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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. CANNABIS LEGALISATION BILL 2021*

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

Strict liability offences

The *Cannabis Legalisation Bill 2021* creates a number of new offences relating to the unlawful growth, distribution, sale, advertisement and consumption of cannabis and cannabis products in certain circumstances. These are largely strict liability offences, meaning there is no mental element attached to them (for example, intent or recklessness). For an individual, the penalties range from 2 penalty units ($220), for consuming cannabis in a public place, to 100 or 500 penalty units ($11,000 or $55,000), for supplying cannabis to a minor (depending on whether it is a first or subsequent offence).

Further, sections 45 and 52 provide for circumstances in which a person may be guilty of an offence committed by another person. Under section 45, a person can be 'deemed' guilty of an offence if they reside in premises where more than the legal limit of cannabis plants are being grown. Under section 52, an employer can be liable for an employee's offence of supplying cannabis to a minor, unless the employer can show that it had no prior knowledge of the offence, and could not have prevented it by exercising due diligence. Proposed section 79 makes it a defence to any offence under the Act if the person proves they had a 'reasonable excuse' for the contravention. However, this term is not defined.

The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or a mental element, is a relevant factor in establishing liability for an offence. This is of particular concern where significant penalties are attached to an offence. Further, the deeming provisions in sections 45 and 52 could result in a person being held liable for an offence about which they had no actual knowledge.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. The Committee also acknowledges the public health and public safety objectives of many of the offence provisions. The Committee understands that many of the offences contained in the Bill relate to conduct already prohibited, in broader terms, in the *Drug Misuse and Trafficking Act 1985*. The offences in that Act also have heavier penalties attached, including imprisonment. However, given the large number of strict liability offences included in the Bill and the range of penalties attached, the Committee refers these provisions to Parliament for consideration.

Broad and ill-defined elements in offences

Section 14 of the Bill makes it an offence for a person to 'undertake' or 'take part in' a range of cannabis-related activities, except as authorised by a licence granted by the New South Wales Cannabis Authority. However, the phrase 'take part in' is not defined in the Bill. The Committee generally prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and content is clear.

The Committee notes that offences in similar legislation which use the phrase 'take part in' also contain a definition of that phrase. For example, section 6 of the *Drug Misuse and Trafficking Act 1985* defines the same phrase for the purposes of offences under sections 25 and 36ZF of that Act. The Committee also notes that those sections contain a further requirement that a defendant 'knowingly take part in' the relevant offence. In contrast, the scope of the phrase as used in section 14 of this Bill is not clear. In these circumstances, the Committee refers the matter to the Parliament to consider whether the elements are clearly defined.

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

Limitation on duty to give reasons

Section 44 of the Bill provides that the New South Wales Cannabis Authority is not required to give reasons for its decisions relating to licences – for example, to cancel a licence or refuse a licence application – 'to the extent the reasons would disclose criminal intelligence'.

This curtails the general requirement under section 49 of the *Administrative Decisions Review Act 1997* that administrators provide written reasons, on request, for administratively reviewable decisions. This may also limit a licence holder's ability to seek merits review of decisions made by the Authority. Without being told the basis on which, for example, the Authority has refused a licence application, an applicant's ability to make arguments to challenge that decision may be seriously diminished.

However, the Committee notes the public security objectives of the exemption in section 44. Further, the Committee notes that under this section, the Authority is not exempt from providing any reasons at all, but only exempt from providing reasons 'to the extent' they would disclose criminal intelligence. In these circumstances, the Committee makes no further comment.

2. COVID-19 LEGISLATION AMENDMENT (STRONGER COMMUNITIES AND HEALTH) BILL 2021

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

Matters deferred to regulations

The Bill amend a number of acts and regulations to extend the repeal clause by six months or until a later date, up to 12 months, as prescribed by the regulations. The Committee notes that this allows the regulation to amend the Act in respect of the repeal date. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),* the statutory rule may have already been in operation for some time before disallowance occurs.

However, the Committee notes that the Bill only seeks to extend the repeal date of existing measures that are part of the Government response to the COVID-19 pandemic, and does not seek to implement new measures. The Committee also recognises that a flexible repeal date for these provisions may be desirable, as the Attorney General noted that these measures are in place with the intent of protecting public health and public safety during a time where there is an ongoing risk of a COVID-19 outbreak. In these circumstances, the Committee makes no further comment.

3. GOVERNMENT SECTOR FINANCE AMENDMENT (GOVERNMENT GRANTS)BILL 2021*

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

Right to privacy

The *Government Sector Finance Amendment (Government Grants) Bill 2021* amends the *Government Sector Finance Act 2018* to insert a new provision requiring that entities responsible for deciding government grant applications disclose certain information about each application to the local member in the applicant's electorate. By requiring this disclosure, the Bill may impact on the privacy rights of government grant applicants.

The Committee notes that the Bill contains some safeguards. For example, subsection 10.6(5) prohibits local members from disclosing information they receive about grant applications without the consent of the entity responsible for deciding the application. However, there is no requirement that the local member obtain consent from the applicant itself. The Bill also provides that an entity responsible for deciding a grant application may refuse to disclose information to a local member if the member has previously disclosed information about an application without consent.

The Committee acknowledges the objectives of the Bill, to improve the transparency of the grant application process. However, the Committee refers the proposed amendments to Parliament to consider whether they would impact the grant applicants' right to privacy.

4. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (MINISTERIAL CODE OF CONDUCT – PROPERTY DEVELOPERS) BILL 2021*

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

Economic rights

The Bill provides that a Minister of Parliamentary Secretary must not remain or become a property developer, and must take all reasonable steps to cease to be a property developer. Transferring an interest to a family member or a trust in which the Minister or Parliamentary Secretary or a family member has a beneficial interest does not constitute adequate steps for the purposes of this clause. The Committee notes that this may impact the economic rights of the affected persons, including property rights and freedom of contract.

The Committee acknowledges that the Bill is intended to prevent Ministers and Parliamentary Secretaries from engaging in activities that may conflict with their role and functions, and provides for exceptions where such a conflict is not judged to be present. However, the Committee refers the matter to the Parliament for its consideration of whether the provisions are appropriate.

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

Ill-defined power

The Bill would provide that a Minister or Parliamentary Secretary must not remain or become a property developer. However, a Minister or Parliamentary Secretary could do so where the person is a property developer only by virtue of being a spouse of a person; and where that other person’s property developer business is not likely to give rise to a conflict of interest; and

the Premier gives a ruling that the Premier approves the Minister or Parliamentary Secretary remaining or becoming a property developer in those circumstances.

The Bill may thereby grant the Premier a wide and ill-defined power affecting the rights and obligations of Ministers and Parliamentary Secretaries. The Committee acknowledges the anti-corruption objectives of the Bill. However, the Bill gives limited guidance as to how the Premier is to make a determination that the property developer business is 'not likely to give rise to a conflict of interest' other than that the Minister or Parliamentary Secretary is only a property developer because they are the spouse of a particular person. The Committee prefers administrative powers affecting rights and obligations to be drafted with sufficient precision so that their scope and content is clear. The Committee refers the matter to Parliament for consideration.

5. PREVENTION OF CRUELTY TO ANIMALS AMENDMENT (AQUATIC ANIMAL RECOGNITION)BILL 2021*

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

6. PUBLIC HEALTH AMENDMENT (VACCINATION COMPENSATION) BILL 2021*

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

Broad liability clause and definitions

The Bill creates a liability upon a relevant body to pay compensation to a worker for any injury, loss or damage suffered by a worker as a result of a vaccine that the relevant body has required the worker to take. The Bill defines a relevant body as a person or body that employs or otherwise engages the worker.

The Bill also contains a broad definition of worker as a person engaged by, or on behalf of, the relevant body under a contract for services, but does not include a volunteer. The Committee notes that the definition of 'worker' is an *inclusive* definition, which means that it may be defined by the definition under the Bill, or may include a broader definition not stated within the Bill's provisions. There are no further eligibility requirements for the definition of worker under the Bill. This means that the Bill may impose a liability on a person that engages another person for services, and this liability may extend until the person's death.

These are broad definitions that permit an individual to be imposed with a significant liability. It also does not include any defence or moderating clause where it may be reasonable in the circumstances for an employer to require that a worker be vaccinated, such as in a health or aged care facility. The Committee refers this provision to the Parliament for its consideration of whether the broad definitions and liability clause are reasonable in the circumstances.

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

Matters that should be contained in the primary legislation

The Bill provides that the section applies if a relevant body requires a worker to be vaccinated against a disease prescribed by the regulations. The Bill does not provide further clarity about what vaccines the section applies to, and whether this is intended to apply beyond the COVID-19 vaccine as noted in the second reading speech. In these circumstances, the Committee refers

this provision to the Parliament for its consideration of whether clarity on the vaccine to which the section applies should be contained in the primary legislation rather than the regulations.

7. RACEHORSE LEGISLATION AMENDMENT (WELFARE AND REGISTRATION) BILL 2021*

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

Strict liability offences

The Bill introduces a number of strict liability offences that prohibit certain activities and practices within the horseracing industry. Some offences carry substantial maximum financial penalties, ranging from 25 penalty units ($2,750) to 300 penalty units ($33,000), and 6 months imprisonment, or both. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, referring to the mental element or intent, is a relevant factor in establishing liability for an offence.

The Committee notes that strict liability offences are not uncommon in legislation and regulatory frameworks to ensure compliance with safe practices, particularly the protection of animal welfare. However, as the strict liability offences may result in a high financial penalty or imprisonment, or both, the Committee refers the issue to the Parliament for its consideration of whether the provisions are reasonable in the circumstances.

