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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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Membership

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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. BETTER REGULATION LEGISLATION AMENDMENT (MISCELLANEOUS) BILL 2021

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

Publication of legally sensitive information

The Bill amends the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* to enable a court order to be made requiring a person convicted of an offence under the Act or its regulations to publicise the offence. The person may also be required to publicise other matters, including if a prohibition order, building work rectification order or stop work order has been made in connection with the person. This may impact a person's right to protect legally sensitive information, especially information that may affect procedural fairness or create reputational damage.

However, the Committee recognises the public interest justification for these changes, including that it is intended enhance industry standards and strengthen consumer protection in the building development sector and create a deterrent for offences under the Act. In these circumstances, the Committee makes no further comment.

Privacy

The Bill amends the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* to enable the Secretary of the Department of Customer Service to enter into information sharing arrangements with particular agencies. The Bill also provides powers for an inspector to require the production of employee records and to take possession of records to be used as evidence. This may impact on an individual's privacy of their employee records and related information.

The Committee acknowledges the intent of the amendments to enable inspectors to enforce compliance and are consistent with existing laws within the portfolio. However, the Committee notes that the Bill does not specify whether this information would constitute 'personal information' as defined under the *Privacy and Personal Information Protect Act 1998*. Under the Privacy Act, there are certain protections regarding the use, disclosure and retention of personal information by public sector agencies. In these circumstances, the Committee refers these provisions to the Parliament for its consideration.

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

Enforcement powers of Secretary

The Bill amends section 85 of the *Associations Incorporations Act 2009* to extend the Secretary's power to require the production of information and documents from a 'previously registered association'. Under the changes, a previously registered association means an association that was previously, and not currently, registered under the Act.

The Bill also amends the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* to provide powers for an inspector to require the production of employee records and to take possession of records to be used as evidence.

This may provide the relevant Secretaries with broad administrative powers to compel the production of documents and take possession of records to be used as evidence. However, the Committee recognises that these powers enable the Secretaries to carry out their primary functions and enforce compliance with the requirements under the Acts. The Committee also recognises that these changes are in line with existing enforcement powers under these Acts. In these circumstances, the Committee makes no further comment.

Economic rights

The Bill amends the *Retirement Villages Act 1999* to allow the Secretary to approve, on the application of an operator, a period longer than the prescribed period for an application of a former resident (of a retirement village) for payment of their exit entitlements following the sale of the former premises. The Bill does not specify what items the Secretary must take into consideration when granting such an order.

This may impact the economic rights of former residents to the payment of their exit entitlement where it has been unreasonably delayed by the operator. In these circumstances, the Committee refers the provisions to the Parliament for their consideration of whether they impact on the economic rights of former residents.

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

Commencement by proclamation

Section 2 provides that Schedules 1.6, 1.13[4] and [5] are to commence on a day or days appointed by proclamation. These schedules contain amendments to the *Design and Building Practitioners Act 2020*, to insert a single definition of 'relevant authorisation', and the *Retirement Villages Act 1999,* regarding exit entitlement orders by the Secretary.

The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons. The Committee understands that a flexible start date may be preferable for necessary administrative arrangements across these sectors. However, the Committee considers that amendments that affect an individual's economic rights should have a clear start date to provide certainty to those affected by the changes. For example, where it affects applications for payment of exit entitlements of former residents. In these circumstances, the Committee refers these provisions regarding the Retirement Villages Act 1999 to the Parliament for its consideration.

Matters deferred to the regulations – penalty notice offences

The Bill amends the *Building and Construction Industry Long Service Payments Act 1986* and the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* to allow their corresponding regulations to create penalty notice offences.

The Committee generally prefers that provisions allowing the creation of offences be contained in the primary legislation to allow sufficient parliamentary scrutiny. However, the Committee notes that such provisions are common in a regulatory setting to promote compliance with the legislation, particularly within these business sectors. In these circumstances, the Committee makes no further comment.

2. BUILDING LEGISLATION AMENDMENT BILL 2021

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

Strict liability offences

The Bill contains a number of strict liability offences that prohibit non-compliance for metering co-ordinators under the *Gas and Electricity (Consumer Safety) Act 2017.* These strict liability offences carry a maximum penalty of 500 penalty units ($55,000) for a corporation and 250 penalty units ($27,500) for an individual.

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. This is of particular concern where significant financial penalties are attached.

However, the Committee notes that strict liability offences are not uncommon in legislation and regulatory frameworks to ensure compliance with safe practices, particularly relating to electrical meter installations. Further, the Committee notes that the provisions impose monetary penalties rather than imprisonment, and are to provide a financial incentive for electrical meter co-ordinators to comply with safety requirements, ensure public safety and promote consumer confidence in the building sector. In these circumstances, the Committee makes no further comment.

Penalties for continuing strict liability offences

Schedule 2 of the Bill amends the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* to amend certain offences to be continuing offences and sets out the penalties for each day the offence continues. This includes offences regarding the notification to Secretary of intended completion of building work (section 7), notification of a changed expected completion date (section 8), failure to comply with a direction of an authorised officer (section 27), and failure to comply with additional orders imposed by a court (proposed section 56B).

In relation to the above offences, the Bill sets out the maximum penalty for the offence, ranging from 500 penalty units ($55,000) to 10,000 penalty units ($1,100,000) for a body corporate, and from 100 penalty units ($11,000) to 2000 penalty units ($220,000) in any other case. The Bill also sets out the maximum penalty for the continuing offence to be issued for each day that the offence continues in each case, ranging from 50 penalty units ($5,500) to 100 penalty units ($110,000) each day for a body corporate, and from 10 penalty units ($1,100) to 200 penalty units ($22,000) each day in any other case.

The Committee notes that these are significant financial penalties in some cases that may be continued each day that the offence continues. This may significantly impact those to which the continuing penalties applies, particularly where it is a strict liability offence. 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.

However, the Committee notes that strict liability offences are not uncommon in legislation and regulatory frameworks to ensure compliance with safe practices. The Committee also notes the public interest aspect to ensure compliance of developers with the relevant residential building laws, and that the majority of such penalties are intended to apply to body corporates and developers, rather than individuals. In these circumstances, the Committee makes no further comments.

Powers of entry – right to privacy and property

The Bill amends the *Gas and Electricity (Consumer Safety) Act 2017* to provide powers of entry to authorised officers of network operators and retailers to enter a premises to carry out work such as preliminary investigations for a proposed installation or extension of electricity works, reading electricity meters, or testing, maintaining or replacing meters. They may also enter for any other purpose as prescribed by the regulations. This power of entry may impact on a person's right to privacy and property by allowing authorised officer to enter a premises without the consent of the owner or resident.

The Committee recognises that the power of entry is limited to the purposes of carrying out certain electricity works on the premises. The Committee also acknowledges that the Bill provides some safeguards on the use of this power of entry, by requiring that it occur during daylight hours except where there is an emergency, and by use of an existing opening in the fence if possible.

However, under the provisions, authorised officers may still damage a premises, although as little as possible, and enter a premises through a 'new' opening that must be closed after the need for entry has ended. In these circumstances, the Committee refers the provision to the Parliament for its consideration of whether it impacts on a person's right to privacy and property.

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

Commencement by proclamation

Proposed section 2 of the Bill provides that Schedule 1[3]-[5] commences on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons. However, the Committee notes that the provisions within Schedule [1]-[5] make a number of changes to the administration of the design and building sector, such as the recognition of professional bodies for engineers and new processes for administrative reviews by the Tribunal. In these circumstances, a flexible start date may be beneficial, and consequently the Committee makes no further comment.

Matters deferred to the regulations

The Committee notes that the Bill defers certain matters to the regulations of the relevant Acts. For example, it amends section 55 of the *Design and Building Practitioners Act 2020* to provide that the regulations may make further provision for the recognition of a professional body of engineers by the Secretary regarding a range of matters related to the recognition of a professional body of engineers. The Bill also amends the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* to provide that the regulations may prescribe additional circumstances where the Secretary may prohibit the issuing of an occupation certificate in relation to residential apartments.

The Committee generally comments where matters are deferred to the regulations. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. However, the Committee recognises that regulations may be used in relation to certain administrative matters. As the matters deferred include the requirements for the registration of recognised professional body of engineers, and additional circumstances where the Secretary may issue a prohibition order, the Committee considers that deferring these matters to the regulations may afford administrative flexibility. The Committee also notes that regulatory changes are tabled in both Houses of Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. In these circumstances, the Committee makes no further comment.

Wide power of exemption

The Bill amends the *Design and Building Practitioners Act 2020* and inserts subsection 107(5), which provides that the regulations may exempt all persons or bodies, specified persons or bodies or classes of persons or bodies, or all work, specified work or classes of work, or all or specified registrations, from any specified provision of this Act.

This subsection grants the regulations with a wide power to exempt any person, body or work from any specified provision of the Act. In doing so, the regulations may alter the application and operation of the Act's provisions. Additionally, that this power is contained in the regulations means that such exemptions would not be required to be passed by Parliament and may commence as soon as it is published.

The Committee recognises the benefits of administrative flexibility that regulations afford, and that regulatory changes are tabled in both Houses of Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. However, the Committee considers that significant matters that may alter the application of the Act should be contained in the primary legislation, such as a wide power of exemption for any person, body or work from any part of the Act. The Committee refers the provision to the Parliament for its consideration of whether it inappropriately delegates legislative power.

3. CHILDREN'S GUARDIAN AMENDMENT (CHILD SAFE SCHEME) BILL 2021

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

Executive liability and strict liability offences

The *Children's Guardian Amendment (Child Safe Scheme) Bill 2021* amends the *Children's Guardian Act 2019* to insert three new offences, relating to non-compliance with enforceable undertakings made to, or directions and compliance notices issued by, the Children's Guardian. These are strict liability offences, meaning there is no mental element required to be proven – it is enough that the organisation, or the head of the organisation, 'failed to comply' with the relevant requirements.

Two of the offences are also prescribed as 'executive liability offences', meaning that a director or person involved in managing a corporation may be personally liable for an offence if they knew or ought to have known about the offence, and failed to take reasonable steps to stop or prevent it. The Committee generally comments on strict and executive liability offences, as they depart from the common law principle that a mental element (such as intent) is required to establish liability for an offence.

The Committee acknowledges that strict and executive liability offences are often used in regulatory settings to encourage compliance. The Committee also notes that although some penalties for the new offences are quite high, ranging from $550 to $55,000, they are solely pecuniary – that is, they do not include any option for imprisonment. Further, the Committee acknowledges the object of the Bill, to promote compliance with the Child Safe Standards recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse. In these circumstances, the Committee makes no further comment.

Privacy – sharing information obtained by exercising monitoring and enforcement functions

The Bill introduces a new section 180A, which provides for the circumstances in which the Children's Guardian may disclose information obtained in monitoring and enforcing compliance of child safe organisations with the Child Safe Standards. Specifically, the section provides that

the Children's Guardian may disclose information to an interstate or federal agency with similar functions to those it exercises under the *Children's Guardian Act 2019*, if the information is relevant to the exercise of an interstate or federal law, or an undertaking being carried out jointly between NSW and another State or Territory, or the Commonwealth.

These provisions may impact on an individual's right to privacy. Section 180A does not specify what types of information can be disclosed, and does not require that the Children's Guardian seek consent from or notify individuals who may be affected. However, the Committee acknowledges that information sharing is limited to government agencies who have similar functions relating to child safety. The Committee also acknowledges the objective of the provision, as emphasised in the second reading speech, to facilitate cooperation between State, Territory and Commonwealth agencies to identify, prevent and respond to incidents and risks of child abuse. In these circumstances, the Committee makes no further comment.

4. GREYHOUND RACING AMENDMENT (WHOLE-OF-LIFE TRACKING) 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.

5. LAW ENFORCEMENT CONDUCT COMMISSION AMENDMENT (COMMISSIONERS) 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.

PART TWO – REGULATIONS

1. BIODIVERSITY CONSERVATION AMENDMENT (CETACEA) REGULATION 2021

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

Strict liability offence

The *Biodiversity Conservation Amendment (Cetacea) Regulation 2021* introduces a new offence in clause 2.8A(1) of 'breeding or importing [an] animal of the order Cetacea' into New South Wales. The maximum penalties for this offence start at $132,000 and $660,000 for an individual and corporation respectively. Additional penalties apply for offences continued on multiple days, or in respect of multiple animals.

The offence is a strict liability offence, meaning there is no mental element required to be proven – for example, intent or recklessness. It is enough that an individual or corporation 'causes' or 'permits' an animal under their control to breed, without necessarily knowing or intending that this would occur.

The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalty for this offence is monetary, not custodial.

The Committee also acknowledges the environmental conservation objectives of the provision. However, given the significant penalties attached to the new offence, the Committee refers the matter to Parliament for consideration.

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

Matters that should be included in primary legislation

As noted above, the Regulation introduces a new offence in clause 2.8A(1) of 'breeding or importing an animal of the order Cetacea'. Clause 2.8A(2) also expands the types of behaviour which constitute 'harming animals' for the purposes of the *Biodiversity Conservation Act 2016*. Accordingly, an offence under clause 2.8A(1) which is committed against an animal that is protected or a member of a threatened species or ecological community will also constitute an offence under section 2.1 of the Act, with higher maximum penalties (including imprisonment) attached.

The Committee prefers new offences which set significant penalties to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. For similar reasons, the Committee also prefers provisions which affect the ambit of an existing offence to be included in primary legislation.

Again, the Committee acknowledges the environmental conservation objectives of these provisions. However, given the substantial penalties attached – including, in the case of section 2.1 of the Act, possible imprisonment – the Committee refers the matter to Parliament for consideration.

2. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (MISCELLANEOUS) REGULATION 2021

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

Right to humane treatment and personal physical integrity while in detention

The Regulation amends the *Crimes (Administration of Sentences) Act 1999 to* permit a correctional officer to require an inmate to undergo a breath test without a suspicion that the inmate has consumed any intoxicant. This extends the circumstances in which this search power may be used by correctional officers and may impact on an inmate's right to personal physical integrity.

