Parliament of New South Wales

Legislation Review Committee

Correspondence received in response to the Legislation Review Committee Digest No. 36 – 9 November 2021

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NSW GOVERNMENT

The Hon Alister Henskens SC MP
Minister for Families, Communities and Disability Services

EAP21/15953

Mr David Layzell, MP
20 Bridge Street
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Email: upperhunter@parliament.nsw.gov.au
cc: Legislation.Review@parliament.nsw.gov.au

David

Dear Mr Layzell,

Thank you for your letter dated 11 November 2021 regarding the *National Disability Insurance Scheme (Worker Checks) Amendment Regulation 2021.*

I appreciate the points raised on behalf of NSW's Legislative Review Committee, and further acknowledge the importance of personal rights and liberties in this context. National Disability Insurance Scheme (NDIS) worker screening is predicated on the ability of state and territory NDIS worker screening units sharing relevant information between each other. This national policy intent is set out in the 'Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme' (the IGA), agreed by the Council of Australian Governments in 2018. Each Australian state and territory has now established NDIS worker screening units and implemented similar information sharing legislation, consistent with the IGA.

The concept of a 'corresponding law' under the NSW *National Disability Insurance Scheme (Worker Checks) Act 2018* (NSW NDISWC Act) exists to facilitate this sharing of information, and recognition of administrative decisions, between NDIS worker screening units in different Australian States and Territories. The scope of inter-jurisdictional information sharing (permissible due to the designation of corresponding laws) is constrained by the concepts of 'relevant information' and 'authorised purposes' and under sections 27 and 25, respectively, of the NSW NDISWC Act. These concepts effectively restrict information sharing to matters concerning worker screening administration, and the assessment of risk posed to children and people with disability.

Relevant and reliable information for individual screening units helps safeguard risk of screening outcomes being compromised. The amendments under the *National Disability Insurance Scheme (Worker Checks) Amendment Regulation 2021* contribute to minimising the risk of harm to people with disability. The amendments are appropriate as they protect vulnerable people under the worker checks scheme.

If you would like more information please contact Mr Brian Woods, Director Disability Policy, Strategy, Policy and Commissioning by email [redacted] or phone [redacted]

Yours sincerely,

THE HON ALISTER HENSKENS SC MP 7/12/21
Minister for Families, Communities and Disability Services

NSW GOVERNMENT
The Hon. Adam Marshall MP
Minister for Agriculture
Minister for Western New South Wales

OM21/7024

Legislation Review Committee
Parliament House
6 Macquarie Street
SYDNEY NSW 2000

Legislation.Review@parliament.nsw.gov.au

Dear Mr Layzell, Dave,

I am writing to you in your capacity as chair of the Legislation Review Committee (the Committee) in relation to the staged repeal of the Animal Research Regulation 2021 and Exhibited Animals Protection Regulation 2021 (the Regulations).

On 1 September 2021, the Regulations came into force, repealing the existing 2010 versions of each Regulation. The Government had intended to postpone the automatic repeal of these Regulations via amendment to the *Subordinate Legislation Act 1989*, however the cancellation of the August 2021 Parliament sitting weeks meant postponement was not possible.

The Government is currently undertaking a project to reform NSW's animal welfare laws. This reform project will ultimately repeal certain Acts, including the *Animal Research Act 1985* (ARA) and the *Exhibited Animals Protection Act 1986* (EAPA), (being the parent Acts under which the Regulations are made) and replace them with a new animal welfare Act. Postponement of the automatic repeal would have ensured that the status quo was maintained while the new Animal Welfare Act and its supporting regulations were developed and implemented.

Instead, the Regulations were remade on an urgent basis using an exemption under section 6(1)(b) of the Act allowing the Regulations to be made without complying with the requirements of section 5 of the Act. I understand that where this exemption is used, section 6(2) of the Act requires that the responsible Minister to ensure that the relevant requirements of section 5 (with any necessary adaptations) are complied with within four months after the proposed Regulation is made. Summarised requirements of section 5 are that, as far as is reasonably practicable:

- a Regulatory Impact Statement (RIS) complying with Schedule 2 of the Act is prepared
- public consultation is undertaken on the RIS.