8. WASTE AVOIDANCE AND RESOURCE RECOVERY AMENDMENT (PLASTIC REDUCTION) BILL 2021*

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

Delegation of administrative powers

The Bill inserts section 48K into the *Waste Avoidance and Resource Recovery Act 2001*. This section enables the regulations to create provisions for or about the implementation and operation of a threat abatement plan in connection with an item of plastic waste, or industry in New South Wales.

The Committee generally prefers for significant matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight. The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulations, especially where specific or technical information is required that is not required to be in the primary legislation.

However, given the broad scope for the regulations to make provisions for or about the implementation and operation of a threat abatement plan, including enabling the regulations to create offences, the Committee refers the matter to Parliament to consider the delegation to the regulations.

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

Matters deferred to regulations – creation of offences

The Bill inserts section 48K(2), which enables the regulations to create offences relating to activities in contravention of a threat abatement plan. The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulations, especially where specific or technical information is not required to be in the primary legislation.

However, the Committee generally prefers for offences to be dealt with in the primary legislation to ensure an appropriate level of parliamentary scrutiny and oversight. Given the broad ambit for the regulations to create offences relating to activities in contravention of a threat abatement plan, the Committee refers the matter to Parliament for its consideration.

PART TWO – REGULATIONS

1. CHILDREN (DETENTION CENTRE) AMENDMENT (DISCLOSURE OF INFORMATION) REGULATION 2020

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

Privacy

The *Children (Detention Centres) Amendment (Disclosure of Information) Regulation 2020* allows the Department of Justice to share information about "relevant persons", including detainees, juvenile inmates, juvenile offenders on parole, those subject to a children's community service order or similar orders, or those on bail. Certain categories of information may be shared, including information which relates to the appropriate management and supervision of relevant persons in the custody or supervision of similar agencies in other jurisdictions; the exercise of lawful functions of the Commonwealth Department of Home Affairs or Attorney General; and to support certain research into interventions and services.

The Regulation also allows the sharing of information about relevant persons between the Department of Justice and the National Disability Insurance Scheme Launch Transition Agency if it helps to identify a relevant person with a disability, or provide support and services to a relevant person with a disability.

The Committee notes that the Regulation may impact on the privacy rights of affected individuals, whose personal information may be shared amongst domestic and international arms of government and law enforcement agencies. However, there may be a public interest in allowing such sharing of information. In doing so, the Regulation increases support for relevant persons and amplifies the co-operation between various governments and law enforcement agencies to properly manage, supervise and support young offenders. Also, the Regulation includes some safeguards about what information can be shared; for instance, the requirement that information be "reasonably necessary" for the relevant purpose, or limited to specific information in relation to the National Disability Insurance Scheme. In the circumstances, the Committee makes no further comment.

2. FAIR TRADING AMENDMENT (CODE OF CONDUCT FOR SHORT-TERM RENTAL ACCOMMODATION INDUSTRY) REGULATION (NO 2) 2020

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

Strict liability offences with large penalties

The *Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation (No 2) 2020* sets the maximum penalties which may be imposed by a Court and recovered as debts owed to the Crown as a result of contravening certain provisions of the Code of Conduct. These include provisions requiring an industry participant to comply with directions of the Fair Trading Commissioner, and a requirement to enter a property on the premises register. The Regulation does not set potential custodial sentences for any contravention of the Code, but still involves a significant maximum penalty of $1,100,000 in the case of a corporation and $220,000 in any other case.

The Committee notes that the Code sets out some 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. That is, a person need not intend to contravene the Code for that provider to incur a penalty.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the provisions are designed to ensure that short-term accommodation providers operate their accommodation in accordance with the Code for the benefit of neighbouring residents. While the penalties for significant breaches of the Code are to be imposed by a Court, these appear to relate to strict liability offences and the maximum penalties are substantial. The Committee generally prefers that such penalties are set out in primary, rather than subordinate, legislation. In these circumstances, the Committee refers this matter to the Parliament for its consideration.

3. PUBLIC HEALTH AMENDMENT (COVID-19 MANDATORY FACE COVERINGS) REGULATION 2021

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

Personal liberty

The regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances. This may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth or may impact their breathing.

However, the Committee recognises that the intent of the regulation is to protect public health and safety and is in response to the COVID-19 pandemic, particularly the recent outbreaks in the northern beaches and greater Sydney. The Committee also notes that the regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.

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

The regulation provides that penalty notices may be issued for not complying with a public health order requiring the wearing of fitted face coverings in certain circumstances, including a wide range of retail, entertainment and hospitality venues. This may have an adverse impact on the business community that may comply with the order during trading and business hours, and may impact or restrict the way their business is conducted while the order is in place.

The Committee also notes that the regulation contains a higher penalty for operators of hospitality venues that contravene the Order than individuals, and requires that the operators ensure that all persons working at the venue comply with the Order. This places an onus on the operator of hospitality venues to ensure that their staff comply with the Order.

However, the Committee recognises that the intent of the regulation is to protect public health and safety in response to the COVID-19 pandemic, particularly the recent outbreaks in the northern beaches and Greater Sydney. The wearing of face masks may allow businesses to continue to operate in certain circumstances while also providing a safety measure to those staff and customers. The Committee also recognises that since this regulation was published that some COVID-19 restrictions have been scaled back, including the requirement for customers to

wear face masks in retail venues and other businesses. In these circumstances, the Committee makes no further comment.

4. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) REGULATION (NO 2) 2020

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

Retrospectivity, property rights and freedom of contract

Like its predecessor, the remade *Retail and Other Commercial Leases (COVID-19) Regulation (No 2)* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

The remade Regulation also goes further than the first Regulation by requiring lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the remade Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. The remade Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

The remade Regulation also has retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee recognises that the remade Regulation, like the first Regulation, only applies to cases involving 'impacted lessees' (i.e. lessees that qualify for the JobKeeper scheme and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes the relatively short period for which the provisions in the remade Regulation have been extended – approximately 10 weeks. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

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

Government regulation of private business contracts – businesses required to incur a loss

As above, the remade Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 crisis. In doing so, the remade Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 31 December 2020.

However, the Committee recognises that the remade Regulation is in response to the ongoing public health emergency and remains in line with the National Cabinet's decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee

understands that lessors may be eligible for a land tax concession, and/or may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

Part One – Bills
1. Cannabis Legalisation Bill 2021*

Date introduced	17 February 2021
House introduced	Legislative Council
Member responsible	Ms Cate Faehrmann MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The objects of the *Cannabis Legalisation Bill 2021* are to—

(a) legalise cannabis or cannabis products produced and distributed under the licensing scheme established by the proposed Act, and

(b) legalise cannabis grown for personal use in particular circumstances, and

(c) establish the New South Wales Cannabis Authority (the Authority), and

(d) regulate the use of cannabis and cannabis products, particularly in relation to protection of persons under 18 years of age and the smoking of cannabis or cannabis products in public places, and

(e) regulate the packaging, labelling and storage requirements for cannabis and cannabis products and prohibit certain advertising and promotions in relation to cannabis and cannabis products, and

(f) provide for administrative review of a decision made by the New South Wales Cannabis Authority in relation to licences under the proposed Act, and

(g) provide for persons to be authorised to enforce and monitor compliance with the proposed Act, and

(h) make other minor and consequential amendments to the *Drug Misuse and Trafficking Act 1985*, the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Public Health (Tobacco) Act 2008*.

BACKGROUND

2. In the second reading speech for the Bill, Ms Faehrmann, MLC outlined flaws in the current legislative approach to cannabis in New South Wales, for example, describing how 'cannabis convictions create serious stigmatisation and have long-lasting effects on people's lives', and disproportionately impact marginalised and disadvantaged communities.

3. Ms Faehrmann referred to statistics 'showing how moving away from a criminal approach to drug use is reducing harm across society' in jurisdictions where cannabis has already been legalised.

4. Ms Faehrmann noted the changes contained in the Bill, including that it would:

> … ensure that products are labelled with potency information and health warnings just like alcohol and tobacco, which in fact are far more harmful for both the individual and the burden those drugs place on society.
>
> ….
>
> The bill decriminalises cultivating, supplying, manufacturing and possessing cannabis. It establishes a New South Wales cannabis authority with the purpose of regulating the cannabis industry in New South Wales, grants licences for the production and distribution of cannabis products, and decides and enforces safe ways for cultivating, processing and distributing cannabis.

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability offences

5. The Bill introduces a number of offences, including (but not limited to) the following:

- Section 14 – 'undertaking' or 'taking part in' certain activities, such as a 'nursery activity', 'cultivation activity', 'wholesale and distribution activity' or 'social club activity', except as authorised by a licence granted by the Authority. The maximum penalty for this offence is 20 penalty units ($2,200) for an individual, or 500 penalty units ($55,000) for a corporation.

- Section 40 – contravening a condition imposed by the Authority relating to the suspension or cancellation of a licence. The maximum penalty is 20 penalty units ($2,200) for an individual, or 500 penalty units ($55,000) for a corporation.

- Section 45 – growing more than the legal limit of cannabis on residential premises (6 plants if no more than 2 people reside on the premises, 12 plants if more than 2 persons reside there). The maximum penalty is 10 penalty units ($1,100).

- Section 46 – selling cannabis to a minor. The maximum penalty for an individual is 100 penalty units or 500 penalty units for a first or subsequent offence respectively. For a corporation, the maximum penalty is 500 penalty units ($55,000) or 1,000 penalty units ($110,000) for a first or subsequent offence respectively.

- Section 47 – purchasing cannabis on behalf of a minor. The maximum penalty is 50 penalty units ($5,500).

- Section 53 – consuming cannabis in a public place or a vehicle in a public place. The maximum penalty is 2 penalty units ($220).

