sitting arrangements—for example, at courts that only sit once per month. As a result, the matter may need to be heard at another court, which can often result in the defendant and person in need of protection travelling long distances for the first mention, only for the matter to be referred back to the original court after that initial hearing. The amendment to section 29 will ensure that the use of these powers, and the existing scheme of police-issued provisional ADVOs, is responsive to the needs of rural and regional areas where court sittings may be more irregular.

Currently, under section 29(3)of the CDPV Act, a provisional apprehended violence order has to be listed before a local court on the next domestic violence list day, and section 29(3)(b) provides that this must be no more than 28 days

[6] See https://lawaccess.nsw.gov.au/Pages/representing/lawassist_avo.sapx viewed 23 October 2020; and *Crimes (Domestic and Personal Violence) Act 2007*, ss29(1)-(3).

[7] See *Crimes (Domestic and Personal Violence) Act 2007*, ss29(4) and (5); and *Crimes (Domestic and Personal Violence) Regulation 2019*, cl 5A.

from the date on which it was made. The court would then replace the provisional order with an interim or final apprehended violence order or dismiss the application (unless it was withdrawn).

This requirement is currently subject to special provisions inserted in response to the COVID-19 pandemic. Section 29(4) provides that during the "prescribed period" a reference to 28 days in section 29(3)(b) is taken to be a reference to 6 months. That is, these special provisions extend the length of time within which the provisional order must be listed from 28 days to 6 months, during the "prescribed period" – the "prescribed period" being from the commencement of the special provisions, up until 26 March 2021.

However, schedule 1, item 5 of the Bill seeks to insert a new section 29(3A) into the CDPV Act which would provide that failure to comply with section 29(3)(b) does not affect the validity of the provisional order if the failure is due to court sitting arrangements that prevent the matter from being heard by the appropriate court. That is, if owing to court sitting arrangements a provisional order contains a date that is more than 28 days after the making of the provisional order, but is the next date on which the matter can be listed on a domestic violence list at the appropriate court, the validity of the order is not affected.

The Committee identifies that the proposed amendments may thereby impact on the review rights of a defendant to a provisional apprehended violence order. He or she could be subject to the restrictions and prohibitions contained in the order for more than 28 days without the opportunity to have the matter reviewed by a court to consider whether these restrictions are warranted. Further, the proposed amendments provide no alternative time limit within which provisional orders must be listed to remain valid – they are open-ended.

While delays may be justified if court sitting dates are affected by an emergency situation caused by COVID-19, the proposed amendments are not tied to COVID-19 – they would apply more generally. In the circumstances, the Committee refers the provisions in question to Parliament to consider their impact on defendants' rights of review.

Right to a fair trial – principles of open justice

17. Schedule 2, item 3 of the Bill seeks to insert a new Division 5 into the *Criminal Procedure Act 1986*. This Division would apply to proceedings for a domestic violence offence and to apprehended violence order proceedings but only if:

- the defendant in proceedings is a person charged with a domestic violence offence, and
- the protected person is the alleged victim of the offence (proposed section 289T).

18. Under section 3 of the *Criminal Procedure Act 1986* "domestic violence offence" has the same meaning as in the CDPV Act. Further, schedule 2, item 1 of the Bill would amend section 3 of the CDPV Act to provide that "apprehended violence order proceedings" has the same meaning as in the CDVP Act. In the Second Reading Speech, the Attorney General provided the following background:

> The bill introduces two important provisions to the Criminal Procedure Act 1986 to assist complainants when giving evidence in criminal proceedings involving domestic violence offences and related ADVO proceedings. A domestic violence offence is a personal violence offence in circumstances where the person who has committed the offence has, or has had, a domestic relationship with the victim. Acts of personal violence include offences such as homicide, acts causing danger to life or bodily harm, assault occasioning actual bodily harm, sexual assault, child sexual assault, intimate image offences and many others. A domestic violence offence also includes offences other than personal violence offences where the commission of the offence is intended to coerce or control the victim or to cause the victim to be intimidated or fearful. Related ADVO proceedings include those that involve the same defendant and victim who is referred to as the person in need of protection [PINOP] in ADVO proceedings, as a result of the alleged domestic violence related charges being the subject of criminal proceedings.

19. Under the new Division 5, any part of domestic violence or apprehended violence order proceedings covered therein, in which a complainant gives evidence, would have to be heard in closed court unless the court otherwise directs (proposed section 289U). Further, the court could only make such a direction that a part of the proceedings be heard in open court if:

    - a party to the proceedings requests; and
    - if the court is satisfied that "special reasons in the interests of justice" require the part of the proceedings to be held in open court; or the complainant consents to giving their evidence in open court (proposed section 289U(2)).

20. In addition, the principle that proceedings for an offence should generally be open or public in nature, or that justice should be seen to be done, does not of itself constitute "special reasons in the interests of justice" requiring the part of the proceedings to be held in open court (proposed section 289U(3)).

