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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. CHILDREN (CRIMINAL PROCEEDINGS) AMENDMENT (AGE OF CRIMINAL RESPONSIBILITY) BILL*

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

2. COMPANION ANIMALS AMENDMENT (REHOMING ANIMALS) BILL 2021*

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

3. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT BILL 2021

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

4. CRIMES LEGISLATION AMENDMENT (LOSS OF FOETUS) BILL 2021

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

Additional punishment for the same conduct

The Bill amends the *Crimes Act 1900* to create standalone offences for conduct constituting an existing criminal offence involving grievous bodily harm or homicide which causes the loss of a foetus. This means that a person may be guilty of two separate indictable offences in respect to the same act or omission, where that conduct also causes the loss of a foetus. By providing for a standalone criminal offence predicated on the commission of a distinct offence involving grievous bodily harm or homicide, the Bill may permit the accused to receive additional punishment for the same action.

However, the Committee notes that, by drawing upon existing offences under the *Crimes Act 1900*, the Bill's offence provisions may ensure greater flexibility and better recognition of the particular circumstances where criminal conduct by a third party causes the loss of a foetus. The Committee also acknowledges the statements of the Attorney General that the creation of separate offences is intended to recognise the harm and gravity of such a loss, as distinct from existing criminal offences. In these circumstances, the Committee makes no further comment.

Strict liability

The Bill amends the *Crimes Act 1900* to create new criminal offences for criminal conduct which causes the loss of a foetus of a pregnant woman. These amendments provide that the prosecution is not required to prove that the accused had knowledge or ought reasonably to have known that the woman was pregnant. The Bill also imposes an additional maximum penalty of 3 years' imprisonment on top of the maximum penalty for the separate underpinning offence of causing grievous bodily harm or homicide.

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.

The Committee acknowledges that, to be guilty of an offence relating to the loss of a foetus, the prosecution must still prove all elements of the underpinning offence of causing grievous bodily harm or homicide including any relevant mental element. However, the Committee notes that the maximum penalty for the specific strict liability offence of causing loss of a foetus is an additional custodial penalty of 3 years' imprisonment. Given the potential custodial penalty and noting again the strict liability nature of these offences, the Committee refers this matter to the Parliament for its consideration.

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

Commencement by proclamation

The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individuals' rights or obligations.

However, the Committee notes that the flexible start, and the Attorney General's proposed consultation period with agencies and stakeholders prior to commencement, may assist with the administrative arrangements required to operationalise the amendments across multiple legislation and the related changes across agencies. In the circumstances, the Committee makes no further comment.

5. ELECTRONIC TRANSACTIONS AMENDMENT (REMOTE WITNESSING) BILL 2021

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

6. GAMING MACHINE TAX AMENDMENT (PROMOTIONAL PRIZES) BILL 2021

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

Retrospectivity

The Bill updates the definitions in the *Gaming Machine Tax Act 2001*. Specifically, it clarifies that a tax is payable on gaming machine bets paid using promotional prizes, such as reward schemes, and that the bet becomes taxable at the point where it is placed in the machine rather than when the payer inserts money into the machine. The Bill further provides that these definitions are taken to have commenced on the commencement of the 2001 Act.

This may create an issue of retrospectivity, whereby the amended definitions in the Bill are taken to have commenced in 2001, and therefore making all actions and obligations under the provisions since that date subject to these terms. The Committee generally comments were provisions have retrospective effect as it runs counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time. This is particularly the case where a Bill seeks to retrospectively remove rights or impose obligations.

However, the Committee notes that the amendments to definitions are to reflect the modernised definitions of these terms and brings the Act into line with how the definitions have been applied. The Committee recognises that the Bill aims to remove ambiguity in the existing definitions and how the provisions are applied, rather than seek to create new obligations that have retrospective effect. In these circumstances, the Committee makes no further comment.

7. GREATER SYDNEY PARKLANDS TRUST BILL 2021

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

Strict liability and vicarious liability offences

Sections 47-49 of the Bill allows an authorised officer who reasonably suspects a person of having committed an offence against this Bill or the regulations to require the person to state the person's full name and residential address, provide their divers licence or request another person to do so. The sections give the authorised officer the power to issue penalty notices up to $1100 for contraventions of those provisions.

Similarly, section 50(2) prescribes that a person who, at the time of the offence, is the owner of a vehicle in connection with an office, is to be dealt with as if the person were the actual offender. This attaches vicarious liability to the owner of the vehicle despite them not necessarily committing the offence. The sections give the authorised officer the power to issue a penalty notice up to $1100 for contravention of this provision.

Amendments to the *Western Sydney Parklands Act 2006* and *Centennial Park and Moore Park Trust Act 1983* also give an authorised officer the power to issue penalty notices of up to $1100 for various offences relating to non-compliance with requests for information of a person reasonably suspected to have committed an offence. These amount to strict liability offences.

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

The Committee further notes that safeguards are available that may protect persons from being penalised incorrectly. For example, section 47 only allows for a penalty notice to be issued if the person is warned by the authorised officer that not providing their name or producing their licence constitutes an offence. Section 48(3) of the Bill and the new sections 18A(3) and 42BA(3) of the *Centennial Park and Moore Park Trust Act 1983* and *Western Sydney Parklands Act 2006* respectively do not create an offence where non-compliance is reasonably excusable. Section 48(4) of the Bill provides for a defence where a person will not be liable if they satisfy the court they did not know, and could not with reasonable diligence have ascertained, the driver's name or residential address. The Committee also notes the exceptions to section 50(2) offences as safeguards to findings of liability under this section. Given the provision of safeguards under the Bill, the Committee makes no further comment.

Procedural fairness – creation of penalty notice offences

The Bill sets significant monetary penalties for certain offences that can be dealt with by way of a penalty notice issued under either the Bill or the regulations. An example of an offence under the Bill includes where a person refuses to state their full name and residential address to an authorised officer where the authorised officer reasonably suspects a person of having committed an offence. A penalty notice issued under the regulations may be as high as $5500 for an offence against the regulations and $1100 for an offence against the Bill.

Whilst a person issued with a penalty notice may elect to have the matter heard by a court, the Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Bill and delegated regulations may thereby impact on a person's right to a fair trial – that is, to have the matter heard by an impartial decision maker in public, and to put forward his or her side of the case. Notwithstanding this, as the Bill does not remove a person's

right to elect to have the matter heard by a court, 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.

Property rights – compulsory acquisition of land

Section 17(1) of the Bill gives the Greater Sydney Parklands Trust the power to acquire and own new parks and supplementary land by compulsory acquisition. That power is conferred by section 17(1) of the Bill and is limited by the *Land Acquisition (Just Terms Compensation) Act 1991.* If enacted, the provision will authorise the Trust to compulsorily acquire privately owned or Crown land that is considered a new park or required to supplement the Trust.

The Committee notes the power may encroach on the private property rights of an owner whose land is sought to be acquired by the Trust. The power to compulsorily acquire land may interfere with the right of a person to use or enjoy their property, their right to exclude others, and the right to sell or give it away. Further, the power may also interfere with the quiet enjoyment of land by a property owner or anyone, such as a tenant, who ordinarily enjoys that property.

However, the Committee recognises that the provisions primarily deal with public land that may only be compulsorily acquired if is not available for public sale and where there is no agreement for acquisition. Further, the acquisition cannot consist of the taking of a mortgage or charge over the land or revoke exclusive rights of burial granted under another Act. Additional financial protections entitle any owner whose land has been compulsorily acquired to just compensation under sections 37 and 54 of that Act. As such, 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 or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes that the flexible start may assist with the administrative arrangements required to implement the various amendments across other legislation and the related community consultation. Given the circumstances, the Committee makes no further comment.

Delegation to the regulations

The Bill gives the Governor power to make regulations on a range of issues as well as delegates a number of matters to the regulations. Matters which may be addressed by the regulations include the regulation of the public on estate land and the creation of offences punishable by a maximum penalty of 50 penalty units ($5500). The Bill also transfers certain powers to the regulations such as the functions of rangers who are authorised to issue penalty notices, the definition of penalty notice offences and the prescription of penalty notice amounts.

The Committee generally prefers 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 limits of rangers who may issue penalty notices and the subsequent attribution of criminal liability. The Committee therefore refers this issue to the Parliament for its consideration.

Delegation of Trust's functions and exercise of functions through private subsidiaries and government sector agencies

Under Division 3 of Part 2 of the Bill, the Greater Sydney Parklands Trust may delegate it's functions to private subsidiary corporations individually or under a partnership or joint venture. The Trust may, by agreement, also delegate its functions to a government sector agency within the meaning of the *Government Sector Employment Act 2013*.

The Committee notes that the Bill does not contain restrictions on this power to delegate, for example, by restricting delegation to people with certain qualifications or expertise. Additionally, it is not clear whether there are safeguards to ensure the conferral of power to either a private subsidiary or government sector agency to ensure that it does not result in the delegation of functions to third parties that may have a conflict of interest. The Committee also notes that a function of the Trust which may be delegated includes the compulsory acquisition of land, charging and receiving fees and financial management. Delegation of functions regarding compulsory acquisition, charging and receiving fees and financial management may warrant clarity about who can perform these tasks. In the circumstances, the Committee refers this matter to Parliament for its consideration.

8. ICAC AND OTHER INDEPENDENT COMMISSIONS LEGISLATION AMENDMENT (INDEPENDENT FUNDING) BILL (NO 2) 2021*

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

Conflict of functions of relevant statutory committees

The Bill amends several acts in relation to the relevant parliamentary committees overseeing the work of the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the New South Wales Electoral Commission, the Ombudsman's Office and the Audit Office. These relevant committees are specified as the Legislative Assembly Public Accounts Committee, the Joint Standing Committee on Electoral Matters, the Joint Committee on the Independent Commission Against Corruption and the Joint Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission.

The Bill also seeks to constitute in statute the Legislative Council Public Accountability Committee and a Joint Committee on Parliamentary Services.

The Bill further provides that these committees are to review, determine and report on an amount which should be included for the appropriation for their relevant oversight body or parliamentary department in annual appropriation bills. It also requires the Treasurer to explain when introducing annual appropriation bills any inconsistency between the committees' determined amount and the amount included in the bill for the appropriation for any of these bodies.

The Committee notes that the primary functions of the relevant committees under the existing Acts and establishing resolution is to monitor and review the exercise by the agency of their functions under the relevant Acts, and to report to one or both Houses of Parliament on any matter relating to their functions that the attention of Parliament should be directed.

The Committee acknowledges the NSW ICAC Special Reports on the need for a new funding model for ICAC. However, the Committee notes that the power to report on a payment of a sum to an agency of which the Committee has oversight may conflict with its function to independently review the performance of the agency. The Committee refers this matter to the

Parliament for its consideration of whether it involves an inappropriate delegation of legislative power to determine and report on the appropriation of funds to agencies or departments of which the relevant committee has oversight.

9. LAW ENFORCEMENT CONDUCT COMMISSION AMENDMENT BILL 2021*

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

10. PUBLIC SPACES (UNATTENDED PROPERTY) BILL 2021

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

Real property rights – placing of stock on private land

The Bill enables an authorised officer to temporarily place an unattended animal that is stock posing an unacceptable risk to health or safety onto nearby private land, where the officer has made reasonable attempts to obtain the consent of the land owner or occupier and comply with their reasonable requests. Consent of the land owner or occupier is not a requirement of placing stock on private land. This may interfere with an owner or occupier's real property rights, including their right to undisturbed enjoyment of their land.

The Committee notes that the interference is temporary, intended to protect the health and safety of persons, and that the authorised officer must make reasonable attempts to obtain consent and comply with requests before exercising thier power. However, it also notes that the term 'emergency' is not defined in the Bill. Although the Minister has indicated that it will be defined in the regulations, the Bill does not clearly indicate that this key definition will be located in the regulations. The Committee considers that it may be beneficial for the Bill to define what constitutes an 'emergency' and the circumstances in which a person's real property rights may be interfered. This could allow for clarity and an appropriate level of parliamentary oversight. It refers this issue to the Parliament for its consideration.

Property rights – interference with private property

Section 25 of the Bill allows an authorised officer to enter an unattended motor vehicle in certain circumstances for the purpose of identifying the responsible person for the vehicle. This includes where the vehicle poses a risk to persons, animals or the environment.

This may interfere with a person's property rights, including non-interference with their property. The Committee notes that the Bill does not require an authorised officer to consider or undertake other less invasive measures to identify the responsible person before entering the motor vehicle including, for example, by checking the registration of the unattended vehicle. However, the Committee acknowledges the circumstances in which this power may be exercised, including where the vehicle poses a risk to persons, animals or the environment. Additionally, that an authorised officer is not limited from requesting the assistance of the NSW Police under section 56 to make inquiries about the name and address of the owner of the vehicle, although the 24 hours response period from the Police may not meet the urgent need to identify the responsible person in some cases. The Committee refers this matter to the Parliament for its consideration.

Offence regime – strict liability offences, new offences and harsher penalties

The Bill includes strict liability offences and new offences, as well as and harsher penalties for comparable offences included in the *Impounding Act 1993*.

The strict liability offences relate to, among other things, leaving an item or animal unattended in a public place. Monetary penalties apply for these offences and, in certain cases, a tiered maximum penalty regime applies to accommodate the different classes of items and further offending. 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. However, it notes that strict liability offences are not uncommon in regulatory settings to encourage compliance.

The Committee notes that the offences of leaving an item or animal unattended in a public place do not provide an exception for people experiencing homelessness, who may be disproportionately affected if found strictly liable for a monetary penalty. The Committee acknowledges the Minister's comment that authorised officers are expected to take into account the specific needs of people experiencing homelessness in exercising their functions. The Committee refers this matter to the Parliament for its consideration of whether the Bill contains sufficient safeguards in relation to this issue.

The new offences include, for example, a person recklessly or negligently leaving an item in a public space in certain circumstances, and a person failing to collect property in possession of the authority within the notified period. In the Second Reading Speech, the Minister provided the intent of each of these offences, including to ensure the application of higher appropriate penalties where a person has been reckless or negligent in their conduct, and to provide a greater incentive for owners to recover their impounded items (respectively). The Committee acknowledges these reasons and makes no further comment on the inclusion of new offences in the Bill.

Harsher penalties for comparable offences apply to the offences of, for example, obstructing an authorising officer or causing or permitting an animal to trespass. In the Second Reading Speech, the Minister explained that higher maximum offences have been provided across offences in the Bill to bring the law into line with similar offences and because the penalties in place under the *Impounding Act 1993* have not changed for nearly 30 years. The Committee acknowledges the reasons for the increased penalties and makes no further comment.

Vicarious liability

Section 39 of the Bill provides that responsible persons are vicariously liable for leaving an item unattended in a public place. A 'responsible person' includes: the person who owns or is otherwise responsible for the property, a person engaged to collect or manage the property on behalf of the owner, another person in control or possession, or entitled to possession, of the property, and a person who causes, or engaged in conduct reasonably likely to result in, the property being unattended. This expands who can be vicariously liable for an offence compared to section 32A of *the Impounding Act 1993*, under which an owner of a motor vehicle abandoned in a public place can be found vicariously liable. The Bill also expands the property applicable to the offence, with an 'item' under the Bill including a motor vehicle and other things.

Vicarious liability provisions can potentially result in people being subject to disciplinary action or penalty for the conduct of others. In this case, a responsible person may be found liable under section 37 for a monetary penalty. However, the Bill includes safeguards to minimise the unfairness to responsible persons. Specifically, section 39 provides that a responsible person is not vicariously liable where they satisfy the person specified in a penalty notice or the court (as relevant) that the property was, at the relevant time, stolen property or otherwise illegally taken or used. The Committee also acknowledges that vicarious liability provisions are not uncommon in regulatory settings and encourage compliance and, in this case, place the onus on people who

own, use or control property to use that property responsibly. In these circumstances, the Committee makes no further comment.

Right to a fair trial – penalty notice offences

The Bill creates a penalty notice regime which allows an authorised officer to issue a penalty notice to a person for a penalty notice offence prescribed by the regulations. The Bill also amends the *Road Transport Act 2013* and *Road Transport (General) Regulation 2021* to allow penalty notices to be issued to the registered operator of any unregistered class A motor vehicle (including cars, trailers and combinations of both) parked on a street 15 days after registration lapses.

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 an individual 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.

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

Limitation on right of review

The Bill provides for administrative review of the decisions to take possession of property and to issue a direction, but only on the ground that the taking of possession or issuing of the direction was unlawful. This may limit a responsible person's right to review of a decision in relation to broader issues.

This right may also be limited by the requirement under section 36 that an applicant, where their application is dismissed by the Civil and Administrative Tribunal, pay additional fees up to the time the authority is notified. This appears to accommodate the obligation of an authority (and an occupier) not to sell or dispose of property if a notice of intention to apply for administrative review is given until the time limit for an application has expired or, if an application is made, it has been finally determined or withdrawn. However, the threat of additional fees may in effect limit exercise by an applicant of their right to review.

The Committee also notes that a time limit does not appear to be included in the Bill regarding applications for review of a decision to issue a direction. The Bill may benefit from including a time limit in this case to ensure that applicants are aware of the period in which they can enforce their right of review of such decision. The Committee refers these matters to the Parliament for its consideration.

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

Commencement by proclamation

The Bill commences (as an Act) on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that the flexible start date may assist with

the administrative arrangements required to undertake consultation on the supporting regulation. Given the circumstances, the Committee makes no further comment.

Referral to regulations

The Bill refers various matters to the regulations including, for example, information integral to the meaning of certain definitions, additional functions of an authorised officer, the creation of offences and additional 'responsible persons'. The creation of offences is also referred to the regulations. Specifically, the general regulation-making power provides that the regulations may create offences punishable by a maximum penalty of 50 penalty units ($5500). Section 26(2)(c) also provides that the regulations may create offences for removing or otherwise interfering with items taken into possession by authorised officers, including removal or other interferences by owners of, or responsible persons for items. It appears that this may overlap, at least in part, with the offence under section 41 of the Bill for the unlawful recovery of property taken into the possession of an authority.

The Committee generally prefers 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 who is liable for those offences (specifically, responsible persons). The Committee therefore refers this issue to the Parliament for its consideration.

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

Incorporation of documents into regulations

The Bill allows the regulations to apply, adopt or incorporate external documents, as in force at a particular time or from time to time. 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.

11. SERVICE NSW (ONE-STOP ACCESS TO GOVERNMENT SERVICES) AMENDMENT (COVID-19 INFORMATION PRIVACY) BILL 2021

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

Privacy of information

The Bill amends the *Service NSW (One-stop Access to Government Services) Act 2013* to provide additional limits on the use of information collected by Service NSW in the course of the COVID-19 pandemic. The Minister noted that this is in relation to information obtained via the Service NSW QR check in app. The release of such information may impact on the privacy of an individual to whom that information relates, particularly where it contains their personal details, location data, and potentially whether they have tested positive for COVID-19.

However, the Committee recognises that the Bill is intended to provide adequate protection for the strict use of this information. Specifically, the Bill provides that such information held must not be used or disclosed except for the purposes for which it was collected: contact tracing in NSW or another Australian jurisdiction; to investigate or prosecute a breach of a public health order; or to provide access of that information to the individual to whom it relates. The Committee further recognises the importance of sharing such information to aid in the contact

tracing of COVID-19 positive cases and protection of public health during the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.

12. TATTOO PARLOURS AMENDMENT (STATUTORY REVIEW) BILL 2021

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

Freedom of association

The Bill provides that a person will be mandatorily disqualified from holding a licence in relation to body art tattooing if the Commissioner is satisfied that they are or have been within the prior 12 months a member of a criminal organisation prescribed by the regulations. This may impact a person's freedom of association as contained in Article 22 of the ICCPR. The right to freedom of association protects their freedom to form and join associations to pursue a common goal, and to exchange ideas and information.

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

Strict liability offences/penalty notice offences

The Bill introduces into the *Tattoo Parlours Act 2012* strict liability offences for the advertising of body art tattooing businesses or procedures without appropriate licensing and/or the inclusion of relevant licence numbers. The Bill also amends the *Tattoo Parlours Regulation 2013* to prescribe these strict liability offences as offences for which a penalty notice may be issued.

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. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. These offences carry maximum penalties that are monetary only and not greater than $5,500 for individuals. The Committee also acknowledges the statements of the Minister that the offences are intended to protect the public from unlicensed body art tattooing procedures.

It is further noted that penalty notices allow a person to pay a specified amount for an offence within a certain time should they not wish to have the matter determined by a court, which may impact on a person's right to a fair trial. Specifically, this may impact a person's right to have their matter heard by an impartial decision maker in public, and to put forward their side of the case. However, the Committee recognises the practical benefits of penalty notices including their cost effectiveness and ease of administration. The Committee further recognises that the amendments does not remove a person's right to elect to have the matter heard by a court. In the circumstances, the Committee makes no further comment.

Wide powers of enforcement – real property rights/right to silence

The Bill amends the *Tattoo Parlours Act 2012* to expand the matters which the Commissioner of Police may investigate and, consequently, underpin the lawful exercise of the existing enforcement powers to enter without a warrant under the Act. The Bill also introduces new enforcement powers in relation to new strict liability offences which empower police officers or other authorised officers to compel the production of records and/or the giving of answers relating to the possible commitment of those offences. These amendments grant authorised

officers, including police officers and members of the NSW Police Force, wide powers of enforcement.

In its Digest No 27/55, the Committee commented on the *Tattoo Parlours Amendment Bill 2012* which introduced the wide enforcement powers under sections 30A to 30C under the Act. Consistent with those comments, the Committee notes that the exercise of these enforcement powers may interfere with individual rights including, for example, their real property rights in respect to the power of entry without warrants or their right to silence in respect to the power to compel records and answers regarding possible offending conduct.

The Committee recognises the purpose of these amendments is to better strengthen compliance with the new prohibitions and to ensure that criminal organisations or unsuitable persons are not able to continue body art tattooing in NSW. However, the Committee notes that the Bill separately provides for mandatory disqualification criteria and strict liability offences to work towards these objectives. Given the additional burden on individual rights, the Committee refers to Parliament whether such wide powers may constitute undue interference with individual rights and liberties.

Procedural fairness/privilege against self-incrimination

The Bill extends the provisions of section 33A of the *Tattoo Parlours Act 2012* which disallows non-compliance with requirements to give records, information or answers in relation to possible offences for reasons of self-incrimination. That section also allows the admissibility in criminal proceedings of certain records and information obtained through the exercise of these powers, despite any objections of involuntary production or self-incrimination. The Bill also includes provisions empowering authorised officers to make recordings of compelled answers without the consent of the person, so long as the officer has notified the person that a recording is being made.

In its Digest No 34/56, the Committee commented on the *Tattoo Parlours Amendment Bill 2017* providing for the inclusion of section 33A into the Act. Consistent with those comments, the Committee notes that these amendments may abrogate an individual's right to silence by explicitly excluding a person's privilege against self-incrimination in the exercise of official State powers. The Committee also notes that by enabling the admissibility of information or records obtained from a person involuntarily through the exercise of those powers and against objections of self-incrimination, the amendments may also impact an individual's right to procedural fairness by excluding established grounds of inadmissibility for evidence in court proceedings. This is of particular concern where recordings of answers compelled from a person may be made without their explicit consent.

Whilst the Committee recognises that the provisions provide that information or answers compelled from natural persons cannot be admissible evidence in criminal proceedings against them, it notes that this safeguard does not limit the use of that information for collecting further information which may constitute admissible evidence in relevant proceedings. The Committee also notes that the safeguard does not allow any exceptions for non-compliance for reasons of self-incrimination which is explicitly disallowed under the Act. For these reasons, the Committee refers this matter to Parliament for their consideration.

Retrospectivity

The Bill provides for the retrospective application of particular amendments to the *Tattoo Parlours Act 2012* in relation to applications, appeals and reviews pending final determination

on commencement of the Bill as an Act. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

In this case, a person could have their licensing application cancelled or refused or their appeal or review determined against their favour due to retrospectively imposed mandatory disqualification criteria relating to that licence. Whilst the Committee acknowledges that the Bill explicitly excludes the retrospective application of new disqualification criteria on existing licence holders, the Committee notes that the retrospective application may have negative implications for individuals seeking to obtain a licence prior to the commencement of the Bill as an Act. For these reasons, the Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

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

Matters deferred to the regulations

The Bill defers some matters to the regulations. In particular, the Bill provides that the regulations may prescribe what offences or organisations constitute an individual meeting the mandatory disqualification criteria for a license (as introduced by the Bill). It also defers the grounds on which the Commissioner may refuse a visiting tattooist permit to the regulations. The Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected, such as the class of worker that may make an application under the Act or the procedure for applications and reviews under the Act.

However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. In these circumstances, the Committee makes no further comment.

Commencement by proclamation

The Bill provides that the Act will commence by proclamation. The Committee prefers that an Act commences on a fixed date or on assent, as this provides certainty to anyone affected by its provisions. This is particularly the case with Bills such as this one which affect police powers and personal rights and liberties.

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, to allow for administrative changes across agencies or other operational arrangements. However, the Committee notes that certain provisions in the Bill may have retrospective application. For these reasons, the Committee refers the matter to Parliament to consider whether commencement on proclamation is reasonable in the circumstances.

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

Significant matters not subject to parliamentary scrutiny – service of documents with the authority

The Bill seeks to amend the *Tattoo Parlours Act 2012* to amend the way in which documents may be served on the Commissioner. Specifically, it provides that service may be by a way that is approved by the Commissioner. Notes to that subsection refer to the NSW Police Force website for those approved manners for service. As the matters dealt with by the website have bearing on the obligations of those effecting service of documents, the Committee would prefer that they were dealt with by regulation. This would foster an appropriate level of parliamentary

oversight. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. There appears to be no such requirement for the website in question.

The Committee acknowledges that the provisions allow for service on the Commissioner in accordance with provisions of other laws or rules of a court. However, the Committee notes that the service of documents may include records or information which a person is required to provide to the Commissioner under enforcement powers granted to them by the Act and not otherwise connected to proceedings covered by that safeguard. For these reasons, the Committee refers this matter to Parliament for consideration.

PART TWO – REGULATIONS

1. COMMUNITY LAND MANAGEMENT REGULATION 2021

Right to fair trial – penalty notice offences

Schedule 2 of the Regulation creates penalty notice offences and prescribes amounts payable for those offences. The highest penalty prescribed for a penalty notice offence by an individual is $550.

Penalty notices to which the Fines Act 1966 applies 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, and are subsequently not liable to any further proceedings for the alleged offence. The Committee notes that an authorised officer may issue a penalty notice under the Community Land Management Act 2021 where it appears to the officer that a person has committed a relevant offence, and no requirement of 'reasonableness' attaches to the officer's provision of the penalty notice.

The penalty notice regime under the Act 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. The Committee also generally prefers provisions that create offences be included in primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight.

However, the statutory regime does not remove a person's right to elect to have the matter heard by a court. The Committee 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 the circumstances, the Committee makes no further comment.

Provisions regarding levy register

Section 103 of the *Community Land Management Act 2021* and clause 22 of the Regulation each include information that a levy register must include. Specifically:

section 103 requires that an levy register for an association include, for each member in the scheme, certain particulars in relation to contributions payable, and

clause 22 requires that a levy register for a fund must include, in separate sections for each lot (and, in certain cases, former lots) in the scheme, certain matters in relation to each contribution levied by the association. The meaning of the term 'fund' for the purposes of clause 22 of the Regulation is unclear.

The matters and particulars set out in clause 22 and section 103 are the same, notwithstanding slight differences in wording and numbering. It is unclear whether the levy register requirements in the Regulation overlap with or are additional to the requirements set out in the Act. This may impact those that are subject to the requirements under the regulation if their obligations are not sufficiently clear. The Committee refers this issue to the Parliament for its consideration.

2. DISTRICT COURT CRIMINAL PRACTICE NOTE 19

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

Access to justice

The Practice Note provides that accused persons who are in custody and without legal representation must await a hearing date for their AVL Readiness Hearing to be fixed by the relevant District Court circuit judge. It also distinguishes unrepresented defendants who are not in custody by providing them with only a telephone connection option for their AVL hearings, without otherwise specifying the connection options for the attendance of unrepresented defendants in custody.

By providing for distinctive pre-trial procedures and practices between unrepresented defendants charged on indictment who are in custody and those who are not in custody, the Practice Note may affect the rights of accused persons to equal access to justice contained in Article 14 of the ICCPR. The right to equal access to justice protects the right of individuals to equality before the courts and tribunals. This is of particular concern as the limitations on the attendance and allocation of hearing dates are imposed for accused persons who are held in custody and thus deprived of their liberty, and who are also without legal representation which would itself impact their right to a fair trial.

The Committee acknowledges that the Practice Note does not preclude the attendance of accused persons held in custody and without legal representation at the AVL hearings. However, the Committee notes that no attendance options for those individuals are specified in the Practice Note and it is unclear how the differentiation between unrepresented defendants in and not in custody achieves the objects of the Practice Note. In the circumstances, the Committee refers the matter to Parliament for consideration.

3. DISTRICT COURT CRIMINAL PRACTICE NOTE 22

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

Right to liberty and freedom from arbitrary arrest or detention

The Practice Note makes the reallocation of hearing dates for criminal trials which have vacated conditional upon the hearing and determination of pre-trial issues. This may have the effect of individuals remaining arraigned on indictable offences and potentially in the custody of the State for an undefined period of time, in circumstances where the person is presumed innocent until their matter has been tried and they have been found guilty of a charge beyond reasonable doubt. The Practice Note may thereby impact on the right to liberty and security of person contained in Article 9 of the ICCPR. The right to liberty and security of person protects the freedom of individuals not to be subjected to arbitrary arrest or detention and the entitlement of individuals arrested or detained on a criminal charge to a trial within a reasonable time, or to be released.

The Practice Note may also impact on the right to equality before the courts and tribunals contained in Article 14 of the ICCPR. The right to be equal before the courts and tribunals in the determination of a criminal trial protects the right of individuals to minimum guarantees of full equality, including the guarantee to be tried without undue delay.

The Committee acknowledges that the Practice Note provides for the previously allocated hearing date of the vacated trial to be reserved for the determination of pre-trial issues, which will prevent further delays to the reallocation of a new trial date that could be caused by the need to fix a hearing date for pre-trial arguments. The Committee also recognises that this measure provides for the efficient use of the Court's resources and may assist the Court in managing the backlog of criminal trials as a result of the vacations caused by the COVID-19 pandemic.

However, the Committee notes that the Criminal Practice Note 18 recognises and makes provisions for the determination of pre-trial issues which may arise in its estimation of trial length. The Committee also notes that the determination of pre-trial issues pending or the signed statement of no such issues provided at the time of the vacation of hearing dates does not preclude the need for determination of further pre-trial issues which might thereafter arise before the new trial date. Therefore, the efficiency savings intended by the restriction may be undermined at the expense of the accused person's right to have their matter set down for trial as soon as reasonable. In circumstances where the accused individual might also be held in custody on remand, the Committee refers this matter to the Parliament for consideration.

4. DISTRICT COURT CRIMINAL PRACTICE NOTE 23

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

Barrier to jury participation

The Practice Note requires that all members of a jury panel attending a new jury trial are vaccinated against COVID-19. While a court participant (including a juror) has the right to decline to provide his or her vaccination status, it appears that doing so prevents that person from being a juror.

The Practice Note does not appear to facilitate juror participation by audio link or audio-visual link as an alternative. However, the Committee notes that in person jury trials help to uphold the right to fair trial and rule of law by allowing the jurors, among other things, full court room visibility (of other court participants present and the Judge) and access to the jury room for deliberation. It also allows juror conduct to be more closely monitored and therefore effectively managed.

The Practice Note does not make any exceptions to the requirement to be vaccinated on medical or other grounds. The requirement to be vaccinated may therefore be discriminatory against non-vaccinated people, including people who are unable to be vaccinated for medical reasons, or people who received a vaccine other than those approved by the Therapeutic Goods Administration (TGA). These include overseas vaccines 'recognised' by TGA, although it is noted that State and Territory governments or certain organisations may apply additional considerations around vaccine requirements.

The Committee notes the centrality of jury service to the criminal justice system, allowing members of the community to play an active role in the administration of justice. It also notes

the intent of the requirement to manage the risk of COVID-19 and protect the safety of all court participants. The Committee refers this issue to the Parliament for its consideration.

Open justice

The Practice Note requires any person who wishes to attend Court in person for Judge alone trial apply for leave, and that such leave will not be granted unless the Judge is satisfied that he or she is vaccinated. It also requires members of the media who wish to attend a trial in person provide evidence that they are vaccinated and consent to undergo rapid antigen testing (RAS). If a person does not apply for leave to attend Court in person or a member of the media declines to provide evidence of vaccination or does not consent to undergo RAS, they have access to the virtual courtroom.

The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny. However, while the Practice Note limits in person appearances and media access to the Court, the Committee acknowledges that such requirements are in response to the current COVID-19 pandemic with the intention of broader public health. The Committee also considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

Access to justice

Where a person declines to provide their vaccination status or evidence of such, or do not consent to rapid antigen testing, the Practice Note allows a Crown witness, a defence witness and a defence expert and/or alibi witness to give evidence in a new jury trial by audio link or audio-visual link. It also permits an accused person to appear by audio-visual link. The Court may direct an accused person to appear by audio-visual link if it is in the administration of justice and having regard to certain circumstances.

The use of audio link or audio-visual link may affect procedural fairness because the Court cannot closely monitor the conduct of a witness or expert including what material they have access to, if other persons are in the room or if they are recording the trial on their own device. It may also affect consistency in the quality of evidence between witnesses who appear in person or remotely, particularly if an audio link or audio-visual link drops out due to technical failures. Additionally, appearance by audio-visual link may impact an accused person's access to justice, particularly if they are Indigenous or have mental health or cognitive impairment issues, as the Court does not have the benefit of observing any nuanced behavioural cues of the accused person.

The Committee acknowledges that the use of audio link or audio-visual link in trials has practical benefits in the circumstances, specifically to protect against the risk of COVID-19 and protect the safety of court participants. In the circumstances, the Committee makes no further comment.

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

Period of application and review date

The Practice Note does not include a specific end date, although it indicates that it will be reviewed in mid-November 2021 or as otherwise may be necessary. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of

the Practice Note on a person's rights, including their right to participate in the administration of justice as a juror, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

5. DRUG MISUSE AND TRAFFICKING REGULATION 2021

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

Liability of directors and managers for offences by the corporation

The Regulation deems certain offences under the Regulation to be executive liability offences. This means that a director or certain managers of a corporation may be prosecuted for an offence committed by the corporation. The Committee notes that the prosecution is not required to prove actual knowledge of the offence on the part of the accused, only that the accused reasonably ought to have known about the offence or the likelihood the offence may occur.

However, the Committee acknowledges that the prosecution still bears the burden of proving the elements of an executive liability offence. Similarly, lower thresholds for the mental element (that must be proved to hold a defendant liable) are not unusual in regulatory contexts in order to encourage compliance. Further, the offences deemed to be executive liability offences by the Regulation will not attract a custodial sentence - the maximum penalty for individuals being a $5 500. In the circumstances, the Committee makes no further comments.

Access to justice

The Regulation provides at section 19(7) that an accused person who requests to have a further sample of a substance analysed will have to pay for that analysis. This may affect the rights of accused persons, especially people who lack financial means, to obtain a secondary analysis of a substance as evidence in proceedings against them. This is of particular concern as some offences in relation to the substances controlled by the Regulation may result in a custodial sentence if an accused is found guilty.

The Committee acknowledges that a secondary sample may be unlikely to demonstrate a different result to the first sample, which is analysed at the expense of the NSW Police Force. Further, the Committee acknowledges that this measure may serve to discourage individuals from delaying the legal proceedings in relation to their case or otherwise seeking to inconvenience the NSW Police Force. However, in acknowledging the cost-saving and practical benefits of this requirement, the Committee does not consider that they fully outweigh the access to justice concerns in the context of significant drug offences. The Committee refers the matter to Parliament for further consideration.

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

Penalties prescribed in the Regulation

The Regulation creates offences in regards to the supply of Schedule 1 and 2 precursors, and Schedule 3 apparatuses to persons except in certain circumstances. The maximum penalty that applies in respect of these offences is $16 500 for a corporation, and $5 500 for an individual.

The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, the Committee notes that the penalty has not

been increased from the level prescribed in the *Drug Misuse and Trafficking Regulation 2011*, and makes no further comment.

6. ELECTRICITY SUPPLY AMENDMENT (PEAK DEMAND REDUCTION SCHEME) REGULATION 2021

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

Imposition of a new scheme

The Regulation imposes a number of penalties for non-compliance with the peak demand reduction scheme. These penalties are of significant value, with the maximum prescribed penalty being $220 000. However, shortfall penalties, which are calculated using a formula particular to the entities' situation, may exceed this amount. The Regulation imposes reporting requirements and other compliance actions on electricity businesses, and these may require those businesses to incur additional costs in order to comply. A failure to comply with these measures may lead to a monetary penalty being imposed.

However, the Committee notes that the increased compliance obligations and the associated penalties may be required to successfully impose the scheme throughout NSW. The Committee accepts that these punitive elements are designed to ensure that all relevant industry participants are properly engaged with the scheme, and are appropriately targeted at fulfilling the Regulation's stated aims of reducing peak demand for electricity in NSW. The Committee notes the high value of some of the penalties, however notes that penalties in the *Electricity Supply Act 1995* exceed the penalties in the Regulation. Considering the nature of the Regulation and the broader expectations placed on electricity market participants, the Committee makes no further comment.

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

Henry VIII Clause

The *Electricity Supply Amendment (Peak Demand Reduction Scheme) Regulation 2021* amends the *Electricity Supply Act 1995*, made possible by Part 8B Division 3, which functions as a Henry VIII clause in the Act.

Henry VIII clauses allow subordinate legislation to amend the Act, thus delegating Parliament's legislative power to the Executive. The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight. The Committee refers this matter to Parliament for further consideration.

Matters that should be included in primary legislation

The Regulation provides that the Minister may provide an exemption to a scheme participant if the Minister is satisfied that the electricity is used for certain activities that are trade exposed or related to the production of green hydrogen. The Committee considers that matters involving an exemption from a scheme as well as penalties for non-compliance, which may include significant monetary penalties, should be dealt with in primary, not subordinate legislation.

The Committee notes that the exemption only applies to certain scheme participants, and not all offences created by the Regulation, and that the Minister's authority to grant such exemptions is limited by considerations of public interest amongst other factors. In regards to

offences created by the Regulations, the Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny.

The Committee also acknowledges that either House of Parliament can pass a resolution disallowing a statutory rule. Nevertheless, the Committee refers to Parliament for further consideration whether the objectives in the Regulation could be more effectively achieved through primary legislation.

7. EXHIBITED ANIMALS PROTECTION REGULATION 2021

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

Penalties should be included in primary legislation

The Regulation creates several offences. For example, Part 4 contains a number of offences regarding the humane treatment of animals and other safety and reporting measures that must be observed by those who are licenced to exhibit animals. The maximum penalty that applies in respect of any of these offences is 10 penalty units ($1100).

The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, given the regulatory context; the fact that it may be more administratively efficient to proceed by regulation, and the fact that the penalties are relatively modest, the Committee makes no further comment.

