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Legislation Review Committee

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

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Guide to the Digest

COMMENT ON BILLS

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

COMMENT ON REGULATIONS

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

Conclusions

PART ONE – BILLS

1. CRIMES LEGISLATION AMENDMENT BILL 2021

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

Right to due process

The Bill amends the *Crimes Act 1900* to increase the time limit for commencing proceedings for an offence regarding unauthorised access to or modification of restricted data held in a computer from 12 months to 3 years from the date the offence was alleged to have been committed. This applies to offences under section 308H, which is a summary offence with a maximum penalty of 2 years imprisonment. Under the proposed section 308H(4), police will have a longer timeframe to investigate and prosecute unauthorised access and modification of restricted data offences.

The Committee notes this may impact on an accused person's right to due process by disentitling them of information adverse to them, or prolonging a prosecution and causing unfair delays. In circumstances where an offence is alleged to have been committed three years prior to an accused being charged, police could have had up to three years to investigate an accused person and subsequently become aware of further offending in the course of investigations that may otherwise have not occurred if police had charged an accused person earlier in the investigation. The increase in time between which a person commits an offence and a date on which they are charged could therefore have the unintended effect of accused persons committing further offences prior to being charged for the index offence.

However, the Committee accepts that statutory limitations are rare in the prosecution of criminal offences and that the imposition of a statutory limitation is a safeguard in itself. As such, increasing the timeframe may be appropriate to allow police greater time to conduct and prosecute these offences under the proviso that the provision is not used intentionally to further incriminate an accused person. The Committee refers the matter to Parliament to consider whether the Bill disproportionately affects an accused person's right to due process under section 308H(4).

Right to fair trial

The Bill amends the *Crimes (High Risk Offenders) Act 2006* and the *Terrorism (High Risk Offenders) Act 2017* to make production of the minutes and deliberations of the Assessment Committee and its sub-committees inadmissible in proceedings before a court, tribunal, authority or other body. The amendments make these records protected records under the Acts, which means that no person can be compelled to produce or disclose those protected records in any proceedings.

The Committee acknowledges disclosure of deliberations of the Assessment Committee could impact the quality of advice the committee can provide and compromise the personal safety of members and persons attending in an advisory capacity, as all attendees are identified in the minutes. The Committee also acknowledges that matters relating to domestic terrorism are highly confidential and should be dealt with in a manner which protects the inadvertent disclosure of that highly confidential material.

However, the Committee notes that this may deny a person access to information on legal matters regarding their continued detention or extended supervisions. The Committee also notes that these provisions may be inconsistent with the general provisions on compellability of a witness who is competent and the admissibility of business records as an exception to the hearsay rule under the *Evidence Act 1995*.

Further, the presiding Supreme Court Justice hearing an application for the extended supervision or continued detention of a person would have the discretion to make decisions on the admissibility of these minutes, including a power to rule segments of the minutes containing names of committee members inadmissible. This could be facilitated by rejecting the evidence on the basis of relevance under section 55 of the *Evidence Act 1995*.

Whilst the Committee notes the amendments are intended to protect the identity of members and the deliberations of the Assessment Committee, the Committee refers the matter to Parliament to consider whether the need to protect the identity of committee members is outweighed by the right of a person subject to an extended supervision order or continued detention order to have legally acquirable to them, whether under the principles of disclosure or by subpoena, all available material which may affect their continued detention or extended supervision.

2. CRIMES LEGISLATION AMENDMENT (SEXUAL CONSENT REFORMS) BILL 2021

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

Reversal of the onus of proof

The Bill inserts the requirement that the accused bears the burden for establishing (on the balance of probabilities) that they had a cognitive or mental health impairment if they wish to argue that this impairment meant that they did not have the requisite knowledge of the complainant's lack of consent.

In regards to criminal actions, a reverse onus may undermine the presumption of innocence. The legal issues surrounding the mental element of a crime is complex, which may be exacerbated if the accused is unable to obtain legal representation and compromise their right to a fair trial. This is particularly relevant considering that a criminal conviction may result in a custodial sentence.

However, the Committee notes that the Crown still bears the onus of proving the mental element of knowledge. Additionally, the accused is only required to prove the presence of a relevant cognitive or mental health impairment on the balance of probabilities, which reduced the capacity for this requirement to have a prejudicial effect. The Committee also notes that the Attorney General stated that these provisions were appropriate in these particular circumstances because matters relating to the accused's mental health or cognitive impairment are peculiarly within their own knowledge. In these circumstances, the Committee makes no further comment.

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

Commencement by proclamation

The Bill commences (as an Act) on a day to be appointed by proclamation, and the Attorney General advised that a proclamation will be issued approximately six months after the Bill receives assent. The Committee generally prefers legislation to commence on a fixed date, or

on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes that the flexible start, and the Attorney General's proposed six month period prior to commencement may assist with the administrative arrangements required to implement the various amendments across other legislation and the related changes across agencies. Given the circumstances, the Committee makes no further comment.

3. CUSTOMER SERVICE LEGISLATION AMENDMENT BILL 2021

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

Confidentiality

Proposed sections 27D of the *Privacy and Personal Information Protection Act 1998* and schedule 1, clauses 10(1)(b)(b1) and 11(1)(b)(b1) of the *Health Records and Information Privacy Act* 2002 outline circumstances in which personal and/or health information may be shared between organisations and public sector agencies. The ability of organisations and public sector agencies to disclose personal information could impact on the confidentiality that would otherwise be afforded to a person regarding their disclosure of personal information to an organisation. Specifically, 27D of the *Privacy and Personal Information Protection Act 1998* exempts public sector agencies from compliance with information protection principles under that statute while clauses 10(1)(b)(b1) and 11(1)(b)(b1) of the *Health Records and Information Privacy Act 2002* permit 'organisations' to do the same. Under section 4 of the *Health Records and Information Privacy Act 2002* an organisation means a public sector agency or a private sector person.

The Committee notes that the amendments 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 provision is further safeguarded by the limitation on the information being used only where the information is reasonably necessary to assist in that emergency. In addition, the information can only be used in particular statutorily defined stages of emergency, notably prevention, preparation, response or recovery stages. As such, the sharing of information between government agencies 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 Committee accordingly makes no further comment.

4. PAYROLL TAX AMENDMENT (PAYROLL TAX WAIVER) BILL 2021

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

Privacy

The Bill provides that the Chief Executive Officer of Service NSW may disclose information to the Chief Commissioner of Revenue NSW regarding an employer's application for a payment under the 2021 COVID-19 JobSaver Payment or 2021 COVID-19 Business Grant schemes administered by Service NSW. This information may be shared if it is in relation to the administration of a taxation law.

The Committee notes that the Bill does not specify or limit what information may be disclosed, and does not require either agency to seek consent from or notify individuals who may be affected. Further, this provision permits the sharing of information disclosed to Service NSW

for the limited purpose of applying for COVID-19 relief payments on a wider and unspecified ambit, being in relation to the administration of "taxation laws", which may include statutes beyond the *Payroll Tax Act 2007*. By allowing information sharing which may include the personal information of individuals provided for a purpose unrelated to the administration taxation laws, the Bill may impact on the privacy rights of affected persons.

However, the Committee recognises that the proposed changes would facilitate eligible employers to access the waiver by enabling the Chief Commissioner of Revenue NSW, who is responsible for administering payroll tax, to receive proof of an employer's eligibility from Service NSW. The Committee also acknowledges that information sharing is limited to government agencies, which are subject to existing privacy protection laws. In these circumstances, the Committee makes no further comment.

5. PLASTIC REDUCTION AND CIRCULAR ECONOMY BILL 2021

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

Extraterritorial operation of Act

Section 6 of the Bill provides that the Act may apply to a person or premises outside the State or a supplier carrying on a business or party to a contract made outside the State if there is an 'extraterritorial impact', which:

- affects, or is likely to affect, the environment of the State,
- relates to the supply or likely supply into or within the State of a regulated item, or
- relates to a matter or thing that is or is likely to be an offence under the Act or regulations.

This extends the legislative jurisdiction of the Act beyond the State of New South Wales. The Committee generally comments where legislation may have extraterritorial effect as it may create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory.

However, the Committee recognises the provision helps to protect the New South Wales environment, including by regulating the supply into the State of regulated items and enforcing offences under the Act which relate to, for example, supply of prohibited items, compliance with product stewardship requirements for regulated products and reporting requirements.

It appears that the Bill may, where there is an extraterritorial impact, permit the EPA to enter a premises outside of the State if it reasonably suspects a person has not complied with a compliance notice. A compliance notice may be issued where the EPA reasonably suspects a person has supplied, is supplying or is likely to supply from premises a prohibited plastic item or item that does not comply with a design standard under the Act. The Committee notes the potentially broad application of this provision. The Committee refers the scope of the extraterritorial operation of the Act to the Parliament for its consideration.

Real property rights

The Bill permits the EPA, as the regulator, to enter premises and land in certain circumstances. Specifically, to:

a) cause an action covered by a brand owner's financial assurance to be carried out if the brand owner fails, in the opinion of the EPA, to carry out the action, or

b) take action to cause a compliance notice to be complied with by the EPA, its employees or an agents or contractor under its direction, where the EPA reasonably suspects a person has not complied with a compliance notice. In this case, entry may be effected with police who are permitted to use reasonable force. It is an offence for a person to wilfully delay or obstruct the EPA or another person authorised by the EPA from taking this action.

It also permits authorised officers to enter premises for investigative purposes as set out in Chapter 7 of the *Protection of the Environment Operations Act 1997*, the application of which is extended to the Bill and its regulations.

The Committee notes that, while these powers may assist the EPA in regulating and investigating breaches of the statutory framework, they interfere with a person's real property rights.

The Committee notes that the threshold for entry to land under paragraphs a) and b), being the 'opinion' of the EPA or 'reasonable suspicion' respectively, is low. However, actions permitted under the financial assurance and required by the compliance notice may limit the circumstances in which the EPA can exercise these powers, and its actions after entering land. These powers also appear to be generally aligned with the powers of the regulator to enter premises for similar purposes under the *Protection of the Environment Operations Act 1997*. The Committee notes certain safeguards which may apply to the statutory power of entry, such as the requirement a warrant be obtained and to take care, are not included in these circumstances.

The Committee also notes that the Bill separately amends the *Protection of the Environment Operations Act 1997* to allow additional powers of entry under Chapter 7 of that Act. However, search powers under that Act require the authority of a search warrant.

Therefore, the Committee refers to the Parliament the question of whether the new search powers under the Bill includes adequate safeguards to protect an individual's real property rights.

Right to liberty and freedom from arbitrary detention

The Bill extends the application of investigative powers under Chapter 7 of the *Protection of the Environment Operations Act 1997*. Under Chapter 7 a person may, 'without another warrant than this Act', be apprehended by an authorised officer and taken before a Magistrate or court officer to be dealt with if the person, after being required to do so, refuses to state their name or residential address or states a name or address that in the opinion of the authorised officer is false. It provides that a Magistrate or court officer may make a bail decision under the *Bail Act 2013* about the person and, if the person has not been charged with an offence, the *Bail Act 2013* applies as if the person were accused of an offence.

The Bill appears to permit an authorised officer to apprehend a person pursuant to a warrant that is not subject to any external oversight, and potentially where a person provided their name and address in accordance with the requirements of the Act, but in the opinion of the authorised officer the name or address provided is false. If the name or address provided by the person is not in fact false, it is unclear if the person is guilty of an offence. The authorised officer's opinion is not subject to a requirement of 'reasonableness'.

It also provides that a Magistrate or court officer (being a registrar of a court or an authorised employee of the Attorney General's Department) may make a bail decision as if the person were accused of an offence, even where they have not been charged. The Committee is concerned that a person brought before a Magistrate or court officer, but not charged with an offence, may not fit within the definition of an 'accused person' or 'person accused of an offence' within the meaning of the *Bail Act 2013*. Specifically, because that person has not been charged with or convicted of an offence. Notwithstanding, a bail decision may result in a person being detained for an uncertain period of time given the delays to matters being listed, or released with or without conditions.

The Committee considers that apprehension and/or detention under Chapter 7 may be considered arbitrary or inappropriate, particularly where a person has not been charged with an offence but the *Bail Act 2013* applies as if the person were accused of an offence.

The Committee considers that the right to liberty and freedom from arbitrary detention are fundamental human rights and that any legislation limiting these rights should only do so to the extent the limitation is compelled by and necessary to meet public interest objectives. Further, that such legislation must include adequate safeguards to prevent undue trespass on individual rights. In the circumstances, the Committee refers this issue to the Parliament for its consideration.

Self-incrimination

Section 17 of the Bill abrogates the privilege against self-incrimination by providing that a brand owner must provide prescribed information to the EPA in an annual report. A failure to do so is a strict liability offence incurring a maximum penalty for an individual of 1000 penalty units ($110 000) and, for a continuing offence, a further 100 penalty units ($11 000) for each day the offence continues. The requirement to provide prescribed information under pain of penalty appears to abrogate the privilege against self-incrimination.

The EPA may consider this information for the purposes of the Act, and the information is admissible in evidence in a prosecution of the brand owner for an offence against the Act or regulations, whether or not the information may incriminate the brand owner (known as 'use immunity').

The privilege is also abrogated by the extension of investigative powers included in Chapter 7 of the *Protection of the Environment Operations Act 1997* (POEO Act) to the Bill, under which a person is not excused from providing information or records or answering a question on the ground it might incriminate them or make them liable to a penalty. Information provided or answers given by a natural person is not admissible in criminal proceedings against them (except for proceedings for an offence under Chapter 7) if they object at the time because doing so might incriminate them, or were not told they could object. This conditional use immunity safeguards the rights of natural persons. However, it does not appear to extend to records provided or further information obtained.

The Committee acknowledges that the privilege against self-incrimination is not absolute and abrogation may be justified in certain circumstances, including where the information compelled concerns an issue of public importance significantly impacting the community, or information is provided as part of a regulatory scheme voluntarily participated in and is part of a mechanism for ensuring compliance. The importance of environmental protection from plastic waste and regulation of industry under the proposed statutory regime may be considered sufficient justification.

However, it also notes that the inclusion of use immunity in a statute abrogating the privilege acts as an important safeguard for individual rights. The exclusion of this immunity by section 17 of the Bill and limited application of the immunity under the POEO Act's provisions appears to exacerbate the abrogation of the privilege and impede individual rights.

The privilege against self-incrimination is a well-established legal principle. The Committee refers to the Parliament the question of whether the abrogation of this privilege and exclusion of use immunity is appropriate, necessary and reasonable in the circumstances.

Strict liability offences

The Bill creates various strict liability offences and prescribes maximum penalties in relation to those offences. The maximum penalty doubles in relation to offences against sections 9(1), 37, 38 and 50(1) where the prosecution proves the person who committed the offence was, at the time the offence was committed, a manufacturer, producer, wholesaler or distributor of items. The purpose is to acknowledge the importance of their role in the supply chain and the potential impacts of supply by these persons.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is a relevant factor in establishing liability. That is, the person does not need to have intended not to comply with the requirements of the section to be held liable for a penalty.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalties for the offences are monetary, not custodial. In these circumstances, the Committee makes no further comment.

Right to a fair trial – penalty notice offences

The Bill creates penalty notice offences relating to supply of a prohibited item, non-compliance with a stop notice or compliance notice, non-payment of a fee recovering administrative costs and providing false or misleading information. Higher penalties apply for certain offences where the offence was committed by a 'relevant person', being a manufacturer, producer, wholesaler or distributor of an item.

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. Additionally, it appears a higher penalty can be imposed on a person that is alleged to be 'relevant person' without the need for it to be proven that they were a relevant person at the time the offence was committed, as the prosecution is required to prove under section 47.

However, the Committee recognises that an individual (including a relevant person) retains the right to elect to have their matter heard and decided by a court. It also acknowledges that 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. In these circumstances, the Committee makes no further comment.

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

Referral to the regulations

The Bill refers various matters to the regulations including, for example:

- circumstances of a defence to prosecution for an offence,

- authorised persons to whom the Minister's functions under the Act may be delegated, and

- circumstances included and/or excluded from defined terms.

The general regulation-making power also provides that the regulations may create offences with monetary penalties of no more than 200 penalty units ($22 000) for an individual and 400 penalty units ($44 000) for a corporation.

The Committee generally prefers that that such matters be included in the primary rather than the subordinate legislation in order to facilitate an appropriate level of parliamentary oversight. It acknowledges that the inclusion of matters in the regulations builds flexibility into the regulatory framework. However, certain matters referred are significant to the interpretation of the Bill, offences under it and the proper delegation of legislative power. The Committee therefore refers this issue to the Parliament.

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

Matters published in NSW Government Gazette

The Bill includes various matters which are determined by the Minister and published in the NSW Government Gazette, including in relation to: the opinion of the Minister that a plastic item is unnecessary or problematic, a product stewardship target and exemptions from provisions of the Act or its regulations.

The Committee notes that including these matters in the Gazette means they are not subject to parliamentary scrutiny. However, the Committee notes that:

- the Minister's opinion that a plastic item is unnecessary and problematic is one requirement of an item being classified as a prohibited plastic item, with the other requirement being that it is prescribed by the regulations or specified in Schedule 1 of the Act. Where the item is prescribed by the regulations, an eight-week consultation period is mandated and commencement is typically delayed,

- the government has indicated it will engage with and educate key stakeholders in relation to exemptions.

It therefore appears that significant consultation will be undertaken with key stakeholders in relation to certain matters that will be published in the NSW Government Gazette. In the circumstances, the Committee makes no further comment.

Incorporation of documents into regulations

The Bill allows the regulations to incorporate external documents, as in force at a particular time or from time to time, published by any authority or body. This may result in the regulations incorporating documents which are not subject to parliamentary scrutiny. The Committee refers this issue to the Parliament for its consideration.

6. ROAD TRANSPORT AMENDMENT (PROHIBITION OF U-TURNS AND 3-POINT TURNS IN SCHOOL ZONES) BILL 2021

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

Strict liability

The Bill amends the Road Rules 2014 to prohibit U-turns and 3-point turns within school zones. The maximum penalty for not complying with this provision is 20 penalty units ($2 200). The Committee notes that this amounts to a strict liability offence. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mens rea or mental element is a necessary part of liability for an offence.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings, such as road rules, to promote compliance and strengthen offence provisions. The Committee also notes that the maximum penalty is not overly significant and are monetary only, not custodial. The Bill also contains additional provisions that permit U-turns and 3-point turns if there are specific school traffic management plans for the school zone where it is safe to do so, or if there is a written agreement between the NSW Police Local Area Commander and the school administration authority. In these circumstances, the Committee makes no further comment.