21. In the Second Reading Speech, the Attorney General noted that enabling complainants to give evidence in a closed court is appropriate given the dynamics of domestic violence offending:

> The ability to give evidence to a closed court is currently available only to domestic violence complainants if the accused has been charged with a prescribed sexual offence or the complainant is a child or a cognitively impaired witness. This amendment will close the gap to ensure that all domestic violence complainants in criminal proceedings are provided with the same protections under the law of New South Wales. Requiring a complainant to give evidence in front of people in the public gallery, who may also be the accused's friends and family, can be intimidating and add unduly to the trauma of the court process. Limiting the courtroom presence only to people directly connected with the criminal proceedings is appropriate, given the sensitive dynamic of domestic violence offending.

22. The Attorney General also stated that principles of open justice must be balanced with a court's ability to perform its functions in the administration of justice:

> The principle that proceedings for an offence should generally be open or public in nature or that justice should be seen to be done will not in itself constitute special reasons for this purpose. Open justice is a fundamental principle of the justice system in Australia. However, this must also be balanced with a court's ability to perform its functions in the administration of justice. The closure of a court in some circumstances recognises that the public interest in the administration

of justice, especially for matters involving vulnerable witnesses such as domestic violence victims, can outweigh the need for open justice.

Schedule 2, item 3 of the Bill seeks to insert a new Division 5 into the *Criminal Procedure Act 1986*. Proposed section 289U of that Division would provide that any part of domestic violence proceedings in which a complainant gives evidence must be held in closed court unless the court otherwise directs.

Further, the court could only make such a direction that a part of the proceedings be heard in open court if: a party to the proceedings requests; and if the court is satisfied that "special reasons in the interests of justice" require the part of the proceedings to be held in open court; or the complainant consents to giving their evidence in open court. In addition, the principle that proceedings for an offence should generally be open or public in nature, or that justice should be seen to be done, does not of itself constitute "special reasons in the interests of justice" requiring the part of the proceedings to be held in open court.

The Committee notes that these provisions of the Bill impact on principles of open justice which are fundamental to ensuring the accused's right to a fair trial. By requiring matters to be heard in open court, proceedings are subject to public scrutiny. This promotes confidence in the courts and prevents any abuses going undetected.

The Committee acknowledges that the amendments in question are designed to recognise the particular dynamics of domestic violence matters and to balance the public interest in principles of open justice with the need to protect vulnerable witnesses. Further, a court could still direct that a matter be heard in open court if a party to proceedings requests and the court is satisfied that there are "special reasons in the interests of justice" to do so. Notwithstanding these factors, as principles of open justice are fundamental to the criminal justice system in Australia, the Committee refers the amendments in question to Parliament to consider whether they impact unduly on the right to a fair trial.

Right to a fair trial – ability to give evidence by audio-visual link

23. As above, schedule 2, item 3 of the Bill seeks to insert a new Division 5 into the *Criminal Procedure Act 1986*, applying to certain domestic violence proceedings. In addition to changes around a complainant giving evidence in a closed court, proposed section 289V of Division 5 would provide that a complainant can give evidence by alternative means in such proceedings.

24. In particular, such a complainant can, but may choose not to give evidence from a place other than the courtroom by audio visual link or "other technology that enables communication between the place and the courtroom" (proposed section 289V(1)(a)).

25. However, a complainant must not give evidence by such means if a court orders, on its own initiative, or on application by a party to the proceedings, that alternative means must not be used. The court can only make such an order, however, if satisfied that there are special reasons in the interests of justice for the complainant's evidence not to be given by alternative means (proposed sections 289V(3) and(4)).

26. In the Second Reading Speech, the Attorney General provided the following background to the amendment:

> The second amendment in schedule 2 [3] provides domestic violence complainants with an entitlement to give evidence remotely via audiovisual link or other similar technology, or through the use of alternative arrangements such as screen and planned seating arrangements. Currently, domestic violence complainants may give evidence remotely only upon successful application to the court under the Evidence (Audio and Audio Visual Links) Act 1998. This is not always granted and there have been inconsistencies in treatment of those witnesses. If contested, those pre-trial applications can also take up valuable court time. This amendment provides more certainty for complainants in domestic violence proceedings through the introduction of a legislative entitlement. It recognises that domestic violence complainants have the same need for and should have the same opportunity to benefit from remote appearances as do other vulnerable witnesses.

27. In addition, the Attorney General stated that the amendment balanced the accused's right to a fair trial with the need to allow the complainant to give evidence in a trauma-informed way:

> It can be intimidating for domestic violence victims to face their perpetrator with whom they may have been in a family or intimate relationship for a number of years. Allowing for alternative means to give evidence strengthens the criminal justice response to these difficult situations in an appropriate and trauma-informed way while balancing an accused's right to a fair trial, including the right to test any evidence to the fullest extent. The amendment ensures that domestic violence complainants will have the right to choose the manner in which they give evidence. The framing of this amendment as an entitlement makes it clear that it is not a directive and complainants will maintain the ability to elect to give evidence in person. The court also retains some discretion to order an in-person appearance; however, only if there are special reasons in the interests of justice to do so.

As noted, schedule 2, item 3 of the Bill seeks to insert a new Division 5 into the *Criminal Procedure Act 1986* applying to certain domestic violence proceedings. Proposed section 289V of that Division would provide that a complainant in such proceedings can give evidence by alternative means. In particular, they can, but may choose not to give evidence from a place other than the courtroom by audio visual link or "other technology that enables communication between the place and the courtroom".