Incorporating standards of external entities that will not be subject to disallowance

Under the Regulation, the standards published by the Department for Regional NSW, which may be amended at any time, are binding on an authority that exhibits animals. Failure to comply with these standards may result in a penalty (maximum 10 penalty units ($1100)), or the inability for an individual or entity to receive a licence to lawfully exhibit animals.

Unlike regulations, there is no requirement for these standards to be tabled in Parliament and subject to disallowance under the Interpretation Act 1987. To ensure an appropriate level of parliamentary oversight, the Committee usually prefers for these requirements to be included in the Regulation, not in separate standards. However, considering the relatively minor penalties for non-compliance, the Committee makes no further comment.

8. LOCAL GOVERNMENT (GENERAL) AMENDMENT REGULATION 2021

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

Strict liability offences

The *Local Government (General) Amendment Regulation 2021* creates strict liability offences. Specifically, it incorporates provisions of the *Electoral Act 2017* to create three strict liability offences regarding secrecy relating to technology assisted voting and the protection of computer hardware and software. Each offence incurs a monetary penalty or imprisonment, or both:

- disclosure of how an eligible elector, voting using technology assisted voting, votes except in accordance with approved procedures incurs a maximum penalty of 20 penalty units ($2200) or 6 months' imprisonment, or both,

- disclosure of a source code of other computer software that relates to technology assisted voting under the approved procedures, except in accordance with the approved procedures or an arrangement with the Electoral Commissioner, incurs a maximum penalty of 200 penalty units ($22 000) or 2 years' imprisonment, or both, and

- destruction or interference with a computer program, data file or electronic device used, or intended to be used, by the Electoral Commissioner for or in connection with technology assisted voting incurs a maximum penalty of 200 penalty units ($22 000) or 3 years' imprisonment.

It also expands the offence under clause 368 to make it an offence for a person to, without lawful authority, enter or remain at a polling place, or refuse to leave a polling place after being required to leave by an election official. The Regulation places the burden on the accused person to prove they had the lawful authority to enter, remain or refuse to leave. This requirement may be interpreted as a reversal of the evidentiary principle that the burden of demonstrating the elements of an offence rests on the prosecution.

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. However, such offences encourage compliance. Compliance is particularly vital to safeguarding the integrity of the electoral process and vote by secret ballot, which guarantees free expression of the will of electors and upholds an individual's right to partake in public affairs and elections.

The Committee also prefers that provisions which create offences are included in the primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight. In this case however the *Local Government Act 1993* contemplates the regulations creating offences by adopting provisions of the *Electoral Act* 2017.

In the circumstances, the Committee makes no further comment.

Freedom of movement

The *Local Government (General) Amendment Regulation 2021* limits the freedom of movement of a person at a polling place or a scrutineer at a polling place, pre-poll voting office, ballot counting place or declared institution or mobile booth. Specifically, the Regulation:

- makes it an offence for a person without lawful authority, proof of which lies on the person, to enter, remain or refuse to leave a polling place, and

- allows a police officer to remove a scrutineer for contravening clause 369, engages in misconduct or fails to obey a lawful direction of the election official.

An individual's freedom of movement may be limited for various reasons, including for public order or the rights and freedoms of others, and any limitation must be necessary and proportionate to protect the permissible purposes and be the least intrusive means of achieving the desired result. The Committee considers the limitations on an individual's freedom of movement in this case are for a permissible purpose, namely to maintain public order and uphold the rights of other persons to take part in public affairs and elections. It generally considers that it is necessary, proportionate and the least intrusive means to achieve this result. However, it notes that the making of a strict liability offence limiting a person's ability to enter a polling place without a lawful purpose may be considered an undue interference with an

individual's freedom of movement. The Committee refers this issue to Parliament for its consideration.

Right to take part in public affairs and elections – free communication of ideas

The *Local Government (General) Amendment Regulation 2021* allows an election manager to give a direction that the display of posters and handing out tangible electoral material at, or on a relevant premises within 100 metres of, a polling place or a pre-polling office. This provision may limit free communication about candidates and the election available in the posters and electoral materials.

Free communication of information and ideas about candidates and elected representatives is an important component of the right to take part in public life and elections. The Committee is of the view that this right should not be derogated from except in extraordinary circumstances warranted by compelling public interest considerations and only to the extent necessary to meet those public interest objectives.

The Committee notes that that the provisions are an extraordinary measure that seek to respond to the public health crisis created by the COVID-19 pandemic, and to protect public health, safety and welfare. It also notes that safeguards are included in the Regulation, for example:

- the requirement that the direction only be given if the election manager is satisfied that it is necessary to comply with a current public health order or reduce the risk of infection,
- online notification of a direction to limit the provision of posters and tangible electoral,
- publishing of links to electoral material online, and
- time limitation of the provisions, with repeal of the clause on 31 December 2021 at the end of the day.

In the circumstances, the Committee makes no further comment.

Access to postal voting – COVID-19 related qualifications

The *Local Government (General) Amendment Regulation 2021* provides that a person is qualified for a postal vote if they are self-isolating because of COVID-19 related reasons, or reasonably believes that attending a polling place on election day will pose a risk to the health or safety of the person, or of another person, because of the COVID-19 pandemic.

The requirement that a person apply for postal ballot-paper and postal vote certificate by 5pm on the fifth day before election day may mean that someone who is required to self-isolate in accordance with a public health order after the postal vote application deadline may not be eligible to vote by post or in person on election day. This may result in a person incurring a penalty notice for failing to vote. The Committee refers this issue to Parliament to consider whether these provisions limit access to postal voting, and whether any waiver would be considered for those who fail to vote due to complying with a public health order.

9. LOCAL GOVERNMENT (MANUFACTURED HOME ESTATES, CARAVAN PARKS, CAMPING GROUNDS AND MOVEABLE DWELLINGS) REGULATION 2021

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

Meaning of 'reasonable charges' unclear

Clause 30(4) requires that occupants residing at a dwelling site that is powered by means other than by a direct connection to the local electricity supply authority's electricity main, be charged reasonable charges for the supply of the electricity. Under the previous version of this clause, clause 30(3) of the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005*, occupants were offered greater clarity on their expected electricity charge, as the 2005 Regulation required the maximum amount that an occupant may be charged for the supply of electricity during a particular period is the amount that the standard retail electricity supplier for the relevant district would have charged during that period under a standard form customer supply contract.

The Committee notes that clause 30(4) of the Regulation does not define 'reasonable charges,' in circumstances where a dwelling site is powered by means other than by a direct connection to the local electricity supply authority's electricity main. The Committee prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and content is clear. Given there does not appear to be an objective guide in the Regulation about determining whether a charge is 'reasonable', the Committee notes this may negatively affect an occupant's residence, as what may constitute 'reasonable' charges may give rise to the risk that occupants are overcharged or charged more than what they would have been charged under the 2005 Regulation which capped the electricity charge to the extent of a standard form customer supply contract for supply during that period.

The Committee acknowledges that it is important in a commercial context for vendors who operate manufactured home estates, caravan parks and camping grounds to have oversight of bills and charges incurred by occupants so as to ensure all of the vendors' rights under a lease or mortgage are respectively upheld. However, clause 30(4) may benefit from the inclusion of an objective guide on how electricity charges are determined as the amended clause is silent on how this will be achieved. As such, the Committee refers the Regulation to Parliament to consider how further elucidation on clause 30(4) may assist in interpretation, particularly for occupants of dwelling sites at manufactured home estates, caravan parks and camping grounds.

10. PRACTICE NOTE DC (CIVIL) NO. 16

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

Open justice

The Practice Note requires persons who wish to attend Court in person for civil trials listed on or after 25 October 2021 apply for leave, and that such leave will not be granted unless the Civil List Judge or trial Judge is satisfied that he or she is vaccinated. It also requires members of the media who wish to attend a civil trial in person to provide evidence to the Civil List Judge or trial Judge that they are vaccinated. If a person does not apply for leave to attend Court in person or a member of the media declines to provide evidence of vaccination, they have access to the virtual courtroom. The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny.

However, while the Practice Note limits in person appearances and media access to the Court, the Committee notes that alternative arrangements may be made for those that do not meet the vaccination requirements to attend a virtual courtroom. The Committee also recognises that these vaccination requirements are in response to the current COVID-19 pandemic for the

protection of public health and considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

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

Period of application and review date

The Practice Note does not include a specific end date. It also indicates that it will be reviewed in mid-November 2021 or as otherwise may be necessary. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential impact on a person's rights, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in other legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

11. PORTS AND MARITIME ADMINISTRATION REGULATION 2021

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

Risk of arbitrary search

The Regulation provides TfNSW the power to conduct audits to ensure compliance with the mandatory standards in relation to truck servicing by Stevedores at Port Botany. These audits may occur at any time, and TfNSW has broad powers to request the disclosure of documents and enter premises and facilities when conducting these audits. The Committee notes that a failure to comply with a direction to produce documents for inspection or otherwise comply with an audit carries a maximum penalty of 500 penalty units ($55 000).

The Committee also acknowledges that the mandatory standards that are able to be audited are not contained wholly in the Regulation, and may be set by the Minister from time to time in accordance with clause 44, noting however that they must be published in the Gazette and that the Regulations include a process for industry input into these standards.

The Committee considers that the unfettered powers in relation to auditing may functionally provide TfNSW with the legal right to conduct ongoing surveillance of a carrier, business or stevedore. This may impact on a person's freedom from arbitrary search. However, the Committee acknowledges that the mandatory standards are designed to ensure the timely and fair operation of Port Botany, which plays a vital role as the largest container port in NSW, and that the capacity for TfNSW to conduct inspections to ensure compliance may be essential to ensure the successful operation of the Port. In these circumstances, the Committee makes no further comment.

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

Privacy

Under the Regulation, the Minister may disclose confidential information if the Minister considers that the disclosure is in the public interest, and that the public benefit of disclosing the information outweighs the detriment that might be suffered by a person as a result of the disclosure. The information that may be disclosed under this provision is in relation to the Port Botany Landside Improvement Project, and may include information such as the identity of port staff and information about the financial position and operations of an involved business. The information regarding the operations of a business may be of value and significance to a

business, as it may give an indication of their performance that would not otherwise be made public which may in turn impact their position in the market.

The Committee however acknowledges that the public interest test provides protection for business from having confidential information revealed in many circumstances, and that due to the complex and highly regulated nature of ports it may be appropriate for this information to be made available by the Minister to a range of involved stakeholders. As such, the Committee makes no further comment.

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

Delegation of legislative powers

The Regulation provides that the Minister can delegate a broad range of powers to any person employed in the Transport Service. These powers include any function of the Minister under the marine legislation, and any other function conferred on the Minister by or under any Act in their capacity of administering the Act.

The Committee notes that under the Act section 27(2) a delegate may sub-delegate to another person employed in the Transport Service if authorised to do so by the Minister.

The Committee would have preferred the provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. In addition, they preferably should be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. However, the Committee does note that the Act already provides that staff of TfNSW, a Port Corporation or a NSW Public Service employee are already deemed as an authorised person who can act as a delegate, and therefore the addition of a person employed in the Transport Service does not provide significant further scope to the power of delegation. The Committee makes no further comment.

Granting of exemptions

The Regulation empowers TfNSW to grant exemptions from the operation of certain provisions of the Regulations. If an exemption is to be made to the operation of a Regulation, the Committee prefers this to be done by amending regulation. This is to foster an appropriate level of parliamentary oversight over the exemptions granted. Regulations must be tabled in Parliament and are subject to disallowance under the Interpretation Act 1987.

There is no such requirement for exemptions granted by TfNSW. The Committee notes that proposed clause 38(4) of the Regulation would require that details of any exemptions granted be published in the Gazette. The Committee also acknowledges that requiring an amending regulation to grant an exemption may be time-consuming, costly and burdensome for the businesses concerned and the government, and that the exemptions that can be granted are in relation to mooring licences of which there are a significant number in NSW. However, the exemptions may have broad application as they can be in regards to a class of person or vessel, which may have significant impact on businesses, individuals or the community. However, the Committee refers the matter to Parliament to consider whether the delegation of legislative power is appropriate in the circumstances.

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

Ill-defined and wide powers

The Regulation provides that TfNSW may impose conditions on a permit for access to charter and commuter wharves, however there is no further information provided as to the nature of the conditions that can be imposed. A failure to comply with these conditions carries a maximum penalty of 100 penalty units ($11 000). In doing so, the Regulation grants TfNSW a wide and ill-defined power to impose conditions on permit holders, who under Part 3 of the Regulation have a right to apply for a permit to access the wharves. Administrative powers that limit rights and liberties should be drafted with sufficient precision so that their scope and content is clear.

Further, TfNSW can vary the conditions on a permit with a minimum of 7 days' notice in writing to a permit holder. This may lead to a permit-holder having to quickly take onerous steps to comply with a new condition if they wish to continue to access the wharves, and as the scope of the conditions is not limited by the Regulation, it is more difficult to assess what the scope of the impact may be on permit holders. The Committee refers these matters to Parliament for further consideration.

12. PROTECTION OF THE ENVIRONMENT OPERATIONS (GENERAL) REGULATION 2021

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

Strict liability offences

The *Protection of the Environment Operations (General) Regulation 2021* creates various strict liability offences relating to record-keeping, reporting, contravention of an EPA order prohibiting or regulating aquatic activities that threaten the safety of drinking water, vehicle inspection tests and reports, burning of native bio-material and discharge of PFAS firefighting foam. The offences include varying maximum monetary penalties. Certain offences, including those relating to the discharge of PFAS firefighting foam, result in high monetary penalties. The discharge of PFAS firefighting foam may also result in special executive liability for directors or persons concerned in the management of a corporation, as a result in liability for pollution of waters or land. The Committee notes its comments in Digest No. 31/57 regarding the PFAS firefighting foam offences, including that the rationale of the penalties is that they seek to prevent PFAS contamination in the NSW environment and PFAS firefighting foam can still be used to fight catastrophic fires or fires on watercraft in relevant waters (although use outside those circumstances is an offence attracting a high monetary penalty).

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, and that provisions which create offences be included in the primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight. However, it notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. In this case, compliance upholds the objects of the Act. In the circumstances, the Committee makes no further comment.

Right to a fair trial – penalty notice offences

Schedule 6 of the *Protection of the Environment Operations (General) Regulation 2021* creates penalty notice offences and prescribes the amounts payable. 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.

The penalty notice regime under the *Protection of the Environment Operations Act 1997* 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. Additionally, the Committee generally prefers provisions that create offences be included in primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight.

Notwithstanding, the statutory regime does not remove a person's right to elect to have the matter heard by a court. The EPA policy on compliance and enforcement also advises that other enforcement options, including cautions, may be used rather than penalty notices where the offence was not knowingly or deliberately committed, and that the intent of penalty notices is to encourage deterrence, avoid court appearances and deal with one-off breaches. In the circumstances, the Committee makes no further comment.

13. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION (NO 2) 2021

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

Penalty notice offence – right to a fair trial

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 2) 2021* provides that penalty notices can be issued to an individual or corporation that contravenes clause 24AC of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021.* Clause 24AC requires an employee living in temporary accommodation in Greater Sydney to work from home unless it is not reasonably practicable for the employee to work at the employee's place of residence.

The Regulation also provides that penalty notices can be issued to an individual or corporation that contravenes clause 24EA of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021.* Clause 24EA requires that non-urgent construction must not to be carried out in the local government areas of Blacktown, Campbelltown, Canterbury-Bankstown, Cumberland, Fairfield, Georges River, Liverpool, Parramatta or any other local government area specified by the Chief Health Officer, unless specific circumstances are met under that clause. A maximum infringement of $2000 and $10 000 may be issued for an individual and corporation respectively for contraventions of clauses 24AC and 24EA.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have a 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 infringements of $2000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

14. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION (NO 3) 2021

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

Penalty notice offences – freedom of movement and freedom of assembly

The Regulation allows for penalty notices to be issued for offences under section 10 of the *Public Health Act 2010*, for failing to comply with directions not to gather in public under clause 23 of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*; for failing to comply with directions to cooperate with contact tracers under clause 25A of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*; or for failing to comply with directions to self-isolate according to the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The penalties imposed by the Regulation are significant, being for amounts of $3,000 or $5,000.

However, individuals retain the right under this Regulation to elect to have their matter heard and decided by a Court. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health crisis created by the COVID-19 pandemic. In the circumstances, the Committee makes no further comment.

15. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION (NO 4) 2021

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

Penalty notice offence – right to a fair trial

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 4) 2021* provides that penalty notices can be issued for a contravention of the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021*. The Regulation is amended by omitting that a penalty notice is to be issued for a contravention of the previous version of the public health order, (*Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*) and instead replaces it with the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021*.

Orders under the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* include, but are not limited to, self-isolation after a person receives a positive diagnosis of COVID-19 under clause 6, and a requirement for close contacts of a person diagnosed with COVID-19 to self-isolate under clause 7.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount, and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $5 000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may thereby impact on a person's right to a fair trial – that is, to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, as the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices particularly in the extraordinary context of COVID-19, the Committee makes no further comment.

16. PUBLIC HEALTH AMENDMENT (COVID-19) REGULATION 2021

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

Penalty notice offences – right to a fair trial

The Regulation extends the operation of penalty notice offences under Schedule 4 of the *Public Health Regulation 2021* until 26 March 2022, for offences under the *Public Health Act 2010* of non-compliance with a ministerial direction under section 7, an order made by the Secretary under section 11 or a public health order made by an authorised medical officer under section 62.

In its Digests No 13/57 and 31/57, the Committee commented on the *Public Health Amendment (Penalty Notices) Regulation 2020* providing for the issue of penalty notices for the aforementioned offences, and the *Public Health Amendment (Miscellaneous) Regulation 2021* which extended the operation of these penalty notice offences until 31 December 2021.

Consistent with those comments, 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, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the spread of the COVID-19 Delta strain, with a current repeal date of 27 March 2022. In the circumstances, the Committee makes no further comment.

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

Henry VIII Clause

The Regulation amends the *Public Health Act 2010* by way of a Henry VIII clause contained in the Act. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes.

Consistent with those comments, the Committee notes that the Regulation extends the operation of existing legislative provisions contained in the *Public Health Act 2010* which are intended to protect public health and public safety in the extraordinary circumstances of the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.

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

Vague and ill-defined powers

The Regulation grants the Secretary a general power under clause 54 of the *Public Health Regulation 2012* that may be ill-defined and could benefit from further clarification. Clause 54, which makes it an offence for any person who is not a funeral director to retain a body after 5 days have passed since death, allows the Secretary to approve "generally" the retention of a body which would otherwise be an offence under the *Public Health Regulation 2012*.

The Committee notes that neither the Regulation or the *Public Health Regulation 2012* provides guidance on the coverage or limitations of any such general approval given by the Secretary.

This may raise questions regarding who may receive such an approval, who may be covered by such an approval in the event that an employer, such as a hospital, is granted a general approval, and whether that approval is valid indefinitely, subject to conditions and/or subject to expiration. In these circumstances the Committee refers this issue to Parliament for consideration of whether the power could benefit from further clarification.

17. RESIDENTIAL TENANCIES AMENDMENT (COVID-19 PANDEMIC EMERGENCY RESPONSE) REGULATION (NO 2) 2021

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

Property rights and freedom of contract

The Regulation makes amendments to Part 6A of the *Residential Tenancies Regulation 2019* to respond to financial hardship experienced by tenants as a result of the COVID-19 pandemic. Specifically, it:

- extends to 12 November 2021 provisions exempting a financially impacted tenant from the operations of the provisions of the *Residential Tenancies Act 2010* and regulations that would result in termination of their residential agreement or recovery of possession on the grounds of non-payment of rent or charges if the tenant continues to pay at least 25 per cent of the rent payable under the agreement, and

- exempts, from 12 November 2021 to 12 February 2022, a tenant who accrued rental arrears from the operation of provisions of the Act and regulations that would result in termination of their residential tenancy agreement or recovery of possession on a ground relating to arrears.

The exemptions limit a landlord's rights in response to the pandemic. Although, it appears that a landlord may continue to seek termination in other circumstances including for example to sell the premises, for illegal use of the premises or hardship to the landlord.

In limiting landlords' rights under tenancy agreements, the Regulation may impact on property rights. In particular, the ability of the landlord to exercise rights under an existing agreement in relation to the non-payment of rent, charges or arrears. This may also impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. Although, clause 41CA does not affect any agreement between the landlord or tenant to waive or defer any rent or charges payable by the tenant.

The Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health crisis and economic hardship created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants. It is accordingly time limited. The Committee also notes that the Regulation furthers the public health objectives of ensuring residents remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

18. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) AMENDMENT REGULATION 2021

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

Retrospectivity, property rights and freedom of contract

Like its predecessors, the *Retail and Other Commercial Leases (COVID19) Amendment Regulation 2021* significantly limits lessors from taking any 'prescribed action', such as eviction,

against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take into account the economic impacts of COVID-19.

Specifically, the amending Regulation extends the prescribed period from 20 August 2021 until 13 January 2022, and amends the definition of impacted lessee to include lessees that are recipients of a 2021 COVID-19 Micro-business Grant, Business Grant, or JobSaver Payment.

The Regulation continues to require lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. The Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. These changes also have retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation in 2020.

The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. However, the Committee recognises that the amending Regulation, like the first Regulation, only applies to cases involving 'impacted lessees', and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes that the prescribed period has again been extended from ending on August 2021 until 13 January 2021. The Committee understands that this is in response to the current COVID-19 pandemic and recent lockdown periods which did not experience an easing of restrictions until 11 October 2021. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

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

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

As above, the amending Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 pandemic. In doing so, the amending Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 13 January 2021.

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

19. ROAD TRANSPORT (DRIVER LICENSING) AMENDMENT (LICENCE REQUIREMENTS) REGULATION 2021

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

Limitations on the granting of a provisional P2 licence

The Regulation provides that if an individual has committed an alcohol or other drug related offence, they may not apply for a provisional P2 licence (if they held a provisional P1 licence) or an unrestricted licence (if they held a provisional P2 licence) whilst action is being taken in regards to those offences under the *Road Transport Act 2013*. This amendment functionally serves to include drug and alcohol offences within the jurisdiction of the Regulation, which previously prevented an individual from applying for a licence only if they had committed a speeding offence.

The limit on an individual's ability to apply for a driver licence can have a significant detrimental effect, as private cars are used to travel to employment, to buy essential items and receive medical services. However, the Committee notes that the proposed amendment codifies in the Regulation the requirements of the *Road Transport Act 2013*, which allows Transport for NSW to cancel or suspend a licence on the basis that an individual has allegedly committed a speeding or drug or other alcohol related driving offence. The Committee also notes the important public safety considerations that apply to driver licencing, and that this ineligibility is only temporary whilst action is being taken under the *Road Transport Act 2013.* Therefore, the Committee makes no further comment.

20. ROAD TRANSPORT (GENERAL) REGULATION 2021

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

Strict liability offences

The Regulation contains a number of strict liability offences, for which a penalty notice may be issued, ranging in maximum penalty value from $3330 to $6660.

Penalty notices allow a person to pay the amount specified for an offence within a certain amount of time should he or she not wish to have the matter determined by the court. The fine payable under a penalty notice is usually less than the maximum penalty that would otherwise apply. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

However, the Regulation does not remove the right of an individual to elect to have their matter heard and decided by a Court. Nevertheless, as these are strict liability offences with more limited defences available, this may leave some individuals uncertain of their capacity to have their matter reconsidered by a Court.

With that being said, the Regulation does provide some defences where a motor-vehicle offence was the result of an accident or could not have been avoided by the person's reasonable efforts. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. Given these factors, the Committee makes no further comment.

Limited rights of appeal

The Regulation lists a series of decisions which cannot be appealed by the individual or organisation it affects. This includes decisions related to the decision to cancel the registration of a car under section 84 or 104C of the Act (light or heavy vehicles that are written off), or the

decision to cancel an individual's licence after they have lost all demerit points and failed to comply with an order to undertake a driving course. This may impact those individuals subject to such provisions and limit their right of appeal for such decisions.

However, the Committee notes that this may only be done where the vehicle is written-off and there is the ability for an individual to seek authorisation to repair the vehicle which may in turn allow the vehicle to be registered. The Committee also acknowledges the provisions relate to regulating and deterring improper and dangerous driving behaviour. Given the safety objectives behind these provisions, as well as the importance of fraud and theft related to motor vehicles, the Committee makes no further comment.

Privacy of individuals

The Regulation allows for a photograph of applicants for a mobility scheme parking authority to be provided by TfNSW to the NSW Police Force for any reason, provided that it is done so in accordance with a protocol approved by the Privacy Commissioner. It also allows for TfNSW to specify that a particular medical practitioner assess an individual applying for a mobility scheme parking authority.

Such provisions may impact on a person's right to privacy regarding their personal information, such as photographs and medical information. The Committee refers this issue to Parliament for further consideration.

21. STRATA SCHEMES MANAGEMENT AMENDMENT (COVID-19) REGULATION (NO 2) 2021

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

Henry VIII Clause

The *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2021* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. Broadly, the Regulation provides that notice of and documents relating to a strata meeting may be served by email, electronic voting may be used for strata meetings despite any requirements in the Act for votes to be exercised in person, and instruments and documents, instead of being affixed with the seal of an owners corporation, may be signed and witnessed in accordance with the Regulation.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19 pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations

made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

22. STRATA SCHEMES MANAGEMENT AMENDMENT (PETS) REGULATION 2021

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

Property rights

The Regulation proposes a new section 36A, which is an exhaustive list of the circumstances in which the keeping of animals unreasonably interfere with another occupant's use and enjoyment of the land. This includes circumstances such as where the animal repeatedly causes property damage, endangers the health of another occupant through infection or infestation, or where an animal repeatedly runs at or chases occupants, visitors or other animals.

The property rights of strata organisations and residents of these communities may be limited by this exhaustive list, as it prevents them from excluding animals from their property on the basis of other circumstances or disruptions not included on the list in proposed section 36A. However, the Committee notes that the list covers many different circumstances, and acknowledges that some limitation on the issues that can be raised may be important to prevent unnecessary and futile disputes amongst residents. The introduction of section 36A is unlikely to restrict the rights of property owners and strata organisations beyond the restrictions in the *Strata Schemes Management Act 2015*, which at section 137B already prohibits strata organisations from making by-laws to unreasonably exclude animals; this Regulation merely provides clarification as to when it is reasonable to do so. For these reasons, the Committee makes no further comment.

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

Uncertain tests

The proposed section 36A provides the circumstances in which the keeping of an animal can be said to unreasonably interfere with another occupants use and enjoyment of the land, and therefore when an animal can be excluded from the premises. However, a number of these circumstances have a requirement of frequency which is unspecified and may be considered vague.

Certain circumstances must happen 'repeatedly' or 'frequently' and these terms may be open to a broad range of personal interpretation as to how regular conduct must occur for it to meet the stated threshold in the Regulation. The Committee notes that the particular interpretation of these terms may have a significant impact on an individual's right to keep an animal at their home, and the Committee usually prefers provisions that affect rights to be drafted with sufficient precision so that their scope and extent is clear.

Nonetheless, while the Regulation does provide further guidance for strata organisations and land owners about the reasonable circumstances in which an animal can be excluded, the Committee acknowledges that individual organisations and owners may benefit from communally reaching an agreement on how frequently behaviour would have to occur for it to meet the proposed thresholds of section 36A. The Committee acknowledges that individuals are best placed to determine their own level of comfort in regards to the use and enjoyment of their land, and that ultimately these matters can be heard by New South Wales Civil and Administrative Tribunal in the instance of a dispute, ensuring that individual opinions cannot be unreasonably enforced. In the circumstances, the Committee makes no further comment.

23. STRONGER COMMUNITIES LEGISLATION AMENDMENT (COVID-19) REGULATION 2021

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

Matters to be included in primary legislation

The Regulation amends a number of regulations to prescribe the beginning of 26 March 2022 as the date on which special statutory provisions enacted to respond to the COVID-19 pandemic are repealed or cease to have effect.

As previously noted by the Committee, the referral to the regulations of the repeal date of a clause allows the regulation to amend an Act in respect of the repeal date. Unlike primary legislation, regulations are not required to be passed by Parliament and the Parliament does not control when a regulation commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*), the statutory rule may have already been in operation for some time before disallowance occurs.

The Committee generally prefers the repeal date or operation period of a clause to be included in primary rather than subordinate legislation to facilitate an appropriate level of parliamentary scrutiny. However, the Committee notes that the primary legislation provisions referring these matters to the regulations were scrutinised by Parliament. Additionally, that the flexibility facilitated by allowing the repeal date to be prescribed by the regulations may be desirable as the provisions respond to the COVID-19 pandemic. In the circumstances, the Committee makes no further comment.

24. SYDNEY OPERA HOUSE TRUST BY-LAW 2021

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

Freedom of assembly

The By-law prohibits the conduct of a "public demonstration" on the premises of the Sydney Opera House and allows the Sydney Opera House Trust to issue penalty notices to anyone who is deemed to be in breach of that prohibition. Its predecessor, the *Sydney Opera House Trust By-law 2015*, did not prohibit such activity on the Sydney Opera House premises.

Clause 9(d) is widely worded to prohibit the "conduct, or cause or assist in the conduct of" a public demonstration. This may result in both organisers and participants of a relevant public demonstration being guilty of an offence under the By-law. The Committee notes that the By-law may potentially impact on the right to freedom of assembly contained in Article 21 of the ICCPR. The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest.

Although the Sydney Opera House Trust may give specific or general consent to the conduct of activities that would otherwise be in breach of the prohibition on "public demonstrations", the By-law does not include a process for obtaining or reviewing the grant or refusal of such consent. Further, the Committee notes that what activity may amount to "public demonstration" is not defined in the By-law and may be determined on the discretion of the Trust. As such, the Committee refers this matter to the Parliament for consideration.

25. TERRORISM (POLICE POWERS) REGULATION 2021

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

Rights of persons detained under preventative detention orders

The Regulation excludes certain legislated rights of, and procedures for dealing with, persons detained at a correctional centre under a preventative detention order. It appears that provisions of the *Crimes (Administration of Sentences) Act 1999* and *Crimes (Administration of Sentences) Regulation 2014* have been excluded by the Regulation to ensure the preventative detention regime under Part 2A the *Terrorism (Police Powers) Act 2002* operates as intended and a conflict of laws does not arise. However, the provisions of Part 2A limit detained persons' rights and liberties compared to those they would otherwise have under the excluded provisions.

For example, the Regulation excludes the right of a detained person to make or receive phone calls or receive visitors, including calls or visits from their lawyer. While Part 2A allows a detained person to contact and receive visits from their lawyer, the Committee is concerned the Regulation unduly limits their right to legal representation and to have a lawyer of their choosing, which is fundamental to their ability to seek relief – including to oppose a preventative detention order or apply for it to be revoked. This is because the right is subject to significant restrictions under the Act, namely:

- their right to contact a lawyer is limited to obtaining advice, arranging legal representation and instructing the lawyer regarding a legal challenge of the preventative detention order or their treatment under that order, or to act for them in relation to an appearance or hearing before a court that is to take place while they are detained,

- their choice of lawyer may be restricted by a prohibited contact order,

- their lawyer can only see the preventative detention order and summary of the grounds on which the order is made, and is therefore unable to review the evidence against the detained person, and

- contact between a detained person and their lawyer is monitored. Although any communication between the detained person and their lawyer for a purpose set out in the Act is not admissible in evidence against the person, the monitoring of contact may in effect hinder frank communication between a lawyer and their client and obstruct a lawyer's ability to represent their client.

Unlike its predecessor regulation, the Regulation excludes the application clause 32 of the *Crimes (Administration of Sentences) Regulation 2014* regarding an inmate's right to request review of their placement, classification and case plan. Although this appears to align with the intent of the preventative detention regime, including because case plans are only adopted for convicted inmates, the exclusion of a detained person's right to request a review of their classification and placement may exacerbate any undue infringement on their freedom of liberty and from arbitrary detention, particularly if their detention exceeds the period necessary to meet public interest objectives or otherwise continues for a lengthy or indefinite period.

The Committee notes the national security aims of the preventative detention regime, the national framework it operates in and the legislated safeguards. It also notes that the conditions of preventative detention, including lengthy or indefinite periods of detention, increases the need for robust safeguards to protect the rights of detained persons. In the circumstances, the Committee refers to the Parliament the question of whether any of the safeguards, rights or procedures typically afforded to detained persons and excluded by the Regulation are unduly limited, including because excluding those rights and safeguards (in whole or in part) is not

necessary for the preventative detention regime to meet public interest objectives or operate effectively.

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

Significant matters in subordinate legislation

The Regulation excludes certain legislated rights of, and procedures for dealing with, persons detained at a correctional centre under a preventative detention order. The Committee generally prefers that such significant matters be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight.

The Committee notes however that section 26X(3) of the *Terrorism (Police Powers) Act 2002* contemplates the exclusion of provisions of or made under the *Crimes (Administration of Sentences) Act 1999* in the regulations and that certain rights and safeguards are provided for in the Act, although they do not appear to be as robust as those in the excluded provisions. The Committee also notes the national security aims of the preventative detention regime and the importance of a nationally consistent approach to this issue.

The Committee refers the issue to the Parliament of whether the excluded provisions should be incorporated in the *Terrorism (Police Powers) Act 2002* to facilitate parliamentary scrutiny of the exclusion of legislated rights, procedures and safeguards typically afforded to detained persons from applying to persons detained under the preventative detention regime.

Part One – Bills

1. Children (Criminal Proceedings) Amendment (Age of Criminal Responsibility) Bill*

Date introduced	11 November 2021
House introduced	Legislative Council
Member responsible	Mr David Shoebridge MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of the *Children (Criminal Proceedings) Amendment (Age of Criminal Responsibility) Bill 2021* (the **Bill**) is to amend the *Children (Criminal Proceedings) Act 1987* (the Act) to raise the age of criminal responsibility and to prevent a child accused of an offence or child offender from being incarcerated.

2. The Bill amends section 5 of the Act to raise the age of criminal responsibility from 10 years to 14 years. Schedule 3 of the Bill inserts section 5A to the Act to provide that children under the age of 16 years are not to be remanded awaiting proceedings nor imprisoned as a penalty for a criminal offence. The amendments expressly provide that a court's power to impose a non-custodial sentence or deal with a child under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* are not affected.

BACKGROUND

3. Proposed amendments to section 5 of the Act raise the age of criminal responsibility from 10 years to 14 years. The direct consequence of this amendment is that a child under the age of 14 cannot be guilty of an offence. This is based on the common law principle that children younger than the age of criminal liability are presumed to be incapable of forming the mens rea of an offence, and are therefore incapable of committing crimes ('doli incapax').

4. The existing common law creates a rebuttable presumption of liability for children accused of offences between the ages of 10 and 14.[1] The presumption means a child aged between 10 and 14 could be found guilty of an offence if it could be shown by the prosecution that the child knew their act was seriously wrong as a matter of morality. The amendments are silent on whether the rebuttable presumption will be extended to apply to children between the ages of 14 and 17.

5. The proposed amendment to section 5 reads:

    i. It shall be conclusively presumed that no child who is under the age of 14 years can be guilty of an offence.

[1] As set out in case law. See *C (A Minor) v DPP 1995 WLR 383*, [401]-[2].

6. In his Second Reading Speech, Mr David Shoebridge MLC stated:

> The bill is in fact very simple. It amends section 5 of the *Children (Criminal Proceedings) Act 1987* to raise the age of criminal responsibility from 10 years to 14 years. This accords with the global consensus. Other nations have a minimum age of criminal responsibility of 14, 16 or 18 years. It is based on understandings of cognition and development that show it is simply not possible for younger children to meaningfully understand the implications of their actions or how they relate to the criminal law and social norms. There is significant—indeed, overwhelming—scientific evidence that 14 is the bare minimum for this, but even that is likely to be too low.

7. Proposed section 5A provides that children under the age of 16 years are not to be remanded awaiting proceedings nor imprisoned as a penalty for a criminal offence. Section 5A states:
   i. A court must not sentence a child under the age of 16 years to imprisonment as a penalty for a criminal offence.
   ii. A child under the age of 16 years who is charged with a criminal offence must not be detained on remand awaiting proceedings for the alleged offence.

8. Section 5A also states the court's powers to impose a non-custodial sentence or deal with a child under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* are not affected by the amendments.

9. On this point, Mr Shoebridge stated:

> That does not take any other punitive or diversionary measures off the table. It does not mean there are no consequences. It simply means that the consequence of prison—one which we know is particularly harmful and associated with reoffending, alienation and a future downward spiral in a young person's life—is not an option for the courts. We know that the young people who do go to prison are not the ones with the expensive lawyers. They are not the ones with the wraparound services available to address issues they may be having. They are some of the most disadvantaged young people in the State. Putting them through the criminal justice system and incarcerating them only entrenches that and cuts off alternative pathways. The medical evidence is clear: Child prisons hurt all children. What hurts an 11 year old or a 13 year old also hurts a 15 year old. Given half the children in prison are on remand, the bill also provides that remand should not be an option for children under 16 years.
>
> Recently we have had an experiment in what it needs to decarcerate young people. The COVID period is a great example of how it can work. In this last year we have seen serious attempts to ensure that young people are granted bail and not exposed to the COVID risks in youth prisons. Research from Yfoundations showed that a 25 per cent reduction in the number of young people in prisons had no matching increase in offending, police cautions or any other criminal justice marker. For many of the young people who, despite that change in attitude, have been held on remand in the juvenile justice system, it is simply because they have not been found a safe home—or they do not have a home to go to at all. A young person being locked up because they have not got a home is perhaps one of the most unfair punishments one could imagine. It doubly penalises a young person for poverty and homelessness, with the penalty being they are sent to jail.

10. Proposed section 50 provides that the *Bail Act 2013* prevails in the event of an inconsistency, subject to the new section 5A.

11. Mr Shoebridge further stated that the reforms were supported by a large number of international and Australian human rights organisations such as the Public Interest Advocacy Centre, Yfoundations, Change the Record, the Australian Medical Association and the Law Council of Australia, as well as the Office of the Children's Guardian and the Advocate for Children and Young People. He noted that such reforms have been introduced the Australian Capital Territory following a government commissioned review.

12. The Committee notes that while the Bill deals with the issue of children in criminal proceedings, the intent of the Bill is to raise the age of criminal responsibility from the current 10 years of age to 14 years of age, and thereby seeks to provide the affected persons additional protection.

ISSUES CONSIDERED BY COMMITTEE

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

2. Companion Animals Amendment (Rehoming Animals) Bill 2021*

Date introduced	10 November 2021
House introduced	Legislative Council
Member responsible	The Hon. Emma Hurst MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of the *Companion Animals Amendment (Rehoming Animals) Bill 2021* (the **Bill**) is to amend the *Companion Animals Act 1998* to set out actions a council must take towards rehoming a seized or surrendered animal.

2. The Bill inserts proposed section 64B into the *Companion Animals Act 1998* to set out actions a council must take towards rehoming a seized or surrendered animal before destroying the animal under section 64(1) or 64A(1), and the records the council is required to keep and make available for inspection.