The Committee acknowledges that the increased power may assist in dealing with substance abuse among inmates, and may be considered necessary in some circumstances. However, the expanded power gives officers a broad power that does not include additional safeguards to mitigate risks arising from the broadened power. The Committee refers the provisions to Parliament to consider whether they trespass unduly on personal rights and liberties and whether they are reasonable and proportionate in the circumstances.

Insufficiently defined or limited power

As noted above, the Regulation permits a correctional officer to require an inmate to undergo a breath test without requiring a suspicion that the inmate has consumed any intoxicant. The Committee notes that the revised regulation does not appear to include additional safeguards to mitigate the use of this broadened power.

The Committee prefers provisions that grant administrative powers to be drafted with sufficient precision so that their scope is clear. The amendments expands an officer's power without additional limitations or guidance as to when the exercise of the power is appropriate. Given the impacts on a person's right to personal physical integrity (as discussed above) and limited

safeguards on the extended power, the Committee refers the provisions to Parliament for its consideration.

3. LIQUOR AMENDMENT (MISCELLANEOUS) REGULATION 2021

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

New condition imposed on small bar licences

The *Liquor Amendment (Miscellaneous) Regulation 2021* inserts a new provision into the *Liquor Regulation 2018*, making it a condition of a small bar licence that licensed premises cannot be used for 'adult relaxation entertainment (including adult entertainment of a sexual nature)'. These phrases are not defined in the *Liquor Regulation 2018* or the *Liquor Act 2007*, although they are used elsewhere in the Regulation.

Under section 11(2) of the Act, contravention of a licence condition by a licensee attracts a large maximum penalty, including possible imprisonment.

The Committee generally prefers provisions which create new offences, or expand the ambit of an existing offence, to be drafted with sufficient precision so that their scope and content is clear. This is of particular concern given that the condition applies to existing small bar licences, as well as new licences, and non-compliance attracts a significant maximum penalty. In these circumstances, the Committee refers the matter to Parliament for consideration.

4. MENTAL HEALTH AND COGNITIVE IMPAIRMENT FORENSIC PROVISIONS REGULATION 2021

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

Disclosure of confidential information

The Regulation contains provisions that permit the Tribunal to disclose certain documents or information. Clause 12 provides that the Tribunal may disclosure an edited version of a submission by a victim to the legal representative of a forensic patient if the Tribunal considers that it should be provided for reasons of procedural fairness. The legal representative of the patient must also agree to non-disclosure conditions. Similarly, Clause 14 provides that the Tribunal may disclose all or part of a victim's submissions to a person treating the forensic patient on the condition that they do not disclose the information to the forensic patient.

Clause 26 provides that the Commissioner of Victim Rights may, with the consent of the Victim, disclose to the Tribunal information contained in the Victims Register and other information relating to the victim.

These provision allows the disclosure of confidential information from the victim's submission to persons representing or treating the forensic patient, and may impact principles of confidentiality. However, the Committee notes the considerable safeguards attached to these provisions, including that the Tribunal must considers it necessary in the interests of procedural fairness, and that this information is not then disclosed to the forensic patient. The Committee also recognises that the victim is to be given the opportunity to review and amend their submission if it is to be disclosed. In these circumstances, the Committee makes no further comment.

Privacy

Under the parent Act, an information sharing arrangement may be established between the agencies led by the Secretary of the Ministry of Health, the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice. The Regulation specifies that type of information that may be provided for the purposes of this information sharing arrangement. This includes information concerning forensic or correctional patients to be transferred, subject to forensic community treatment orders or community treatment orders, and those who are reasonably believed to pose a security risk to the good management and order of a correctional centre or mental health facility.

This provision may impact on the privacy of the forensic and correctional patient to whom the information relates. However, the Committee recognises that the information sharing arrangements are limited to information about patient transfer, treatment orders and security risks. The information may also only be shared between those Departments (Health, Correctional Services, and Communities and Justice) that directly manage patient custody and care. In these circumstances, the Committee makes no further comment.

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

Henry VIII

The Regulation modifies the *Mental Health Act 2007* to replace Chapter 3 Part 3 of the Act with Part 3 of the Regulation for the purposes of making a forensic community treatment order under section 99(2) of the Act. Part 3 of the Regulation sets out the provisions in regards to forensic community treatment orders, including applications for community treatment orders, treatment plans, and the implementation, breaches, and variations of forensic community treatment orders.

In permitting the Regulation to amend the Act, these clauses operate as a Henry VIII clause which allows subordinate legislation to amend the Act, thus delegating Parliament's legislative power to the Executive. The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight. Given the amendment extends to provisions regarding forensic community treatment orders of forensic patients in mental health care facilities, the Committee refers this Regulation to the Parliament for its consideration of whether the objective could have been achieved by alternative and more effective means.

5. PORTS AND MARITIME ADMINISTRATION AMENDMENT (COMMERCIAL VESSEL INFORMATION) REGULATION 2021

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

Privacy

The Regulation allows Transport for NSW to collect and use information about commercial vessels from the Australian Maritime Safety Authority for the purpose of exercising the functions of Transport for NSW under the *Ports and Maritime Administration Act 1995*. Under the amending regulation, *information* about commercial vessels means information disclosed to Transport for NSW by the Australian Maritime Safety Authority under section 11 of the *Australian Maritime Safety Authority Act 1990* of the Commonwealth. This information may also include personal information within the meaning of the *Privacy and Personal Information Protection Act 1998*.

This may impact the privacy rights of those individual to whom the personal or confidential information relates. However, the Committee notes that under the amending Regulation, personal information has the same meaning as within the *Privacy and Personal Information Protection Act 1998*, which carries certain safeguards under that Act regarding the retention, use and disclosure of that information. The Committee also notes that the information may only be shared for the purposes of exercising the functions of Transport for NSW under the *Ports and Maritime Administration Act 1995*. In these circumstances, the Committee makes no further comment.

6. PROTECTION OF THE ENVIRONMENT OPERATIONS (GENERAL) AMENDMENT (PFAS FIREFIGHTING FOAM) REGULATION 2021

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

Prohibition on sale of PFAS fire extinguishers

The Regulation prohibits the sale of a portable fire extinguisher containing the precursor to PFAS firefighting foam. The maximum penalty for offences under this clause is 400 penalty units ($44,000) for a corporation, and 200 penalty units ($22,000) for an individual. This may impact the business community that would otherwise be able to sell such products.

However, the Committee notes that a person does not commit such an offence if they reasonably believe that they are selling such a product to a relevant authority, or the owner of a relevant watercraft, or an exempt person under clause 95B of the Regulation. The Committee also recognises that the intention of the regulation is to prevent PFAS contamination in the NSW environment. In these circumstances, the Committee makes no further comment.

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

Regulation creates offences

The Committee notes that the Regulation creates offences with a high monetary penalty. The Regulation makes it an offence to discharge PFAS firefighting foam for the purposes of training or demonstration, and the foam is discharged by a relevant authority or person to put out a catastrophic fire. The maximum penalty for these offences is 400 penalty units ($44,000) for a corporation, and 200 penalty units ($22,000) for an individual.

The Committee prefers provisions which create offences to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. The Committee also generally comments on strict liability offences as they depart from the common law principle that *mens rea*, the mental element of an offence, is relevant to the imposition of liability.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. In this instance, the strict liability offence only applies to the use of PFAS firefighting foam during training or a demonstration. It is not an offence where a person uses PFAS firefighting foam to put out a catastrophic fire, or to extinguish a fire on a watercraft in relevant waters. As noted above, the Committee also notes that the intention of the regulation is to prevent PFAS contamination in the NSW environment. In these circumstances, the Committee makes no further comment.

7. PUBLIC HEALTH AMENDMENT (MISCELLANEOUS) REGULATION 2021

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

Penalty notice offences – Right to a fair trial

The Regulation extends the operation of certain offences under Schedule 4 of the *Public Health Regulation 2012* until 31 December 2021. This includes penalty notice offences for contraventions of COVID-related public health orders under sections 10, 11 and 70(1) of the *Public Health Act 2010*.

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

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, with a current repeal date of 31 December 2021. In the circumstances, the Committee makes no further comment.

Appointment of Authorised Officers

The Regulation extends, until 31 December 2021, the operation of certain provisions under the *Public Health Regulation 2012* that allow the Secretary of the Ministry of Health to appoint any member, or member of staff, of the Department of Customer Service or the NSW Food Authority as an authorised officer. Such authorised officers have functions and powers under the Public Health Act, including the power to issue penalty notices for breaching public health orders and the power to require a person to answer questions.

The Committee generally prefers that provisions that may confer significant powers to be included in primary legislation rather than the subordinate legislation, in order to foster an appropriate level of parliamentary oversight. However, the Committee acknowledges that in the current emergency situation created by COVID-19, it may be reasonable for public health regulations to include such broad provisions so that authorities can respond swiftly and flexibly to the pandemic.

Further, the provisions are time limited to be repealed on 31 December 2021. The Committee also notes safeguards in the Act, for example, authorised officers cannot enter residential premises unless they have the occupier's permission, or they have obtained a search warrant. In the circumstances, the Committee makes no further comment.

8. WATER MANAGEMENT (GENERAL) AMENDMENT (MISCELLANEOUS) REGULATION 2021

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

Impact on business – obligation of monthly reporting

The Regulation changes the reporting requirements of water access licence holders by prescribing that water usage must be reported within 14 days of the end of each month, unless water usage data is automatically transmitted via telemetry. The penalty for breaching water access license conditions are 4,550 penalty units ($500,500) plus 600 penalty units for every day

the offence continues for a corporations, and 4,550 penalty units ($500,500) plus 600 penalty units for every day the offence continues for an individual. The requirement to report every month may present a burden to small business where telemetry is not installed. The alternative of installing telemetry equipment may present an additional cost burden to some small business enterprises.

However, the Committee acknowledges that there are exemptions from monthly reporting where no water is taken provided that the licence holder notifies the Minister that the holder did not intend to cause or permit water to be taken. Such “no take notices” are limited to a maximum period of six months. Additionally, although the maximum penalties are significant, it is not an offence for failing to report water use if it is established that all reasonable steps to prevent the contravention of the condition of the licence. In the circumstances, the Committee makes no further comment.

Part One – Bills

1. Better Regulation Legislation Amendment (Miscellaneous) Bill 2021

Date introduced	12 May 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend various Acts and a regulation, and to repeal a regulation, administered by the Minister for Better Regulation and Innovation, including as follows—

(a) to amend the *Associations Incorporation Act 2009* for the following purposes—

(i) to provide that, on the winding up of an association or on the involuntary cancellation of the association's registration, the surplus property of the association must be distributed in accordance with—

(A) if the association's constitution addresses the distribution—the constitution, or

(B) a special resolution of the association, or

(C) a direction by the Secretary,

(ii) to provide that, on the voluntary cancellation of the registration of an association, the assets of the association must be distributed in accordance with a special resolution passed by the association,

(iii) to clarify that surplus property and assets must not be distributed to a member or former member of an association unless the member of former member is an entity or organisation, whether incorporated or unincorporated, that is prohibited from distributing property to its members,

(iv) to enable a committee of an association to appoint sufficient members to constitute a quorum,

(v) to remove the penalty for the offence of a former committee member or public officer failing to deliver documents belonging to an association after vacating office,

(vi) to extend the Secretary's power to require the production of information and documents from an association to include the production of information and documents from a previously registered association,

(vii) to provide that an audit of an association's financial records may be carried out by an authorised audit company or a qualified member of a professional accounting body,

(b) to amend the *Biofuels Act 2007* to enable the Minister to appoint to the Expert Panel an additional person who has recent experience or expertise in the petroleum or biofuels industry,

(c) to amend the *Building and Construction Industry Long Service Payments Act 1986* to permit the issuing of penalty notices under that Act,

(d) to amend the *Building Products (Safety) Act 2017* to provide that the register of building product undertakings is to be made available, free of charge, on a NSW Government website,

(e) to amend the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* for the following purposes—

(i) to allow the issuing of penalty notices under that Act,

(ii) to require employers for the contract cleaning industry to keep a copy of the employment contract for each employee,

(iii) to empower inspectors to require the production of employee records and to take possession of records to be used as evidence,

(iv) to enable the Secretary to enter into information sharing arrangements with relevant agencies,

(f) to amend the *Design and Building Practitioners Act 2020* for the following purposes—

(i) to consolidate the concepts of 'equivalent authorisation' and 'relevant authorisation', as used in that Act and the Design and Building Practitioners Regulation 2021, by inserting a single definition of relevant authorisation to refer to certain qualifications or authorisations related to practitioners under that Act,

(ii) to provide that, if a practitioner is a registered body corporate, the Secretary may take disciplinary action under that Act, Part 6 against a director of the body corporate, including action intended to prevent the director from being a director of other registered body corporates,

(g) to amend the *Electricity Supply Act 1995* to replace references to 'metering provider' with 'metering co-ordinator' to ensure consistency with how the terms are used in the national electricity laws,

(h) to amend the *Fair Trading Act 1987* to provides that the register of enforceable undertakings is to be made available, free of charge, on a NSW Government website,

(i) to amend the *Funeral Funds Act 1979* for the following purposes—

(i) to provide that a registered company auditor or an authorised audit company may be appointed as an independent auditor of a pre-paid funeral fund,

(ii) to provide for the publication and provision of annual returns of pre-paid funeral funds lodged with the Secretary, and, as a consequence, remove the need for a person to attend a government office to request a copy of a return,

(j) to amend the *Funeral Funds Regulation 2016* as a consequence of the amendments made to the *Funeral Funds Act 1979* by the proposed Act,

(k) to amend the *Home Building Act 1989* for the following purposes—

(i) to clarify that the holder of a contractor licence is guilty of improper conduct if the holder does not comply with the requirements of a rectification order under that Act, Part 3A, Division 2 before the date specified in the order,

(ii) to provide that, if the holder of an authority is a partnership or corporation, the Secretary may take disciplinary action against members of the partnership, officers of corporations that are members of the partnership and officers of the corporation,

(l) to amend the *Residential Apartment Buildings (Compliance and Enforcement) Act 2020* for the following purposes—

(i) to provide that the Secretary may accept an undertaking from a developer to provide a bank guarantee, bond or other form of security (a rectification bond) to the Secretary that may be applied to the costs of eliminating, minimising or remediating a serious defect or a potential serious defect in a residential apartment building,