By allowing evidence to be given by audio visual link or similar technology, the Bill may impact on the right to a fair trial. Such arrangements may have some impact on the ability of the court or juries to assess witness demeanour and weigh their evidence. In particular, evidence given by audio visual link would enable the court to see and hear the witness but it is unclear if this is the case with "other technology that enables communication between the place and the courtroom".

The Committee again acknowledges that amendments such as these are designed to recognise the particular dynamics of domestic violence matters and to provide appropriate protections to vulnerable witnesses. Further, the Bill provides a safeguard so that a court can order a complainant not to give evidence by alternative means – but the court can only do so if the court is satisfied that there are special reasons in the interests of justice for the evidence not to be so given.

The Committee considers that the amendments would be more appropriately drafted if they made it clear that any technology allowing the complainant to give evidence by alternative means also allowed the court to both see and hear the complainant. This would better balance the need to protect vulnerable witnesses with the defendant's right to a fair trial. The Committee refers this matter to Parliament for consideration.

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

Commencement by proclamation

28. Clause 2 of the Bill provides for the proposed Act to commence on assent except for schedule 1, items 1 and 10-12.

29. Schedule 1, items 11 and 12 seek to amend section 39 of the CDVP Act so that an apprehended domestic violence order made at the time of the conviction of a person sentenced to a term of imprisonment for a serious offence will remain in force for an additional two years after the end of the person's imprisonment, or another period specified by the sentencing court. In the Second Reading Speech, the Attorney General explained that commencement by proclamation would allow the police and courts time to implement associated system changes and conduct necessary training:

> Schedule 1 [11] to the bill makes minor amendments to section 39 (1) of the CDPV Act to enable "a court" to make an order under section 39, rather than just "the court" that is hearing the sentencing. This will ensure that where matters that are sentenced in the District Court are then remitted to the Local Court due to a concurrent ADVO application, the Local Court will have the power to make the ADVO under section 39, with the standard additional two-year period. This provides consistency across the courts. These amendments will commence on proclamation—anticipated to be in early 2021—to ensure that all necessary systems changes for courts and police have occurred and all necessary training has taken place. They will also be subject to a transitional provision, such that the extended duration will not apply to someone who has pleaded guilty to or been found guilty of a serious offence before the commencement of the provision.

30. Schedule 1, items 1 and 10 relate to harm to animals belonging to, or in the possession of, a protected person. Item 1 seeks to amend section 7 of the CDPV Act to include conduct that causes reasonable apprehension of harm to an animal belonging to or in the possession of the protected person within the definition of "intimidation". In the Second Reading Speech, the Attorney General explained:

> Amending the definition to include any conduct that causes a reasonable apprehension of harm being done to an animal which belongs or belonged to, or which is or was in the possession of the relevant person will therefore explicitly include both harm or threatened harm to animals as a form of intimidation. Changing the definition of "intimidation" will clarify and streamline the application of the offence of stalking or intimidation under section 13 of the CDPV Act. A person who engages in that conduct is guilty of an offence that carries a maximum penalty of five years imprisonment or 50 penalty units or both.

31. Further, schedule 1, item 10 would amend section 36 (c) of the CDPV Act to provide that every apprehended violence order prohibits a defendant from harming an animal belonging to or in the possession of a protected person or a person with whom the protected person has a domestic relationship.

Clause 2 of the Bill provides for the proposed Act to commence on assent except for schedule 1, items 1 and 10-12. The Committee generally prefers legislation affecting rights and obligations to commence on assent, or on a fixed date, to provide certainty to those affected.

Schedule 1, items 11 and 12 seek to amend section 39 of the CDVP Act so that an apprehended domestic violence order made at the time of the conviction of a person sentenced to a term of imprisonment for a serious offence will remain in force for an additional two years after the end of the person's imprisonment, or another period specified by the sentencing court.

Further, schedule 1, item 10 would amend section 36 (c) of the CDPV Act to provide that every apprehended violence order prohibits a defendant from harming an animal belonging to or in the possession of a protected person or a person with whom the protected person has a domestic relationship.

The Committee acknowledges that it may be appropriate for these amendments to commence on assent given that this would allow time for courts and police to undertake the necessary administrative arrangements e.g. make appropriate system changes, undertake training, and amend standard documentation relating to apprehended violence orders. It therefore makes no further comment in respect of these amendments.

However, schedule 1, item 1 seeks to amend section 7 of the CDPV Act to include conduct that causes reasonable apprehension of harm to an animal belonging to or in the possession of the protected person within the definition of "intimidation". It is understood from the Second Reading Speech that changing the definition of "intimidation" will clarify and streamline the application of the offence of stalking or intimidation under section 13 of the CDPV Act and that a person who engages in that conduct is guilty of an offence that carries a maximum penalty of five years imprisonment or a $5,500 fine, or both.