PART TWO – REGULATIONS

1. ANIMAL RESEARCH REGULATION 2021

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

Strict liability offences

The *Animal Research Regulation 2021* includes strict liability offences, each with a maximum penalty of 10 penalty units ($1100). The offences relate to providing written notice of changes in particulars (including a change in directors, change in membership of the ethics committee and conviction for a prescribed offence) and annual reporting. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. Additionally, the Committee generally prefers provisions creating offences to be included in the primary legislation in order to facilitate an appropriate level of parliamentary scrutiny.

The Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance. Additionally, that attaching penalties to notice and reporting requirements (including providing notice of a conviction for a prescribed offence) will help to maintain accurate records and, in accordance with the object of the *Animal Research Act 1985*, the welfare of animals used in connection with research. The primary legislation, which has been subject to parliamentary scrutiny, also provides for the prescription of offences by regulation and the maximum penalty which attaches. 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

Incorporation of code not subject to disallowance

The Animal Research Regulation 2021 incorporates the document published by the Australian government entitled *Australian code for the care and use of animals for scientific purposes* as in force form time to time (Australian Code) as a Code of Practice under the *Animal Research Act 1985.* Notably, a complaint regarding contravention of this Code can result in suspension

or cancellation of a research establishment accreditation, an authority (to carry out animal research) or a licence (to supply of animals for use in connection with animal research). The Regulation also requires compliance with specific provisions of the Australian Code.

There is no requirement that the Australian Code be tabled in Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. However, Schedule 1 of the Regulation requires compliance with certain Australian Code provisions, which will result in scrutiny of at least some of the Code's provisions.

The Committee notes that a function of the Animal Research Review Panel is to investigate and evaluate the efficacy of the Code of Practice in regulating the conduct of animal research and the supply of animals for use in connection with animal research. The Committee considers that this helps to maintain oversight and ongoing scrutiny of the Australian Code and its application to the statutory regime. In the circumstances, the Committee makes no further comment.

2. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (COMPLIANCE FEES) REGULATION 2021

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

Limit to council discretion

The Regulating provides that a council must not charge a fee for a service if another Act prohibits the charging of the fee. However, a relevant council may charge a prohibited fee in relation to a development application received on or before 31 December 2021. The Regulation specifies 30 NSW councils as being a 'relevant council'.

The Committee notes that this non-uniform application of the prohibition of development fees may cause inequity between the different councils, and may impact on the business community within those councils by limiting the discretion of council to issue compliance fees. The Committee refers this issue to the Parliament for its consideration of the regulation's impact on the business community of each council to which the regulation relates.

3. GAS AND ELECTRICITY (CONSUMER SAFETY) AMENDMENT (MEDICAL GAS) REGULATION 2021

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

Public safety

The Regulation makes amendments that specify the qualified persons that may carry out safety and compliance tests on work relating to medical gas. However, the Regulation also provides that, as a temporary measure, an unqualified person may conduct these safety and compliance tests until 1 May 2022. This may impact the safety of those that rely on such work to be carried out by qualified persons, particularly as the work relates to medical gas where there is a high imperative that such work is carried out according to established safety standards.

The Committee recognises that these clauses are intended as a temporary measure during a transitional period until 1 May 2022. The Committee also recognises the additional requirements for unqualified persons to record the results of such tests within 7 days of the test and keep a copy for at least 5 years to be provided upon request within that period. In these circumstances, the Committee makes no further comment. However, given the importance of public safety regarding the use of medical gas by suitably qualified persons, the

Committee refers this issue to Parliament for consideration of whether the safeguards are adequate in the circumstances.

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

Strict liability offences for work providers

The Regulation contains various mandatory requirements for those that carry out safety and compliance tests on certain work relating to medical gas. For example, that the work must be in accordance with the relevant Australian Standards, requirements to provide notice of the results of safety and compliance tests and to retain notices or produce copies of the notice within certain time periods. Failure to comply with these requirements amounts to an offence under the regulation, and carries maximum penalties ranging from 100 penalty units for a corporation and 25 penalty units for an individual.

The Committee notes that these amount to strict liability offences. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing the liability for an offence. As these offences apply specifically to those carrying out electrical and gas work, it may adversely impact those industries within that business community.

However, the Committee notes that strict liability offences are not uncommon in regulatory setting to encourage compliance, particularly relating to safety measures for work relating to medical gas. Further, the Committee notes that the provisions impose monetary penalties, and provides a financial incentive for relevant workers to comply with these public safety requirements. In these circumstances, the Committee makes no further comment.

4. GRAFFITI CONTROL REGULATION 2021

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

Right to a fair trial – penalty notice offences

Clause 11 of the *Graffiti Control Regulation 2021* prescribes $550 as the amount payable for a penalty notice where a person has committed an offence relating to the sale or display of spray paint cans under the *Graffiti Control Act 2008*. Penalty notices allow a person to pay the amount specified in the notice within a certain time if they do not wish to have the matter determined by a court. However, the Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The penalty notice regime under the *Graffiti Control Act 2008* and its Regulation may therefore impact on a person's right to a fair trial, specifically the automatic right to have their matter heard by an impartial decision maker.

However, the Committee notes that the statutory regime does not remove a person's right to elect to have the matter heard by a court. Section 7 also includes defences for employees and employers where a spray paint can has been sold to a person under 18 years. In these circumstances, and given the practical benefits of penalty notices (including that they reduce the costs and time associated with the administration of justice), the Committee makes no further comment.

Strict liability offence

Part 2 of the *Graffiti Control Regulation 2021* sets out the procedure for and after seizure of a spray paint can by a police officer from a person under 18 years in a public place. The possession of a spray paint can by a person under 18 years in a public place is a strict liability

offence under the *Graffiti Control Act 2008*, to which a maximum penalty of 10 penalty units ($1100) or 6 months imprisonment attaches.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. In this case, the strict liability offence applies to persons under 18 years of age and may result in imprisonment.

However, the Act clearly states that a custodial sentence is a last resort. Specifically, section 8B(5) provides that the person must have been previously convicted of an offence for possession of a spray paint can or another graffiti related offence, on so many occasions that the court is satisfied the person is a serious and persistent offender and is likely to commit such an offence again. In these circumstances, the Committee makes no further comment.

5. LIQUOR AND GAMING LEGISLATION AMENDMENT REGULATION 2021

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

Powers of Secretary

The Regulation grants the Secretary certain powers regarding live music and performance venues. Specifically, the Secretary may compile a list of licensed premises that are live music and performance venues, the content of an application of a licensed premises under the Live Music Support Package or requirements under clause 61A(2), and either decide not to include or remove licenced premises from the list of live music and performance venues on various conditions.

The Committee notes that the Regulation does not specify the timeframe in which the Secretary must give the licensee or manager notice of removal from the list of live music and performance venues. If the obligations of the Secretary's notice are not clarified this may result in negative business outcomes for the licensee or manager relative to their eligibility for the Live Music Support Package and may disentitle them from application entirely.

Further clarification for licensees could be provided in the notice requirement by providing written reasons as to why a licensee is no longer considered a live music and performance venue for the purpose of clause 61B.

The Committee prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and content is clear. Pursuant to clause 4 of schedule 1 of the *Subordinate Legislation Act 1989*, a statutory rule must be expressed plainly and unambiguously, and consistently with the language of the enabling Act. The Committee refers this provision to the Parliament for consideration of whether it calls for elucidation.

6. MINING AMENDMENT (STANDARD CONDITIONS OF MINING LEASES—REHABILITATION) REGULATION 2021

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

Additional conditions of mining leases

The Regulation sets out standard conditions of mining leases granted under the *Mining Act 1992*. These conditions broadly relate to environmental management, protection and rehabilitation of land that is or may be affected by activities under mining leases.

A number of clauses set out requirements for the protection of the environment and rehabilitation, including that the holder of a mining lease must take all reasonable measures to prevent, or if that is not reasonably practicable, to minimise harm to the environment caused by activities under the mining lease, and that they must rehabilitate land and water in the mining area that is disturbed by activities under the mining lease as soon as reasonably practicable after the disturbance occurs.

The conditions include requirements in relation to a number of matters, including that contravention of a condition constitutes an offence under the Act, and if by a corporation it constitutes an executive liability offence. This may have an adverse impact on the mining business community and those that hold mining licences. However, the Committee notes that strict and executive liability offences are not uncommon in a regulatory setting to encourage compliance, particularly relating to environmental protection. In these circumstances, the Committee makes no further comment.

7. NATIONAL PARKS AND WILDLIFE AMENDMENT (ASSETS OF INTERGENERATIONAL SIGNIFICANCE) REGULATION 2021

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

Freedom of information

Clause 78D(1) of the Regulation provides for the making of submissions in response to conservation action plans and requires that conservation action plans be made available to the public for this purpose. However, Clause 78D(2) of the Regulation allows for the publicly available versions of draft action plans to be redacted under certain circumstances. Similarly, Clause 78D(3) removes the requirement to publish draft conservation action plans where the urgent finalisation and approval is considered necessary to address an imminent threat to land declared to be an asset of environmental or cultural intergenerational significance under section 188H of the *National Parks and Wildlife Act 1974*.

This may prevent members of the public from making submissions in response to a conservation action plan, since they may not have access to all the relevant information necessary to form a view. The Committee prefers that, where practical, members of the public have access to all relevant information in order to facilitate accountability and public participation in decision making.

However, the Committee recognises that there may be circumstances where publishing certain information may undermine efforts to protect the conservation value of a specific area, and that a reasonable degree of discretion is warranted as to what material is appropriate to make available for the purpose of public scrutiny. Under the circumstances, the Committee makes no further comment.

8. NATIONAL DISABILITY INSURANCE SCHEME (WORKER CHECKS) AMENDMENT REGULATION 2021

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

Right to work and privacy

The *National Disability Insurance Scheme (Worker Checks) Amendment Regulation 2021* expands the definition of a 'corresponding law' under the *National Disability Insurance Scheme (Worker Checks) Act 2018*. This effectively broadens the application of the Act's worker

clearance and information-sharing provisions, which may limit a person's right to obtain work in the disability care sector and right to privacy.

However, the Committee notes the purpose of this regime is to minimise the risk of harm to people with disabilities, which requires access to certain information in order to properly assess and monitor a person's risk to NDIS participants. Additionally, it notes that the Act limits the persons and purposes for which information can be shared under the Act. In the circumstances, the Committee makes no further comment.

9. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) 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 *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation 2021* inserts an offence when an individual fails to comply with the Minister's direction prohibiting coughing or spitting on a public official or other worker. A failure to comply with the direction, without reasonable excuse, would result in a penalty notice of $5,000 issued to the individual. The offence inserted into the Regulation is the same offence that was in the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* and its previous iterations.

In its previous Digests 13/57, 17/57, 25/57 and 30/57, the Committee commented on the earlier versions of *Public Health (COVID-19 Spitting and Coughing Order 2020*, which provided that a penalty notice of $5,000 could be issued to a person who contravened the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a 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 the amount of $5,000 is a significant monetary amount to be imposed on an individual by way of a penalty notice.

While individuals retain the right to elect to have their matters heard and decided by the Courts. An individual may be financially dissuaded to do so, as the maximum penalty is a significant amount.

The Committee acknowledges there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by the COVID-19 pandemic, where public institutions, including the courts, would need to facilitate social distancing. Given these factors, 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

Matters that should be included in primary legislation

As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes Schedule 4 of the *Public Health Regulation 2012* by coughing or spitting on an official or other worker.

Consistent with its comments made in Digest 13/57, 17/57, 25/57 and 30/57, the Committee generally prefers significant matters to be dealt with in the primary rather than subordinate

legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight.

The Committee is also concerned that unlike the offences created in the *Public Health (COVID-19 Spitting and Coughing) Order 2020* and its subsequent iterations which would expire 90 days after it is published, there is no such expiry date for an offence inserted into the *Public Health Regulation 2012*.

Given the severe circumstances surrounding the COVID-19 pandemic, the Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses aren't delayed by the need to amend a Bill. Given the extraordinary circumstances, the Committee makes no further comment.

10. PUBLIC HEALTH AMENDMENT (COVID-19 MANDATORY FACE COVERINGS) REGULATION (NO 4) 2021

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

Personal liberty

The Regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances when inside NSW airports and domestic commercial aircraft. As noted by the Committee regarding earlier renditions of this regulation (in Digests 27 and 32), this may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth.

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

Right to fair trial – penalty notice offences

The Regulation increases the penalty amounts imposed for offences of failing to comply with a direction to wear a face mask covering under the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 3) 2021* from $200 for an individual to $500. The Regulation also introduces penalties of $80 for the offences when committed by an individual who is 16 or 17 years of age, and for $40 when committed by an individual who is 15 years of age or younger.

The Committee notes that 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.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court and acknowledge that 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 penalty offence is part of the regulatory response to the COVID-19 pandemic, and of a temporary nature as it is attached to the offences under the public health orders which may be in force for a period of 90 days unless revoked or replaced. In these circumstances, the Committee makes no further comment.

Part One – Bills
1. Crimes Legislation Amendment Bill 2021

Date introduced	21 October 2021
House introduced	Legislative Assembly
Member introducing	Melanie Gibbons, Parliamentary Secretary to the Attorney General
Minister responsible	The Hon. Mark Speakman, SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

The objects of the *Crimes Legislation Amendment Bill 2021* (the **Bill**) are as follows—

a) to amend the *Crimes Act 1900* to increase the time limit for commencing proceedings for an offence against the Crimes Act 1900, section 308H to 3 years from the date on which the offence was alleged to have been committed.

b) to amend the *Crimes (High Risk Offenders) Act 2006* to—

provide that –

i. the minutes or deliberations of the High Risk Offenders Assessment Committee and its sub-committees are not admissible in legal proceedings, and

ii. a person cannot be compelled in any proceedings to produce that material, and

iii. classify certain offences under the *Criminal Code Act 1995* of the Commonwealth, relating to the following, as serious sex offences or offences of a sexual nature—

iv. grooming a person to make it easier to engage in sexual activity with, or procure, a child,

v. the use of electronic services for child abuse material.

2. to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to—

a) provide that an offence under the *Crimes Act 1900*, section 308H relating to the unauthorised access to or modification of restricted data held in a computer, or under

b) section 308I relating to the unauthorised impairment of data held in a computer disk, credit card or other device, is a searchable offence in relation to a search warrant, and

c) enable particular warrants to be applied for by email for a trial period of 2 years, and

d) allow any police officer to take a person who has been arrested under the *Law Enforcement (Powers and Responsibilities) Act 2002*, section 99 before an authorised officer to be dealt with according to law.

3. to amend the *Surveillance Devices Act 2007* to clarify the requirements for applying for a surveillance device warrant,

4. to amend the *Terrorism (High Risk Offenders) Act 2017* to provide that –

a) the minutes or deliberations of the High Risk Offenders Assessment Committee and its sub-committees are not admissible in legal proceedings, and

b) a person cannot be compelled in any proceedings to produce that material,

5. to amend the *Terrorism (Police Powers) Act 2002* to extend the operation of particular preventative detention orders and prohibited contact orders, and allow applications for preventative detention orders and prohibited contact orders, until 16 December 2023.

BACKGROUND

6. The Bill amends six criminal law bills, including the *Crimes Act 1900*, *Crimes (High Risk Offenders) Act 2006, Law Enforcement (Powers and Responsibilities) Act 2002, Surveillance Devices Act 2007, Terrorism (High Risk Offenders) Act 2017*, and the *Terrorism (Police Powers) Act 2002.*

7. In the second reading speech to the Bill, the Parliamentary Secretary to the Attorney General, Ms Melanie Gibbons MP, noted that the amendments contained in the Bill were aimed at improving criminal investigations:

> The bill introduces seven largely procedural proposals to amend six criminal laws to strengthen our community by improving criminal investigation, enforcement and penalties, and police response. These amendments were developed through consultation with agencies and stakeholders as part of the Government's regular program of legislative reviews and improvements.

8. The proposed amendments aim to deliver the following:

a) improve investigation of computer offences under the *Crimes Act 1900* and the *Law Enforcement (Powers and Responsibilities) Act 2002*;

b) allow non-urgent warrant applications to be made by email or in any other way prescribed by the regulations for a two-year period under the *Law Enforcement (Powers and Responsibilities) Act 2002.* This is particularly in response to situations during the COVID-19 pandemic where these warrants may only be issued in person;

c) streamline the application process for a surveillance device warrant by allowing an application to be made with a single document that includes all the required information under the *Surveillance Devices Act 2007*;

d) amend the definitions of "serious sex offence" and "offence of a sexual nature" in the *Crimes (High Risk Offenders) Act 2006* to include new Commonwealth offences;

e) provide that the minutes and deliberations of the High Risk Offender Assessment Committee and its sub-committees cannot be compelled or admitted as evidence in any proceedings, under the *Crimes (High Risk Offenders) Act 2006* and the *Terrorism (High Risk Offenders) Act 2017*;

f) allow a police officer other than the arresting officer to take a person arrested under the section before an authorised officer to be dealt with according to law under the *Law Enforcement (Powers and Responsibilities) Act 2002*; and

g) extend the operation of preventative detention orders and prohibited contact orders until 16 December 2023 under the *Terrorism (Police Powers) Act 2002*.

ISSUES CONSIDERED BY COMMITTEE

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

Right to due process

9. Schedule 1.1 of the Bill amends section 308H(4) of the *Crimes Act 1900* to increase the time limit for commencing proceedings for an offence relating to the unauthorised access to or modification of restricted data held in a computer from 12 months to 3 years from the date on which the offence was alleged to have been committed.

10. An offence under section 308H is a summary offence with a maximum penalty of 2 years imprisonment. If amended, the new provision provides that proceedings for an offence against this section must be commenced within 3 years of the date on which offence was alleged to have been committed.

11. Under section 308 of the Act data includes information in any form, or any program (or part of a program). Under section 308H(3) of the Act restricted data means data held in a computer, being data to which access is restricted by an access control system associated with a function of the computer.