- Section 56 – in exchange for a benefit, displaying a cannabis advertisement in, or so it can be seen or heard from, a public place. The maximum penalty for an individual is 20 or 80 penalty units ($2,200 or $8,800) for a first or subsequent offence

respectively. For a corporation, the maximum penalty is 6,000 or 10,000 penalty units ($660,000 or $1,100,000) for a first or subsequent offence respectively.

6. Under section 45, a person may be 'deemed' to have committed an offence of growing more than the maximum allowable number of cannabis plants for personal use if they reside on or own the premises where the cannabis is being grown. There is no defence included in this section which allows a person to escape liability if they were unaware of the cultivation of cannabis on the premises.

7. Section 52 provides that an employer can be liable for an employee supplying cannabis to a minor whether or not the employee acted without the employer's authority or contrary to instructions. However, it is a defence if the employer has no prior knowledge of the offence and could not have prevented it by the exercise of due diligence.

8. Section 79 further provides that it is a defence to prosecution for any offence under the Act if the person charge proves they had a 'reasonable excuse' for the contravention. The term 'reasonable excuse' is not defined, nor are any examples provided.

9. Many of the proposed offences in the Bill relate to conduct that is currently prohibited under the *Drug Misuse and Trafficking Act 1985* – for example, section 23, under which it is an offence to cultivate or supply or possess a prohibited plant, or section 25, under which it is an offence to supply or knowingly take part in the supply of a prohibited drug. Those offences carry heavy maximum penalties, including periods of imprisonment.

The *Cannabis Legalisation Bill 2021* creates a number of new offences relating to the unlawful growth, distribution, sale, advertisement and consumption of cannabis and cannabis products in certain circumstances. These are largely strict liability offences, meaning there is no mental element attached to them (for example, intent or recklessness). For an individual, the penalties range from 2 penalty units ($220), for consuming cannabis in a public place, to 100 or 500 penalty units ($11,000 or $55,000), for supplying cannabis to a minor (depending on whether it is a first or subsequent offence).

Further, sections 45 and 52 provide for circumstances in which a person may be guilty of an offence committed by another person. Under section 45, a person can be 'deemed' guilty of an offence if they reside in premises where more than the legal limit of cannabis plants are being grown. Under section 52, an employer can be liable for an employee's offence of supplying cannabis to a minor, unless the employer can show that it had no prior knowledge of the offence, and could not have prevented it by exercising due diligence. Proposed section 79 makes it a defence to any offence under the Act if the person proves they had a 'reasonable excuse' for the contravention. However, this term is not defined.

The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or a mental element, is a relevant factor in establishing liability for an offence. This is of particular concern where significant penalties are attached to an offence. Further, the deeming provisions in sections 45 and 52 could result in a person being held liable for an offence about which they had no actual knowledge.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. The Committee also acknowledges the public health and public safety objectives of many of the offence provisions. The Committee understands that many of the offences contained in the Bill relate to conduct already prohibited, in broader terms, in the *Drug Misuse and Trafficking Act 1985*. The offences in that Act also have heavier penalties attached, including imprisonment. However, given the large number of strict liability offences included in the Bill and the range of penalties attached, the Committee refers these provisions to Parliament for consideration.

Broad and ill-defined elements in offences

10. As noted above, section 14 of the Bill makes it an offence to 'take part in' a range of cannabis-related activities unless authorised by a licence granted by the Authority. The maximum penalty for this offence is 20 penalty units ($2,200) for an individual, or 500 penalty units ($55,000) for a corporation.

11. There is no definition of the phrase 'take part in' in the Bill, despite this being a key element of the offence in section 14. Under the *Drug Misuse and Trafficking Act 1985*, a person 'takes part in' the cultivation or supply of a prohibited plant or the manufacture, production or supply of a prohibited drug or psychoactive substance if—

    (a) the person takes, or participates in, any step, or causes any step to be taken, in the process of that cultivation, manufacture, production or supply,

    (b) the person provides or arranges finance for any such step in that process, or

    (c) the person provides the premises in which any such step in that process is taken, or suffers or permits any such step in that process to be taken in premises of which the person is the owner, lessee or occupier or in the management of which the person participates.[1]

12. However, this definition only applies for the purposes of the *Drug Misuse and Trafficking Act 1985* and the regulations made under it. In particular, it relates to the offences of supplying prohibited drugs (section 25) and manufacturing psychoactive substances (section 36ZF) under that Act.

13. The Committee also notes that the offences under the *Drug Misuse and Trafficking Act 1985* only apply to those who 'knowingly take part' in the prohibited activity. In contrast, there is no requirement under the proposed section 14 of the *Cannabis Legalisation Bill 2021* that a defendant 'know' they are taking part in an unauthorised activity. Liability, as mentioned in the section above, is strict.

Section 14 of the Bill makes it an offence for a person to 'undertake' or 'take part in' a range of cannabis-related activities, except as authorised by a licence granted by the New South Wales Cannabis Authority. However, the phrase 'take part in' is not defined in the Bill. The Committee generally prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and content is clear.

[1] *Drug Misuse and Trafficking Act 1985*, section 6

The Committee notes that offences in similar legislation which use the phrase 'take part in' also contain a definition of that phrase. For example, section 6 of the *Drug Misuse and Trafficking Act 1985* defines the same phrase for the purposes of offences under sections 25 and 36ZF of that Act. The Committee also notes that those sections contain a further requirement that a defendant 'knowingly take part in' the relevant offence. In contrast, the scope of the phrase as used in section 14 of this Bill is not clear. In these circumstances, the Committee refers the matter to the Parliament to consider whether the elements are clearly defined.

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

Limitation on duty to give reasons

14. Under section 35(5), the Authority is required to given an applicant written notice of a decision to grant or refuse a licence.

15. Section 80 provides that applicants or licence holders can seek administrative review of decisions by the Authority to suspend, cancel or amend a licence, impose a condition on a licence, or not grant, renew or amend a licence.

16. However, section 44 provides that the Authority is not, under the Bill or any other law, required to give reasons for its decisions relating to licences 'to the extent the reasons would disclose criminal intelligence'.

17. In general, section 49 of the *Administrative Decisions Review Act 1997* provides that an 'administrator' must provide a written statement of reasons for an administratively reviewable decision if requested to do so by an 'interested person'. That statement of reasons must set out the administrator's findings on material questions of fact, its understanding of the applicable law, and the reasoning process that led to its conclusions.

Section 44 of the Bill provides that the New South Wales Cannabis Authority is not required to give reasons for its decisions relating to licences – for example, to cancel a licence or refuse a licence application – 'to the extent the reasons would disclose criminal intelligence'.

This curtails the general requirement under section 49 of the *Administrative Decisions Review Act 1997* that administrators provide written reasons, on request, for administratively reviewable decisions. This may also limit a licence holder's ability to seek merits review of decisions made by the Authority. Without being told the basis on which, for example, the Authority has refused a licence application, an applicant's ability to make arguments to challenge that decision may be seriously diminished.

However, the Committee notes the public security objectives of the exemption in section 44. Further, the Committee notes that under this section, the Authority is not exempt from providing any reasons at all, but only exempt from providing reasons 'to the extent' they would disclose criminal intelligence. In these circumstances, the Committee makes no further comment.

2. COVID-19 Legislation Amendment (Stronger Communities and Health) Bill 2021

Date introduced	18 February 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney-General

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to—

(a) amend the following Acts and regulations to extend the operation of temporary provisions that were introduced because of the COVID-19 pandemic until 26 September 2021, and allow their further extension to a day not later than 26 March 2022 by regulation if necessary—

(i) *Child Protection (Working with Children) Act 2012*,

(ii) *Child Protection (Working with Children) Regulation 2013*,

(iii) *Children (Community Service Orders) Act 1987*,

(iv) *Children (Community Service Orders) Regulation 2020*,

(v) *Children (Detention Centres) Act 1987*,

(vi) *Children (Detention Centres) Regulation 2015*,

(vii) *Civil and Administrative Tribunal Act 2013*,

(viii) *Civil and Administrative Tribunal Regulation 2013*,

(ix) *Constitution Act 1902*,

(x) *Constitution (COVID-19 Emergency Measures Regulation 2020*,

(xi) *Court Security Act 2005*,

(xii) *Court Security Regulation 2016*,

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

(xiv) *Crimes (Administration of Sentences) Regulation 2014*,

(xv) *Criminal Procedure Act 1986*,

(xvi) *Criminal Procedure Regulation 2017*,

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

(xviii) *Evidence (Audio and Audio Visual Links) Regulation 2015*,

(xix) *Interpretation Act 1987,*

(xx) Jury Act 1977,

(xxi) *Jury Regulation 2015*,

(xxii) *Private Health Facilities Act 2007*,

(xxiii) *Public Health Act 2010*,

(xxiv) *Sheriff Act 2005*,

(xxv) *Sheriff Regulation 2016*, and

(b) repeal temporary regulation-making powers in the following Acts that were introduced because of the COVID-19 pandemic—

(i) *Civil and Administrative Tribunal Act 2013*,

(ii) *Criminal Procedure Act 1986*, and

(iii) *Interpretation Act 1987*, and

(c) amend the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (the Act) to—

(i) ensure the process for making orders relating to diversion of accused persons in the Local Court does not trigger the processes under the *Local Court Act 2007* relating to the commencement of proceedings, and

(ii) clarify that the Mental Health Review Tribunal's power to extend of a statutory review period applies only to mandatory reviews for forensic patients, mandatory reviews for correctional patients and reviews of persons in custody who are subject to community treatment orders, and

(iii) provide for the transitional arrangements for criminal proceedings in the Supreme Court and District Court in which the court had imposed a limiting term in respect of the accused person and that were commenced before the commencement of the Act, and

(iv) clarify the transitional arrangements for summary proceedings before a Magistrate and that were commenced before the commencement of the Act, and

(d) repeal the *Mental Health (Forensic Provisions) Amendment (Victims) Act 2018*.