The Committee considers that changes to definitions that may impact on whether or not a person is found guilty of an offence attracting custodial penalties should commence on a fixed date or on assent. It therefore refers the commencement by proclamation of the amendment in schedule 1, item 1 of the Bill to Parliament for consideration.

6. Work Health and Safety Amendment (Food Delivery Workers) Bill 2020*

Date introduced	21 October 2020
House introduced	Legislative Council
Member responsible	The Hon. Daniel Mookhey MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Work Health and Safety Act 2011* to require food delivery workers to be provided with safety clothing and equipment.

BACKGROUND

2. The Bill amends the *Work Health and Safety Act 2011* (the principal Act), which sets out the legislative framework to secure the health and safety of workers and workplaces by protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.

3. The Bill amends the principal Act to require food and delivery workers to be provided with safety clothing and equipment, particularly when riding bicycles and motorbikes during the course of their work.

4. In the Second Reading Speech, the Hon. Daniel Mookhey MLC stated that the Bill seeks to prioritise worker's health and safety in the gig economy:

> The Bill is necessary because, with the onset of the COVID-19 pandemic, many workers are out of work or on reduced hours and they are turning to the gig economy to earn a living. Those workers should not have to put their lives at risk to earn a wage. Like other workers, gig workers deserve a safe workplace.

5. Mr Mookey further stated the intention of the Bill to prevent worker deaths on the roads:

> Predominantly, the workplace of food delivery workers is our roads. We know that the transport industry is inherently dangerous. In 2018, 62 per cent of all workplace deaths occurred in the transport industry. The second highest fatality rate in this country is attributed to the transport industry. That was well before the emergence of the gig economy and of food delivery. The emergence of food delivery and the gig economy in the transport space compounds a severe safety crisis in transport. It is not creating it; it is making it far worse. In case we are ignorant of the human element of what that means, just in the last month we learnt of two food delivery workers who died while on food delivery runs.

6. Mr Moohkey also outlined how the provisions of the Bill would address the health and safety of delivery workers while riding a bicycle or motor bike on the roads:

> The Bill amends the *Work Health and Safety Act* to require food delivery workers to be provided with safety clothing and equipment. It implements a minimum standard of personal protective

equipment to be provided to workers in the gig economy on bikes and motorcycles. It applies a duty to persons conducting a business or undertaking that involves the delivery of food or drink by a worker riding a bicycle or motorbike to provide specified safety equipment. That equipment includes a raincoat and a reflective vest. For those workers on bicycles, it also requires lights and reflectors for their bikes, and an approved bicycle helmet as required by the NSW Road Rules. For workers riding a motorbike, it additionally requires boots and an approved motorbike helmet within the meaning of the Road Rules.

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability

7. Clause 3 of the Bill seeks to amend Division 3 (Further duties of persons conducting businesses or undertakings) of the *Work Health and Safety Act 2011* to insert a new section 26A. The new section would create a duty upon persons conducting a business or undertaking that involves the delivery of food or drink by a worker riding a bicycle or motorbike and require that they must ensure, so far as is reasonably practical, that the worker is provided with protective equipment, including:

    - A raincoat
    - A reflective vest
    - If the work rides a bicycle–an approved bicycle helmet and the lights and reflector required to be displayed on a bicycle under rule 259 of the Road Rules 2014
    - If the worker rides a motor bike—an approved motor bike helmet and boots.

8. Division 5 of the principal Act sets out offences, and penalties for those offences, in relation to the health and safety duties imposed by Divisions 2, 3 and 4 of Part 2 of the Act. As the proposed new section 26A falls within Division 3 of the principal Act, it will therefore be subject to the offences and penalties within Division 5, including gross negligence or reckless conduct and failure to comply with health and safety duty (Categories 2 and 3). These various offences carry significant maximum penalties, ranging from 575 to 6,925 penalty units (at $110 per penalty unit) or up to 5 years imprisonment or both for individuals, and from 5,770 to 34,630 penalty units for a body corporate.

    The Bill seeks to amend the *Work Health and Safety Act 2011* to insert a new section 26A. The new section imposes a duty on persons conducting a business that involves the delivery of food or drink to ensure protective equipment is provided to workers riding a bicycle or motorbike. The protective equipment to be provided includes a raincoat, reflective vest, approved bicycle helmet and lights and reflector (when riding a bicycle), and an approved motor bike helmet and boots (when riding a motor bike). In doing so, the Bill imposes a strict liability requirement on persons conducting a business of this nature.

    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. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the requirement is intended to provide

additional protection to delivery workers while on the road. However, given the offences and the significant penalties that may be applicable to individuals in particular, the Committee refers these provisions to Parliament for their consideration of whether the strict liability requirements are reasonable in the circumstances.

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

Commencement by proclamation

9. Clause 2 of the Bill states that the Act commences on a day or days to be 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 as the Bill intends to amend an industry-wide standard of minimum protection requirements and impose a duty of care to these workers, a flexible start date may be afford these workplaces notice of when the changes will commence and allow time to appropriately implement these changed workplace practices. In this case, the Committee makes no further comment.