As such, I write to demonstrate compliance with the requirements of section 5 of the Act as far as is reasonably practicable and with necessary adaptions having regard to following circumstances:

- the unexpected and unavoidable need to urgently remake the existing 2010 Regulations due to the cancellation of Parliamentary sittings; and
- the remaking of the existing Regulations occurring at a time when the animal welfare reform project is underway which will ultimately modernise and replace those Regulations.

The requirements of section 5 of the Act will be met through the NSW Animal Welfare Reform process which is currently at the point of developing a new animal welfare Act. Once this process is complete, consideration will be given to developing new Regulations which would involve the development of a RIS and public consultation, and ultimately repealing the existing Regulations.

Given the intention is that the recently developed Regulations will be replaced, and the extensive reform consultation to date as well as the planned consultation and RIS development of proposed new Regulations, it is considered that the requirements set out in Section 5 of the *Subordinate Legislation Act 1989* will be met as part of the NSW Animal Welfare Reform Process and therefore the obligations set out in section 6(2) of the Act will be met.

I note that on 11 November 2021 and 17 November 2021, you wrote to me in relation to issues noted in the Committee's Digest relating to the Animal Research Regulation 2021 and Exhibited Animals Protection Regulation 2021 respectively. The issues you raised were:

- That in the Animal Research Regulation 2021, the use of strict liability offences may unduly trespass on personal rights and liberties. Also, that the objective of the Regulation could have been achieved by alternative and more effective means by incorporating the National Code in a way that is not subject to disallowance.
- That in the Exhibited Animals Protection Regulation 2021, the penalties in the Regulation should instead be in the primary legislation to afford a greater level of parliamentary scrutiny. Also, that the exhibited animals Standards published by the Department should be included in the Regulation, so they are subject to Parliamentary disallowance.

I will ensure that these issues are considered in the development of new animal welfare Regulations (which will include the repeal of the Animal Research Regulation 2021 and Exhibited Animals Protection Regulation 2021) as part of the ongoing animal welfare reform process outlined above.

The Departmental contact is Clem Harris, Director, Strategy & Policy. Ms Harris can be contacted on [redacted]

Yours sincerely

Adam Marshall
MINISTER

14 DEC 2021

NSW GOVERNMENT
The Hon. Paul Toole MP
Deputy Premier
Minister for Regional New South Wales
Minister for Regional Transport and Roads

Ref: IM21/34150

Mr Dave Lazell MP
Chair, Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr ~~Lazell~~ Dave,

Thank you for your correspondence of 11 November 2021 regarding the Mining Amendment (Standard Conditions of Mining Leases - Rehabilitation) Regulation 2021 which also notes that the Regulation may have an adverse impact on the mining business community.

The Regulation commenced on 2 July 2021. It imposes standard rehabilitation conditions for all new mining leases issued from this date. The new rehabilitation conditions will replace existing rehabilitation and environmental management conditions on current leases with a transition period of 12 months for large mines and 24 months for small mines.

The new rehabilitation conditions are part of a series of operational improvements to address the recommendations of the 2017 NSW Audit Office Report – Mining Rehabilitation Security Deposits, in particular the recommendations to improve the quality of rehabilitation and closure plans and to enhance oversight of mine rehabilitation.

The new conditions require lease holders to plan and rehabilitate progressively, report on progress and achieve the final land use. The Regulation will impose the same rehabilitation obligations on every lease instead of having different conditions on different leases within a single mining operation. This benefits industry by standardising rehabilitation conditions, streamlining title instruments and reducing red tape. It promotes an outcomes-based regulatory approach, enabling leaseholders to make reasonable adjustments to their operations without needing approval on each occasion, provided rehabilitation outcomes are achieved. It also enables intervention and enforcement action if progressive rehabilitation outcomes are not being met, consistent with the objects of the *Mining Act 1992* (the Act) and community expectations.