> **The Bill amends the *Crimes Act 1900* to increase the time limit for commencing proceedings for an offence regarding unauthorised access to or modification of restricted data held in a computer from 12 months to 3 years from the date the offence was alleged to have been committed. This applies to offences under section 308H, which is a summary offence with a maximum penalty of 2 years imprisonment. Under the proposed section 308H(4), police will have a longer timeframe to investigate and prosecute unauthorised access and modification of restricted data offences.**
>
> **The Committee notes this may impact on an accused person's right to due process by disentitling them of information adverse to them, or prolonging a prosecution and causing unfair delays. In circumstances where an offence is alleged to have been committed three years prior to an accused being charged, police could have had up to three years to investigate an accused person and subsequently become aware of further offending in the course of investigations that may otherwise have not occurred if police had charged an accused person**

earlier in the investigation. The increase in time between which a person commits an offence and a date on which they are charged could therefore have the unintended effect of accused persons committing further offences prior to being charged for the index offence.

However, the Committee accepts that statutory limitations are rare in the prosecution of criminal offences and that the imposition of a statutory limitation is a safeguard in itself. As such, increasing the timeframe may be appropriate to allow police greater time to conduct and prosecute these offences under the proviso that the provision is not used intentionally to further incriminate an accused person. The Committee refers the matter to Parliament to consider whether the Bill disproportionately affects an accused person's right to due process under section 308H(4).

Right to fair trial

12. The Bill amends the *Crimes (High Risk Offenders) Act 2006* in relation to the Assessment Committee under the Act, which is responsible for the review of offender risk assessments and making recommendations to the Commissioner of Corrective Services NSW for the taking of action by the State under this Act in respect of those offenders.

13. Schedule 1.2[3] of the Bill inserts section 28B(1) into the Act to make production of the minutes and deliberations of the Assessment Committee and its sub-committees inadmissible in proceedings before a court, tribunal, authority or other body. These records are considered protected records under the proposed section 28B(3) of the Act. Amendments under section 28B(2) state that no person can be compelled to produce or disclose those protected records in any proceedings. Provision 28B states:

    a) A protected record, or evidence of the contents of a protected record, is not admissible in proceedings before a court, tribunal, authority or other body or person.

    b) A person cannot be compelled in the proceedings to—

        i. produce a protected record, or a copy of or extract from a protected record, or

        ii. disclose or give evidence of the contents of a protected record.

    c) In this section protected record means any of the following—

        i. the minutes of a meeting of the Assessment Committee or a sub-committee, or a copy of or extract from the minutes,

        ii. another record of the deliberations of the Assessment Committee or a sub-committee, or a copy of or extract from the record.

    d) Sub-committee means a sub-committee formed by the Assessment Committee under section 24AD.

14. Under section 5B of the Act, the Supreme Court may make an order for the extended supervision in the community of a person (an extended supervision order) if:

a) the person is an offender who is serving (or who has served) a sentence of imprisonment for a serious offence either in custody or under supervision in the community, and

b) the person is a supervised offender (within the meaning of section 5I), and

c) an application for the order is made in accordance with section 5I, and

d) the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing another serious offence if not kept under supervision under the order.

15. Under section 5C of the Act, the Supreme Court may make an order for the continued detention of a person (a continuing detention order) if:

a) the person is an offender who is serving (or who has served) a sentence of imprisonment for a serious offence either in custody or under supervision in the community, and

b) the person is a detained offender or supervised offender (within the meaning of section 13B), and

c) an application for the order is made in accordance with section 13B, and

d) the Supreme Court is satisfied to a high degree of probability that the person poses an unacceptable risk of committing another serious offence if not kept in detention under the order.

16. Similarly, Schedule 1.5 of the Bill amends the *Terrorism (High Risk Offenders) Act 2017* identically to amendments under the *Crimes (High Risk Offenders) Act 2006* to make production of the minutes and deliberations of the High Risk Offenders Assessment Committee and its sub-committees inadmissible in proceedings before a court, tribunal, authority or other body. The amendment includes a definition of a protected record under section 71B(3) to mean the minutes of a meeting of the High Risk Offenders Assessment Committee or an High Risk Offenders sub-committee, or a copy of or extract from the minutes, another record of the deliberations of the High Risk Offenders Assessment Committee or an High Risk Offenders sub-committee, or a copy of or extract from the record. Under the amendment, the provisions will state under section 71B of the Act:

a) A protected record, or evidence of the contents of a protected record, is not admissible in proceedings before a court, tribunal, authority or other body or person.

b) A person cannot be compelled in the proceedings to—

i. produce a protected record, or a copy of or extract from a protected record, or

ii. disclose or give evidence of the contents of a protected record.

c) In this section, protected record means any of the following—

i. the minutes of a meeting of the HRO Assessment Committee or an HRO sub-committee, or a copy of or extract from the minutes,

ii. another record of the deliberations of the HRO Assessment Committee or an HRO sub-committee, or a copy of or extract from the record.

d) HRO sub-committee means a sub-committee formed by the HRO Assessment Committee under the *Crimes (High Risk Offenders) Act 2006*, section 24AD.

17. Under section 63 of the Act, the High Risk Offenders Assessment Committee has the following functions:

a) to review the risk assessments of eligible offenders and make recommendations to the Commissioner of Corrective Services for the taking of action by the State under this Act in respect of those offenders,

b) to facilitate co-operation between and the co-ordination of relevant agencies in the exercise of their functions in connection with risk assessment and management of eligible offenders who could be subject to this Act (the high risk terrorism offender functions of relevant agencies),

c) to monitor and provide expert oversight of the exercise of the high risk terrorism offender functions of relevant agencies for the purpose of identifying opportunities for improved outcomes in individual cases and opportunities for systemic improvement and removal of inter-agency barriers to the effective exercise of high risk terrorism offender functions,

d) to facilitate information sharing between relevant agencies in connection with the exercise of their high risk terrorism offender functions,

e) to develop best practice standards and guidelines for the exercise by relevant agencies of their high risk terrorism offender functions,

f) to identify gaps in resourcing, service provision and training that may impact on the proper and effective exercise of high risk terrorism offender functions,

g) to conduct research into the effectiveness of this Act in ensuring the safety and protection of the community and to disseminate the results of that research,

h) such other functions in connection with the operation of this Act as the Minister may from time to time direct.

18. Under sections 20 and 34 of the Act, only the Supreme Court has jurisdiction to make an extended supervision order or continued detention order if the offender satisfies the criteria in those respective sections.

The Bill amends the *Crimes (High Risk Offenders) Act 2006* and the *Terrorism (High Risk Offenders) Act 2017* to make production of the minutes and deliberations of the Assessment Committee and its sub-committees inadmissible in proceedings before a court, tribunal, authority or other body. The amendments make these records protected records under the Acts, which

means that no person can be compelled to produce or disclose those protected records in any proceedings.

The Committee acknowledges disclosure of deliberations of the Assessment Committee could impact the quality of advice the committee can provide and compromise the personal safety of members and persons attending in an advisory capacity, as all attendees are identified in the minutes. The Committee also acknowledges that matters relating to domestic terrorism are highly confidential and should be dealt with in a manner which protects the inadvertent disclosure of that highly confidential material.

However, the Committee notes that this may deny a person access to information on legal matters regarding their continued detention or extended supervisions. The Committee also notes that these provisions may be inconsistent with the general provisions on compellability of a witness who is competent and the admissibility of business records as an exception to the hearsay rule under the *Evidence Act 1995*.

Further, the presiding Supreme Court Justice hearing an application for the extended supervision or continued detention of a person would have the discretion to make decisions on the admissibility of these minutes, including a power to rule segments of the minutes containing names of committee members inadmissible. This could be facilitated by rejecting the evidence on the basis of relevance under section 55 of the *Evidence Act 1995*.

Whilst the Committee notes the amendments are intended to protect the identity of members and the deliberations of the Assessment Committee, the Committee refers the matter to Parliament to consider whether the need to protect the identity of committee members is outweighed by the right of a person subject to an extended supervision order or continued detention order to have legally acquirable to them, whether under the principles of disclosure or by subpoena, all available material which may affect their continued detention or extended supervision.

2. Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021

Date introduced	20 October 2021
House introduced	Legislative Assembly
Minister responsible	The Hon Mark Speakman SC MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Violence

PURPOSE AND DESCRIPTION

The objects of this bill are as follows—

a) To recognise that—
   i. Every person has a right to choose whether to participate in a sexual activity, and
   ii. Consent to a sexual activity must not be presumed, and
   iii. Consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity,

b) To update the language of provisions of the *crimes act 1900* relating to sexual offences,

c) To allow, and in some circumstances require, judges to make directions to juries about consent in trials relating to certain sexual offences under the *crimes act 1900.*

BACKGROUND

1. The Bill amends the *Crimes Act 1990*, and the *Criminal Procedure Act 1986*. The Bill provides significant reform to strengthen the laws in relation to sexual offending in NSW to ensure that the prosecution of these offences is in line with community expectations, and is fair.

2. The Bill has been drafted following the NSW Law Reform Commission's review of the law of consent in relation to sexual offences.[1] This was a large-scale review that received 110 preliminary submissions, 36 submissions in response to its consultation paper and 51 submissions in response to its draft proposals. The review considered the issues that frequently arose in sexual offence trails around consent, and how to appropriately recognise the common 'freeze' response where a person freezes in fear during a sexual offence and cannot communicate their lack of consent.

[1] New South Wales Law Reform Commission, *Report 148 - Consent in relation to sexual offences,* tabled 18 November 2020 (https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20148.pdf)

3. The Bill proposed a new definition of consent at section 61HI of the *Crimes Act 1900,* which specifies that consent is a 'free and voluntary agreement' to participate in sexual activity that must be present at all times during sexual activity.

4. The Attorney-General in his second reading speech summarised the statutory objectives underpinning the section of the Bill focussed on consent:

> … to recognise that every person has a right to choose whether or not to participate in a sexual activity; consent to a sexual activity is not to be presumed; and consensual sexual activity involves ongoing and mutual communication, decision-making, and a free and voluntary agreement between the persons participating in the sexual activity. While these are not new concepts, stating them expressly in legislation enhances the communicative model of consent that is embodied in the criminal law, guiding the application of the law and aiding the understanding of consent in the general community.

5. To support these objectives, the Bill provides a non-exhaustive list of circumstances in which a person does not consent under section 61HJ of the *Crimes Act 1900*. This includes circumstances where the person participates because of coercion, blackmail or intimidation, they are unlawfully detained, they do not have the capacity to consent or they are asleep or unconscious at the time of the sexual activity. This section also provides greater clarity as to when participation in sexual activity is procured dishonestly by a false representation. In relation to this change, the Attorney-General explained that 'only very serious deceit is intended to fall within the scope of this section.'

6. The other key part of the consent reforms concerns an offenders' knowledge of consent, which is governed under proposed section 61HK of the *Crimes Act 1900*. Knowledge of non-consent can be established on any one of three grounds: actual knowledge of non-consent, recklessness as to whether they were consenting, and a test of no reasonable ground for believing they were consenting. This last test it described by the Attorney-General as a 'hybrid test' that:

> … provides an important balance between fairness to the accused in recognition of what they may have perceived at the time of sexual activity, consideration of the complainant's experience, the surrounding factual circumstances of the alleged assault, and community standards of what is reasonable in those circumstances. The objective test of reasonableness protects against the circumstances where an offender has a distorted or outdated view or belief about appropriate sexual conduct and how consent operates that is inconsistent with the standards expected by the community.

7. The Bill also proposes amendments to the *Criminal Procedure Act 1986*, including at Subdivision 3 the introduction of five new jury directions about consent, which judges can give at trial to the jury. The Attorney General stated that 'the purpose of these direction is to address common misconceptions about consent and to ensure a complainant's evidence is assessed fairly and impartially by the tribunal of fact.' The Bill provides that a judge may give a consent direction at any point during a trial, and may provide a direction as many times as the judge considers necessary.

ISSUES CONSIDERED BY COMMITTEE

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

Reversal of the onus of proof

8. Section 61HK of the Bill sets out the test for knowledge, which is the mental element the prosecution must prove beyond reasonable doubt to establish that sexual activity was not consensual. In this context, knowledge can be actual or implied knowledge that the person did not consent, or recklessly failing to ensure that the person was consenting, or having a belief that the person was consenting that was unreasonable in the circumstances. This is a broad test, that reinforces that under the Bill, consent must be expressly given.

9. Subsection 61HK(2) further clarifies that a belief that the other person was consenting is not reasonable if the accused person did not say or do anything to find out whether that person was indeed consenting.

10. However, subsection 61HK(3) clarifies that the provision does not apply if the accused person shows that at the time of the sexual activity they had a cognitive impairment (which is defined at section 23A(8) and (9) of the *Crimes Act 1900*), or a mental health impairment that was a cause of them not saying or doing anything to find out whether the person was consenting.

11. Subsection 61HK(4) puts the onus of proving that they had a cognitive or mental health impairment on the accused.

12. However, the Attorney General stated in his second reading speech that this does not operate as a full reversal of the onus of proof:

> [T]he Crown still bears the onus of proving beyond reasonable doubt that the accused person's belief in consent was not reasonable in the circumstances, anyone who seeks to rely on the exception will need to prove on the balance of probabilities that they had a cognitive impairment or mental health impairment that was a cause of them not taking steps to ascertain consent.

13. The Attorney General clarified why it was considered appropriate that the accused was required to prove their cognitive or mental health impairment:

> Imposing a legal, rather than evidential, burden on an accused is appropriate in these particular circumstances because matters relating to their mental health or cognitive impairment may fairly be regarded as peculiarly within the knowledge of the accused person.

> **The Bill inserts the requirement that the accused bears the burden for establishing (on the balance of probabilities) that they had a cognitive or mental health impairment if they wish to argue that this impairment meant that they did not have the requisite knowledge of the complainant's lack of consent.**
>
> **In regards to criminal actions, a reverse onus may undermine the presumption of innocence. The legal issues surrounding the mental element of a crime is complex, which may be exacerbated if the accused is unable to obtain legal representation and compromise their right to a fair**

trial. This is particularly relevant considering that a criminal conviction may result in a custodial sentence.

However, the Committee notes that the Crown still bears the onus of proving the mental element of knowledge. Additionally, the accused is only required to prove the presence of a relevant cognitive or mental health impairment on the balance of probabilities, which reduced the capacity for this requirement to have a prejudicial effect. The Committee also notes that the Attorney General stated that these provisions were appropriate in these particular circumstances because matters relating to the accused's mental health or cognitive impairment are peculiarly within their own knowledge. In these circumstances, the Committee makes no further comment.

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

Commencement by proclamation

1. Section 2 provides that the Bill commences (as an Act) on a day or days to be appointed by proclamation.

2. In his second reading speech, the Attorney General stated that proclamation is intended to occur approximately six months after assent, which will provide relevant agencies with the time to implement the reforms by undertaking training, and update materials and processes. The Attorney General also stated that the Department of Communities and Justice has formed an implementation and monitoring working group to oversee this process.

The Bill commences (as an Act) on a day to be appointed by proclamation, and the Attorney General advised that a proclamation will be issued approximately six months after the Bill receives assent. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes that the flexible start, and the Attorney General's proposed six month period prior to commencement may assist with the administrative arrangements required to implement the various amendments across other legislation and the related changes across agencies. Given the circumstances, the Committee makes no further comment.

3. Customer Service Legislation Amendment Bill 2021

Date introduced	20 October 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello, MP
Portfolio	Customer Service and Better Regulation

PURPOSE AND DESCRIPTION

1. The object of the *Customer Service Legislation Amendment Bill 2021* (the **Bill**) is to amend legislation administered by the Minister for Customer Service and other Acts for related purposes. This Bill amends the following legislation—

   a) *Betting and Racing Act 1998* No 114,

   b) *Casino Control Act 1992* No 15,

   c) *Conveyancing Act 1919* No 6,

   d) *Health Records and Information Privacy Act 2002* No 71,

   e) *Home Building Act 1989* No 147,

   f) *Independent Pricing and Regulatory Tribunal Act 1992* No 39,

   g) *Land and Environment Court Act 1979* No 204,

   h) *Liquor Act 2007* No 90,

   i) *Liquor Regulation* 2018,

   j) *Motor Accident Injuries Act 2017* No 10,

   k) *Motor Accidents Compensation Act 1999* No 41,

   l) *Music Festivals Act 2019* No 17,

   m) *Personal Injury Commission Act 2020* No 18,

   n) *Privacy and Personal Information Protection Act 1998* No 133,

   o) *Real Property Act 1900* No 25,

   p) *Registered Clubs Act 1976* No 31,

   q) *Statutory and Other Offices Remuneration Act 1975* (1976 No 4),

r) *Totalizator Act 1997* No 45,

s) *Workplace Injury Management and Workers Compensation Act 1998* No 86.

BACKGROUND

2. The Bill makes amendments to 19 Acts under the Customer Service portfolio to correct minor drafting errors, clarify clauses in existing Acts, introduce new minor amendments that support COVID-19 economic recovery and make consequential amendments following the establishment of the Personal Injury Commission.

3. In the second reading speech to the Bill, the Minister for Customer, the Hon. Victor Dominello MP, stated that the Bill intended to make various reforms that corrected minor drafting errors and deliver on Government commitments.

4. In particular, the Minister noted that the Bill amended the following Acts:

a) *Privacy and Personal Information Protection Act 1998*: to enable the sharing of personal information during emergencies and natural disasters and subsequent recovery operations (Schedule 1.14);

b) *Health Records and Information Privacy Act 2002*: to mirror the amendments to the *Privacy and Personal Information Protection Act* to ensure that health information can be shared between government agencies and emergency support services during an emergency (Schedule 1.4);

c) *Liquor Act 2007*: to exempt certain applications for temporary and permanent changes to the boundary of outdoor parts of a licensed premises from consultation and fee requirements and extends the operation of certain special provisions relating to the COVID-19 pandemic by 12 months until 11 December 2022 (Schedule 1.8);

d) *Motor Accidents Compensation Act 1999, Motor Accident Injuries Act 2017, Workplace Injury Management and Workers Compensation Act 1998* and *Personal Injury Commission Act 2020*: to make consequential amendments following the establishment of the Personal Injury Commissioner or otherwise support the commission in addressing COVID-19-related delays in settling disputes. The Bill also introduces amendments to allow for an extension of time to make an application for a review of a merit review decision, review of a medical assessment or appeal against a decision of a non-presidential member of the commission beyond 28 days, in accordance with the Personal Injury Commission Rules (Schedules 1.10, 1.11, 1.13, and 1.19);

e) *Statutory and Other Offices Remuneration Act 1975*: to clarify the remuneration arrangements of the Independent Review Officer consequent on the enactment of the *Personal Injury Commission Act 2020* (Schedule 1.17);

f) *Registered Clubs Act 1976*: to modernise governance arrangements and remove membership costs as part of a COVID-19 assistance package (Schedule 1.16);

g) *Conveyancing Act 1919*: to enable corporations to execute deeds in electronic form (Schedule 1.3);

h) *Home Building Act 1989*: to allow a licence holder or other persons, such as a developer, to enter into an agreement with NSW Fair Trading in lieu of prosecution or an order for rectification works that have adverse impacts on a licence holder going forward (Schedule 1.5);

i) *Betting and Racing Act 1998*: to explicitly enable regulations that require a sports controlling body to notify the Minister of a change in the sports controlling body's circumstances and enables the Minister to, by order, authorise the use of New South Wales race field information by a betting service provider or prescribed person (Schedule 1.1);

j) *Casino Control Act 1992*: to update the legislation to match current drafting conventions that clarifies that regulations may confer functions on the Minister or a delegate (Schedule 1.2);

k) *Independent Pricing and Regulatory Tribunal Act 1992*: to enable the Independent Pricing and Regulatory Tribunal to correct minor, obvious, clerical and administrative errors in certain pricing determinations made in relation to monopoly services and fares for public passenger services (Schedule 1.6);

l) *Land and Environment Court Act 1979*: to provide that appeals against a decision of a planning authority to refuse to amend a development contract under the *Community Land Development Act 2021* are class 2 proceedings in the Land and Environment Court (Schedule 1.7);

m) *Music Festivals Act 2019*: to protect officials administering the Act from personal liability (Schedule 1.12);

n) *Totalizator Act 1997*: to enable the Minister for Customer Service to exclude a person or a person belonging to a class of persons from the definition of a key employee and to enable the regulations to apply, adopt or incorporate the provisions of a document as in force at a particular time or as in force from time to time (Schedule 1.18).