BACKGROUND

2. The Bill amends various pieces of legislation to change the repeal clause that would otherwise expire on 26 March 2021, and to extend it for a six month period until 26 September 2021, or until 26 March 2022 if prescribed by the regulations.

3. In the second reading speech to the Bill, the Attorney General stated that the Bill seeks to temporarily extend a number of emergency measures already implemented as a result of the COVID-19 pandemic.

4. The Attorney General noted that while NSW had recorded 31 days of no transmission as at the date the Bill was introduced, the recent Northern Beaches and Greater Sydney outbreaks, as well as the Victorian outbreak, highlighted that the risk of outbreak remains and there is still a need for COVID-safe practices.

5. He further stated that:

> The COVID-19 Legislation Amendment (Stronger Communities and Health) Bill 2021 seeks to extend temporarily a number of emergency measures already implemented as a result of the COVID-19 pandemic until September 2021, with an option of a further six-month extension by regulation. In particular, this is to allow court, tribunal and correctional services to continue to provide services safely during the pandemic. In March and May 2020, the New South Wales Parliament passed emergency legislation to adopt temporary measures to help manage the COVID-19 pandemic, including, in March 2020, the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020*; and later in May 2020, the *COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Act 2020* and the *COVID-19 Legislation Amendment (Emergency Measures—Miscellaneous) Act 2020*. The majority of the provisions were temporary and included sunset dates to ensure they only remained operational for as long as they needed to be. Without legislative amendment to extend them, many of these measures will sunset on 26 March 2021.

6. The Committee previously reported on the Bill that initially introduced these measures, contained in the *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020*, the *COVID-19 Legislation Amendment (Emergency Measures-Attorney General) Bill 2020*, and the *COVID-19 Legislation Amendment (Emergency Measures-Miscellaneous) Bill 2020*. The reports for these bills are contained in Digest No 12 /57 and Digest No 15/57.[2]

7. To the extent that the Bill seeks to extend the repeal clause of the existing provisions, and does not substantially amend the operative provisions, the Committee will not comment further on issues already reported in prior digests.

ISSUES CONSIDERED BY THE COMMITTEE

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

Matters deferred to regulations

8. Schedule 1 of the Bill amends various pieces of legislation to extend the repeal clause from 26 March 2021 until 26 September 2021, or a later day, not later than 26 March 2022, prescribed by the regulations.

[2] Legislation Review Committee, Legislation Review Digest No 12/57, 22 April 2020; Legislation Review Committee, Legislation Review Digest No 15/57, 2 June 2020.

9. In the second reading speech, the Attorney General noted that the bill does not propose any new COVID-19 measures and aligns with the timeline for the planned vaccine rollout:

> This bill proposes to extend temporarily the operation of certain COVID-19 legislative provisions for a further six months to 26 September 2021, with an option to extend by up to a further six months by regulation. This extension coincides with projected vaccination rollout time frames, incorporating some flexibility in light of the unpredictable nature of the pandemic. The bill does not extend any extraordinary regulation-making powers, colloquially known as King Henry VIII clauses, introduced as part of the COVID-19 emergency response, that allowed government to make regulations altering some legislative provisions if needed urgently due to COVID-19, for example, if Parliament were not sitting.
>
> … Parliament has continued to sit throughout the pandemic, and we are now in a different phase of our response. The bill does not propose any new COVID-19 emergency provisions. All provisions proposed for temporary extension were previously passed by Parliament.

The Bill amend a number of acts and regulations to extend the repeal clause by six months or until a later date, up to 12 months, as prescribed by the regulations. The Committee notes that this allows the regulation to amend the Act in respect of the repeal date. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),* the statutory rule may have already been in operation for some time before disallowance occurs.

However, the Committee notes that the Bill only seeks to extend the repeal date of existing measures that are part of the Government response to the COVID-19 pandemic, and does not seek to implement new measures. The Committee also recognises that a flexible repeal date for these provisions may be desirable, as the Attorney General noted that these measures are in place with the intent of protecting public health and public safety during a time where there is an ongoing risk of a COVID-19 outbreak. In these circumstances, the Committee makes no further comment.

3. Government Sector Finance Amendment (Government Grants)Bill 2021*

Date introduced	17 February 2021
House introduced	Legislative Council
Member responsible	The Hon. Robert Borsak MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of the *Government Sector Finance Amendment (Government Grants) Bill 2021* is to enable members of Parliament to be informed about applications for grants of government money that are made by applicants located in the electorates of the members of Parliament.

BACKGROUND

2. The Bill seeks to amend the *Government Sector Finance Act 2018* by inserting provisions requiring the government to notify local members of grant applications made by entities in their electorate. This amendment is aimed at ensuring greater transparency in the grant application process, and preventing 'misuse' of government funds.

3. In the second reading speech for the introduction of the Bill, the Hon Robert Borsak, MLC said:

> The intent of this bill is to curb the misuse of government grants by the Government—or any government. This misuse takes the form of using the public purse to force the affection of community groups and local government to the exclusion and suppression of competing political interests …. Providing for the inclusion of the elected representatives in that process considerably lessens the growing use of grants to exclude political competitors from announcing of public money for public purposes. This will lessen the politicisation of grants decisions and the growing replacement of recurrent funding with discretionary grants.

4. Mr Borsak further noted that the amendment:

> …includes the capacity to exclude the local member from the future provision of … information [about grant applications] if that person discloses unreleased information without the consent of the grant decision-maker. It does not preclude the government from announcing grants; however, it does provide for the inclusion of the elected representatives in that process.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to privacy

5. The Bill seeks to insert a new section 10.6 into the *Government Sector Finance Act 2018*, requiring entities responsible for deciding government grant applications to disclose information about those applications to 'relevant members of Parliament'.

6. Subsection (6) defines a 'relevant member of Parliament' as meaning the member of the Legislative Assembly for the electorate in which the address provided by the grant applicant is located.

7. Specifically, according to subsection (3), an entity responsible for determining a grant application must disclose to the relevant member:

   a) when the entity received the application,

   b) the time frame for deciding the application,

   c) the decision about whether to pay the grant to the applicant, and

   d) if a decision is made to pay the grant to the applicant, the amount to be paid and when and where the decision will be announced.

8. Section 10.6(4) provides that the relevant member must not, without the consent of the entity responsible for deciding the application, disclose the information obtained under section 10.6.

9. Under subsection (5), the entity may also refuse to provide a member with information about grant applications if the member has previously failed to comply with subsection (4).

The *Government Sector Finance Amendment (Government Grants) Bill 2021* amends the *Government Sector Finance Act 2018* to insert a new provision requiring that entities responsible for deciding government grant applications disclose certain information about each application to the local member in the applicant's electorate. By requiring this disclosure, the Bill may impact on the privacy rights of government grant applicants.

The Committee notes that the Bill contains some safeguards. For example, subsection 10.6(5) prohibits local members from disclosing information they receive about grant applications without the consent of the entity responsible for deciding the application. However, there is no requirement that the local member obtain consent from the applicant itself. The Bill also provides that an entity responsible for deciding a grant application may refuse to disclose information to a local member if the member has previously disclosed information about an application without consent.

The Committee acknowledges the objectives of the Bill, to improve the transparency of the grant application process. However, the Committee refers the proposed amendments to Parliament to consider whether they would impact the grant applicants' right to privacy.

4. Independent Commission Against Corruption Amendment (Ministerial Code of Conduct – Property Developers) Bill 2021*

Date introduced	18 February 2021
House introduced	Legislative Assembly
Minister responsible	Ms Jodi McKay MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the NSW Ministerial Code of Conduct (which is set out in the Appendix to the *Independent Commission Against Corruption Regulation 2017*) to provide that Ministers and Parliamentary Secretaries must not remain or become property developers.

2. The Bill also amends the NSW Ministerial Code of Conduct to provide that—

   (a) a Minister or Parliamentary Secretary must take all reasonable steps to cease to be a property developer before or, if that is not practicable, as soon as practicable after appointment, and

   (b) the Premier may give a ruling to approve a Minister or Parliamentary Secretary remaining or becoming a property developer in special specified circumstances, and

   (c) a Minister or Parliamentary Secretary must promptly take steps to cease to be a property developer if the Premier, being satisfied that being a property developer has the potential to give rise to a conflict of interest, directs the Minister or Parliamentary Secretary to do so.

BACKGROUND

3. The Bill seeks to amend the NSW Ministerial Code of Conduct, which sets out the code of conduct for NSW Government Ministers and Parliamentary Secretaries. It includes prohibited interests, such as shareholdings, directorships, secondary employment, and divestiture at the direction of the Premier. It also lists standing disclosures of interests that must be made to the Parliament, duties to disclose conflicts of interest, prohibition on commissions from property developers, and prohibitions and disclosures in relations to gifts.

4. In the second reading speech to the Bill, Ms McKay noted that her party considered that being a property developer while a Cabinet Minister or Parliamentary Secretary was a conflict of interest.

ISSUES CONSIDERED BY THE COMMITTEE

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

Economic rights

5. The Regulation amends the NSW Ministerial Code of Conduct (which is set out in the Appendix to the *Independent Commission Against Corruption Regulation 2017*) to provide that Ministers and Parliamentary Secretaries must not remain or become property developers.