In accordance with the requirements of clause 13(1) of Schedule 1B of the Act, notice of the proposed Regulation was published in a daily newspaper circulating throughout NSW. Public consultation was carried out on the draft Regulation and associated 'form and way' documents, including two public online forums and meetings with key stakeholder groups held during October 2020. Twenty-one submissions were received from stakeholders including from individuals, local councils, environment groups and representatives of the mining business community, such as the NSW Minerals Council and the Association of Mining and Exploration Companies.

The NSW Minerals Council commented:

> *From an industry perspective, the revised Operational Rehabilitation Reforms appear to be significantly improved, and industry recognises that the Regulator has made efforts to reduce the regulatory and administrative burden from what was previously proposed.*

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The submission from the Association of Mining and Exploration Companies states:

> *Rehabilitation is one of the most important factors for the minerals industry in NSW and a key parameter of social licence to operate. AMEC supports practical improvements to operational requirements for rehabilitation to improve the outcomes of rehabilitation through improved planning, management and transparency of this important stage of the mine cycle. We endorse the objective of achieving improved rehabilitation through outcomes focussed risk based approached regulation with a reduction in red tape.*

All comments and submissions received were considered in the preparation and drafting of the proposed Regulation and some changes were made in response to feedback received. The submissions received on the draft Regulation and a summary of the responses can be found at www.resourcesregulator.nsw.gov.au/about-us/have-your-say/operational-rehabilitation-reforms.

The mining business community has actively contributed to the development of the operational rehabilitation reforms and in particular the development of the Mining Amendment (Standard Conditions of Mining Leases - Rehabilitation) Regulation 2021 and have not raised concerns regarding an adverse impact on business.

Offence provisions are in place under the Act and Regulation to discourage illegal and fraudulent activities, such as mining or prospecting without authorisation, stealing minerals and contravening conditions. Contravention of condition of authorisation is an offence under 378D of the Act and is subject to penalties. The legislation, including offence provisions, provides a clear framework for mining businesses to operate within and encourages ecologically sustainable and responsible development of mineral resources and appropriate return to the state.

The NSW Resources Regulator undertakes risk-based compliance and enforcement activities in relation to obligations under the Act. This includes conducting targeted assessment and compliance activities in relation to mine rehabilitation activities and security deposits.

Thank you for the opportunity to respond to the matters raised by the Legislative Review Committee.

Yours sincerely

The Hon. Paul Toole MP
Deputy Premier
Minister for Regional New South Wales
Minister for Regional Transport and Roads

The Honourable Victor Dominello MP
Minister for Digital
Minister for Customer Service

Our reference: COR-08063-2021

Mr David Layzell MP
Chair, Legislation Review Committee
NSW Parliament
By email: legislation.review@parliament.nsw.gov.au

Dear Mr Layzell

Thank you for your correspondence about the Legislative Review Committee Digest No. 36 in relation to the *Customer Service Legislation Bill 2021*.

I note that the Committee's comment on the amendments to the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002* that exempt public sector agencies and organisations from compliance with information protection principles in an emergency could impact on the confidentiality that would otherwise be afforded to a person regarding their disclosure of personal information to an organisation.

I acknowledge that Committee's view that the sharing of information between public sector agencies and organisations may be essential to natural justice, the effective recovery of persons affected by an emergency, or where it is in the public interest to do so. The provisions are safeguarded by:

- only allowing the disclosure of personal or health information between public sector agencies and organisations in circumstances where it is necessary to assist in a stage of emergency,
- the limitation on the information being used only where the information is reasonably necessary to assist in that emergency, and
- the information can only be used in statutorily defined stages of emergency, prevention, preparation, response or recovery stages.

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As the Committee acknowledged, there are safeguards in place in the Acts as the handling of personal and health information by public sector agencies and organisations on the basis of the exemption is limited to those circumstances where it is reasonably necessary to assist in a stage of an emergency, as defined. I strongly support the Committee's view that safeguards are critical to ensure that the provision is used appropriately to assist people affected by an emergency.