Part Two – Regulations

1. Building and Construction Industry Security of Payment Regulation 2020

Date tabled	15 September 2020
Disallowance date	17 November 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to repeal and remake, with amendments, the *Building and Construction Industry Security of Payment Regulation 2008* (2008 Regulation), which would otherwise be repealed on 1 September 2021 by section 10(2) of the *Subordinate Legislation Act 1989*.

2. This Regulation provides for the following—

   a) the requirement for head contractors to hold retention money for construction contracts with a value of at least $20 million,

   b) the maintenance and disclosure of retention money trust account records,

   c) the eligibility criteria for adjudicators.

3. This Regulation is made under the *Building and Construction Industry Security of Payment Act 1999* (Act), including sections 4(1) (definitions of exempt residential construction contract and recognised financial institution), 7(5), 12A, 18(1)(b) and (2)(b), 28(1), 34B(2) and (4), 34D(1)(b)(ii) (definition of executive liability offence) and 35 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Significant increase in penalties

4. The Regulation contains significantly increased penalties for corporations which commit an offence under clauses 8 and 9 of the Regulation. The penalties for corporations have increased from 200 to 1,000 penalty units (approximately $22,000 to $110,000). This is the maximum penalty allowable in the Regulation by section 12A of the *Building and Construction Industry Security of Payment Act 1999*.

5. Clause 8(1) of the Regulation, which existed under the 2008 Regulation, provides that a head contractor must hold retention money in trust for the subcontractor and ensure that the money is paid into and retained in an approved trust account.

6. Clause 8(2) of the Regulation, which did not exist under the 2008 Regulation, provides that a head contractor must ensure that the money is paid into the retention money trust account as soon as possible, but no later than 5 business days after the head contractor is required to retain the money.

7. Relevantly, clause 7 of the Regulation also provides that offences under clause 8(1) or (2) are executive liability offences, meaning that directors of a corporation which contravenes the clause may be personally liable for the offence.

8. Clause 9 of the Regulation outlines the requirements for establishment of a trust account.

    - name and description of the account in the records of the head contractor must include their name and the words "Trust Account"

    - a head contractor must ensure that that the approved ADI is notified in writing that the account is a trust account required to be established under the Regulation

    - a head contractor must, within 10 business days, notify the Secretary of various details relating to the account including the account number and balance.

9. Under the 2008 Regulation, the above offences (excluding clause 8(2), which is a new offence) previously carried a consistent maximum penalty of 200 penalty units for individuals and corporations alike. The increases under the Regulation in respect of the offences in clauses 8 and 9 reflect a five-fold increase in maximum fines for corporations.

    The *Building and Construction Industry Security of Payment Regulation 2008* appears to largely remake the previous 2008 Regulation, but increases penalties for corporations from 200 to 1,000 penalty units (that is, from around $22,000 to $110,000) in relation to a number of offences. These include offences such as failing to notify a bank that the trust account has been created under the Regulation, or failing to notify the Secretary of certain matters relating to the account within 10 business days. The Regulation also creates a new offence for where a contractor pays retention moneys into the trust account later than 5 business days after the head contractor is required to retain that money. The Committee notes that these are strict liability offences.

    The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and strict liability offences are also contained in the 2008 Regulation. Further, the maximum penalties for the offences are monetary, not custodial. However, in relation to corporations, the maximum penalties for these strict liability offences are significantly higher than those that existed in the previous regulation. For these reasons, the Committee refers this matter to the Parliament for its consideration.

2. Royal Botanic Gardens and Domain Trust Regulation 2020

Date tabled	15 September 2020
Disallowance date	17 November 2020
Minister responsible	The Hon. Rob Stokes MP
Portfolio	Planning and Public Spaces

PURPOSE AND DESCRIPTION

1. The object of the *Royal Botanic Gardens and Domain Trust Regulation 2020* (Regulation) is to remake, with amendments, the *Royal Botanic Gardens and Domain Trust Regulation 2013* (2013 Regulation), which was repealed on 1 September 2020 by section 10(2) of the *Subordinate Legislation Act 1989*.

2. This Regulation deals with the management, use and regulation of the land vested in the Royal Botanic Gardens and Domain Trust (Trust lands), including—

    - the entry of persons onto the Trust lands, and
    - the use of vehicles on the Trust lands, and
    - commercial and public activities, and
    - recreational activities, and
    - offensive and dangerous conduct, and
    - the bringing of animals on the Trust lands, and
    - the offences under the Regulation for which penalty notices may be issued and the amount of the penalty payable.

3. The Trust lands include the Domain and the Gardens. Clause 3 of the Regulation defines the Gardens to include the Royal Botanic Garden Sydney, the Australian Botanic Garden Mount Annan, the Blue Mountains Botanic Garden Mount Tomah, and the Mount Tomah Conservation Area.

4. This Regulation is made under the *Royal Botanic Gardens and Domain Trust Act 1980*, including sections 22 (the general regulation-making power) and 22B.

5. The Regulatory Impact Statement prepared by the Centre for International Economics dated June 2020 (RIS) suggests that there is a need for the Government to manage potential damages to natural features and structures, and to protect the safety and enjoyment of visitors.

ISSUES CONSIDERED BY THE COMMITTEE

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

Freedom of movement

6. Under clause 32 of the 2013 Regulation, there was no limit on the number of people able to jog or run in a group in any part of the Trust lands.