ISSUES CONSIDERED BY COMMITTEE

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

Confidentiality

5. Schedules 1.4 and 1.14 of the Bill allow information sharing between government agencies and private organisations in emergency situations. They streamline the process for the provision of personal information of people affected by an emergency under the *Health Records and Information Privacy Act 2002* and the *Privacy and Personal Information Act 1988* respectively.

6. Schedule 1.14 amends the *Privacy and Personal Information Act 1988* by inserting section 27D(1) into the Act which provides that a public sector agency is not required to comply with the information protection principles in relation to the collection, use or disclosure of personal information if it is reasonably necessary to assist in a stage of an emergency.

7. In his second reading speech, the Minister stated this reform was in response to the New South Wales Bushfire Inquiry.

8. The Minister also commented on schedule 1.14, which exempts public sector agencies from compliance with information protection principles under the *Privacy and Personal Information Protection Act 1998* (section 27D):

> This amendment aims to enable the sharing of personal information during emergencies and natural disasters and subsequent recovery operations. This is a public commitment from the New South Wales Government response to the NSW Bushfire Inquiry and means that people will only have to tell their story once to receive assistance from a range of agencies, local councils and non-government organisations [NGOs] that support people during and after natural disasters and emergencies. This amendment will enable Government to coordinate supports effectively and efficiently. It will facilitate supports for people through evacuations and provide financial and material help and in the recovery phase help to rebuild their communities and their lives. We have seen the devastating speed at which the bushfires tore through New South Wales during the 2019 bushfire season. This amendment is critical to make sure we can provide comprehensive assistance to people immediately, when they need it. The amendment must be enacted before the commencement of the 2021 bushfire season to enable an effective disaster response.

9. Schedule 1.4 of the Bill identically amends the *Health Records and Information Privacy Act 2002* to enable the use of personal information between organisations in an emergency under schedule 1, clauses 10(1)(b)(b1) and 11(1)(b)(b1) of that Act. Proposed clause 10(1)(b)(b1) provides that an organisation that holds health information must not use the information for a purpose (a secondary purpose) other than the purpose (the primary purpose) for which it was collected unless it is reasonably necessary to assist in a stage of an emergency.

10. Proposed clause 11(1)(b)(b1) similarly provides that an organisation that holds health information must not disclose the information for a purpose (a secondary purpose) other than the purpose (the primary purpose) for which it was collected unless it is reasonably necessary to assist in a stage of an emergency.

11. In this context, emergency means due to an actual or imminent occurrence which endangers, or threatens to endanger, the safety or health of persons or animals in the State, or destroys or damages, or threatens to destroy or damage, property in the State, or causes a failure of, or a significant disruption to, an essential service or infrastructure, being an emergency which requires a significant and co-ordinated response.[2] For example, a fire, flood, storm, earthquake, explosion, terrorist act, accident, epidemic or warlike action.

12. Additionally, 'stage' is defined to mean a variety of processes:

    a) prevention in relation to an emergency includes the identification of hazards, the assessment of threats to life and property and the taking of measures to reduce potential loss to life or property, and

    b) preparation in relation to an emergency includes arrangements or plans to deal with an emergency or the effects of an emergency, and

[2] Note: Under the *Health Records and Information Privacy Act 2002, the* definition of 'emergency' is adopted from section 4 of the *State Emergency and Rescue Management Act 1989*.

c) response in relation to an emergency includes the process of combating an emergency and of providing immediate relief for persons affected by an emergency, and

d) recovery in relation to an emergency includes the process of returning an affected community to its proper level of functioning after an emergency.[3]

13. By way of example, the Minister stated that the reform could give government agencies and emergency support services the power to share an eligible participant's basic personal information to providers of mental health supports during the recovery phase of emergency management.

Proposed sections 27D of the *Privacy and Personal Information Protection Act 1998* and schedule 1, clauses 10(1)(b)(b1) and 11(1)(b)(b1) of the *Health Records and Information Privacy Act* 2002 outline circumstances in which personal and/or health information may be shared between organisations and public sector agencies. The ability of organisations and public sector agencies to disclose personal information could impact on the confidentiality that would otherwise be afforded to a person regarding their disclosure of personal information to an organisation. Specifically, 27D of the *Privacy and Personal Information Protection Act 1998* exempts public sector agencies from compliance with information protection principles under that statute while clauses 10(1)(b)(b1) and 11(1)(b)(b1) of the *Health Records and Information Privacy Act 2002* permit 'organisations' to do the same. Under section 4 of the *Health Records and Information Privacy Act 2002* an organisation means a public sector agency or a private sector person.

The Committee notes that the amendments 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 provision is further safeguarded by the limitation on the information being used only where the information is reasonably necessary to assist in that emergency. In addition, the information can only be used in particular statutorily defined stages of emergency, notably prevention, preparation, response or recovery stages. As such, the sharing of information between government agencies 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 Committee accordingly makes no further comment.

[3] Note: As above, the definition of 'stage' has been adopted from section 5 of the *State Emergency and Rescue Management Act 1989*.

4. Payroll Tax Amendment (Payroll Tax Waiver) Bill 2021

Date introduced	20 October 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Treasurer

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Payroll Tax Act 2007* to provide for a 50% payroll tax waiver for the 2021–2022 financial year for an employer if—

   a) wages paid or payable by the employer are $10,000,000 or less, and

   b) the employer has qualified for the 2021 COVID-19 JobSaver Payment scheme or the 2021 COVID-19 Business Grant scheme administered by Service NSW or met the 30% or greater decline in turnover test set out in the schemes, whether or not the employer has applied for a payment or grant, or met other eligibility criteria for a payment or grant, under the schemes.

BACKGROUND

c) The Bill amends the *Payroll Tax Act 2007*, which provides for the imposition of payroll tax liability upon employers in respect to certain wages and for the assessment and collection of the tax. Specifically, the Bill amends the *Payroll Tax Act 2007* to enact a temporary waiver of 50 per cent of an eligible employer's payroll tax liability in the financial year commencing on 1 July 2021.

d) In his second reading speech, the Treasurer noted that the waiver was intended to assist businesses manage the economic impact of the public health measures imposed in response to the spread of the COVID-19 Delta strain in Sydney throughout mid-2021, stating that:

The additional economic support package announced on 2 September responded to the extended lockdown by increasing the payroll tax waiver to 50 per cent… as a result of the COVID-19 public health orders.

e) The Treasurer further stated that:

> The 50 per cent payroll tax waiver is an important part of the recently announced COVID-19 business support package, which will help ensure that New South Wales remains the best place to do business in Australia. The legislative amendments in the bill will deliver tax relief to help businesses around New South Wales through the challenges posed by the COVID-19 public health orders.

f) In discussing the expected benefits of the Bill, the Treasurer noted that:

> The payroll tax waiver is expected to benefit around 8,000 businesses in New South Wales and save businesses about $410 million in payroll tax in 2021-22. The average value of the payroll tax waiver is estimated at around $50,000 per business. The combined impact, along with the option provided by the Government to defer payroll tax payments until 14 January 2022, will be that businesses can start claiming the payroll tax waiver for any payments that will be due from 14 January 2022 in relation to their 2021-22 annual payroll tax liabilities. This will help businesses to manage their cash flows and increase the chances of a strong economic recovery.

g) The waiver provided under section 99B is in broadly similar terms to the payroll tax waiver provided under section 99A, which applied for wages paid or payable in the financial year commencing on 1 July 2019. However, section 99B imposes a further eligibility criterion for employers to benefit from the waiver, by requiring that, for the waiver to apply, an employer who pays or is liable to pay Australian wages of no more than $10 million in the financial year commencing on 1 July 2021 must also have either:

   (i) qualified for the 2021 COVID-19 JobSaver Payment scheme or the 2021 COVID-19 Business Grant scheme administered by Service NSW, or

   (ii) met the 30% or greater decline in turnover eligibility test for either of the schemes, whether or not the employer has applied or a payment or grant, or met other eligibility criteria for a payment or grant, under the schemes.

h) In discussing the additional eligibility criterion, the Treasurer emphasised that the waiver is intended to benefit those businesses which can demonstrate a 30 per cent or more decline in turnover as a result of the restrictions on movement imposed by the most recent public health orders. He noted that the second limb of the criterion would require further clarification, and acknowledged that:

> … not all businesses that are eligible for the payroll tax waiver will have applied for a COVID-19 grant or payment. Revenue NSW will develop a pathway for those businesses to be able to show their turnover decline. More information about that pathway will be communicated to businesses as it becomes available.

ISSUES CONSIDERED BY COMMITTEE

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

Privacy

i) The Bill amends the *Payroll Tax Act 2007* to provide for a temporary waiver of 50 per cent of the payroll tax liability assessed for eligible employers in the financial year commencing on 1 July 2021. Specifically, the Bill inserts section 99B under Part 8, Division 2 in relation to special cases concerning the collection and recovery of payroll tax.

j) Relevantly, subsection 99B(4) entitles the Chief Executive Officer of Service NSW to disclose to the Chief Commissioner of Revenue NSW information contained in, or relating to, an employer's application for a 2021 COVID-19 JobSaver Payment or a 2021 COVID-19 Business Grant. This subsection also entitled the Chief Commissioner to receive and to use that information "in relation to the administration of a taxation law".

k) "Taxation law" is not defined in the *Payroll Tax Act 2007*, however, section 4 of the Act provides that it is to be read together with the *Taxation Administration Act 1996*, which provides for the administration and enforcement of this Act and other taxation laws.

l) Section 4 of the *Taxation Administration Act 1996* deems various statutes, including the *Payroll Tax Act 2007*, as well as regulations under those statues to be "taxation laws".

The Bill provides that the Chief Executive Officer of Service NSW may disclose information to the Chief Commissioner of Revenue NSW regarding an employer's application for a payment under the 2021 COVID-19 JobSaver Payment or 2021 COVID-19 Business Grant schemes administered by Service NSW. This information may be shared if it is in relation to the administration of a taxation law.

The Committee notes that the Bill does not specify or limit what information may be disclosed, and does not require either agency to seek consent from or notify individuals who may be affected. Further, this provision permits the sharing of information disclosed to Service NSW for the limited purpose of applying for COVID-19 relief payments on a wider and unspecified ambit, being in relation to the administration of "taxation laws", which may include statutes beyond the *Payroll Tax Act 2007*. By allowing information sharing which may include the personal information of individuals provided for a purpose unrelated to the administration taxation laws, the Bill may impact on the privacy rights of affected persons.

However, the Committee recognises that the proposed changes would facilitate eligible employers to access the waiver by enabling the Chief Commissioner of Revenue NSW, who is responsible for administering payroll tax, to receive proof of an employer's eligibility from Service NSW. The Committee also acknowledges that information sharing is limited to government agencies, which are subject to existing privacy protection laws. In these circumstances, the Committee makes no further comment.

5. Plastic Reduction and Circular Economy Bill 2021

Date introduced	20 October 2021
House introduced	Legislative Assembly
Member introducing	Felicity Wilson MP, Parliamentary Secretary for the Environment
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy and Environment

PURPOSE AND DESCRIPTION

1. The objects of the *Plastic Reduction and Circular Economy Bill 2021* (the **Bill**) are as follows:

    i. to prohibit the supply into and within the State of certain plastic items,

    ii. to specify design standards for certain items,

    iii. to establish a product stewardship framework for brand owners of certain products,

    iv. to create various offences relating to the above matters.

BACKGROUND

2. In the Second Reading Speech, Ms Felicity Wilson MP, Parliamentary Secretary for the Environment, on behalf of the Hon Matt Kean MP, Minister for Energy and Environment stated:

> The bill will give effect to key reforms outlined in the NSW Waste and Sustainable Materials Strategy 2041 and the NSW Plastics Action Plan. The bill will support a paradigm shift in the way that products are made, used and disposed of. It will help transition New South Wales towards a circular economy where materials and resources are valued and kept in the productive economy while creating jobs and protecting the environment and the community.

3. Ms Wilson further stated that the Bill followed a 2020 discussion paper regarding the environmental and economic issues caused by plastic litter and waste:

> To address these issues, in March 2020 the New South Wales Government released a discussion paper entitled *Cleaning Up Our Act: Redirecting the Future of Plastic in NSW*. More than 16,000 submissions were received in response to the paper from the community and key stakeholders, including retailers, peak bodies, local councils and community groups. Those submissions showed overwhelming support for action on plastics, including more than 98 per cent support for the phasing out of single-use plastics. Submissions also revealed strong support for product stewardship schemes, with 93 per

cent of community respondents agreeing that companies should be held more accountable for their own plastic packaging. Environmental groups, local councils, and waste and recycling groups shared that sentiment. Many businesses requested that the Government take action, such as those that identified the wider cost of inaction to our environment and economy. Businesses noted the importance of harmonising plastics rules with other Australian jurisdictions to minimise the regulatory burden for companies that operate Australia wide.

4. One of the targets under the NSW Waste and Sustainable Materials Strategy 2041: Stage 1 – 2021-2027 and the NSW Plastics Action Plan is to phase out problematic and unnecessary plastics by 2025.[4]

ISSUES CONSIDERED BY COMMITTEE

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

Extraterritorial operation of Act

5. Section 6 of the Bill states that, if there is an extraterritorial impact, this Act may apply to:

    i. a person and premises whether or not they are outside the State, and

    ii. a supplier whether or not they are carrying on a business, or are a party to a contract made, outside the State.

6. 'Extraterritorial impact' means a matter or thing, whether or not it occurs or is located outside the State, that:

    i. affects, or is likely to affect, the environment of the State, or

    ii. relates to the supply, or the likely supply, into or within the State of a regulated item, or

    iii. relates to a matter or thing that is, or is likely to be, an offence under this Act or the regulations.

7. 'Regulated item' means an item that the EPA (as the regulator) reasonably suspects is:

    i. a prohibited plastic item,

    ii. an item for which a design standard is specified for the item in Schedule 1, Part 2, or prescribed the regulations, or

    iii. a regulated product, being a product or part of a product prescribed by the regulations for the purposes of Part 3 (product stewardship requirements and targets).

8. The Bill allows the EPA to enter premises under section 45. Section 45 provides that the EPA may, by its employees, agents or contractors, enter premises at a reasonable time if the EPA reasonably suspects a person has not complied with a compliance notice. A

[4] State of New South Wales, Department of Planning, Industry and Environment, *Waste and Sustainable Materials Strategy 2041 – Frequently asked questions*, 2021.

compliance notice may be issued under section 36 where the EPA reasonably suspects a person has supplied, is supplying or is likely to supply from premises or otherwise than from premises:

i. a prohibited plastic item, or

ii. an item that does not comply with a design standard specified for the item in Schedule 1, Part 2, or prescribed the regulations in relation to the item.

Section 6 of the Bill provides that the Act may apply to a person or premises outside the State or a supplier carrying on a business or party to a contract made outside the State if there is an 'extraterritorial impact', which:

- **affects, or is likely to affect, the environment of the State,**
- **relates to the supply or likely supply into or within the State of a regulated item, or**
- **relates to a matter or thing that is or is likely to be an offence under the Act or regulations.**

This extends the legislative jurisdiction of the Act beyond the State of New South Wales. The Committee generally comments where legislation may have extraterritorial effect as it may create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory.

However, the Committee recognises the provision helps to protect the New South Wales environment, including by regulating the supply into the State of regulated items and enforcing offences under the Act which relate to, for example, supply of prohibited items, compliance with product stewardship requirements for regulated products and reporting requirements.

It appears that the Bill may, where there is an extraterritorial impact, permit the EPA to enter a premises outside of the State if it reasonably suspects a person has not complied with a compliance notice. A compliance notice may be issued where the EPA reasonably suspects a person has supplied, is supplying or is likely to supply from premises a prohibited plastic item or item that does not comply with a design standard under the Act. The Committee notes the potentially broad application of this provision. The Committee refers the scope of the extraterritorial operation of the Act to the Parliament for its consideration.

Real property rights

9. The Bill allows the EPA, as the regulator, to enter premises and land in certain circumstances.

10. Section 29 provides that the EPA may enter, or authorise another person to enter, premises to cause an action covered by a financial assurance to be carried out if the brand owner fails, in the opinion of the EPA, to carry out the action.

11. Section 45 also permits the EPA to enter land. Subsection (1) states that, if a person does not comply with a compliance notice, the EPA may take action to cause the compliance notice to be complied with by the EPA, its employees or an agent or contractor under its direction. Subsection (2) provides that, without limiting subsection (1), the EPA may, by its employees, agents or contractors, enter premises at a reasonable time if the EPA reasonably suspects a person has not complied with a compliance notice.

12. Under section 45, entry extends to entering other premises and authorises entry by foot, a motor vehicle or other vehicle in any way. Entry may be effected by the EPA with the number of authorised officers or police officers as the EPA considers necessary, and the use of reasonable force by police officers.