(ii) to enable the Secretary to make an order prohibiting the issue of an occupation certificate in relation to a residential apartment building if a developer fails to provide the Secretary with a rectification bond required under the terms of an undertaking given by the developer,

(iii) to enable the Secretary to give a building work rectification order to a developer if the Secretary has a reasonable belief that a residential apartment building has a serious defect or that building work was or is being carried out in a way that could result in a serious defect in a residential apartment building,

(iv) to remove the requirement for the Registrar-General to be notified of, and given the opportunity to make written representations about, a proposed building work rectification order,

(v) to enable a court order to be made requiring a person convicted of an offence under that Act, or the regulations under that Act, to publicise the offence and require the person to publicise other matters, including if a

prohibition order, building work rectification order or stop work order has been made in connection with the person

(m) to amend the *Retirement Villages Act 1999* for the following purposes—

(i) to provide that a surplus, or part of a surplus, in the annual accounts of a retirement village may, with the agreement of the existing residents of the village, be distributed equally based on the number of existing residential premises in the village rather than the number of existing residents,

(ii) to clarify that if a former occupant of residential premises in a retirement village applies for an exit entitlement order and the Secretary does not make the order, the former occupant may not make another application for an exit entitlement order until the expiration of a further prescribed period or a longer period approved by the Secretary,

(iii) to impose a maximum penalty of 50 penalty units for the failure of a person appointed by a resident of a retirement village to sell the resident's premises to notify the resident of offers to purchase the premises or give the resident reports on the marketing of, and inquiries relating to, the premises, (

(iv) to enable the regulations to prescribe additional information that a valuer must include in a valuation of residential premises in a retirement village,

(n) to amend the *Storage Liens Act 1935* to relocate the requirements for a notice served on a storer by a person claiming to be the owner of goods or to have an interest in goods from the Storage Liens Regulation 2019,

(o) to repeal the *Storage Liens Regulation 2019* as a consequence of the amendments to the Storage Liens Act 1935 by the proposed Act,

(p) to amend the *Tow Truck Industry Act 1998* for the following purposes—

(i) to provide additional licence conditions for tow truck operators, which require a licensee to release a vehicle from their holding yard after the vehicle's owner or owner's agent has paid the fees charged by the licensee for the licensee's dealings with the vehicle, and prohibit a licensee from sending a vehicle away from the holding yard for repairs without the vehicle owner's or owner's agent's permission,

(ii) to enable payments to be made from the Tow Truck Industry Fund to fund the prosecution of offences under other legislation that may be committed by tow truck operators in the course of operating their business,

(q) to make other necessary consequential and related amendments to instruments listed in this overview, including savings and transitional amendments.

BACKGROUND

2. This Bill makes various amendments to 14 principal Acts across the Better Regulation Portfolio.

3. In the second reading speech, the Minister stated:

> The bill will ensure these legislative schemes can continue to operate as Parliament intended, by making minor but important amendments to modernise regulatory provisions and administrative processes, ensure the laws remain relevant and fit for purpose, strengthen consumer protection, clarify legal requirements and improve customer outcomes. The amendments contained in this bill are mainly administrative and non-contentious but will implement real positive changes to the way the people of New South Wales interact with laws and government processes.
>
> These proposed reforms have been identified through consultation with industry stakeholders, the development of supporting regulations and the day-to-day functions of the various agencies involved. Other amendments have arisen as a result of taking a stewardship approach to the legislation across the Better Regulation portfolio to ensure our legislation remains fit for purpose.

4. The Minister further noted:

> The bill is an important part of the Government's regular legislative review and monitoring program. The amendments in the bill strengthen consumer protection, support businesses and improve the community's experience with government services. I am confident that these reforms will drive positive outcomes in the community and improve public confidence in the law. They address emerging issues, close gaps in the law, improve industry compliance, clarify roles and responsibilities and correct drafting errors.

ISSUES CONSIDERED BY THE COMMITTEE

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

Publication of legally sensitive information

5. Schedule 1.12 amends the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*. The Bill inserts proposed section 56A, which enables a court order to be made requiring a person convicted of an offence under the Act or its regulations to publicise the offence. The person may also be required to publicise other matters, including if a prohibition order, building work rectification order or stop work order has been made in connection with the person.

6. In the second reading speech to the Bill, the Minister stated:

> While legally sensitive information, such as that relating to criminal proceedings, is subject to privacy and confidential laws for the protection of integrity and procedural fairness, a court-made publication order in the context of consumer protection can greatly benefit the public. For example, the Protection of the Environment Operations Act 1997 specifies that the court may make an order directing the defendant to make public details of their conviction. Recently, in Environment Protection Authority v Sydney Water Corporation, the court relied upon this provision to order the defendant to publicise their conviction, the penalty and the judgement on their social media accounts.

> The bill inserts a similar publication order as a power of the court into the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020. The new section 56A will enable the court to issue a publication order compelling a developer to publicly release information relating to an offence or the issue of orders made against them. This amendment will enhance industry standards and strengthen consumer protection in the sector by adding a further deterrent to secure the highest possible level of compliance with the requirements under this Act.

The Bill amends the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* to enable a court order to be made requiring a person convicted of an offence under the Act or its regulations to publicise the offence. The person may also be required to publicise other matters, including if a prohibition order, building work rectification order or stop work order has been made in connection with the person. This may impact a person's right to protect legally sensitive information, especially information that may affect procedural fairness or create reputational damage.

However, the Committee recognises the public interest justification for these changes, including that it is intended enhance industry standards and strengthen consumer protection in the building development sector and create a deterrent for offences under the Act. In these circumstances, the Committee makes no further comment.

Privacy

7. Schedule 1.5[5] inserts sections 47A and 47B to the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010*, which provide powers for an inspector to require the production of employee records and to take possession of records to be used as evidence.

8. The Bill also inserts section 114A, which enables the Secretary of the Department of Customer Service to enter into information sharing arrangements with particular agencies.

9. In regards to these changes, the Minister noted:

> …the bill will expand the powers of inspectors under the Contract Cleaning Industry Act to authorise them to compel production of employee records and to take possession of records to be used as evidence. These are appropriate and reasonable compliance and enforcement powers for the corporation's officers to have and are consistent with other laws within the portfolio. Sharing information will also be made easier by the new section 114A, which will create an information sharing arrangement between the Long Service Corporation and relevant agencies. These amendments will ensure that the Long Service Corporation can perform all of its regulatory functions more effectively.

The Bill amends the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* to enable the Secretary of the Department of Customer Service to enter into information sharing arrangements with particular agencies. The Bill also provides powers for an inspector to require the production of employee records and to take possession of records to be used as evidence. This may impact on an individual's privacy of their employee records and related information.

The Committee acknowledges the intent of the amendments to enable inspectors to enforce compliance and are consistent with existing laws within the portfolio. However, the Committee notes that the Bill does not specify whether this information would constitute 'personal information' as defined under the *Privacy and Personal Information Protect Act 1998*. Under the Privacy Act, there are certain protections regarding the use, disclosure and retention of personal information by public sector agencies. In these circumstances, the Committee refers these provisions to the Parliament for its consideration.

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

Enforcement powers of Secretary

10. Schedule 1.1 of the Bill amends section 85 of the *Associations Incorporations Act 2009* to extend the Secretary's power to require the production of information and documents from a 'previously registered association'. Under proposed section 85(4), a 'previously registered association' means an association that is not currently registered under this Act, and that has been, or taken to be, previously registered under this Act.

11. As noted above, Schedule 1.5[3] amends the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* to insert sections 47A and 47B, which provide powers for an inspector to require the production of employee records and to take possession of records to be used as evidence respectively.

12. Also noted above, in regards to the changes to the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010*, the Minister noted that the changes are "appropriate and reasonable compliance and enforcement powers for the corporation's officers to have and are consistent with other laws within the portfolio".

The Bill amends section 85 of the *Associations Incorporations Act 2009* to extend the Secretary's power to require the production of information and documents from a 'previously registered association'. Under the changes, a previously registered association means an association that was previously, and not currently, registered under the Act.

The Bill also amends the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* to provide powers for an inspector to require the production of employee records and to take possession of records to be used as evidence.

This may provide the relevant Secretaries with broad administrative powers to compel the production of documents and take possession of records to be used as evidence. However, the Committee recognises that these powers enable the Secretaries to carry out their primary functions and enforce compliance with the requirements under the Acts. The Committee also recognises that these changes are in line with existing enforcement powers under these Acts. In these circumstances, the Committee makes no further comment.

Economic rights

13. Schedule 1.13 amends section 182AE of the *Retirement Villages Act 1999*, which allows the Secretary to approve a period longer than the period prescribed for an application of a former resident (of a retirement village) for payment of their exit entitlement.

14. Under section 182AA of the Act, exit entitlement means the amount that would be required to be paid by an operator of the retirement village to the former occupant under the Act and the former occupant's village contract—

    (a) following the sale of the premises, or

    (b) for Division 2—if the premises were sold for the agreed valuation

15. Section 182AB of the Act provides that a former occupant may apply to Secretary to make an order requiring the operator to pay their exit entitlement where it has not been paid within the prescribed period.

16. Section 182AC provides that the Secretary may make an exit entitlement order for a former occupant of residential premises if they are satisfied that an operator of a retirement village has unreasonably delayed the sale of residential premises.

17. Under the Bill, proposed 182AE provides that the Secretary may, on application by an operator of a retirement village, approve-

    (a) a period longer than the period prescribed by the regulations for the purposes of section 182AB(9), definition of prescribed period, paragraph (a), or

    (b) a later day than the day prescribed by the regulations for the purposes of section 182AB(8)(b)(ii).

    The Bill amends the *Retirement Villages Act 1999* to allow the Secretary to approve, on the application of an operator, a period longer than the prescribed period for an application of a former resident (of a retirement village) for payment of their exit entitlements following the sale of the former premises. The Bill does not specify what items the Secretary must take into consideration when granting such an order.

    This may impact the economic rights of former residents to the payment of their exit entitlement where it has been unreasonably delayed by the operator. In these circumstances, the Committee refers the provisions to the Parliament for their consideration of whether they impact on the economic rights of former residents.

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

Commencement by proclamation

18. Proposed section 2 of the Bill provides that Act commences on the date of assent to this Act, except for Schedules 1.6, 1.13[4] and [5] which are to commence on a day appointed by proclamation.

19. Schedule 1.6 amends the *Design and Building Practitioners Act 2020* to consolidates the concepts of 'equivalent authorisation' and 'relevant authorisation', as used in the *Design and Building Practitioners Act 2020* and *Design and Building Practitioners Regulation 2021*, by inserting a single definition of relevant authorisation. It also makes consequential amendments arsing form this change.

20. Schedule 1.13 amends the *Retirement Villages Act 1999*. Clauses [4] and [5] clarify that if a former occupant of residential premises in a retirement village applies for an exit entitlement order and the Secretary does not make the order, the former occupant must not make another application for an exit entitlement order until the expiration of a further prescribed period or a longer period approved by the Secretary.

> **Section 2 provides that Schedules 1.6, 1.13[4] and [5] are to commence on a day or days appointed by proclamation. These schedules contain amendments to the *Design and Building Practitioners Act 2020*, to insert a single definition of 'relevant authorisation', and the *Retirement Villages Act 1999,* regarding exit entitlement orders by the Secretary.**
>
> **The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons. The Committee understands that a flexible start date may be preferable for necessary administrative arrangements across these sectors. However, the Committee considers that amendments that affect an individual's economic rights should have a clear start date to provide certainty to those affected by the changes. For example, where it affects applications for payment of exit entitlements of former residents. In these circumstances, the Committee refers these provisions regarding the Retirement Villages Act 1999 to the Parliament for its consideration.**

Matters deferred to the regulations – penalty notice offences

21. Schedule 1.3 of the Bill amends the *Building and Construction Industry Long Service Payments Act 1986.* Proposed section 64A permits the issuing of penalty notices under the Act.

22. Similarly, Schedule 1.5[4] inserts section 103A to the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* to provide that an inspector may issue penalty notices to a person that has committed a penalty notice offence. Subsection 103A(2) provides that a penalty notice offence is an offence against this Act or the regulations that is prescribed by the regulations as a penalty notice offence.

> **The Bill amends the *Building and Construction Industry Long Service Payments Act 1986* and the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* to allow their corresponding regulations to create penalty notice offences.**
>
> **The Committee generally prefers that provisions allowing the creation of offences be contained in the primary legislation to allow sufficient parliamentary scrutiny. However, the Committee notes that such provisions are common in a regulatory setting to promote compliance with the legislation, particularly within these business sectors. In these circumstances, the Committee makes no further comment.**

2. Building Legislation Amendment Bill 2021

Date introduced	12 May 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend building, design and electricity legislation as follows—

(a) to amend the *Design and Building Practitioners Act 2020* to—

(i) clarify obligations relating to the variation of building work, and

(ii) enable regulations to be made in relation to the recognition of professional bodies of engineers by the Secretary of the Department of Customer Service (the Secretary), and

(iii) enable administrative review of a decision of the Secretary relating to the recognition of a professional body of engineers, and

(iv) enable regulations to be made to provide for the waiver, reduction, postponement or refund of fees, and

(v) enable regulations to be made to exempt persons from the operation of the Act

(b) to amend the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* to—

(i) enable the Secretary to impose a levy on developers, and

(ii) increase certain penalties, provide that certain offences under the Act are continuing offences and set out the penalties for each day the offences continue, and

(iii) enable the Secretary to prohibit the issue of an occupation certificate or strata plan registration if a direction has not been complied with under the Act, or if other circumstances exist as prescribed by the regulations, and

(iv) enable the Local Court or Land and Environment Court, if a person is convicted of failing to comply with an order or direction under the Act, to order the person to comply with the order or direction,

(c) to transfer provisions relating to electricity metering from the *Electricity Supply Act 1995* to the *Gas and Electricity (Consumer Safety) Act 2017*,

(d) to amend the *Home Building Act 1989* to enable the Secretary to specify, by notice published in the Gazette, the qualifications and experience required to be held by an applicant for a contractor licence, supervisor or tradesperson certificate.