7. However, proposed clause 26 of the Regulation now provides that a person must not do any of the following in the Gardens, except with written permission from the Trust or the Executive Director:

   a) jog or run other than on a road, path or specifically designed circuit

   b) jog or run in a group of more than 10 persons.

8. Proposed clause 20 of the Regulation also now states that a person must not organise or conduct various types of races, including foot races and bicycle races, without the written permission of the Trust or the Executive director.

9. The effect of these provisions, which have a maximum penalty of 10 penalty units, are that groups of ten or more people cannot jog or run in a group in the Gardens, nor can they organise a footrace in the Domain or the Gardens (unless consent from the Trustee is obtained). This prohibition did not exist in the 2013 Regulation.

10. Similarly, the 2013 Regulation provided, with respect to cycling, that:

    - cycling was allowed anywhere in the Domain (clause 43):
    - cycling in the Gardens was only allowed if the person rides in an area designated for that purpose (clause 44)
    - cycling on Trust lands contrary to a sign is guilty of an offence (clause 45).

11. In contrast, proposed clause 23 of the Regulation now states that a person must not ride a bicycle on Trust lands without the written permission of the Trust or Executive Director, except in area designated for that activity under clause 8.[8] Also, a person must not ride a bicycle alongside 2 or more persons or in a group of 16 or more persons, unless that person has obtained permission from the Trust or Executive Director.

12. This largely preserves the ability to cycle in the Trust lands, however only in certain areas (whereas one could previously cycle anywhere in the Domain). In addition, even though cyclists in the Domain may be riding in an area which has been designated by the Trust as suitable for cycling, they cannot do so alongside two or more others, where such prohibition did not exist under the 2013 Regulation.

The *Royal Botanic Gardens and Domain Trust Regulation 2013* allowed running or jogging anywhere in the Domain, provided the person(s) involved remained

[8] Broadly, proposed clause 8 provides that the Trust or Executive Director may designate certain areas of the Trust Lands on which organised or non-organised activities may be undertaken.

on the paths. This approach was mirrored with respect to cycling, which could be done anywhere in the Domain. Under the proposed *Royal Botanic Gardens and Domain Trust Regulation 2020*, groups of ten or more people cannot jog or run in a group in the Gardens, nor can anyone organise a footrace in the Domain or the Gardens without Trust approval (whether for profit or not). In addition, while cyclists in the Domain may be riding in an area which has been designated by the Trust as suitable for cycling, they cannot do so alongside two or more others. This prohibition did not previously exist under the 2013 Regulation. The Regulation changes the way in which the public may use the Trust lands by partially restricting free movement in the space and may therefore impact a person's right to freedom of movement.

The Committee notes that the RIS states that partitioning certain areas of the Domain will better preserve the wider greenspace and commercialising access to certain areas will fund maintenance costs. Noting these factors, the Committee refers the regulation to Parliament, with particular regard to the potential to reduce public access and potential for commercialisation of the space.

Common law right to peaceful assembly

13. Clause 70 of the 2013 Regulation allowed a person to address a public function, meeting or demonstration or other public gathering in the Domain in daylight hours, without permission from the Trust. However, undertaking these activities without permission before sunrise or after sunset was an offence (clause 70(3)).

14. Clause 69 of the 2013 Regulation provided that a person could only address a public function, meeting, demonstration or other public gathering in the Gardens if they had written consent from the Trust.

15. Proposed clause 18 of the Regulation now makes it an offence for a person to organise or participate in, or cause to be organised, a public meeting, function, demonstration or other public activity, if written permission has not be obtained by the Trust or Executive Director. If permission is granted, the relevant activity must also be undertaken in the manner approved by the Trust.

16. Under clause 18, both an organiser or participant in a public demonstration for which permission has not been obtained may be guilty of an offence. Previously, only a person who addressed a public demonstration or activity could be guilty of an offence.

17. The Regulation does not set out a review process for the grant or otherwise of such permits; for instance, there is no review mechanism if an applicant is denied a permit or if the permit is subject to certain conditions. The Regulation also does not appear to require the Trust or Executive Director to provide reasons for its decision.

The *Royal Botanic Gardens and Domain Trust Regulation 2020* creates an offence to participate in public meetings, functions, demonstrations or other public gatherings in the Domain without permission from the Trust. Its predecessor, the *Royal Botanic Gardens and Domain Trust Regulation 2013,* appeared to allow such assemblies during daylight hours without consent of the Trust. Further, both organisers and participants of a relevant public meeting, function or demonstration could now be guilty of an offence. Previously, it appeared that

only a person addressing such a demonstration or activity in the Domain before sunrise or after sunset could be guilty of an offence.

The Committee notes that the Regulation may potentially impact on the right to freedom of assembly. Although the Trust may still grant permission to undertake a public meeting or demonstration in the Domain, there appears to be no review process which governs the grant of permits. As such, the Committee refers this matter to the Parliament for consideration.