BACKGROUND

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

4. In the Second Reading Speech, the Hon. Emma Hurst MLC stated:

> The bill will amend the Companion Animals Act to create a right to rescue. It will enable rescue groups to intervene when a council is considering convenience killing and will give animals on death row a second chance. Of course, this does not oblige rescue groups to take on every animal on death row…It should be made clear that the purpose of the bill is not to transfer the government's legal or financial burden onto rescue groups. However, I know from speaking with rescue groups that many are frustrated at being locked out of pounds with high kill rates and have a desire to do more to help those animals. That is what the bill is designed to achieve.

5. The Hon. Emma Hurst MLC also provided:

> I have consulted with rescue groups and councils about this issue, including at my pound reform working group, and all have said that we desperately need changes in this space.

ISSUES CONSIDERED BY COMMITTEE

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

3. Crimes (Administration of Sentences) Amendment Bill 2021

Date introduced	10 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Counter Terrorism and Corrections

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Crimes (Administration of Sentences) Act 1999* as follows—

(a) to update the provisions relating to the Victims Register, including—

(i) to allow any victim of an offender sentenced to full-time detention to request to be recorded in the Victims Register, instead of only victims of an offender with a sentence that includes a parole period, and

(ii) to allow a victim of a personal violence offence to request to be recorded in the Victims Register if the offender is sentenced to intensive correction in the community, and

(iii) to make further provision for victims who are less than 18 years of age, and

(iv) to allow for a victim to nominate an individual to act and receive information on the victim's behalf in relation to the Victims Register, and

(v) to allow the Commissioner of Corrective Services (the ***Commissioner***) to notify a victim recorded in the Victims Register if the offender is transferred into the custody of another State, a Territory or the Commonwealth, and

(vi) to allow the Commissioner to notify a victim of an adult offender serving a sentence of imprisonment by intensive correction for a personal violence offence if the offender is returned to custody,

(b) to require the State Parole Authority, when considering whether to release an offender on parole, to have regard to a recommendation from the High Risk Offenders Assessment Committee that an application for an extended supervision order or continuing detention order be made in relation to the offender under the Crimes (High Risk Offenders) Act 2006 or the Terrorism (High Risk Offenders) Act 2017,

(c) to allow the Chief Executive of the Justice Health and Forensic Mental Health Network to delegate the Chief Executive's right to free and unfettered access to correctional centres, records and offenders in custody.

2. The Bill also amends the *Crimes (High Risk Offenders) Act 2006* to authorise certain information about an offender that is provided to the Attorney General under that Act to be used by the State and the Commissioner in the offender's parole proceedings.

3. The Bill makes minor consequential amendments to other legislation.

BACKGROUND

4. The *Crimes (Administration of Sentences) Amendment Bill 2021* (the **Bill**) makes amendments to the *Crimes (Administration of Sentences) Act 1999*, the *Crimes (High Risk Offenders) Act 2006* and consequential amendments to the *Government Information (Public Access) Act 2009* and the *Terrorism (High Risk Offenders) Act 2017*.

5. The *Crimes (Administration of Sentences) Act 1999* is amended to update the categories of victims who may be registered on the New South Wales Victims Register and to allow victims to nominate representatives to act on their behalf. Under the amendments, the victim of an offender sentenced to full-time detention and a victim of a personal violence offence where the offender is sentenced to an intensive correction order may now request to be registered on the Victims Register. The Bill also creates obligations on the Commissioner of Corrective Services to register victims aged 16 or 17 and to keep victims informed of the sentencing, movements and classicisation of respective offenders. Schedule 14 of the Bill particularises the written information which the State Parole Authority must disclose to a victim about an offender's home detention, reintegration and conditions.

6. Schedule 1 [11] to the Bill removes a restriction on the Chief Executive of Justice Health to delegate the right to access medical records between government managed and privately managed gaols.

7. Schedule 1[6] of the Bill amends the Act to provides that the State Parole Authority may rely on recommendations of the High Risk Offenders Committee when determining whether to release an offender on parole.

8. The *Crimes (High Risk Offenders) Act 2006* is amended to authorise the State Parole Authority to use information about an offender provided to the Attorney General in parole proceedings.

9. The *Government Information (Public Access) Act 2009* and *Terrorism (High Risk Offenders) Act 2017* are amended to reflect proposed changes to the *Crimes (Administration of Sentences) Act 1999* and the *Crimes (High Risk Offenders) Act 2006.*

10. In his Second Reading Speech, the Hon. Anthony Roberts MP, Minister for Counter Terrorism and Corrections, stated:

> The amendments will improve process to promote community safety. They will clarify, address gaps and ensure there is consistency in legislation, and also improve the State Parole Authority's decision-making processes. Several of the amendments will improve the welfare and wellbeing of victims of crime through improvements to the Victims Register.
>
> The right of free and unfettered access is for the purpose of ensuring the provisions of the Crimes (Administration of Sentences) Act 1999 are being complied with insofar as they relate to (a) the medical treatment or health of offenders, in respect of

managed correctional centres; and (b) the functions of Justice Health, in respect of government run correctional centres.

11. The Hon. Anthony Roberts MP also stated in his Second Reading Speech that the amendments had been developed as part of the regular legislative review and monitoring program within the Stronger Communities Cluster, and the Bill had been drafted in consultation with key stakeholders.

ISSUES CONSIDERED BY COMMITTEE

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

4. Crimes Legislation Amendment (Loss of Foetus) Bill 2021

Date introduced	10 November 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

1. The object of this Bill is to amend the following—

(a) the *Crimes Act 1900*, to create offences in relation to causing the loss of a foetus of a pregnant woman,

(b) the *Crimes (Sentencing Procedure) Act 1999*, to extend provisions relating to the preparation and consideration of victim impact statements to include statements prepared by an immediate family member of the primary victim of an offence relating to the loss of the primary victim's foetus about the impact of that loss,

(c) the *Criminal Procedure Act 1986*, to provide that stating the name of a foetus does not affect an indictment for an offence under the *Crimes Act 1900* relating to the destruction or loss of the foetus,

(d) the *Motor Accident Injuries Act 2017*, to provide for the payment of statutory benefits for reasonable funeral expenses following the loss of a foetus of a pregnant woman that results from a motor accident.

BACKGROUND

2. The Bill amends the *Crimes Act 1900*, *Crimes (Sentencing Procedure) Act 1999* and *Criminal Procedure Act 1986* to enact provisions in relation to criminal offences which cause the loss of a foetus of a pregnant woman. The Bill also amends the *Motor Accident Injuries Act 2017* to extend the payment of statutory benefits for reasonable funeral expenses resulting from a motor accident to the loss of a foetus.

3. The Bill has been drafted following a significant process of consultation. This included the NSW Government's public consultation on the Exposure Draft of the Crimes Legislation (Offences Against Pregnant Women) Bill 2020 ('the exposure draft bill') open from November 2020 up to January 20212, which received a total of 114 submissions from the community.[2]

[2] NSW Department of Communities & Justice, *Exposure Draft of the Crimes Legislation (Offences Against Pregnant Women) Bill 2020*, 4 November 2020, viewed 10 November 2021.

4. The Attorney General in his second reading speech spoke of the existing gaps in the State criminal laws which the Bill is intended to address:

> Currently the law in New South Wales… recognises the destruction of a foetus as grievous bodily harm to the pregnant woman. However, despite accommodating the loss within grievous bodily harm to the mother, there is currently no guarantee that the loss of a foetus will be specified within the particulars of a criminal charge, nor result in the imposition of a higher penalty to recognise the criminality of the act or the unique harm caused by the loss. Close family members are currently unable to provide a victim impact statement to a court regarding a loss. This means they are unable to address the harm caused to them by the loss of a foetus separately in sentencing proceedings when grievous bodily harm to a pregnant woman has occurred, or when the pregnant woman has died.

5. The Attorney General confirmed that the "most significant aspect" of the Bill is the proposed insertion of sections 54A and 54B into the *Crimes Act 1900* ('the Act') which introduces two standalone criminal offences. These sections respectively provide that a person commits a offence if their act or omission causes the loss of a pregnant woman's foetus and either occasions grievous bodily harm to the pregnant woman or amounts to a homicide offence where the victim is the pregnant woman.

6. However, the Attorney General emphasised in his second reading speech that the Bill "does not in any way affect a woman's ability to obtain a lawful abortion under existing New South Wales legislation". Subsections 54A(6) and 54B(5) explicitly exclude the application of the offence provisions to lawful abortions or loss of foetuses resulting from the pregnant woman's own act or omission.

7. The Bill also proposes to amend section 16 of the *Criminal Procedure Act 1986* to provide that stating the name of the lost foetus in an indictment for these standalone offences is not a defect which affects the indictment.

8. In his second reading speech, the Attorney General acknowledged that the loss of a foetus is always "harrowing" and the loss as a result of another person's criminal offending "is profoundly distressing". He further reiterated that the NSW Government:

> … remains committed to reform to address the gaps that have been identified in the law, and to reflect the widely held community view that it is necessary to recognise in the criminal law the loss of a foetus as a result of a criminal act of another.

9. The Bill also proposes amendments to Division 2 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* which provide for the consideration of victim impact statements during the sentencing of indictable offences. The Bill proposes to expand both the definition of 'family victim' to include the immediate family of a person who lost a foetus as a result of being the victim of an offence, and what may be included in a victim impact statement to allow particulars of the impact of the loss of a foetus.

10. The Attorney General highlighted the significance of victim impact statements in his second reading speech, stating:

> Victim impact statements play an important role in sentencing proceedings. They are a written or spoken statement that provides a voice to victims and their immediate family members and offers a personalised perspective for courts which may assist in their determination of an appropriate sentence. … This reform will expand eligibility

> of those entitled to give a victim impact statement in circumstances where an unborn child has been lost to family members, recognising the impact this loss can have on a family unit.

11. He also confirmed that these amendments are intended to apply to all sentencing proceedings, not just those for the new criminal offences introduced by the Bill.

12. Finally, the Bill proposes to amend section 3.4 of the *Motor Accident Injuries Act 2017*, which provides for the payment of statutory benefits for reasonable funeral expenses of a person whose death results from a motor accident. Specifically, the Bill seeks to insert sub-sections (4) and (5) to clarify that such a death for which statutory benefits are payable includes the loss of a foetus. In speaking on the intended operation of these amendments, the Attorney General stated that it:

> … will ensure that, if families wish to hold a funeral or memorial for the unborn child who was lost as a result of a motor accident, they will be able to do so without being financially burdened.

ISSUES CONSIDERED BY COMMITTEE

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

Additional punishment for the same conduct

13. Section 54A of the Bill provides that a person commits an offence if their act or omission constitutes an existing offence under the grievous bodily harm provisions of the Act and causes the loss of a foetus of a pregnant woman ("offence of causing loss of a foetus").

14. Similarly, section 54B of the Bill provides that a person commits an offence if their act or omission constitutes an existing offence under the homicide provisions of the Act, involves a victim who is a pregnant woman and causes the loss of the pregnant woman's foetus ("offence of causing death of pregnant woman"). Subsection 54B(2) clarifies that a person can only be charged with this offence if they are also charged with an offence under the existing homicide provisions of the Act.

15. In discussing proposed section 54A, the Attorney General stated in his second reading speech that drawing on existing offences will ensure "greater flexibility, better recognition and a more targeted response to the specific circumstances that causes the loss of a foetus in any given case" and that "the new offence can address varying levels of criminal behaviour and intent".

16. The Attorney General acknowledged that the standalone criminal offences diverged from the approach taken in the exposure draft bill, which provided for aggravated offences relating to criminal conduct causing the loss of a foetus. In his second reading speech, he explained the rationale for introducing the new offences as follows:

> The standalone offences ensure there is independent recognition of this harm, separate to the existing offences under the Crimes Act. This bill, together with the administrative payment scheme, will provide better recognition of the gravity of the loss of a foetus due to a third-party criminal act.

The Bill amends the *Crimes Act 1900* to create standalone offences for conduct constituting an existing criminal offence involving grievous bodily harm or homicide which causes the loss of a foetus. This means that a person may be guilty

of two separate indictable offences in respect to the same act or omission, where that conduct also causes the loss of a foetus. By providing for a standalone criminal offence predicated on the commission of a distinct offence involving grievous bodily harm or homicide, the Bill may permit the accused to receive additional punishment for the same action.

However, the Committee notes that, by drawing upon existing offences under the *Crimes Act 1900*, the Bill's offence provisions may ensure greater flexibility and better recognition of the particular circumstances where criminal conduct by a third party causes the loss of a foetus. The Committee also acknowledges the statements of the Attorney General that the creation of separate offences is intended to recognise the harm and gravity of such a loss, as distinct from existing criminal offences. In these circumstances, the Committee makes no further comment.

Strict liability

17. In criminal proceedings for either offences under section 54A and 54B, subsections 54A(5) and 54B(4) respectively provide that the prosecution does not have to prove that the defendant knew (or ought reasonably to have known) that the woman was pregnant.

18. However, for an offence of causing loss of a foetus, subsection 54A(5) clarifies that the prosecution must still prove that knowledge if it is an element of the grievous bodily harm relevant provision under the Act. In his second reading speech, the Attorney General commented that this subsection:

> … makes clear that it is not necessary for the prosecution to prove that the defendant knew, or ought reasonably to have known, that the woman was pregnant unless that knowledge or intent is an element of the grievous bodily harm offence. The drafting of the provision will capture offences like dangerous driving, where the defendant may not directly interact with the woman, and therefore may not have known that she was pregnant.

19. Under subsection 54A(3), the maximum penalty for an offence causing loss of a foetus is 3 years imprisonment in addition to the maximum penalty for the existing grievous bodily harm offence.

20. However, subsection 54A(4) clarifies that, in sentencing a defendant for this offence and another offence "arising from the same act or omission", a court cannot impose a total sentence greater than the maximum penalty under subsection 54A(3). The Attorney General noted in this second reading speech that this subsection is intended to:

> … prevent disproportionate sentences being imposed for overlapping conduct and reflects the likely sentencing practice of the courts—that is, that sentences for the same course of conduct are usually served concurrently or only partly consecutively. The higher maximum penalty that applies by virtue of section 54A(3) will provide courts with ample sentencing scope to impose appropriate sentences in these cases.

21. Likewise, subsection 54B(4) provides that an offence causing death of a pregnant woman carries a maximum penalty of 3 years' imprisonment. The Attorney General further clarified that a person who is guilty of an offence under proposed section 54B is also liable to the maximum penalty for the underpinning homicide offence.

The Bill amends the *Crimes Act 1900* to create new criminal offences for criminal conduct which causes the loss of a foetus of a pregnant woman. These amendments provide that the prosecution is not required to prove that the accused had knowledge or ought reasonably to have known that the woman was pregnant. The Bill also imposes an additional maximum penalty of 3 years' imprisonment on top of the maximum penalty for the separate underpinning offence of causing grievous bodily harm or homicide.

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.

The Committee acknowledges that, to be guilty of an offence relating to the loss of a foetus, the prosecution must still prove all elements of the underpinning offence of causing grievous bodily harm or homicide including any relevant mental element. However, the Committee notes that the maximum penalty for the specific strict liability offence of causing loss of a foetus is an additional custodial penalty of 3 years' imprisonment. Given the potential custodial penalty and noting again the strict liability nature of these offences, the Committee refers this matter to the Parliament for its consideration.

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

Commencement by proclamation

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

23. The Bill also provides that the provisions which amend the *Crimes Act 1900*, *Crimes (Sentencing Procedure) Act 1999*, *Criminal Procedure Act 1986* and *Motor Accident Injuries Act 2017* do not apply to conduct constituting offences, criminal and sentencing proceedings or motor accidents occurring before the commencement of the Bill (as an Act).

24. In his second reading speech, the Attorney General stated that the Bill's commencement on proclamation, if passed, is intended to allow the NSW Government to work with agencies and stakeholders to operationalise the Bill "as quickly as possible". The Attorney General further remarked that he anticipates commencement would occur in the first quarter of 2022.

The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation in question affects individuals' rights or obligations.

However, the Committee notes that the flexible start, and the Attorney General's proposed consultation period with agencies and stakeholders prior to commencement, may assist with the administrative arrangements required to operationalise the amendments across multiple legislation and the related changes across agencies. In the circumstances, the Committee makes no further comment.

5. Electronic Transactions Amendment (Remote Witnessing) Bill 2021

Date introduced	10 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney-General

PURPOSE AND DESCRIPTION

1. The objects of this Bill are—

(a) to make permanent certain provisions that were introduced as a pilot scheme to enable—

(i) the remote witnessing of documents, and

(ii) oaths, declarations and affidavits to be taken or made before an Australian legal practitioner, and

(b) to identify—

(i) the document that is the original document when a document is witnessed remotely, and

(ii) the place of execution of the document, and

(c) to make clear it is not necessary for the signatory or witness to physically be in New South Wales to witness a document remotely, and

(d) to enable regulations to exclude documents that may not be witnessed remotely and to set out methods, technologies and processes for witnessing documents remotely, and

(e) to re-enact a temporary provision that expands the classes of persons before whom a statutory declaration can be made.

BACKGROUND

2. The Bill amends the *Electronic Transactions Act 2000* to make permanent certain provisions about the remote witnessing of documents.

3. The Bill also amends the *Oaths Act 1900* to expand the classes of persons before whom oaths and statutory declarations may be made.

4. In the second reading speech to the Bill, the Attorney General, the Hon. Mark Speakman SC MP, stated that the Bill followed the successful trial of remote witnessing measures as part of the emergency response to the COVID-19 pandemic:

> This bill will extend temporary measures relating to the witnessing of personal and business documents, after a successful trial period of 18 months and significant stakeholder support. In April 2020 the Government enacted provisions via the Electronic Transactions Regulation 2017, first, to enable documents to be witnessed remotely via audiovisual link; second, to enable Australian legal practitioners to take oaths, declarations or affidavits under section 26 of the Oaths Act 1900; and, third, to enable statutory declarations to be made before a person before whom a statutory declaration under the Statutory Declarations Act 1959 of the Commonwealth may be made. These measures were introduced as part of the Government's emergency response to the COVID-19 pandemic.
>
> Public health restrictions and social distancing measures made witnessing the signing of documents in person—sometimes before a limited range of qualified witnesses—difficult and, in some circumstances, unsafe. The purpose of the measures was to give individuals and businesses the ability to continue to execute important legal documents safely and in accordance with physical distancing restrictions. In September 2020, following positive stakeholder feedback about the measures' operation in practice, they were legislated in part 2B of the Electronic Transactions Act 2000 to continue to operate until 1 January 2022. The decision to extend these provisions was made following extensive consultation with those who have used the scheme, including members of the legal profession, industry groups, government departments, community advocacy organisations and heads of court jurisdictions. Stakeholders have indicated these measures have proven to be useful, even when COVID-19 restrictions have not prevented people from having documents physically witnessed.

5. The Attorney General also noted that the Bill contained specific safeguards to prevent the use of fraud or duress, in addition to existing safeguards in other legislation:

> The Government listened carefully to concerns raised last year by some stakeholders about the risk that the remote witnessing pilot scheme could be used to take advantage of vulnerable community members through fraud or duress. The remote witnessing scheme contains several safeguards to promote the integrity of the document being witnessed and the integrity of the witnessing process to minimise the risk of fraud and duress. First, the witness must see the signatory signing the document in real time over audiovisual link [AVL]. Second, the witness must sign the document, or an exact copy of the document, signed by the signatory as evidence that the witness witnessed the signature. Third, the witness must be reasonably satisfied that the document they sign is the same document, or a copy of the document, signed by the signatory. Fourth, the witness must endorse the document they signed with a statement specifying the method used to witness the signatory's signature and that the document was witnessed in accordance with the Electronic Transactions Act.
>
> In addition, existing safeguards in other legislation will continue to apply when documents are witnessed remotely under the provisions continued by the bill. Those protections include certification and verification of identity requirements, and the legal and professional obligations of particular classes of witnesses. Importantly, remote witnessing is not mandatory; it provides greater choice and flexibility for individuals and business. The bill does not do away with the ability to witness documents in person.

6. This Bill was introduced and urgently passed in the Legislative Assembly on 10 November 2021.

ISSUES CONSIDERED BY COMMITTEE

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

6. Gaming Machine Tax Amendment (Promotional Prizes) Bill 2021

Date introduced	10 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Gaming Machine Tax Act 2001* (*the **GMT Act***) to make it clear that bets placed on gaming machines using promotional prizes are taxable.

2. Under the GMT Act, tax is payable on profits from gaming machines kept in a hotel or on the premises of a registered club. The Bill makes clear, and removes ambiguities about, the determination of profits for the purposes of the GMT Act.

BACKGROUND

3. In the second reading speech, the Hon. Matt Kean MP, Treasurer, noted that the intention of the Bill was to confirm the original legislative intent of taxing all bets placed on a gaming machine, regardless of whether bets are made using cash or non-cash means.

4. The Minister stated:

> The bill makes amendments to definitions relating to taxable profits in the Gaming Machine Tax Act 2001 and confirms alignment of the law with longstanding tax collection practices of the gaming regulator, Liquor & Gaming NSW. These definitions have been in place since the commencement of the Gaming Machine Tax Act 2001 and need to be clarified and modernised to ensure certainty for taxpayers on their payable taxes.

5. Specifically, the Minister noted the changes to definitions contained in the Act:

> The proposed amendments to the definitions in section 3 of the Gaming Machine Tax Act have three specific purposes. Firstly, the bill clarifies that tax has, and will continue to be, payable on gaming machine bets that are paid using promotional prizes such as reward schemes and other marketing or promotional activities. Many clubs and hotels across New South Wales offer player reward schemes or other promotional prizes to encourage people to spend more on gaming machines. These prizes and schemes have operated since at least the early 2000s and are regulated by the Gaming Machines Act 2001. This change seeks to provide clarity to taxpayers who offer such prizes and schemes, and improve the transparency and simplicity of our tax system. Secondly, the bill clarifies the point at which a bet becomes taxable—that is, when the bet is placed in a machine rather than when the player inserts money into a machine. This change removes any potential ambiguity in the law regarding the point at which money is invested in a gaming machine.

> The bill also clarifies the point at which deductions are included in the tax calculation—that is, when a player wins a prize, including a progressive jackpot prize, from playing a machine. Finally, the bill clarifies what the scope of revenue from a gaming machine has always included, and will continue to include bets placed through non-cash means such as stored-value cards and digital wallets. This means that for tax purposes, regardless of the method used to fund a bet, all bets placed in a machine have been, and will continue to be, part of the revenue used to calculate tax liability. This has always been the Government's position and the legislative intent.

6. The Minister considered that these amendments would provide further clarity and ensure the taxation system continues to be robust enough to handle future technological developments in payment methods and gaming machine functionality.

7. On a broader note, the Minister noted the intent of the Bill's provisions to be adaptable to future changes in promotional prizes and non-payment cash methods which are likely to continue to evolve:

> The use of promotional prizes and non-cash payment methods are likely to continue to evolve. This bill therefore makes it clear that any bets placed in a gaming machine, regardless of the payment method a player uses, are covered by the tax system, including through non-cash means. These changes are consistent with longstanding tax treatment and collection practices by Liquor & Gaming NSW and clarify the alignment between the legislation and its application to taxpayers. There will be no change in how gaming machine tax has been, and will be, calculated in the future. Accordingly, for taxpayers there will be no change in historical or future tax liability as a result of these amendments. The bill therefore clarifies that the amendments discussed are taken to have been made on the commencement of the Gaming Machine Tax Act. In summary, the clarifications in the bill resolve any ambiguities in the law and confirm the application of the law by the regulator since the Gaming Machine Tax Act was introduced.

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity

8. The Bill amends section 3 of the Act to include updated definitions for 'outgoings' and 'progressive jackpot prize'.

9. Specifically, the following definitions are updated:

- ***outgoings***, in relation to a gaming machine, means winnings, or progressive jackpot prizes, or the amount that is deducted from the gaming machine to build a prize for the authorised linked gaming system (for a gaming machine that is a part of an authorised linked gaming system operating under the Gaming Machines Act 2001, Part 10)

- ***progressive jackpot prize*** means the amount to which a gaming machine player or other person is entitled to be paid either:

  - for the achievement by the player, at the end of a play, of a combination of symbols designated, in the original design of the gaming machine, or in a

subsequent modification approved by the Authority, as a progressive jackpot combination, or

- on the happening of another event or contingency which the Authority approves, by written instrument, as being a due occasion for a progressive jackpot prize for the purposes of this definition

- ***promotional prize*** has the same meaning as it has in the *Gaming Machines Act 2001*, section 45.

- ***revenue from a gaming machine*** means the total amount of bets made on a gaming machine by a player, including bets made using a promotional prize.

- ***winnings*** means the total amount of prizes won by and paid or awarded, or liable to be paid or awarded, to a player from playing a gaming machine, but does not include promotional prizes.

10. The Bill inserts section 11 into the Act, which provides that the amendments made to section 3 by the amending Act are taken to have commenced on the commencement of the principal Act.

11. To avoid doubt, a return lodged with the CMS licensee under section 8 before the commencement of the amending Act, or during the transitional period, is taken to have complied with the requirements of the principal Act, as amended by the amending Act, if the return complied with the requirements of the principal Act, as in force immediately before the commencement.

12. The transition period is defined as beginning on the commencement of the amending Act and ending after a period of 3 months.

13. In the second reading speech to the Bill, the Treasurer noted that the amendments were to reflect the modern definitions of these terms and clarify this under the Act for the certainty of taxpayers on their payable taxes. The Treasurer further stated:

> There will be no change in how gaming machine tax has been, and will be, calculated in the future. Accordingly, for taxpayers there will be no change in historical or future tax liability as a result of these amendments. The bill therefore clarifies that the amendments discussed are taken to have been made on the commencement of the Gaming Machine Tax Act.

The Bill updates the definitions in the *Gaming Machine Tax Act 2001*. Specifically, it clarifies that a tax is payable on gaming machine bets paid using promotional prizes, such as reward schemes, and that the bet becomes taxable at the point where it is placed in the machine rather than when the payer inserts money into the machine. The Bill further provides that these definitions are taken to have commenced on the commencement of the 2001 Act.

This may create an issue of retrospectivity, whereby the amended definitions in the Bill are taken to have commenced in 2001, and therefore making all actions and obligations under the provisions since that date subject to these terms. The Committee generally comments were provisions have retrospective effect as it runs counter to the rule of law principle that people are entitled to know the law

to which they are subject at any given time. This is particularly the case where a Bill seeks to retrospectively remove rights or impose obligations.

However, the Committee notes that the amendments to definitions are to reflect the modernised definitions of these terms and brings the Act into line with how the definitions have been applied. The Committee recognises that the Bill aims to remove ambiguity in the existing definitions and how the provisions are applied, rather than seek to create new obligations that have retrospective effect. In these circumstances, the Committee makes no further comment.

7. Greater Sydney Parklands Trust Bill 2021

Date introduced	10 November 2021
House introduced	Legislative Assembly
Member responsible	The Hon. Rob Stokes MP
Portfolio	Planning and Public Spaces

PURPOSE AND DESCRIPTION

1. The object of the *Greater Sydney Parklands Trust Bill 2021* (the **Bill**) is to create the Greater Sydney Parklands Trust (the Trust) as a corporation and NSW Government agency. The Bill establishes the Trust's functions, powers and obligations, including in relation to the Greater Sydney Parklands Trust estate.

2. The Bill also makes consequential and minor amendments to the *Callan Park (Special Provisions) Act 2002*, the *Centennial Park and Moore Park Trust Act 1983*, the *Centennial Park and Moore Park Trust Regulation 2014*, the *Parramatta Park Trust Act 2001* and the *Western Sydney Parklands Act 2006*.

BACKGROUND

3. The Bill establishes the Greater Sydney Parklands Trust in eight Parts and includes 5 schedules relating to various other amendments and clarifications.

4. Part 1 of the Bill introduces the Act including the objects of the Bill and commencement by proclamation.

5. Part 2 establishes the Greater Sydney Parklands Trust and sets out its governance structure. It outlines the Board and appointment to the Board of the Trust, delegates functions to authorised persons, subsidiaries or partners, establishes a committee and designates responsibility to the chief executive and staff of the Trust.

6. Part 3 outlines the functions of the Trust and associated Trusts, including but not limited to conserving and enhancing the natural environment and conserving, restoring and enhancing connection to Country for First Nations People. Part 3 further stipulates how the Trust may acquire land, regulates agreements for the management of Trust land and gives the Trust power to lease, licence and establish easements. Division 2 of Part 3 prohibits the disposal of Trust estate or land, stipulates the requirement for a management plan and oversees the relationship of the Trust with other Government Agencies, services and private and subsidiary corporations.

7. Part 4 requires the Trust to have an approved consultation and engagement framework and establishes the guidelines for consultation with the general community, visitors and other users of particular parks. In his Second Reading Speech, the Hon. Rob Stokes MP, Minister for Planning and Public Spaces, stated:

> The purpose of the framework is to provide guidance to the Greater Sydney Parklands Trust about how it consults and engages with the local community and will

> provide transparency and opportunities for collaboration across those communities. The framework will also set out further details and procedures for how the Greater Sydney Parklands Trust interacts with community trustee boards. These boards are to be established by the Greater Sydney Parklands Trust for every park within the parklands estate. Community trustee boards will consist of seven members approved by the Greater Sydney Parklands Trust, which will ensure that the appointed members represent a wide range of interests and voices.

8. Part 5 regulates the financial structure of the Trust, including the establishment of the Greater Sydney Parklands Trust Fund within the Treasury's Special Deposits Account. Part 5 further regulates the Trusts' financial powers regarding payments into the fund and investments.

9. Part 6 authorises and regulates the appointment of rangers and their powers. The Part creates various offences relating to the provision of personal details of persons whom are reasonably suspected to have committed an offence. Division 3 of Part 6 outlines the proceedings for offences if a person elects to have a penalty notice dealt with in court.

10. Part 7 explains liability in circumstances where offences by a relevant person are committed in good faith. A relevant person means a Board member, member of a Trust committee, an employee of the Public Service under the Government Sector or a person acting under the direction of the preceding three classes of persons. Part 7 also allows for the making of Regulations.

11. Schedules 1 and 2 of the Bill establish membership procedure. Schedule 3 outlines the transitional and savings provisions. Schedule 4 is a dictionary to the Bill. Schedule 5 contains miscellaneous updates and streamlining amendments to the *Callan Park (Special Provisions) Act 2002*, the *Centennial Park and Moore Park Trust Act 1983*, the *Centennial Park and Moore Park Trust Regulation 2014*, the *Parramatta Park Trust Act 2001* and the *Western Sydney Parklands Act 2006*.

12. In the Second Reading Speech, the Minister stated:

> This bill presents this Parliament with a once in a generation opportunity to make parks and public spaces as important as other types of essential infrastructure—roads, trains, hospitals—and to create a trust that has a powerful voice for parklands. Our communities know just how important our parks are. We now need to translate what we all know into great legislative power and identity. This bill ensures that parklands in Greater Sydney will be maintained and improved through the establishment of the Greater Sydney Parklands Trust which will act as an innovative manager and responsible custodian of the current parklands estate. In doing so the bill will ensure the effective management and operation of parklands across Greater Sydney—east, west, north, south—and the delivery of world-class and ecologically sustainable parklands for the use and enjoyment of our diverse community.

13. The Minister also stated that the Bill had been through a detailed, collaborative process of investigation.

ISSUES CONSIDERED BY COMMITTEE

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

Strict liability and vicarious liability offences

14. Sections 47-50 of the Bill allow an authorised officer to issue penalty notices for offences under the Bill and the regulations. Section 47 provides that an authorised officer that reasonably suspects a person has committed an offence under the Bill or the regulations may require the person to state their full name and residential address. The authorised officer may also require a driver of a vehicle on the Greater Sydney Parkland Trust to produce their driver's licence, and state their full name and residential address. If a person does not comply with those requests and is warned that the failure to comply with those requests constitutes an offence, then that person may be issued a penalty notice of up to $1110.

15. Section 48 provides that an authorised person may also issue a penalty notice to a driver of a vehicle alleged to have committed an offence under the Bill or the regulations. The authorised officer may require the owner of a vehicle or another person who has custody of the vehicle to immediately give the officer information about the name and residential address of the driver. An authorised officer has the power to issue a penalty notice of up to $1100 to a person who does not comply with this request. The person will not be penalised if they have a reasonable excuse not to comply with the request. Section 48(4) creates a defence whereby a person will not be liable where they satisfy the court that they did not know, and could not with reasonable diligence have ascertained, the driver's name or residential address.

16. Section 49 of the Bill states that the Fines Act 1996 applies which means that where a person issued with a penalty notice does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence. Section 49(5) prescribes that a penalty notice must not be more than the maximum amount of penalty that could be imposed for the offence by a court.

17. Similarly, section 50(2) prescribes that a person who, at the time of an offence involving their vehicle, the owner of the vehicle is guilty of the offence as if the person were the actual offender. Exceptions to this rule include where the offence is dealt with by a penalty notice and:

    (i) The prescribed officer the vehicle was, at the time of the offence, stolen or otherwise illegally taken or used, or

    (ii) Within 21 days after receiving the penalty notice, gives the prescribed officer an approved nomination notice containing the name and address of the person who was in charge of the vehicle at the time of the offence, or

    (iii) Satisfies the prescribed officer the owner did not know, and could not with reasonable diligence have ascertained, the name and address of the person who was in charge of the vehicle at the time of the offence.

18. Additional exceptions to section 50(2) include circumstances in which the owner of the vehicle elects to deal with the offence in court and:

(i) Satisfies the court the vehicle was at the time of the offence stolen or otherwise illegally taken or used, or

(ii) Within 21 days after service on the owner of a court attendance notice for the offence, gives the informant an approved nomination notice containing the name and address of the person who was in charge of the vehicle at the time of the offence, or

(iii) Satisfies the court the owner did not know, and could not with reasonable diligence have ascertained, the name and address of the person who was in charge of the vehicle at the time of the offence.

19. Schedule 5.2 of the Bill amends the Centennial Park and Moore Park Trust Act 1983 to give an authorised officer the power to issue penalty notices of up to $1100 to persons parking in a non-parking area or in a non-parking grass area in Moore Park East from 31 December 2023. An authorised officer may also issue a penalty notice of up to $1100 to a person who does not provide information as to the owner of a vehicle that is alleged to have been involved in an offence. The amendment requires the owner of the vehicle or other person having custody of the vehicle to immediately give the officer information about the name and residential address of the driver.

20. Part 5A of schedule 5 of the Bill amends the Western Sydney Parklands Act 2006 by inserting section 42B and 42BA into the Act which give the authorised officer the power to issue penalty notices for certain offences. The new section 42B(2) allows an authorised officer to issue penalty notices of up to $1100 to the driver of a vehicle on Trust land if they do not produce their driver's driver licence, state their full name and residential address. The penalty notice may be issued in circumstances where the driver is reasonably suspected of having committed an offence and where the authorised officer has warned the person that non-compliance with their request constitutes an offence.

21. Under schedule 4 of the Bill, an authorised person means a Board member, an employee of the Public Service under the Government Sector Employment Act 2013, the head or staff member of a government sector agency, or a person who is a member of a class of persons prescribed by the regulations.

Sections 47-49 of the Bill allows an authorised officer who reasonably suspects a person of having committed an offence against this Bill or the regulations to require the person to state the person's full name and residential address, provide their divers licence or request another person to do so. The sections give the authorised officer the power to issue penalty notices up to $1100 for contraventions of those provisions.

Similarly, section 50(2) prescribes that a person who, at the time of the offence, is the owner of a vehicle in connection with an office, is to be dealt with as if the person were the actual offender. This attaches vicarious liability to the owner of the vehicle despite them not necessarily committing the offence. The sections give the authorised officer the power to issue a penalty notice up to $1100 for contravention of this provision.

Amendments to the *Western Sydney Parklands Act 2006* and *Centennial Park and Moore Park Trust Act 1983* also give an authorised officer the power to issue

penalty notices of up to $1100 for various offences relating to non-compliance with requests for information of a person reasonably suspected to have committed an offence. These amount to strict liability offences.

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

The Committee further notes that safeguards are available that may protect persons from being penalised incorrectly. For example, section 47 only allows for a penalty notice to be issued if the person is warned by the authorised officer that not providing their name or producing their licence constitutes an offence. Section 48(3) of the Bill and the new sections 18A(3) and 42BA(3) of the *Centennial Park and Moore Park Trust Act 1983* and *Western Sydney Parklands Act 2006* respectively do not create an offence where non-compliance is reasonably excusable. Section 48(4) of the Bill provides for a defence where a person will not be liable if they satisfy the court they did not know, and could not with reasonable diligence have ascertained, the driver's name or residential address. The Committee also notes the exceptions to section 50(2) offences as safeguards to findings of liability under this section. Given the provision of safeguards under the Bill, the Committee makes no further comment.

Procedural fairness – creation of penalty notice offences

22. As noted above, the Bill provides for an authorised officer to issue penalty notices for various offences, including those created by sections 47-50, section 18A(3) of the Centennial Park and Moore Park Trust Act 1983, section 42BA(3) of the Western Sydney Parklands Act 2006 as well as offences created under the regulations. Offences created under the Bill carry a maximum penalty notice amount of $1100. Offences under the regulations carry a maximum penalty notice amount of $5500 (50 penalty units).

The Bill sets significant monetary penalties for certain offences that can be dealt with by way of a penalty notice issued under either the Bill or the regulations. An example of an offence under the Bill includes where a person refuses to state their full name and residential address to an authorised officer where the authorised officer reasonably suspects a person of having committed an offence. A penalty notice issued under the regulations may be as high as $5500 for an offence against the regulations and $1100 for an offence against the Bill.

Whilst a person issued with a penalty notice may elect to have the matter heard by a court, the Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Bill and delegated regulations may thereby impact on a person's right to a fair trial – that is, to have the matter heard by an impartial decision maker in public, and to put forward his or her side of the case. Notwithstanding this, as the Bill does not remove a person's right to elect to have the matter heard by a court, 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.

Property rights – compulsory acquisition of land

23. Proposed section 17(1) of the Bill gives the Greater Sydney Parklands Trust the power to acquire and own new parks and supplementary land. Under section 17(3) of the Bill the Trust may acquire land either by agreement or by compulsory acquisition in accordance with the Land Acquisition (Just Terms Compensation) Act 1991.

24. Section 7B of the Land Acquisition (Just Terms Compensation) Act 1991 enables an authority of the State that is authorised by law to acquire land by compulsory process even if the land is vested in the authority itself. Section 4(1)(d) of that Act enables the Trust to compulsorily acquire land as the Trust is an authority authorised to acquire land by compulsory process under section 17(1) of the Bill. The Land Acquisition (Just Terms Compensation) Act 1991 does not apply to land that is available for public sale or where the land is acquired by agreement.

25. Section 19 of the Act requires the authority of the state (the Trust), to declare, by notice published in the Gazette, that any land described in the notice is acquired by compulsory process. The effect of publication in the Gazette results in the land becoming vested in the authority of the state and the automatic discharge of all existing easements, rights, rates and other restrictions over or in connection with the land. Section 20(1) of the Act precludes the discharge of existing interests if express provisions in other Acts provide so.