BACKGROUND

2. The *Building Legislation Amendment Bill* 2021 amends a number of existing Acts including the *Design and Building Practitioners Act 2020*, *Residential Apartments Building (Compliance and Enforcement Powers) Act 2020* and the *Home Building Act 1989*.

3. In addition, the Bill also transfers provisions relating to electricity metering from the *Electricity Supply Act 1995* to the *Gas and Electricity (Consumer Safety) Act 2017*.

4. In the second reading speech, the Minister for Better Regulation and Innovation, the Hon. Kevin Anderson MP noted that the Bill's provisions were aimed at improving consumer confidence and enhancing compliance in the building, design and electricity industries:

> This comprehensive reform agenda is focused on improving building quality and restoring consumer confidence in the New South Wales construction industry. The Government's reforms since the election are part of its response to the 2019 Building Confidence Report, authored by Professor Peter Shergold, AC, and Ms Bronwyn Weir. The reforms include the establishment of the Office of the NSW Building Commissioner and the introduction of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*, known as the RAB Act, and the Design and Building Practitioners Act 2020.
>
> The amendments contained in the bill will enhance compliance and enforcement powers of the regulator, ensure industry contributes to the cost of administering the new Design and Building Practitioners Act compliance declaration scheme, and make minor machinery changes to other building legislation necessary to detect, investigate and require the rectification of serious building defects for the benefit of consumers in New South Wales. We are doing this by holding design and building practitioners, professional engineers and developers accountable for their work throughout the building process.

5. While the Bill makes miscellaneous amendments to certain building and design legislation, the Minister highlighted that a key reform of the Bill was to introduce a new levy on developers and owners of buildings:

> While the changes in the bill are predominantly focused on enhancing existing measures, I will highlight one of the key reforms included in the bill, which is the introduction of a levy on developers and owners of the building to support the oversight of these two new schemes. The *Design and Building Practitioners Act* introduces new requirements on design and building practitioners to design and build in accordance with the Building Code of Australia and other prescribed standards. The new scheme provides that only registered design and building practitioners can sign off on design and building work that meet the needs and standards to ensure that the critical parts of a building are compliant with the building code and are safe. That is crucially important to protect consumers and ensure a return of confidence to the market.

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability offences

6. Schedule 4 of the Bill transfers provisions relating to electrical metering from the *Electricity Supply Act 1995* to the *Gas and Electricity (Consumer Safety) Act 2017*. Under these changes, proposed section 38AC provides requirements that metering coordinators must comply with under the Act.

7. This includes that a metering co-ordinator who provides, installs, maintains or replace an advanced meter must have a safety management system in place which satisfies the requirements of the Code for Safe Meter Installation (subsection 38AC(1)).

8. A metering co-ordinator must also comply with a direction of the Secretary to amend a safety management system if it is found to not comply with the Act (subsection 38AC(4)).

9. Additionally, before providing, installing, maintaining or replacing an advanced meter, a metering co-ordinator must provide documentation in relation to the co-ordinator's safety management system to install, replace or maintain an advanced meter (subsection 38AC(5)).

10. The maximum penalty for not complying with such requirements is 500 penalty units ($55,000) for a corporation and 250 penalty units ($27,500) for an individual.

11. In the Minister's second reading speech, the Hon. Kevin Anderson MP noted that the current regulation of electrical metering is split across the *Electricity Supply Act 1995* and the *Gas and Electricity (Consumer Safety) Act 2017*:

> Currently the regulation of electrical metering is split across these two Acts. With these Acts being administered by two Ministers, regulatory responsibilities are split across the Department of Customer Service and Department of Planning, Industry and Environment. The proposed amendments will not substantively change the effect of the rules relating to electricity meters, including advanced meters, but seek to reflect that compliance and enforcement of safety requirements relating to metering is overseen by the Department of Customer Service.

The Bill contains a number of strict liability offences that prohibit non-compliance for metering co-ordinators under the *Gas and Electricity (Consumer Safety) Act 2017.* These strict liability offences carry a maximum penalty of 500 penalty units ($55,000) for a corporation and 250 penalty units ($27,500) for an individual.

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. This is of particular concern where significant financial penalties are attached.

However, the Committee notes that strict liability offences are not uncommon in legislation and regulatory frameworks to ensure compliance with safe practices, particularly relating to electrical meter installations. Further, the Committee notes that the provisions impose monetary penalties rather than imprisonment,

and are to provide a financial incentive for electrical meter co-ordinators to comply with safety requirements, ensure public safety and promote consumer confidence in the building sector. In these circumstances, the Committee makes no further comment.

Penalties for continuing strict liability offences

12. Schedule 2 of the Bill amends the *Residential Apartments Buildings (Compliance and Enforcement Powers) Act 2020* in relation to penalties for certain offences and for each day the offence continues.

13. Under section 7 of the Act, the Secretary must be notified of intended completion of building work. The Bill amends the maximum penalty for an offence under this section as follows:

    (a) for a body corporate—1,000 penalty units and in addition, in the case of a continuing offence, 100 penalty units for each day the offence continues, or

    (b) otherwise—200 penalty units and in addition, in the case of a continuing offence, 20 penalty units for each day the offence continues.

14. Under section 8 of the Act, the Secretary must be notified of a change to the expected date of completion. The Bill amends the maximum penalty for an offence under this section as follows:

    (a) for a body corporate—500 penalty units and in addition, in the case of a continuing offence, 50 penalty units for each day the offence continues, or

    (b) otherwise—100 penalty units and in addition, in the case of a continuing offence, 10 penalty units for each day the offence continues.

15. Under section 27 of the Act, a person must not, without reasonable excuse fail to comply with a direction of an authorised officer made in accordance with this Part 3 of the Act. The Bill amends the maximum penalty for an offence under this section as follows:

    (a) for a body corporate—10,000 penalty units and in addition, in the case of a continuing offence, 1,000 penalty units for each day the offence continues, or

    (b) otherwise—2,000 penalty units and in addition, in the case of a continuing offence, 200 penalty units for each day the offence continues.

16. The Bill also inserts new section 56B, which provides that if a person is convicted by a court of failing to comply with an order or direction under this Act or the regulations, the court may order the person to comply with the order or direction. The court may, in the order, fix a period for compliance and impose other requirements the court considers necessary or expedient for enforcement of the order. The maximum penalty for an offence under this section is as follows:

    (a) for a body corporate—3,000 penalty units and in addition, in the case of a continuing offence, 300 penalty units for each day the offence continues, or

    (b) otherwise—1,000 penalty units and in addition, in the case of a continuing offence, 100 penalty units for each day the offence continues.

17. In the second reading speech, the Minister noted that the Bill intended to provide incentive for developers to comply with the Act's provisions and fix any defective building work before an occupation certificate could be issued:

> Notification is critical to ensure effective oversight of the Act, including determining whether an inspection by compliance officers is required before an occupation certificate is issued. The proposed amendments will prescribe daily penalties for each day the developer is in contravention of the requirements to notify.
>
> The prohibition orders under the [Act] are a critical tool for ensuring that developers remedy defects before settling on properties with the end customer. The orders prevent an occupation certificate being issued so that the developer has a financial incentive to fix the defective building work. While the Government considers this as a measure of last resort, we must ensure that when developers are not willing to fix their defective building work that there is an appropriate response available to the building regulator to prevent the costs of fixing this work being shifted from the developer to owners' corporations and lot owners.

Schedule 2 of the Bill amends the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* to amend certain offences to be continuing offences and sets out the penalties for each day the offence continues. This includes offences regarding the notification to Secretary of intended completion of building work (section 7), notification of a changed expected completion date (section 8), failure to comply with a direction of an authorised officer (section 27), and failure to comply with additional orders imposed by a court (proposed section 56B).

In relation to the above offences, the Bill sets out the maximum penalty for the offence, ranging from 500 penalty units ($55,000) to 10,000 penalty units ($1,100,000) for a body corporate, and from 100 penalty units ($11,000) to 2000 penalty units ($220,000) in any other case. The Bill also sets out the maximum penalty for the continuing offence to be issued for each day that the offence continues in each case, ranging from 50 penalty units ($5,500) to 100 penalty units ($110,000) each day for a body corporate, and from 10 penalty units ($1,100) to 200 penalty units ($22,000) each day in any other case.

The Committee notes that these are significant financial penalties in some cases that may be continued each day that the offence continues. This may significantly impact those to which the continuing penalties applies, particularly where it is a strict liability offence. 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.

However, the Committee notes that strict liability offences are not uncommon in legislation and regulatory frameworks to ensure compliance with safe practices. The Committee also notes the public interest aspect to ensure compliance of developers with the relevant residential building laws, and that the majority of such penalties are intended to apply to body corporates and developers, rather than individuals. In these circumstances, the Committee makes no further comments.

Powers of entry – right to privacy and property

18. Schedule 4.2 amends the *Gas and Electricity (Consumer Safety) Act 2017* and inserts section 55A, which provides powers of entry to authorised officers.

19. Subsection 55A(1) provides than an authorised officer of a network operator may enter a premises for the purpose of carrying out preliminary investigations in connection with a proposed installation or extension of electricity works or reading electricity meters.

20. Subsection 55A(2) also provides that an authorised officer of a retailer may enter the premises of a customer for the purposes of:

    (a) reading, testing, maintaining, inspecting or altering any meter installed at the premises,

    (b) calculating or measuring energy supplied or taken at the premises,

    (c) checking the accuracy of metered consumption at the premises,

    (d) replacing meters,

    (e) any other purpose prescribed by the regulations relating to metering.

21. Under this section, a power of entry to premises may be exercised if there is a problem with a meter on the premises that poses a risk to safety, by an authorised officer of a retailer at any time, or otherwise only during daylight hours. In exercising this power, the Bill provides that an authorised officer must do as little damage as possible.

22. Additionally, entry onto fenced land is to be made through an existing opening in the fence or, if that is not practicable, through a new opening that is to be properly closed when the need for entry ends.

23. In this section, an authorised officer of a network operator or retailer has the meaning given by section 94 of the *Electricity Supply Act 1995*. Under that Act, an appointed authorised officer has certain functions under the Act and may exercise those functions only with respect to the premises of customers of the retailer.

24. In the second reading speech to the Bill, the Minister noted:

> To ensure continuity with existing arrangements when this change is introduced, the bill also proposes a new section 55A into the Gas and Electricity (Consumer Safety) Act 2017 to give officers of metering providers power to enter the premises for the purposes of carrying out functions under the Act, including to read electricity meters. This bill will support the Government's six pillar work plan to regain public confidence in a new, customer-facing industry by 2025. It is about accountability, transparency and quality.

The Bill amends the *Gas and Electricity (Consumer Safety) Act 2017* to provide powers of entry to authorised officers of network operators and retailers to enter a premises to carry out work such as preliminary investigations for a proposed installation or extension of electricity works, reading electricity meters, or testing, maintaining or replacing meters. They may also enter for any other purpose as prescribed by the regulations. This power of entry may impact on a

person's right to privacy and property by allowing authorised officer to enter a premises without the consent of the owner or resident.

The Committee recognises that the power of entry is limited to the purposes of carrying out certain electricity works on the premises. The Committee also acknowledges that the Bill provides some safeguards on the use of this power of entry, by requiring that it occur during daylight hours except where there is an emergency, and by use of an existing opening in the fence if possible.

However, under the provisions, authorised officers may still damage a premises, although as little as possible, and enter a premises through a 'new' opening that must be closed after the need for entry has ended. In these circumstances, the Committee refers the provision to the Parliament for its consideration of whether it impacts on a person's right to privacy and property.

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

Commencement by proclamation

25. Proposed section 2 of the Bill provides that the majority of the Act is to commence on assent or a specific date, except Schedule 1[3]-[5] which amends the *Design and Building Practitioners Act 2020* and is to commence on a day or days to be appointed by proclamation.

26. Schedule 1[3] amends section 55 of the Act, regarding requirements for a Secretary to recognise a professional body of engineers, to add the requirement that the professional body's recognition or registration scheme complies with any guidelines adopted and published by the Secretary.

27. Schedule 1[4] amends section 55(3) to provide that the regulations may make further provisions for certain matters in relation to the recognition of professional bodies for engineers, including applications, renewals, refusals, conditions, variations, suspensions and cancellations of recognised professional bodies of engineers.

28. Schedule 1[5] inserts section 55A to provide that a person aggrieved by certain decisions of the Secretary may apply to the Tribunal for an administrative review under the *Administrative Decisions Review Act 1997.* Such decisions include:

    (a) a decision of the Secretary to refuse to recognise a professional body of engineers,

    (b) a decision of the Secretary to suspend or cancel recognition of a professional body of engineers,

    (c) a decision of the Secretary to impose or vary a condition on a recognition of a professional body of engineers, or on the suspension or cancellation of a recognition,

    (d) a decision prescribed by the regulations for the purposes of this section.

    Proposed section 2 of the Bill provides that Schedule 1[3]-[5] commences on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for

affected persons. However, the Committee notes that the provisions within Schedule [1]-[5] make a number of changes to the administration of the design and building sector, such as the recognition of professional bodies for engineers and new processes for administrative reviews by the Tribunal. In these circumstances, a flexible start date may be beneficial, and consequently the Committee makes no further comment.

Matters deferred to the regulations

29. Schedule 1 of the Bill amends the *Design and Building Practitioners Act 2020* to insert subsection 55(3), which provides that the regulations may make further provision for the recognition of a professional body of engineers by the Secretary regarding a range of matters. This may include applications for recognition or renewal of recognition, fees for such applications, refusal of recognition, conditions of recognition, variations of conditions or recognition, duration of recognition, suspension or cancellation of recognition, and functions of recognised professional bodies of engineers.

30. Schedule 2 of the Bill amends *the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* to insert subsection 9(1)(f), which provides that the regulations may prescribe additional circumstances where the Secretary may prohibit the issuing of an occupation certificate in relation to residential apartments.

The Committee notes that the Bill defers certain matters to the regulations of the relevant Acts. For example, it amends section 55 of the *Design and Building Practitioners Act 2020* to provide that the regulations may make further provision for the recognition of a professional body of engineers by the Secretary regarding a range of matters related to the recognition of a professional body of engineers. The Bill also amends the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* to provide that the regulations may prescribe additional circumstances where the Secretary may prohibit the issuing of an occupation certificate in relation to residential apartments.