6. Proposed section 4A(1) provides that a Minister or Parliamentary Secretary must not remain or become a property developer. Proposed section 4A(2) provides that a Minister or Parliamentary Secretary must take all reasonable steps to ceases to be a property developer before or, if that is not practicable, as soon as practicable after appointment.

7. Subsection 4A(3) provides that a Minister or Parliamentary Secretary may remain or become a property developer where the person is a property developer only by virtue of being a spouse of a person, and that other person's property developer business is not likely to give rise to a conflict of interest, and the Premier gives a ruling that the Premier approved the Minister or Parliamentary Secretary remaining or becoming a property developer in those circumstances.

8. Subsection 4B(1) provides that, in addition to clause 4A, a Minister or Parliamentary Secretary must promptly take steps to cease to be a property developer if the Premier, being satisfied that being a property developer has the potential to give rise to a conflict of interest, directs the Minister or Parliamentary Secretary to do so.

9. Subsection 4B(2) provides that transferring an interest to a family member or to a trust in which the Minister or Parliamentary Secretary or a family member has a beneficial interest does not constitute adequate steps for the purposes of this clause.

10. Under the Bill, the definition of property developer has the same meaning as that in the *Electoral Funding Act 2018,* which provides that a property developer is:

> (a) an individual or corporation if
>
> > (i) the individual or a corporation carries on a business mainly concerned with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit, and
> >
> > (ii) in the course of that business—
> >
> > (A) 1 relevant planning application has been made by or on behalf of the individual or corporation and is pending, or
> >
> > (B) 3 or more relevant planning applications made by or on behalf of the individual or corporation have been determined within the preceding 7 years,
>
> (b) a person who is a close associate of an individual or a corporation referred to in paragraph (a).

The Bill provides that a Minister of Parliamentary Secretary must not remain or become a property developer, and must take all reasonable steps to cease to be a property developer. Transferring an interest to a family member or a trust in which the Minister or Parliamentary Secretary or a family member has a beneficial interest does not constitute adequate steps for the purposes of this clause. The Committee notes that this may impact the economic rights of the affected persons, including property rights and freedom of contract.

The Committee acknowledges that the Bill is intended to prevent Ministers and Parliamentary Secretaries from engaging in activities that may conflict with their role and functions, and provides for exceptions where such a conflict is not judged to be present. However, the Committee refers the matter to the Parliament for its consideration of whether the provisions are appropriate.

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

Ill-defined power

11. As noted above, proposed section 4A provides that that a Minister or Parliamentary Secretary must not remain or become a property developer, and that a Minister or Parliamentary Secretary must take all reasonable steps to cease to be a property developer before or, if that is not practicable, as soon as practicable after appointment.

12. Subsection 4A(3) provides that a Minister or Parliamentary Secretary may remain or become a property developer where the person is a property developer only by virtue of being a spouse of a person, and that other person's property developer business is not likely to give rise to a conflict of interest, and the Premier gives a ruling that the Premier approved the Minister or Parliamentary Secretary remaining or becoming a property developer in those circumstances.

13. Proposed section 4B provides that, in addition to 4A, a Minister or Parliamentary Secretary must promptly take steps to cease to be a property developer if the Premier, being satisfied that being a property developer has the potential to give rise to a conflict of interest, directs the Minister or Parliamentary Secretary to do so.

The Bill would provide that a Minister or Parliamentary Secretary must not remain or become a property developer. However, a Minister or Parliamentary Secretary could do so where the person is a property developer only by virtue of being a spouse of a person; and where that other person's property developer business is not likely to give rise to a conflict of interest; and the Premier gives a ruling that the Premier approves the Minister or Parliamentary Secretary remaining or becoming a property developer in those circumstances.

The Bill may thereby grant the Premier a wide and ill-defined power affecting the rights and obligations of Ministers and Parliamentary Secretaries. The Committee acknowledges the anti-corruption objectives of the Bill. However, the Bill gives limited guidance as to how the Premier is to make a determination that the property developer business is 'not likely to give rise to a conflict of interest' other than that the Minister or Parliamentary Secretary is only a property developer because they are the spouse of a particular person. The Committee prefers administrative powers affecting rights and obligations to be drafted with

sufficient precision so that their scope and content is clear. The Committee refers the matter to Parliament for consideration.

5. Prevention of Cruelty to Animals Amendment (Aquatic Animal Recognition)Bill 2021*

Date introduced	17 February 2021
House introduced	Legislative Council
Member responsible	The Hon. Emma Hurst MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The *Prevention of Cruelty to Animals Amendment (Aquatic Animal Recognition) Bill 2021* amends the *Prevention of Cruelty to Animals Act 1979* (POCTAA) to provide that crustaceans and cephalopods are animals for the purposes of that Act.

BACKGROUND

2. The Bill amends the *Prevention of Cruelty to Animals Act 1979* (POCTAA), which sets out the legislative framework to prevent cruelty to animals, to promote the welfare of animals to require a person in charge of an animal: to provide care, ensure the welfare of the animal and for the animal to be treated in a humane way.

3. The Bill amends the POCTAA to include crustaceans and cephalopods within the definition of animals for the purpose of the Act. The Bill proposes to provide protections under the POCTAA to extend to crustaceans and cephalopods.

4. In her second reading speech, the Hon. Emma Hurst MLC explained the purpose of the Bill:

> The bill will ensure that cephalopods such as octopuses, squid and cuttlefish, and crustaceans such as lobsters, crabs and prawns are recognised in the definition of "animal" in the Prevention of Cruelty to Animals Act 1979, also known as POCTAA. This will have the flow-on effect of ensuring that those animals are protected by the provisions of POCTAA, which provides that an individual must not be cruel or neglectful towards an animal. Right now, octopuses are not even mentioned in POCTAA. That means someone could abuse, smash, disfigure or beat an octopus to death without facing any criminal charges or penalty, and this would be perfectly legal because octopuses are not defined as animals. The exception is octopuses used in research, which are covered by a national code of practice. This highlights the inconsistent ways in which these animals are classified under our laws. Perhaps even more bizarrely, POCTAA recognises some crustaceans as animals, but only when they are:
>
> … at a building or place (such as a restaurant) where food is prepared or offered for consumption by retail sale …

ISSUES CONSIDERED BY THE COMMITTEE

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

6. Public Health Amendment (Vaccination Compensation) Bill 2021*

Date introduced	17 February 2021
House introduced	Legislative Council
Member responsible	Rev. the Hon. Fred Nile MLC
	*Private member's bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Public Health Act 2010* (the Act) to provide for the payment of compensation to workers who suffer injury, loss or damage as a result of a requirement to be vaccinated.

BACKGROUND

2. The Bill proposes to amend the Act, which sets out the legislative framework for the protection of the health and safety of the public.

3. The amendments within the Bill outline provisions for the payment of compensation to workers that incur injury loss or damage as a result of a vaccine that they have been required to take by their employer.

4. In the second reading speech to the Bill, Rev the Hon Fred Bile noted that the Bill intended to apply to any relevant body that requires workers to receive a vaccine, and where that vaccine results in injury or damage to the worker:

> … [I]t is the intention of this legal reform to create liabilities on relevant bodies who retain people for services rendered—whether those people are employees, contractors, agents or any other paid representatives of the relevant body. For the liability to be triggered, all that is required is proof that the relevant body mandates, through policy or other action, that the worker will not be able to continue his or her employment or will not be considered for future employment if a vaccination is not taken by him or her. For compensation to be triggered, a causal relationship will naturally have to be proved on the part of the worker or, in the case of death, by the relevant authority representing the interests of that worker or his estate.

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

Broad liability clause and definitions

5. Proposed subsection 137(2) provides that the relevant body is liable to pay compensation to the worker for any injury, loss or damage suffered by the worker as a result of the vaccine.

6. Proposed subsection 137(2) provides that the relevant body continues to be liable to pay compensation to the worker until the worker's death, even if the worker ceases to be employed or otherwise engaged by the relevant body.

7. In this section, the relevant body, in relation to a worker, means the person or body that employs or otherwise engages the worker. A worker of a relevant body is defined by the Bill as including a person engaged by, or on behalf of, the relevant body under a contract for services, but does to include a volunteer.

> **The Bill creates a liability upon a relevant body to pay compensation to a worker for any injury, loss or damage suffered by a worker as a result of a vaccine that the relevant body has required the worker to take. The Bill defines a relevant body as a person or body that employs or otherwise engages the worker.**
>
> **The Bill also contains a broad definition of worker as a person engaged by, or on behalf of, the relevant body under a contract for services, but does not include a volunteer. The Committee notes that the definition of 'worker' is an *inclusive* definition, which means that it may be defined by the definition under the Bill, or may include a broader definition not stated within the Bill's provisions. There are no further eligibility requirements for the definition of worker under the Bill. This means that the Bill may impose a liability on a person that engages another person for services, and this liability may extend until the person's death.**
>
> **These are broad definitions that permit an individual to be imposed with a significant liability. It also does not include any defence or moderating clause where it may be reasonable in the circumstances for an employer to require that a worker be vaccinated, such as in a health or aged care facility. The Committee refers this provision to the Parliament for its consideration of whether the broad definitions and liability clause are reasonable in the circumstances.**

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

Matters that should be contained in the primary legislation

8. The Bill inserts section 137 into the *Public Health Act 2010* in regards to liability to workers to be vaccinated.

9. Subsection 137(1) provides that this section applies if a relevant body requires a worker to be vaccinated against a disease prescribed by the regulations.