13. It is an offence for a person to wilfully delay or obstruct the EPA or another person authorised by the EPA from taking action under section 45. The maximum penalty for an individual is 100 penalty units ($11 000) and, for a continuing offence, a further 10 penalty units ($1100) for each day the offence continues.

14. In the Second Reading Speech, Ms Wilson, on behalf of the Hon Matt Kean, provided that the bill draws on the investigation provisions within the *Protection of the Environment Operations Act 1997* (**POEO Act**), 'equipping the EPA with the necessary tools to regulate the frameworks'. The POEO Act also includes the power of the regulator to enter premises, including to:

    i. carry out any work or program covered by a financial assurance where, in the opinion of the authority, the holder or former holder of an environmental protection licence has failed to do so in accordance with the licence's conditions, and

    ii. to exercise its functions in relation to environment protection notices.

15. The Bill also amends section 186 of the POEO Act to extend the application of the investigative powers under Chapter 7 of the POEO Act to the Bill and its regulations. Chapter 7 permits an authorised officer to enter and search premises with the authority of a search warrant and do things at premises (including to require records to be produced for inspection and seize anything the authorised officer has reasonable grounds for believing is connected with an offence against the Act or regulations). Powers may be exercised under Chapter 7 to:

    i. determine whether there has been compliance with or contravention of the Act or the regulations or any notice or requirement issued or made under the Act,

    ii. obtain information or records for purposes connected with administration of the Act,

    iii. generally for administration the Act and protecting the environment.

    The Bill permits the EPA, as the regulator, to enter premises and land in certain circumstances. Specifically, to:

a) cause an action covered by a brand owner's financial assurance to be carried out if the brand owner fails, in the opinion of the EPA, to carry out the action, or

b) take action to cause a compliance notice to be complied with by the EPA, its employees or an agents or contractor under its direction, where the EPA reasonably suspects a person has not complied with a compliance notice. In this case, entry may be effected with police who are permitted to use reasonable force. It is an offence for a person to wilfully delay or obstruct the EPA or another person authorised by the EPA from taking this action.

It also permits authorised officers to enter premises for investigative purposes as set out in Chapter 7 of the *Protection of the Environment Operations Act 1997*, the application of which is extended to the Bill and its regulations.

The Committee notes that, while these powers may assist the EPA in regulating and investigating breaches of the statutory framework, they interfere with a person's real property rights.

The Committee notes that the threshold for entry to land under paragraphs a) and b), being the 'opinion' of the EPA or 'reasonable suspicion' respectively, is low. However, actions permitted under the financial assurance and required by the compliance notice may limit the circumstances in which the EPA can exercise these powers, and its actions after entering land. These powers also appear to be generally aligned with the powers of the regulator to enter premises for similar purposes under the *Protection of the Environment Operations Act 1997*. The Committee notes certain safeguards which may apply to the statutory power of entry, such as the requirement a warrant be obtained and to take care, are not included in these circumstances.

The Committee also notes that the Bill separately amends the *Protection of the Environment Operations Act 1997* to allow additional powers of entry under Chapter 7 of that Act. However, search powers under that Act require the authority of a search warrant.

Therefore, the Committee refers to the Parliament the question of whether the new search powers under the Bill includes adequate safeguards to protect an individual's real property rights.

Right to liberty and freedom from arbitrary detention

16. The Bill also amends section 186 of the POEO Act to extend the application of the investigative powers under Chapter 7 of the POEO Act to the Bill and its regulations, with a reference to the POEO Act or its regulations to be read as a reference to the Bill and its regulations.

17. Section 204 of the POEO Act includes the power of authorised officers to demand a name and address:

    i. an authorised officer may require a person whom the authorised officer suspects on reasonable grounds to have offended or to be

offending against this Act or the regulations to state their full name and residential address.

ii. a person may, 'without any other warrant than this Act', be apprehended by the authorised officer and taken before a Magistrate or court officer to be dealt with according to law if, after being required to do so, they refuse to state their name or address or state a name or address that in the opinion of the authorised officer is false.

iii. the Magistrate or court officer may make a bail decision under the *Bail Act 2013* in respect of the person. If the person has not been charged with an offence, the *Bail Act 2013* applies as if the person were accused of an offence. For the purposes of applying the *Bail Act 2013*, a court officer (being a registrar of a court or an authorised employee of the Attorney General's Department) has the same functions as an authorised justice under that Act.

18. Section 7 of the *Bail Act 2013* provides that bail can be granted under that Act to a person accused of an offence. 'A person accused of an offence' or an 'accused person' is defined in section 4 of that Act to include the following:

i. a person who has been charged with or convicted of an offence,

ii. a person whose conviction for an offence is stayed,

iii. a person in respect of whom proceedings on an appeal against conviction or sentence for the offence are pending,

iv. a person in respect of whom a new trial has been ordered to be held for an offence.

19. Section 211(1) states that a person who, without lawful excuse, neglects or fails to comply with a requirement under Chapter 7 is guilty of an offence. It is also an offence under section 211(2) for a person to furnish information or do anything in purported compliance knowing that it is false or misleading in a material respect. Section 204 provides that the maximum penalty for an offence under section 211 in connection with a requirement under section 204 is 100 penalty units ($11 000).

The Bill extends the application of investigative powers under Chapter 7 of the *Protection of the Environment Operations Act 1997*. Under Chapter 7 a person may, 'without another warrant than this Act', be apprehended by an authorised officer and taken before a Magistrate or court officer to be dealt with if the person, after being required to do so, refuses to state their name or residential address or states a name or address that in the opinion of the authorised officer is false. It provides that a Magistrate or court officer may make a bail decision under the *Bail Act 2013* about the person and, if the person has not been charged with an offence, the *Bail Act 2013* applies as if the person were accused of an offence.

The Bill appears to permit an authorised officer to apprehend a person pursuant to a warrant that is not subject to any external oversight, and

potentially where a person provided their name and address in accordance with the requirements of the Act, but in the opinion of the authorised officer the name or address provided is false. If the name or address provided by the person is not in fact false, it is unclear if the person is guilty of an offence. The authorised officer's opinion is not subject to a requirement of 'reasonableness'.

It also provides that a Magistrate or court officer (being a registrar of a court or an authorised employee of the Attorney General's Department) may make a bail decision as if the person were accused of an offence, even where they have not been charged. The Committee is concerned that a person brought before a Magistrate or court officer, but not charged with an offence, may not fit within the definition of an 'accused person' or 'person accused of an offence' within the meaning of the *Bail Act 2013*. Specifically, because that person has not been charged with or convicted of an offence. Notwithstanding, a bail decision may result in a person being detained for an uncertain period of time given the delays to matters being listed, or released with or without conditions.

The Committee considers that apprehension and/or detention under Chapter 7 may be considered arbitrary or inappropriate, particularly where a person has not been charged with an offence but the *Bail Act 2013* applies as if the person were accused of an offence.

The Committee considers that the right to liberty and freedom from arbitrary detention are fundamental human rights and that any legislation limiting these rights should only do so to the extent the limitation is compelled by and necessary to meet public interest objectives. Further, that such legislation must include adequate safeguards to prevent undue trespass on individual rights. In the circumstances, the Committee refers this issue to the Parliament for its consideration.

Self-incrimination

20. Section 17 requires a brand owner to provide a report including the information prescribed by the regulations to the EPA, as the regulator, within three months of the end of the financial year. Failure to do so results in a maximum penalty for an individual of 1000 penalty units ($110 000) and, for a continuing offence, a further 100 penalty units ($11 000) for each day the offence continues.

21. That section states that information provided to the EPA under this section may be taken into consideration by the EPA and used for the purposes of the Act, and that the information is admissible in evidence in a prosecution of the brand owner for an offence against the Act or the regulations, whether or not the information may incriminate the brand owner.

22. The Bill also amends section 186 of the POEO Act to extend the application of the investigative powers under Chapter 7 of the POEO Act to the Bill and its regulations, with a reference to the POEO Act or its regulations to be read as a reference to the Bill and its regulations. Chapter 7 includes the power the EPA, a regulatory authority (other than the EPA) and authorised officers to:

    i. compel information and records,

ii. require answers to questions, and

iii. demand a name and address of a person. As set out above, non-compliance with this demand or providing a name and address which, in the opinion of an authorised officer, is false may result in a person being apprehended and taken before a Magistrate or court officer, who may make a bail decision about the person.

23. Section 212 of the POEO Act states that a person is not excused from a requirement to furnish records or information or to answer a question on the ground that the record, information or answer might incriminate the person or make the person liable to a penalty. However, any information furnished or answer given by a natural person in compliance with a requirement is not admissible in evidence against the person in criminal proceedings (except proceedings for an offence under Chapter 7) if:

i. the person objected at the time to doing so on the ground that it might incriminate the person, and

ii. the person was not warned on that occasion that the person may object on the ground it might incriminate them.

24. Notwithstanding:

i. any record furnished by a person in compliance with a requirement is not inadmissible in evidence against the person in criminal proceedings on the ground that the record might incriminate them, and

ii. further information obtained as a result of a record or information furnished or of an answer given in compliance with a requirement is not inadmissible on the ground that the record or information had to be furnished or the answer had to be given, or that the record or information furnished or answer given might incriminate the person.

Section 17 of the Bill abrogates the privilege against self-incrimination by providing that a brand owner must provide prescribed information to the EPA in an annual report. A failure to do so is a strict liability offence incurring a maximum penalty for an individual of 1000 penalty units ($110 000) and, for a continuing offence, a further 100 penalty units ($11 000) for each day the offence continues. The requirement to provide prescribed information under pain of penalty appears to abrogate the privilege against self-incrimination.

The EPA may consider this information for the purposes of the Act, and the information is admissible in evidence in a prosecution of the brand owner for an offence against the Act or regulations, whether or not the information may incriminate the brand owner (known as 'use immunity').

The privilege is also abrogated by the extension of investigative powers included in Chapter 7 of the *Protection of the Environment Operations Act 1997* (POEO Act) to the Bill, under which a person is not excused from providing information or records or answering a question on the ground it might

incriminate them or make them liable to a penalty. Information provided or answers given by a natural person is not admissible in criminal proceedings against them (except for proceedings for an offence under Chapter 7) if they object at the time because doing so might incriminate them, or were not told they could object. This conditional use immunity safeguards the rights of natural persons. However, it does not appear to extend to records provided or further information obtained.

The Committee acknowledges that the privilege against self-incrimination is not absolute and abrogation may be justified in certain circumstances, including where the information compelled concerns an issue of public importance significantly impacting the community, or information is provided as part of a regulatory scheme voluntarily participated in and is part of a mechanism for ensuring compliance.[5] The importance of environmental protection from plastic waste and regulation of industry under the proposed statutory regime may be considered sufficient justification.

However, it also notes that the inclusion of use immunity in a statute abrogating the privilege acts as an important safeguard for individual rights. The exclusion of this immunity by section 17 of the Bill and limited application of the immunity under the POEO Act's provisions appears to exacerbate the abrogation of the privilege and impede individual rights.

The privilege against self-incrimination is a well-established legal principle. The Committee refers to the Parliament the question of whether the abrogation of this privilege and exclusion of use immunity is appropriate, necessary and reasonable in the circumstances.

Strict liability offences

25. The Bill includes various strict liability offences for individuals. These include, for example, that it is an offence under:

    i. section 9(1), for a person, while carrying on a business, to supply a prohibited item to another person, resulting in a maximum penalty of 100 penalty units ($11 000),

    ii. section 16(1), for a brand owner not to prepare, keep and make records available for inspection in accordance with the requirements of section 16, resulting in a maximum penalty of 1000 penalty units ($110 000) and for a continuing offence, a further 100 penalty units ($11 000) for each day the offence continues,

    iii. section 37, for not complying with a stop notice given by the EPA, resulting in maximum penalty of 500 penalty units ($55 000) and, for a continuing offence, a further 50 penalty units ($5500) for each day the offence continues,

[5] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Report 129)*, 12 January 2016, Chapter 11; Queensland Law Reform Commission, *The abrogation of the privilege against self-incrimination*, Report No 59, December 2004, pp 54-55.

iv. section 38, for not complying with a compliance notice (other than a stop notice) given by the EPA, resulting in a maximum penalty of 100 penalty units ($11 000) and, for a continue offence, a further 10 penalty units ($1100) for each day the offence continues,

v. section 40(7), for not paying the fee for the recovery of administrative costs for preparing and giving notices costs within the time provided, resulting in a maximum penalty of 200 penalty units ($22 000), and

vi. under section 50(1), to provide information in connection with the supply of a prohibited plastic item or an item for which a design standard is included in the Act or regulations that is false or misleading in a material particular, except where the person provides they exercised due diligence to prevent the commission of the offence or the circumstances of a defence prescribed by the regulations This offence results in a maximum penalty of 100 penalty units ($11 000).

26. Section 47 of the Bill also provides that the maximum penalty for an offence against section 9(1), 37, 38 or 50(1) is increased to double the specified penalty if the prosecution proves the person who committed the offence was, at the time the offence was committed, a relevant person.

27. A 'relevant person' means a person who is a manufacturer or producer of the item, or supplies the item while carrying on a business as a wholesaler or distributor.

28. In the Second Reading Speech, Ms Wilson, on behalf of the Hon Matt Kean, stated:

> The bill also imposes a tiered penalty structure for these offences. This tiered penalty structure places higher penalties on manufacturers, producers and distributors of prohibited items. This reflects their important role in the supply chain and the potential impacts when supplying prohibited items at scale.
>
> **The Bill creates various strict liability offences and prescribes maximum penalties in relation to those offences. The maximum penalty doubles in relation to offences against sections 9(1), 37, 38 and 50(1) where the prosecution proves the person who committed the offence was, at the time the offence was committed, a manufacturer, producer, wholesaler or distributor of items. The purpose is to acknowledge the importance of their role in the supply chain and the potential impacts of supply by these persons.**
>
> **The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is a relevant factor in establishing liability. That is, the person does not need to have intended not to comply with the requirements of the section to be held liable for a penalty.**
>
> **The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, the maximum penalties for the offences are monetary, not custodial. In these circumstances, the Committee makes no further comment.**

Right to a fair trial – penalty notice offences

29. The Bill amends the *Protection of the Environment Operations (General) Regulation 2021* to create penalty notice offences for contraventions of the Bill's provisions and prescribes the amounts payable. Penalties notice offences are prescribed where an individual is guilty of an offence under:

    i. section 9(1), for supply of a prohibited item to another person while carrying on a business, incurring a penalty of $1100,

    ii. section 37, for not complying with a stop notice, incurring a penalty of $1100,

    iii. section 38, for not complying with a compliance notice (other than a stop notice), incurring a penalty of $550,

    iv. section 40(7), if they do not pay the fee for the recovery of administrative costs for preparing and giving notices costs within the time provided, incurring a penalty of $550, and

    v. section 50(1) for providing information in connection with the supply of a prohibited plastic item or an item for which a design standard is included in the Act or regulations that is false or misleading in a material particular while carrying on a business, except where a defence is established. This incurs a penalty of $1100.

30. A higher penalty applies if the person who commits a penalty notice offence under sections 9(1), 37, 38 or 50(1) is a 'relevant person'. Specifically, the penalty incurred by a breach of sections 9(1), 37 and 50(1) is $2750, and the penalty for a breach of section 38 is $1100.

31. Section 47 defines a 'relevant person' as person who is a manufacturer or producer of an item, or who supplies the item while carrying on a business as a wholesaler or distributor. Under that section, the maximum penalty for an offence against the specified sections of the Act increases if the prosecution proves the person who committed the offence was, at the time the offence was committed, a relevant person.

32. As stated above, the Second Reading Speech indicates that the imposition of higher penalties on manufacturers, producers and distributors of prohibited items reflects their important role in the supply chain and the potential impacts when supplying prohibited items at scale.

    The Bill creates penalty notice offences relating to supply of a prohibited item, non-compliance with a stop notice or compliance notice, non-payment of a fee recovering administrative costs and providing false or misleading information. Higher penalties apply for certain offences where the offence was committed by a 'relevant person', being a manufacturer, producer, wholesaler or distributor of an item.

    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. Additionally, it appears a higher penalty can be imposed on a person that is alleged to be 'relevant person' without the need for it to be proven that they were a relevant person at the time the offence was committed, as the prosecution is required to prove under section 47.

However, the Committee recognises that an individual (including a relevant person) retains the right to elect to have their matter heard and decided by a court. It also acknowledges that 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. In these circumstances, the Committee makes no further comment.

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

Referral to the regulations

33. The Bill refers a number of matters to the regulations including, for example:

    i. the circumstances of a defence to a prosecution under section 50, for providing false or misleading information in connection with supply,

    ii. a person authorised for the purposes of section 62, under which the Minister may delegate the exercise of a function of the Minister under the Act or regulations, and

    iii. circumstances included and/or excluded from the certain definitions in Schedule 4, including the definition of 'plastic', 'plastic item', 'single-use' and 'supply'.

34. Section 68(4) also provides that the regulations may create offences punishable by a penalty of no more than 200 penalty units ($22 000) for an individual and 400 penalty units ($44 000) for a corporation.

The Bill refers various matters to the regulations including, for example:

- **circumstances of a defence to prosecution for an offence,**
- **authorised persons to whom the Minister's functions under the Act may be delegated, and**
- **circumstances included and/or excluded from defined terms.**

The general regulation-making power also provides that the regulations may create offences with monetary penalties of no more than 200 penalty units ($22 000) for an individual and 400 penalty units ($44 000) for a corporation.

The Committee generally prefers that that such matters be included in the primary rather than the subordinate legislation in order to facilitate an appropriate level of parliamentary oversight. It acknowledges that the inclusion of matters in the regulations builds flexibility into the regulatory framework. However, certain matters referred are significant to the interpretation of the

Bill, offences under it and the proper delegation of legislative power. The Committee therefore refers this issue to the Parliament.

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

Matters published in NSW Government Gazette

35. Various matters in the Bill are determined by the Minister and published in the NSW Government Gazette. For example:

    i. notification of the Minister's opinion that a plastic item is unnecessary or problematic, which is one of the requirements of a plastic item being a 'prohibited plastic item' under section 7(a). The other requirement is that the item be prescribed in the regulations or specified in Schedule 1, Part 1,

    ii. order of a product stewardship target set by the Minister under section 14, and

    iii. notification of exemptions granted, varied or revoked by the EPA from specified provisions of the Act or regulations under section 61.

36. Section 66 legislates an eight-week consultation period by the Minister before recommending the making of a regulation that prescribes a prohibited plastic item. A provision of the regulation prescribing a prohibited plastic item must not commence earlier than six months after the regulation is published (although this requirement may be dispensed with if the Minister is satisfied doing so is in the public interest or the making of the regulation is urgent).