The Committee generally comments where matters are deferred to the regulations. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. However, the Committee recognises that regulations may be used in relation to certain administrative matters. As the matters deferred include the requirements for the registration of recognised professional body of engineers, and additional circumstances where the Secretary may issue a prohibition order, the Committee considers that deferring these matters to the regulations may afford administrative flexibility. The Committee also notes that regulatory changes are tabled in both Houses of Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. In these circumstances, the Committee makes no further comment.

Wide power of exemption

31. Schedule 2 of the Bill amends the *Design and Building Practitioners Act 2020* and inserts subsection 107(5), which provides that the regulations may exempt all persons or bodies, specified persons or bodies or classes of persons or bodies, or all work, specified work or classes of work, or all or specified registrations, from any specified provision of this Act.

The Bill amends the *Design and Building Practitioners Act 2020* and inserts subsection 107(5), which provides that the regulations may exempt all persons or bodies, specified persons or bodies or classes of persons or bodies, or all work, specified work or classes of work, or all or specified registrations, from any specified provision of this Act.

This subsection grants the regulations with a wide power to exempt any person, body or work from any specified provision of the Act. In doing so, the regulations may alter the application and operation of the Act's provisions. Additionally, that this power is contained in the regulations means that such exemptions would not be required to be passed by Parliament and may commence as soon as it is published.

The Committee recognises the benefits of administrative flexibility that regulations afford, and that regulatory changes are tabled in both Houses of Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. However, the Committee considers that significant matters that may alter the application of the Act should be contained in the primary legislation, such as a wide power of exemption for any person, body or work from any part of the Act. The Committee refers the provision to the Parliament for its consideration of whether it inappropriately delegates legislative power.

3. Children's Guardian Amendment (Child Safe Scheme) Bill 2021

Date introduced	12 May 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Families, Communities and Disability Services

PURPOSE AND DESCRIPTION

1. The object of the *Children's Guardian Amendment (Child Safe Scheme) Bill 2021* (the Bill) is to embed the Child Safe Standards, as recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, as the primary framework that guides child safe practice in organisations in New South Wales.

2. In his second reading speech for the introduction of the Bill, the then Minister for Families, Communities and Disability Services, the Hon. Gareth Ward MP, described the bill as a 'demonstration of [the NSW Government's] public commitment' to the recommendations made by the royal commission.

3. In a media statement on 12 May 2021, the then Minister said that the Bill 'will implement a Child Safe Scheme to create stronger, safer environments for children in line with what the Royal Commission recommended'. The standards implemented by the scheme 'provide a framework for organisations to create and maintain child safe cultures, operations and environments while offering the flexibility to apply them in ways that suit their size, resources and the nature of their involvement with children'.[1]

BACKGROUND

4. In his second reading speech, the then Minister outlined the 'comprehensive consultation process' that led to introduction of the Bill. This included:

    - consultation with agencies in child-related sectors on the 'policy parameters of the Child Safe Scheme' recommended by the royal commission,
    - a consultation report by the Office of the Children's Guardian, released in July 2019,[2]
    - targeted consultation with government stakeholders, carried out by the Office of the Children's Guardian in March 2020,

[1] Minister for Families, Communities and Disability Services, Media Release – Promoting Child Safe Organisations, 12 May 2021.

[2] Office of the Children's Guardian, New report outlines key elements of a child safe regulatory model in NSW, 5 July 2019; Office of the Children's Guardian, Making organisations safer for children: Regulation of child safe standards in NSW – Consultation Report, July 2019.

- a child safe survey, conducted between August and November 2020,[3]
- Consultation on the Exposure Draft of the Bill, between December 2020 and February 2021, which saw 'overwhelming support for the Child Safe Scheme, the objectives of the bill and the various components of the scheme'.[4]

5. As a result of these consultations, Mr Ward described an 'eagerness in the sector to implement these changes [in the Bill] to meet our shared objective to improve child safe practice'.

6. The Children's Guardian, Ms Janet Schorer, has also welcomed the introduction of the Bill.[5]

ISSUES CONSIDERED BY COMMITTEE

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

Executive liability and strict liability offences

7. The Bill amends the *Children's Guardian Act 2019* (the Act) to insert a number of new offences, relating to compliance with the Child Safe Standards by 'child safe organisations'.

8. 'Child safe organisation' is defined in an amendment to the dictionary in the Act, to include:

   (a) entities mentioned in schedule 1 to the Act, with some exceptions,

   (b) religious bodies that provide services to children, or in which adults have contact with children,

   (c) local government authorities,

   (d) clubs providing sporting or recreational programs for children, in which workers are required to have a working with children check clearance, and

   (e) entities prescribed by the regulations.

9. The Standards themselves are set out in new section 8C, and include requirements such as that:

   (a) child safety is embedded in organisational leadership, governance and culture,

   (b) children participate in decisions affecting them and are taken seriously,

   (c) people working with children are suitable and supported, and

[3] Office of the Children's Guardian, Child Safe 'Pulse Check' Survey Summary, January 2021; Office of the Children's Guardian, Child Safe Survey now online, 22 October 2020

[4] NSW Draft Government Bill, Children's Guardian Amendment (Child Safe Scheme) Bill 2021 – Public Consultation Draft, 15 December 2020.

[5] Office of the Children's Guardian, Children's Guardian welcomes new child protection Bill, 12 May 2021.

(d) policies and procedures document how the organisation is child safe.

10. The new offences in the Bill include:

(a) Section 8V(2) – it is an offence if the 'head' of a child safe organisation fails to comply with a direction from the Children's Guardian to complete a self-assessment under section 8V(1)(e). The maximum is penalty 5 penalty units ($550).

(b) Section 152F(1) – it is an offence for a child safe organisation to fail to comply with a compliance notice issued by the Children's Guardian under section 152A. The maximum penalty is 250 penalty units ($27,500) for a corporation, or 50 penalty units ($5,500) 'otherwise'.

(c) Section 152J – It is an offence for a child safe organisation to fail to comply with an enforceable undertaking made under section 152G. The maximum penalty is 500 penalty units ($55,000) for a corporation, or 100 penalty units ($11,000) 'otherwise'.

11. The offences in sections 152F and 152J are in the same terms, and carry the same penalties, as those included in the exposure draft published in December 2020. The offence in section 8V(2) is a new introduction.

12. In relation to the offences in section 152F and 152J, if a child safe organisation is not a 'person', the reference to a child safe organisation is to be read as a reference to the 'head' of that organisation.

13. The 'head' of a relevant entity is defined in the Act to mean:

(a) for a Department – the Secretary or Secretary's delegate,

(b) if the regulations prescribe a person or class of persons as the head – the prescribed person or a person belonging to the class of persons described,

(c) otherwise – the chief executive office or principal officer, however described, or a 'person approved by the Children's Guardian under section 66' of the Act.

14. The Bill also expands the list of offences which attract 'executive liability' under section 164 of the Act to include offences under sections 152F and 152J.

15. According to section 165 of the Act, a person commits an executive liability offence if:

1. a corporation commits an executive liability offence, and

2. the person is a director or is 'involved in the management' of the corporation and is in a position to influence its conduct in relation to the offence, and

3. the person –

(i) knew or ought reasonably to have known that the offence would be or was being committed, and

(ii) failed to take all reasonable steps to prevent or stop the offence.

16. Section 167 further provides for circumstances in which directors can be liable for offences committed by corporations, including if they, 'by act or omission', are 'knowingly concerned in, or party to, the commission of the corporate offence'.

> **The *Children's Guardian Amendment (Child Safe Scheme) Bill 2021* amends the *Children's Guardian Act 2019* to insert three new offences, relating to non-compliance with enforceable undertakings made to, or directions and compliance notices issued by, the Children's Guardian. These are strict liability offences, meaning there is no mental element required to be proven – it is enough that the organisation, or the head of the organisation, 'failed to comply' with the relevant requirements.**
>
> **Two of the offences are also prescribed as 'executive liability offences', meaning that a director or person involved in managing a corporation may be personally liable for an offence if they knew or ought to have known about the offence, and failed to take reasonable steps to stop or prevent it. The Committee generally comments on strict and executive liability offences, as they depart from the common law principle that a mental element (such as intent) is required to establish liability for an offence.**
>
> **The Committee acknowledges that strict and executive liability offences are often used in regulatory settings to encourage compliance. The Committee also notes that although some penalties for the new offences are quite high, ranging from $550 to $55,000, they are solely pecuniary – that is, they do not include any option for imprisonment. Further, the Committee acknowledges the object of the Bill, to promote compliance with the Child Safe Standards recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse. In these circumstances, the Committee makes no further comment.**

Privacy – sharing information obtained by exercising monitoring and enforcement functions

17. The Bill also inserts a new section 180A into the Act, setting out the circumstances in which the Children's Guardian may share information obtained in the exercise of its functions.

18. Specifically, section 180A provides that the Children's Guardian may give information obtained under Part 3A or 9A to a 'relevant person' in relation to:

    (a) a matter relevant to the exercise of a law of the Commonwealth, or another State or Territory, or

    (b) an undertaking that is or was being carried out jointly by NSW and the Commonwealth, or another State or Territory.

19. A 'relevant person' is defined as meaning a person exercising functions under a law of another State or Territory, or the Commonwealth, that are substantially the same as the Children's Guardian's functions under the Act.

20. Part 3A and 9A are also new introductions to the Act, contained in the Bill. In sum, Part 3A contains a range of provisions implementing the Child Safe Standards. These include powers for the Children's Guardian to:

(a) issue a written notice for a child safe organisation to provide information about its systems, policies and processes (section 8E), or progress reports on its implementation of a child safe action plan (section 8M),

(b) monitor implementation of Child Safe Standards by a child safe organisation, including by requesting the head of the organisation to answer questions and provide information, reviewing information about the organisation and its employees, inspecting the organisation's premises, or directing the head of the organisation to complete a self-assessment (section 8V),

(c) monitor self-assessment reports (section 8W), and

(d) conduct an investigation into a child safe organisation, including by conducting an 'inquiry', in which the Children's Guardian has the same powers as those conferred on a commissioner under the *Royal Commissions Act 1923* (section 8X, and see Schedule 3 to the Act for the Children's Guardian's powers when conducting an inquiry).

21. Part 9A then sets out 'enforcement measures', including powers for the Children's Guardian to issue compliance notices to and accept enforceable undertakings from child safe organisations (see sections 152A and 152G).

22. In the second reading speech for the introduction of the Bill, Mr Ward commented on the inclusion of section 180A as a 'new information-sharing provision' to 'allow the Children's Guardian to share information obtained for the purposes of the Child Safe Scheme or its enforcement functions with persons undertaking similar child safe functions in another State or Territory or for the Commonwealth'. The then Minister also referred to the royal commission's emphasis on 'the importance of information sharing in identifying, preventing, and responding to incidents and risks of child sexual abuse'.

> **The Bill introduces a new section 180A, which provides for the circumstances in which the Children's Guardian may disclose information obtained in monitoring and enforcing compliance of child safe organisations with the Child Safe Standards. Specifically, the section provides that the Children's Guardian may disclose information to an interstate or federal agency with similar functions to those it exercises under the *Children's Guardian Act 2019*, if the information is relevant to the exercise of an interstate or federal law, or an undertaking being carried out jointly between NSW and another State or Territory, or the Commonwealth.**
>
> **These provisions may impact on an individual's right to privacy. Section 180A does not specify what types of information can be disclosed, and does not require that the Children's Guardian seek consent from or notify individuals who may be affected. However, the Committee acknowledges that information sharing is limited to government agencies who have similar functions relating to child safety. The Committee also acknowledges the objective of the provision, as emphasised in the second reading speech, to facilitate cooperation between State, Territory and Commonwealth agencies to identify, prevent and respond to incidents and risks of child abuse. In these circumstances, the Committee makes no further comment.**

4. Greyhound Racing Amendment (Whole-of-life Tracking) Bill 2021*

Date introduced	12 May 2021
House introduced	Legislative Council
Member responsible	Ms Abigail Boyd MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Greyhound Racing Act 2017* to extend the Greyhound Welfare and Integrity Commission's powers to provide for whole-of-life tracking of greyhounds, including greyhounds that are re-homed and no longer owned by a greyhound racing industry participant.

BACKGROUND

2. In her second reading speech to the Bill, Ms Abigail Boyd MLC stated that:

> During the 2017 debate, the then Minister for Racing, the Hon. Paul Toole, stated that the bill would 'enable the commission to implement whole-of-lifecyle tracking for every greyhound that enters and exits the industry. However, the bill itself did not explicitly allow for whole-of-life tracking.

3. Ms Boyd's speech also provided examples of situations in which greyhounds would not be protected under the *Greyhound Racing Act 2017* once their racing career ended. These included where the greyhound was given to a relative of the owner.

4. The Commission's functions and powers in relation to the welfare of greyhounds are set down in sections 12, 35 and 67 and of the Act. Each of these sections relies on the definition of "greyhound" to determine its scope. Section 3 of the Act currently defines a greyhound as being "a greyhound that is owned or kept in connection with greyhound racing", thus excluding retired greyhounds.

5. The Bill expands the definition of "greyhound" to include retired greyhounds, that have "at any time in the past been owned or kept in connection with greyhounds". The expanded definition ensures that the Commission's powers are not restricted to those greyhounds who continue in the greyhound racing industry and that greyhounds do not lose the protection provided by the Act or the code of conduct when they no longer participate in the greyhound racing industry.

6. The *Greyhound Racing Act* requires the Commission to prepare a code of practice for the welfare of greyhounds for submission to the Minister. The Minister may then make the code of practice by ordering its publication. Section 35 of the Act lists a number of areas where the Commission is required to prepare standards for inclusion in the code of practice. These include treatment and training of greyhounds, but no mention is made of rehoming or euthanasia for retired greyhounds.

7. The Bill establishes a requirement for the Greyhound Welfare and Integrity Commission to include two standards in the Code of Practice: one in relation to the re-homing of greyhounds and one in relation to the euthanasia of greyhounds. Standards for rehoming and euthanasia are already included in Part 9 of the code of conduct.