10. In the second reading speech, the Hon. Fred Nile MLC stated:

> The bill addresses an issue that has been at the forefront of the minds of many Australians in recent months. The ongoing coronavirus lockdowns have had an impact on our economy and society. I prefer to think that there will be light at the end of the tunnel, and I pray that we approach it soon. Many have put their mind as to what the world will look like when this episode of our history is over. In terms of employment, I am sure we look forward to the time when things return to normal. This bill is directed at how any future vaccinations regime will operate in the area of employment law and workers' rights.
>
> **The Bill provides that the section applies if a relevant body requires a worker to be vaccinated against a disease prescribed by the regulations. The Bill does not provide further clarity about what vaccines the section applies to, and whether this is intended**

to apply beyond the COVID-19 vaccine as noted in the second reading speech. In these circumstances, the Committee refers this provision to the Parliament for its consideration of whether clarity on the vaccine to which the section applies should be contained in the primary legislation rather than the regulations.

7. Racehorse Legislation Amendment (Welfare and Registration) Bill 2021*

Date introduced	17 February 2021
House introduced	Legislative Council
Member responsible	The Hon. Mark Pearson MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows—

(a) to prohibit the carrying or use of a whip, or the wearing of spurs, by persons who ride or drive a horse at certain horse races,

(b) to prohibit the riding or driving of a horse that is fitted with a tongue tie during certain horse races,

(c) to establish a registration scheme for horses that are owned, bred or kept by horse racing industry participants under the *Thoroughbred Racing Act 1996*,

(d) to prohibit the racing of a horse unless the horse is registered under the *Thoroughbred Racing Act 1996* and is at least 3 years old,

(e) to prohibit the slaughtering of horses registered under the *Thoroughbred Racing Act 1996*,

(f) to establish a rehoming scheme for horses that are registered under the *Thoroughbred Racing Act 1996* that are not used or intended to be used for horse racing.

BACKGROUND

2. The Bill amends the *Prevention of Cruelty of Animals Act 1979* (the POCTAA), which sets out the legislative framework to prevent cruelty to animals, to promote the welfare of animals to require a person in charge of an animal, to provide care, ensure the welfare of the animal and for the animal to be treated in a humane way.

3. The Bill also amends the *Thoroughbred Racing Act 1996* (the TR Act), which outlines the administrative powers and functions of Racing NSW and Racing Industry Consultation Group.

4. In his second reading speech, the Hon. Mark Pearson MLC noted that the Bill addressed the health and wellbeing of racehorses:

> The bill is necessary because the toll on the health and wellbeing of racehorses is intolerable and worsening each year as the pressure mounts to push horses to race ever faster to win the mighty dollar for their owners. The racing industry tries to avoid accountability for the damage done to

> these majestic and sensitive animals, but thanks to campaigning by animal advocacy groups such as the Coalition for the Protection of Resources, they are now exposed to the bright light of public scrutiny.

5. The Hon. Mark Pearson noted the Bill proposed to ban industry practices such as whipping, the use of spurs and tongue ties, to protect the welfare of racehorses and reflect changing community standards:

> The use of the whip during racing was once widely practised around the world, but increasing public awareness about animal sentience and changed attitudes towards animal welfare have put the industry on notice that this practice is indeed cruel and that the continued use of the whip creates a reputational risk for the future of racing.

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability offences

6. The Bill introduces a number of strict liability offences, some with significant maximum penalties into the POCTAA and the TR Act.

7. Schedule 1.1 of the Bill creates a number of offences in the POCTAA This includes:

- Prohibiting a person to carry a whip or whipping a horse during races, which carries a maximum penalty of 25 penalty units ($2,750).
- Prohibiting a person to use a whip to hit part of a horse while riding or driving a horse during a horse race, which carries a maximum penalty of 50 penalty units ($5,500) or 6 months imprisonment, or both.
- Prohibiting a person to ride or drive a horse that is fitted with a tongue tie during a horse race, which carries a maximum penalty of 50 penalty units ($5,500) or 6 months imprisonment, or both.
- Prohibiting a person from wearing spurs while riding or driving a horse during a horse race, which carries a maximum penalty of 50 penalty units ($5,500) or 6 months imprisonment, or both.
- Prohibiting a person to cause or arrange for a horse that is registered under the TR Act to be slaughtered, unless the defendant can satisfy to the court that the horse was suffering from significant personal pain or had a terminal illness that required the defendant to take immediate action and was euthanised as a result of the injury or condition. This offence carries a maximum penalty of 50 penalty units ($5,500) or 6 months imprisonment, or both.

8. Schedule 1.2 of the Bill also creates a number of offences in the TR Act. This includes:

- Prohibiting a horse racing industry participant to own, breed or keep a horse that is not registered within 6 months of birth of the horse or comes into possession of the horse. This section applies regardless of whether a horse has already been registered by Racing NSW for the purposes of section 14. This

offence carries a maximum penalty of 300 penalty units ($33,000) for an individual.

- Prohibiting a person to cause or permit a horse to compete in a horse race unless the horse is registered, which carries a maximum penalty of 300 penalty units ($33,000) for an individual.

- Prohibiting a person from causing or permitting a horse to compete in a race that is at least 3 years old. This offence carries a maximum penalty of 300 penalty units ($33,000) for an individual.

The Bill introduces a number of strict liability offences that prohibit certain activities and practices within the horseracing industry. Some offences carry substantial maximum financial penalties, ranging from 25 penalty units ($2,750) to 300 penalty units ($33,000), and 6 months imprisonment, or both. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, referring to the mental element or intent, is a relevant factor in establishing liability for an offence.

The Committee notes that strict liability offences are not uncommon in legislation and regulatory frameworks to ensure compliance with safe practices, particularly the protection of animal welfare. However, as the strict liability offences may result in a high financial penalty or imprisonment, or both, the Committee refers the issue to the Parliament for its consideration of whether the provisions are reasonable in the circumstances.

8. Waste Avoidance and Resource Recovery Amendment (Plastic Reduction) Bill 2021*

Date introduced	18 February 2021
House introduced	Legislative Council
Member responsible	Ms Cate Faehrmann MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows—

(a) to provide for the phasing out of single-use plastics, polystyrene packaging, products containing plastic microbeads and other plastic products that are harmful to the environment,

(b) to establish a Plastics Reduction Commission (the Commission),

(c) to require the Commission to develop reports and liaise with industry and government to plan for measures to meet specified plastics elimination targets.

BACKGROUND

2. The Bill amends the *Waste Avoidance and Resource Recovery Act 2001* (WARR Act). The object of the WARR Act is to provide a legislative framework for the following:

- To encourage the most efficient use of resources and to reduce environmental harm in accordance with the principles of ecological sustainable development,
- To ensure that resource management options are considered against a hierarchy in the following order: avoidance of unnecessary resource consumption, resource recovery (including reuse, reprocessing, recycling and energy recovery) and disposal.
- To provide for the continual reduction in waste generation,
- To minimise the consumption of natural resources and the final disposal of waste by encouraging the avoidance of waste and recycling of waste,
- To ensure that industry shares with the community the responsibility for reducing and dealing with waste,
- To ensure the efficient funding of waste and resource management planning, programs and service delivery
- To achieve integrated waste and resource management planning, programs and service delivery on a State-wide basis and

- To assist in the achievement of the objectives of the *Protection of the Environment Operations Act 1997.*

3. In her second reading speech, Ms Cate Faehrmann MLC noted the purpose of the Bill.

> The Greens Waste Avoidance and Resource Recovery Amendment (Plastics Reduction) Bill 2021 to phase out single-use plastics, polystyrene packaging, products containing plastic microbeads and other plastic products that are harmful to the environment. Since its mass production began in the 1950s, over eight billion tonnes of plastic have been produced, half of which was produced in the past 15 years. Of that astonishing figure, only 9 per cent has been recycled. The other 91 per cent is sitting in landfill, contaminating our oceans or has been incinerated, releasing harmful dioxins into our atmosphere.
>
> The bill will establish a plastics reduction commission, which will work with industry to phase out single-use plastics and ultimately eliminate all plastics pollution from the environment by 2025. The bill outlines a clear and explicit plan to achieve that, and sets out targets for the elimination of different types of plastic waste. Except where specified, the bill does not distinguish between plastics derived from petroleum and those derived from plant-based materials.

4. Ms Cate Faehrmann MLC noted the Bill's targets to eliminate all plastic pollution from the environment by 2025.

> The bill's first two targets are to reduce the amount of plastic waste that enters the environment by 90 per cent from 2019 levels and eliminate plastic resin pellets used in industrial processes from the environment by the end of 2022. The bill's third target is to ensure that all washing machines are fitted with a lint filter that traps microfibres and microplastics by the end of 2024. It also sets the target of all packaging used in the State to be comprised of at least 30 per cent recycled plastic by 2024.
>
> The final target of the bill focuses on the elimination of specific types of plastic waste from the environment by varying deadlines. Single-use plastic bags, oxo-degradable plastics and cosmetic products containing microbeads will be eliminated three months after the Act commences. Plastic drinking straws, stirrers, balloons, takeaway polystyrene, food and beverage containers, sauce containers and re-usable plastic bags will be eliminated within six months of the Act commencing.

ISSUES CONSIDERED BY THE COMMITTEE

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

Delegation of administrative powers

5. The Bill amends the WARR Act and inserts section 48K provides that the regulations may make provisions for or about the implementation and operation of a threat abatement plan in connection with an item of plastic waste, group of items of plastic water industry in New South Wales.

> **The Bill inserts section 48K into the *Waste Avoidance and Resource Recovery Act 2001*. This section enables the regulations to create provisions for or about the implementation and operation of a threat abatement plan in connection with an item of plastic waste, or industry in New South Wales.**
>
> **The Committee generally prefers for significant matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight. The Committee acknowledges that it may be useful to delegate matters of an**

administrative nature to the regulations, especially where specific or technical information is required that is not required to be in the primary legislation.