37. In the Second Reading Speech, Ms Wilson, on behalf of the Hon Matt Kean, provided that the broad exemption framework will be tailored to the specific needs of the community. Additionally, in relation to single-use plastic drinking straws, that the government will work with key stakeholders on an exemption framework and, prior to straws being phased out, exemptions will be published and a comprehensive business education and engagement campaign will be implemented.

38. Ms Wilson also stated that the New South Wales framework will closely align with the exemption provisions implemented in South Australia. The South Australian framework currently provides exemptions for single-use plastic drinking straws and single-use plastic spoons.

The Bill includes various matters which are determined by the Minister and published in the NSW Government Gazette, including in relation to: the opinion of the Minister that a plastic item is unnecessary or problematic, a product stewardship target and exemptions from provisions of the Act or its regulations.

The Committee notes that including these matters in the Gazette means they are not subject to parliamentary scrutiny. However, the Committee notes that:

- **the Minister's opinion that a plastic item is unnecessary and problematic is one requirement of an item being classified as a**

prohibited plastic item, with the other requirement being that it is prescribed by the regulations or specified in Schedule 1 of the Act. Where the item is prescribed by the regulations, an eight-week consultation period is mandated and commencement is typically delayed,

- **the government has indicated it will engage with and educate key stakeholders in relation to exemptions.**

It therefore appears that significant consultation will be undertaken with key stakeholders in relation to certain matters that will be published in the NSW Government Gazette. In the circumstances, the Committee makes no further comment.

Incorporation of documents into regulations

39. Section 68(5) states that the regulations may incorporate by reference, wholly or in part and with or without modification, standards, rules, codes, specifications, methods or another document, as in force at a particular time or from time to time, prescribed or published by an authority or body, whether or not it is a New South Wales authority or body.

The Bill allows the regulations to incorporate external documents, as in force at a particular time or from time to time, published by any authority or body. This may result in the regulations incorporating documents which are not subject to parliamentary scrutiny. The Committee refers this issue to the Parliament for its consideration.

6. Road Transport Amendment (Prohibition of U-turns and 3-point Turns in School Zones) Bill 2021

Date introduced	25 October 2021
House introduced	Legislative Assembly
Member responsible	Mr Hugh McDermott MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of the Bill is to amend the *Road Rules 2014* to prohibit the making of U-turns and 3-point turns in school zones during school zone times.

BACKGROUND

2. The Bill amends the *Road Rules 2014*, which set out the road rules that are applicable in New South Wales. These are based on the *Australian Road Rules* which ensures that the road rules applicable in this State are substantially uniform with road rules applicable elsewhere in Australia. The *Road Rules 2014* also provide for additional rules which are not included in the *Australian Road Rules*.

3. In the second reading speech to the Bill, Mr McDermott stated that the Bill aimed to protect children in school zones and other roads in close proximity to schools:

Children are the most particularly vulnerable pedestrians. Children are smaller, difficult to see and, at times, can act unpredictably. Every year children are killed or seriously injured by being struck by a moving vehicle. While the majority of these accidents occur on major roads, a significant number occur at low speed at suburban homes or in non-traffic locations, like a shopping centre car park, and slow roads, such as schools zones or in near proximity to schools. According to data from Transport for NSW, from 2016 to 2020 two children were killed and 112 injured, with 36 serious injuries, while walking in active school zones. That is two deaths, 36 serious injuries and 76 additional injuries too many. The safety of our children must remain a top priority, and more needs to be done to improve the safety of our children.

4. Mr McDermott further stated that the Bill achieved this by prohibiting U-turns and 3-point turn within school zones, which is not specifically prohibited by the Road Rules. For example, Mr McDermott noted that the current road rules do include rules that outline where a driver may not perform a U-turn, however these do not cover all situations involving a school zone and may create ambiguity:

> It is reasonable to view a three-point turn as falling within the definition of a U-turn. This is suggested by there being no separate definition or reference to a three-point turn in the Road Rules 2014. However, it is possible to argue that a three-point turn is not a U-turn because it takes two turns rather than "a turn" or "the turn" for a driver's vehicle to face "in approximately the opposite direction from which it was facing, immediately before the turn was made".

> Alternatively, a person crossing two continuous parallel lines and using a driveway to perform a three-point turn in front of a school commits an offence under rule 132 (2). It requires a driver on a road with a dividing line to drive to the left of the dividing line except as permitted under rule 132 (2), which enables a driver to cross two continuous parallel lines to leave a road by driving on to or entering it in any way. The circumstances in which a driver can perform a U-turn are covered in rule 134. A driver may drive to the right of the dividing line to overtake another vehicle to enter or leave a road or to move from one part of the road to another. Rule 139 (2) deals with driving to the right of the dividing line to avoid an obstruction. Drivers are also permitted to cross a single dividing line to enter or leave a road.
>
> The situations I have just mentioned where a driver is permitted to make a U-turn could apply in school zones and, therefore, make it currently legal to perform dangerous manoeuvres during school times in some circumstances. It is very confusing to drivers, police officers and local council traffic enforcement officers when the rules relating to three-point turns are ambiguous. To understand whether a particular manoeuvre is legal, a driver, a police officer, or a local council traffic enforcement officer should not have to analyse and interpret the road rules to understand if a three-point turn is covered under the definition of a U-turn. Therefore, it is necessary to insert a new road rule which provides clarity on all of the comments I have just discussed.

ISSUES CONSIDERED BY COMMITTEE

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

Strict liability

5. The Bill amends the *Road Rules 2014* to insert Rule 42-1, which provides that a driver must not make a U-turn or perform a 3-point turn on a road in a school zone during the times indicated on the school zone sign on a road, or the road, into the zone.

6. Contravention of this provision carries a maximum penalty of 20 penalty units ($2 200).

7. Sub rule 42-1(2) provides that this rule does not apply in cases where complying with the rule is unsafe or impractical, or if there is a school traffic management plan for the school zone that permits making U-turns and performing 3-point turns. The rule also does not apply where U-turns and 3-point turns are permitted by a written agreement between the Local Area Commander within the NSW Police Force for the local area the school is in, and the school administration authority.

> **The Bill amends the Road Rules 2014 to prohibit U-turns and 3-point turns within school zones. The maximum penalty for not complying with this provision is 20 penalty units ($2 200). The Committee notes that this amounts to a strict liability offence. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mens rea or mental element is a necessary part of liability for an offence.**
>
> **However, the Committee notes that strict liability offences are not uncommon in regulatory settings, such as road rules, to promote compliance and strengthen offence provisions. The Committee also notes that the maximum penalty is not overly significant and are monetary only, not custodial. The Bill also contains additional provisions that permit U-turns and 3-point turns if there are specific school traffic management plans for the school zone where it is safe to do so, or if there is a written agreement between the NSW Police**

Local Area Commander and the school administration authority. In these circumstances, the Committee makes no further comment.

Part Two – Regulations
1. Animal Research Regulation 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Adam Marshall MP
Portfolio	Agriculture and Western New South Wales

PURPOSE AND DESCRIPTION

1. The object of the *Animal Research Regulation 2021* (the **Regulation**) is to remake, without substantial changes, the *Animal Research Regulation 2010*, which was repealed on 1 September 2021 by section 10(2) of the *Subordinate Legislation Act 1989*.

2. The Regulation provides for the following:

   a) the Code of Practice relating to the conduct of animal research and the supply of animals for use in animal research,

   b) the accreditation and licensing of persons and organisations that conduct animal research or supply animals,

   c) certain exemptions from requirements relating to the conduct of animal research and the supply of animals,

   d) the qualifications of members of the Animal Research Review Panel,

   e) the constitution and procedure of animal care and ethics committees and subcommittees,

   f) the form of identification to be carried by inspectors,

   g) the records to be kept by persons or organisations conducting animal research,

   h) the payment, waiver and refund of fees, and

   i) savings and formal matters, including the repeal of the Regulation on 1 September 2023.

3. The Regulation is made under sections 4, 6, 13, 15, 18, 25A, 25B, 25C, 37, 49, 56A and 62 (general regulation-making power) of the *Animal Research Act 1985* (the **Act**), as well as the definitions of 'corporation' and 'exempt animal'.

ISSUES CONSIDERED BY COMMITTEE

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

Strict liability offences

4. The following clauses of the Regulation include strict liability offences, with a maximum penalty of 10 penalty units ($1100) attaching for non-compliance with each clause:

    a) Clauses 7 and 14 (respectively) require:

        i. a corporation that is an accredited research establishment, and

        ii. the holder of an animal supplier's licence,

    to give the Secretary written notice with details of a change in particulars within 30 days after the change occurring. Specifically: change in directors of a corporation, change in the membership of the ethics committee and conviction for a prescribed offence.

    b) Clause 10 requires the holder of an animal research authority convicted of a prescribed offence to give written notice to the Secretary or accredited research establishment, whichever issued the authority, within 30 days of the conviction or imposition of a penalty, whichever is the later.

    c) Clause 24(2) requires accredited research establishments (other than school-based establishments) and holders of animal research authorities to send a report to the Secretary by 31 March each year on its work and activities during the 12 month period ending 31 December in the previous year.

5. Clause 3 of the Regulation defines a 'prescribed offence' as an offence:

    a) under the provisions of or made under the Act, the *Exhibited Animals Protection Act 1986*, the *National Parks and Wildlife Act 1974* or the *Prevention of Cruelty to Animals Act 1979*,

    b) under the provisions of or made under the *Biosecurity Act 2015*, relating to a dealing with a non-indigenous animal,

    c) committed in NSW for which the penalty or maximum penalty is imprisonment of 2 years or more, and

    d) outside of NSW that, if committed in NSW, would have been an offence referred to in paragraphs (i) or (ii) above.

6. Section 62(3) of the Act states that a regulation may create an offence punishable by a penalty not exceeding 10 penalty units ($1100).

    The *Animal Research Regulation 2021* includes strict liability offences, each with a maximum penalty of 10 penalty units ($1100). The offences relate to providing written notice of changes in particulars (including a change in directors, change in membership of the ethics committee and conviction for a

prescribed offence) and annual reporting. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. Additionally, the Committee generally prefers provisions creating offences to be included in the primary legislation in order to facilitate an appropriate level of parliamentary scrutiny.

The Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance. Additionally, that attaching penalties to notice and reporting requirements (including providing notice of a conviction for a prescribed offence) will help to maintain accurate records and, in accordance with the object of the *Animal Research Act 1985*, the welfare of animals used in connection with research. The primary legislation, which has been subject to parliamentary scrutiny, also provides for the prescription of offences by regulation and the maximum penalty which attaches. 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

Incorporation of code not subject to disallowance

7. The Code of Practice, meaning the Code of Practice referred to in section 4 of the Act, forms an integral part of the animal research statutory framework. In particular, a complaint that animal research or supply is being carried out in contravention of the Code of Practice may result in cancellation or suspension of a research establishment accreditation, an authority (to carry out animal research) or a licence (to supply animals for use in connection with animal research). The Code can also confer or impose functions on animal care and ethics committees under section 14, and the Minister and Animal Research Review Panel must have regard to the Code when considering applications for concurrence under section 26.

8. Section 9 provides that a function of the Animal Research Review Panel is investigation and evaluation of the efficacy of the Code of Practice in regulating the conduct of animal research and the supply of animals for use in connection with animal research. The Animal Research Review Panel is constituted by section 6 of the Act and comprises 12 members appointed by the Minister, including ministers, an officer of the National Parks and Wildlife Service and persons nominated by specified stakeholder organisations.

9. Regarding what comprises the Code of Practice, section 4 of the Act states that:

    a) the regulations may prescribe a Code of Practice with respect to the conduct of animal research and the supply of animals for use in connection with animal research, and

    b) for the purposes of prescribing such a Code, the regulations may apply, adopt or incorporate by reference, wholly or in part and with or without modification, any standards, rules, codes, specifications or methods as in force at a particular time or as in force from time to time, prescribed or published by any authority or body, whether or not it is a NSW authority or body.

10. Clause 4 of the Regulation prescribes the Australian Code as a Code of Practice, along with Schedule 1 of the Regulation (which itself incorporates provisions of the Australian Code relating to the functions and procedures of a school ethics committee).

11. The 'Australian Code' (being the document entitled *Australian code for the care and use of animals for scientific purposes*, as in force from time to time) is published by the National Health and Medical Research Council to promote the ethical, humane and responsible care and use of animals for scientific purposes. This includes the use of animals in research, teaching associated with an educational outcome in science, field trials, product testing, diagnosis and production of biological products and environmental studies.

12. The Regulation requires compliance with certain provisions of the Australian Code regarding particulars to be included in an application for an animal research authority and the membership of ethics committees.

The Animal Research Regulation 2021 incorporates the document published by the Australian government entitled *Australian code for the care and use of animals for scientific purposes* as in force form time to time (Australian Code) as a Code of Practice under the *Animal Research Act 1985.* Notably, a complaint regarding contravention of this Code can result in suspension or cancellation of a research establishment accreditation, an authority (to carry out animal research) or a licence (to supply of animals for use in connection with animal research). The Regulation also requires compliance with specific provisions of the Australian Code.

There is no requirement that the Australian Code be tabled in Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. However, Schedule 1 of the Regulation requires compliance with certain Australian Code provisions, which will result in scrutiny of at least some of the Code's provisions.

The Committee notes that a function of the Animal Research Review Panel is to investigate and evaluate the efficacy of the Code of Practice in regulating the conduct of animal research and the supply of animals for use in connection with animal research. The Committee considers that this helps to maintain oversight and ongoing scrutiny of the Australian Code and its application to the statutory regime. In the circumstances, the Committee makes no further comment.

2. Environmental Planning and Assessment Amendment (Compliance Fees) Regulation 2021

Date tabled	LA: 12 Oct 2021 LC: 12 Oct 2021
Disallowance date	LA: 24 Nov 2021 LC: 24 Nov 2021
Minister responsible	The Hon. Rob Stokes MP
Portfolio	Planning and Public Spaces

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Environmental Planning and Assessment Regulation 2000* to—

   (a) prohibit the charging of a fee by a council in relation to a development application for the exercise of the council's compliance or enforcement functions under the Act in relation to development carried out in the council's area (a compliance fee), and

   (b) enable certain councils to continue to charge a compliance fee in relation to a development application until 31 December 2021, subject to certain limitations.

ISSUES CONSIDERED BY COMMITTEE

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

Limit to council discretion

2. The Regulation amends the *Environmental Planning and Assessment Regulation 2000* and inserts clause 256BA, which provides that a council must not charge a fee for a service if another Act prohibits the charging of the fee.

3. The Regulation further provides that clause 256BA does not apply to a relevant council in relation to a development application received by the relevant council on or before 31 December 2021. That is, a relevant council may charge a prohibited fee in relation to a development application received on or before 31 December 2021.

4. In this clause, a relevant council means Ballina Shire Council, Bayside Council, Bellingen Shire Council, Byron Shire Council, Campbelltown City Council, Canterbury-Bankstown Council, City of Canada Bay Council, Georges River Council, Inner West Council, Ku-Ring-Gai Council, Lane Cove Municipal Council, Lismore City Council, Liverpool City Council, Mosman Municipal Council, Nambucca Valley Council, Newcastle City Council, North Sydney Council, Penrith City Council, Randwick City Council, Ryde City Council, the

Council of the Municipality of Hunter's Hill, the Council of the Municipality of Kiama, the Council of the Shire of Hornsby, The Hills Shire Council, Tamworth Regional Council, Tweed Shire Council, Waverley Council, Wollondilly Shire Council and Woollahra Municipal Council.

The Regulating provides that a council must not charge a fee for a service if another Act prohibits the charging of the fee. However, a relevant council may charge a prohibited fee in relation to a development application received on or before 31 December 2021. The Regulation specifies 30 NSW councils as being a 'relevant council'.

The Committee notes that this non-uniform application of the prohibition of development fees may cause inequity between the different councils, and may impact on the business community within those councils by limiting the discretion of council to issue compliance fees. The Committee refers this issue to the Parliament for its consideration of the regulation's impact on the business community of each council to which the regulation relates.

3. Gas and Electricity (Consumer Safety) Amendment (Medical Gas) Regulation 2021

Date tabled	LA: 12 Oct 2021 LC: 12 Oct 2021
Disallowance date	LA: 24 Nov 2021 LC: 24 Nov 2021
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the Gas and Electricity (Consumer Safety) Regulation 2018 as follows—

   (a) to specify the qualified persons by whom a safety and compliance test (a test) on certain work relating to medical gas must be carried out,

   (b) to provide that failure to conduct a test is an offence with a maximum penalty of 25 penalty units,

   (c) to update record-keeping requirements in relation to tests,

   (d) to provide for a transitional period in which tests may be conducted by unqualified persons,

   (e) to set out requirements for notifying the results of the commissioning of a medical gas installation, (f) to update and clarify references to Australian Standards,

   (g) to make consequential and related amendments.

ISSUES CONSIDERED BY COMMITTEE

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

Public safety

2. The object of the Regulation is to specify the qualified persons by whom a safety and compliance test (a test) on certain work relating to medical gas must be carried out.

3. However, the Regulation also amends clauses 69F to provide for temporary measures that a person who is not a qualified person (an unqualified person) may, until the end of 1 May 2022, conduct a safety and compliance test required by clause 69B(2) on work carried out by them.

4. Subclauses 69F(3)-(5) provides that the unqualified person must make a record of the results of the test as soon as is reasonably practicable, but no later than 7 days, after completing the test. The record is to be signed by the unqualified person and, if applicable, the work provider. The unqualified person and, if applicable, the work provider must keep a copy of the results of the test for at least 5 years after the notification was given, and produce a copy of the results within this period to an authorised officer as soon as is reasonably practicable but no later than 48 hours after receiving the written demand.

5. The maximum penalty for not complying with the above provisions is 100 penalty units ($11 000) for a corporation and 25 penalty units ($2 750) for an individual.