8. Under section 39 of the Act, a person who contravenes the code of practice may be guilty of an offence, but only if the person contravenes one of those provisions that are designated as being "offence provisions". The maximum penalty for such a contravention is 200 penalty units or two years' imprisonment or both, or 1,000 penalty units if the breach is by a corporation. Standards 9.4 and 9.5 of the Code, relating to euthanasia of greyhounds, are the only provisions identified as "offence provisions" for the purposes of section 39.

9. The Bill does not alter the rights and obligations of greyhound owners, as the relevant standards are already included in the Code of Conduct. However, the Bill does clarify that the welfare of retired greyhounds is within the scope of the Commission's functions, including in relation to rehoming and euthanasia.

ISSUES CONSIDERED BY COMMITTEE

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

5. Law Enforcement Conduct Commission Amendment (Commissioners) Bill 2021

Date introduced	13 May 2021
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Special Ministry of State, and Public Service and Employee Relations, Aboriginal Affairs and the Arts

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Law Enforcement Conduct Commission Act 2016* as follows—

   (a) to remove the office of the Commissioner for Oversight and to rename the office of the Commissioner for Integrity as the Commissioner,

   (b) consequentially, to require the Chief Commissioner to authorise certain decisions of the Commission after consulting with the Commissioner,

   (c) to appoint the person holding office as the Commissioner for Integrity to the office of the Commissioner for the balance of the person's term,

   (d) to make other consequential amendments.

BACKGROUND

2. As originally constituted, the Law Enforcement Conduct Commission (LECC) had a three Commissioner leadership structure. This consisted of a Chief Commissioner, an Integrity Commissioner and an Oversight Commissioner. The Bill replaces this with a two Commissioner structure and clarifies the method of making decisions in the event of a disagreement between the two Commissioners.

3. In his second reading speech in support of the Bill, the Hon Don Harwin MLC, stated that —

> The Government is introducing this bill in recognition of the successful operation of the LECC with only two commissioners. The bill reflects feedback from the chief commissioner and the Inspector of the LECC during the statutory review processes that this is the most desirable structure for the commission moving forward.

4. The Bill reflects the fact that the LECC has operated with only two commissioners since 15 January 2020, when the last Oversight Commissioner was removed. In February 2020 the current Chief Commissioner, the Hon. Reginald Blanch AM QC, gave evidence to the Committee on the Ombudsman, the LECC and the Crime Commission's Review of Oversighted Bodies, stating that the LECC is working well with only two commissioners.

5. The amendments set down in the Bill are based on the recommendations arising from the Statutory Review of the *Law Enforcement Conduct Commission Act 2016* that was tabled on 11 May 2021.[6] The Statutory Review concluded that a two Commissioner model is appropriate and would allow the LECC to continue to exercise the full range of its statutory functions. The report also noted that:

> …a consultative decision-making model in which the Chief Commissioner's views prevail in respect of section 19(2) decisions is preferable to a unanimous decision-making model.
>
> …the operation of section 19(4), is interpreted by the Crown Solicitor and as understood by the current members of the LECC, should continue it's application to a two-Commissioner model.

6. The Bill abolishes the role of Oversight Commissioner and renames the role of Integrity Commissioner to Commissioner. The Bill also removes the requirement for the Commissioners to reach unanimous agreement when making decisions to exercise its functions.

7. Section 19(2) of the Act currently requires that —

> A decision of the Commission to exercise any of the following functions must be authorised by the Chief Commissioner and at least one other Commissioner—
>
> (a) a decision under sections 44 (1) (a) and 51 (1), made after taking into account the relevant factors set out in sections 45 and 46, that conduct is (or could be) serious misconduct, serious maladministration, police misconduct, Crime Commission officer misconduct, officer maladministration or agency maladministration and should be investigated,
>
> (b) a decision to hold an examination under Division 3 of Part 6 (except where there is a duty to hold an examination into conduct referred by Parliament for investigation under section 196),
>
> (c) a decision under Division 3 of Part 6 to hold an examination (or part of an examination) in public,
>
> (d) a decision under section 79 (2) that there are reasonable grounds to issue a search warrant,
>
> (e) a decision under section 23 (1) to delegate a function of the Commission.

8. Although section 19(4) of the Act recognises the prevailing role of the Chief Commission in the event of any inconsistency, subsection 19(2) is specifically excluded from subsection 19(4). The Bill removes that exclusion, so that the amended Act will require the two Commissioner's to consult with each other and in the event of a disagreement, the Chief Commissioner's decision will prevail.

9. While the Bill abolishes the role of Oversight Commissioner and renames it to Integrity Commissioner, the Commission will retain its powers and functions. In Part 4 of the Act,

[6] Department of Premier and Cabinet, Report on the Statutory Review of the *Law Enforcement Commission Act 2016*, tabled 11 May 2021 (NSW Legislative Council).

which describes such powers and functions, they are granted to "the Commission" rather than to a specific Commissioner. Section 19(1) of the Act states that,

> the functions of the Commission are exercisable by a Commissioner, and any act, matter or thing done in the name of, or on behalf of, the Commission is taken to have been done by the Commission.

10. Section 62(1) of the Act states that an examination must be held by the Chief Commissioner, the Commissioner for Integrity or an Assistant Commissioner, as determined by the Chief Commissioner. The Bill amends section 62(1) by replacing "the Commissioner for Integrity" with "Commissioner", thus ensuring that both Commissioners can conduct examinations.

ISSUES CONSIDERED BY COMMITTEE

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

Part Two – Regulations

1. Biodiversity Conservation Amendment (Cetacea) Regulation 2021

Date tabled	LA: 16 March 2021 LC: 16 March 2021
Disallowance date	LA: 22 June 2021 LC: 24 June 2021
Minister responsible	The Hon. Matt Kean MP
Portfolio	Minister for Energy and Environment

PURPOSE AND DESCRIPTION

1. The objects of the *Biodiversity Conservation Amendment (Cetacea) Regulation 2021* are—

    a) to prohibit the breeding or importation of certain marine mammals, and

    b) to constitute the breeding or importation of the marine animals as harm for the purposes of the *Biodiversity Conservation Act 2016*.

2. Under section 2.7(5) of the Act, a biodiversity conservation licence is not to be issued to authorise a person to harm or obtain a marine mammal for exhibition or other purposes unless the person issuing the licence is satisfied that it is necessary for genuine scientific or educational purposes or any other purpose connected with the conservation or protection of marine mammals.

3. This Regulation is made under the *Biodiversity Conservation Act 2016*, including sections 2.7(3) and (4) and 14.10 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability offence

4. This Regulation amends the *Biodiversity Amendment Regulation 2017* to insert clause 2.8A, containing a new offence of 'breeding or importing [an] animal of the order Cetacea'. The term 'Cetacea' refers to marine mammals, such as whales, dolphins, porpoises and dugongs.

5. Under clause 2.8A(1), a person must not –

    a) import an animal of the order Cetacea into New South Wales, or

b) cause or permit the animal under the control of the person to breed.

6. The maximum penalty for this offence is a 'Tier 2 monetary penalty'. This equates to $660,000 for a corporation, or $132,000 for an individual. There is an additional penalty of $66,000 or $13,200 (for a corporation and individual respectively) for each day the offence continues, and/or for each animal to which the offence relates.[7]

The *Biodiversity Conservation Amendment (Cetacea) Regulation 2021* introduces a new offence in clause 2.8A(1) of 'breeding or importing [an] animal of the order Cetacea' into New South Wales. The maximum penalties for this offence start at $132,000 and $660,000 for an individual and corporation respectively. Additional penalties apply for offences continued on multiple days, or in respect of multiple animals.

The offence is a strict liability offence, meaning there is no mental element required to be proven – for example, intent or recklessness. It is enough that an individual or corporation 'causes' or 'permits' an animal under their control to breed, without necessarily knowing or intending that this would occur.

The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalty for this offence is monetary, not custodial.

The Committee also acknowledges the environmental conservation objectives of the provision. However, given the significant penalties attached to the new offence, the Committee refers the matter to Parliament for consideration.

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

Matters that should be included in primary legislation

7. As noted above, the Regulation introduces a new strict liability offence in clause 2.8A(1) of 'breeding or importing an animal of the order Cetacea'.

8. Clause 2.8A(2) further provides that the actions in subclause (1) constitute 'harming a marine mammal' for the purposes of the *Biodiversity Conservation Act 2016*.

9. This has the effect that an individual who commits an offence under clause 2.8A(1) may also commit an offence under section 2.1 of the Act. That section provides that a person who harms or attempts to harm an animal that is part of a threatened species or ecological community, or is a protected animal, is guilty of an offence. The maximum penalty is –

a) for an animal that is part of a threatened species or ecological community (other than a vulnerable species or community) – Tier 1 monetary penalty ($1,650,000

[7] See section 13.1(3), *Biodiversity Conservation Act 2016*

for a corporation, $330,000 for an individual, with an additional penalty for each animal) or imprisonment for 2 years or both, or

b) for an animal that is part of a vulnerable species or ecological community – Tier 3 monetary penalty ($440,000 for a corporation, $88,000 for an individual, with an additional penalty for each animal), or

c) for any other case – Tier 4 monetary penalty ($110,000 for a corporation, $22,000 for an individual, with an additional penalty for each animal).

10. The offence of 'harming animals' in section 2.1 of the Act would now apply, for example, to an offence committed under clause 2.8A(1) of the Regulation against a dugong or southern right whale, which are 'endangered' species in New South Wales, or a humpback whale or sperm whale, which are 'vulnerable' species.[8]

As noted above, the Regulation introduces a new offence in clause 2.8A(1) of 'breeding or importing an animal of the order Cetacea'. Clause 2.8A(2) also expands the types of behaviour which constitute 'harming animals' for the purposes of the *Biodiversity Conservation Act 2016*. Accordingly, an offence under clause 2.8A(1) which is committed against an animal that is protected or a member of a threatened species or ecological community will also constitute an offence under section 2.1 of the Act, with higher maximum penalties (including imprisonment) attached.

The Committee prefers new offences which set significant penalties to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. For similar reasons, the Committee also prefers provisions which affect the ambit of an existing offence to be included in primary legislation.

Again, the Committee acknowledges the environmental conservation objectives of these provisions. However, given the substantial penalties attached – including, in the case of section 2.1 of the Act, possible imprisonment – the Committee refers the matter to Parliament for consideration.

[8] NSW Government Officer of Environment & Heritage, 'Threatened species biodiversity profile search', available here: https://www.environment.nsw.gov.au/threatenedSpeciesApp/

2. Crimes (Administration of Sentences) Amendment (Miscellaneous) Regulation 2021

Date tabled	LA: 16 March 2021 LC: 16 March 2021
Disallowance date	LA: 22 June 2021 LC: 24 June 2021
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Counter Terrorism and Corrections

Purpose and description

1. The object of the *Crimes (Administration of Sentences) Amendment (Miscellaneous) Regulation 2021* is to enable a correctional officer or other person having supervision of an inmate to require the inmate to undergo a breath test whether or not the inmate is suspected of having recently consumed or being under the influence of alcohol or another intoxicating substance.

2. This Regulation also includes additional positions in the rankings of correctional officers and departmental officers employed in the Corrective Services Industries Branch of Corrective Services NSW.

3. This Regulation is made under the *Crimes (Administration of Sentences) Act 1999*, including sections 79(1)(v), 234(5) and 271 (the general regulation-making power).

Issues considered by committee

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

Right to humane treatment and personal physical integrity while in detention

4. The Regulation is made under the *Crimes (Administration of Sentences) Act 1999*, which outlines the legislative framework for holding and supervising offenders in custody in a safe, secure and humane manner, to provide for their rehabilitation, and to ensure the safety of the persons who have custody of such offenders (section 2A).

5. The Regulation amends the *Crimes (Administration of Sentences) Regulation 2014*, by replacing clause 157. The previous clause 157(1) stated that:

> On forming a suspicion that an inmate has recently consumed or is under the influence of alcohol or any other intoxicating substance, a correctional officer or other person having supervision of the inmate may require the inmate to undergo a breath test.

6. The revised clause 157(1) states that a correctional officer or other person having supervision of the inmate may require the inmate to undergo a breath test.

7. The Regulation also inserts a new clause 157(3), which states that an inmate may be required to undergo a breath test under this clause in cases where the inmate may not be reasonably suspected of having recently consumed or being under the influence of alcohol or another intoxicating substance.

8. Refusal to comply with a requirement to undergo a breath test under clause 157 constitutes a "correctional centre offence" under Part 2, Division 6 of the *Crimes (Administration of Sentences) Act 1999*. An inmate found to have committed a correctional centre offence may be subject to penalties including the withdrawal of privileges for up to 56 days or confinement to a cell for up to seven days.

> **The Regulation amends the *Crimes (Administration of Sentences) Act 1999 to* permit a correctional officer to require an inmate to undergo a breath test without a suspicion that the inmate has consumed any intoxicant. This extends the circumstances in which this search power may be used by correctional officers and may impact on an inmate's right to personal physical integrity.**
>
> **The Committee acknowledges that the increased power may assist in dealing with substance abuse among inmates, and may be considered necessary in some circumstances. However, the expanded power gives officers a broad power that does not include additional safeguards to mitigate risks arising from the broadened power. The Committee refers the provisions to Parliament to consider whether they trespass unduly on personal rights and liberties and whether they are reasonable and proportionate in the circumstances.**

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

Insufficiently defined or limited power

9. As noted above, the Regulation amends Clause 157 of the *Crimes (Administration of Sentences) Regulation 2014* to broaden the power to breath test inmates in correctional facilities. Prior to this Regulation, the power to require an inmate to undergo a breath test was limited by the pre-condition that an officer had formed a suspicion that the inmate had consumed drugs or alcohol. This Regulation removes that pre-condition.