26. Sections 37 and 54 of the Act entitle the owner of land whose property interest has been compulsorily acquired to be justly compensated by the Trust for the acquisition of the land.

27. In the second reading speech, the Minister noted that the Bill outlined that the Trust has functions in relation to acquiring land for new parks:

> The trust also has functions in relation to acquiring land for new parks and managing its estate by entering into agreements with other government agencies. The Greater Sydney Parklands Trust may also grant leases, licences and easements over land in its estate, with the Minister's approval required for leases over 25 years. These leases include things like sports fields managed by Blacktown council at Western Sydney Parklands, the golf course at Moore Park, cafes, or shorter-term attractions like filming *Thor* at Centennial Park or attending an afternoon concert at Parramatta Park.

28. This Minister further noted that amendments to the Callan Park (Special Provisions) Act 2002 and the Parramatta Park Trust Act 2001 to allow the respective substratum of these parks to be acquired for a public purpose:

> Other amendments to the Callan Park Act will allow the substratum of Callan Park to be acquired for a public purpose—such as, most notably, the Sydney Metro—and permit the granting of longer-term leases up to 50 years at Kirkbride, Broughton Hall and the Convalescent Cottages at Callan Park with the Minister's approval. Express legislative priority is to be given to leases for not-for-profit uses of Callan Park.
>
> … New section 9AA will amend the Parramatta Park Trust Act to allow the substratum of the parklands to be acquired for a public purpose.

Section 17(1) of the Bill gives the Greater Sydney Parklands Trust the power to acquire and own new parks and supplementary land by compulsory acquisition.

That power is conferred by section 17(1) of the Bill and is limited by the *Land Acquisition (Just Terms Compensation) Act 1991.* If enacted, the provision will authorise the Trust to compulsorily acquire privately owned or Crown land that is considered a new park or required to supplement the Trust.

The Committee notes the power may encroach on the private property rights of an owner whose land is sought to be acquired by the Trust. The power to compulsorily acquire land may interfere with the right of a person to use or enjoy their property, their right to exclude others, and the right to sell or give it away. Further, the power may also interfere with the quiet enjoyment of land by a property owner or anyone, such as a tenant, who ordinarily enjoys that property.

However, the Committee recognises that the provisions primarily deal with public land that may only be compulsorily acquired if is not available for public sale and where there is no agreement for acquisition. Further, the acquisition cannot consist of the taking of a mortgage or charge over the land or revoke exclusive rights of burial granted under another Act. Additional financial protections entitle any owner whose land has been compulsorily acquired to just compensation under sections 37 and 54 of that Act. As such, the Committee makes no further comment.

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

Commencement by proclamation

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

The Bill commences (as an Act) on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes that the flexible start may assist with the administrative arrangements required to implement the various amendments across other legislation and the related community consultation. Given the circumstances, the Committee makes no further comment.

Delegation to the regulations

30. Section 57 of the Bill gives the Governor the power to make regulations on a number of matters. Examples of regulations which may be made by the Governor include regulations relating to:

(i) fees and charges that may be imposed for the purposes of the Bill,

(ii) regulation of the use by the public of, and the conduct of the public on, the parklands estate,

(iii) regulating the use of the Trust's facilities and the provision of services by the Trust,

(iv) requiring the payment of charges for the use of a facility operated, or service provided, by the Trust,

(v) authorising a person granted a lease, licence or other authority by the Trust to require the payment of charges for the use of a facility operated, or service provided, under the lease, licence or other authority,

(vi) the creation of offences punishable by a maximum penalty of 50 penalty units ($5500).

31. The Bill also defers a number of matters to the regulations which have not yet been created. Examples of delegations include the way in which public notice of public leases must be made, establishing the function and limits of rangers, the creation of certain offences, the definition of penalty notice offences and prescription of penalty notice amounts.

The Bill gives the Governor power to make regulations on a range of issues as well as delegates a number of matters to the regulations. Matters which may be addressed by the regulations include the regulation of the public on estate land and the creation of offences punishable by a maximum penalty of 50 penalty units ($5500). The Bill also transfers certain powers to the regulations such as the functions of rangers who are authorised to issue penalty notices, the definition of penalty notice offences and the prescription of penalty notice amounts.

The Committee generally prefers 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 limits of rangers who may issue penalty notices and the subsequent attribution of criminal liability. The Committee therefore refers this issue to the Parliament for its consideration.

Delegation of Trust's functions and exercise of functions through private subsidiaries and government sector agencies

32. Division 3 of Part 2 of the Bill provides the Trust the power to delegate Trust functions to private subsidiary corporations individually or under a partnership or joint venture. The definition of a private subsidiary corporation under schedule 4 is a private corporation in which the Trust has a controlling interest. The only Trust function not delegated under the Bill is the power to delegate.

33. Functions which may be delegated to a private subsidiary either individually or as a partnership or joint venture are the general functions of the Trust under section 15 of the Bill, including but not limited to functions of:

(i) conservation, restoration and enhancement of the natural environment of the parklands estate,

(ii) facilitating and promoting the use of the parklands estate for education, environmental sustainability and scientific and other research, including by providing facilities for education and research,

(iii) encouraging and promoting appropriate public access and enjoyment of the parklands estate, including by catering to a diverse range of community interests, organisations and activities.

34. In addition, in circumstances where the Trust enters into an agreement with a government sector agency, that government sector agency is granted the power to delegate functions of the trust under section 19 of the Bill. The Trust may enter into an agreement with a government sector agency for the agency to manage, maintain, improve or develop the Trust estate or provide related services. The Bill adopts the definition of a government sector agency from section 3 of the Government Sector Employment Act 2013 to mean a Public Service agency, or any other service in the government sector.

Under Division 3 of Part 2 of the Bill, the Greater Sydney Parklands Trust may delegate it's functions to private subsidiary corporations individually or under a partnership or joint venture. The Trust may, by agreement, also delegate its functions to a government sector agency within the meaning of the *Government Sector Employment Act 2013*.

The Committee notes that the Bill does not contain restrictions on this power to delegate, for example, by restricting delegation to people with certain qualifications or expertise. Additionally, it is not clear whether there are safeguards to ensure the conferral of power to either a private subsidiary or government sector agency to ensure that it does not result in the delegation of functions to third parties that may have a conflict of interest. The Committee also notes that a function of the Trust which may be delegated includes the compulsory acquisition of land, charging and receiving fees and financial management. Delegation of functions regarding compulsory acquisition, charging and receiving fees and financial management may warrant clarity about who can perform these tasks. In the circumstances, the Committee refers this matter to Parliament for its consideration.

8. ICAC and Other Independent Commissions Legislation Amendment (Independent Funding) Bill (No 2) 2021*

Date introduced	11 November 2021
House introduced	Legislative Council
Member responsible	The Hon. Robert Borsak MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to make amendments to various Acts—

   (a) to facilitate the administrative and financial independence of the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the New South Wales Electoral Commission, the Ombudsman's Office and the Audit Office (***the relevant GSF agencies***), and

   (b) to constitute, by statute, committees to review the Budget information prepared by the Department of the Legislative Council and the Department of Parliamentary Services and to determine amounts of appropriations for inclusion in annual Appropriation Acts, and

   (c) to extend the functions of the existing Public Accounts Committee to the review of Budget information prepared by the Audit Office and to the determination of amounts of appropriations for inclusion in relevant Appropriation Acts, and

   (d) to require the Treasurer to make a statement of explanation if an appropriation made by an Appropriation Act is inconsistent with the determination of a Committee on the appropriation.

BACKGROUND

2. The Bill makes amendments to several Acts establishing statutory oversight bodies, including the *Government Sector Audit Act 1983*, *Electoral Act 2017*, *Independent Commission Against Corruption Act 1988*, *Law Enforcement Conduct Commission Act 2016*, and *Ombudsman Act 1974*. The Bill also makes several amendments to the *Government Sector Finance Act 2018* in respect to those bodies.

3. In the second reading speech to the Bill, the Hon. Robert Borsak MLC stated that the intention of the Bill is to:

> … truly facilitate the administrative and financial independence of the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the NSW Electoral Commission, the Ombudsman's Office and the Audit Office.

4. Mr Borsak then noted that the Bill was drafted to reflect the recommendations of the Legislative Council Public Accountability Committee's inquiry into the budget process for independent oversight bodies and the Parliament of New South Wales. The committee tabled its final report in the Legislative Council on 5 February 2021.[3]

5. Commenting on the committee's report, Mr Borsak went on to note that:

> It was the unanimous view of the committee that annual funding for the Audit Office's performance audits should be provided as a separate amount in the Appropriation (Parliament) Bill rather than a government contribution, and that the Audit Office should be removed from the Premier and Cabinet cluster. This bill that we have before us reflects all the recommendations and evidence we have heard and seen.

6. Mr Borsak also highlighted in his second reading speech "the tabling of two special reports to Parliament by the Independent Commission Against Corruption regarding its funding".

7. To that end, the Bill amends the respective Acts establishing the aforementioned oversight bodies. Specifically, it expands the functions of the parliamentary committees established by these Acts to monitor and review the respective oversight body or bodies. These amendments would introduce committee functions in relation to annual appropriations.

8. The Bill also amends the *Government Sector Finance Act 2018* to insert section 4.6A, which provides that the Treasurer must make a statement of explanation to Parliament when introducing annual appropriation bills in relation to funding for these oversight bodies.

9. Finally, the Bill provides for the statutory establishment of the Legislative Council Public Accountability Committee as well as a Joint Committee on Parliamentary Services responsible for reviewing the appropriation amount for the Department of Parliamentary Services.

10. The Committee notes that a previous reiteration of this Bill was introduced by Mr Borsak in 2021 and reported on by this Committee in Digest No 35/57 (19 October 2021).[4] Mr Borsak noted that an objection had been upheld to the previous 2021 Bill, on the basis that it amounted to an appropriation bill originating outside the Legislative Assembly which is in contravention of section 5 of the *Constitution Act 1902*. This report draws upon the analysis of the 2021 bill report.[5]

ISSUES CONSIDERED BY COMMITTEE

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

Conflict of functions of relevant statutory committees

11. The Bill makes amendments to several Acts in respect to the functions of the committees established under those Acts to review the relevant oversight body. That is, it expands the functions of the following parliamentary committees:

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[3] Public Accountability Committee, *Budget process for independent oversight bodies and the Parliament of New South Wales*, report 7/57, Parliament of New South Wales, February 2021.

[4] Legislation Review Committee, Legislation Review Digest No. 35/57, 19 October 2021.

[5] See footnote 2.

- the Legislative Assembly Public Accounts Committee which reviews the work of the Audit Office;

- the Joint Standing Committee on Electoral Matters that reviews the work of the New South Wales Electoral Commission;

- the Joint Committee on the Independent Commission Against Corruption which reviews the work of the Independent Commission Against Corruption; and

- the Joint Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission which reviews the work of a number of oversight bodies including the Law Enforcement Conduct Commission and the Ombudsman's Office.

12. Specifically, Schedules 1 and 3 to 6 of the Bill amends the respective Acts to include provisions that would require each Committee to:

    - review the information for use in Budget preparations prepared by the relevant oversight body in accordance with section 4.5 of the *Government Sector Finance Act 2018*;

    - determine the amounts for inclusion in an annual appropriation bill for appropriations for the relevant oversight body; and

    - report to the Parliament on that determination before the introduction of the relevant annual appropriation bill.

13. These proposed provisions would also require the Treasurer to make a statement of explanation when introducing an annual appropriation bill to the Parliament. That statement must address if the appropriation for one of the aforementioned oversight bodies contained in the bill is inconsistent with a determination by the responsible parliamentary committee. The Bill also proposes to insert section 4.6A into the *Government Sector Finance Act 2018* to mirror this requirement for a statement of explanation.

14. Schedule 2 of the Bill also makes other amendments to the *Government Sector Finance Act 2018*. Specifically, the Bill proposes to insert Parts 9A and 9B that would respectively constitute in statute the existing Legislative Council Public Accountability Committee and establish by statute a Joint Committee on Parliamentary Services. Consistent with the amendments proposed in Schedules 1 and 3 to 6 of the Bill, the provisions under Schedule 2 would likewise require these committees to review and determine an amount for appropriation in relation to the Department of the Legislative Council and Department of Parliamentary Services respectively.

The Bill amends several acts in relation to the relevant parliamentary committees overseeing the work of the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the New South Wales Electoral Commission, the Ombudsman's Office and the Audit Office. These relevant committees are specified as the Legislative Assembly Public Accounts Committee, the Joint Standing Committee on Electoral Matters, the Joint Committee on the

Independent Commission Against Corruption and the Joint Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission.

The Bill also seeks to constitute in statute the Legislative Council Public Accountability Committee and a Joint Committee on Parliamentary Services.

The Bill further provides that these committees are to review, determine and report on an amount which should be included for the appropriation for their relevant oversight body or parliamentary department in annual appropriation bills. It also requires the Treasurer to explain when introducing annual appropriation bills any inconsistency between the committees' determined amount and the amount included in the bill for the appropriation for any of these bodies.

The Committee notes that the primary functions of the relevant committees under the existing Acts and establishing resolution is to monitor and review the exercise by the agency of their functions under the relevant Acts, and to report to one or both Houses of Parliament on any matter relating to their functions that the attention of Parliament should be directed.

The Committee acknowledges the NSW ICAC Special Reports on the need for a new funding model for ICAC. However, the Committee notes that the power to report on a payment of a sum to an agency of which the Committee has oversight may conflict with its function to independently review the performance of the agency. The Committee refers this matter to the Parliament for its consideration of whether it involves an inappropriate delegation of legislative power to determine and report on the appropriation of funds to agencies or departments of which the relevant committee has oversight.

9. Law Enforcement Conduct Commission Amendment Bill 2021*

Date introduced	12 November 2021
House introduced	Legislative Council
Member responsible	The Hon. Adam Searle MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Law Enforcement Conduct Commission Act 2016* (***the Act***) to provide for the maximum term a member of the Commission, an Assistant Commissioner or an alternate Commissioner may hold office for, and provide for when an office becomes vacant.

BACKGROUND

2. This Bill amends the *Law Enforcement Conduct Commission Act 2016* to provide for additional term limits in respect to various offices in the Law Enforcement Conduct Commission ('the Commission'). Specifically, it provides that a person can hold a single relevant office in the Commission for a maximum five year term and additionally can hold multiple offices if the total years they hold such offices is not more than ten years.

3. In the second reading speech to the Bill, the Hon. Adam Searle MLC described the purpose of the Bill to be:

> … to ensure that a commissioner of the Law Enforcement Conduct Commission [LECC], or an assistant commissioner or anyone holding a like position within the body which oversights the NSW Police Force, is eligible to be reappointed or appointed to another office within the LECC provided that they do not hold any combination of offices for more than 10 years.

4. Highlighting the current five year cap for holding any one or more terms under the existing provisions of the *Law Enforcement Conduct Commission Act 2016*, Mr Searle emphasised that the Bill is intended to address the issue of perceived lack of continuity in the senior leadership that might undermine the Commission's effectiveness.

5. Mr Searle noted that there are similar term limits to the office of the Auditor General and Commissioner for the Independent Commission Against Corruption. However, he distinguished the higher levels of probity concerns underpinning the term limits for the Audit Office and Independent Commission Against Corruption from that of the Commission.

6. The Bill also seeks to clarify a possible inconsistency within Schedule 1 of the *Law Enforcement Conduct Commission Act 2016* by amending both clauses 3 and 7 which regulate the terms and vacancy of offices in the Commission respectively. Mr Searle spoke to the pressing need to clarify the consistency of these provisions as:

> … the time for those offices to fall vacant is approaching, and I am certain that the Government would want there to be no doubt about the process of advertising and recruiting for any of those positions. There should be no doubt regarding the eligibility of any person expressing interest in applying for those roles.

7. The Committee notes that while the Bill deals with a statutory body which oversights the functions of a government agency, in this case the NSW Police Force, the intent of the Bill is to expand terms of office limits to allow continuity of senior leadership within the oversight body, and thereby does not diminish any employment law rights or public oversight.

ISSUES CONSIDERED BY COMMITTEE

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

10. Public Spaces (Unattended Property) Bill 2021

Date introduced	10 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Shelley Hancock MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The objects of the *Public Spaces (Unattended Property) Bill 2021* (the **Bill**) are to—

   i. encourage persons responsible for property to act quickly and responsibly to mitigate risks to access, safety and amenity that may arise from the property being left unattended, and

   ii. to ensure public spaces can continue to be used, shared and enjoyed by the community as a whole, and

   iii. to empower occupiers of private land to take possession of stray animals on the land.

BACKGROUND

2. The Bill repeals the *Impounding Act 1993* (**Impounding Act**).

3. In the Second Reading Speech, the Hon. Shelley Hancock MP, Minister for Local Government, stated:

> It gives me great pleasure to introduce the Public Spaces (Unattended Property) Bill 2021, following a major review and consultation on the outdated Impounding Act 1993 over the past two years, which is to be repealed. Through the new, future-focused public spaces bill, the New South Wales Government is meeting its commitment to keep our roadsides, open spaces and other public places safe, accessible and enjoyable for our local communities across New South Wales for generations to come. The bill will resolve a range of concerns that our communities have raised with every member of the House and every council in New South Wales for years. Those concerns are about shopping trolleys, abandoned vehicles and stray stock.

4. The Minister indicated that extensive consultation was undertaken to prepare this Bill:

> Over the past two years, I have overseen extensive consultation to develop the reform proposals reflected in this bill. The Office of Local Government has engaged many times with local councils, the retail sector, recreational boating and fishing groups, farmers associations, disability advocacy groups, affected State agencies and others. I know that many in the community have an interest in the outcomes of this review, particularly in relation to problem shopping trolleys, vehicles and straying

> stock. Opportunities for feedback were provided in response to a discussion paper, options papers, targeted stakeholder workshops and a range of meetings since I initiated this review in 2019. This feedback was carefully considered and has been instrumental in shaping the bill.

5. As stated above, an object of the Bill is to encourage persons responsible for property to act quickly and responsibly to mitigate risks to access, safety and amenity that may arise from the property being left unattended. 'Property' includes an animal and an item.

6. Under section 15, the 'responsible persons' for property are:

   i. the person who owns or is otherwise responsible for the property, and

   ii. a person engaged to collect or manage the property on behalf of the property's owner, and

   iii. another person who is in control or possession, or entitled to possession, of the property, and

   iv. a person who caused, or engaged in conduct that was reasonably likely to result in, the property being unattended.

7. Examples of responsible persons set out in the Bill include a person who opens a gate that releases an animal and a person who leaves a shopping trolley unattended.

8. Under section 9, 'items' include:

   i. class 1 items, being a small or medium-sized thing capable of ownership, except a living creature, that can ordinarily be collected by 1 or 2 persons without the need for machinery to lift, tow or otherwise move the thing. Baggage, personal recreational equipment not available for hire (such as bikes and surfboards) and other personal items are class 1 items.

   ii. class 2 items, being a thing capable of ownership, except a living creature, and made available for the use of the public at large, whether or not on payment of a fee or other benefit, including as part of a sharing service. Share-bikes and shopping trolleys are class 2 items.

   iii. class 3 items, being a motor vehicle and including a hire-car, and

   iv. another thing prescribed by the regulations to be an item.

ISSUES CONSIDERED BY COMMITTEE

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

Real property rights – placing of stock on private land

9. Section 19 of the Bill enables an unattended animal that is stock to be placed temporarily onto premises, including private land, without the consent of the landowner. Specifically:

   a. If, in an emergency, an authorised officer reasonably believes the stock is unattended, appropriate arrangements cannot be made for the officer to take possession and failure to move the stock is an unacceptable risk to health and

safety, the officer may arrange for it to be kept on any practical premises in the vicinity.

b. The authorised officer may arrange for the stock to be kept on private land only if the officer has made reasonable attempts to:

   i. obtain the consent of the land owner or occupier, and

   ii. comply with the reasonable requests of the owner or occupier of the private land in relation to keeping the animal on the land until it is removed.

c. The authorised officer must arrange for the stock for be removed from private land as soon as reasonably practical after the emergency ends unless otherwise agreed with the land owner or occupier.

d. To the extent of any inconsistency with the Biosecurity Act 2015, section 19 prevails over that Act except where an emergency order is made under that Act.

10. An 'emergency' is not defined in the Bill. Section 19(5) states that the regulations may provide for additional matters in relation to the arrangements made in emergencies for animals that are stock.

11. In the Second Reading Speech, the Minister provided that the term is to be prescribed by the regulations to include truck rollovers involving livestock.

12. Regarding the intent of this provision, the Minister stated:

> Ultimately, we need to do better to empower authorities to act promptly and to work together to protect our regional and rural communities. I am assured that the Office of Local Government will work closely with the Department of Primary Industries and the NSW Police Force to develop protocols for seeking landowner consent and other guidance to mitigate biosecurity risks.

The Bill enables an authorised officer to temporarily place an unattended animal that is stock posing an unacceptable risk to health or safety onto nearby private land, where the officer has made reasonable attempts to obtain the consent of the land owner or occupier and comply with their reasonable requests. Consent of the land owner or occupier is not a requirement of placing stock on private land. This may interfere with an owner or occupier's real property rights, including their right to undisturbed enjoyment of their land.

The Committee notes that the interference is temporary, intended to protect the health and safety of persons, and that the authorised officer must make reasonable attempts to obtain consent and comply with requests before exercising thier power. However, it also notes that the term 'emergency' is not defined in the Bill. Although the Minister has indicated that it will be defined in the regulations, the Bill does not clearly indicate that this key definition will be located in the regulations. The Committee considers that it may be beneficial for the Bill to define what constitutes an 'emergency' and the circumstances in which a person's real property rights may be interfered. This could allow for clarity and

an appropriate level of parliamentary oversight. It refers this issue to the Parliament for its consideration.

Property rights – interference with private property

13. Section 25(2) allows an authorised officer to enter an unattended motor vehicle in certain circumstances, including if it is posing a risk to persons, animals or the environment, for the purpose of identifying the responsible person for the vehicle.

14. In the Second Reading Speech, the Minister stated that the Bill will 'make it easier and quicker for authorised officers to access the information they need to identify and notify people responsible for vehicles, including specific but limited powers of entry to vehicles to do so'.

15. Section 56 of the Bill obliges the NSW Police, if asked by an authorised officer or authority, to make enquiries about the name and address of the owner of a motor vehicle and, within 24 hours after the request is made, give the officer or authority a written statement about the results of the inquiry. If the vehicle is registered, the statement may include the name and address of the last registered operator.

Section 25 of the Bill allows an authorised officer to enter an unattended motor vehicle in certain circumstances for the purpose of identifying the responsible person for the vehicle. This includes where the vehicle poses a risk to persons, animals or the environment.

This may interfere with a person's property rights, including non-interference with their property. The Committee notes that the Bill does not require an authorised officer to consider or undertake other less invasive measures to identify the responsible person before entering the motor vehicle including, for example, by checking the registration of the unattended vehicle. However, the Committee acknowledges the circumstances in which this power may be exercised, including where the vehicle poses a risk to persons, animals or the environment. Additionally, that an authorised officer is not limited from requesting the assistance of the NSW Police under section 56 to make inquiries about the name and address of the owner of the vehicle, although the 24 hours response period from the Police may not meet the urgent need to identify the responsible person in some cases. The Committee refers this matter to the Parliament for its consideration.

Offence regime – strict liability offences, new offences and harsher penalties

16. The Bill includes strict liability offences and new offences, as well as harsher penalties for comparable offences set out in the *Impounding Act 1993*.

17. Strict liability offences include, for example:

    i. a person leaving an item unattended in a public place in circumstances set out in section 37(1). For an individual, a tiered maximum penalty regime applies to accommodate the different classes of items, with the penalty increasing each day or part of a day if a class 3 item is not removed or additional class 2 item is left unattended,

ii. a person leaving an animal unattended in a public place (except where the person establishes they took all reasonable precautions to prevent the animal from being left unattended) under section 37(2). A maximum penalty of 25 penalty units ($2750) applies for the first animal or, for each additional animal in the same public place, 5 penalty units ($550) but not more than 50 penalty units ($5500), and

iii. a person allowing an animal under their control to be on private land without permission of the occupier. A maximum penalty of 25 penalty units ($2750) applies for the first animal and, for each additional animal, 5 penalty units ($550) but not more than 50 penalty units ($5500).

18. It appears that the offences under section 37 are broad enough to include items left by people experiencing homelessness (in particular, class 1 items or class 2 items) unattended in a public place.

19. In the Second Reading Speech, the Minister stated that 'it will continue to be expected that authorised officers consider the specific needs and circumstances of homeless people in undertaking their functions'.

20. New offences compared to the *Impounding Act* include, for example:

i. a person commits an offence if the person recklessly or negligently leaves an item unattended in a public place in the circumstances set out in section 38. For an individual, a tiered maximum penalty regime applies to accommodate the different classes of items, with the penalty increasing each day or part of a day if a class 3 item is not removed or additional class 2 item is left unattended, and

ii. failure by a responsible person to collect the property in possession of an authority within the period required under the authority's notice, under section 42(3). A maximum penalty of 25 units ($2750) applies for an individual.

21. In the Second Reading Speech, the Minister provided that:

> … to ensure that appropriate penalties may be applied by the courts in relation to different offenders and circumstances, higher maximum penalties apply where a person has been reckless or negligent in their conduct. These maximum penalties are double that of strict liability offences.

22. The Minister also stated that the offence under section 42(3) is included 'to offer a greater incentive for owners to recover their items, once impounded, rather than to leave them for the authority to dispose of at the cost of the community'.

23. Harsher penalties for comparable offences set out in the *Impounding Act* include, for example:

i. for the offence of obstructing an authorising officer, 100 penalty units ($11 000) under section 43 of the Bill. Comparatively, a person incurs a maximum penalty of 20 penalty units ($2200) for obstructing an impounding officer under section 35 of the Impounding Act, and

ii. for the offence of causing or permitting an animal to trespass, a person incurs a maximum penalty under section 40 of the Bill of 25 penalty units ($2750) for the first animal and, for each additional animal, 5 penalty units ($550) but not more than 50 penalty units ($5500). Comparatively, under a person incurs a maximum penalty of 5 penalty units ($550) under section 33 of the Impounding Act.

24. Regarding harsher penalties, in the Second Reading Speech the Minister explained:

> Across the offences in the bill, higher maximum penalties have been provided to bring this area of the law into line with current penalties for similar offences across the statute book. This is appropriate as penalties currently in place under the Impounding Act have not changed for nearly 30 years, a period over which their value would have doubled if the consumer price index was applied. A reasonable approach has been taken, however, to specify different maximum penalties for different classes of items to reflect their different values and the potential risk they pose.

The Bill includes strict liability offences and new offences, as well as and harsher penalties for comparable offences included in the *Impounding Act 1993*.

The strict liability offences relate to, among other things, leaving an item or animal unattended in a public place. Monetary penalties apply for these offences and, in certain cases, a tiered maximum penalty regime applies to accommodate the different classes of items and further offending. 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. However, it notes that strict liability offences are not uncommon in regulatory settings to encourage compliance.

The Committee notes that the offences of leaving an item or animal unattended in a public place do not provide an exception for people experiencing homelessness, who may be disproportionately affected if found strictly liable for a monetary penalty. The Committee acknowledges the Minister's comment that authorised officers are expected to take into account the specific needs of people experiencing homelessness in exercising their functions. The Committee refers this matter to the Parliament for its consideration of whether the Bill contains sufficient safeguards in relation to this issue.

The new offences include, for example, a person recklessly or negligently leaving an item in a public space in certain circumstances, and a person failing to collect property in possession of the authority within the notified period. In the Second Reading Speech, the Minister provided the intent of each of these offences, including to ensure the application of higher appropriate penalties where a person has been reckless or negligent in their conduct, and to provide a greater incentive for owners to recover their impounded items (respectively). The Committee acknowledges these reasons and makes no further comment on the inclusion of new offences in the Bill.

Harsher penalties for comparable offences apply to the offences of, for example, obstructing an authorising officer or causing or permitting an animal to trespass. In the Second Reading Speech, the Minister explained that higher maximum offences have been provided across offences in the Bill to bring the law into line

with similar offences and because the penalties in place under the *Impounding Act 1993* have not changed for nearly 30 years. The Committee acknowledges the reasons for the increased penalties and makes no further comment.

Vicarious liability

25. Section 39 provides that the responsible person for property in relation to an offence for leaving an item or animal unattended in a public place under section 37 is guilty of the offence as if the person were the actual offender, unless the responsible person satisfies the person specified in a penalty notice or the court (as relevant) that the property was, at the relevant time, stolen property or otherwise illegally taken or used.

26. Comparatively, under section 32A of the Impounding Act only the owner of vehicle abandoned in a public place is vicariously liable for that offence.

27. The definitions of 'responsible persons' and 'items' are set out included in the Background to this report, above.

Section 39 of the Bill provides that responsible persons are vicariously liable for leaving an item unattended in a public place. A 'responsible person' includes: the person who owns or is otherwise responsible for the property, a person engaged to collect or manage the property on behalf of the owner, another person in control or possession, or entitled to possession, of the property, and a person who causes, or engaged in conduct reasonably likely to result in, the property being unattended. This expands who can be vicariously liable for an offence compared to section 32A of *the Impounding Act 1993*, under which an owner of a motor vehicle abandoned in a public place can be found vicariously liable. The Bill also expands the property applicable to the offence, with an 'item' under the Bill including a motor vehicle and other things.

Vicarious liability provisions can potentially result in people being subject to disciplinary action or penalty for the conduct of others. In this case, a responsible person may be found liable under section 37 for a monetary penalty. However, the Bill includes safeguards to minimise the unfairness to responsible persons. Specifically, section 39 provides that a responsible person is not vicariously liable where they satisfy the person specified in a penalty notice or the court (as relevant) that the property was, at the relevant time, stolen property or otherwise illegally taken or used. The Committee also acknowledges that vicarious liability provisions are not uncommon in regulatory settings and encourage compliance and, in this case, place the onus on people who own, use or control property to use that property responsibly. In these circumstances, the Committee makes no further comment.

Right to a fair trial – penalty notice offences

28. Section 49 provides that an authorised officer may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence under the Act or regulations.

29. Section 39(1) indicates that an offence under section 37 for leaving an item unattended in a public place may be a penalty notice offence.

30. Schedule 2 of the Bill also amends the *Road Transport Act 2013* and *Road Transport (General) Regulation 2021* to allow penalty notices to be issued to the registered operator of any unregistered class A motor vehicle (including cars, trailers and combinations of both) parked on a street 15 days after registration lapses.

31. In the Second Reading Speech, the Minister explained the reason for this consequential amendment:

> In the case of unregistered cars and trailers parked long-term on residential streets where parking is scarce, councils and members of Parliament have told me they get daily calls from frustrated residents about them, and that they are told very little can be done. Councils currently need to track down the owner before they can even seek to impound a vehicle. Then if an owner claims the vehicle, even if it is in poor repair and unregistered, councils often cannot issue fines or impound the vehicle.

The Bill creates a penalty notice regime which allows an authorised officer to issue a penalty notice to a person for a penalty notice offence prescribed by the regulations. The Bill also amends the *Road Transport Act 2013* and *Road Transport (General) Regulation 2021* to allow penalty notices to be issued to the registered operator of any unregistered class A motor vehicle (including cars, trailers and combinations of both) parked on a street 15 days after registration lapses.

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 an individual 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.

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

Limitation on right of review

32. Section 34 provides that certain decisions under the Act are subject to administrative review by the Civil and Administrative Tribunal:

i. a responsible person for property taken possession of may apply for review of the decision to take possession of the property, but only on the ground that the taking of possession was unlawful,

ii. a person issued with a direction may apply for review of the decision to issue the direction, but only on the ground the issuing of the direction was unlawful, and

iii. a responsible person for property taken possession of may apply for review of an amount required to be paid for return of the property, but only on the ground

that the amount has been improperly charges or incorrectly calculated, or is excessive.

33. The responsible person must give the authority or occupier notice of their intention to apply for administrative review. Once a notice of intention is given, the authority or occupier must not sell or otherwise dispose of the property until the time limit for the application has expired and the application has not been made or, if the application is made, it has been finally determined or withdrawn.

34. Under section 35, a time limit of 28 days generally applies to applications for review of a decision to take possession of property, and applies to review of an amount paid for the return of property. It does not appear a timeframe is included for review of a decision to issue a direction. These timeframe aligns with those included for review of administrative decisions in section 39 of the Impounding Act.

35. Section 36(1) states that if an application for administrative review of a decision to take possession of property is dismissed, the applicant is liable for additional fees incurred up to the time the authority is notified for the decision of the application.

The Bill provides for administrative review of the decisions to take possession of property and to issue a direction, but only on the ground that the taking of possession or issuing of the direction was unlawful. This may limit a responsible person's right to review of a decision in relation to broader issues.

This right may also be limited by the requirement under section 36 that an applicant, where their application is dismissed by the Civil and Administrative Tribunal, pay additional fees up to the time the authority is notified. This appears to accommodate the obligation of an authority (and an occupier) not to sell or dispose of property if a notice of intention to apply for administrative review is given until the time limit for an application has expired or, if an application is made, it has been finally determined or withdrawn. However, the threat of additional fees may in effect limit exercise by an applicant of their right to review.

The Committee also notes that a time limit does not appear to be included in the Bill regarding applications for review of a decision to issue a direction. The Bill may benefit from including a time limit in this case to ensure that applicants are aware of the period in which they can enforce their right of review of such decision. The Committee refers these matters to the Parliament for its consideration.

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

Commencement by proclamation

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

The Bill commences (as an Act) on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that the flexible start date may assist with the administrative

arrangements required to undertake consultation on the supporting regulation. Given the circumstances, the Committee makes no further comment.

Referral to regulations

37. The Bill provides that a number of matters are or may be included in the regulations including, for example:

    i. additional responsible persons for property or a class of property under section 15. Responsible persons may be liable for various offences under the Bill,

    ii. additional matters relating to the functions of authorised officers regarding items the officers have taken into possession, including creating offences for removing or otherwise interfering with items taken into possession by authorised officers, including removal or other interferences by owners of, or responsible persons for items, under section 26(2)(c). It appears that this may overlap, at least in part, with the offence under section 41 of the Bill for the unlawful recovery of property taken into the possession of the authority,

    iii. functions of an authorised officer (in addition to those conferred by the Bill) under section 46, and

    iv. information integral to the meaning certain definitions in the Bill, including the area prescribed as the 'area of operations' for an authorised officer or authority.

38. As stated above, in the Second Reading Speech the Minister also provided that the definition of an 'emergency' would be prescribed in the regulations for the purpose of section 19.

39. Section 61(5) of the Bill also provides that the regulations may create offences punishable by a maximum penalty of 50 penalty units ($5500).

The Bill refers various matters to the regulations including, for example, information integral to the meaning of certain definitions, additional functions of an authorised officer, the creation of offences and additional 'responsible persons'. The creation of offences is also referred to the regulations. Specifically, the general regulation-making power provides that the regulations may create offences punishable by a maximum penalty of 50 penalty units ($5500). Section 26(2)(c) also provides that the regulations may create offences for removing or otherwise interfering with items taken into possession by authorised officers, including removal or other interferences by owners of, or responsible persons for items. It appears that this may overlap, at least in part, with the offence under section 41 of the Bill for the unlawful recovery of property taken into the possession of an authority.

The Committee generally prefers 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 who is liable for those offences (specifically, responsible persons). The Committee therefore refers this issue to the Parliament for its consideration.

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

Incorporation of documents into regulations

40. Section 61(3) states that a regulation may apply, adopt or incorporate a document as in force at a particular time or from time to time.

> **The Bill allows the regulations to apply, adopt or incorporate external documents, as in force at a particular time or from time to time. 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.**

11. Service NSW (One-stop Access to Government Services) Amendment (COVID-19 Information Privacy) Bill 2021

Date introduced	10 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The object of this Bill is to ensure that personal information and health information collected by the Chief Executive Officer of Service NSW as part of the response to the COVID-19 pandemic is not used or disclosed except in very limited circumstances.

BACKGROUND

2. In the second reading speech to the Bill, the Minister for Customer Service, the Hon. Victor Dominello stated:

> The bill will limit the disclosure and use of any personal and health information collected by Service NSW under the COVID-19 public health orders. The Service NSW COVID Safe Check-in app has been central to the New South Wales Government's pandemic response. It has allowed us to quickly identify people who may have been in contact with a positive case and support efficient and effective contact tracing. Now, as New South Wales continues to reopen, the COVID Safe Check-in app provides customers with case alerts for venues they have attended. The check-in app has given people confidence that they will be notified if they come in contact with a positive case and will be able to protect their family and friends.

3. Specifically, the Bill aims to address the use of information collected via the Service NSW QR check in app that has been a mandatory requirement of entry for many venues across NSW.

4. The Minister also noted that amendments in the bill implemented advice from the NSW Privacy Commissioner:

> The Government has listened to advice from the Privacy Commissioner and decided to further strengthen privacy protections through the introduction of the COVID-19 information privacy bill. The bill takes the long-standing position that check-in data is to be used only for the purpose it was collected, or contact tracing, and enshrines it in legislation. It will ensure that information cannot be accessed for secondary purposes, including for law enforcement and by use of a warrant. It will reinforce to the people of New South Wales that the additional collection of their information during the pandemic is only to protect public health. The bill will prevent Service NSW from disclosing personal and health information collected under the public health orders for any use other than the purpose it was collected—contact tracing—

> to provide it to the person it is about, or, in limited circumstances, to investigate a breach of the public health orders.

5. The Bill was introduced and urgently passed by the Legislative Assembly on 10 November 2021.

ISSUES CONSIDERED BY COMMITTEE

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

Privacy of information

6. The Bill inserts Part 3A into the *Service NSW (One-stop Access to Government Services) Act 2013*. Proposed Part 3A outlines additional provisions regarding information collected during the COVID-19 pandemic.

7. Section 17A outlines the objective of this Part, including to recognise that the collection of information about the location or movement of people during the COVID-19 pandemic plays a vital role in protecting people from serious illness and death, and people are generally compelled to provide the information under extraordinary powers that have been invoked because of the pandemic. It also outlines that people expect the information provided will be used only for the purposes of protecting them from the pandemic, and inappropriate use or disclosure of the information may increase the circumstances in which information is not provided and consequently increase the risk of serious illness or death.

8. Section 17B places additional limits on the use of information held by the Service NSW CEO that has been collected in the exercise of a function made under the *Public Health Act 2010*, under authority of a public health order, or for COVID-19 contact tracing and because of a Ministerial direction.

9. Specifically, subsection 17B(2) provides that such information held must not be used or disclosed except for the purposes for which it was collected: contact tracing in NSW or another Australian jurisdiction; to investigate or prosecute a breach of a public health order; or to provide access of that information to the individual to whom it relates.

10. Section 17C provides that the Minister must review this Part after one year since its commencement to determine whether the policy objectives of the Part remain valid and whether the terms of the Part remain appropriate for securing the objectives. A report on the outcome of the review must be tabled in each House of Parliament within 6 months after the end of the period of 1 year.