> **The Regulation makes amendments that specify the qualified persons that may carry out safety and compliance tests on work relating to medical gas. However, the Regulation also provides that, as a temporary measure, an unqualified person may conduct these safety and compliance tests until 1 May 2022. This may impact the safety of those that rely on such work to be carried out by qualified persons, particularly as the work relates to medical gas where there is a high imperative that such work is carried out according to established safety standards.**
>
> **The Committee recognises that these clauses are intended as a temporary measure during a transitional period until 1 May 2022. The Committee also recognises the additional requirements for unqualified persons to record the results of such tests within 7 days of the test and keep a copy for at least 5 years to be provided upon request within that period. In these circumstances, the Committee makes no further comment. However, given the importance of public safety regarding the use of medical gas by suitably qualified persons, the Committee refers this issue to Parliament for consideration of whether the safeguards are adequate in the circumstances.**

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

Strict liability offences for work providers

6. The Regulation amends clause 69B to provide that a responsible person must conduct a safety and compliance test on work to which this clause applies, immediately after the completion of the work, in accordance with the requirements of the Australian Standards. A person who fails to comply with this requirement is guilty of an offence, which carries a maximum penalty of 25 penalty units ($2 750).

7. In this clause, a responsible person means the qualified person who carried out the work, or if a qualified person did not carry out the work—the qualified person under whose supervision the work was carried out.

8. The Regulation also amends the penalty amounts applicable to failure to comply with various requirements under clause 69C regarding notification of results of safety and compliance tests. This includes requirements to provide notice of the results of safety and compliance tests, to retain notices or produce copies of the notice within certain time periods. The penalty for these offences has been increased from 40 penalty units

(for a corporation) and 20 penalty units (for an individual), to 100 penalty units for a corporation and 25 penalty units for an individual.

The Regulation contains various mandatory requirements for those that carry out safety and compliance tests on certain work relating to medical gas. For example, that the work must be in accordance with the relevant Australian Standards, requirements to provide notice of the results of safety and compliance tests and to retain notices or produce copies of the notice within certain time periods. Failure to comply with these requirements amounts to an offence under the regulation, and carries maximum penalties ranging from 100 penalty units for a corporation and 25 penalty units for an individual.

The Committee notes that these amount to strict liability offences. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing the liability for an offence. As these offences apply specifically to those carrying out electrical and gas work, it may adversely impact those industries within that business community.

However, the Committee notes that strict liability offences are not uncommon in regulatory setting to encourage compliance, particularly relating to safety measures for work relating to medical gas. Further, the Committee notes that the provisions impose monetary penalties, and provides a financial incentive for relevant workers to comply with these public safety requirements. In these circumstances, the Committee makes no further comment.

4. Graffiti Control Regulation 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Mark Speakman MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Violence

PURPOSE AND DESCRIPTION

1. The *Graffiti Control Regulation 2021* (the **Regulation**) repeals and remakes, with minor amendments, the *Graffiti Control Regulation 2014*, which would otherwise be repealed on 1 September 2021 by section 10(2) of the *Subordinate Legislation Act 1989*.

2. The objects of the Regulation are to:

   a) set out the procedure to be followed for the seizure of spray paint cans,

   b) make provision for the secured display by retailers of spray paint cans, and

   c) prescribe the amount payable when certain offences under the *Graffiti Control Act 2008* are dealt with by way of penalty notices and additional persons who may issue penalty notices.

3. The Regulation is made under section 19 of the Act (general regulation-making power), as well as sections 8, 9 and 16.

ISSUES CONSIDERED BY COMMITTEE

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

Right to a fair trial – penalty notice offences

4. Section 16(1) of the Act provides that an authorised officer (being a police officer or, as per the Regulation, investigators within the meaning of the *Fair Trading Act 1987* or employees of a local council who are authorised persons of the purposes of section 679 of the *Local Government Act 1993*) may issue a penalty notice to a person if it appears to the officer that the person has committed an offence against section 7 or 8 of the Act, whereby:

   a) the person has sold a spray paint can to a person under 18 years (and cannot prove a defence under section 7), or

b) an occupier of a shop selling spray paint cans has displayed any such can in a part of the shop to which members of the public are permitted access and the can is not properly secured in accordance with section 8(2).

5. Section 16(3) provides that the amount payable under a penalty notice is prescribed by the regulations, not exceeding the maximum amount of penalty that could be imposed for the offence by a court. A maximum penalty of 10 penalty units ($1100) attaches to each offence.

6. Clause 11 of the Regulation provides that for the purposes of section 16(3) the amount prescribed is $550.

Clause 11 of the *Graffiti Control Regulation 2021* prescribes $550 as the amount payable for a penalty notice where a person has committed an offence relating to the sale or display of spray paint cans under the *Graffiti Control Act 2008*. Penalty notices allow a person to pay the amount specified in the notice within a certain time if they do not wish to have the matter determined by a court. However, the Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The penalty notice regime under the *Graffiti Control Act 2008* and its Regulation may therefore impact on a person's right to a fair trial, specifically the automatic right to have their matter heard by an impartial decision maker.

However, the Committee notes that the statutory regime does not remove a person's right to elect to have the matter heard by a court. Section 7 also includes defences for employees and employers where a spray paint can has been sold to a person under 18 years. In these circumstances, and given the practical benefits of penalty notices (including that they reduce the costs and time associated with the administration of justice), the Committee makes no further comment.

Strict liability offence

7. Part 2 of the Regulation sets out the procedure for and after seizure of a spray paint can by a police officer under section 9 of the Act. A police officer may seize a spray paint can where the officer suspects on reasonable grounds that a person in possession of a spray paint can in a public place is under 18 years.

8. A person under 18 years who is in possession of a spray paint can in a public place is guilty of an offence under section 8B, resulting in a maximum penalty of 10 penalty units ($1100) or imprisonment for 6 months, unless they can provide a defence under section 8B(2). This is a strict liability offence.

9. Section 8B(5) states that a court that convicts a person of an offence under section 8B must not sentence the person to imprisonment unless the person has previously been convicted of an offence under section 8B or sections 4(2) or (5) (being a graffiti related offence), on so many occasions that the court is satisfied that the person is a serious and persistent offender and is likely to commit such an offence again.

Part 2 of the *Graffiti Control Regulation 2021* sets out the procedure for and after seizure of a spray paint can by a police officer from a person under 18 years in a public place. The possession of a spray paint can by a person under 18

years in a public place is a strict liability offence under the *Graffiti Control Act 2008*, to which a maximum penalty of 10 penalty units ($1100) or 6 months imprisonment attaches.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. In this case, the strict liability offence applies to persons under 18 years of age and may result in imprisonment.

However, the Act clearly states that a custodial sentence is a last resort. Specifically, section 8B(5) provides that the person must have been previously convicted of an offence for possession of a spray paint can or another graffiti related offence, on so many occasions that the court is satisfied the person is a serious and persistent offender and is likely to commit such an offence again. In these circumstances, the Committee makes no further comment.

5. Liquor and Gaming Legislation Amendment Regulation 2021

Date tabled	LA: 12 Oct 2021 LC: 12 Oct 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

10. The object of the *Liquor and Gaming Legislation Amendment Regulation 2021* (the **Regulation**) is to –

    a) to amend the *Gaming and Liquor Administration Regulation 2016* to remove references to repealed provisions, and

    b) to amend the Liquor Regulation 2018—

        i. to specify licensed premises that may be included on the list of live music and performance

        ii. venues to be kept by the Secretary of the Department of Customer Service, and

        iii. to provide that licensed premises on the list are eligible for certain fee concessions, and

        iv. to extend by 6 months the period within which specified temporary boundary changes to licensed premises may apply, and

        v. to provide for exemptions from consultation and fee requirements for certain permanent

        vi. boundary changes to licensed premises that are substantively identical to earlier temporary boundary changes to which the same exemptions were applicable, and

        vii. to provide that a licensee of subject premises is not required to maintain an incident register in a period during which a high-risk music festival is being held at the premises if the licensee reaches specified written agreements in advance with the music festival organiser, and

        viii. to make miscellaneous and consequential amendments.

11. This Regulation is made under the *Gaming and Liquor Administration Act 2007* and *Liquor Act 2007.*

ISSUES CONSIDERED BY COMMITTEE

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

Powers of Secretary

12. Clause 61B generally gives the Secretary the power to compile a list of licenced premises that are live music and performance venues, including live music venues, live performance venues and venues that participate or are to participate, in incentivised events.

13. A benefit of a licensee being a live music or performance venue under the Regulation is that it entitles the licensee or manager to be eligible for the government's Live Music Support Package if that licensee is experiencing financial hardship. The Live Music Support Package was established by the NSW Government in 2021 in response to the COVID-19 pandemic, as defined in clause 61B(6) of this Regulation.

14. Clause 61B(4) gives the Secretary the power to remove licensed premises from the list of live music and performance venues if the criteria in clauses 61B(1)(a-c) and 61B(3)(a-c) are satisfied.

15. Clause 61B(5) broadly states that before publishing a list of live music and performance venues, if that lists omits licensed premises that were previously included in the list, the Secretary must give the licensee or manager of the premises written notice that the licensed premises are to be removed from the list.

> **The Regulation grants the Secretary certain powers regarding live music and performance venues. Specifically, the Secretary may compile a list of licensed premises that are live music and performance venues, the content of an application of a licensed premises under the Live Music Support Package or requirements under clause 61A(2), and either decide not to include or remove licenced premises from the list of live music and performance venues on various conditions.**
>
> **The Committee notes that the Regulation does not specify the timeframe in which the Secretary must give the licensee or manager notice of removal from the list of live music and performance venues. If the obligations of the Secretary's notice are not clarified this may result in negative business outcomes for the licensee or manager relative to their eligibility for the Live Music Support Package and may disentitle them from application entirely.**
>
> **Further clarification for licensees could be provided in the notice requirement by providing written reasons as to why a licensee is no longer considered a live music and performance venue for the purpose of clause 61B.**
>
> **The Committee prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and content is clear. Pursuant to clause 4 of schedule 1 of the *Subordinate Legislation Act 1989*, a statutory rule must be expressed plainly and unambiguously, and consistently**

with the language of the enabling Act. The Committee refers this provision to the Parliament for consideration of whether it calls for elucidation.

6. Mining Amendment (Standard Conditions of Mining Leases—Rehabilitation) Regulation 2021

Date tabled	LA: 12 Oct 2021 LC: 12 Oct 2021
Disallowance date	LA: 24 Nov 2021 LC: 24 Nov 2021
Minister responsible	The Hon. Paul Toole MP
Portfolio	Regional NSW, Industry and Trade

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to prescribe standard conditions of mining leases granted under the *Mining Act 1992*.

2. The conditions broadly relate to environmental management, protection and rehabilitation of land that is or may be affected by activities under mining leases. The conditions include requirements relating to the following—

   (a) preventing or minimising harm to the environment,

   (b) ensuring rehabilitation occurs promptly and achieves the final land use,

   (c) carrying out rehabilitation risk assessments,

   (d) preparing documents relating to rehabilitation and having some of them approved,

   (e) keeping records of compliance and reporting on non-compliance,

   (f) nominating contact persons,

   (g) giving notice in relation to development applications and modifications of development consent.

3. This Regulation is made under the *Mining Act 1992*, including section 388, the general regulation-making power, Schedule 1B, Part 3, clauses 7–7B, and Schedule 4, clauses 2 and 9.

ISSUES CONSIDERED BY COMMITTEE

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

Additional conditions of mining leases

4. The object of this Regulation is to prescribe standard conditions of mining leases granted under the *Mining Act 1992*. The conditions broadly relate to environmental management, protection and rehabilitation of land that is or may be affected by activities under mining leases.

5. Schedule 1 of the Regulation amends the Mining Regulation 2016 and inserts clause 31A, which provides that, for the purposes of the Act, Schedule 1B, clause 7 and the provisions of Schedule 8A, Part 2 are prescribed as conditions of a mining lease. The note to this provision specifies that a contravention of a mining lease by a person constitutes an offence under the Act (section 378D) by each holder of the lease. In addition, if committed by a corporation, this constitutes an executive liability offence, and is grounds for cancellation of the lease under the Act (section 125).

6. Part 2 of the Regulation sets out the standard conditions for holders of mining leases. For instance, clause 4 provides that the holder of a mining lease must take all reasonable measures to prevent, or if that is not reasonably practicable, to minimise, harm to the environment caused by activities under the mining lease. Clause 5 requires that the holder of a mining lease must rehabilitate land and water in the mining area that is disturbed by activities under the mining lease as soon as reasonably practicable after the disturbance occurs.

7. Division 2 of the regulation places requirements that the holder of a mining lease must conduct a risk assessment that identifies, assesses and evaluates the risks that need to be addressed to achieve rehabilitation objective, completion criteria and identifies measures that need to be implemented to eliminate, minimise or mitigate the risks. The holder of a mining lease must implement these measures identified.

The Regulation sets out standard conditions of mining leases granted under the *Mining Act 1992*. These conditions broadly relate to environmental management, protection and rehabilitation of land that is or may be affected by activities under mining leases.

A number of clauses set out requirements for the protection of the environment and rehabilitation, including that the holder of a mining lease must take all reasonable measures to prevent, or if that is not reasonably practicable, to minimise harm to the environment caused by activities under the mining lease, and that they must rehabilitate land and water in the mining area that is disturbed by activities under the mining lease as soon as reasonably practicable after the disturbance occurs.

The conditions include requirements in relation to a number of matters, including that contravention of a condition constitutes an offence under the Act, and if by a corporation it constitutes an executive liability offence. This may have an adverse impact on the mining business community and those that hold mining licences. However, the Committee notes that strict and executive

liability offences are not uncommon in a regulatory setting to encourage compliance, particularly relating to environmental protection. In these circumstances, the Committee makes no further comment.

7. National Parks and Wildlife Amendment (Assets of Intergenerational Significance) Regulation 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy and Environment

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to prescribe the following as actions that may be taken for the management of environmental and cultural assets of intergenerational significance—

    (a) the management of known or foreseeable risks, including protection from bush fire risks,

    (b) the preparation and approval of conservation action plans,

    (c) the carrying out of conservation activities under approved conservation action plans.

ISSUES CONSIDERED BY COMMITTEE

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

Freedom of information

2. The regulation permits conservation activities to be carried out on declared land under conservation action plans approved by the Secretary of the Department of Planning, Industry and Environment. In this context "declared land" is land declared to be an asset of environmental or cultural intergenerational significance under section 188H of the *National Parks and Wildlife Act 1974*.

3. Clause 78C(1) of the regulation provides for drafting of conservation action plans by the Secretary, while Clause 78E(1) provides for the approval of such plans by the Secretary.

4. Clause 78D(1)(b) requires that the Secretary consider any submissions received in response to draft conservation action plans. Clause 78D(1)(a) requires that the Secretary publish draft plans for at least 14 days, thereby facilitating the making of such submissions.

5. However, Clause 78D(2) allows for the publicly available versions of the action plans to be redacted if, in the Sectary's opinion, the draft plan contains information the disclosure of which may diminish the protection of the environmental and cultural values of the declared land.

6. Similarly, Clause 78D(3) provides that the Secretary is not required to exhibit the draft plan if the Secretary is satisfied that urgent finalisation and approval of the draft plan is necessary to address an imminent threat to declared land.

> **Clause 78D(1) of the Regulation provides for the making of submissions in response to conservation action plans and requires that conservation action plans be made available to the public for this purpose. However, Clause 78D(2) of the Regulation allows for the publicly available versions of draft action plans to be redacted under certain circumstances. Similarly, Clause 78D(3) removes the requirement to publish draft conservation action plans where the urgent finalisation and approval is considered necessary to address an imminent threat to land declared to be an asset of environmental or cultural intergenerational significance under section 188H of the *National Parks and Wildlife Act 1974*.**
>
> **This may prevent members of the public from making submissions in response to a conservation action plan, since they may not have access to all the relevant information necessary to form a view. The Committee prefers that, where practical, members of the public have access to all relevant information in order to facilitate accountability and public participation in decision making.**
>
> **However, the Committee recognises that there may be circumstances where publishing certain information may undermine efforts to protect the conservation value of a specific area, and that a reasonable degree of discretion is warranted as to what material is appropriate to make available for the purpose of public scrutiny. Under the circumstances, the Committee makes no further comment.**

8. National Disability Insurance Scheme (Worker Checks) Amendment Regulation 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Alister Henskens MP
Portfolio	Families, Communities and Disability Services

PURPOSE AND DESCRIPTION

1. The *National Disability Insurance Scheme (Worker Checks) Act 2018* (the **Act**) requires workers who deliver specific support and services to National Disability Insurance Scheme (**NDIS**) participants to obtain a clearance before they start working. It also allows authorised persons to obtain information about a person applying for a clearance.

2. The object of the *National Disability Insurance Scheme (Worker Checks) Amendment Regulation* 2021 (the **Amending Regulation**) is to amend the *National Disability Insurance Scheme (Worker Checks) Regulation 2020* (the **regulations**) to:

   a) remove the *Disability Services Act 2006* (Qld) from the list of laws of another state or territory prescribed for the purposes of information sharing provisions in the *National Disability Insurance Scheme (Worker Checks) Act 2018*, and

   b) prescribe certain Acts, including the *Disability Services Act 2006* (Qld), for the purposes of NDIS worker check clearances held under the law of another state or territory.

3. The Amending Regulation is made under sections 60 (general regulation-making power) and 23(e), and the definition of 'corresponding law' under Schedule 1, section 1 of the Act.

4. The Committee commented on the *National Disability Insurance Scheme (Worker Checks) Bill 2018* in Digest No. 64/56,[6] including regarding the Bill's impact on a person's right to privacy and to work.

[6] Parliament of New South Wales, Legislation Review Committee, Digest No. 64/56, 13 November 2018.

ISSUES CONSIDERED BY COMMITTEE

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

Right to work and privacy

5. The definition of 'corresponding law' is set out in Schedule 1, Section 1 of the Act, and means a law of another state or territory that corresponds to the Act and includes any law that is prescribed by the regulations as a corresponding law for the purposes of this Act.

6. Clause 10 of the regulations provides for legislation for the purposes of the definition of 'corresponding law'. The Amending Regulation includes the following laws in clause 10:

   a) *Disability Services Act 2006* (Qld),

   b) *National Disability Insurance Scheme (Worker Screening) Act 2020* (WA), and

   c) *Worker Screening Act 2020* (Vic).

7. The Amending Regulation also removes the *Disability Services Act 2006* (Qld) from clause 9 of the regulations, which prescribes laws for the protection of children or vulnerable people for the purposes of the definition of 'relevant law' under section 23(e) of the Act. However, a 'relevant law' also includes a 'corresponding law' under section 23(b), meaning that the *Disability Services Act 2006* (Qld) continues to fall within the definition of a 'relevant law' under the Act and is now also included in the definition of an 'NDIS purpose' under section 26 of the Act.