Yours sincerely

Victor Dominello MP
Minister for Digital
Minister for Customer Service

Date: 16/12/21

Mark Speakman
Attorney General

IM21/34084
EAP21/15949
D21/1942895

Mr Dave Layzell MP
Chair
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Dear Mr ~~Layzell~~ Dave

Legislation Review Committee - Legislation Review Digest No. 36/57

Thank you for your letter, received 11 November 2021, on behalf of the Legislative Review Committee (the Committee) about the tabling of the Legislation Review Digest No. 36/57 (the Digest) on 9 November 2021.

I note that the Digest includes consideration of the Crimes Legislation Amendment Bill 2021 and the Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, which both passed the Parliament, and the Graffiti Control Regulation 2021.

I welcome the Committee's close consideration of the Bills and Regulation, and the opportunity to respond to the issues discussed in the Digest.

Crimes Legislation Amendment Bill 2021

Right to due process

The amendment to section 308H of the *Crimes Act 1900* (NSW) does not diminish the right to due process. It addresses the particular and specific issues that arise in prosecutions under this section, balancing the rights of victims with the rights of accused persons to due process.

Although the time limit for commencing prosecutions is already longer than the usual six month time limit for summary offences, the nature and complexity of this offence means that victims often do not know that an offence has been committed until some time after the commission of the offence. This might be the case where an individual's personal information has been stolen, and this is only later discovered in another environment or context.

This makes it difficult for police to obtain evidence and commence prosecutions within the existing timeframe. This difficulty is further compounded if police need to request information or seek evidence from overseas, which is a time-consuming process.

Cybercrime offences threaten the privacy of individuals, and this amendment will better protect victims of cybercrime by enabling more effective and appropriate prosecutions.

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An accused person charged with an offence under section 308H will still be entitled to existing rights to due process, such as access to the brief of evidence, and, if the matter goes to court, the accused will have the rights available under the *Evidence Act 1995* (NSW), including to seek to exclude and adduce evidence.

Right to a fair trial

In relation to the Committee's concern regarding the amendments to protect the minutes and deliberations of the High Risk Offender Assessment Committee (HROAC), the NSW Government does not believe that this adversely affects the right to a fair trial.

Where an application is made by the State to the Supreme Court under the *Crimes (High Risk Offenders) Act 2006* (NSW) or the *Terrorism (High Risk) Offenders Act 2017* (NSW), the State discloses to the offender all documents, reports and other information relevant to the proceedings on the application in accordance with its pre-trial disclosure obligations. This includes the recommendations of the HROAC and key documents the HROAC considers, such as risk assessment reports. The minutes and deliberations of the HROAC, which contain the identities and opinions of individual members, are not currently provided to an offender. The Bill formalises this existing practice.

Although the Attorney General considers the recommendations of the HROAC when determining whether the State should apply to the Supreme Court for orders against an offender, those recommendations are not binding on the Attorney General, and are not the only matters considered when determining whether to make an application. In addition, the recommendations are not binding on the Supreme Court, and the Court is not required to have regard to them in determining whether to make orders against an offender. The minutes of the HROAC's meetings, which record the identities and views of individual members, would have less determinative impact on the outcome of proceedings than the recommendations.

As outlined during the Consideration in Detail stage of this Bill, the protection of minutes and the deliberation of the HROAC is consistent with Schedule 1 to the *Government Information (Public Access) Act 2009* (NSW). This provides a conclusive presumption that there is an overriding public interest against the disclosure of information contained in any document prepared for the purposes of the committee. Disclosure of the HROAC's minutes and deliberations could affect the candour and frankness of committee members and compromise their personal safety, because all those attending are identified in the minutes.

As an offender will have access to the HROAC's recommendations, all key documents considered by the HROAC, and other material obtained by the State, the NSW Government considers that the public interest in protecting the HROAC's minutes and deliberations from disclosure outweighs any possible benefit to the offender and does not diminish the offender's right to a fair trial.

Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021

I note the Committee has raised concerns with, but made no further comment on, the Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, in relation to the exception to affirmative consent.

The reforms in this Bill do not shift any legal burden to an accused in order to establish their belief in consent or to raise a defence.

The only burden an accused person will bear is if they seek to rely on the mental health or cognitive impairment exception to the requirement to say or do something to ascertain consent in order to have a reasonable belief in consent. Once the accused has established a relevant impairment on the balance of probabilities, the Crown still bears the burden of proving each element of an offence beyond a reasonable doubt, including that the accused's belief in consent was not reasonable.

As noted by the Committee, the legislation will commence on proclamation. This is necessary to provide agencies with sufficient time to implement the reforms, including training of police, legal practitioners and the judiciary, updating educative materials, and any technical updates. The Department of Communities and Justice has formed an implementation and monitoring working group to oversee this process.

Graffiti Control Regulation 2021

I note that the Committee has raised concerns with, but made no further comment on, the Graffiti Control Regulation 2021 regarding the inclusion of penalty notices in the Regulation.

The NSW Government does not believe that including penalty notices in the Regulation affects the right of an accused person to a fair trial. The penalty notice scheme provides a person with the choice to proceed either by paying the fine, or by electing to have the matter heard in court.

Penalty notices are widely used throughout the NSW criminal law, and have significant practical and financial benefits as they divert matters away from the criminal justice system.

In relation to the Committee's concern about the offence of possession of a spray paint can being a strict liability offence, the NSW Government notes this offence is contained in the *Graffiti Control Act 2008* (NSW), and is not impacted by the Graffiti Control Regulation 2021.

However, the NSW Government notes that strict liability offences are commonly used throughout the NSW criminal law, and that appropriate safeguards are in place to ensure that only serious, persistent offenders can be sentenced to a term of imprisonment for this offence.

Thank you for the Committee's careful consideration of the Bills and Regulation.

Yours sincerely

Mark Speakman

30 DEC 2021

NSW GOVERNMENT

Your ref: D21/59020
Our ref: MDPE21/3072

Mr Dave Layzell MP
Member for Upper Hunter
Chair, Legislation Review Committee
Parliament of New South WalesSYDNEY NSW 2000

Via email: legislation.review@parliament.nsw.gov.au

Dear Mr Layzell

Thank you for your correspondence on behalf of the Legislation Review Committee (the Committee) to the Hon. Rob Stokes MP, the former Minister for Planning and Public Spaces regarding the *Environmental Planning and Assessment Amendment (Compliance Fees) Regulation 2021* (the Regulation). I was asked to respond on his behalf.

The Department of Planning and Environment (Department) recognises the role that councils play in monitoring and enforcing local development. However, the compliance fees being charged by some councils were excessive, in many cases far exceeding the development application (DA) fees, making it hard to see how they could be justified from a cost of compliance perspective. That is why the Regulation was introduced to prevent councils from introducing compliance fees on DAs under the *Local Government Act 1993*.

While the prohibition did not initially apply to all councils until 1 January 2022, because of a transitional arrangement, this did not limit the discretion of councils, create inequity between them, or impact on the business community within those councils. Rather, the arrangements were necessary to give the 29 councils (not 30 as you noted in your correspondence), that were already charging these fees and had factored them into their budgets, the power to continue to do so, so that they could adjust and realign their business operations.

While I note the Committee's concerns on this matter and recognise there will be a financial impact on some councils, I believe that overall, the Regulation will have a positive impact on the business community by creating consistent rules related to compliance fees on DAs and preventing councils from charging excessive

Should the Legislation Review Committee have any questions, they are welcome to contact Ms Teresa Hislop, Acting Director, State and Regional Economy at the Department on [redacted]

Yours sincerely

27.01.2022

Marcus Ray
Group Deputy Secretary
Planning and Assessment