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

> During the Delta outbreak, we asked the people of New South Wales to assist contact tracing by checking in when attending any indoor venue. We also asked the people of New South Wales to provide declarations and obtain permits for travel and other activities that would ordinarily be part of their everyday lives. Those measures work only with public buy-in. Trust and compliance is central to their effectiveness, and to our ability to reduce the spread of COVID-19. Over 7½ million people have used the Service NSW COVID Safe Check-in app, for over one billion total check-ins. That is over one billion times people in New South Wales have entrusted the Government with their personal information.

> Throughout the pandemic, we have recognised the significance of this trust and have sought to ensure that it is reflected with robust privacy protections. The public health orders state that contact details collected through the COVID Safe Check-in are to be used or disclosed only for contact tracing during the COVID-19 pandemic. Service NSW has upheld this position and has not provided any personal information collected through the COVID Safe Check-in to NSW Police Force. All contact details held by Service NSW are stored in an encrypted database that is accessible only by NSW Health through a restricted authenticated interface for the purposes of COVID-19 contact tracing. If information is not required by Health, Service NSW deletes personal check-in information it holds after 28 days.

The Bill amends the *Service NSW (One-stop Access to Government Services) Act 2013* to provide additional limits on the use of information collected by Service NSW in the course of the COVID-19 pandemic. The Minister noted that this is in relation to information obtained via the Service NSW QR check in app. The release of such information may impact on the privacy of an individual to whom that information relates, particularly where it contains their personal details, location data, and potentially whether they have tested positive for COVID-19.

However, the Committee recognises that the Bill is intended to provide adequate protection for the strict use of this information. Specifically, the Bill provides that such information held must not be used or disclosed except for the purposes for which it was collected: contact tracing in NSW or another Australian jurisdiction; to investigate or prosecute a breach of a public health order; or to provide access of that information to the individual to whom it relates. The Committee further recognises the importance of sharing such information to aid in the contact tracing of COVID-19 positive cases and protection of public health during the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.

12. Tattoo Parlours Amendment (Statutory Review) Bill 2021

Date introduced	10 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. David Elliott MP
Portfolio	Police and Emergency Services

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Tattoo Parlours Act 2012* (***the Act***) to address recommendations of the Statutory Review of the *Tattoo Parlours Act 2012*, including to—

   (a) rename the Act the *Tattoo Industry Act 2012* and rename the *Tattoo Parlours Regulation 2013* the *Tattoo Industry Regulation 2013*, and

   (b) allocate the responsibilities under the Act of the Secretary of the Department of Customer Service (the ***Secretary***) to the Commissioner of Police (the ***Commissioner***), and

   (c) provide that membership of a prescribed criminal organisation is a mandatory ground for refusal of a licence, and

   (d) provide for a regulation-making power to prescribe mandatory disqualifying offences in relation to refusal of a licence or permit, and

   (e) establish a limited duration permit scheme for body art tattooists visiting from overseas which is not related to attendance at a tattoo show or other industry event, and

   (f) provide for offences in relation to the advertising of body art tattooing and powers to obtain information and records for those offences, and

   (g) make other minor and consequential amendments.

BACKGROUND

2. The Bill amends the *Tattoo Parlours Act 2012* ('the Act') to enact significant reforms to the existing legislative framework for the assessment and licensing of body art tattooists and operators of tattoo parlours under the Act. It also provides for other minor and consequential amendments including renaming the Act to the *Tattoo Industry Act 2012* and the *Tattoo Parlours Regulation 2013* ("the Regulation") to the *Tattoo Industry Regulation 2013*.

3. The Bill has been drafted to address the recommendations which came out of a statutory review of the Act conducted from June to August in 2017.[6] The review concluded that the objectives of the Act remain valid and its terms remain appropriate for securing those objectives. However, it made several recommendations including in respect to providing greater clarity about the Act's operation, around eligibility for licences under the Act, and improving access to the State industry by permitting visiting foreign body art tattooists to participate.

4. In the second reading speech to the Bill, the Minister for Police and Emergency Services, the Hon. David Elliott MP summarised the statutory objectives of the Bill:

> The amendments will ensure that the newly named Tattoo Industry Act 2012 remains fit for purpose. The bill will limit infiltration of the body art industry by organised criminal groups by creating a new offence for advertising body art tattooing procedures without a licence. It will improve transparency in relation to grounds for refusal of a licence under the Act and provide further opportunities for international artists to trade in New South Wales.

5. Amongst the various proposed reforms to the Act, the Bill provides that the Commissioner of Police would be the sole authority responsible for regulating the tattoo industry under the Act. This would remove the coregulatory role that NSW Fair Trading currently holds under the Act.

6. The Bill also introduces explicit criteria for mandatory disqualification from holding a licence to perform body art tattooing or operate a tattoo parlour. The amendments would require the Commissioner to refuse an application where an applicant has either committed a prescribed disqualifying offence in the previous 10 years or has current or recent membership in a prescribed criminal organisation. In remarking on the inclusion of the explicit mandatory disqualification criteria, the Minister noted that the amendments will ensure that applicants know "up-front" whether their application may be refused and that:

> The intent is that the time waiting to know the outcome of a licence or permit application will be reduced and the process is made more transparent.

7. In addition, the Bill proposes to prohibit the advertising of body art tattooing without an appropriate licence. It also provides for enforcement powers to investigate and prosecute these offences in line with existing enforcement powers under the Act.

8. A further key amendment is the implementation of a new visiting tattooist permit scheme which is intended to enable international tattooists to temporarily operate in New South Wales. The Bill would expand beyond the existing licensing exemption scheme under the regulations and, as the Minister stated in his second reading speech, the permits:

> … will mean that New South Wales tattoo businesses, for the first time since the regulatory scheme commenced, can benefit from hosting international talent at their businesses to improve local expertise and their customers' experiences.

6

ISSUES CONSIDERED BY COMMITTEE

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

Freedom of association

9. The Bill amends subsection 16(3) of the Act to require the Commissioner refuse to grant, renew or restore a licence if an applicant is currently or, has been within the prior 12 months to making the application, a member of a "prescribed criminal organisation".

10. Proposed section 4A provides that the regulations may prescribe "an incorporated body or unincorporated group", regardless of structure or location, to be a prescribed criminal organisation.

> **The Bill provides that a person will be mandatorily disqualified from holding a licence in relation to body art tattooing if the Commissioner is satisfied that they are or have been within the prior 12 months a member of a criminal organisation prescribed by the regulations. This may impact a person's freedom of association as contained in Article 22 of the ICCPR.[7] The right to freedom of association protects their freedom to form and join associations to pursue a common goal, and to exchange ideas and information.**
>
> **However, Article 22 also recognises that derogation from this right may be warranted in certain circumstances, including to protect public safety and public health. The Committee notes that these provisions are addressed at targeting associations linked to criminal activities. In these circumstances, the Committee makes no further comment.**

Strict liability offences/penalty notice offences

11. The Bill proposes to insert section 8A into the Act which introduces various strict liability offences for individuals or corporations in relation to the advertising of body art tattooing. These provisions provide that a person commits an offence if, for example, they:

- Advertise that they carry on a body art tattooing business when they are not a master licence holder or the holder of a tattooist licence or permit; or
- Are a licence or permit holder who fails to ensure their advertisement includes the relevant licence number.

12. The offences under section 8A carries a maximum penalty of $5,500 (50 penalty units) for individuals, or $11,000 (100 penalty units) for corporations.

13. The Minister explained the rationale behind the new offences is that the provisions will:

> … help to uphold the law that only licensed businesses and tattooists can legally carry on the business of tattooing. It addresses stakeholder concerns that "backyard tattooing", or those who are conducting tattoo procedures without a licence or permit, undermines legitimate industry professionals and poses a risk to the public.

[7] United Nations, Office of the High Commissioner for Human Rights, International Covenant on Civil and Political Rights, 1966.

14. Under section 35 of the Act, an authorised officer under the Act may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence. Subsection 35(2) provides that the regulations may prescribe what constitutes a penalty notice offence.

15. The Bill proposes to amend the Regulations to prescribe the strict liability offences under section 8A as penalty notice offences carrying a penalty of $550 for an individual and $1,100 for a corporation.

> **The Bill introduces into the *Tattoo Parlours Act 2012* strict liability offences for the advertising of body art tattooing businesses or procedures without appropriate licensing and/or the inclusion of relevant licence numbers. The Bill also amends the *Tattoo Parlours Regulation 2013* to prescribe these strict liability offences as offences for which a penalty notice may be issued.**
>
> **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. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. These offences carry maximum penalties that are monetary only and not greater than $5,500 for individuals. The Committee also acknowledges the statements of the Minister that the offences are intended to protect the public from unlicensed body art tattooing procedures.**
>
> **It is further noted that penalty notices allow a person to pay a specified amount for an offence within a certain time should they not wish to have the matter determined by a court, which may impact on a person's right to a fair trial. Specifically, this may impact a person's right to have their matter heard by an impartial decision maker in public, and to put forward their side of the case. However, the Committee recognises the practical benefits of penalty notices including their cost effectiveness and ease of administration. The Committee further recognises that the amendments does not remove a person's right to elect to have the matter heard by a court. In the circumstances, the Committee makes no further comment.**

Wide powers of enforcement – real property rights/right to silence

16. The Bill proposes to amend the definition of "authorised officer" under the Act to mean a police officer, or a member of the NSW Police Force authorised by the Commissioner in writing, as well as any other person prescribed by the regulations. This has the effect of removing an investigator with NSW Fair Trading within the meaning of "authorised officer".

17. Authorised officers currently have wide powers of enforcement under the Act. Specifically, section 30A empowers an authorised officer to enter any licensed premises or other premises that they reasonably suspect are being used for body art tattooing for fee or reward at any reasonable time for the purpose of either determining whether there has been compliance with or contravention of the Act or regulations, or generally administering the Act.

18. Relevantly, section 30C of the Act currently empowers an authorised officer to lawfully exercises that power to enter without a warrant to do any of the following:

(a) examine any licence, registers, books, records or other documents on the premises,

(b) make a copy on the premises of any licence, registers, books, records or other documents and retain that copy,

(c) require any person to make a copy on the premises of any licence, registers, books, records or other documents and give that copy to the authorised officer to retain,

(c1) make such examinations and inquiries as the authorised officer considers necessary,

(d) take such photographs, films, audio, video or other recordings as the authorised officer considers necessary,

(e) require any person to produce any licence, registers, books, records or other documents on the premises,

(f) require any person to answer any question relating to any licence, registers, books, records or other documents or any other relevant matter,

(g) take any licence, registers, books, records or other documents from the premises for the purposes of copying them,

(h) seize any licence, registers, books, records or other documents, or any other thing that the authorised officer believes on reasonable grounds is connected with an offence against this Act or the regulations.

19. As noted earlier, the Bill amends subsection 16(3) of the Act to introduce a mandatory disqualification criteria in relation to membership of a "prescribed criminal organisation". The amendments also introduce a further criteria that would require the Commissioner to refuse to grant, renew or restore a licence to operate a tattoo parlour for an applicant that has been convicted of a "disqualifying offence" in any jurisdiction within the ten year period prior to making the application.

20. The Bill also amends section 19 of the Act to include these mandatory disqualification criteria as matters which the Commissioner may investigate, inquire into and determine. Consequently, the Commissioner's existing power under section 19A of the Act, to compel by written notice a licensee or their "close associate" to provide records, information or necessary authorisation to obtain information, also extend to investigations regarding the new disqualification criteria introduced.

21. Additionally, the proposed amendments to section 19 of the Act may also expand the matters of general administration, compliance and contravention under the Act which entitle authorised officers to invoke the enforcement powers under sections 30A and 30C.

22. In addition to these existing enforcement powers under the Act, the Bill proposes to introduce Division 2A under Part 4 of the Act to provide similar enforcement powers specifically in relation to the strict liability offences of advertising body art tattooing. Section 31A of the Bill provides that the division's enforcement powers apply whether or not the existing power of entry under the Act are being or have been exercised.

23. Section 31B of the Bill provides that an authorised officer may require a person to give the officer information or records required under a written notice for the purpose of determining whether they have committed any of the new strict liability offences relating to body tattoo advertising.

24. In relation to matters relating to information required for the same purpose, section 31C empowers an authorised officer to require a person, who they suspect on reasonable grounds to have knowledge of those matters, to answer questions about that matter.

> **The Bill amends the *Tattoo Parlours Act 2012* to expand the matters which the Commissioner of Police may investigate and, consequently, underpin the lawful exercise of the existing enforcement powers to enter without a warrant under the Act. The Bill also introduces new enforcement powers in relation to new strict liability offences which empower police officers or other authorised officers to compel the production of records and/or the giving of answers relating to the possible commitment of those offences. These amendments grant authorised officers, including police officers and members of the NSW Police Force, wide powers of enforcement.**
>
> **In its Digest No 27/55, the Committee commented on the *Tattoo Parlours Amendment Bill 2012* which introduced the wide enforcement powers under sections 30A to 30C under the Act. Consistent with those comments, the Committee notes that the exercise of these enforcement powers may interfere with individual rights including, for example, their real property rights in respect to the power of entry without warrants or their right to silence in respect to the power to compel records and answers regarding possible offending conduct.**
>
> **The Committee recognises the purpose of these amendments is to better strengthen compliance with the new prohibitions and to ensure that criminal organisations or unsuitable persons are not able to continue body art tattooing in NSW. However, the Committee notes that the Bill separately provides for mandatory disqualification criteria and strict liability offences to work towards these objectives. Given the additional burden on individual rights, the Committee refers to Parliament whether such wide powers may constitute undue interference with individual rights and liberties.**

Procedural fairness/privilege against self-incrimination

25. The enforcement power under proposed section 31C discussed above empowers an authorised officer to compel a person to answer questions, in respect to matters relating to the commitment of a strict liability offence introduced by the Bill.

26. Additionally, subsection 31C(4) empowers an authorised officer to record questions and answers given to those questions under this section, so long as the officer has information the person being questioned that a recording is to be made. Subsection 31C(7) clarifies that the officer may make a recording "despite the provisions of another law".

27. The Bill also extends the operation of section 33A of the Act to apply to exercises of the amended powers under sections 31B and 31C discussed above.

28. Section 33A sets out a number of provisions relating to requirements under the Act to give records, information or answers to questions. This section relevantly provides that, as it relates to the proposed new enforcement powers:

- A person will be guilty of an offence for failing to comply with a requirement under sections only if they are informed that failure to comply is an offence;
- A person is not excused from a requirement under those sections on the grounds that it might incriminate them or make them liable to a penalty;
- Any records given by a person in compliance with those sections is not inadmissible in criminal proceedings on the ground that it might incriminate them; and
- Further information obtained as a result of exercising the powers under those sections is not inadmissible on the ground that the record, information or answer was compelled to be given, or that it might incriminate the person.

29. However, subsection 33A(3) provides that information or answers given by a natural person in compliance with those sections is not admissible evidence in criminal proceedings against that person if they objected at the time of compliance on grounds of self-incrimination or was not otherwise warned that they may so object.

30. Under subsection 34(1) of the Act, proceedings for offences under the Act are to be dealt with summarily before the Local Court or Supreme Court.

The Bill extends the provisions of section 33A of the *Tattoo Parlours Act 2012* which disallows non-compliance with requirements to give records, information or answers in relation to possible offences for reasons of self-incrimination. That section also allows the admissibility in criminal proceedings of certain records and information obtained through the exercise of these powers, despite any objections of involuntary production or self-incrimination. The Bill also includes provisions empowering authorised officers to make recordings of compelled answers without the consent of the person, so long as the officer has notified the person that a recording is being made.

In its Digest No 34/56, the Committee commented on the *Tattoo Parlours Amendment Bill 2017* providing for the inclusion of section 33A into the Act. Consistent with those comments, the Committee notes that these amendments may abrogate an individual's right to silence by explicitly excluding a person's privilege against self-incrimination in the exercise of official State powers. The Committee also notes that by enabling the admissibility of information or records obtained from a person involuntarily through the exercise of those powers and against objections of self-incrimination, the amendments may also impact an individual's right to procedural fairness by excluding established grounds of inadmissibility for evidence in court proceedings. This is of particular concern where recordings of answers compelled from a person may be made without their explicit consent.

Whilst the Committee recognises that the provisions provide that information or answers compelled from natural persons cannot be admissible evidence in

criminal proceedings against them, it notes that this safeguard does not limit the use of that information for collecting further information which may constitute admissible evidence in relevant proceedings. The Committee also notes that the safeguard does not allow any exceptions for non-compliance for reasons of self-incrimination which is explicitly disallowed under the Act. For these reasons, the Committee refers this matter to Parliament for their consideration.

Retrospectivity

31. The Bill proposes to include provisions consequent on its enactment (as an Act) under Part 6 of Schedule 1 to the Act.

32. Clauses 17(1) and 18 provide that the Bill's amendments to the investigation and determination of licensing applications will apply to any pending applications and appeals or reviews in relation to a tattooing licence application or decision. That is, the amendments will apply to such applications, appeals and reviews which are initiated prior to the commencement of the Bill (as an Act) which are not determined at commencement.

The Bill provides for the retrospective application of particular amendments to the *Tattoo Parlours Act 2012* in relation to applications, appeals and reviews pending final determination on commencement of the Bill as an Act. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

In this case, a person could have their licensing application cancelled or refused or their appeal or review determined against their favour due to retrospectively imposed mandatory disqualification criteria relating to that licence. Whilst the Committee acknowledges that the Bill explicitly excludes the retrospective application of new disqualification criteria on existing licence holders, the Committee notes that the retrospective application may have negative implications for individuals seeking to obtain a licence prior to the commencement of the Bill as an Act. For these reasons, the Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

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

Matters deferred to the regulations

33. As earlier noted, the Bill proposes to insert section 4A into the Act which provides that the regulations may prescribe a body or group to be a prescribed criminal organisation, where current or recent membership of, would mandatorily disqualify a licence holder or applicant. The Bill proposes to amend the Regulations by inserting clause 13A and Schedule 3 to provide that "prescribed criminal organisation" are the bodies and groups listed in Schedule 3.

34. In commenting on proposed section 4A, the Minister clarified that they are intended to address an issue that the Act that currently does not achieve the intended purpose of excluding criminal groups from the tattoo industry. Specifically, the Minister noted that only criminal organisations declared by the Supreme Court may not apply for a licence, however the court has not exercised that power to date. He further stated that the

participation of criminal groups in the industry presents "danger to community safety and damage to the integrity of the industry".

35. Similarly, as discussed above, the Bill also introduces a second mandatory disqualification criteria in relation to convictions for a "disqualifying offence". Under section 3(1) of the Act, the Bill seeks to define "disqualifying offence" to mean an offence so prescribed by the regulations.

36. The Bill also proposes to insert Division 5A into the Act, which provides for visiting tattooist permits that authorise unlicensed holders to perform body art tattooing within the period and under the conditions stated in the permit. Subsection 26A(2)(c) provides that the regulations may prescribe conditions of the permit. Further, section 26C of the Bill provides that the Commissioner may decide an application for a visiting tattooist permit "in accordance with the grounds prescribed by the regulations".

37. Those grounds are also set out in amendments to the Regulations proposed by the Bill. Specifically, proposed clause 11A sets out seven grounds on which the Commissioner may refuse an application for a visiting tattooist permit that effectively mirror the mandatory disqualification criteria set out in proposed section 19 of the Bill.

> **The Bill defers some matters to the regulations. In particular, the Bill provides that the regulations may prescribe what offences or organisations constitute an individual meeting the mandatory disqualification criteria for a license (as introduced by the Bill). It also defers the grounds on which the Commissioner may refuse a visiting tattooist permit to the regulations. The Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected, such as the class of worker that may make an application under the Act or the procedure for applications and reviews under the Act.**
>
> **However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. In these circumstances, the Committee makes no further comment.**

Commencement by proclamation

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

> **The Bill provides that the Act will commence by proclamation. The Committee prefers that an Act commences on a fixed date or on assent, as this provides certainty to anyone affected by its provisions. This is particularly the case with Bills such as this one which affect police powers and personal rights and liberties.**
>
> **The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, to allow for administrative changes across agencies or other operational arrangements. However, the Committee notes that certain provisions in the Bill may have retrospective application. For these reasons, the Committee refers the matter to Parliament to consider whether commencement on proclamation is reasonable in the circumstances.**

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

Significant matters not subject to parliamentary scrutiny – service of documents with the authority

39. The Bill proposes to amend section 40 of the Act. Specifically, it proposes to amend subsection 40(1) to provide that a document may be served on, given to or lodged with the Commissioner in a way approved by the Commissioner.

40. The note to that subsection states that "The ways a document may be served under this Act that are approved by the Commissioner are listed on the NSW Police Force website".

41. However, subsection 40(2) provides that the provisions do not affect any other provisions of law or rules of a court authorising a document to be served on the Commissioner in any other manner.

> **The Bill seeks to amend the *Tattoo Parlours Act 2012* to amend the way in which documents may be served on the Commissioner. Specifically, it provides that service may be by a way that is approved by the Commissioner. Notes to that subsection refer to the NSW Police Force website for those approved manners for service. As the matters dealt with by the website have bearing on the obligations of those effecting service of documents, the Committee would prefer that they were dealt with by regulation. This would foster an appropriate level of parliamentary oversight. Under the *Interpretation Act 1987*, regulations must be tabled in Parliament and are subject to disallowance. There appears to be no such requirement for the website in question.**
>
> **The Committee acknowledges that the provisions allow for service on the Commissioner in accordance with provisions of other laws or rules of a court. However, the Committee notes that the service of documents may include records or information which a person is required to provide to the Commissioner under enforcement powers granted to them by the Act and not otherwise connected to proceedings covered by that safeguard. For these reasons, the Committee refers this matter to Parliament for consideration.**

Part Two – Regulations

1. Community Land Management Regulation 2021

Date tabled	LA: 19 October 2021 LC: 19 October 2021
Disallowance date	LA: To be confirmed (upon publication of 2022 sitting calendar) LC: To be confirmed (upon publication of 2022 sitting calendar)
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

Purpose and description

1. The object of the *Community Land Management Regulation 2021* (the ***Regulation***) is to provide for the following matters relating to associations—

   i. the functions of associations that may be delegated only to a member of the association committee or a managing agent,

   ii. requirements for the first annual general meeting of an association,

   iii. procedural matters relating to elections and voting,

   iv. financial matters, including requirements for accounting records,

   v. matters to be included in the initial maintenance schedule for the association property of a scheme,

   vi. the operation of and limitations on by-laws that impose occupancy limits,

   vii. insurance requirements,

   viii. the keeping of records,

   ix. mediation procedures,

   x. offences for which penalty notices may be issued by an authorised officer,

   xi. fees and other miscellaneous matters.

2. The Regulation is made under the *Community Land Management Act 2021* (the **Act**).

Issues considered by committee

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

Right to fair trial – penalty notice offences

3. Section 210 of the Act provides that a penalty notice offence is an offence against the Act or regulations as prescribed as a penalty notice offence. The amount payable under a penalty notice is the amount prescribed by the regulations, not exceeding the maximum amount of penalty that could be imposed for the offence by a court.

4. An authorised officer may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence. An 'authorised officer' is a member of staff of the Department of Customer Service designated by the Secretary of the Department as an authorised officer for the purposes of section 210.

5. The *Fines Act 1996* applies to a penalty notice issued under section 210.

6. Schedule 2 of the Regulation creates offences for which a penalty notice can be served and prescribes the penalty payable for each offence by an individual or corporation. Penalty notices are created for:

    i. certain offences by the managing agent,

    ii. failure by an association to insure a building or structure on association property and keep the building insured under a contract of insurance,

    iii. non-compliance by an association or strata corporation with a request to provide information to the Secretary and allow the Secretary to inspect its records, and

    iv. failure by a lessor, sub-lessor or assignor of a lease or sublease to provide notice within the statutory timeframe.

7. The maximum penalty prescribed for a penalty notice offence by an individual is $550 (and for a corporation, $1100).

    Schedule 2 of the Regulation creates penalty notice offences and prescribes amounts payable for those offences. The highest penalty prescribed for a penalty notice offence by an individual is $550.

    Penalty notices to which the Fines Act 1966 applies 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, and are subsequently not liable to any further proceedings for the alleged offence. The Committee notes that an authorised officer may issue a penalty notice under the Community Land Management Act 2021 where it appears to the officer that a person has committed a relevant offence, and no requirement of 'reasonableness' attaches to the officer's provision of the penalty notice.

    The penalty notice regime under the Act 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. The Committee also generally

prefers provisions that create offences be included in primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight.

However, the statutory regime does not remove a person's right to elect to have the matter heard by a court. The Committee 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 the circumstances, the Committee makes no further comment.

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

Provisions regarding levy register

8. Section 103 of the Act also sets out information regarding the levy register. It provides that the treasurer of an association must keep a levy register that includes, for each member of the scheme, the following particulars in relation to contributions payable:

   i. the date on which the contribution is due and payable,

   ii. the type of contribution and the period in respect of which it is to be made,

   iii. the amount of the contribution levied shown as a debit,

   iv. the amount of each payment shown as a credit,

   v. the date on which each payment relating to the contribution is made,

   vi. whether a payment made was made in cash or in some other specified manner,

   vii. whether an amount paid comprised full payment or part payment,

   viii. details of any discount given for early payment,

   ix. the balance of the account.

9. Clause 22 of the Regulation provides that:

   i. under clause 22(1), the levy register for a fund must include a separate section for each lot (and, for a register kept by a community association or precinct association, former lot) in a scheme, and

   ii. under clause 22(2), each section must specify, by appropriate entries, certain matters in relation to each contribution levied by the association and must indicate whether the entries are debits or credits and the balance for the entries.

10. The matters listed at clause 22(2)(a)-(i) are the same as those particulars set out in section 103, notwithstanding slight differences in wording and numbering.

11. The term 'fund' used in clause 22(1) does not appear to be defined.

Section 103 of the *Community Land Management Act 2021* and clause 22 of the Regulation each include information that a levy register must include. Specifically:

section 103 requires that an levy register for an association include, for each member in the scheme, certain particulars in relation to contributions payable, and

clause 22 requires that a levy register for a fund must include, in separate sections for each lot (and, in certain cases, former lots) in the scheme, certain matters in relation to each contribution levied by the association. The meaning of the term 'fund' for the purposes of clause 22 of the Regulation is unclear.

The matters and particulars set out in clause 22 and section 103 are the same, notwithstanding slight differences in wording and numbering. It is unclear whether the levy register requirements in the Regulation overlap with or are additional to the requirements set out in the Act. This may impact those that are subject to the requirements under the regulation if their obligations are not sufficiently clear. The Committee refers this issue to the Parliament for its consideration.

2. District Court Criminal Practice Note 19

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 SC MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Violence

Purpose and description

1. This Practice Note commences on 2 August 2021 and revises District Court Criminal Practice Note 19, which commenced on 6 April 2020.

2. This Practice Note applies to all proceedings on indictment committed to the District Court for trial on or after the commencement date at Bega, Bourke, Broken Hill, Coonamble, Dubbo, Goulburn, Grafton, Moree, Nowra, Port Macquarie, Queanbeyan and Taree.

3. The purpose of this Practice Note is to:

    i. ensure that matters are dealt with efficiently and in a manner consistent with the obligations of the prosecution and an accused person under Chapter 3, Part 3 of the *Criminal Procedure Act 1986*;

    ii. establish case management procedures from the time an accused person's matter is first mentioned in the District Court;

    iii. refine the disclosure obligations of the prosecution and an accused person;

    iv. reduce avoidable delays; and

    v. promote procedural fairness.

ISSUES CONSIDERED BY COMMITTEE

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

Access to justice

4. The Practice Note substantially remakes the preceding Criminal Practice Note 19 that commenced on 6 April 2020 and the majority of the revisions made were in respect to phrasing. However, the Practice Note does make certain amendments in respect to the conduct of pre-trial procedures for defendants without legal representation in proceedings on indictment in specified regional courthouses of the District Court.

5. In accordance with items 10 and 19 of the Practice Note, the magistrate presiding over the committal hearing of an accused person in applicable proceedings on indictment must list the matter for a call-over date by Audio Visual Link (AVL) before the Sydney District Court in four weeks' time which will serve as the first trial management listing. At that listing, the Court will fix a date for trial in an appropriate circuit sitting of the Court as well as fix a date for an AVL Readiness Hearing at least eight weeks before the trial date.

6. A Readiness Hearing is defined in the Practice Note to mean a hearing to ascertain the parties' readiness to proceed on the allocated trial date. The Practice Note sets out the Court's procedures and practices at the AVL Readiness Hearing at items 25 to 37.

7. Notably, item 27 provides that, where the matters relevant at the AVL Readiness Hearing cannot be resolved on the forms annexed to the Practice Note which the parties must submit two days prior, both the prosecutor and the accused person or their legal representative must be present during the AVL Readiness Hearing. However, the Practice Note introduces item 28 which provides that:

> If the accused person is in custody and not legally represented, the AVL Readiness Hearing will be listed on a date to be fixed by the circuit Judge.

8. The Practice Note also amends the existing limitation regarding the attendance of accused persons without legal representation to telephone connection only at the AVL Call-Over and the AVL Readiness Hearing. Specifically, items 16 and 33 amend the pre-existing limitation such that the option for telephone connection only to those hearings will be provided to those unrepresented defendants who are "not in custody".

9. The Practice Note does not specify what connection options will or may be provided for accused persons who do not have legal representation and are in custody.

> **The Practice Note provides that accused persons who are in custody and without legal representation must await a hearing date for their AVL Readiness Hearing to be fixed by the relevant District Court circuit judge. It also distinguishes unrepresented defendants who are not in custody by providing them with only a telephone connection option for their AVL hearings, without otherwise specifying the connection options for the attendance of unrepresented defendants in custody.**
>
> **By providing for distinctive pre-trial procedures and practices between unrepresented defendants charged on indictment who are in custody and those who are not in custody, the Practice Note may affect the rights of accused persons to equal access to justice contained in Article 14 of the ICCPR.[8] The right to equal access to justice protects the right of individuals to equality before the courts and tribunals. This is of particular concern as the limitations on the attendance and allocation of hearing dates are imposed for accused persons who are held in custody and thus deprived of their liberty, and who are also without legal representation which would itself impact their right to a fair trial.**
>
> **The Committee acknowledges that the Practice Note does not preclude the attendance of accused persons held in custody and without legal representation**

[8] United Nations, Office of the High Commissioner for Human Rights, International Covenant on Civil and Political Rights, 1966.

at the AVL hearings. However, the Committee notes that no attendance options for those individuals are specified in the Practice Note and it is unclear how the differentiation between unrepresented defendants in and not in custody achieves the objects of the Practice Note. In the circumstances, the Committee refers the matter to Parliament for consideration.

3. District Court Criminal Practice Note 22

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

PURPOSE AND DESCRIPTION

1. The purpose of this Practice Note is to ensure that, due to the large number of criminal trials being vacated because of COVID-19, jury trials proceed as efficiently as possible when they resume.

ISSUES CONSIDERED BY COMMITTEE

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

Right to liberty and freedom from arbitrary arrest or detention

2. The Practice Note provides that, in the event a criminal trial is to be vacated, the trial will not be reallocated a new hearing date until all pre-trial issues are argued and determined. In order to resolve all pre-trial issues, the Practice Note further provides that the date allocated for the trial will be utilised for the hearing of pre-trial arguments.

3. In the event that the parties consider there are no pre-trial issues, the Practice Note annexes a form which must be completed and signed by the solicitor instructing counsel who are briefed to appear at the trial which is to be vacated. This form is effectively a signed statement from the solicitor advising the Court that there are no pre-trial issues for the Court's resolution in the matter.

4. The District Court's Criminal Practice Note 18 sets out the general case management and pre-trial procedures for the conduct of matters under the Court's criminal jurisdiction. Items 16 to 18 of the Criminal Practice Note 18 sets out the Court's practice for trial management.

5. Item 16 provides that the accused's arraignment date will serve as the first trial management listing and, if the accused enters a plea of not guilty to any of the charges, the Court will fix dates for both the trial and the Readiness Hearing (being a hearing a week prior to trial where parties make relevant disclosures and the Court may exercise its powers as appropriate for the efficient management and conduct of the trial). In fixing a date for the trial, item 17(b) of the Criminal Practice Note 18 states that the prosecutor and the legal representative for the accused are to provide the Court with:

> an accurate estimate of the length of the trial… The estimate of the trial is to include allowance for pre-trial argument…

6. Likewise, at the Readiness Hearing fixed before trial, item 28(j) of the Criminal Practice Note 18 states the prosecutor and the legal representative for the accused are to inform the Court of the accurate estimate of the trial length "which must include an allowance for any pre-trial argument that has been identified by the parties".

> **The Practice Note makes the reallocation of hearing dates for criminal trials which have vacated conditional upon the hearing and determination of pre-trial issues. This may have the effect of individuals remaining arraigned on indictable offences and potentially in the custody of the State for an undefined period of time, in circumstances where the person is presumed innocent until their matter has been tried and they have been found guilty of a charge beyond reasonable doubt. The Practice Note may thereby impact on the right to liberty and security of person contained in Article 9 of the ICCPR.[9] The right to liberty and security of person protects the freedom of individuals not to be subjected to arbitrary arrest or detention and the entitlement of individuals arrested or detained on a criminal charge to a trial within a reasonable time, or to be released.**
>
> **The Practice Note may also impact on the right to equality before the courts and tribunals contained in Article 14 of the ICCPR. The right to be equal before the courts and tribunals in the determination of a criminal trial protects the right of individuals to minimum guarantees of full equality, including the guarantee to be tried without undue delay.**
>
> **The Committee acknowledges that the Practice Note provides for the previously allocated hearing date of the vacated trial to be reserved for the determination of pre-trial issues, which will prevent further delays to the reallocation of a new trial date that could be caused by the need to fix a hearing date for pre-trial arguments. The Committee also recognises that this measure provides for the efficient use of the Court's resources and may assist the Court in managing the backlog of criminal trials as a result of the vacations caused by the COVID-19 pandemic.**
>
> **However, the Committee notes that the Criminal Practice Note 18 recognises and makes provisions for the determination of pre-trial issues which may arise in its estimation of trial length. The Committee also notes that the determination of pre-trial issues pending or the signed statement of no such issues provided at the time of the vacation of hearing dates does not preclude the need for determination of further pre-trial issues which might thereafter arise before the new trial date. Therefore, the efficiency savings intended by the restriction may be undermined at the expense of the accused person's right to have their matter set down for trial as soon as reasonable. In circumstances where the accused individual might also be held in custody on remand, the Committee refers this matter to the Parliament for consideration.**

[9] United Nations, Office of the High Commissioner for Human Rights, International Covenant on Civil and Political Rights, 1966.

4. District Court Criminal Practice Note 23

Date tabled	LA: 19 October 2021 LC: 19 October 2021
Disallowance date	LA: To be confirmed (to be confirmed on publication of 2022 sitting calendar) LC: To be confirmed (to be confirmed on publication of 2022 sitting calendar)
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Violence

PURPOSE AND DESCRIPTION

1. The District Court Criminal Practice Note 23 titled 'Resumption of Jury Trials and in person appearances in Judge Alone Trials' (the **Practice Note**) was published in NSW Government Gazette No 527 of 15 October 2021.

2. The Practice Note is made under the *District Court Act 1973.*

3. The introduction of the Practice Note provides:

> 3. The commencement of new jury trials at the Court venues identified in paragraph 10 were temporarily suspended due to COVID-19. With the easing of restrictions under Public Health Orders and increased vaccination rates, the temporary suspension of jury trials at these venues will be lifted on 25 October 2021.
>
> 4. The steps that the Court will take to enable the return of jury trials in a way that is in the interests of the health and wellbeing of all court participants will build on the measures implemented last year…
>
> 5. The additional steps that the Court will take to facilitate the safe resumption of jury trials include:
>
> a. all jurors being vaccinated against COVID-19; and
>
> b. all court participants undergoing rapid antigen screening (**RAS**) at least twice-weekly or as otherwise required by the Sheriff of NSW.
>
> 6. In person appearances will only be allowed for new jury trials from 25 October 2021. All other matters in the Court will continue to be conducted by use of the virtual courtroom, subject to any leave granted by application to the trial Judge in judge alone trials.

4. The Practice Note applies to the resumption of jury trials at the following Court venues: the Downing Centre, John Maddison Tower, Campbelltown, Dubbo, Gosford, Katoomba, Newcastle, Parramatta, Penrith and Wollongong. Risk assessments will be conducted by the Sheriff of NSW and the application of the Practice Note may be extended to other Court venues, in accordance with paragraph 11.

ISSUES CONSIDERED BY COMMITTEE

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

Barrier to jury participation

5. The Practice Note requires all members of a jury panel to be vaccinated in order to attend a new jury trial. Specifically, paragraph 14 states that the NSW Sheriff will ensure that all members of the jury panel are vaccinated, consent to undergoing rapid antigen testing (RAS) as required and have undergone RAS.

6. 'Vaccinated' means that a person:

   i. has either completed a two-dose schedule of Pfizer Australia Pty Ltd, AstraZeneca Pty Ltd or Moderna Australia Pty Ltd, or received a single dose of Janssen-Cilag Pty Ltd; and

   ii. at least 14 days has elapsed since completing their vaccination schedule.

7. Paragraph 17 states that any court participant (which includes a juror) has the right to decline to provide his or her vaccination status. However, it appears that doing so prevents the person from being a juror. Unlike for other court participants (specifically, witnesses, defence experts or accused persons) the Practice Note does not facilitate jurors partaking in a trial by audio link or audio-visual link where they decline to provide their vaccination status or evidence of such, or undergo RAS.

8. Paragraph 19 provides the rationale for the provision of a court participant's vaccination status, stating that it will assist the Court to manage the risk of COVID-19 and facilitate the safety of all court participants under the *Court Security Act 2005* (NSW), the *Work Health and Safety Act 2011* (NSW) and NSW Public Health Orders.

> **The Practice Note requires that all members of a jury panel attending a new jury trial are vaccinated against COVID-19. While a court participant (including a juror) has the right to decline to provide his or her vaccination status, it appears that doing so prevents that person from being a juror.**
>
> **The Practice Note does not appear to facilitate juror participation by audio link or audio-visual link as an alternative. However, the Committee notes that in person jury trials help to uphold the right to fair trial and rule of law by allowing the jurors, among other things, full court room visibility (of other court participants present and the Judge) and access to the jury room for deliberation. It also allows juror conduct to be more closely monitored and therefore effectively managed.**
>
> **The Practice Note does not make any exceptions to the requirement to be vaccinated on medical or other grounds. The requirement to be vaccinated may therefore be discriminatory against non-vaccinated people, including people who are unable to be vaccinated for medical reasons, or people who received a vaccine other than those approved by the Therapeutic Goods Administration (TGA). These include overseas vaccines 'recognised' by TGA, although it is noted**

that State and Territory governments or certain organisations may apply additional considerations around vaccine requirements.[10]

The Committee notes the centrality of jury service to the criminal justice system, allowing members of the community to play an active role in the administration of justice. It also notes the intent of the requirement to manage the risk of COVID-19 and protect the safety of all court participants. The Committee refers this issue to the Parliament for its consideration.

Open justice

9. The Practice Note requires that other persons (besides jurors) attending the Court in person are vaccinated.

10. Leave will not be granted to any person to attend the Court in person for a Judge alone trial unless the trial Judge is satisfied that he or she is vaccinated. Leave is granted by application to the trial Judge. All other matters will continue to be heard by use of the virtual courtroom.