> **As noted above, the Regulation permits a correctional officer to require an inmate to undergo a breath test without requiring a suspicion that the inmate has consumed any intoxicant. The Committee notes that the revised regulation does not appear to include additional safeguards to mitigate the use of this broadened power.**
>
> **The Committee prefers provisions that grant administrative powers to be drafted with sufficient precision so that their scope is clear. The amendments expands an officer's power without additional limitations or guidance as to when the exercise of the power is appropriate. Given the impacts on a person's right to personal physical integrity (as discussed above) and limited safeguards on the extended power, the Committee refers the provisions to Parliament for its consideration.**

3. Liquor Amendment (Miscellaneous) Regulation 2021

Date tabled	LA: 16 March 2021 LC: 16 March 2021
Disallowance date	LA: 22 June 2021 LC: 24 June 2021
Minister responsible	The Hon. Victor Dominello, MP
Portfolio	Customer Service

Purpose and description

1. The objects of the *Liquor Amendment (Miscellaneous) Regulation 2021* are as follows—

    a) to provide that small bars cannot be used to operate as a facility regularly used for adult relaxation entertainment,

    b) to clarify, following certain events being rescheduled, the extended hours in which certain hotels and clubs may trade during the Australian Open,

    c) to provide that an application made during the COVID-19 pandemic to change the boundaries of licensed premises to incorporate certain outdoor areas allowed for use by a local council under section 166 of the *Liquor Act 2007* is exempt from the submission processes and fees prescribed for the making of these applications,

    d) to insert a transitional provision consequent on the commencement of the *Liquor Amendment (Night-time Economy) Act 2020*, (e) to update the lists of licensed premises that are high risk venues.

2. This Regulation is made under the *Liquor Act 2007*, including sections 6(1)(l), 11(1)(b), 13, 99(1), 116B and 159 (the general regulation-making power) and Schedule 1, clause 1(1).

Issues considered by committee

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

New condition imposed on small bar licences

3. Among other amendments, schedule 1 to the *Liquor Amendment (Miscellaneous) Regulation 2021* inserts a new clause 44B into the *Liquor Regulation 2018*. That clause provides that it is a condition of a small bar licence that the licensed premises 'cannot be used to operate as a facility regularly used for adult relaxation entertainment (including adult entertainment of a sexual nature)'.

4. This amendment is enabled by section 159(f4) of the *Liquor Act 2007*, which provides that regulations may be made about conditions of licences relating to the entertainment that may be provided, or the way in which it may be provided, on licensed premises.

5. Relevantly, section 11(2) of the *Liquor Act 2007* provides that a licensee must comply with any conditions to which its licence is subject. The maximum penalty for failure to comply with licence conditions is 100 penalty units ($11,000) or imprisonment for 12 months, or both.

6. Neither the phrase 'adult relaxation entertainment', nor 'adult entertainment of a sexual nature', nor any part thereof, is defined in the *Liquor Regulation 2018* or the *Liquor Act 2007*. However, these phrases are used elsewhere in the Regulation – for example, clauses 96(5) and 130AA(2).

The *Liquor Amendment (Miscellaneous) Regulation 2021* inserts a new provision into the *Liquor Regulation 2018*, making it a condition of a small bar licence that licensed premises cannot be used for 'adult relaxation entertainment (including adult entertainment of a sexual nature)'. These phrases are not defined in the *Liquor Regulation 2018* or the *Liquor Act 2007*, although they are used elsewhere in the Regulation.

Under section 11(2) of the Act, contravention of a licence condition by a licensee attracts a large maximum penalty, including possible imprisonment.

The Committee generally prefers provisions which create new offences, or expand the ambit of an existing offence, to be drafted with sufficient precision so that their scope and content is clear. This is of particular concern given that the condition applies to existing small bar licences, as well as new licences, and non-compliance attracts a significant maximum penalty. In these circumstances, the Committee refers the matter to Parliament for consideration.

4. Mental Health and Cognitive Impairment Forensic Provisions Regulation 2021

Date tabled	LA: 23 March 2021 LC: 23 March 2021
Disallowance date	LA: 3 August 2021 LC: 11 August 2021
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

1. The object of this Regulation is to remake, with minor amendments, the provisions of the Mental Health (Forensic Provisions) Regulation 2017 as a consequence of the Mental Health (Forensic Provisions) Act 1990 being repealed and replaced by the Mental Health and Cognitive Impairment Forensic Provisions Act 2020. This Regulation—

(a) prescribes certain psychologists as a class of persons who may provide reports to the Supreme Court or District Court following a verdict in a special hearing, or for determining whether to make an order releasing a person not criminally responsible because of mental health impairment or cognitive impairment, and

(b) requires the Mental Health Review Tribunal (the Tribunal) to review the case of a person subject to an order for transfer from a correctional centre to a mental health facility if the person is not transferred after 14 days, and

(c) provides for the Tribunal to be constituted by a President or Deputy President for reviews of certain orders, adjourning a review of a forensic patient and for determining a request made by a victim not to disclose the whole or part of a submission made by the victim, and

(d) prescribes certain psychologists as a class of persons who may provide reports to the Tribunal for the purposes of determining whether to make an order releasing a forensic patient or correctional patient, and

(e) sets out procedures for appeals to the Tribunal against decisions by the Secretary of the Ministry of Health not to grant a forensic patient or correctional patient leave of absence from a mental health facility, and

(f) sets out matters that may be the subject of submissions by victims of forensic patients for the purposes of proceedings before the Tribunal relating to the consideration of a grant of leave or release, and

(g) enables the Tribunal to disclose an edited version of a victim's submission to the legal representative of a forensic patient, or a legal representative appointed by the Tribunal, in circumstances where the Tribunal has agreed to a request by the

victim not to disclose the submission but is of the opinion that some disclosure is required for reasons of procedural fairness, and

(h) enables a victim to be represented before the Tribunal by a nominated representative, and

(i) enables the Tribunal to disclose all or part of or a summary of a submission by a victim of a forensic patient to a person treating the patient or a delegate of the person, and

(j) modifies the application of Chapter 3, Part 3 of the Mental Health Act 2007 to community treatment orders made in relation to forensic patients, correction patients, inmates of correctional centres and persons subject to orders for transfer to mental health facilities, and

(k) provides for certain matters relating to the Victims Register, including additional information to be included in the Victims Register, administration of the Victims Register and matters relating to the disclosure of information to the Tribunal, and

(l) prescribes persons who may transport persons to or from places for the purposes of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020, and

(m) prescribes as forensic patients certain persons found not guilty of an offence by reason of mental illness or mental impairment under a law of Norfolk Island, who are transferred and detained in New South Wales under New South Wales law, and

(n) sets out additional information that may be covered by an information sharing protocol between the Ministry of Health and the Department of Justice.

2. This Regulation is made under the Mental Health and Cognitive Impairment Forensic Provisions Act 2020, including sections 17(1), 22(1), 26, 33(2), 66(1), 72(1), 84(1), 89(1), 97(2) and (3), 99(2), 115(6), 145(5), 148(4) and (5), 156(2) and (5), 157(2), 161(2), 166 (the general regulation-making power) and Schedule 2, Part 1.

Issues considered by committee

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

Disclosure of confidential information

3. The Regulation contains provisions that permit the Tribunal to disclose certain documents or information.

4. Clause 12 provides that the Tribunal may disclosure an edited version of a submission by a victim to the legal representative of a forensic patient if:

(a) the Tribunal determines under section 145 of the Act that a submission is not to be disclosed to a forensic patient, and

(b) the Tribunal is of the opinion that information contained in the submission should be provided to the legal representative of the patient for reasons of procedural fairness, and

(c) the legal representative has agreed to the non-disclosure conditions.

5. The non-disclosure conditions include:

(a) the edited submission must not be disclosed to the forensic patient without the consent of the Tribunal

(b) the following information may be disclosed, but not information identifying the location of the residence or place of work of the victim or the victim's family or friends or of other places frequented by the victim—

(i) information about proposed place restrictions,

(ii) general information about the areas the proposed restrictions apply,

(iii) the reasons for the victim's proposal,

(c) the legal representative must only disclose to the forensic patient general information about the submission of a kind specified by the Tribunal.

6. The edited version of the submission may be created by the victim or the Tribunal. The victim must also be informed of the proposed disclosure and given an opportunity to withdraw or amend the submission.

7. If the forensic patient is not legally represented, the Tribunal may appoint a legal practitioner to act on their behalf for the purposes of this clause.

8. Clause 14 of the Regulation provides that the Tribunal may disclose all or part of, or a summary of, a submission received from a victim of a forensic patient to a person who is treating the forensic patient or a delegate of the person. The submission must be disclosed on the condition that the person to whom the information is disclosed does not disclose the information to the forensic patient.

9. Clause 26 provides that the Commissioner of Victim Rights may, with the consent of the Victim, disclose to the Tribunal information contained in the Victims Register and other information relating to the victim.

The Regulation contains provisions that permit the Tribunal to disclose certain documents or information. Clause 12 provides that the Tribunal may disclosure an edited version of a submission by a victim to the legal representative of a forensic patient if the Tribunal considers that it should be provided for reasons of procedural fairness. The legal representative of the patient must also agree to non-disclosure conditions. Similarly, Clause 14 provides that the Tribunal may disclose all or part of a victim's submissions to a person treating the forensic patient on the condition that they do not disclose the information to the forensic patient.

Clause 26 provides that the Commissioner of Victim Rights may, with the consent of the Victim, disclose to the Tribunal information contained in the Victims Register and other information relating to the victim.

These provision allows the disclosure of confidential information from the victim's submission to persons representing or treating the forensic patient, and may impact principles of confidentiality. However, the Committee notes the considerable safeguards attached to these provisions, including that the Tribunal must considers it necessary in the interests of procedural fairness, and that this information is not then disclosed to the forensic patient. The Committee also recognises that the victim is to be given the opportunity to review and amend their submission if it is to be disclosed. In these circumstances, the Committee makes no further comment.

Privacy

10. Clause 31 provides that, for the purposes of section 161(2)(b) of the Act, an information sharing protocol may include:

    (a) information concerning former forensic patients or correctional patients transferred, or proposed to be transferred, to correctional centres,

    (b) information concerning persons, other than forensic patients or correctional patients, who are, or may be, subject to forensic community treatment orders,

    (c) information concerning persons, other than forensic patients or correctional patients, who were formerly subject to forensic community treatment orders and who have been released from a correctional centre and are subject to community treatment orders,

    (d) information concerning visitors to forensic patients or correctional patients who are reasonably believed to pose a security risk to the good management and order of a correctional centre or mental health facility.

11. Section 161(2)(b) of the Act provides that the Secretary of the Ministry of Health, the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice may enter into information sharing arrangements with each other agencies. Such information must be limited to information concerning forensic and correctional patients, and other information prescribed by the regulations.

    Under the parent Act, an information sharing arrangement may be established between the agencies led by the Secretary of the Ministry of Health, the Commissioner of Corrective Services and the Secretary of the Department of Communities and Justice. The Regulation specifies that type of information that may be provided for the purposes of this information sharing arrangement. This includes information concerning forensic or correctional patients to be transferred, subject to forensic community treatment orders or community treatment orders, and those who are reasonably believed to pose a security risk to the good management and order of a correctional centre or mental health facility.

This provision may impact on the privacy of the forensic and correctional patient to whom the information relates. However, the Committee recognises that the information sharing arrangements are limited to information about patient transfer, treatment orders and security risks. The information may also only be shared between those Departments (Health, Correctional Services, and Communities and Justice) that directly manage patient custody and care. In these circumstances, the Committee makes no further comment.

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

Henry VIII

12. Part 3 of the Regulation sets out the provisions for forensic community treatment orders, including applications for community treatment orders, treatment plans, and the implementation, breaches, and variations of forensic community treatment orders.

13. Under this Part, clause 15 modifies the provisions of Chapter 3, Part 3 of the *Mental Health Act 2007* as set out in Part 3 of the Regulation.

The Regulation modifies the *Mental Health Act 2007* to replace Chapter 3 Part 3 of the Act with Part 3 of the Regulation for the purposes of making a forensic community treatment order under section 99(2) of the Act. Part 3 of the Regulation sets out the provisions in regards to forensic community treatment orders, including applications for community treatment orders, treatment plans, and the implementation, breaches, and variations of forensic community treatment orders.

In permitting the Regulation to amend the Act, these clauses operate as a Henry VIII clause which allows subordinate legislation to amend the Act, thus delegating Parliament's legislative power to the Executive. The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight. Given the amendment extends to provisions regarding forensic community treatment orders of forensic patients in mental health care facilities, the Committee refers this Regulation to the Parliament for its consideration of whether the objective could have been achieved by alternative and more effective means.

5. Ports and Maritime Administration Amendment (Commercial Vessel Information) Regulation 2021

Date tabled	16 March
Disallowance date	LA: 22 June 2021 LC: 24 June 2021
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Roads

Purpose and description

1. The object of this Regulation is to authorise Transport for NSW to collect and use information about commercial vessels from the Australian Maritime Safety Authority.

2. This Regulation is made under the *Ports and Maritime Administration Act 1995*, including section 110 (the general regulation-making power).

Issues considered by committee

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

Privacy

3. The Regulation amends the *Ports and Maritime Administration Regulation 2012* to insert clause 68, which allows Transport for NSW to collect and use information about commercial vessels from the Australian Maritime Safety Authority for the purpose of exercising the functions of Transport for NSW under the Act.

4. Under clause 68, *information* about commercial vessels means information disclosed to Transport for NSW by the Australian Maritime Safety Authority under section 11 of the *Australian Maritime Safety Authority Act 1990* of the Commonwealth and may include personal information within the meaning of the *Privacy and Personal Information Protection Act 1998*.

> **The Regulation allows Transport for NSW to collect and use information about commercial vessels from the Australian Maritime Safety Authority for the purpose of exercising the functions of Transport for NSW under the *Ports and Maritime Administration Act 1995*. Under the amending regulation, *information* about commercial vessels means information disclosed to Transport for NSW by the Australian Maritime Safety Authority under section 11 of the *Australian Maritime Safety Authority Act 1990* of the Commonwealth. This information may also include personal information within the meaning of the *Privacy and Personal Information Protection Act 1998*.**

This may impact the privacy rights of those individual to whom the personal or confidential information relates. However, the Committee notes that under the amending Regulation, personal information has the same meaning as within the *Privacy and Personal Information Protection Act 1998*, which carries certain safeguards under that Act regarding the retention, use and disclosure of that information. The Committee also notes that the information may only be shared for the purposes of exercising the functions of Transport for NSW under the *Ports and Maritime Administration Act 1995*. In these circumstances, the Committee makes no further comment.