8. The expansion of the definition of 'corresponding law' effectively broadens the application of the Act, including to (without limitation):

   a) limit the ability of a greater number of persons to apply for a clearance if their application for a clearance has been refused or cancelled, or is pending, under a corresponding law (section 7), and

   b) expand the number of 'authorised persons' (which includes a person exercising functions in the execution or administration of a relevant law) who may disclose relevant information to the Screening Agency for an NDIS purpose (section 31), and any other authorised person to prevent significant harm (section 40).

   The *National Disability Insurance Scheme (Worker Checks) Amendment Regulation 2021* expands the definition of a 'corresponding law' under the *National Disability Insurance Scheme (Worker Checks) Act 2018*. This effectively broadens the application of the Act's worker clearance and information-sharing provisions, which may limit a person's right to obtain work in the disability care sector and right to privacy.

   However, the Committee notes the purpose of this regime is to minimise the risk of harm to people with disabilities, which requires access to certain information in order to properly assess and monitor a person's risk to NDIS participants. Additionally, it notes that the Act limits the persons and purposes

for which information can be shared under the Act. In the circumstances, the Committee makes no further comment.

9. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation 2021

Date tabled	LA: 12 October 2021 LC: 12 October 201
Disallowance date	LA: 12 October 2021 LC: 12 October 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to enable penalty notices to be issued for offences relating to the following—

   (a) failing to comply with the direction in the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*, clause 23 concerning outdoor gatherings,

   (b) failing to comply with a direction in the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*, clause 25A concerning answering questions from authorised contact tracers,

   (c) failing to comply with a direction in the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*.

2. The Regulation inserts offences which were previously in the various remakes of the *Public Health (COVID-19 Spitting and Coughing) Order 2020*. The original *Public Health (COVID-19 Spitting and Coughing) Order 2020*, which commenced on 9 April 2020, has been remade five times. The orders were made under the *Public Health Act 2010* and pursuant to section 7(5), expired after 90 days.

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 inserts offences into the *Public Health Regulation 2012* that were previously in the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* and its previous iterations.

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

5. Under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction, must without reasonable excuse, fail to comply with the direction. The maximum penalty for doing this is the following:

   (a) for an individual – 100 penalty units (11,000), or imprisonment for 6 months, or both, and, in the case of a continuing offence, a further 250 penalty ($27,500) units for each day the offence continues

6. Schedule 4 of the *Public Health Regulation 2012* provides that it is an offence to fail to comply with a Minister's direction prohibiting coughing or spitting on a public official or other worker given by the Minister in an order made under the *Public Health Act 2010*.

7. Similar to the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* and its previous iterations, under section 10 of the Act, the offence has a maximum penalty of $5,000. However, the difference is that the offences inserted into the Regulation do not have an expiration date.

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation 2021* inserts an offence when an individual fails to comply with the Minister's direction prohibiting coughing or spitting on a public official or other worker. A failure to comply with the direction, without reasonable excuse, would result in a penalty notice of $5,000 issued to the individual. The offence inserted into the Regulation is the same offence that was in the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* and its previous iterations.

In its previous Digests 13/57, 17/57, 25/57 and 30/57, the Committee commented on the earlier versions of *Public Health (COVID-19 Spitting and Coughing Order 2020*, which provided that a penalty notice of $5,000 could be issued to a person who contravened the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a 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 the amount of $5,000 is a significant monetary amount to be imposed on an individual by way of a penalty notice.

While individuals retain the right to elect to have their matters heard and decided by the Courts. An individual may be financially dissuaded to do so, as the maximum penalty is a significant amount.

The Committee acknowledges there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by the COVID-19 pandemic, where public institutions, including the courts, would need to facilitate social distancing. Given these factors, 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

Matters that should be included in primary legislation

8. As noted above, Schedule 4 provides that it is an offence to fail to comply with a Minister's direction prohibiting coughing or spitting on a public official. The Regulation allows for a $5,000 penalty notice to be issued for a contravention of the Ministerial direction under Schedule 4 of the Regulation.

> **As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes Schedule 4 of the *Public Health Regulation 2012* by coughing or spitting on an official or other worker.**
>
> **Consistent with its comments made in Digest 13/57, 17/57, 25/57 and 30/57, the Committee generally prefers significant matters to be dealt with in the primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight.**
>
> **The Committee is also concerned that unlike the offences created in the *Public Health (COVID-19 Spitting and Coughing) Order 2020* and its subsequent iterations which would expire 90 days after it is published, there is no such expiry date for an offence inserted into the *Public Health Regulation 2012*.**
>
> **Given the severe circumstances surrounding the COVID-19 pandemic, the Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses aren't delayed by the need to amend a Bill. Given the extraordinary circumstances, the Committee makes no further comment.**

10. Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation (No 4) 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to—

   (a) increase the penalty notice amount payable for an offence against the *Public Health Act 2010*, section 10 committed by an adult involving a contravention of a Ministerial direction to wear a face covering given in an order made under section 7 of that Act to $500,

   (b) provide for specific penalty notice amounts for a child under the age of 18 years of age who commits the offence.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 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

Personal liberty

3. The Regulation increases the penalties payable for failing to comply with a direction to wear or carry a face mask given by the Health Minister in an order under section 7 of the *Public Health Act 2010*.

4. Penalty notices may be issued for offences under section 10 of the *Public Health Act 2010* for a contravention of a Ministerial direction.

5. Under *Public Health (COVID-19 Mandatory Face Coverings) Order (No 3) 2021*, the Minister may direct that persons wear a fitted face mask in certain indoor settings, such as airports and aircraft, public transport, retail premises and hospitality and business settings.

6. However, the Order provides that these requirements do not apply to persons under 12 or to a person with a physical or mental health illness or condition, or disability, that

makes wearing a fitted face covering unsuitable including, for example, a skin condition, an intellectual disability, autism or trauma.

7. The Order also provides exceptions to the requirement to wearing a fitted face mask, including when a person is eating or drinking, when communicating with another person who is deaf or hard of hearing, when it interferes with the nature of their work, where they are asked to remove it to ascertain their identity, because of an emergency or where it is necessary for the proper provision of goods or services.

8. Under this Regulation, the penalty for this offence has been increased from $200 to $500 for an individual. In addition, the Regulation introduces a penalty of $80 when committed by an individual aged 16 or 17 years of age, and a penalty of $40 for the offence when committed by a child who is aged between 12 and 15 years of age.

9. The Committee previously commented on earlier renditions of the *Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation* in Digest No.27 (16 March 2021)[7] and No. 32 (22 June 2021).[8]

> **The Regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances when inside NSW airports and domestic commercial aircraft. As noted by the Committee regarding earlier renditions of this regulation (in Digests 27 and 32), this may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth.**
>
> **However, the Committee recognises that the intent of the regulation is to protect public health and safety in certain indoor areas within NSW and is in response to the ongoing COVID-19 pandemic. The Committee also notes that the Regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.**

Right to fair trial – penalty notice offences

10. As noted, the Regulation allows penalty notices to be issued for offences under section 10 of the *Public Health Act 2010* for a contravention of a Ministerial direction. Specifically, for an offence of failing to comply with a direction to wear a face mask covering under the Public Health (COVID-19 Mandatory Face Coverings) Order (No 3) 2021.

11. This public health order is made under section 7 of the *Public Health Act 2010,* which provides the Minister with power to deal with public health risks. Under this section, public health orders may be issued by the Minister that expire after a period of 90 days unless earlier revoked.

[7] Legislation Review Committee, Legislation Review Digest No.27/57, 16 March 2021

[8] Legislation Review Committee, Legislation Review Digest No. 33/27, 22 June 2021

The Regulation increases the penalty amounts imposed for offences of failing to comply with a direction to wear a face mask covering under the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 3) 2021* from $200 for an individual to $500. The Regulation also introduces penalties of $80 for the offences when committed by an individual who is 16 or 17 years of age, and for $40 when committed by an individual who is 15 years of age or younger.

The Committee notes that 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.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court and acknowledge that 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 penalty offence is part of the regulatory response to the COVID-19 pandemic, and of a temporary nature as it is attached to the offences under the public health orders which may be in force for a period of 90 days unless revoked or replaced. In these 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.

Appendix Two – Regulations without papers

Note: At the time of writing, the committee makes no further comment about the following regulations

1. Private Health Facilities Amendment (COVID-19 Prescribed Period) Regulation (No 2) 2021

   The object of this Regulation is to extend the operation of the *Private Health Facilities Act 2007*, section 70, which was enacted in response to the COVID-19 pandemic. Section 70 allows the Secretary of the Ministry of Health to exempt a private health facility licensee or class of licensees from certain licence conditions and requirements, if satisfied that—
   (a) it is reasonably necessary because of the COVID-19 pandemic, and
   (b) patient care and safety at the facility are to be properly maintained.
   The Regulation is made under the *Private Health Facilities Act 2007*.
2. Residential Apartment Buildings (Compliance and Enforcement Powers) Amendment (Miscellaneous) Regulation 2021

   The object of this Regulation is to allow the Secretary to make a prohibition order in relation to a residential apartment building if a rectification bond required under the terms of an undertaking given by the developer relating to the residential apartment building has not been provided to the Secretary.

   The Regulation is made under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*.

3. Liquor Amendment (Outdoor Dining) Regulation 2021

   The object of this Regulation is to facilitate temporary boundary changes for licensed premises relating to the proposed use of certain land for outdoor dining.

   The Regulation is made under the *Liquor Act 2007.*
4. Contract Cleaning Industry (Portable Long Service Leave Scheme) (Levy Determinations) Order 2021

   The object of this Order is to determine the long service leave levy payable by employers for the contract cleaning industry and contractors who are registered as workers for the contract cleaning industry. Under this Order, the levy is to be 1.0 per cent of the employee's or contractor's ordinary remuneration.

5. Passenger Transport (General) Amendment (Drug and Alcohol Testing) Regulation 2021

   The object of this Regulation is to transfer provisions, relating to drug and alcohol testing of certain employees of bus and ferry services, from the *Passenger Transport*

(Drug and Alcohol Testing) Regulation 2010 to the *Passenger Transport (General) Regulation 2017*.

6. Fisheries Management (General) Amendment (Bowfishing) Regulation 2021

The object of this Regulation is to prohibit the taking of fish using a bow and arrow, except in certain circumstances.

This Regulation is made under section 23 of the *Fisheries Management Act 1994*, which regulates the use of fishing gear. This Regulation inserts in clause 52 of the *Fisheries Management (General) Regulation 2019* subclauses (3)–(5), which prohibits the use of bowfishing equipment to take fish, save for limited excepted circumstances.

7. Referable Debt Order (2021-584)

This Order is made pursuant to section 7(2) of the *State Debt Recovery Act 2018*, and declares that act of grace payments made by the Government for the purpose Accommodation Support Grant Program, which are recoverable under section 5.7(3) of the *Government Sector Finance Act 2018* of the NSW, are referable debts.

Part 2 of the *State Debt Recovery Act 2018* enables the Chief Commissioner of Revenue NSW to take debt recovery action as provided for under the Act in respect to a State debt, which includes referable debt.

8. Retail and Other Commercial Leases (COVID-19) Amendment (Eligibility) Regulation 2021

The objects of the Regulation are to:

(a) to clarify that a Commonwealth COVID-19 Disaster Payment made to a lessee, which makes the lessee ineligible for certain New South Wales payments or grants, does not prevent the lessee from being an impacted lessee, and

(b) to enable a lessor to request evidence at any time that it is reasonably necessary to ensure that a lessee continues to be an impacted lessee, and

(c) to enable further rent renegotiation for a period if the lessee ceases to be an impacted lessee during the period, and

(d) to provide that when renegotiating a reduction in rent—
    i. certain New South Wales payments or grants made to the lessee must be taken into account, and
    ii. the lessor is not required to reduce rent in relation to periods during which the lessee is not an impacted lessee.

This Regulation is made under the *Retail Leases Act 1994*, including sections 85 (the general
regulation-making power) and 87.

9. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 5) 2021

   The object of this Regulation is to update provisions as a consequence of the repeal of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* by the *Public Health (COVID-19 General) Order 2021*.

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

10. Water Industry Competition (Access to Infrastructure Services) Regulation 2021
    The object of this Regulation is to remake, without significant changes, the provisions of the Water Industry Competition (Access to Infrastructure Services) Regulation 2007, which is repealed on 1 September 2021 by the Subordinate Legislation Act 1989, section 10(2).

    The Regulation makes provision for the scheme established by the Water Industry Competition Act 2006, Part 3, including the following matters—

    a) coverage declarations and non-coverage declarations,
    b) access undertakings,
    c) access agreements,
    d) access determinations under that Part.

11. Uniform Civil Procedure (Amendment No 98) Rule 2021 (2021-585)

    The object of this Rule is to require a document filed in relation to proceedings, including originating process, to contain telephone contact details of—
    a. the party or person on whose behalf the document is filed, if the party or
    b. person has not engaged a solicitor, or the solicitor of the party or person, if the party or person has engaged a solicitor.

12. Crown Land Management Amendment (Reserve Trusts) Regulation (No 2) 2021

    The object of this Regulation is to further amend the savings and transitional provisions in the *Crown Land Management Act 2016*, Schedule 7 to extend until 30 December 2021 the transitional period for reserve trusts managed by corporations that are category 1 non-council managers under the repealed *Crown Lands Act 1989*.

13. Public Health Amendment (COVID-19 Delta Outbreak) Regulation 2021
    The object of this Regulation is to update cross-references in provisions authorising the issue of penalty notices as a consequence of the remaking of an order under the Public Health Act 2010, section 7.

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

14. Electricity Infrastructure Investment Amendment Regulation 2021

    The object of this Regulation is to make provision in relation to—
    a. the appointment of the electricity infrastructure jobs advocate, and

b. energy security targets, including the reports prepared by the energy security target monitor.

15. Petroleum (Onshore) Amendment Regulation 2021

The object of this Regulation is to amend the Petroleum (Onshore) Regulation 2016 to remove the current restriction limiting the beneficial use of gas for an assessable prospecting operation authorised by an activity approval to a period of 1,000 days only and to remove the royalty exemption that applies to certain cases.

16. Community Land Development Regulation 2021

The object of this Regulation is to set out requirements relating to—

a. community, precinct and neighbourhood plans, and
b. plans and instruments relating to certain transactions, including the following—
    (i) community, precinct and neighbourhood plans of consolidation and subdivision,
    (ii) boundary adjustment plans,
    (iii) acquisition plans,
    (iv) the severance of development lots,
    (v) the conversion of development or neighbourhood lots to association property, and
c. development contracts, and
d. management statements, and
e. the amalgamation of a precinct scheme or neighbourhood scheme with the community scheme of which it forms part, and
f. other matters of a minor, consequential or ancillary nature.

17. Conveyancers Licensing Regulation 2021

The object of this Regulation is to repeal and remake, with some amendments, the Conveyancers Licensing Regulation 2015, which would otherwise be repealed by the Subordinate Legislation Act 1989, section 10(2).

This Regulation provides for the following—

a) fees payable in relation to conveyancer licences,
b) professional indemnity insurance requirements for licensees,
c) matters the Secretary must take into account in considering whether to grant an exemption from provisions of the Conveyancers Licensing Act 2003 (the Act) that will authorise a licensee to—
    (i) be in charge at more than 1 place of business, or
    (ii) exercise functions or provide services on behalf of 2 or more licensees at a place of business,
        i. the rules of conduct licensees must comply with when conducting conveyancing businesses or
d) exercising functions under licences,
e) prohibitions on licensees conducting, or being employed in the conduct of, the business of an agent,
f) matters relating to costs that licensees must disclose to clients,

g) requirements for itemised accounts,
h) the form of notification to the Civil and Administrative Tribunal of disputes about costs payable for conveyancing work,
i) requirements for trust money,
j) requirements for keeping of records,
k) particulars that must be recorded in the Register under the Act,
l) provisions of the Act that apply to a suspended licence,
m) offences for which penalty notices may be issued and the amount of the penalty payable,
n) other miscellaneous matters.

18. Local Government (General) Amendment (Integrated Planning and Reporting) Regulation 2021

The object of this Regulation is to amend the Local Government (General) Regulation 2005 to—
a) prescribe the integrated planning and reporting guidelines that councils must comply with for the purposes of the Local Government Act 1993, section 406, and
b) omit a redundant provision.

19. Local Government (General) Amendment (Miscellaneous) Regulation 2021

The object of this Regulation is to make miscellaneous amendments in the nature of law revision to the Local Government (General) Regulation 2021.

20. Local Government (General) Amendment (Rates) Regulation 2021

The object of this Regulation is to limit the highest ordinary rate that a council may make for rateable land in both a residential sub-category and a contiguous urban area.

21. Local Government (General) Regulation 2021

The object of this Regulation is to remake, without substantive changes, the provisions of the *Local Government (General) Regulation 2005*.

22. Notification of the Australian Institute of Building Surveyors Professional Standards Scheme (n2021-1002)

Pursuant to section 13 of the *Professional Standards Act 1994*, the Minister for Better Regulation and Innovation authorised the publication of The Australian Institute of Building Surveyors Professional Standards Scheme. This scheme commenced on 1 July 2021.

Published in Government Gazette No 214, n2021-1002

23. Notification of the Australian Property Institute Valuers Limited Professional Standards Scheme (n2021-1001)

Pursuant to section 13 of the *Professional Standards Act 1994*, the Minister for Better Regulation and Innovation authorised the publication of the Australian Property

Institute Valuers Limited Professional Standards Scheme. This scheme commenced on 1 September 2021.

Published in Government Gazette No 214, n2021-1001

24. Notification of the Strata Community Association (NSW) Limited Professional Standards Scheme (n2021-1003)

Pursuant to section 13 of the *Professional Standards Act 1994*, the Minister for Better Regulation and Innovation authorised the publication of The Strata Community Association (NSW) Limited Professional Standards Scheme. This scheme commenced on 1 July 2021.

Published in Government Gazette 214 (n2021-1207

25. District Court Criminal Practice Note 16 (n2021-1207)

This practice note is to be known as Practice Note 16 - Work Health and Safety Prosecutions (WHS prosecutions). It replaces Practice Note 16 -Work Health and Safety Act Prosecutions issued 5 November 2018. 2 This practice note commences on 28 June 2021 and applies to all WHS prosecutions before the Court at that date, except those already listed for trial or sentence hearing. The extent to which the practice note is applicable to existing matters is to be approached, by the parties and the Court, on a case by case basis.

26. Referable Debt Order (2021-529)

Pursuant to section 7 (2) of the State Debt Recovery Act 2018, the fees, charges and other amounts specified in Column 1, payable to the public authorities specified in Column 2, are declared to be referable debts.