11. A member of the media who wishes to attend a civil trial in person must also provide evidence that he or she is vaccinated and consents to undergo RAS. Where a member of the media declines to do so, attendance will be permitted by the use of the virtual courtroom, on request and subject to orders made by the trial Judge concerning the conduct of the trial.

12. As noted above, 'vaccinated' means that a person has either received the full dosage of a TGA-recognised vaccine and at least 14 days has elapsed since completing their vaccination schedule.

The Practice Note requires any person who wishes to attend Court in person for Judge alone trial apply for leave, and that such leave will not be granted unless the Judge is satisfied that he or she is vaccinated. It also requires members of the media who wish to attend a trial in person provide evidence that they are vaccinated and consent to undergo rapid antigen testing (RAS). If a person does not apply for leave to attend Court in person or a member of the media declines to provide evidence of vaccination or does not consent to undergo RAS, they have access to the virtual courtroom.

The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny. However, while the Practice Note limits in person appearances and media access to the Court, the Committee acknowledges that such requirements are in response to the current COVID-19 pandemic with the intention of broader public health. The Committee also considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

[10] Australian Government Department of Health, Therapeutic Goods Administration, *COVID-19 vaccines not registered in Australia but in current international use – TGA advice on "recognition"*, 22 October 2021.

Access to justice

13. The Practice Note facilitates the giving of evidence or appearance of certain court participants by audio link or audio-visual link where they decline to provide their vaccination status or evidence of such, or do not consent to an RAS. Specifically:

    i. a Crown witness to give evidence by audio link or audio-visual link,

    ii. a defence witness to give evidence by audio link or audio-visual link,

    iii. defence expert and/or alibi witness to give evidence by audio link or audio-visual link and

    iv. an accused person to appear by audio-visual link.

14. In accordance with paragraph 40, where an accused person declines to provide their vaccination status or evidence of such, or does not consent to RAS, the Court may vacate the trial or, on its own motion or with the parties to the proceedings' consent, make a direction that an accused person appear by audio-visual link. The parties will have an opportunity to make submissions to the Court as to whether such a direction should be made and the Court will have regard to the accused person's vaccination status and sections 22C(6) and (7) of the *Evidence (Audio and Audio Visual Links) Act 1998,* being COVID-19 pandemic special provisions which are in force until 26 March 2022. These sections provide that:

    i. the court is to make a direction under this section only if it is in the interest of justice, having regard to the public health risk posed by the COVID-19 pandemic, the efficient use of available judicial and administrative resources, relevant matters raised by a party and other matters the court considers relevant, and

    ii. if an audio-visual link is used, the court must be satisfied that a party is able to have private communication with their legal representative and has had a reasonable opportunity to do so.

    Where a person declines to provide their vaccination status or evidence of such, or do not consent to rapid antigen testing, the Practice Note allows a Crown witness, a defence witness and a defence expert and/or alibi witness to give evidence in a new jury trial by audio link or audio-visual link. It also permits an accused person to appear by audio-visual link. The Court may direct an accused person to appear by audio-visual link if it is in the administration of justice and having regard to certain circumstances.

    The use of audio link or audio-visual link may affect procedural fairness because the Court cannot closely monitor the conduct of a witness or expert including what material they have access to, if other persons are in the room or if they are recording the trial on their own device. It may also affect consistency in the quality of evidence between witnesses who appear in person or remotely, particularly if an audio link or audio-visual link drops out due to technical failures. Additionally, appearance by audio-visual link may impact an accused person's access to justice, particularly if they are Indigenous or have mental health or cognitive impairment issues, as the Court does not have the benefit of observing any nuanced behavioural cues of the accused person.

The Committee acknowledges that the use of audio link or audio-visual link in trials has practical benefits in the circumstances, specifically to protect against the risk of COVID-19 and protect the safety of court participants. In the circumstances, the Committee makes no further comment.

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

Period of application and review date

15. The Practice Note commences on 13 October 2021.

16. Paragraph 2 states that the Practice Note will be reviewed in mid-November 2021 or as otherwise may be necessary.

The Practice Note does not include a specific end date, although it indicates that it will be reviewed in mid-November 2021 or as otherwise may be necessary. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on a person's rights, including their right to participate in the administration of justice as a juror, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

5. Drug Misuse and Trafficking 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 SC MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Violence

PURPOSE AND DESCRIPTION

1. The object of the *Drug Misuse Trafficking Regulation 2021* (the **Regulation**) is to remake, without substantial changes, the *Drug Misuse and Trafficking Regulation 2011*, which is repealed on 1 September 2021 by the Subordinate Legislation Act 1989, section 10(2).

2. The Regulation provides for the following matters—

   i. the substances that are precursors and the apparatus that are drug manufacture apparatus for the purposes of the *Drug Misuse and Trafficking Act 1985* (the Act), and the sale and storage of those substances and apparatus,

   ii. the custody, handling, analysis and destruction of drug exhibits and related evidentiary matters,

   iii. exemptions from certain drug offences under the Act for certain police officers, people involved in needle and syringe programs and pharmacists,

   iv. other miscellaneous matters.

ISSUES CONSIDERED BY COMMITTEE

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

Liability of directors and managers for offences by the corporation

3. Section 9 of the Regulation prescribes that offences under sections 5, 6 or 7 of the Regulation (which are all related to supply of Schedule 1 or 2 precursors, or Schedule 3 apparatuses) are a prescribed executive liability offence to which section 43A of the *Drug Misuse and Trafficking Act 1985* (Act) applies.

4. Section 43A of the Act provides that a person commits an offence against the section if they are a director or individual involved in the management of a corporation that commits an executive liability offence. To be liable under section 43A, a person must

have known or reasonably ought to have known that the offence would be or was committed, and failed to take reasonable steps to prevent the offence from occurring.

The Regulation deems certain offences under the Regulation to be executive liability offences. This means that a director or certain managers of a corporation may be prosecuted for an offence committed by the corporation. The Committee notes that the prosecution is not required to prove actual knowledge of the offence on the part of the accused, only that the accused reasonably ought to have known about the offence or the likelihood the offence may occur.

However, the Committee acknowledges that the prosecution still bears the burden of proving the elements of an executive liability offence. Similarly, lower thresholds for the mental element (that must be proved to hold a defendant liable) are not unusual in regulatory contexts in order to encourage compliance. Further, the offences deemed to be executive liability offences by the Regulation will not attract a custodial sentence - the maximum penalty for individuals being a $5 500. In the circumstances, the Committee makes no further comments.

Access to justice

5. Section 16(7) of the Regulation provides that if a defendant or accused person for an offence relating to a relevant substance requests an analysis of a further sample (a 'B Sample'), they must pay for the cost of that analysis.

The Regulation provides at section 19(7) that an accused person who requests to have a further sample of a substance analysed will have to pay for that analysis. This may affect the rights of accused persons, especially people who lack financial means, to obtain a secondary analysis of a substance as evidence in proceedings against them. This is of particular concern as some offences in relation to the substances controlled by the Regulation may result in a custodial sentence if an accused is found guilty.

The Committee acknowledges that a secondary sample may be unlikely to demonstrate a different result to the first sample, which is analysed at the expense of the NSW Police Force. Further, the Committee acknowledges that this measure may serve to discourage individuals from delaying the legal proceedings in relation to their case or otherwise seeking to inconvenience the NSW Police Force. However, in acknowledging the cost-saving and practical benefits of this requirement, the Committee does not consider that they fully outweigh the access to justice concerns in the context of significant drug offences. The Committee refers the matter to Parliament for further consideration.

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

Penalties prescribed in the Regulation

6. Section 5 of the Regulation makes it an offence for a supplier to supply a Schedule 1 precursor to a person except in certain circumstances. Section 6 of the Regulation makes it an offence for a supplier to supply a Schedule 2 precursor to a person except in certain circumstances. Section 7 of the Regulation makes it an offence for a supplier to supply a Schedule 3 apparatus to a person except in certain circumstances. The maximum penalties for these offences is:

i. For a corporation is 100 penalty units ($11 000) for the first offence or 150 penalty units ($16 500) for a second or subsequent offence, or

ii. for an individual, 30 penalty units ($3 300) for a first offence or 50 ($5 500) penalty units for a second or subsequent offence.

The Regulation creates offences in regards to the supply of Schedule 1 and 2 precursors, and Schedule 3 apparatuses to persons except in certain circumstances. The maximum penalty that applies in respect of these offences is $16 500 for a corporation, and $5 500 for an individual.

The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, the Committee notes that the penalty has not been increased from the level prescribed in the *Drug Misuse and Trafficking Regulation 2011*, and makes no further comment.

6. Electricity Supply Amendment (Peak Demand Reduction Scheme) 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 the *Electricity Supply Amendment (Peak Demand Reduction Scheme) Regulation 2021* (the **Regulation**) is to create a financial incentive to reduce the consumption of electricity during peak times by creating a peak demand reduction scheme. The peak demand reduction scheme is a scheme established as part of the energy security safeguard under the *Electricity Supply Act 1995*, Part 8B, Division 3.

2. The other objects of this Regulation are specified under proposed section 83(2) of the *Electricity Supply Act 1995*, which are to:

   i. Improve the reliability of electricity supply,

   ii. Reduce the cost of electricity for customers,

   iii. Improve the sustainability of electricity generation.

3. Under section 83(4) of the *Electricity Supply Act 1995* the following persons are required to participate in the peak demand reduction scheme:

   i. A retailer

   ii. A direct supplier of electricity

   iii. A market customer within the meaning of the *National Electricity Rules*.

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

Imposition of a new scheme

4. The Regulation under section 83 requires retailers, direct suppliers of electricity and market customers within the meaning of the *National Electricity Rules* to participate in the peak demand reduction scheme. This requires all of these persons to implement measures to reduce their peak demand, and comply with other requirements of the Regulation including a reporting framework.

5. Failure to meet the reduction targets, otherwise comply with the Regulation, or provide information carries a penalty. For example, a failure to notify the Scheme Regulator about exemptions and liable acquisitions as is required under section 88 may incur a maximum penalty of 250 penalty units ($27 500) for a corporation or 100 penalty units ($11 000) for an individual. Other penalties can also apply if a person has a shortfall for a compliance period, which under section 98 is defined as the amount, in dollars, calculated by multiplying the shortfall by the scheme penalty rate, as rounded down to the nearest whole dollar.

6. Other financial penalties are also contained in sections 89(4), 103(6), 108(1), 114(2), 117(4), 128(3), 129, 130, 131 and 137, with the largest maximum penalty being set at 2000 penalty units ($220 000). However it is noted the shortfall penalties, and the associated failure to remedy a carried forward shortfall penalty contained in section 102, may exceed these prescribed amounts.

The Regulation imposes a number of penalties for non-compliance with the peak demand reduction scheme. These penalties are of significant value, with the maximum prescribed penalty being $220 000. However, shortfall penalties, which are calculated using a formula particular to the entities' situation, may exceed this amount. The Regulation imposes reporting requirements and other compliance actions on electricity businesses, and these may require those businesses to incur additional costs in order to comply. A failure to comply with these measures may lead to a monetary penalty being imposed.

However, the Committee notes that the increased compliance obligations and the associated penalties may be required to successfully impose the scheme throughout NSW. The Committee accepts that these punitive elements are designed to ensure that all relevant industry participants are properly engaged with the scheme, and are appropriately targeted at fulfilling the Regulation's stated aims of reducing peak demand for electricity in NSW. The Committee notes the high value of some of the penalties, however notes that penalties in the *Electricity Supply Act 1995* exceed the penalties in the Regulation. Considering the nature of the Regulation and the broader expectations placed on electricity market participants, the Committee makes no further comment.

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

Henry VIII Clause

7. The Regulation amends the *Electricity Supply Act 1995*, made possible by Part 8B Division 3, which is a Henry VIII clause in the Act. Section 98D(1) provides that a regulation can amend schedule 4A to give effect to a scheme whose object is to encourage a specific energy activity.

8. The Regulation sets out a detailed peak demand reduction scheme, that places additional requirements on scheme participants. Further, as an example, the Regulation grants the Minister the power to set peak demand reduction targets for each compliance period. The Ministerial power is somewhat limited by section 84(4) which sets out what the Minister must be satisfied of prior to setting a reduction target, however it is still a broad power.

The *Electricity Supply Amendment (Peak Demand Reduction Scheme) Regulation 2021* amends the *Electricity Supply Act 1995*, made possible by Part 8B Division 3, which functions as a Henry VIII clause in the Act.

Henry VIII clauses allow subordinate legislation to amend the Act, thus delegating Parliament's legislative power to the Executive. The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight. The Committee refers this matter to Parliament for further consideration.

Matters that should be included in primary legislation

9. The Regulation provides that under the proposed Division 3 of the Act, the Minister may grant an exemption to the peak demand reduction scheme. This exemption must be published in the Gazette and provided to the Scheme Regulator, and may only be granted if the Minister is satisfied that the electricity is used either:

    (i) in connection with an industry or activity that is both emission intensive and trade exposed, or

    (ii) to produce green hydrogen.

10. The effect of an exemption is that a scheme participant is entitled to deduct from the total value of its liable acquisitions the value of each purchase of electricity that is to be used in connection with an activity, and when so used, is a fully exempt electricity load.

11. As well as providing for exemptions, the Regulation provides that the Scheme must be complied with by scheme participants, and penalties apply for a failure to comply with a number of provisions of the Scheme. For example, a participant may be liable for the shortfall penalties under proposed section 100 (the amount of the penalties can be specified by the Minster in accordance with proposed section 99) if the participant surrenders less than the number of certificates in its individual certificate target for a compliance period.

12. A further example of where penalties may apply is under proposed section 103, which requires scheme participants to lodge an annual statement in the approved form to the Scheme Regulator, and a failure to do so carries a maximum penalty of 250 penalty units ($27 500) for a corporation or 100 penalty units ($11 000) for an individual.

13. Certificate providers may also face penalties; under proposed section 114, a person who contravenes a condition of their accreditation as a certificate provider faces a maximum penalty of 2,000 penalty units ($220 000).

The Regulation provides that the Minister may provide an exemption to a scheme participant if the Minister is satisfied that the electricity is used for certain activities that are trade exposed or related to the production of green hydrogen. The Committee considers that matters involving an exemption from a scheme as well as penalties for non-compliance, which may include significant monetary penalties, should be dealt with in primary, not subordinate legislation.

The Committee notes that the exemption only applies to certain scheme participants, and not all offences created by the Regulation, and that the Minister's authority to grant such exemptions is limited by considerations of public interest amongst other factors. In regards to offences created by the Regulations, the Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny.

The Committee also acknowledges that either House of Parliament can pass a resolution disallowing a statutory rule. Nevertheless, the Committee refers to Parliament for further consideration whether the objectives in the Regulation could be more effectively achieved through primary legislation.

7. Exhibited Animals Protection 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

PURPOSE AND DESCRIPTION

1. The object of the *Exhibited Animals Protection Regulation 2021* (the **Regulation**) is to remake, with minor changes, the *Exhibited Animals Protection Regulation 2010*, which is repealed on 1 September 2021 by the *Subordinate Legislation Act 1989*, section 10(2).

2. This Regulation—

   i. exempts certain animals, and displays of animals, from the operation of the *Exhibited Animals Protection Act 1986* (the **Act**) and prescribes classes of, and standards for, animal display establishments, and

   ii. provides for terms and conditions of authorities under the Act, including fees, and

   iii. creates offences relating to the keeping and display of animals regulated under the Act, and

   iv. provides for other miscellaneous matters.

ISSUES CONSIDERED BY COMMITTEE

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

Penalties should be included in primary legislation

3. The Regulation creates several offences, mostly contained under Part 4. For example, section 24 of the Regulation provides that a person must not chain or tether an exhibited animal, or cause or permit it to be so chained or tethered, to an anchorage except for the purposes of veterinary treatment or grooming (with limited exemptions applying to elephants, domesticated hoof stock and raptors). This offence, and the other contained in Part 4 are aimed at protecting the welfare of exhibited animals, people viewing the animals and record keeping and carries a maximum penalty of 10 penalty units ($1100).

4. The Regulation under Schedule 4 also specifies the value of penalty notices under the *Exhibited Animals Protection Act 1986*. The penalties specified are a maximum of $500.

The Regulation creates several offences. For example, Part 4 contains a number of offences regarding the humane treatment of animals and other safety and reporting measures that must be observed by those who are licenced to exhibit animals. The maximum penalty that applies in respect of any of these offences is 10 penalty units ($1100).

The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, given the regulatory context; the fact that it may be more administratively efficient to proceed by regulation, and the fact that the penalties are relatively modest, the Committee makes no further comment.

Incorporating standards of external entities that will not be subject to disallowance

5. The Regulation under section 8 prescribes the standards for animal display establishments, which are published by the Department for Regional NSW. Failure to comply with these Standards is a breach of the terms and conditions under section 31 of the Act, which has a maximum penalty of 10 penalty units ($1100). Further, under section 14 of the Act, the Secretary will not issue a licence to an individual or entity that the Secretary considers they will comply with the standards.

Under the Regulation, the standards published by the Department for Regional NSW, which may be amended at any time, are binding on an authority that exhibits animals. Failure to comply with these standards may result in a penalty (maximum 10 penalty units ($1100)), or the inability for an individual or entity to receive a licence to lawfully exhibit animals.

Unlike regulations, there is no requirement for these standards to be tabled in Parliament and subject to disallowance under the Interpretation Act 1987. To ensure an appropriate level of parliamentary oversight, the Committee usually prefers for these requirements to be included in the Regulation, not in separate standards. However, considering the relatively minor penalties for non-compliance, the Committee makes no further comment.

8. Local Government (General) 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. Shelly Hancock MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The object of the *Local Government (General) Amendment Regulation 2021* (the **Regulation**) is to make amendments to the *Local Government (General) Regulation 2005* as follows:

   i. to prescribe the information to be included on the roll of electors that is to be kept by the Electoral Commissioner,

   ii. to provide that the election manager may make arrangements for inspection of a list of names of persons proposed for nomination,

   iii. to provide for the forms, and the approval of the forms, to be used for the purposes of a claim for the grouping of candidates and the withdrawal of the claim for grouping of candidates,

   iv. to prescribe additional classes of persons who are qualified for postal voting,

   v. to change the time that an envelope on which a postal vote certificate is printed must be received by the returning officer,

   vi. to provide that a person qualified to vote in the election of councillors to be held in September 2021 is qualified to vote before election day,

   vii. to reassign the functions relating to mobile booths for pre-poll voting in remote local government areas to the election manager,

   viii. to make arrangements for the COVID-19 pandemic in relation to polling places, scrutineers being present, and providing certain information be available on the election manager's website,

   ix. to allow the election manager to make a direction about the display of a poster or the handing out of tangible election material, in or on particular premises, if the direction is intended to comply with a public health order and to reduce the risk of infection from COVID-19,

x. to make provision for technology assisted voting,

xi. to update the questions to be put to an elector,

xii. to clarify the process for the preliminary scrutiny of postal voting envelopes,

xiii. to provide that, for an attendance election, an election manager may direct that a ballot-box be moved from a polling place to a ballot counting place,

xiv. to provide for the process required for the scrutiny and counting of votes at a ballot counting place,

xv. to provide for certain ballot-papers in sealed envelopes to be counted if the elector was not entitled to be enrolled on a residential roll for a ward but was entitled to be enrolled for another ward in the area,

xvi. to make it an offence for a person to enter or remain at a polling place unlawfully, or refuse to leave a polling place after being required to leave by an election official,

xvii. to align provisions relating to the suspension or adjournment of polling at an attendance election with the *Electoral Act 2017*,

xviii. to provide that a policy under the Act, section 252 must provide for the making of payment of expenses associated with carer responsibilities that are adequate or reasonable,

xix. to provide for when an election for chairperson of a county council is to be held,

xx. to prescribe the process for the receipt and scrutiny of postal votes, including the rejection of informal votes,

xxi. to update a form,

xxii. to make other minor and consequential amendments.

2. This Regulation is made under the *Local Government Act 1993* (the **Act**), including sections 252(5), 305, 310A and 748 (the general regulation-making power) and Schedule 6.

ISSUES CONSIDERED BY COMMITTEE

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

Strict liability offences

3. Sections 748(3) and (4) of the Act provide that the regulations may create offences in connection with elections and polls by adopting, with modifications as are necessary, any provision of the *Electoral Act 2017*, and for the penalty for an offence not to exceed the penalty for the corresponding offence in the *Electoral Act 2017*.

4. The Regulation inserts provisions into the *Local Government (General) Regulation 2005* regarding technology assisted voting by adopting the provisions of Part 7, Division 11 of the *Electoral Act 2017*. Two of these adopted provisions create strict liability offences.

5. Section 333J adopts section 159 of the *Electoral Act 2017*, providing that:

   i. a person who becomes aware of how an eligible elector, voting in accordance with the approved procedures, voted is not to disclose that information to another person except in accordance with the approved procedures. Contravention of this provision results in a maximum penalty of 20 penalty units ($2200) or imprisonment for 6 months, or both, and

   ii. a person must not disclose to another a source code or other computer software that relates to technology assisted voting under the approved procedures, except in accordance with the approved procedures or in accordance with an arrangement entered into by the person with the Electoral Commissioner. Contravention of this provision results in maximum penalty of 200 penalty units ($22 000) or imprisonment for 2 years, or both.

6. Section 333K adopts section 160 of the *Electoral Act 2017*, providing that a person must not, without reasonable excuse, destroy or interfere with a computer program, data file or electronic device used, or intended to be used, by the Electoral Commissioner for or in connection with technology assisted voting. Contravention of this provision results in a maximum penalty of 200 penalty units ($22 000) or imprisonment for 3 years, or both. It is an indictable offence.

7. The Regulation also amends clause 368(2) of the *Local Government (General) Regulation 2005*, which included an offence for remaining at a polling place after being requested by an election official to leave. The amendment makes it an offence for a person to, without lawful authority (proof of which lies on the person):

   i. enter or remain at a polling place, or

   ii. refuse to leave the polling place on being required to leave by an election official, or by the police officer acting under the direction or authority of an election official.

   This offence incurs a maximum penalty of 5 penalty units ($550).

The *Local Government (General) Amendment Regulation 2021* creates strict liability offences. Specifically, it incorporates provisions of the *Electoral Act 2017* to create three strict liability offences regarding secrecy relating to technology assisted voting and the protection of computer hardware and software. Each offence incurs a monetary penalty or imprisonment, or both:

- **disclosure of how an eligible elector, voting using technology assisted voting, votes except in accordance with approved procedures incurs a maximum penalty of 20 penalty units ($2200) or 6 months' imprisonment, or both,**

- **disclosure of a source code of other computer software that relates to technology assisted voting under the approved procedures, except in accordance with the approved procedures or an arrangement with the Electoral Commissioner, incurs a maximum penalty of 200 penalty units ($22 000) or 2 years' imprisonment, or both, and**

- **destruction or interference with a computer program, data file or electronic device used, or intended to be used, by the Electoral Commissioner for or in connection with technology assisted voting incurs a maximum penalty of 200 penalty units ($22 000) or 3 years' imprisonment.**

It also expands the offence under clause 368 to make it an offence for a person to, without lawful authority, enter or remain at a polling place, or refuse to leave a polling place after being required to leave by an election official. The Regulation places the burden on the accused person to prove they had the lawful authority to enter, remain or refuse to leave. This requirement may be interpreted as a reversal of the evidentiary principle that the burden of demonstrating the elements of an offence rests on the prosecution.

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. However, such offences encourage compliance. Compliance is particularly vital to safeguarding the integrity of the electoral process and vote by secret ballot, which guarantees free expression of the will of electors and upholds an individual's right to partake in public affairs and elections.

The Committee also prefers that provisions which create offences are included in the primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight. In this case however the *Local Government Act 1993* contemplates the regulations creating offences by adopting provisions of the *Electoral Act* 2017.

In the circumstances, the Committee makes no further comment.

Freedom of movement

8. The Regulation regulates the freedom of movement of persons at polling places and other locations.

9. As noted above, the Regulation amends clause 368(2) of the *Local Government (General) Regulation 2005* to state that a person must not, without lawful authority (proof of which lies on the person):

   i. enter or remain at a polling place, or

   ii. refuse to leave the polling place on being required to leave by an election official, or by the police officer acting under the direction or authority of an election official.

   This is a strict liability offence incurring a maximum penalty of 5 penalty units ($550).

10. The Regulation also amends clause 369 of the *Local Government (General) Regulation 2005* to insert a new subclause which states that, without limiting clause 356SA, a scrutineer who, within a polling place, pre-poll voting office, ballot counting place or declared institution or mobile booth, does any of the following, may be removed from the place by a police officer on the request of an election official:

i. contravenes this clause (by interfering with or influencing an elector or communicating with any person except as necessary to carry out the scrutineer's functions, or does not obey the lawful direction of an election official),

ii. engages in misconduct,

iii. fails to obey the lawful direction of the election official.

11. Under clause 356SA of the *Local Government (General) Regulation 2005*, a police officer may remove a person from a polling place or the immediate vicinity of a polling place if the police officer has reasonable grounds to believe the person is committing, has committed or is attempting to commit an offence under the Act or this Regulation at that polling place or in the immediate vicinity of that polling place.

The *Local Government (General) Amendment Regulation 2021* limits the freedom of movement of a person at a polling place or a scrutineer at a polling place, pre-poll voting office, ballot counting place or declared institution or mobile booth. Specifically, the Regulation:

- **makes it an offence for a person without lawful authority, proof of which lies on the person, to enter, remain or refuse to leave a polling place, and**
- **allows a police officer to remove a scrutineer for contravening clause 369, engages in misconduct or fails to obey a lawful direction of the election official.**

An individual's freedom of movement may be limited for various reasons, including for public order or the rights and freedoms of others, and any limitation must be necessary and proportionate to protect the permissible purposes and be the least intrusive means of achieving the desired result. The Committee considers the limitations on an individual's freedom of movement in this case are for a permissible purpose, namely to maintain public order and uphold the rights of other persons to take part in public affairs and elections. It generally considers that it is necessary, proportionate and the least intrusive means to achieve this result. However, it notes that the making of a strict liability offence limiting a person's ability to enter a polling place without a lawful purpose may be considered an undue interference with an individual's freedom of movement. The Committee refers this issue to Parliament for its consideration.

Right to take part in public affairs and elections – free communication of ideas

12. The Regulation makes clauses 356TA and 356TB which provide (respectively) for the election manager to direct that posters must not be displayed, or tangible electoral material handed out, in or on a relevant premises within 100 metres of a polling place or pre-polling office if the election manager is satisfied that the direction is necessary to:

i. comply with a public health order that is in force at the time of the election, or

ii. reduce the risk of infection from COVID-19 where the poster would be displayed or material would be handed out.

13. Clauses 356TA and 356TB also each provide that:

i. a notice of the direction must be published on the election manager's website,

ii. the election manager may publish links to election material and electoral material (respectively) published by the political participants on the election manager's website, and

iii. the clause is repealed on 31 December 2021 at the end of the day.

The *Local Government (General) Amendment Regulation 2021* allows an election manager to give a direction that the display of posters and handing out tangible electoral material at, or on a relevant premises within 100 metres of, a polling place or a pre-polling office. This provision may limit free communication about candidates and the election available in the posters and electoral materials.

Free communication of information and ideas about candidates and elected representatives is an important component of the right to take part in public life and elections. The Committee is of the view that this right should not be derogated from except in extraordinary circumstances warranted by compelling public interest considerations and only to the extent necessary to meet those public interest objectives.

The Committee notes that that the provisions are an extraordinary measure that seek to respond to the public health crisis created by the COVID-19 pandemic, and to protect public health, safety and welfare. It also notes that safeguards are included in the Regulation, for example:

- **the requirement that the direction only be given if the election manager is satisfied that it is necessary to comply with a current public health order or reduce the risk of infection,**
- **online notification of a direction to limit the provision of posters and tangible electoral,**
- **publishing of links to electoral material online, and**
- **time limitation of the provisions, with repeal of the clause on 31 December 2021 at the end of the day.**

In the circumstances, the Committee makes no further comment.

Access to postal voting – COVID-19 related qualifications

14. Clause 313 sets out when a person is qualified for a postal vote.

15. The Regulation provides additional qualifications for when a person is qualified for a postal vote under clause 313, including when a person:

i. is self-isolating because of COVID-19 related reasons, or

ii. reasonably believes that attending a polling place on election day will pose a risk to the health or safety of the person, or of another person, because of the COVID-19 pandemic,

16. Section 314 of the *Local Government (General) Regulation 2005* states that an application for a postal ballot-paper and postal vote certificate envelope must be received by the election manager before 5pm on the fifth day before election day.

17. A penalty notice may be served under the Act for a failure to vote. The form of the penalty notice at Schedule 11 of the Act allows a person who failed to vote, if they think they have a sufficient reason for not voting, to provide that reason or otherwise dispose of the matter by paying a penalty or having the matter dealt with in court.

The *Local Government (General) Amendment Regulation 2021* provides that a person is qualified for a postal vote if they are self-isolating because of COVID-19 related reasons, or reasonably believes that attending a polling place on election day will pose a risk to the health or safety of the person, or of another person, because of the COVID-19 pandemic.

The requirement that a person apply for postal ballot-paper and postal vote certificate by 5pm on the fifth day before election day may mean that someone who is required to self-isolate in accordance with a public health order after the postal vote application deadline may not be eligible to vote by post or in person on election day. This may result in a person incurring a penalty notice for failing to vote. The Committee refers this issue to Parliament to consider whether these provisions limit access to postal voting, and whether any waiver would be considered for those who fail to vote due to complying with a public health order.

9. Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) 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. Shelley Hancock MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The object of the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021* (the **Regulation**) is to repeal and remake, with minor changes, the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005* (the **2005 Regulation**), which would otherwise be repealed on 1 September 2021 by the *Subordinate Legislation Act 1989*, section 10(2).

2. The Regulation relates to the following matters under the *Local Government Act 1993* -

   i. the granting of approvals to operate manufactured home estates, caravan parks and camping grounds,

   ii. requirements for land, sites, setbacks, roads and utility services for manufactured home estates, caravan parks and camping grounds,

   iii. design, construction and installation requirements for manufactured homes, relocatable homes and associated structures,

   iv. requirements for caravans, tents and annexes in caravan parks or camping grounds.

3. But for clause 30, the Regulation re-formats and clarifies all clauses in the 2005 Regulation, and extends the operation of the 2005 Regulation by making minor amendments and repealing it. The amended Regulation will be repealed on 1 September 2022, pursuant to clause 174(1).

ISSUES CONSIDERED BY COMMITTEE

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

Meaning of 'reasonable charges' unclear

4. Under the new clause 30(4), occupants of a dwelling site which is powered by means other than by a direct connection to the local electricity supply authority's electricity main, the occupant of the dwelling site may only be charged reasonable charges for the supply of the electricity.

5. The previous version of this clause 30(3) under the 2005 Regulation required that if a dwelling site is provided with electricity other than by way of direct connection to the local electricity supply authority's electricity main, the maximum amount that an occupant may be charged for the supply of electricity during a particular period is the amount that the standard retail electricity supplier for the relevant district would have charged during that period under a standard form customer supply contract.

> **Clause 30(4) requires that occupants residing at a dwelling site that is powered by means other than by a direct connection to the local electricity supply authority's electricity main, be charged reasonable charges for the supply of the electricity. Under the previous version of this clause, clause 30(3) of the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005*, occupants were offered greater clarity on their expected electricity charge, as the 2005 Regulation required the maximum amount that an occupant may be charged for the supply of electricity during a particular period is the amount that the standard retail electricity supplier for the relevant district would have charged during that period under a standard form customer supply contract.**
>
> **The Committee notes that clause 30(4) of the Regulation does not define 'reasonable charges,' in circumstances where a dwelling site is powered by means other than by a direct connection to the local electricity supply authority's electricity main. The Committee prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and content is clear. Given there does not appear to be an objective guide in the Regulation about determining whether a charge is 'reasonable', the Committee notes this may negatively affect an occupant's residence, as what may constitute 'reasonable' charges may give rise to the risk that occupants are overcharged or charged more than what they would have been charged under the 2005 Regulation which capped the electricity charge to the extent of a standard form customer supply contract for supply during that period.**
>
> **The Committee acknowledges that it is important in a commercial context for vendors who operate manufactured home estates, caravan parks and camping grounds to have oversight of bills and charges incurred by occupants so as to ensure all of the vendors' rights under a lease or mortgage are respectively upheld. However, clause 30(4) may benefit from the inclusion of an objective guide on how electricity charges are determined as the amended clause is silent on how this will be achieved. As such, the Committee refers the Regulation to Parliament to consider how further elucidation on clause 30(4) may assist in**

interpretation, particularly for occupants of dwelling sites at manufactured home estates, caravan parks and camping grounds.

10. Practice Note DC (Civil) No. 16

Date tabled	LA: 19 October 2021 LC: 19 October 2021
Disallowance date	LA: To be confirmed (upon publication of 2022 sitting calendar) LC: To be confirmed (upon publication of 2022 sitting calendar)
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Violence

PURPOSE AND DESCRIPTION

1. The Practice Note DC (Civil) No 16 titled 'Applications for leave for in persona appearances in Civil Trials' (the **Practice Note**) was published in the NSW Government Gazette No 527 of 15 October 2021.

2. The Practice Note is made under the *District Court Act 1973.*

3. The introduction of the Practice Note provides:

    i. In person appearances have been temporarily suspended due to COVID-19. With the easing of restrictions and increased vaccination rates, applications may be made for leave to be granted for in person appearances in civil trials which are listed for hearing on or after 25 October 2021.

    ii. All other matters will continue to be heard by use of the virtual courtroom.

ISSUES CONSIDERED BY COMMITTEE

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

Open justice

4. The Practice Note requires that persons attending the Court in person are vaccinated. Specifically:

    i. leave will not be granted to any person to attend the Court in person unless the Civil List Judge or trial Judge is satisfied that he or she is vaccinated. An application for leave must be made to the Civil List Judge (where a trial Judge has not been allocated) or to the trial Judge (where allocated).

    ii. all other matters will continue to be heard by use of the virtual courtroom.

5. A member of the media who wishes to attend a civil trial in person must also provide evidence to the Civil List Judge or trial Judge (where allocated) that he or she is vaccinated. Where a member of the media declines to do so, attendance will be permitted by the use

of the virtual courtroom, on request and subject to orders made by the trial Judge concerning the conduct of the trial.

6. 'Vaccinated' means that a person:

   i. has either completed a two-dose schedule of Pfizer Australia Pty Ltd, AstraZeneca Pty Ltd or Moderna Australia Pty Ltd, or received a single dose of Janssen-Cilag Pty Ltd; and

   ii. at least 14 days has elapsed since completing their vaccination schedule.

The Practice Note requires persons who wish to attend Court in person for civil trials listed on or after 25 October 2021 apply for leave, and that such leave will not be granted unless the Civil List Judge or trial Judge is satisfied that he or she is vaccinated. It also requires members of the media who wish to attend a civil trial in person to provide evidence to the Civil List Judge or trial Judge that they are vaccinated. If a person does not apply for leave to attend Court in person or a member of the media declines to provide evidence of vaccination, they have access to the virtual courtroom. The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny.

However, while the Practice Note limits in person appearances and media access to the Court, the Committee notes that alternative arrangements may be made for those that do not meet the vaccination requirements to attend a virtual courtroom. The Committee also recognises that these vaccination requirements are in response to the current COVID-19 pandemic for the protection of public health and considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

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

Period of application and review date

7. The Practice Note commences on 13 October 2021.

8. Paragraph 2 states that the Practice Note will be reviewed in mid-November 2021 or as otherwise may be necessary.

The Practice Note does not include a specific end date. It also indicates that it will be reviewed in mid-November 2021 or as otherwise may be necessary. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential impact on a person's rights, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in other legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

11. Ports and Maritime Administration 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. Rob Stokes MP
Portfolio	Transport and Roads

PURPOSE AND DESCRIPTION

1. The object of the *Ports and Maritime Administration Regulation 2021* (the **Regulation**) is to remake, with changes, the provisions of the *Ports and Maritime Administration Regulation 2012* which is repealed on 1 September 2021 by the *Subordinate Legislation Act 1989*, section 10(2).

2. This Regulation deals with the following matters—

   i. the calculation and administration of various port charges payable to port authorities for vessels, cargo and passengers,

   ii. the commuter and charter wharves in NSW that require a permit or booking prior to use,

   iii. mooring licences, including applications and fees,

   iv. traffic control at ports and wharves,

   v. the Port Botany Landside Improvement Strategy, which regulates the provision of rail and truck servicing by stevedores at Port Botany,

   vi. the management of dangerous goods, by repealing and replacing provisions under the *Dangerous Goods (General) Regulation 1999*, Part 11, as continued in effect by regulations under the *Work Health and Safety Act 2011*,

   vii. the offences under the Ports and Maritime Administration Act 1995 and this Regulation that may be dealt with by penalty notice and the penalty amounts payable,

   viii. other minor and miscellaneous matters.

ISSUES CONSIDERED BY COMMITTEE

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

Risk of arbitrary search

3. The Regulation provides for a scheme of compliance audits. There audits are not regularly scheduled by the Regulation, instead under subclause 64(1) Transport for NSW (**TfNSW**) may audit compliance with the mandatory standards at any time.

4. Subclause 64(3) provides that officers or agents of TfNSW may enter and inspect premises or a facility at a stevedore's terminal for the purpose of or in connection with a compliance audit. This is in addition to powers TfNSW has under subclause 64(2) to request a carrier, stevedore or stevedore service provider provide TfNSW with a range of information relating to their practises and procedures which are connected to any matter dealt with in the mandatory standards.

5. Under clause 44, the Minister is authorised to set the mandatory standards in connection with the provision of truck servicing by stevedores at Port Botany. The mandatory standards are set by the Minister by written order published in the Gazette and on the TfNSW website and may, from time to time, be amended by the Minister in the same manner.

> **The Regulation provides TfNSW the power to conduct audits to ensure compliance with the mandatory standards in relation to truck servicing by Stevedores at Port Botany. These audits may occur at any time, and TfNSW has broad powers to request the disclosure of documents and enter premises and facilities when conducting these audits. The Committee notes that a failure to comply with a direction to produce documents for inspection or otherwise comply with an audit carries a maximum penalty of 500 penalty units ($55 000).**
>
> **The Committee also acknowledges that the mandatory standards that are able to be audited are not contained wholly in the Regulation, and may be set by the Minister from time to time in accordance with clause 44, noting however that they must be published in the Gazette and that the Regulations include a process for industry input into these standards.**
>
> **The Committee considers that the unfettered powers in relation to auditing may functionally provide TfNSW with the legal right to conduct ongoing surveillance of a carrier, business or stevedore. This may impact on a person's freedom from arbitrary search. However, the Committee acknowledges that the mandatory standards are designed to ensure the timely and fair operation of Port Botany, which plays a vital role as the largest container port in NSW, and that the capacity for TfNSW to conduct inspections to ensure compliance may be essential to ensure the successful operation of the Port. In these circumstances, the Committee makes no further comment.**

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

Privacy

6. Subclause 61(3) provides that confidential information may be disclosed in relation to the Port Botany Landside Improvement Project, which may include information such as the identity of port staff, and information about the financial position and operations of an involved business. The Minister can disclose confidential information under this clause only if the disclosure is in the public interest, and the Minister considers that the benefit of disclosing the information outweighs the detriment that may be suffered by a person as a result of the disclosure.