Property rights – search and seizure without a warrant

18. Proposed clause 19 of the Regulation introduces a power for authorised officers to seize and store any equipment being used for a prohibited purpose under clause 18 which is not removed *"immediately"* after the owner is directed to do so by an authorised officer. The clause provides that this is at the cost of the legal owner and without risk or liability being assumed by the relevant authority or authorised officer.

19. Clause 18 outlines several prohibited commercial and public activities, including busking, public demonstrations or meetings, the use of any audiovisual equipment for commercial purposes, and advertising.

The *Royal Botanic Gardens and Domain Trust Regulation 2020* introduces a power for authorised officers to seize and store, at the cost to the legal owner and without risk or liability being assumed by the relevant authority or authorised officer, any equipment being used for a prohibited purpose under the Regulation which is not removed "immediately" after the owner is directed to do so by an authorised officer.

This power may impact the property rights of affected individuals as it could constitute seizure without a warrant, which is normally required for seizure of goods. Also, "immediately" is not defined, and so it may be unclear what amount of time would justify the seizure or property. Although the seizure power only relates to activities which are prohibited under the Regulation, the relevant clause includes a wide range of common activities such as busking, filming for commercial purposes, and public demonstrations. For these reasons, the Committee refers this matter to Parliament for consideration.

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

Personal training prohibited without consent

20. Proposed clause 25 of the Regulation prevents the private (or not-for-profit) operation of fitness classes, exercise programs or personal training in the Domain, where that activity was previously allowed without consent from the Trustee under clause 48 of the 2013 Regulation.

21. Under the proposed Regulation, breach of this new provision carries the second highest penalty notice under the Regulation at $750 (see Schedule 1 of the Regulation).

The *Royal Botanic Gardens and Domain Trust Regulation 2020* prevents the private (or not-for-profit) operation of fitness classes, exercise programs or

personal training in the Domain, where that activity was previously allowed without consent from the Trustee. The Regulatory Impact Statement indicates that certain areas of the Domain will be partitioned for commercial exercise and fitness purposes. Access may need to be granted by the Trust and that access may come at a cost, at the discretion of the Trustee.

This change may have an adverse impact on the fitness community, particularly any persons or groups who run private or personal fitness classes or tests who were previously able to engage in that activity without consent from the Trustee. A person who is guilty of the new offence could receive a penalty of around $750. However, there may be good policy reasons for commercial users to seek consent for the use of public space. Also, the Regulation appears to have been drafted following a period of consultation which included sporting groups. As such, the Committee makes no further comment.

3. Water NSW Regulation 2020

Date tabled	LA: 15 September 2020 LC: 25 August 2020
Disallowance date	LA: 17 November 2020 LC: 10 November 2020
Minister responsible	The Hon Melinda Jane Pavey, MP
Portfolio	Water, Property and Housing

PURPOSE AND DESCRIPTION

1. The object of the *Water NSW Regulation 2020* (Regulation) is to remake, with minor amendments, the *Water NSW Regulation 2013* (2013 Regulation), which has been repealed as of 1 September 2020 by section 10(2) of the *Subordinate Legislation Act 1989*.

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

   a) the conferral on the Regulatory Authority, being the Minister administering the *Water NSW Act 2014* (Act) or a person appointed by the Minister, of various functions under the *Protection of the Environment Operations Act 1997*,

   b) the regulation of certain conduct on land in a special area or controlled area declared under the Act, including offensive conduct, the taking of water, pollution, entering certain land (including with vehicles or animals), lighting fires and causing harm to flora, fauna or buildings, structures or fixtures,

   c) the giving of a notification to the Regulatory Authority by a public agency of a proposal to carry out functions in a special area,

   d) the delegation of functions conferred on the Regulatory Authority under this Regulation,

   e) the councils to which Water NSW is to supply water,

   f) the fees chargeable by Water NSW for water supplied by it,

   g) the offences under the Act and this Regulation that may be dealt with by way of a penalty notice and the prescribed penalties payable for those offences when dealt with by penalty notice.

3. This Regulation is made under the *Water NSW Act 2014*, including sections 7(1)(c), 39, 51, 55, 63(1) and (2), 102, 110 and 114 (the general regulation-making power).

4. The Regulatory Impact Statement dated March 2020 (RIS) prepared on behalf of WaterNSW outlines the main changes contemplated by the Regulation. A draft of the Regulation was subject to public consultation and WaterNSW received feedback from 7 stakeholders.

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability offences – certain offensive conduct

5. The Regulation introduces an offence for certain offensive conduct on Schedule 1 and Schedule 2 land.[9] Specifically, proposed clause 26 of the Regulation prohibits a person from, among other things:

    - behaving in a disorderly manner,
    - using insulting or offensive language, or committing an act of indecency,
    - using, or being affected by, a prohibited drug, or
    - operating or using a radio, television, speakers or other sound-generating device in a manner likely to interfere with or cause a nuisance to a person or animal.

6. The new offence has a maximum penalty of 200 penalty units or approximately $22,000.

7. The RIS noted that these new powers would be useful for regulation of anti-social behaviour, "particularly in WaterNSW recreation areas where WaterNSW allows access and recreation…". It further stated that many of these areas were remote and police attendance was rare, and there were no provisions in the previous regulation which penalised offensive conduct.[10]

8. According to the RIS, the wording in proposed clause 26 is based on clause 15 of the *National Parks and Wildlife Service Regulation 2019* (National Parks Regulation).