However, given the broad scope for the regulations to make provisions for or about the implementation and operation of a threat abatement plan, including enabling the regulations to create offences, the Committee refers the matter to Parliament to consider the delegation to the regulations.

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

Matters deferred to regulations – creation of offences

6. The Bill amends the WARR Act and inserts section 48K(2) which enables the regulation to create offences relating to activities in contravention of a threat abatement plan.

The Bill inserts section 48K(2), which enables the regulations to create offences relating to activities in contravention of a threat abatement plan. The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulations, especially where specific or technical information is not required to be in the primary legislation.

However, the Committee generally prefers for offences to be dealt with in the primary legislation to ensure an appropriate level of parliamentary scrutiny and oversight. Given the broad ambit for the regulations to create offences relating to activities in contravention of a threat abatement plan, the Committee refers the matter to Parliament for its consideration.

Part Two – Regulations

1. Children (Detention Centre) Amendment (Disclosure of Information) Regulation 2020

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: 13 May 2021
Minister responsible	The Hon. Gareth Ward MP
Portfolio	Families, Communities and Disability Services

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide for the following matters under the *Children (Detention Centres) Act 1987*—

   (a) the purposes for which the Secretary of the Department of Communities and Justice may disclose information obtained in connection with the exercise of the Secretary's functions,

   (b) prescribing the National Disability Insurance Scheme Launch Transition Agency as an agency with whose head the Secretary may enter into an information sharing arrangement,

   (c) the information that the parties to the arrangement may request, receive and disclose.

2. This Regulation is made under the *Children (Detention Centres) Act 1987*, including sections 102A, 102B(5) (definitions of prescribed information and relevant agency) and 109 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Privacy

3. Section 102A of the *Children (Detention Centres) Act 1987* (Act) provides that the Secretary of the Department of Justice may disclose information to which it has access or has obtained in connection with its official functions under the Act (or any other Act) for any purpose prescribed by the Children (Detention Centres) Regulation 2015.

4. The *Children (Detention Centres) Amendment (Disclosure of Information) Regulation 2020* (Regulation) amends the *existing Children (Detention Centres) Regulation 2015* by adding a new Part 12A ('Disclosures and exchange of information'). This new Part 12A sets out the circumstances in which the Secretary of the Department of Communities and Justice may disclose information in accordance with section 102A of the Act described above.

5. The disclosure provisions extend to 'relevant persons', including: detainees, certain juvenile inmates, juvenile offenders on parole and subjections of a children's community service order and other similar orders, and persons supervised by Youth Justice NSW on bail.

6. Under the Regulation, the Secretary of the Department of Justice may disclose information reasonably necessary for a range of purposes. These may include:

   (a) facilitating appropriate management of a relevant person in the custody or under supervision of a substantially similar agency of another State or Territory or New Zealand;

   (b) facilitating the exercise of the lawful functions of the Commonwealth Department of Home Affairs or the Attorney General's Department (and any successors to those departments),

   (c) facilitating the assessment of a relevant person's eligibility and suitability for certain support programs;

   (d) facilitating data-matching by a government data-linkage centre to enable research into provision of interventions and services.

7. The Regulation also allows the Secretary to disclose to another person or body information relating to the safety, welfare or well-being of a particular child or young person (or class of children or young person) in another state or territory (including New Zealand) if the Secretary reasonably believes that the disclosure would assist the recipient in certain circumstances. For example, if it would assist the recipient to make any decision, assessment or plan or to initiate or conduct an investigation, or to provide a service, relating to the safety, welfare or well-being of the chid or young person.

8. The Regulation also adds the National Disability Insurance Scheme Launch Transition Agency (NDISLTA) to the list of relevant agencies with which the Department of Justice may enter into an information sharing arrangement with under section 102B of the Act, but only if it helps to identify a relevant person with a disability or provide support and services to that person. It is also only limited to certain information including names, date of birth, and details of next of kin or carer.

9. The other agencies which may enter into an information sharing arrangement include the Australian Federal Police, other state police forces, the Department of Public Prosecutions in NSW and other states, the Law Enforcement Conduct Commission and others. Those agreements allow the free flow of prescribed information between the parties, notwithstanding anything in the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.

10. Notably, all of the above amendments do not take place until the commencement of Schedule 1.4[4] to the *Justice Legislation Amendment Act (No 3) 2018*, which is due to commence by proclamation.

The *Children (Detention Centres) Amendment (Disclosure of Information) Regulation 2020* allows the Department of Justice to share information about "relevant persons", including detainees, juvenile inmates, juvenile offenders on parole, those subject to a children's community service order or similar orders, or those on bail. Certain categories of information may be shared, including information which relates to the appropriate management and supervision of relevant persons in the custody or supervision of similar agencies in other jurisdictions; the exercise of lawful functions of the Commonwealth Department of Home Affairs or Attorney General; and to support certain research into interventions and services.

The Regulation also allows the sharing of information about relevant persons between the Department of Justice and the National Disability Insurance Scheme Launch Transition Agency if it helps to identify a relevant person with a disability, or provide support and services to a relevant person with a disability.

The Committee notes that the Regulation may impact on the privacy rights of affected individuals, whose personal information may be shared amongst domestic and international arms of government and law enforcement agencies. However, there may be a public interest in allowing such sharing of information. In doing so, the Regulation increases support for relevant persons and amplifies the co-operation between various governments and law enforcement agencies to properly manage, supervise and support young offenders. Also, the Regulation includes some safeguards about what information can be shared; for instance, the requirement that information be "reasonably necessary" for the relevant purpose, or limited to specific information in relation to the National Disability Insurance Scheme. In the circumstances, the Committee makes no further comment.

2. Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation (No 2) 2020

Date tabled	LA: 10 November 2020 LC: 10 November 2020
Disallowance date	LA: 23 March 2021 LC: 24 March 2021
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The objects of the *Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation (No 2) 2020* are as follows—

   (a) to declare a code of conduct for the short-term rental accommodation industry,

   (b) to prescribe persons who provide property management services as an additional class of persons to whom the code of conduct applies,

   (c) to exclude certain arrangements (including the provision of refuge or crisis accommodation) from the operation of the code of conduct,

   (d) to provide for appeals against the listing of a person on the exclusion register kept under the code of conduct,

   (e) to authorise the imposition and recovery of fees in connection with the enforcement and administration of the code of conduct,

   (f) to specify the maximum amount that may be imposed as a civil penalty for contravention of the code of conduct,

   (g) to enable the offence of contravention of the code of conduct to be dealt with by way of penalty notice.

2. This Regulation amends the *Fair Trading Regulation 2019* and is made under the *Fair Trading Act 1987*, including Part 4, Division 4A and sections 67 and 92 (the general regulation-making power).

3. For completeness, it is noted that the *Fair Trading (Code of Conduct for Short-term Rental* Accommodation *Industry) Regulation 2020*, the predecessor to the current Regulation, was tabled in Parliament on 24 March 2020 and was to commence on 10 April 2020. However, the *Fair Trading (Code of Conduct for Short-term Rental Accommodation*

Industry) Repeal Regulation 2020 commenced on 9 April 2020 and had the effect of repealing that regulation before it commenced.

4. The Committee noted in Digest 13/57 that, due to the repeal, the Committee had discontinued its consideration of the *Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation 2020*.[3]

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 with large penalties

5. Section 54C of the *Fair Trading Act 1987* (Act) provides that a short-term rental accommodation industry participant who contravenes a provision of a code of conduct that is identified by the code as an offence provision is guilty of an offence.

6. This Regulation stipulates the latest code of conduct as that which is titled Code of Conduct for the Short-term Rental Accommodation Industry as published in the Gazette on 22 October 2020 (Code).

7. Examples of offence provisions in the Code include clause 2.1.3, which requires industry participants to comply with requests for information made by the Fair Trading Commissioner, and clause 2.4.1, which requires hosts to register their property before advertising it for rent.

8. The maximum penalty for short-term rental accommodation industry participants who contravene such offence provisions is 1,000 penalty units for a corporation or 200 penalty units in any other case (approximately $110,000 or $22,000 respectively).

9. Relevantly, section 54D(1) of the Act provides that on application by the Secretary (or a person authorised in writing by the Secretary) a Court may order a short-term rental accommodation industry participant to pay a monetary penalty if the Court is satisfied that the participant has contravened a civil penalty provision of the Code. Section 54D also states that the regulations made under the Act may stipulate the maximum monetary penalty which may be imposed by the Court.

10. Examples of civil penalty provisions include clause 2.1.4, which requires an industry participant to comply with any direction issued by the Commissioner, and clause 2.4.1, which requires hosts to register their property on the premises register (and is also an offence provision under section 54C).

11. Clause 11F of the Regulation stipulates that the maximum civil penalty which may be ordered by a Court in proceedings under section 54D of the Act described above is 10,000 penalty units for a corporation and 2,000 penalty units in any other case (approximately $1,100,000 or $220,000 respectively).

[3] NSW Parliament, Legislation Review Committee, *Legislation Review Digest No. 13/57 – 5 May 2020*, available from: https://www.parliament.nsw.gov.au/ladocs/digests/645/Digest%20No.%2013%20-%205%20May%202020.pdf, p 19

The *Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation (No 2) 2020* sets the maximum penalties which may be imposed by a Court and recovered as debts owed to the Crown as a result of contravening certain provisions of the Code of Conduct. These include provisions requiring an industry participant to comply with directions of the Fair Trading Commissioner, and a requirement to enter a property on the premises register. The Regulation does not set potential custodial sentences for any contravention of the Code, but still involves a significant maximum penalty of $1,100,000 in the case of a corporation and $220,000 in any other case.