> **Under the Regulation, the Minister may disclose confidential information if the Minister considers that the disclosure is in the public interest, and that the public benefit of disclosing the information outweighs the detriment that might be suffered by a person as a result of the disclosure. The information that may be disclosed under this provision is in relation to the Port Botany Landside Improvement Project, and may include information such as the identity of port staff and information about the financial position and operations of an involved business. The information regarding the operations of a business may be of value and significance to a business, as it may give an indication of their performance that would not otherwise be made public which may in turn impact their position in the market.**
>
> **The Committee however acknowledges that the public interest test provides protection for business from having confidential information revealed in many circumstances, and that due to the complex and highly regulated nature of ports it may be appropriate for this information to be made available by the Minister to a range of involved stakeholders. As such, the Committee makes no further comment.**

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

Delegation of legislative powers

7. Under section 111 of the Regulation, the Minister can delegate their powers under the section 27(3)(e) of the *Ports and Maritime Administration Act 1995* to any person employed in the Transport Service. These powers include any function of the Minister under the marine legislation, and any other function conferred on the Minister by or under any Act in their capacity of administering the Act.

> **The Regulation provides that the Minister can delegate a broad range of powers to any person employed in the Transport Service. These powers include any function of the Minister under the marine legislation, and any other function conferred on the Minister by or under any Act in their capacity of administering the Act.**
>
> **The Committee notes that under the Act section 27(2) a delegate may sub-delegate to another person employed in the Transport Service if authorised to do so by the Minister.**

The Committee would have preferred the provisions about the persons and class of persons to whom such functions can be delegated to have been drafted with more specificity. In addition, they preferably should be included in the primary legislation and not delegated to the regulations. This is to ensure an appropriate level of parliamentary oversight. However, the Committee does note that the Act already provides that staff of TfNSW, a Port Corporation or a NSW Public Service employee are already deemed as an authorised person who can act as a delegate, and therefore the addition of a person employed in the Transport Service does not provide significant further scope to the power of delegation. The Committee makes no further comment.

Granting of exemptions

8. Under clause 38 of the Regulation, TfNSW may exempt a person, vessel or class of person or vessel from the provisions relating to mooring licences. The exemption must be published in the Gazette, and may be subject to conditions which are not further specified in the Regulation. A failure to comply with any conditions attached to a relevant exemption granted under the proposed section may incur a maximum penalty of 50 penalty units ($55 000).

The Regulation empowers TfNSW to grant exemptions from the operation of certain provisions of the Regulations. If an exemption is to be made to the operation of a Regulation, the Committee prefers this to be done by amending regulation. This is to foster an appropriate level of parliamentary oversight over the exemptions granted. Regulations must be tabled in Parliament and are subject to disallowance under the Interpretation Act 1987.

There is no such requirement for exemptions granted by TfNSW. The Committee notes that proposed clause 38(4) of the Regulation would require that details of any exemptions granted be published in the Gazette. The Committee also acknowledges that requiring an amending regulation to grant an exemption may be time-consuming, costly and burdensome for the businesses concerned and the government, and that the exemptions that can be granted are in relation to mooring licences of which there are a significant number in NSW. However, the exemptions may have broad application as they can be in regards to a class of person or vessel, which may have significant impact on businesses, individuals or the community. However, the Committee refers the matter to Parliament to consider whether the delegation of legislative power is appropriate in the circumstances.

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

Ill-defined and wide powers

9. The Regulation at Part 3 establishes a scheme under which persons can apply to TfNSW for permits to access commuter and charter wharves. Clause 19 provides that TfNSW may issue a permit subject to conditions, and a failure to comply with these conditions carries a maximum penalty of 100 penalty units ($11 000). However, the Regulation does not provide further description as to what type of conditions are able to be imposed by TfNSW.

The Regulation provides that TfNSW may impose conditions on a permit for access to charter and commuter wharves, however there is no further

information provided as to the nature of the conditions that can be imposed. A failure to comply with these conditions carries a maximum penalty of 100 penalty units ($11 000). In doing so, the Regulation grants TfNSW a wide and ill-defined power to impose conditions on permit holders, who under Part 3 of the Regulation have a right to apply for a permit to access the wharves. Administrative powers that limit rights and liberties should be drafted with sufficient precision so that their scope and content is clear.

Further, TfNSW can vary the conditions on a permit with a minimum of 7 days' notice in writing to a permit holder. This may lead to a permit-holder having to quickly take onerous steps to comply with a new condition if they wish to continue to access the wharves, and as the scope of the conditions is not limited by the Regulation, it is more difficult to assess what the scope of the impact may be on permit holders. The Committee refers these matters to Parliament for further consideration.

12. Protection of the Environment Operations (General) 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 the *Protection of the Environment Operations (General) Regulation 2021* (the **Regulation**) is to remake, without any significant changes, the provisions of the *Protection of the Environment Operations (General) Regulation 2009*, which is repealed on 1 September 2021 by section 10A and Schedule 5, clause 13 of the *Subordinate Legislation Act 1989*.

2. The Regulation makes provision for or in relation to the following:

   i. environment protection licences, including the payment of licence fees under a pollution load-based licensing scheme (Chapter 2),

   ii. water pollution, including exemptions from the offence of polluting waters (Chapter 3),

   iii. compliance with the National Environment Protection (National Pollutant Inventory) Measure made under the National Environment Protection Council Act 1994 of the Commonwealth (Chapter 4),

   iv. vehicle testing and inspection, including the approval of persons and premises in relation to the testing and inspection (Chapter 5),

   v. environmental monitoring programs, for example, the Upper Hunter Air Quality Monitoring Network and Newcastle Local Air Quality Monitoring Network (Chapter 6),

   vi. the issuing of penalty notices under certain environmental legislation (Chapter 7),

   vii. the identity of the appropriate regulatory authority, within the meaning of the *Protection of the Environment Operations Act 1997* (the **Act**), for certain types of activities (Part 1 of Chapter 8),

   viii. exemptions from certain provisions of the Act (Part 2 of Chapter 8),

ix. the prohibition on the burning of native forest bio-material in electricity generating works (Part 3 of Chapter 8),

x. pollution incident response management plans (Part 4 of Chapter 8),

xi. pollution prevention measures in relation to certain firefighting foam (Part 5 of Chapter 8),

xii. miscellaneous matters including fees relating to environment protection notices, the notification of

xiii. pollution incidents and forms relating to noise abatement directions (Part 6 of Chapter 8),

xiv. repeals, savings, transitional and formal matters.

3. The Regulation is made under (without limitation) sections 224 and 323 (general regulation-making power of the Act.

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 Regulation includes various strict liability offences. Strict liability offences under the Regulation relate to record-keeping, reporting, contravention of an EPA order prohibiting or regulating aquatic activities that threaten the safety of drinking water, vehicle inspection tests and reports, burning of native bio-material and discharge of per- and poly-fluoroalkyl substances (PFAS) firefighting foam, and result in varying maximum monetary penalties.

5. Non-compliance with the following clauses results in the highest maximum penalties:

i. Under clause 58, an environmental protection licence holder must retain records used to calculate a licence fee for not less than 4 years from the date on which he fee was paid or payable, whichever is later. Non-compliance results in a maximum penalty of 200 penalty units ($22 000) for a corporation or individual.

ii. Subject to the exemptions set out in clause 127, clause 126 provides that an occupier of a premises who causes or allows native forest bio-material to be burned in electricity generating work in or on those premises is guilty of an offence resulting in a maximum penalty of 400 penalty units ($40 000) for corporation or 200 penalty units ($22 000) for an individual.

iii. Under clause 135, a person must not discharge PFAS firefighting foam in firefighting training or a demonstration. Non-compliance results in a maximum penalty of 400 penalty units ($44 000) for a corporation and 200 ($22 000) penalty units for an individual. This penalty is in addition to a penalty incurred under the Act for pollution of waters under section 120 or pollution of land under section 142A. The following maximum penalties apply for the pollution of waters or land, which are also strict liability offences:

a) for a corporation, $1 million plus a further daily penalty for continuing offences. Each offence also attracts special executive liability under section 169, and

b) for an individual, $250 000 plus a further daily penalty for continuing offences.

iv. Under clause 136, on and from 26 September 2022 a person must not discharge PFAS firefighting foam to which the clause applies unless it is discharged by a relevant authority to fight a catastrophic or potentially catastrophic fire, or by a person to fight a fire on a watercraft in relevant waters. Non-compliance results in a maximum penalty of 400 penalty units ($44 000) for a corporation and 200 ($22 000) penalty units for an individual. This penalty is in addition to a penalty incurred under the Act for pollution of waters under section 120 or pollution of land under section 142A, for which the maximum penalties are set out above.

2. The Committee commented on the introduction of the penalties for the discharge of PFAS firefighting foam in Digest No. 31/57,[11] noting that the intention of these provisions is to prevent PFAS contamination in the NSW environment.

3. The objects of the Act include, among other things:

i. to protect, restore and enhance the quality of the NSW environment, having regard to the need to maintain ecologically sustainable development,

ii. to reduce risks to human health and prevent degradation of the environment by use of mechanisms that promote (without limitation) pollution prevent and cleaner production, the reduction to harmless levels of the discharge of substances likely to cause harm to the environment, and the monitoring and reporting of environmental quality on a regular basis, and

iii. to improve the efficiency of the administration of the environment protection legislation.

The *Protection of the Environment Operations (General) Regulation 2021* creates various strict liability offences relating to record-keeping, reporting, contravention of an EPA order prohibiting or regulating aquatic activities that threaten the safety of drinking water, vehicle inspection tests and reports, burning of native bio-material and discharge of PFAS firefighting foam. The offences include varying maximum monetary penalties. Certain offences, including those relating to the discharge of PFAS firefighting foam, result in high monetary penalties. The discharge of PFAS firefighting foam may also result in special executive liability for directors or persons concerned in the management of a corporation, as a result in liability for pollution of waters or land. The Committee notes its comments in Digest No. 31/57[12] regarding the PFAS firefighting foam offences, including that the rationale of the penalties is that they seek to prevent PFAS contamination in the NSW environment and PFAS firefighting foam can still be used to fight catastrophic fires or fires on watercraft

[11] Parliament of New South Wales, Legislation Review Committee, Digest No. 31/57 (8 June 2021).

[12] Parliament of New South Wales, Legislation Review Committee, Digest No. 31/57 (8 June 2021).

in relevant waters (although use outside those circumstances is an offence attracting a high monetary penalty).

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, and that provisions which create offences be included in the primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight. However, it notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. In this case, compliance upholds the objects of the Act. In the circumstances, the Committee makes no further comment.

Right to a fair trial – penalty notice offences

4. Section 224 of the Act provides that an enforcement officer may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence, with penalty notice offences and the amount payable for each offence prescribed by the regulations. The amount of a penalty notice cannot exceed the maximum amount of penalty that could be imposed for the offence by a court.

5. Schedule 6 of the Regulation creates, for the purposes of section 224 of the Act, offences for which a penalty notice may be issued, and specifies the amount payable for the penalty notice (for individuals and corporations) and the category of enforcement officer that may issue the penalty notice for that offence. Penalty notice offences are created for certain provisions of the following legislation:

   i. *Environmentally Hazardous Chemicals Act 1985,*

   ii. *Ozone Protection Act 1989,*

   iii. *Protection of the Environment Operations Act 1997,*

   iv. *Protection of the Environment Operations (Clean Air) Regulation 2021,*

   v. *Protection of the Environment Operations (General) Regulation 2021,*

   vi. *Protection of the Environment Operations (Hunter River Salinity Trading Scheme) Regulation 2002,*

   vii. *Protection of the Environment Operations (Noise Control) Regulation 2017,*

   viii. *Protection of the Environment Operations (Underground Petroleum Storage Systems) Regulation 2019,*

   ix. *Protection of the Environment Operations (Waste) Regulation 2014,*

   x. *Waste Avoidance and Resource Recovery Act 2001,* and

   xi. *Waste Avoidance and Resource Recovery (Container Deposit Scheme) Regulation 2017*.

6. The most serious penalty notice offences incur a penalty of $7500 for individuals and $15 000 for corporations.

7. The Environmental Protection Authority Compliance Policy[13] summarises its general approach to compliance and enforcement. It provides that show cause letters or official cautions may be issued rather than a penalty notice, and that a caution is used if the issuing officer has reasonable grounds to believe that an offence has been committed and believes a caution is appropriate in the circumstances, for example where the offence was not knowingly or deliberatively committed. It indicates penalty notices are issued:

   i. for minor breaches when the facts appear obvious and a penalty notice is likely to be a viable deterrent,

   ii. allow the person served with the notice to pay a fine rather than have the alleged offence dealt with in court, and

   iii. are designed primarily to deal with one off breaches that can be remedied easily (rather than multiple or ongoing breaches where there is a continuing environmental or compliance problem, usually dealt with by issuing an appropriate notice or court proceedings).

   Schedule 6 of the *Protection of the Environment Operations (General) Regulation 2021* creates penalty notice offences and prescribes the amounts payable. 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.

   The penalty notice regime under the *Protection of the Environment Operations Act 1997* 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. Additionally, the Committee generally prefers provisions that create offences be included in primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight.

   Notwithstanding, the statutory regime does not remove a person's right to elect to have the matter heard by a court. The EPA policy on compliance and enforcement also advises that other enforcement options, including cautions, may be used rather than penalty notices where the offence was not knowingly or deliberately committed, and that the intent of penalty notices is to encourage deterrence, avoid court appearances and deal with one-off breaches. In the circumstances, the Committee makes no further comment.

[13] State of NSW and Environmental Protection Authority, Compliance Policy, May 2013.

13. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 2) 2021

Date tabled	LA: 12 October 2021 LA: 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 the *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 2) 2021* (the **Regulation**) is to enable a penalty notice to be issued for the offence of failing to comply with a direction of the Minister for Health and Medical Research under the *Public Health Act 2010*, section 7 that applies to an occupier of a construction site in certain areas of Greater Sydney.

2. Amendments under the Regulation are to take effect from the date on which the Regulation was published, on 11 August 2021.

ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offence – right to a fair trial

3. The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to enable a penalty notice to be issued for two public health order offences relating to construction employees and employers. The amendments apply to the offences of failing to comply with directions under clauses 24AC and 24EA of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021.*

4. A amendment to schedule 4 states that the penalty notice infringement value for an individual or corporation in breach of clause 24AC of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* is $2000 and $10 000 respectively. Clause 24AC of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* states:

    i. This clause applies to an employee—

        a) whose place of residence is in Greater Sydney, or

        b) who is staying in temporary accommodation in Greater Sydney.

ii. The Minister directs that an employer must require an employee to work at the employee's place of residence.

iii. Subclause (2) does not apply if it is not reasonably practicable for the employee to work at the employee's place of residence.

5. A further amendment to schedule 4 states that the penalty notice infringement value for an individual or corporation in breach of clause 24EA of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* is $2000 and $10 000 respectively. Clause 24EA of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* states:

i. Work must not be carried out on a construction site in a local government area to which this Division applies, unless the work is urgently required for the following purposes—

a) to ensure the safety or security of the construction site,

b) to deal with environmental risks,

c) to maintain and ensure the integrity of critical plant, equipment or assets, including partially completed works, that would otherwise deteriorate,

d) to receive deliveries of supplies that would otherwise deteriorate,

e) to maintain public utilities,

f) to ensure the safe operation of existing transport infrastructure,

g) by or on behalf of NSW Health in response to the COVID-19 pandemic,

h) because of an emergency.

ii. An employee or other person must not enter or remain on a construction site in a local government area to which this Division applies, other than to carry out work required under subclause (1).

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 2) 2021* provides that penalty notices can be issued to an individual or corporation that contravenes clause 24AC of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021.* Clause 24AC requires an employee living in temporary accommodation in Greater Sydney to work from home unless it is not reasonably practicable for the employee to work at the employee's place of residence.

The Regulation also provides that penalty notices can be issued to an individual or corporation that contravenes clause 24EA of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021.* Clause 24EA requires that non-urgent construction must not to be carried out in the local government areas of Blacktown, Campbelltown, Canterbury-Bankstown, Cumberland, Fairfield, Georges River, Liverpool, Parramatta or any other local government area specified by the Chief Health Officer,

unless specific circumstances are met under that clause. A maximum infringement of $2000 and $10 000 may be issued for an individual and corporation respectively for contraventions of clauses 24AC and 24EA.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have a 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 infringements of $2000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

14. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 3) 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 the *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 3) 2021* (the **Regulation**) is to enable penalty notices to be issued for offences relating to the following—

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

    ii. 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,

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

ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offences – freedom of movement and freedom of assembly

2. The Regulation allows for the issuing of penalty notices for offences committed under section 10 of the *Public Health Act 2010* for failing to comply with directions under the *Public Health (COVID-19) Additional Restrictions for Delta Outbreak) Order 2021* (Clause 23 or Clause 25A) or the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*.

3. The *Public Health (COVID-19) (Additional Restrictions for Delta Outbreak) Order 2021* seeks to address the problem of community transmission of COVID-19 in Greater Sydney by placing temporary restrictions on freedom of movement and freedom of assembly. The Order also mandates the wearing of face coverings.

4. Clause 23 of the *Public Health (COVID-19) (Additional Restrictions for Delta Outbreak) Order 2021*:

23 Direction of Minister concerning outdoor public gatherings

(1) The Minister directs that a person must not participate in an outdoor public gathering in Greater Sydney of more than 2 persons.

(2) This clause does not apply to a person who is—

(a) engaged in work, or

(b) providing care or assistance to vulnerable persons.

(3) This clause does not apply to the following—

(a) an exempted gathering,

(b) a gathering of persons all of whom are members of the same household,

(c), (d) (Repealed)

(e) a gathering to provide emergency assistance to a person or persons,

(f) a gathering necessary to allow a person to fulfil a legal obligation,

(g) a gathering to facilitate a move to a new place of residence, including a business moving to new premises.

5. Clause 25A of the *Public Health (COVID-19) (Additional Restrictions for Delta Outbreak) Order 2021*:

25A Directions about answering questions from contact tracers

(1) The Minister directs that a person, at the request of an authorised contact tracer, must answer questions or provide other information about the person's movements.

(2) The Minister directs that a person, at the request of an authorised contact tracer, must provide the person's contact details to the authorised contact tracer.

(3) The Minister directs that a person who provides information under this clause must ensure the information is true and accurate.

(4) In this clause—

authorised contact tracer means a person engaged by NSW Health whose duties include—

(a) identifying persons who may have come into contact with a person with COVID-19, or

(b) notifying a person that the person has been identified as a close contact, being a person—

(i) likely to have come into contact with a person with COVID-19, and

(ii) at risk of developing COVID-19.

contact details, of a person, means—

(c) the person's name, and

(d) the person's telephone number or email address.

6. Clause 5 of the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021* directs that a person diagnosed of COVID-19 must travel to a suitable residence or hospital or place

determined by a designated health practitioner to be suitable and reside at that location until medically cleared. Clause 5(3) directs that such a person must not leave the location except to obtain medical care or medical supplies or in an emergency.

7. The amounts for the penalties imposed by the Regulation are significant, being $3,000 for failing to complying with Clause 23 of the *Public Health (COVID-19) (Additional Restrictions for Delta Outbreak) Order 2021*; $5,000 for failing to comply with Clause 25A and $5,000 for failing to comply with the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*.

8. The Committee notes that the restrictions imposed by the Public Health Orders referred to in the Regulation make severe limitations on the rights and freedom of people subject to the orders.

9. However, the Committee acknowledges that the Orders are only a temporary measure intended to address the emergency situation created by the outbreak of the Delta variant of the COVID-19 infection.

10. The ability to issue penalty notices for offences under section 10 of the Act does not remove the right to elect to have such matters determined by a court.

The Regulation allows for penalty notices to be issued for offences under section 10 of the *Public Health Act 2010*, for failing to comply with directions not to gather in public under clause 23 of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*; for failing to comply with directions to cooperate with contact tracers under clause 25A of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*; or for failing to comply with directions to self-isolate according to the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The penalties imposed by the Regulation are significant, being for amounts of $3,000 or $5,000.

However, individuals retain the right under this Regulation to elect to have their matter heard and decided by a Court. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health crisis created by the COVID-19 pandemic. In the circumstances, the Committee makes no further comment.

15. Public Health Amendment (COVID-19 Penalty Notice Offences) 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 the *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 4) 2021* (the **Regulation**) is to update, for the purpose of penalty notice offences, the reference to the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021* to a reference to the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021*; and to include a penalty notice amount of $10 000 for an offence by a corporation under that Order.

2. The Regulation is made under the delegation of the *Public Health Act 2010* and is to take effect from the date on which the Regulation was published; 6 September 2021.

ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offence – right to a fair trial

3. The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to enable a penalty notice to be issued for a contravention of a direction under the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021.* Orders under the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* include, but are not limited to, self-isolation after a person receives a positive diagnosis of COVID-19 and a requirement for close contacts of a person diagnosed with COVID-19 to self-isolate.

4. The penalties for a contravention of the public health orders under the amendment are $5 000 and $10 000 for an individual and corporation respectively.

> **The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 4) 2021* provides that penalty notices can be issued for a contravention of the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021*. The Regulation is amended by omitting that a penalty notice is to be issued for a contravention of the previous version of the public health order, (*Public Health (COVID-19 Self-***

***Isolation) Order (No 2) 2021*) and instead replaces it with the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021*.**

Orders under the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* include, but are not limited to, self-isolation after a person receives a positive diagnosis of COVID-19 under clause 6, and a requirement for close contacts of a person diagnosed with COVID-19 to self-isolate under clause 7.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount, and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $5 000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may thereby impact on a person's right to a fair trial – that is, to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, as the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices particularly in the extraordinary context of COVID-19, the Committee makes no further comment.

16. Public Health Amendment (COVID-19) 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. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Public Health Regulation 2012* as follows—

   i. to enable the Secretary of the Ministry of Health to generally approve, rather than on a case-by-case basis only, the retention of bodies for longer than 5 days by persons who are not funeral directors,

   ii. to extend the period during which the Secretary of the Ministry of Health may appoint members and members of staff of the Department of Customer Service and the NSW Food Authority to be authorised officers, either generally or in relation to a particular function exercisable by authorised officers relating to public health, until 26 March 2022,

   iii. to prescribe 26 March 2022 as the day on which the COVID-19 emergency measures provisions contained in the Public Health Act 2010, as defined by the Act, section 135(2), are repealed,

   iv. to allow penalty notices to be served for offences occurring between 26 March 2020 and 26 March 2022 against certain provisions of the Public Health Act 2010 that involve contravening—

      a) a Ministerial direction that deals with a public health risk, or

      b) an order to close public premises on public health grounds, or

      c) a public health order relating to COVID-19.

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

2. The Regulation amends the penalty notice offences set out in Schedule 4 of the *Public Health Regulation 2012*. Specifically, it extends the relevant time period to cover acts

occurring from 1 January to 26 March 2022 that constitute offences under sections 10, 11 and 70(1) of the *Public Health Act 2010*.

3. Section 7 of the *Public Health Act 2010* empowers the Minister to give such direction by order as they consider necessary to deal with a situation giving rise to a risk to public health, with that order to expire at the end of 90 days after it was made unless an earlier expiry date is specified or the order is earlier revoked. Section 10 provides that a person who is subject to, and has notice of, such a ministerial direction and fails to comply without reasonable excuse is guilty of an offence.

4. Section 11 empowers the Secretary to direct the restriction or prohibition of access to a premises on which the public are required, permitted or accustomed to congregate, where the Secretary considers the order should be made to protect public health. Sub-section (3) provides that any person who controls or is involved in the control of premises that fails to take reasonably practicable action to comply with such a secretarial direction that they have notice of, is guilty of an offence.

5. Section 62 empowers an authorised medical practitioner to make a public health order in respect of a person with certain medical conditions if they are satisfied there are reasonable grounds to believe that the behaviour of that person may be a risk to public health. Sub-section 70(1) provides that a person who fails to comply with the requirements of such a public health order is guilty of an offence.

The Regulation extends the operation of penalty notice offences under Schedule 4 of the *Public Health Regulation 2021* until 26 March 2022, for offences under the *Public Health Act 2010* of non-compliance with a ministerial direction under section 7, an order made by the Secretary under section 11 or a public health order made by an authorised medical officer under section 62.

In its Digests No 13/57 and 31/57, the Committee commented on the *Public Health Amendment (Penalty Notices) Regulation 2020* providing for the issue of penalty notices for the aforementioned offences, and the *Public Health Amendment (Miscellaneous) Regulation 2021* which extended the operation of these penalty notice offences until 31 December 2021.

Consistent with those comments, 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, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the spread of the COVID-19 Delta strain, with a current repeal date of 27 March 2022. In the circumstances, the Committee makes no further comment.

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

Henry VIII Clause

6. The Regulation inserts clause 99B into the *Public Health Regulation 2012* which prescribes 26 March 2022 for the purposes of sub-section 135(1)(b) of the *Public Health Act 2010*.

7. Sub-section 135(1) relevantly provides that the 'COVID-19 emergency measures' provisions of the Act are repealed on 26 September 2021 or a later date not later than 26 March 2022 as prescribed by the regulations.

> **The Regulation amends the *Public Health Act 2010* by way of a Henry VIII clause contained in the Act. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes.**
>
> **Consistent with those comments, the Committee notes that the Regulation extends the operation of existing legislative provisions contained in the *Public Health Act 2010* which are intended to protect public health and public safety in the extraordinary circumstances of the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.**

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

Vague and ill-defined powers

8. The Regulation amends clause of 54(2) of the *Public Health Regulation 2012* to expand the existing power of the Secretary to approve of the retention of a deceased person's body for longer than 5 days by a person who is not a funeral director. The Amendment permits the Secretary to give general approval for such a retention, in addition to the pre-existing power of the Secretary to approve retention of a body for longer than 5 days on a case-by-case basis.

9. Sub-clause 54(1) makes it an offence for a person who is not a funeral director to retain a body of a deceased person if more than 5 days have passed since their death. Clause 54 of the *Public Health Regulation 2012* applies to those persons who are not funeral directors, however, may be required to handle the body of a deceased person in the course of their profession. In particular, the offence would apply to hospital staff and medical practitioners who regularly are required in the course of their duties to handle bodies.

> **The Regulation grants the Secretary a general power under clause 54 of the *Public Health Regulation 2012* that may be ill-defined and could benefit from further clarification. Clause 54, which makes it an offence for any person who is not a funeral director to retain a body after 5 days have passed since death, allows the Secretary to approve "generally" the retention of a body which would otherwise be an offence under the *Public Health Regulation 2012*.**
>
> **The Committee notes that neither the Regulation or the *Public Health Regulation 2012* provides guidance on the coverage or limitations of any such general approval given by the Secretary. This may raise questions regarding who may receive such an approval, who may be covered by such an approval in the event**

that an employer, such as a hospital, is granted a general approval, and whether that approval is valid indefinitely, subject to conditions and/or subject to expiration. In these circumstances the Committee refers this issue to Parliament for consideration of whether the power could benefit from further clarification.

17. Residential Tenancies Amendment (COVID-19 Pandemic Emergency Response) Regulation (No 2) 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. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of *Residential Tenancies Amendment (COVID-19 Pandemic Emergency Response) Regulation (No 2) 2021* (the **Regulation**) is to—

   i. extend provisions exempting tenants who are financially impacted by the COVID-19 pandemic from the operation of provisions of the *Residential Tenancies Act 2010* (the **Act**) or the regulations made under that Act (the regulations) that would result in the termination of residential tenancy agreements or the recovery of possession of premises on the grounds of non-payment of rent or charges if the tenants continue to pay at least 25% of the rent payable under the agreement until 12 November 2021, and

   ii. from 12 November 2021 until 12 February 2022, exempt those tenants who accrued rental arrears from the operation of provisions of the Act or the regulations that would result in the termination of residential tenancy agreements or the recovery of possession of premises on the grounds of those arrears unless—

      a) if the landlord and the tenant have an agreement for the repayment of the arrears—the tenant has failed to comply with the agreement on at least 2 occasions and it is otherwise fair and reasonable for the provisions to apply to the tenant, or

      b) if the landlord and the tenant do not have an agreement for the repayment of the arrears—the landlord and tenant have participated in good faith in a formal arrears repayment negotiation process and it is otherwise fair and reasonable for the provisions to apply to the tenant.

2. The Committee has previously commented on Part 6A of the *Residential Tenancies Regulation 2019*. Specifically, the Committee commented on the:

i. *Residential Tenancies Amendment (COVID-19) Regulation 2020* in Digest No. 14/57,[14]

ii. *Residential Tenancies Amendment (COVID-19) (No. 2) Regulation 2020* in Digest No. 25/57,[15] and

iii. *Residential Tenancies (COVID-19 Pandemic Emergency Response) Amendment Regulation 2021* in Digest No. 34/57.[16]

ISSUES CONSIDERED BY COMMITTEE

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

Property rights and freedom of contract

3. Section 12 of the Act provides that regulations made under the *Residential Tenancies Act 2010* may exempt any specified person, agreement or premises from the operation of the Act or regulations.

4. The Regulation:

   i. extends the moratorium period applicable to Part 6A of the *Residential Tenancies Regulation 2019*, from the end of 11 September 2021 to the beginning of 12 November 2021. This extends the period during which the exemption from the provisions of the Act and regulations under clause 41C applies, and

   ii. provides an additional exemption to the provisions of the Act and regulations under clause 41CA.

5. For the purposes of section 12, clause 41C of the *Residential Tenancies Regulation 2019* provides an exemption to a tenant during the moratorium period from the operation of any provision of the Act or regulations that would result in the termination of their residential tenancy agreement or recovery of possession of the premises on the grounds of non-payment of rent or charges, if the tenant:

   i. is an 'impacted tenant', being a tenant who is a member of a household impacted by the COVID-19 pandemic,

   ii. gives the landlord notice of he or she is an impacted tenant, and

   iii. continues to pay the landlord at least 25 per cent of the rent payable under the residential tenancy agreement.

6. Clause 41B of the Regulation provides, broadly, that a household is impacted by the COVID-19 pandemic if one or more rent-paying members of the household have lost employment or income, had reduced work hours, or had to stop working or materially

[14] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 14/57, 12 May 2020.

[15] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 25/57, 16 February 2021.

[16] Parliament of New South Wales, Legislations Review Committee, Legislation Review Digest No. 34/57, 12 November 2021.

reduce work hours because of a COVID-19 illness. The household income must have, as a result of the COVID-19 illness, been reduced by at least 25 per cent compared to the average weekly household income for the four weeks immediately preceding 26 June 2021.

7. For the purposes of section 12, clause 41CA of the Regulation amends the *Residential Tenancies Regulation 2019* to create an exemption which applies to a tenant who was an impacted tenant during the moratorium period.

8. Specifically, clause 41CA provides that during the moratorium transitional period (from the beginning of 12 November 2021 until the end of 12 February 2022), a tenant is exempt from the operation of the provisions of the Act or regulations that would result in termination of residential tenancy agreements or recovery of possession of the premises on a ground relating to "arrears accrued during the moratorium period", being rent or charges that:

    i. were payable by the tenant during the moratorium period, and

    ii. were not paid, either with or without the agreement of the landlord, and

    iii. are still owing.

9. This exemption does not apply:

    i. if the landlord and tenant agreed to a repayment plan for the arrears – the tenant failed to make payments at the times and in the amounts required by the plan on two or more consecutive occasions, and it is otherwise fair and reasonable in the circumstances for the tenant not to be exempt, or

    ii. if the landlord and the tenant have not agreed to a repayment plan for the arrears – the landlord has participated in good faith in a formal arrears repayment negotiation process with the tenant about a repayment plan, and it is otherwise fair and reasonable in the circumstances for the tenant not to be exempt.

10. "Formal arrears repayment negotiation process" means a dispute resolution process between a landlord and a tenant, facilitated by NSW Fair Trading, to negotiate a repayment plan for arrears accrued during the moratorium period having regard to the specific circumstances of the landlord and the tenant.

11. Clause 41CA also sets out matters the Tribunal must have regard to when deciding whether it is fair and reasonable in the circumstances for the tenant not to be exempt, without limitation. These matters include:

    i. the steps taken by the landlord and tenant to negotiate a repayment plan, including any advice provided by NSW Fair Trading relating to the participation of the parties in a formal arrears payment negotiation process and including whether the landlord or tenant refused, or refused to make, a reasonable offer,

    ii. any payments made by the impacted tenant towards the arrears,

    iii. the nature of any financial hardship experienced by the landlord or tenant, including the general financial position of each party,

iv. the availability and affordability of reasonable alternative accommodation for the tenant,

v. whether the landlord has applied for and, if so, received any financial assistance or land tax rebates, and

vi. any special vulnerability of the tenant.

12. Clause 41CA provides that it does not affect any agreement between the landlord or tenant to waive or defer any rent or charges payable by the tenant.

The Regulation makes amendments to Part 6A of the *Residential Tenancies Regulation 2019* to respond to financial hardship experienced by tenants as a result of the COVID-19 pandemic. Specifically, it:

- **extends to 12 November 2021 provisions exempting a financially impacted tenant from the operations of the provisions of the *Residential Tenancies Act 2010* and regulations that would result in termination of their residential agreement or recovery of possession on the grounds of non-payment of rent or charges if the tenant continues to pay at least 25 per cent of the rent payable under the agreement, and**

- **exempts, from 12 November 2021 to 12 February 2022, a tenant who accrued rental arrears from the operation of provisions of the Act and regulations that would result in termination of their residential tenancy agreement or recovery of possession on a ground relating to arrears.**

The exemptions limit a landlord's rights in response to the pandemic. Although, it appears that a landlord may continue to seek termination in other circumstances including for example to sell the premises, for illegal use of the premises or hardship to the landlord.

In limiting landlords' rights under tenancy agreements, the Regulation may impact on property rights. In particular, the ability of the landlord to exercise rights under an existing agreement in relation to the non-payment of rent, charges or arrears. This may also impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. Although, clause 41CA does not affect any agreement between the landlord or tenant to waive or defer any rent or charges payable by the tenant.

The Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health crisis and economic hardship created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants. It is accordingly time limited. The Committee also notes that the Regulation furthers the public health objectives of ensuring residents remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

18. Retail and Other Commercial Leases (COVID-19) 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. Damien Tudehope MLC
Portfolio	Finance and Small Business

PURPOSE AND DESCRIPTION

1. The *Retail and Other Commercial Leases (COVID-19) Regulation 2021* and the *Conveyancing (General) Regulation 2018*, Schedule 5 provide protections for certain commercial lessees (impacted lessees) where related businesses have had a fall in turnover due to lockdowns in New South Wales.

2. The object of this Regulation is to extend those protections as follows—

   i. to extend the prescribed period, which began on 13 July 2021, until 13 January 2022,

   ii. to prohibit a lessor increasing rent during the prescribed period if the lessee is an impacted lessee,

   iii. to require an impacted lessee to give the lessor evidence that the lessee is an impacted lessee,

   iv. to require lessors and impacted lessees to renegotiate rent and other terms of the lease if 1 party requests the renegotiation,

   v. to require a renegotiation to be conducted in good faith with consideration being given to the leasing principles set out in the National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19 (the National Principles),

   vi. to require a lessor to do the following before taking action in relation to certain breaches of the lease occurring during the prescribed period—

      a) to attempt to mediate the dispute with the impacted lessee, and

      b) to engage in a renegotiation if required,

   vii. to provide that actions an impacted lessee takes to comply with a law are not breaches of a commercial lease,

viii. to require a court or tribunal to consider the National Principles when considering whether to make certain orders or decisions relating to commercial leases.

3. This Regulation is made under—

i. the *Retail Leases Act 1994*, including sections 85, the general regulation-making power, and 87, and

ii. the *Conveyancing Act 1919*, section 202, the general regulation-making power.

4. This Regulation is made with the agreement of the Minister for Customer Service who administers the *Conveyancing Act 1919*.

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity, property rights and freedom of contract

5. The Regulation amends the *Retail and Other Commercial Leases (COVID-19) Regulation 2021*, which provides that during the prescribed period a lessor is prohibited from taking 'prescribed action' against an impacted lessee because of:

i. a failure to pay rent,

ii. a failure to pay outgoings, or

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

6. The Regulation amends the definition of 'impacted lessee' (clause 4) to include where the lessee qualifies for one or more of the following:

i. 2021 COVID-19 Micro-business Grant,

ii. 2021 COVID-19 Business Grant,

iii. 2021 JobSaver Payment.

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

8. Further, the amending regulation continues to place certain obligations on lessors, including an obligation not to increase rent payable for an impacted lessee (clause 6B), compulsory mediation (clause 6C), and the obligation to renegotiate the rent payable under the impacted lease (clause 6D). It also specifies that an act or omission of an impacted lessee required under a law of the Commonwealth or the State in response to the COVID-19 pandemic does not amount to a breach of the impacted lease and does not constitute grounds for termination or the taking of any prescribed action by the lessor against the impacted lessee (clause 6E).

9. This Regulation also extends the prescribed period from 20 August 2021 until 13 January 2022.

Like its predecessors, the *Retail and Other Commercial Leases (COVID19) Amendment Regulation 2021* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take into account the economic impacts of COVID-19.

Specifically, the amending Regulation extends the prescribed period from 20 August 2021 until 13 January 2022, and amends the definition of impacted lessee to include lessees that are recipients of a 2021 COVID-19 Micro-business Grant, Business Grant, or JobSaver Payment.

The Regulation continues to require lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. The Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. These changes also have retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation in 2020.

The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. However, the Committee recognises that the amending Regulation, like the first Regulation, only applies to cases involving 'impacted lessees', and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes that the prescribed period has again been extended from ending on August 2021 until 13 January 2021. The Committee understands that this is in response to the current COVID-19 pandemic and recent lockdown periods which did not experience an easing of restrictions until 11 October 2021. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

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

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

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

11. The amending Regulation extends the prescribed period for which these limitations are imposed from 20 August 2021 until 13 January 2022.

12. The Committee notes that financial mortgage assistance is available for eligible lessors to defer business loan repayments for a period of 3 months.[17] Following any 3-month loan repayment deferral, lessors experiencing ongoing financial difficulty may be able to negotiate with their bank to restructure or vary their loan, or be eligible for a deferral extension.[18]

13. The NSW Government is also providing that commercial landlords will be able to apply for a land tax concession if they provide rent reductions to eligible tenants from 1 July 2021 to 31 December 2021.[19]

> **As above, the amending Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 pandemic. In doing so, the amending Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 13 January 2021.**
>
> **However, the Committee recognises that the amending Regulation is in response to the ongoing public health emergency and remains in line with the National Cabinet's decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that lessors may be eligible for a land tax concession, and/or may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.**

[17] Australian Banking Association, Support during COVID-19, current as at 8 November 2021.

[18] Australian Banking Association, COVID-19 support: phase two, current as at 8 November 2021.