6. Protection of the Environment Operations (General) Amendment (PFAS Firefighting Foam) Regulation 2021

Date tabled	LA: 16 March 2021 LC: 16 March 2021
Disallowance date	LA: 22 June 2021 LC: 24 June 2021
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy and Environment

Purpose and description

11. The objects of this Regulation are to—

(a) prevent pollution caused by certain types of PFAS firefighting foam by—

(i) making it an offence to discharge the PFAS firefighting foam for the purposes of firefighting training or demonstration, and

(ii) from 26 September 2022, making it an offence to discharge the PFAS firefighting foam unless the foam is discharged by—

(A) particular persons to prevent, extinguish, or attempt to extinguish a fire that, in the opinion of the person, is a catastrophic fire or has the potential to be a catastrophic fire, or

(B) a person to prevent, extinguish, or attempt to extinguish a fire on a watercraft in State waters or prescribed waters, and

(iii) from 26 September 2022, making it an offence to sell a portable fire extinguisher containing the precursor to the PFAS firefighting foam, except if the extinguisher is sold to particular persons, the owner or master of a watercraft or a person granted an exemption by the Environment Protection Authority to discharge the firefighting foam from a portable fire extinguisher, and

(b) enable the Environment Protection Authority to exempt a person or class of persons from offences in relation to the prevention of pollution caused by certain types of PFAS firefighting foam, and

(c) declare the Environment Protection Authority is the appropriate regulatory authority for a matter relating to the prevention of pollution caused by certain types of PFAS firefighting foam.

12. This Regulation is made under the *Protection of the Environment Operations Act 1997*, including sections 6(3), 286(1) and 323 (the general regulation-making power) and Schedule 2, clause 15(1).

Issues considered by committee

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

Prohibition on sale of PFAS fire extinguishers

13. Clause 98J of the Regulation provides that a person must not sell a portable fire extinguisher containing the precursor to PFAS firefighting foam. The maximum penalty for offences under this clause is 400 penalty units ($44,000) for a corporation, and 200 penalty units ($22,000) for an individual.

14. Subclause 98K(3) provides that a person does not commit such an offence if the person reasonably believes they are selling a portable fire extinguisher containing PFAS firefighting foam to:

    a) a relevant authority, or

    b) in relation to a watercraft—the owner or master of a vessel, within the meaning of the *Marine Safety Act 1998*, or

    c) an exempt person.

15. In this clause, an exempt person means a person granted an exemption by the EPA under clause 95B (of the Regulation) in relation to the discharge of PFAS firefighting foam from a portable fire extinguisher.

16. In a media release by the NSW Environment Protection Authority, it was noted that PFAS firefighting foam has been banned for all training and demonstration purposes in NSW. The Hon. Matt Kean MP, Minister for Energy and Environment, stated:

> Firefighting foam is the key cause of PFAS contamination in the NSW environment with concentrations detected at airports, defence sites, emergency service facilities, training facilities, major hazard facilities, and their surrounding environments.
>
> This ban on PFAS firefighting foam will significantly reduce the impact on our environment but still enable our emergency agencies to fight catastrophic fires that can have devastating impacts on life and property.[9]

The Regulation prohibits the sale of a portable fire extinguisher containing the precursor to PFAS firefighting foam. The maximum penalty for offences under this clause is 400 penalty units ($44,000) for a corporation, and 200 penalty units ($22,000) for an individual. This may impact the business community that would otherwise be able to sell such products.

However, the Committee notes that a person does not commit such an offence if they reasonably believe that they are selling such a product to a relevant authority, or the owner of a relevant watercraft, or an exempt person under

[9] NSW Environment Protection Authority, Media Release, PFAS firefighting foam banned in NSW, 1 March 2021.

clause 95B of the Regulation. The Committee also recognises that the intention of the regulation is to prevent PFAS contamination in the NSW environment. In these circumstances, the Committee makes no further comment.

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

Regulation creates offences

17. The Regulation amends the *Protection of the Environment (General) Regulation 2009* to insert clause 98H, which provides that a person must not discharge PFAS firefighting foam for the purposes of firefighting training or a firefighting demonstration.

18. Clause 98I(2) also provides that a person must not discharge PFAS firefighting foam to which this clause applies unless the foam is discharged by:

    a) a relevant authority to prevent, extinguish, or attempt to extinguish a fire that, in the opinion of the relevant authority is a catastrophic fire, or has the potential to be a catastrophic fire, or

    b) a person to prevent, extinguish, or attempt to extinguish a fire on a watercraft in relevant waters.

19. The maximum penalty for either offence under clauses 98H and 98I(2) is 400 penalty units ($44,000) for a corporation, and 200 penalty units ($22,000) for an individual.

The Committee notes that the Regulation creates offences with a high monetary penalty. The Regulation makes it an offence to discharge PFAS firefighting foam for the purposes of training or demonstration, and the foam is discharged by a relevant authority or person to put out a catastrophic fire. The maximum penalty for these offences is 400 penalty units ($44,000) for a corporation, and 200 penalty units ($22,000) for an individual.

The Committee prefers provisions which create offences to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. The Committee also generally comments on strict liability offences as they depart from the common law principle that *mens rea*, the mental element of an offence, is relevant to the imposition of liability.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. In this instance, the strict liability offence only applies to the use of PFAS firefighting foam during training or a demonstration. It is not an offence where a person uses PFAS firefighting foam to put out a catastrophic fire, or to extinguish a fire on a watercraft in relevant waters. As noted above, the Committee also notes that the intention of the regulation is to prevent PFAS contamination in the NSW environment. In these circumstances, the Committee makes no further comment.

7. Public Health Amendment (Miscellaneous) Regulation 2021

Date tabled	LA: 23 March 2021 LC: 23 March 2021
Disallowance date	LA: 3 August 2021 LC: 11 August 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

Purpose and description

1. The objects of this Regulation are—

   (a) to allow for the issue of penalty notices for an offence occurring between 26 March 2020 and 31 December 2021 against a provision of the *Public Health Act 2010* involving a contravention of the following—

      (i) a Ministerial direction to deal with a public health risk,

      (ii) an order to close public premises on public health grounds,

      (iii) a public health order relating to COVID-19, and

   (b) to extend the operation of clause 99A of the Public Health Regulation 2012 to allow the Secretary of the Ministry of Health to appoint members and members of staff of the Department of Customer Service and the NSW Food Authority as authorised officers, either generally or in relation to particular functions exercisable by authorised officers relating to public health until 31 December 2021, and

   (c) to omit a reference to repealed legislation.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118, 126(1) and 134 (the general regulation-making power).

Issues considered by committee

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

Penalty notice offences – Right to a fair trial

3. The Regulation amends Schedule 4 of the *Public Health Regulation 2012*, which lists penalty notice offences under the *Public Health Act 2010* and Regulation, to extend the operation of certain offences until 31 December 2021. This includes penalty notice offences under the following sections:

   - Section 10, regarding offences for not complying with a Ministerial direction

- Section 11, regarding the power to close public premises on public health grounds
- Section 70(1), regarding offences for not complying with a public health order

4. Under Schedule 4 of the *Public Health Regulation 2012,* the penalty for the above offences under the Act are:

   - Section 10, for an offence against clause 5 of the *Public Health (COVID-19 Spitting and Coughing) Order 2021*: $5000 for an individual
   - Section 10, for another offence occurring between 26 March 2020 and 31 December 2021: $1000 for an individual and $5000 for a corporation
   - Section 11, for an offence occurring between 26 March 2020 and 31 December 2021: $1000 for an individual and $5000 for a corporation
   - Section 70(1), for an offence occurring between 26 March 2020 and 31 December 2021 involving a contravention of public health order relating to COVID-19: $1000 for an individual

5. However, the ability to issue penalty notices for offences under sections 10, section 11 or 70(1) of the Act does not remove the right to elect to have such matters determined by a court.

The Regulation extends the operation of certain offences under Schedule 4 of the *Public Health Regulation 2012* until 31 December 2021. This includes penalty notice offences for contraventions of COVID-related public health orders under sections 10, 11 and 70(1) of the *Public Health Act 2010*.

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

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, with a current repeal date of 31 December 2021. In the circumstances, the Committee makes no further comment.

Appointment of Authorised Officers

1. The Regulation extends the operation of Clause 99A of the *Public Health Regulation 2012* from 26 March until 31 December 2021. Clause 99A operates in conjunction with section 126(1)(c) of the *Public Health Act 2010*, which gives the Secretary of the Ministry of Health

the power to appoint a member, or member of staff, of a body prescribed by the regulations, to be an authorised officer.

2. An authorised officer holds certain functions and powers under the Act. In particular, section 118 provides authorised officers with the power to issue penalty notices. Authorised officers also have the power to direct a person to answer questions, or to apply for a search warrant (see sections 41, 108 to 112, 118 and 127 of the Act).

3. Clause 99A of the *Public Health Regulation 2012* prescribes the Department of Customer Service and the NSW Food Authority for the purposes of section 126(1)(c). The practical effect is to allow the Secretary to appoint a member or employee of the Department of Customer Service or the NSW Food Authority as an authorised officer, with a range of powers including the power to issue penalty notices for offences under the *Public Health Act 2010*.

4. As noted in the Legislation Review Committee's Digest 17,[10] a person appointed as an authorised officer may have significant coercive powers. However, the Act contains safeguards to mitigate the risk of impinging unnecessarily or excessively upon personal rights and freedoms. For example, before entering premises an authorised officer must give reasonable notice where possible (subsection 108(2)(c)) and, if seeking to enter residential premises, an authorised officer must obtain the consent of the occupier, or do so under the authority of a search warrant (subsection 108(4)).

The Regulation extends, until 31 December 2021, the operation of certain provisions under the *Public Health Regulation 2012* that allow the Secretary of the Ministry of Health to appoint any member, or member of staff, of the Department of Customer Service or the NSW Food Authority as an authorised officer. Such authorised officers have functions and powers under the Public Health Act, including the power to issue penalty notices for breaching public health orders and the power to require a person to answer questions.

The Committee generally prefers that provisions that may confer significant powers to be included in primary legislation rather than the subordinate legislation, in order to foster an appropriate level of parliamentary oversight. However, the Committee acknowledges that in the current emergency situation created by COVID-19, it may be reasonable for public health regulations to include such broad provisions so that authorities can respond swiftly and flexibly to the pandemic.

Further, the provisions are time limited to be repealed on 31 December 2021. The Committee also notes safeguards in the Act, for example, authorised officers cannot enter residential premises unless they have the occupier's permission, or they have obtained a search warrant. In the circumstances, the Committee makes no further comment.

[10] Legislation Review Committee, Digest No 17/57, 4 August 2020, p40.

8. Water Management (General) Amendment (Miscellaneous) Regulation 2021

Date tabled	LA: 16 March 2021 LC: 16 March 2021
Disallowance date	LA: 22 June 2021 LC: 24 June 2021
Minister responsible	The Hon. Melinda Pavey MP
Portfolio	Water, Property and Housing

Purpose and description

1. The object of this Regulation is to amend the mandatory conditions imposed on access licences and approvals in relation to the reporting requirements of holders of access licences or approvals as to water taken.

2. This Regulation is made under the *Water Management Act 2000*, including sections 115, 115A and 400 (the general regulation-making power).

Issues considered by committee

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

Impact on business – obligation of monthly reporting

20. The Regulation amends clauses 244 and 244A of the *Water Management (General) Regulation 2018*. Under clause 244(2) of the Regulation water access licence holders are required to keep records of water taken in an approved form. The previous clause 244(2B) provided that records made under clause 244(2) were to be given to the Minister in an approved form and manner.

21. The revised clause 244(2B) specifies that records of water taken must be given to the Minister within 14 days of each named month.

22. The previous clause 244A(2) made it a condition of a water access licence that the licence holder must report the water taken using the work to the Minister in accordance with this clause, unless metering equipment is required by Clause 6 of Schedule 8 to have telemetry capacity (for example, where the pipe used to draw surface water is larger than 199mmm).

23. The revised clause 244A makes it a condition of a water access licence that the licence holder must give the Minister, within 14 days of the end of the month, in an approved way, a report containing the meter readings of the metering equipment at the beginning and end of the named month. This is the case unless metering equipment is required by Clause 6 of Schedule 8 to have telemetry capacity (for example, where the pipe used to draw surface water is larger than 199mm).

24. A breach of a condition of a water access licence may attract a significant penalty under the *Water Management Act 2000.* Under s.60B(2) such an offence is subject to a "Tier 2" penalty. According to s.363B Tier 2 penalties attract the following maximum penalties:

- For a corporation – 18,200 penalty units ($2,002,000) plus 1,200 penalty units for every day the offence continues;
- For an individual – 4,550 penalty units ($500,500) plus 600 penalty units for every day the offence continues.

25. Section 60B(3) provides a defence against prosecution under s.60B(2), where the licence holder establishes the following:

(a) that the contravention of the term or condition was caused by another person, and

(b) that the other person was not associated with the holder at the time the term or condition was contravened, and

(c) that the holder took all reasonable steps to prevent the contravention of the term or condition.

The Regulation changes the reporting requirements of water access licence holders by prescribing that water usage must be reported within 14 days of the end of each month, unless water usage data is automatically transmitted via telemetry. The penalty for breaching water access license conditions are 4,550 penalty units ($500,500) plus 600 penalty units for every day the offence continues for a corporations, and 4,550 penalty units ($500,500) plus 600 penalty units for every day the offence continues for an individual. The requirement to report every month may present a burden to small business where telemetry is not installed. The alternative of installing telemetry equipment may present an additional cost burden to some small business enterprises.

However, the Committee acknowledges that there are exemptions from monthly reporting where no water is taken provided that the licence holder notifies the Minister that the holder did not intend to cause or permit water to be taken. Such "no take notices" are limited to a maximum period of six months. Additionally, although the maximum penalties are significant, it is not an offence for failing to report water use if it is established that all reasonable steps to prevent the contravention of the condition of the licence. In the circumstances, the Committee makes no further comment.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

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

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

i trespasses unduly on personal rights and liberties, or

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

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

iv inappropriately delegates legislative powers, or

v insufficiently subjects the exercise of legislative power to parliamentary scrutiny

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

9 Functions with respect to Regulations

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

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

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

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

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

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

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

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

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

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

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

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

2 Further functions of the Committee are:

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

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

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