The Committee notes that the Code sets out some 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. That is, a person need not intend to contravene the Code for that provider to incur a penalty.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the provisions are designed to ensure that short-term accommodation providers operate their accommodation in accordance with the Code for the benefit of neighbouring residents. While the penalties for significant breaches of the Code are to be imposed by a Court, these appear to relate to strict liability offences and the maximum penalties are substantial. The Committee generally prefers that such penalties are set out in primary, rather than subordinate, legislation. In these circumstances, the Committee refers this matter to the Parliament for its consideration.

3. Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation 2021

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: 13 May 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to enable a penalty notice to be issued to a person for not complying with the *Public Health (COVID-19 Mandatory Face Coverings) Order 2021*.

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

ISSUES CONSIDERED BY THE COMMITTEE

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

Personal liberty

3. The regulation amends the *Public Health Regulation 2012* to comply with the *Public Health (COVID-19 Mandatory Face Coverings) Order 2021* (the Order).[4] The object of the order is to require persons in Greater Sydney to wear fitted face coverings in particular circumstances, including:

    - Retail premises, entertainment facilities, licenced gaming facilities, pubs, registered clubs, casinos, premises used for places of worship or religious services, and residential aged care facilities.

    - Public transport waiting areas or in a vehicle or vessel being used to provide public transport services

    - Hospitality venues

4. The order does not apply to persons under the age of 12, person with a physical or mental illness or condition or disability that makes wearing a fitted face covering unsuitable, residents of an aged care facility.

[4] *Public Health (COVID-19 Mandatory Face Coverings) Order 2021*

5. The order also provides that a person may remove a fitted face covering in the following circumstances, and must resume wearing it as soon as practicable after the circumstance ends:

- the person is eating or drinking,
- the person is communicating with another person who is deaf or hard of hearing,
- the person is at work and the nature of the person's work—
  - (i) makes the wearing of a fitted face covering a risk to the person's, or another person's health and safety, or
  - (ii) means clear enunciation or visibility of the person's mouth is essential,
- the person is asked to remove the fitted face covering to ascertain the person's identity,
- because of an emergency,
- the removal of the fitted face covering is necessary for the proper provision of the goods or service.

6. The regulation provides that a penalty notice may be issued to persons not complying with the order. A penalty notice of $200 may be issued to a person contravening the order. A penalty notice of $1,000 may be issued to an individual for contravening the order in relation to a hospitality venue, and $5,000 for a corporation.

The regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances. This may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth or may impact their breathing.

However, the Committee recognises that the intent of the regulation is to protect public health and safety and is in response to the COVID-19 pandemic, particularly the recent outbreaks in the northern beaches and greater Sydney. The Committee also notes that the regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.

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

Additional obligation on hospitality operators

7. As noted above, the regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances.

8. Clause 5(3) of the Order provides that a person working at a hospitality venue in Greater Sydney whose functions require the person to deal directly with members of the public must wear a fitted face covering at all times while carrying out the functions. The regulation provides that an offence against clause 5(3) is $200.

9. Clause 5(4) of the Order provides that the operator of a hospitality venue in Greater Sydney must ensure all persons working at the venue comply with subclause (3). The regulation provides that an offence against clause 5(4) is $1,000 for an individual and $5,000 for a corporation.

The regulation provides that penalty notices may be issued for not complying with a public health order requiring the wearing of fitted face coverings in certain circumstances, including a wide range of retail, entertainment and hospitality venues. This may have an adverse impact on the business community that may comply with the order during trading and business hours, and may impact or restrict the way their business is conducted while the order is in place.

The Committee also notes that the regulation contains a higher penalty for operators of hospitality venues that contravene the Order than individuals, and requires that the operators ensure that all persons working at the venue comply with the Order. This places an onus on the operator of hospitality venues to ensure that their staff comply with the Order.

However, the Committee recognises that the intent of the regulation is to protect public health and safety in response to the COVID-19 pandemic, particularly the recent outbreaks in the northern beaches and Greater Sydney. The wearing of face masks may allow businesses to continue to operate in certain circumstances while also providing a safety measure to those staff and customers. The Committee also recognises that since this regulation was published that some COVID-19 restrictions have been scaled back, including the requirement for customers to wear face masks in retail venues and other businesses. In these circumstances, the Committee makes no further comment.

4. Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020

Date tabled	23 October 2020
Disallowance date	LA: 23 March 2021 LC: 24 March 2021
Minister responsible	The Hon. Damien Tudehope, MLC
Portfolio	Minister for Finance and Small Business

PURPOSE AND DESCRIPTION

1. The *Retail and Other Commercial Leases (COVID-19) Regulation (No 2)* (the remade Regulation) is made under the *Retail Leases Act 1994*, including sections 85 and 87, and under section 202 of the *Conveyancing Act 1919*.

2. The object of the remade Regulation is to repeal and remake, with amendments, the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (the first Regulation) to extend prohibitions and requirements in relation to the exercise of certain rights of lessors during the COVID-19 pandemic period until the end of 31 December 2020.

3. Accordingly, the remade Regulation will continue to give effect to the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* adopted by the National Cabinet on 7 April 2020. Like the fist Regulation, the remade Regulation—

    a. prohibits and regulates the exercise of certain rights of lessors relating to the enforcement of certain commercial leases during the COVID-19 pandemic period, and

    b. requires, in response to the COVID-19 pandemic, that lessors and lessees renegotiate the rent and other terms of those commercial leases in good faith having regard to the leasing principles set out in the National Code of Conduct, before any legal enforcement action of the terms of those commercial leases can be commenced.

4. The provisions of the remade Regulation are largely the same as the first Regulation, as amended in July 2020. However, there are new provisions requiring lessors to commence renegotiation of a lease within 14 days of a request by a lessee (unless another timeframe is agreed), and allowing lessees to make multiple requests for rent renegotiation during the prescribed period.

5. This Regulation is made with the agreement of the Minister for Customer Service, being the Minister administering the *Conveyancing Act 1919*.

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity, property rights and freedom of contract

6. When introduced in April 2020, the first Regulation applied for a 'prescribed period' of 6 months, the time limit for regulations made under section 87 of the *Retail Leases Act 1994*. The remade Regulation extends the prescribed period for just over two months, until 31 December 2020. However, the remade Regulation itself will not be repealed until 6 months after it commences, on 22 April 2021 (clause 12).

7. 'Impacted lessees' continue to be defined as those who are eligible for JobKeeper payments and who had less than $50 million in turnover in the 2018-19 financial year (clause 4).

8. During the prescribed period, a lessor is prohibited from taking 'prescribed action' against an impacted lessee because of (clause 6):

    a. a failure to pay rent,

    b. a failure to pay outgoings, or

    c. the business operating under the lease not being open for business during the hour specified in the lease.

9. 'Prescribed actions' include evicting the lessee, terminating the lease, or charging interest or fees for unpaid rent, among other actions (clause 3).

10. Further, a lessor cannot take a prescribed action against a lessee because of a failure to pay rent unless the lessor has, if requested by the lessee, renegotiated the rent payable (and other terms) under the lease in good faith (clause 7(4)(a)). This was also a requirement under the first Regulation. However, as mentioned above, the remade Regulation contains an additional requirement that the lessor commence renegotiations within 14 days of receiving a request by an impacted lessee, unless another timeframe is agreed.

11. However, nothing in the remade Regulation prevents a lessor from taking a prescribed action against a lessee on grounds unrelated to the COVID-19 pandemic (clause 10).

12. Further, parties are not prevented from agreeing to a prescribed action, including termination of an impacted lease (clause 6(7)).

> **Like its predecessor, the remade *Retail and Other Commercial Leases (COVID-19) Regulation (No 2)* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.**
>
> **The remade Regulation also goes further than the first Regulation by requiring lessors to commence renegotiation within 14 days of a request by the lessee.**

However, the parties may agree to a different time period. Further, the remade Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. The remade Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

The remade Regulation also has retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee recognises that the remade Regulation, like the first Regulation, only applies to cases involving 'impacted lessees' (i.e. lessees that qualify for the JobKeeper scheme and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes the relatively short period for which the provisions in the remade Regulation have been extended – approximately 10 weeks. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

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

Government regulation of private business contracts – businesses required to incur a loss

13. As noted above, the remade Regulation significantly limits lessors from taking any prescribed action, such as eviction, against an impacted lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours.

14. The remade Regulation extends the prescribed period for which these limitations are imposed, which was initially due to end on 23 October 2020, until 31 December 2020.

15. While the previous Regulation was in force, the Committee notes that financial mortgage assistance was made available for eligible lessors to defer business loan repayments for a period of 6 months.[5] Following any 6-month loan repayment deferral, lessors experiencing ongoing financial difficulty may now be able to restructure or vary their loan, or be eligible for a 4-month deferral extension.[6]

[5] Australian Banking Association, 'Commercial Landlord Relief Package', https://www.ausbanking.org.au/covid-19/the-landlord-relief-package/

[6] Australian Banking Association, 'COVID-19 support: phase two', https://www.ausbanking.org.au/covid-support-phase-two/

16. The NSW Government has also announced that commercial landlords will be able to apply for a land tax concession of up to 25% if they provide rent reductions to eligible tenants from 1 January 2021 to 28 March 2021.[7]

As above, the remade Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 crisis. In doing so, the remade Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 31 December 2020.

However, the Committee recognises that the remade Regulation is in response to the ongoing public health emergency and remains in line with the National Cabinet's decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that lessors may be eligible for a land tax concession, and/or may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

[7] Service NSW, 'Commercial lease support', https://www.service.nsw.gov.au/campaign/covid-19-help-small-businesses/commercial-lease-support

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.