[19] Services NSW, COVID-19 assistance for commercial and residential landlords, current as at 8 November 2021.

19. Road Transport (Driver Licensing) Amendment (Licence Requirements) 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. Rob Stokes MP
Portfolio	Transport and Roads

PURPOSE AND DESCRIPTION

1. The object of the *Road Transport (Driver Licensing) Amendment (Licence Requirements) Regulation 2021* (the **Regulation)** is to amend the *Road Transport (Driver Licensing) Regulation 2017* to—

   i. provide that a provisional driver is not eligible to apply for a provisional P2 licence or unrestricted licence if—

      a) the driver has committed an alcohol or other drug related driving offence, and

      b) action under the *Road Transport Act 2013*, section 59 to cancel or suspend the driver's licence has not been taken or completed, and

   ii. provide that a visiting driver is not exempt from requirements to hold a NSW driver licence if the driver commits a speeding offence in NSW, and, if the driver were to hold a NSW driver licence, Transport for NSW could suspend the licence because of the offence, and

   iii. provide that an authorised officer may give a visiting driver notice that the driver is not exempt from requirements to hold a NSW driver licence if this is indicated by the records of Transport for NSW, and

   iv. make other consequential and miscellaneous amendments.

ISSUES CONSIDERED BY COMMITTEE

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

Limitations on the granting of a provisional P2 licence

2. Previously, the *Road Transport (Driver Licensing) Regulation 2017* only prevented a person from applying for a provisional P2 licence (if they held a provisional P1 licence) or an unrestricted licence (if they held a provisional P2 licence) if they had committed a

speeding offence within the meaning of section 59 of the *Road Transport Act 2013* (Act). The Regulation amends clauses 25 and 31 to also include 'an alcohol or other drug related driving offence' to the list of offences that make a person ineligible to apply for a provisional P2 or unrestricted licence.

3. The Regulation only prevents an individual from applying for the relevant class of driver licence while action under section 59 of the Act has not been taken or completed. After action has been finalised under the Act (either by the individual paying the relevant penalty, or the individual has elected not to have the matter dealt with by a court, or the time for doing so has elapsed) the Regulation will no longer apply, as under the Act, Transport for NSW instead has the power to cancel or suspend the individual's drivers licence.

The Regulation provides that if an individual has committed an alcohol or other drug related offence, they may not apply for a provisional P2 licence (if they held a provisional P1 licence) or an unrestricted licence (if they held a provisional P2 licence) whilst action is being taken in regards to those offences under the *Road Transport Act 2013*. This amendment functionally serves to include drug and alcohol offences within the jurisdiction of the Regulation, which previously prevented an individual from applying for a licence only if they had committed a speeding offence.

The limit on an individual's ability to apply for a driver licence can have a significant detrimental effect, as private cars are used to travel to employment, to buy essential items and receive medical services. However, the Committee notes that the proposed amendment codifies in the Regulation the requirements of the *Road Transport Act 2013*, which allows Transport for NSW to cancel or suspend a licence on the basis that an individual has allegedly committed a speeding or drug or other alcohol related driving offence. The Committee also notes the important public safety considerations that apply to driver licencing, and that this ineligibility is only temporary whilst action is being taken under the *Road Transport Act 2013.* Therefore, the Committee makes no further comment.

20. Road Transport (General) 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. Rob Stokes MP
Portfolio	Transport and Roads

PURPOSE AND DESCRIPTION

1. The object of the Road Transport (General) Regulation 2021 (the **Regulation**) is to remake, with substantial amendments, the *Road Transport (General) Regulation 2013*, which will be repealed on 1 September 2021 by the *Subordinate Legislation Act 1989*, section 10(2).

2. This Regulation makes provision for the following—

   i. offences relating to responsible use of certain vehicles in particular circumstances;

   ii. substances which are prescribed as drugs for the purposes of the Act, and further provision for the alcohol and drug use testing processes under the Act, Schedule 3;

   iii. the prescribing of signs, signals, markings, structures or other devices as prescribed traffic control devices for the purposes of the Act, Part 5.3;

   iv. the manner of testing approved traffic enforcement devices for accuracy and functional requirements;

   v. the processes for the seizure and impounding of vehicles;

   vi. mass, dimension and load requirements for light vehicles and light combinations, and the measuring procedures for determining loads and mass;

   vii. the prescribing of heavy vehicles to which the vehicle monitoring requirements under the Act, Part 6.1 apply;

   viii. the prescribing of classes of vehicles to which the speed limiter requirements under the Act, Part 6.2 apply, and the manner of limiting the speed of those vehicles;

   ix. parking schemes, including schemes for paid parking, mobility parking, loading zones and parking in special event areas;

   x. determination of criminal responsibility for offences under this Regulation;

xi. offences against a provision of the road transport legislation which may be dealt with by way of penalty notice, and the amount of penalties payable for offences if dealt with in that way;

xii. appeals processes and decisions of Transport for NSW (**TfNSW**) which may or may not be the subject of an appeal to the Local Court;

xiii. service requirements for documents served on persons under the road transport legislation; and

xiv. other miscellaneous matters.

3. The substantive changes are focussed on the matters outlined in paragraph 2(ix) above, being paid parking schemes. The Government in their Regulatory Impact Statement[20] proposed that these amendments, which give local councils and declared organisations more autonomy in regards to paid parking, will reduce costs, remove red tape, aid enforcement and reduce reliance on written notices and gazettal of guidelines.

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 Regulation contains numerous strict liability offences in relation to the operation and parking of vehicles and related permits and schemes in NSW.

5. The Committee notes that the maximum penalty that applies is $6660 (30 penalty units) which is reasonably high for an offence created by a Regulation. However, no custodial penalties apply and (without limiting the defences available under the Commonwealth Criminal code) a person is not liable under the Regulation if they prove to the satisfaction of the court dealing with the case that the offence was the result of an accident, or could not have been avoided by the person's reasonable efforts. These additional defences dampen the effect of the strict liability provisions. In the circumstances, the Committee makes no further comments.

> **The Regulation contains a number of strict liability offences, for which a penalty notice may be issued, ranging in maximum penalty value from $3330 to $6660.**
>
> **Penalty notices allow a person to pay the amount specified for an offence within a certain amount of time should he or she not wish to have the matter determined by the court. The fine payable under a penalty notice is usually less than the maximum penalty that would otherwise apply. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.**
>
> **However, the Regulation does not remove the right of an individual to elect to have their matter heard and decided by a Court. Nevertheless, as these are strict liability offences with more limited defences available, this may leave some**

[20] Road Transport (General) Regulation 2013 Regulatory Impact Statement– June 2021, p 12-13.

individuals uncertain of their capacity to have their matter reconsidered by a Court.

With that being said, the Regulation does provide some defences where a motor-vehicle offence was the result of an accident or could not have been avoided by the person's reasonable efforts. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. Given these factors, the Committee makes no further comment.

Limited rights of appeal

6. Clause 143 of the Regulation excludes a series of decisions from the definition of 'appealable decision' which functionally prevents these decisions from being legally challenged or appealed.

7. Some of the excluded decisions largely concern property rights; such as the decision to cancel the registration of a car under section 84 or 104C of the Act (light or heavy vehicles that are written off). Other excluded decisions include the decision to cancel an individual's licence after they have lost all demerit points and failed to comply with an order to undertake a driving course.

The Regulation lists a series of decisions which cannot be appealed by the individual or organisation it affects. This includes decisions related to the decision to cancel the registration of a car under section 84 or 104C of the Act (light or heavy vehicles that are written off), or the decision to cancel an individual's licence after they have lost all demerit points and failed to comply with an order to undertake a driving course. This may impact those individuals subject to such provisions and limit their right of appeal for such decisions.

However, the Committee notes that this may only be done where the vehicle is written-off and there is the ability for an individual to seek authorisation to repair the vehicle which may in turn allow the vehicle to be registered. The Committee also acknowledges the provisions relate to regulating and deterring improper and dangerous driving behaviour. Given the safety objectives behind these provisions, as well as the importance of fraud and theft related to motor vehicles, the Committee makes no further comment.

Privacy of individuals

8. Clause 112 of the Regulations permits TfNSW to release a photograph to the NSW Police Force which was taken in regards to an application for a mobility scheme parking authority. Unlike in regards to the release of these photographs to other entities, the Regulation does not limit the release of the photograph to the NSW Police Force only in circumstances relevant to the issue of the authority or other parking related matters. However, the release must be in accordance with a protocol approved by the Privacy Commissioner, which does provide an additional level of oversight to the release.

9. Clause 107 permits TfNSW to require an individual who is applying for a mobility scheme parking authority to be examined by a specified medical practitioner, or a medical practitioner belonging to a specified class of medical practitioner.

The Regulation allows for a photograph of applicants for a mobility scheme parking authority to be provided by TfNSW to the NSW Police Force for any reason, provided that it is done so in accordance with a protocol approved by the Privacy Commissioner. It also allows for TfNSW to specify that a particular medical practitioner assess an individual applying for a mobility scheme parking authority.

Such provisions may impact on a person's right to privacy regarding their personal information, such as photographs and medical information. The Committee refers this issue to Parliament for further consideration.

21. Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 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. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of the *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2021* (the **Regulation**) is to provide for the following matters in response to the public health emergency caused by the COVID-19 pandemic:

   i. altered arrangements for convening, and voting at, meetings of an owners corporation or a strata committee, and

   ii. allowing instruments and documents, instead of being affixed with the seal of an owners corporation in the presence of certain persons, to be signed, and the signatures to be witnessed, by those persons.

2. The Regulation is made under sections 271 (general regulation-making power) and section 271A of the *Strata Schemes Management Act 2015*.

3. The Committee has published reports on predecessors to this Regulation. Specifically, the Committee commented on the *Strata Schemes Management Amendment (COVID-19) Regulation 2020* in Digest No. 17/57,[21] *the Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020* in Digest No. 28/57[22] and the *Strata Schemes Management Amendment (COVID-19) Regulation 2021* in Digest No. 34/57.[23]

[21] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 17/57, 4 August 2020.

[22] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 28/57, 23 March 2021.

[23] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 34/57, 12 October 2021.

ISSUES CONSIDERED BY COMMITTEE

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

Henry VIII Clause

4. The *Strata Schemes Management Act 2015* (the **Act**) sets out the legislative framework for the management of strata schemes and disputes related to strata schemes. The Act and the *Strata Schemes Management Regulation 2016* made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees, matters such as how they meet and vote, and time periods within which certain steps must be taken.

5. Section 271A of the Act authorises regulations to be made to respond to the public health emergency caused by COVID-19. These regulations can provide for the matters set out in subsection 271A(1), including (without limitation) altered arrangements for convening and voting at a relevant strata meeting, and an alternative to affixing the seal of the owners corporation.

6. Subsections 271A(3) and (4) of the Act further provide that regulations made under the section:

    i. can override a provision of the Act, and

    ii. expire on the day that is six months after their commencement, or the earlier day decided by Parliament by resolution of either House.

7. Subsection 271A(5) provides that section 271A is repealed on 31 March 2022.

8. The Regulation is made under section 271A and section 271 (the general regulation-making power) and amends the *Strata Schemes Management Regulation 2016* to insert a new Part 11, which provides for altered arrangements for certain matters set out in section 271A(1) of the Act.

9. Specifically, the Regulation provides:

    i. under clause 69, that notice of or another document in relation to a strata meeting may be served by email,

    ii. under clause 70, that certain means of voting, including teleconference, videoconference or email, may be used to determine certain matters at a strata meeting even if the owners corporation or strata committee has not resolved to adopt those means of voting. Further, clause 70(4)(a) provides that these arrangements are to apply despite any requirements in the Act for a vote to be exercised in person, and

    iii. under clause 71, that an instrument or document may, instead of being affixed with the seal of an owners corporation in the presence of certain persons, may be signed, and the signatures witnessed, by those persons. Clause 71(4) provides that a signatory or witness can be present by audio visual link.

10. Clause 72 of the Regulation provides that Part 11 is repealed at the end of 20 January 2022.

The *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2021* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. Broadly, the Regulation provides that notice of and documents relating to a strata meeting may be served by email, electronic voting may be used for strata meetings despite any requirements in the Act for votes to be exercised in person, and instruments and documents, instead of being affixed with the seal of an owners corporation, may be signed and witnessed in accordance with the Regulation.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19 pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

22. Strata Schemes Management Amendment (Pets) 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. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of the *Strata Schemes Management Amendment (Pets) Regulation 2021* (the **Regulation**) is to prescribe the circumstances in which the keeping of an animal unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property of a strata scheme.

2. The Regulation inserts Clause 36A into the *Strata Schemes Management Regulation 2016*, which clarifies that for the purposes of section 137B(3) of the *Strata Schemes Management Act 2015* when the keeping of an animal 'unreasonably interferes' with another occupants use or enjoyment of their lot or the common property.

3. The Act at section 137B(2) provides that it is taken to be reasonable to keep an animal on a lot unless doing so would unreasonably interfere with another occupants use and enjoyment of the land. The Act further provides that a strata by-law cannot unreasonably prohibit the keeping of an animal on a lot, and that a by-law may be rendered unenforceable by a ruling of the Land and Environment Tribunal on the basis that it is harsh, unconscionable or oppressive if it unreasonably prohibits the keeping of an animal on a lot.

4. Functionally, the currently in force Act and Regulation provides that strata by-laws cannot prohibit the keeping of animals unless the keeping of animals is unreasonable because it would impact on other occupant's use and enjoyment of the land. This Regulation provides further clarification as to what circumstances are considered 'unreasonable interference' and therefore assist strata groups in making lawful decisions about the keeping of animals on their land.

5. The Regulation proposes that 'unreasonable interference' includes circumstances such as:

   i. the animal repeatedly causes damage to the common property or another lot;

   ii. the animal causes a persistent offensive odour that penetrates another lot or the common property; or

   iii. the owner of the animal fails to comply with an order or other restriction under the *Companion Animals Act 1998*.

ISSUES CONSIDERED BY COMMITTEE

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

Property rights

6. The Regulation proposes a new section 36A, which is an exhaustive list of the circumstances in which the keeping of animals unreasonably interfere with another occupant's use and enjoyment of the land. This may limit the ability of landowners and strata organisations to enforce by-laws that are the preference of their membership, as they will only be allowed to make by-laws that exclude the keeping of animals in the precise circumstances set out in the new section 36A.

> **The Regulation proposes a new section 36A, which is an exhaustive list of the circumstances in which the keeping of animals unreasonably interfere with another occupant's use and enjoyment of the land. This includes circumstances such as where the animal repeatedly causes property damage, endangers the health of another occupant through infection or infestation, or where an animal repeatedly runs at or chases occupants, visitors or other animals.**
>
> **The property rights of strata organisations and residents of these communities may be limited by this exhaustive list, as it prevents them from excluding animals from their property on the basis of other circumstances or disruptions not included on the list in proposed section 36A. However, the Committee notes that the list covers many different circumstances, and acknowledges that some limitation on the issues that can be raised may be important to prevent unnecessary and futile disputes amongst residents. The introduction of section 36A is unlikely to restrict the rights of property owners and strata organisations beyond the restrictions in the *Strata Schemes Management Act 2015*, which at section 137B already prohibits strata organisations from making by-laws to unreasonably exclude animals; this Regulation merely provides clarification as to when it is reasonable to do so. For these reasons, the Committee makes no further comment.**

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

Uncertain tests

7. The proposed section 36A provides the circumstances in which the keeping of an animal can be said to unreasonably interfere with another occupants' use and enjoyment of the land. However, a number of these circumstances have a requirement of frequency which is unspecified and may be considered vague. For example, section 36A(d) requires that 'the animal repeatedly causes damage' (emphasis applied), and section 36A(f) requires that 'the animal causes a persistent offensive odour.'

8. The specification that a circumstance must occur at a particular frequency is vague as written in the Regulation. This may be an issue as individuals may have personal opinions about how often a circumstances must occur for it to be considered to have occurred 'repeatedly' or be 'persistent,' leading to disputes amongst strata organisations or landowners about whether a particular circumstance has met the frequency threshold set out in section 36A.

The proposed section 36A provides the circumstances in which the keeping of an animal can be said to unreasonably interfere with another occupants use and enjoyment of the land, and therefore when an animal can be excluded from the premises. However, a number of these circumstances have a requirement of frequency which is unspecified and may be considered vague.

Certain circumstances must happen 'repeatedly' or 'frequently' and these terms may be open to a broad range of personal interpretation as to how regular conduct must occur for it to meet the stated threshold in the Regulation. The Committee notes that the particular interpretation of these terms may have a significant impact on an individual's right to keep an animal at their home, and the Committee usually prefers provisions that affect rights to be drafted with sufficient precision so that their scope and extent is clear.

Nonetheless, while the Regulation does provide further guidance for strata organisations and land owners about the reasonable circumstances in which an animal can be excluded, the Committee acknowledges that individual organisations and owners may benefit from communally reaching an agreement on how frequently behaviour would have to occur for it to meet the proposed thresholds of section 36A. The Committee acknowledges that individuals are best placed to determine their own level of comfort in regards to the use and enjoyment of their land, and that ultimately these matters can be heard by New South Wales Civil and Administrative Tribunal in the instance of a dispute, ensuring that individual opinions cannot be unreasonably enforced. In the circumstances, the Committee makes no further comment.

23. Stronger Communities Legislation Amendment (COVID-19) 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 SC MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Abuse

PURPOSE AND DESCRIPTION

1. The objects of the *Stronger Communities Legislation Amendment (COVID-19) Regulation 2021* (the **Regulation**) are—

   i. to postpone the dates on which special statutory provisions enacted in response to the COVID-19 pandemic are repealed, and

   ii. to extend the periods during which special statutory provisions enacted in response to the COVID-19 pandemic have effect.

2. This Regulation is made under the following provisions—

   i. *Child Protection (Working with Children) Act 2012*, including sections 13(4)(b) and 54(2)(b),

   ii. *Children (Community Service Orders) Act 1987*, including section 9A(3), definition of prescribed period and section 14A(3), definition of "prescribed period",

   iii. *Children (Detention Centres) Act 1987*, including section 110(5), definition of "prescribed period",

   iv. *Civil and Administrative Tribunal Act 2013*, including Schedule 1, clause 22, definition of "prescribed period",

   v. *Court Security Act 2005*, including section 12H(b),

   vi. *Crimes (Administration of Sentences) Act 1999*, including section 274, definition of "prescribed period",

   vii. *Criminal Procedure Act 1986*, including section 367(b),

   viii. *Evidence (Audio and Audio Visual Links) Act 1998*, including section 22C(9), definition of "prescribed period",

   ix. *Jury Act 1977*, including section 25(6)(b),

x. *Sheriff Act 2005*, including section 7C(14), definition of "prescribed period".

3. This Regulation is made with the agreement of—

i. the Minister for Counter Terrorism and Corrections, being the Minister administering the *Crimes (Administration of Sentences) Act 1999*, and

ii. the Minister for Families, Communities and Disability Services, being the Minister administering the following Acts—

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

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

c) *Children (Detention Centres) Act 1987*.

ISSUES CONSIDERED BY COMMITTEE

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

Matters to be included in primary legislation

4. The Regulation amends various legislation to prescribe the beginning of 26 March 2022 as the date on which special statutory provisions enacted to respond to the COVID-19 pandemic are repealed or cease to have effect.

5. The special statutory provisions relate to, for example:

i. the prohibition or restriction on visitors to detention centres or correctional centres,

ii. appearance of an accused person in bail proceedings via audiovisual link, and

iii. the power of a sheriff to exempt a person from selection to be summon for trials or coronial inquest.

6. The Committee previously commented on the introduction of the special statutory provisions in Digest No. 12/57[24] and Digest No. 15/57,[25] including in relation to trespass of certain provisions on personal rights and liberties.

7. The Committee also commented in Digest No. 27/57[26] on the *COVID-19 Legislation Amendment (Stronger Communities and Health) Bill 2021*, which changed the repeal clauses in various legislation which would otherwise expire on 26 March 2021. Specifically, it extended the repeal clauses for a six month period until 26 September 2021 or until a later date, not later than 26 March 2022, prescribed by the regulations.

[24] Parliament of New South Wales, Legislation Review Committee, Legislation Review Committee Digest No. 12/57, 22 April 2020.

[25] Parliament of New South Wales, Legislation Review Committee, Legislation Review Committee Digest No. 15/57, 2 June 2020.

[26] Parliament of New South Wales, Legislation Review Committee, Legislation Review Committee Digest No. 27/57, 22 April 2020.

The Regulation amends a number of regulations to prescribe the beginning of 26 March 2022 as the date on which special statutory provisions enacted to respond to the COVID-19 pandemic are repealed or cease to have effect.

As previously noted by the Committee, the referral to the regulations of the repeal date of a clause allows the regulation to amend an Act in respect of the repeal date. Unlike primary legislation, regulations are not required to be passed by Parliament and the Parliament does not control when a regulation commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*), the statutory rule may have already been in operation for some time before disallowance occurs.

The Committee generally prefers the repeal date or operation period of a clause to be included in primary rather than subordinate legislation to facilitate an appropriate level of parliamentary scrutiny. However, the Committee notes that the primary legislation provisions referring these matters to the regulations were scrutinised by Parliament. Additionally, that the flexibility facilitated by allowing the repeal date to be prescribed by the regulations may be desirable as the provisions respond to the COVID-19 pandemic. In the circumstances, the Committee makes no further comment.

24. Sydney Opera House Trust By-law 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. Don Harwin MLC
Portfolio	Public Service and Employee Relations, Aboriginal Affairs, and the Arts

PURPOSE AND DESCRIPTION

1. The object of this By-law is to remake, with minor amendments, the *Sydney Opera House Trust By-law 2015*, which is repealed on 1 September 2021 by the *Subordinate Legislation Act 1989*, section 10(2).

2. This By-law makes provision in relation to the following—

   i. the regulation of vehicles on the premises of the Sydney Opera House,

   ii. the regulation of persons attending performances and events at the Sydney Opera House and on the premises of the Sydney Opera House,

   iii. the powers of authorised officers,

   iv. other minor and miscellaneous matters.

ISSUES CONSIDERED BY COMMITTEE

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

Freedom of assembly

3. In accordance with its object, the By-law effectively remakes the prior and now repealed *Sydney Opera House Trust By-law 2015* ("the 2015 By-law"). The majority of amendments are largely in respect to phrasing and structure, however, the By-law does prohibit an additional activity on the premises of the Sydney Opera House not previously included in the 2015 By-law.

4. Specifically, clause 9(d) prohibits a person from conducting, or causing or assisting in the conduct of, a public demonstration on the premises of the Sydney Opera House. However, clause 19(1) provides that a person does not commit an offence of the By-law if the relevant act which is otherwise prohibited was done:

   - as part of a performance put on, or approved, by the Trust, or

- by a member of staff of the Trust in the course of the member's employment, or

- under the direction or with the consent of the Trust.

5. The prohibitions set out in clause 9 is made pursuant to section 28 of the *Sydney Opera House Trust Act 1961* which enables the Sydney Opera House Trust to make by-laws and impose a penalty not exceeding 50 penalty units for any breach of the by-laws. The penalty for contravening any prohibition set out under this clause is 10 penalty units ($1100).

6. Neither the By-law or the *Sydney Opera House Trust Act 1961* define what amounts to a "public demonstration".

The By-law prohibits the conduct of a "public demonstration" on the premises of the Sydney Opera House and allows the Sydney Opera House Trust to issue penalty notices to anyone who is deemed to be in breach of that prohibition. Its predecessor, the *Sydney Opera House Trust By-law 2015*, did not prohibit such activity on the Sydney Opera House premises.

Clause 9(d) is widely worded to prohibit the "conduct, or cause or assist in the conduct of" a public demonstration. This may result in both organisers and participants of a relevant public demonstration being guilty of an offence under the By-law. The Committee notes that the By-law may potentially impact on the right to freedom of assembly contained in Article 21 of the ICCPR.[27] The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest.

Although the Sydney Opera House Trust may give specific or general consent to the conduct of activities that would otherwise be in breach of the prohibition on "public demonstrations", the By-law does not include a process for obtaining or reviewing the grant or refusal of such consent. Further, the Committee notes that what activity may amount to "public demonstration" is not defined in the By-law and may be determined on the discretion of the Trust. As such, the Committee refers this matter to the Parliament for consideration.

[27] United Nations, Office of the High Commissioner for Human Rights, International Covenant on Civil and Political Rights, 1966.

25. Terrorism (Police Powers) 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 SC MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Violence

PURPOSE AND DESCRIPTION

1. The *Terrorism (Police Powers) Regulation 2021* (the **Regulation**) repeals and remakes, without substantial changes, the provisions of the *Terrorism (Police Powers) Regulation 2016*, which would otherwise be repealed on 1 September 2021 by section 10(2) of the *Subordinate Legislation Act 1989*.

2. The Regulation provides for:

   i. the provisions of, or made under, the *Crimes (Administration of Sentences) Act 1999* that do not apply in relation to a person detained in a correctional centre when the person is detained under a preventative detention order,

   ii. the delegation of the Commissioner of Police's power to give an authorisation,

   iii. the keeping and inspection of records relating to covert search warrants,

   iv. the certification of documents or parts of documents that must not be made available for inspection,

   v. the approval of forms by the Attorney General, and

   vi. savings and formal matters.

3. The Regulation is made under sections 26X(3), 27E(2), 27L(2) and 32 (general regulation-making power) of the *Terrorism (Police Powers) Act 2002* (the **Act**).

4. The Committee reported on the impact of the predecessor regulation on the rights of persons detained under preventative detention orders in Digest No. 24/56.[28] It expressed its concern that a number of safeguards had been excluded, and was particularly concerned about the exclusion of the role of the Review Council and the Official Visitor,

[28] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 24/56, 13 September 2016.

and the incapacity of legal practitioners to meet and correspond with detained persons (under the excluded provisions).

5. The Committee also reported in Digest No 15 of 2005[29] that the implementation preventative detention regime pursuant to the *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005* would trespass, to a significant degree, on a number of fundamental rights and liberties including the right to liberty and freedom from arbitrary arrest, the right to legal representation and the right to confidential communications with counsel.

6. The preventative detention regime is set out in Part 2A of the Act. The regime was designed to detain persons in order to prevent a terrorist attack or preserve evidence following a terrorist attack. The second reading speech described the powers as 'extraordinary', noting that 'they are designed to be used only in extraordinary circumstances and are accompanied by strong safeguards and accountability measures'.[30] The second reading speech also noted that the scheme implements an agreement reached at the COAG meeting of 27 September 2005 and complements the preventative detention scheme introduced by the Commonwealth government and all other states and territories.

7. The Supreme Court makes preventative detention orders and interim orders in relation to terrorist acts for up to maximum legislated periods under the Act:

   i. A preventative detention order is for a maximum period of 14 days. Two separate orders may apply consecutively and a person held for up to 28 days where one order is made to prevent a terrorist act and another on basis of preserving evidence of, or relating to, that terrorist act, and

   ii. An interim order is made by the court pending the hearing and final determination of an application for a preventive detention order, and expires 48 hours after the person was first taken into custody if the application has not been heard and finally determined.

8. A terrorist act ceases to be the same terrorist act if there is a change in the date on which the terrorist act is expected to occur. As noted in Digest No 15 of 2005, the Act does not prescribe the maximum number of orders that may be made against a person.

ISSUES CONSIDERED BY COMMITTEE

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

Rights of persons detained under preventative detention orders

9. Clause 4 of the Regulation excludes certain legislated rights of, and procedures for dealing with, persons detained at a correctional centre under a preventative detention order. Personal rights and procedures set out in the *Crimes (Administration of Sentences) Act*

[29] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 15 of 2005, 29 November 2005.

[30] *Terrorism (Police Powers) Amendment (Preventative Detention) Bill,* Second Reading Speech, Hansard, 17 November 2005.

1999 and *Crimes (Administration of Sentences) Regulation 2014* excluded by clause 4 include, for example:

i. to apply to the Review Council for review of a segregated or protective custody direction under which they are held where that custody exceeds 14 continuous days and, if the review is not refused, to be present, heard and represented at any inquiry hearing. Such review may result in the Review Council suspending the segregated or protective custody direction or transferring the inmate to a different correctional centre,

ii. to apply for a local or interstate leave of absence. A local leave permit may allow the inmate to attend a funeral, be present at a significant social occasion, visit a seriously ill family member, apply for work or attend an interview, attend work or allow a mother to serve her sentence with her young child or children in an appropriate environment. An interstate leave permit may allow an inmate to attend a funeral, be present at a significant social occasion or receive medical treatment,

iii. making by the Minister of an order for the transfer of juveniles from an adult centre to a juvenile centre,

iv. Commissioner's consideration of various issues in determining which correctional centre an inmate is to be placed, including, for example, the inmate's classification, any assessment of the inmate's physical or mental health and the proximity to the inmate's family member,

v. for an inmate to request review of the correctional centre at which they are placed, their classification or the contents of their case plan,

vi. to have visitors, including the inmate's legal practitioner and (as relevant) diplomatic or consular representatives, national organisation or a field officer of the Aboriginal Legal Service,

vii. to send or receive letters or parcels, and

viii. to make or receive telephone calls.

The Regulation excludes certain legislated rights of, and procedures for dealing with, persons detained at a correctional centre under a preventative detention order. It appears that provisions of the *Crimes (Administration of Sentences) Act 1999* and *Crimes (Administration of Sentences) Regulation 2014* have been excluded by the Regulation to ensure the preventative detention regime under Part 2A the *Terrorism (Police Powers) Act 2002* operates as intended and a conflict of laws does not arise. However, the provisions of Part 2A limit detained persons' rights and liberties compared to those they would otherwise have under the excluded provisions.

For example, the Regulation excludes the right of a detained person to make or receive phone calls or receive visitors, including calls or visits from their lawyer. While Part 2A allows a detained person to contact and receive visits from their lawyer, the Committee is concerned the Regulation unduly limits their right to legal representation and to have a lawyer of their choosing, which is fundamental

to their ability to seek relief – including to oppose a preventative detention order or apply for it to be revoked. This is because the right is subject to significant restrictions under the Act, namely:

- **their right to contact a lawyer is limited to obtaining advice, arranging legal representation and instructing the lawyer regarding a legal challenge of the preventative detention order or their treatment under that order, or to act for them in relation to an appearance or hearing before a court that is to take place while they are detained,**
- **their choice of lawyer may be restricted by a prohibited contact order,**
- **their lawyer can only see the preventative detention order and summary of the grounds on which the order is made, and is therefore unable to review the evidence against the detained person, and**
- **contact between a detained person and their lawyer is monitored. Although any communication between the detained person and their lawyer for a purpose set out in the Act is not admissible in evidence against the person, the monitoring of contact may in effect hinder frank communication between a lawyer and their client and obstruct a lawyer's ability to represent their client.**

Unlike its predecessor regulation, the Regulation excludes the application clause 32 of the *Crimes (Administration of Sentences) Regulation 2014* regarding an inmate's right to request review of their placement, classification and case plan. Although this appears to align with the intent of the preventative detention regime, including because case plans are only adopted for convicted inmates, the exclusion of a detained person's right to request a review of their classification and placement may exacerbate any undue infringement on their freedom of liberty and from arbitrary detention, particularly if their detention exceeds the period necessary to meet public interest objectives or otherwise continues for a lengthy or indefinite period.

The Committee notes the national security aims of the preventative detention regime, the national framework it operates in and the legislated safeguards. It also notes that the conditions of preventative detention, including lengthy or indefinite periods of detention, increases the need for robust safeguards to protect the rights of detained persons. In the circumstances, the Committee refers to the Parliament the question of whether any of the safeguards, rights or procedures typically afforded to detained persons and excluded by the Regulation are unduly limited, including because excluding those rights and safeguards (in whole or in part) is not necessary for the preventative detention regime to meet public interest objectives or operate effectively.

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

Significant matters in subordinate legislation

10. Section 26(2A) provides that provisions of or made under the *Crimes (Administration of Sentences) Act 1999* apply to a person detained under a preventative detention order at

a correctional detention centre in the same way as they apply to an inmate, except to the extent any such provision:

i. is inconsistent with a requirement of Part 2A or the detention arrangement,

ii. entitles a person to visit the detained person or the detained person to communicate with another person (unless allowed under Part 2A), or

iii. is excluded under section 26(3).

11. Section 26X(3) of the Act states that the regulations may exclude the person detained under a preventative detention order from the application of any provision of or made under the *Crimes (Administration of Sentences) Act 1999.*

12. For the purposes of clause 26X(3), clause 4 of the Regulation excludes certain provisions of the *Crimes (Administration of Sentences) Act 1999* and *Crimes (Administration of Sentences) Regulation 2014* which contain rights of, and procedures for, dealing with detained persons. See above regarding the content of these provisions.

The Regulation excludes certain legislated rights of, and procedures for dealing with, persons detained at a correctional centre under a preventative detention order. The Committee generally prefers that such significant matters be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight.

The Committee notes however that section 26X(3) of the *Terrorism (Police Powers) Act 2002* contemplates the exclusion of provisions of or made under the *Crimes (Administration of Sentences) Act 1999* in the regulations and that certain rights and safeguards are provided for in the Act, although they do not appear to be as robust as those in the excluded provisions. The Committee also notes the national security aims of the preventative detention regime and the importance of a nationally consistent approach to this issue.

The Committee refers the issue to the Parliament of whether the excluded provisions should be incorporated in the *Terrorism (Police Powers) Act 2002* to facilitate parliamentary scrutiny of the exclusion of legislated rights, procedures and safeguards typically afforded to detained persons from applying to persons detained under the preventative detention regime.

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. Workers compensation guidelines for the approval of treating allied health practitioners (n2021-1421)

   The Guidelines apply to treating allied health practitioners working within the NSW workers compensation system and outline the requirements to be appropriately qualified for the purpose of providing allied health treatment or services.

   These Guidelines replace the Guideline for approval of treating allied health practitioners 2016 No 2 ('the former Guidelines').

   This Guideline is issued by the A/Chief Executive, State Insurance Regulatory Authority pursuant to section 60(2C) of the Workers Compensation Act 1987 and section 376(1) of the Workplace Injury Management and Workers Compensation Act 1998.

   Published in Government Gazette No 298, n2021-1421

2. Notification of Practice Note SC CL 4 (n2021-1591)

   This Practice Note was issued on 29 June 2021 and commences on 1 July 2021.

   The purpose of this Practice Note is to explain the operation of the Defamation List in the Common Law Division.

3. Notification of District Court Criminal Practice Note 18 (n2021-1585)

   This Practice Note commences on 2 August 2021 and revises District Court Criminal Practice Note 18, which commenced on 6 April 2020.

   This Practice Note applies to all proceedings on indictment committed to the District Court for trial on or after the commencement date, with the exception of committals to the Child Sexual Offence Evidence Program Scheme, to the Rolling List at Sydney and to the Court at Bega, Bourke, Broken Hill, Coonamble, Dubbo, Goulburn, Grafton, Moree, Nowra, Port Macquarie, Queanbeyan and Taree. For these regional venues, the Audio Visual Link ("AVL") call-over system will apply in accordance with District Court Criminal Practice Note 19.

   The purpose of this Practice Note is to:
   (a) ensure that matters are dealt with efficiently and in a manner consistent with the obligations of the prosecution and an accused person under Chapter 3, Part 3 of the CP Act;

(b) establish case management procedures from the time an accused person is first arraigned;
(c) refine the disclosure obligations of the prosecution and an accused person;
(d) reduce avoidable delays; and
(e) promote procedural fairness.

4. Coronial Practice Note No 3 of 2021—Case management of mandatory inquests involving section 23 deaths (n2021-1890)

This Practice Note sets out the procedural requirements for the listing and case management of deaths which fall within the scope of section 23 of the *Coroners Act 2009*.

In setting out these requirements, the objects of this Practice Note are to ensure:

a. All coronial investigations and inquests into reported deaths which fall within its scope are conducted in a timely and proper manner.
b. The families of the deceased are provided with appropriate information and material on the status of the investigation and the coronial process in a timely and proper manner, including advice in relation to delay and the reason(s) for the delay.
c. Together with the First Nations Protocol, all coronial investigations and mandatory inquests into deaths of First Nations Peoples are conducted in a culturally sensitive and appropriate manner which is respectful of the needs of First Nations Peoples.

5. Practice Note No SC CCA 1—Court of Criminal Appeal—General (n2021-1893)

This Practice Note was issued on 22 July 2021 and commences on 22 July 2021.

This Practice Note applies to all new and existing matters in the Court of Criminal Appeal save that its requirements do not apply to documents filed on or before 1 May 2021.

The purpose of this Practice Note is to explain the administrative and case management procedures followed in the Court.

6. Referable Debt Order (2021-529)

Pursuant to section 7 (2) of the State Debt Recovery Act 2018, act of grace payments made by the Government which are recoverable under section 5.7(3) of the Government Sector Finance Act 2018 for the purpose of the Test and Isolate support payment payable to Service NSW, are declared by the Chief Commissioner of State Revenue to be referable debts.

7. Statutory and Other Offices Remuneration Act 1975—Annual Determination (n2021-2002)

Section 13 of the *Statutory and Other Offices Remuneration Act 1975* requires the Tribunal, each year, to make a determination on the remuneration to be

paid to office holders. Schedule 6, Part 3, clause (3)(2) of the Act provides for the determination in respect to the office of Governor to be taken as a determination under section 13.

Published in Government Gazette No 468, n2021-2002

8. Fisheries Management (Tailor Possession Limit) Order 2021 (n2021-2059)

The Deputy Director General Fisheries, with delegated under sections 227 and 228 of the *Fisheries Management Act 1994*, make the Order under section 17C of the Act.

Published in Government Gazette No 477, n2021-2059

9. Notification of The Institute of Public Accountants Professional Standards Scheme (n2021-2139)

Pursuant to section 13 of the Professional Standards Act 1994, the Minister for Better Regulation and Innovation authorises the publication of The Institute of Public Accountants Professional Standards Scheme. The Scheme will commence on 1 January 2022.

The Scheme has been prepared by the Institute of Public Accountants Ltd for the purposes of limiting Occupational Liability to the extent to which such liability may be limited under the Act.

Published in Government Gazette No 499, n2021-2139

10. Coroners Act 2009—Practice Note (n2021-2193)

This Practice Note sets out the procedural requirements for the listing and case management of deaths which fall within the scope of section 23 of the *Coroners Act 2009*.

In setting out these requirements, the objects of this Practice Note are to ensure:

a. All coronial investigations and inquests into reported deaths which fall within its scope are conducted in a timely and proper manner.
b. The families of the deceased are provided with appropriate information and material on the status of the investigation and the coronial process in a timely and proper manner, including advice in relation to delay and the reason(s) for the delay.
c. Together with the First Nations Protocol, all coronial investigations and mandatory inquests into deaths of First Nations Peoples are conducted in a culturally sensitive and appropriate manner which is respectful of the needs of First Nations Peoples.

11. Erratum—Coronial Practice Note 3 of 2021: Case management of mandatory inquests involving section 23 deaths (n2021-2241)

This is notification of the correction of the published Coronial Practice Note 3 of 2021: Case management of mandatory inquests involving section 23 deaths.

Published in Government Gazette No 527, n2021-2241