9. Notably, the National Parks Regulation imposes a maximum penalty of 30 penalty units for committing a substantially similar offence to that proposed in clause 26 of the Regulation. Under proposed clause 26 of the Regulation, the maximum penalty is 200 penalty units. This means that the maximum penalty under the proposed Regulation appears to be significantly larger than its counterpart in the National Parks Regulation.

10. In addressing this penalty unit gap, the RIS states:

> The current level of penalties aligns with similar penalties under other regulations, e.g. the regulations under the [*Protection of The Environment Operations Act 1997*] POEO Act. However, WaterNSW has observed evidence of regulatory signage being ignored, gates and barriers being by-passed and vandalism occurring, and is concerned that the current penalties are insufficient.

11. Notably, neither the proposed new clause 26 offence or the offence in the National Parks Regulation contain reference to a "move-on" direction or similar. It is noted that the disorderly conduct offence in section 9 of the *Summary Offences Act 1988* is only committed after a 'move-on' direction is ignored.

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[9] Schedule 1 lands are defined under the Regulation to include, broadly, various catchment areas across the state, including in the Wingecarribee and Woronora regions, and various "Special Areas" in the Blue Mountains. Schedule 2 lands include catchment areas in Fitzroy Falls, the Shoalhaven and Warragamba.

[10] RIS, p. 20.

The *Water NSW Regulation 2020* creates an offence for certain offensive conduct on Schedule 1 or 2 lands. This conduct includes behaving in a disorderly manner, using insulting or offensive language, or using a radio, television or other similar device in a manner likely to interfere with or cause a nuisance to a person or animal.

The proposed new offence is a strict liability one. 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. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalties for the offences are monetary, not custodial.

However, the contemplated offences carry a maximum total penalty of 200 penalty units, or $22,000. This appears to be much larger than the penalty for substantially similar offences in the *National Parks and Wildlife Service Regulation 2019*. There also appears to be no 'move-on' or similar warning mechanism that is seen in some other disorderly conduct offences (for example, see section 9 of the *Summary Offences Act 1988*). For these reasons, and noting again the strict liability nature of the offence, the Committee refers this matter to the Parliament.

Freedom of movement and enjoyment of public space - prohibiting the use of drones

12. The Regulation introduces new clause 25(1)(d), which prohibits the use of drones on Schedule 1 or 2 land. Specifically, the clause prevents a person from operating an unmanned vehicle (including by causing the unmanned vehicle to enter, or fly or otherwise move over, the land). "Unmanned vehicle" is defined in clause 25(4) as an "unmanned airborne craft, including a drone or other remotely piloted airborne craft, or any other unmanned motorised vehicle."

13. The RIS indicates that WaterNSW is concerned that there is a "small but non-negligible risk that a drone could fall into the catchment and interfere with catchment infrastructure…[or] impinge on the wellbeing of those visiting…".[11]

14. Relevantly, under the *Protection of the Environment Operations Act 1997* (POEO Act), "aircraft" (which is defined to include drones) can be operated over parklands in certain circumstances, but only with approval from authorised officers. The National Parks and Wildlife Service has a process in place for persons to apply and have their drone use approved ahead of time.[12] For instance, the Department of Planning, Industry and Environment's website states that it recognises that drones can sometimes be used in a park for recreational and commercial purposes that are unrelated to park management.[13]

[11] RIS, p. 21.

[12] See Department of Planning, Industry and Environment, "Using drones in national parks", <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Policy-and-law/drones-in-national-parks-190305.pdf>, EES 2019/0305, July 2019, viewed 6 October 2020.

[13] Department of Planning, Industry and Environment, "Drones in parks policy" <https://www.environment.nsw.gov.au/topics/parks-reserves-and-protected-areas/park-policies/drones-in-parks>, last updated 2 October 2020, viewed 6 October 2020.

The Regulation introduces a prohibition on the use of drones over Schedule 1 and Schedule 2 lands. Schedule 1 and 2 lands mainly consist of catchment areas across the state which are managed by Water NSW. There appears to be no proposed system in the Regulation for drone users to seek approval from authorised officers before obtaining a permit to fly a drone over Schedule 1 and 2 lands. Such a permit system appears to apply to drones used in national parks.

The new prohibition on drones potentially trespasses on freedom of movement and the enjoyment of public space. While the RIS notes that the clause is designed to protect catchment infrastructure and the wellbeing of visitors, it appears that some other public lands such as national parks may not be affected by a similar prohibition. There also appear to be several catchment areas across the state, including the Warragamba catchment area, which may be affected. As such, the Committee refers this matter to Parliament for its consideration.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

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

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

i trespasses unduly on personal rights and liberties, or

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

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

iv inappropriately delegates legislative powers, or

v insufficiently subjects the exercise of legislative power to parliamentary scrutiny

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

9 Functions with respect to Regulations

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

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

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

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

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

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

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

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

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

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

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

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

2 Further functions of the Committee are:

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

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

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